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

AGENDA

February 24, 2017 9:00 a.m.
2 East 14th Ave., Supreme Court Conference Room, 4th Floor
Call-in numbers: 720-625-5050 – Access Code: 71499701
WiFi Access Code: To be provided at the meeting

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1. Approval of minutes of November 4, 2016 meeting [to be distributed separately]

2. Report from Rule 1.6 Subcommittee (A.G. Coffman proposal) [Jamie Sudler for Dave Stark, pp. 001-045]

3. Report from Fee Subcommittee [Nancy Cohen & Jamie Sudler]

4. Report from Civil Rules Committee's Subcommittee on Judicial Expectations Amendments to CRCP [Judge Webb, pp. 24-29 of July 22, 2016 materials]

5. U.S. District Court Local Rule Amendments [Marcy Glenn, pp. 046-051]

6. New Business:

    a. Potential adoption of ABA Model Rule 8.4(g) [Jim Coyle, pp. 96-99 or November 4, 2016 materials, and pp. 052-085]

    b. Pretexting, the Sequel? – Potential amendments to create law enforcement exception to Rule 8.4(c) [Marcy Glenn & Dick Reeve, pp. 086-156]

    c. Potential contingent fee rule amendments [Marcy Glenn, pp. 19-22 of November 4, 2016 materials]

    d. Potential amendments to require attorney-client engagement agreements [Tony van Westrum & Dave Little, pp. 157-159]

    e. Housekeeping amendments:

        i. Rule 1.2, cmt. [14] [Marcy Glenn, pp.160-162]

ii. Rule 1.5, cmt. [12] [Marcy Glenn, pp. 163-167]

7. Administrative matters: Select next meeting date

8. Adjournment (before noon)

Marcy G. Glenn, Chair
Holland & Hart LLP
(303) 295-8320
mglenn@hollandhart.com

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MEMORANDUM

February 17, 2017

TO: Colorado Supreme Court Standing Committee on the Rules of Professional Conduct

FROM: Frances Smylie Brown, Lindy Frolich, John Gleason, Marcy Glenn, Melissa Michaelis, Barbara Miller, Linda Michow, Bert Nieslanik, David Stark, Jamie Sudler, Linda Wienerman

RE: Majority Report of Rule 1.6 Subcommittee

I. Introduction and Background

A. Original Proposed Comment

By letter dated March 15, 2016, Attorney General (AG) Cynthia H. Coffman requested the Standing Committee to recommend to the Supreme Court the inclusion of new language in the comments to Rule 1.6, Confidentiality of Information (the Original Proposed Comment), to read as follows:

> The total amount of fees or costs incurred by a public entity on a particular matter is not "information relating to the representation of a client" which must be maintained as confidential under Rule 1.6(a).

See Exh. A. The letter explained that the purpose of the proposed comment was to remove from the protection of Rule 1.6(a) information regarding the total amount of fees or costs incurred in connection with legal services rendered by public attorneys, on a per-client basis.

At the Standing Committee meeting on April 29, 2016, a subcommittee was formed to study the proposed comment language. Dave Stark agreed to chair the subcommittee and Standing Committee members Marcy Glenn, Dick Reeve, and Jamie Sudler volunteered as members. The Standing Committee directed the subcommittee to include additional members to ensure a diverse range of views, including the views of the AG, the Office of the State Public Defender (OSPD), other government attorney offices, and

municipal attorneys. AG Coffman designated David Blake (Chief Deputy AG) and Stephanie Scoville (Senior Assistant AG) to represent the AG's Office. Frances Smylie Brown (OSPD, General Counsel); John Gleason (private practitioner and former Attorney Regulation Counsel); Lindy Frolich (Director, Alternate Defense Counsel (ADC)), Barbara Miller (Executive Director, Center for Education in Law and Democracy); Melissa Michaelis (Executive Director, Office of Respondent Parents' Counsel (ORPC)), Linda Michow (private practitioner in municipal law), Bert Nieslanick (Deputy Director, ADC), Linda Wienerman (Executive Director, Office of the Child's Representative (OCR)), and Steven Zansberg (private practitioner in media law) also participated on the subcommittee.

The subcommittee met a number of times between June 2016 and February 13, 2017. Initially, the Chair divided the subcommittee into working groups to look at four areas of interest: (a) legislation and rules proposed in Colorado and elsewhere; (b) case law from other jurisdictions, (c) the history and purpose of Rule 1.6; and (d) relevant treatises and articles. Those working groups reported back to the full subcommittee, which then discussed the issues at length in light of those reports.

B. The Revised Proposed Amendments

The minority report dated February 16, 2017 includes proposed amendments that differ from those originally proposed in the AG's March 15, 2006 letter. The AG now proposes to add a new exception to Rule 1.6(b), which would permit a lawyer to reveal information relating to the representation of a client, "to the extent the lawyer reasonably believes necessary"

> (9) to comply with a request for information made under other law when the information sought is the total number of attorney hours expended or the total amount of costs incurred on a particular matter by a public law office on behalf of a client.

Minority Report at 10-11 (the Proposed Rule). Alternatively, the AG requests that this proposal be included in a new comment, to read:

> Rule 1.6(b)(8) recognizes that there may be circumstances in which a lawyer may reveal some client information to comply with other law. When a request is made to a public law office

> pursuant to other law, such as an open records law, for the total number of attorney hours expended or the total amount of costs incurred on a particular matter by the office on behalf of a client, a lawyer may comply with that request without violating Rule 1.6.

Id. at 12 (the Revised Proposed Comment).

II. Executive Summary

The subcommittee's views were divided at the start of the process and remained divided in the end. A majority,[1] who authored this report, recommends against any of the AG's proposed amendments or any amendment to Rule 1.6 or its comments that would accomplish the AG's goal of exempting from a governmental lawyer's duty of non-disclosure information regarding the total amount of fees or costs incurred in connection with legal services rendered by public attorneys to particular clients. A minority[2] recommends adoption of the AG's Proposed Rule or Revised Proposed Comment. One subcommittee member (Dick Reeve) agrees with the result reached by the majority but does not concur with the opinion.

This majority report explains the reasoning of the majority of subcommittee members and responds to points made and authorities relied upon in the minority report. The majority recommends against adoption of any of the proposed amendments for these primary reasons:

- Fee-related information fits within Rule 1.6(a)'s broad definition of "information relating to the representation."
- Neither the ABA nor any other state has adopted a comparable amendment and the AG's proffered reasons for a Colorado-unique amendment are not sufficient to rebut the presumption of uniformity between the Colorado Rules and the Model Rules.

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[1] Subcommittee members Brown, Frolich, Gleason, Glenn, Michaelis, Michow, Miller, Nieslanik, Stark, Sudler, and Wienerman.
[2] Subcommittee members Blake, Scoville, and Zansberg.

- Rule 1.6(a) prohibits disclosure of matter-related information without regard to whether disclosure is likely to harm the client.
- The Rule 1.6(a) duty of non-disclosure applies equally to government and private attorneys and to government and private clients of public attorneys.
- The limited authority relied upon by the minority is either not on point or not persuasive.
- The AG's proposed language is ambiguous.

III. The History, Structure, and Intent of Rule 1.6

Currently Rule 1.6 reads, in full:

> (a) *A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).*
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
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> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to reveal the client's intention to commit a crime and the information necessary to prevent the crime;
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> (3) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (4) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has

> resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
>
> (5) to secure legal advice about the lawyer's compliance with these Rules, other law or a court order;
>
> (6) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
>
> (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information is not protected by the attorney-client privilege and its revelation is not reasonably likely to otherwise materially prejudice the client; or
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> (8) to comply with other law or a court order.
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> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(Emphasis added.) The rule's structure is straightforward. Subparagraph (a) states a general duty of non-disclosure of "information relating to the representation of a client," absent informed client consent, unless one of two circumstances exists: (1) "the disclosure is impliedly authorized in order to carry out the representation"; or (2) "the disclosure is permitted" by one of the exceptions stated in subparagraph (b).

Subparagraph (b) states eight exceptions to the general duty of non-disclosure. Subparagraph (b) is permissive, not mandatory; it allows, but does not require, a lawyer to reveal information covered by an exception.

Any disclosure under subparagraph (b) must be limited "to the extent the lawyer reasonably believes necessary" to fall within the exception.

Subparagraph (c) states a lawyer's duty to guard against inadvertent or unauthorized disclosure of, or unauthorized access to, protected information.

Comments [2], [3], and [4] bear on the meaning of "information relating to the representation of a client," as that phrase is used in Rule 1.6(a), and read:

> [2] *A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation.* See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.
>
> [3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. *The confidentiality*

> *rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.* A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.
>
> [4] *Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.* A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

(Emphasis added.) The comments explain that the duty of non-disclosure

- contributes to the trust that is essential in every attorney-client relationship;
- "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source"; and
- "also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person."

In summary, although Rule 1.6 does not define "information relating to the representation of a client," that phrase is facially broad and the comments indicate that the drafters intended it to be broad.

So does the legislative history. When the ABA considered the adoption of Model Rule 1.6, its Kutak Commission wrote that "Rule 1.6 defined confidentiality much more broadly than had the predecessor Model Code

and avoided the terms 'secrets' and 'confidences.'" ABA-LEGHIST Rule 1.6, Feb. 1983 ABA Midyear Meeting, Discussion, *available on Westlaw*.

For other authority regarding the broad scope of "information relating to the representation of a client," *see, e.g.*, Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering*, § 1.6:201 (2d ed. 1990) (Model Rule 1.6(a) "creates a genuine presumption of confidentiality. It operates automatically, in all cases, without any signal from the client, and without vague qualifiers."); Michael H. Berger & Katie A. Reilly, "The Duty of Confidentiality: Legal Ethics and the Attorney-Client and Work Product Privileges," 38 *The Colorado Lawyer* 35 (Jan. 2009) ("The scope of Rule 1.6 is vast; it is not limited to secrets or confidential information."); *see also People v. Isaac*, 2016 WL 6124510, at *3 & n.14 (Colo. PDJ Sept. 22, 2016) (relying on Comment [3] and other authorities to conclude that, given the breadth of "information relating to the representation of a client," a lawyer may not disclose even publicly available information).

The Colorado Rules are drafted in a "Restatement format." The rules state black-letter law, while the comments are explanatory. Only a violation of a rule may be a basis for professional discipline. Colo. RPC, Scope [14], [21]. Therefore, if the Supreme Court were to adopt the AG's proposed change, it would need to do so in Rule 1.6 itself rather than through new comment language. In addition, if the proposed change were added as a new exception (in Rule 1.6(b)) to the general duty of non-disclosure under Rule 1.6(a), as in the Proposed Rule, a public lawyer would be *permitted*, but not *required*, to disclose the information covered by the proposal. However, as discussed below, we believe that the phrasing of the Proposed Rule could *require* governmental lawyers subject to the Colorado Open Records Act (CORA) to disclose information in response to a CORA request, contrary to the expressed intent that Rule 1.6(b) disclosures be permissive only.[3]

IV. OARC Enforcement History and Views

The subcommittee solicited the views of the Office of Attorney Regulation Counsel (OARC) and learned that OARC's view is that Rule 1.6 does not allow an attorney to reveal *any* information relating to the representation

[3] Executive and Legislative branch lawyers are subject to CORA, C.R.S. § 24-72-200.1, *et seq.*, and Judicial branch lawyers are subject to that branch's open records rule, the Public Access to Administrative Records of the Judicial Branch (PAIRR), Colo. Ct. Rules, Ch. 38, R. 2.

unless the disclosure is impliedly authorized in order to carry out the representation, the client consents, or an exception contained in Rule 1.6(b) permits the disclosure. In particular, in OARC's view, information relating to the representation includes the total or itemized fees charged to a particular client or client's matter and the total or itemized time devoted to a particular client matter.

Rule 1.6 has not been the subject of many attorney discipline matters. However, those that have been prosecuted confirm the OARC's view of the rule as broadly prohibiting disclosure of information relating to the representation of clients.

V. The AG's Motivation for the Proposed Amendments

Read together, AG Coffman's March 15, 2016 letter and the Minority Report state the following circumstances and policy considerations that we understand to be the bases for the proposed amendments:

- There is a public interest in transparency in public affairs. Ex. A (*passim*); Minority Report (*passim*).
- The AG's Office has had a longstanding policy of providing "the amount of time its attorneys have spent on a particular legal matter, as well as the total amount of expenses incurred in particular litigation," "whenever doing so is consistent with the Rules." Ex. A at 1; Minority Report at 3. However, the AG seeks clarification that providing this information does not violate the broad duty of non-disclosure stated in Rule 1.6(a). Ex. A at 5.[4]
- It is sometimes difficult for government attorneys to obtain client consent to disclosure of information protected by Rule 1.6(a). Minority Report at 5-6.

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[4] The March 15, 2016 letter is somewhat ambiguous. It initially suggests that the proposed comment is needed to confirm the propriety of *the AG's* practice of releasing client billing information regarding its own clients. Elsewhere, however, its language is broad enough to suggest that the AG seeks to require *other* governmental lawyers to disclose such information.

In any event, the language of the AG's proposed amendments is not limited to fee information for clients represented by the AG.

- In recent years, the AG has supported "legislation that would subject the Judicial Branch and public law offices to increased disclosure requirements[,]" and a proposed ethics rule amendment "is preferable to large scale changes to the law governing public entities[.]" Ex. A at 2.

VI. The Majority's Reasoning

In voting against recommending the AG's proposed amendments, we rely on a number of propositions, summarized here.

A. Neither the ABA Nor Any Other State Has Adopted Comparable Language in Any Rule or Comment.

The AG has not identified any precedent for the proposed amendments or other language that would require or permit government lawyers to disclose aggregate fee information. As far as we are aware, neither the ABA nor any state has adopted language in Rule 1.6, its comments, or any other ethics rule that either (a) states that such fee information is not "information relating to the representation of a client," or (b) allows a lawyer to reveal such fee information as an exception to the general duty of non-disclosure.[5]

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[5] The District of Columbia's version of Rule 1.6 provides:

> (e) A lawyer may use or reveal client confidences or secrets:
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> * * *
>
> (2)(A) when permitted by these Rules or required by law or court order; and
>
> (B) if a government lawyer, when permitted or authorized by law.

D.C. RPC 1.6(e)(2). This rule *permits* disclosure by a government lawyer in specific circumstances, but does not require disclosure, as the AG Office's Original Proposed Comment would do and as the Revised Rule and Comment might do, depending on whether particular government lawyers are subject to CORA. Also, the D.C. "government lawyer" provision applies only when a government lawyer represents a public agency or employee—

We view the absence of any comparable language in other ethics rules as significant. The Standing Committee adheres to "an informal presumption" of uniformity with the ABA Model Rules:

> Unless existing Colorado law or public policy – as established by prior rules, Court decisions, or Colorado Bar Association ("CBA") Ethics Committee opinions – justified a departure from a New Model Rule, the Committee would recommend adoption of the New Model Rule. However, this presumption was rebuttable and the Committee occasionally recommended a unique Colorado rule instead of a New Model Rule based on a determination that the recommended rule would be substantially better than the New Model Rule; but even in these situations, the Committee carefully weighed the benefits against the detriments of a non-uniform rule. The Committee also considered uniformity with respect to the comments to the rules; but the comments, by definition, do not establish black-letter standards and, therefore, the Committee deemed uniformity in the comments to be less critical.

Standing Committee, "Report and Recommendations Concerning the ABA Ethics 2000 Model Rules of Professional Conduct," at 5 (Dec. 30, 2005).

The presumption of uniformity exists for three main reasons. *First*, because attorneys increasingly practice across state lines, they are increasingly subject to multiple jurisdictions' ethics rules, and uniform rules decrease the potential for conflicting obligations. *Second*, Colorado courts and lawyers have access to much greater authority construing uniform rules and comments. *Third*, the Standing Committee respects the intense study the ABA conducts before changing the Model Rules; moreover, when a

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not a private citizen. D.C. RPC 1.6, cmt. [39] ("Government lawyers may also be assigned to provide an individual with counsel or representation in circumstances that make clear that an obligation of confidentiality runs directly to the individual and that subparagraph (e)(2)(A), not (e)(2)(B), applies. . . . Examples of such representation include representation by a public defender[.]"). The AG's proposals do not draw that distinction.

proponent seeks an amendment based on broad public policy grounds that should apply in all states, as here, the Standing Committee factors into its analysis whether the ABA has considered a comparable request.

As noted above, because the comments are not binding and cannot change the meaning of the rules, if the Supreme Court were to adopt any of the AG's proposed amendments, it would need to do so in Rule 1.6 itself, *i.e.*, it would need to adopt the Proposed Rule. Therefore, the presumption of uniformity demands that the Proposed Rule be "substantially better" than current Rule 1.6 and that the benefits of the deviation from Model Rule 1.6 be carefully weighed against its detriments. Under that test, for the reasons outlined below, the majority of the subcommittee does not believe that the significant proposed departure from Model Rule 1.6 is justified.

B. "Information Relating to the Representation" Extends Beyond Privileged Information.

"[I]nformation relating to the representation of a client" under Rule 1.6(a) is a much broader category than information subject to the attorney-client privilege or the work product doctrine. *See* CRPC 1.6, cmt. [3] (quoted above); Ronald D. Rotunda and John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*," § 1.6-1 (2016-2017 ed.) ("Both the Model Code and the Model Rules offer protection [of information] much broader than the evidentiary privilege."). *See, e.g.*, State Bar of Nev. Formal Op. 91 (2009) (same).

Due to this important difference, we attach little weight to authorities applying the privilege to aggregate fee information. *See infra* at 22.

C. "Information Relating to the Representation" Includes Client Billing Information.

As discussed above, the phrase "information relating to the representation," as used in Rule 1.6(a) is intentionally broad and includes "all information relating to the representation." Rule 1.6, cmt. [3].

Comment [11] states: "A lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services rendered in an action to collect it." We read this language as implying that, absent a need "to prove the services rendered" in a collection action (and absent the application of some other exception in Rule 1.6(b)(6)), information related to fees, including the gross amount of

fees devoted to a particular matter, is "information relating to the representation," which a lawyer may not disclose.

Courts and ethics committees have recognized that Rule 1.6(a) extends to fee-related information. *E.g.*, State Bar of Ga. Advisory Op. 41, "Client Confidentiality" (1984, as amended 1985) (under former Code of Professional Responsibility, which prohibited disclosure of client's "confidences and secrets," lawyer who reported large cash fee payments in accordance with federal law could not reveal names of clients who paid those fees); State Bar of Mont. Ethics Op. 960828 (1996) (even with client consent, frowning upon attorney's use of local bank to send client invoices because, even if information in a billing statement is not privileged, it is "confidential" under Montana rule); State Bar of Nev. Formal Op. 91 (2009) ("For purposes of Rule 1.6, . . . [e]ven a general balance due invoice contains 'information relating to representation of a client,' including . . . the total billed to the client for the billing period."); Tex. State Bar Prof. Ethics Comm. Op. 464 (1989) (under Texas counterpart to Rule 1.6, which prohibits disclosure of "confidential information of a client," client must consent before lawyer may disclose client fee information incident to a sale of delinquent accounts receivable: "[I]n most cases, the amount of the fee owing . . . would be confidential."); Tex. State Bar Prof. Ethics Comm. Op. 655 (2016) (reaffirming Opinion 464); *United States v. Davidson*, 2013 WL 7019211, at *1 (D. Ariz. 2013) ("Rule 1.6 is broader than the attorney-client privilege and, absent a court order, it likely prohibits [respondent] from disclosing his accounts receivable information.") (citing Arizona ethics opinion); *D'Aprile v. Unum Life Ins. Co. of Am.*, 2010 WL 3788271, at *4 (M.D. Fla. Sept. 24, 2010) (lawyer's "case fees," as recorded in lawyer's trust account records and firm ledgers, are subject to Florida version of rule); *see also* Eugene R. Gaetke & Sarah N. Welling, "Money Laundering and Lawyers," 43 Syracuse L. Rev. 1165, 1208 (1992) (in article authored prior to inclusion of "other law" exception to Model Rule 1.6, opining that disclosure of identified client's cash attorneys' fee payments under federal law "fall within the ambit of Model Rule 1.6(a)") (footnote omitted); *cf. Bd. of Prof. Responsibility v. Casper*, 2014 WY 22, ¶¶ 22-23, 318 P.3d 790 (Wyo. 2014) (relying on both Wyoming Rules 1.6 and 1.9(c) to conclude that lawyer violated Rule 1.9(c) by attaching complete billing records to lien statement); CBA Ethics Op. 107, "Third-Party Auditors" (1999) ("Legal billing statements . . . and the substantive information therein clearly is within the ambit of Rule 1.6(a) . . ."). The minority report confirms that the

CBA Ethics Committee has not addressed the disclosure of aggregate billing information. Minority Report at 6 n.5.

The fact that the AG is proposing amendments to either permit or require governmental lawyers to disclose fee information implies that the AG views current Rule 1.6 as prohibiting the disclosure of that information, absent client consent or application of one of the existing exceptions in Rule 1.6(b).

D. Rule 1.6 Prohibits Disclosure Without Regard to Potential Harm to Clients.

A premise of the AG's proposal is that "the disclosure of aggregate billing information on matters does not pose a risk of harm to the clients of government lawyers." Ex. A at 5; *see also id.* at 3 ("aggregate information about the legal expenses of public agencies is not the type of sensitive information that implicates the justifications for Rule 1.6's categorical rule of confidentiality"); *id.* at 5 ("aggregate billing information for public legal services . . . does not reveal any specific information that would harm a client's interest"); Minority Report at 3 ("aggregate billing should not be shielded from public view, especially in those circumstances in which there is no particular or articulable risk of harm to the client").

The AG urges the Supreme Court to incorporate a "harm" standard into Rule 1.6 when it comes to the governmental law office billing information:

> Although the current Model Rules do not consider harm or detriment to a client in determining whether confidential client information may be shared, potential prejudice to a client (or lack thereof) should be considered by public lawyers in determining whether to make a permissive disclosure under the Attorney General's proposal as described below.

Minority Report at 7.

We view this focus on harm as misplaced. Rule 1.6 protects all information relating to the representation, not merely information that could be harmful to the client if disclosed. *See generally* Edward W. Feldman, "Be Careful What You Reveal: Model Rule of Professional Conduct 1.6," 38 *Litigation* 33, 36 (2011-2012) (contrasting the absence of a "'no-harm-no-foul'

qualification[ ]" in Rule 1.6(a), with Section 60 of the Restatement, which does have a "'material harm' qualification"); *cf.*, *People v. Isaac*, 2016 WL 6124150 at *3 & n.14 (concluding that even the disclosure of publicly available matter-related information violates Rule 1.6).

In the majority's view, incorporating a "potential prejudice" standard into Rule 1.6 would be a radical departure from the Model Rule and the rules in other jurisdictions. But the AG's proposed amendments are even more disturbing because, at least for public law offices subject to CORA, they could apply to aggregate billing information in all circumstances, and might not even allow the government lawyer to determine whether disclosure of that information would be potentially harmful to a client in a given case. Public law offices subject to CORA requests would arguably be required to disclose even potentially harmful billing information.

E. The Duties Stated in the Rules Apply Equally to Government and Private Attorneys and to Government and Private Clients of Public Attorneys.

Generally speaking, the Rules are drafted as rules for all lawyers. However, certain rules apply specifically to certain types of lawyers or lawyers in certain practice areas. *See*, *e.g.*, Colo. RPC 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees); Colo. RPC 2.4 (Lawyer Serving as Third-Party Neutral); Colo. RPC 3.8 (Special Responsibilities of a Prosecutor); Colo. RPC 3.9 (Advocate in Non-Adjudicative Proceedings). In addition, a comment states:

> Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other

> government law officers. . . . These rules do not abrogate any such authority.

Colo. RPC, Scope, cmt. [18].

Rule 1.6, however, draws no distinction between government and private attorneys or between public and private clients, and we see no legal basis for drawing such distinctions, including under the comment quoted above. The AG has not pointed to any "legal provisions" that would repose in a government attorney representing either a public or private client authority to disclose information relating to the representation that would otherwise be protected from disclosure under Rule 1.6.

Lawyer Disciplinary Board v McGraw, 461 S.E.2d 850 (W. Va. 1995), underscores why the public interest lies in requiring public attorneys to fully conform to the ethics rules. In *McGraw*, the West Virginia Attorney General was disciplined under Rule 1.6 for disclosing client confidential information when he revealed to a third party his client's changed position in a case. The Court rejected the Attorney General's argument "that, in some instances, the Rules apply differently to the Attorney General than to a lawyer representing a private litigant . . . [since] . . . as an elected official, he has a constitutional duty to act as a 'servant of the people' and [ ] this duty takes precedence over the *Rules of Professional Conduct. See W.Va. Const.* art. III, § 2." *Id.* at 862. The Court held:

> We see no conflict between respondent's duty as a servant of the public and his ethical duty of confidentiality under Rule 1.6(a) of the *Rules of Professional Conduct. See Rules of Professional Conduct* 1.6 cmt. ("The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance."). A lawyer's relationship to the people "'is one of high responsibility, involving complete trust and confidence and absolute fidelity to integrity.'" Such responsibility is clearly consistent with respondent's function as the Attorney General of the state. To conclude otherwise would serve to denigrate the legal profession and destroy the

> public's trust and confidence in the entire judicial system.

Id. at 862-63 (internal case citations omitted).

We carefully considered whether CORA might constitute governmental "authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships," under Comment [18], but concluded that it does not. As the AG recognized, "CORA itself . . . provides that inspection of public records should be denied when a rule promulgated by the Supreme Court, such as Rule 1.6, would prohibit disclosure. § 24-72-204(1), C.R.S." Ex. A at 2 n.2; Minority Report at 5 (same).[6] Thus, as CORA and Rule 1.6 are currently drafted, CORA does not authorize a government attorney to produce documents that the attorney may not disclose under Rule 1.6, because CORA requires denial of the records request when a Supreme Court rule prohibits disclosure.

We are concerned, however, that the Proposed Rule and Revised Proposed Comment, while couched in permissive terms, could lead to mandatory disclosure for any public law office subject to CORA. The relevant provision of CORA states:

> (1) The custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one or more of the following grounds or as provided in subsection (2) or (3) of this section:
>
> * * *
>
> (c) Such inspection is prohibited by rules promulgated by the supreme court or by the order of any court.

C.R.S. § 24-72-204(1)(c). Currently, because Rule 1.6(a) prohibits disclosure of fee-related information and no exception in Rule 1.6(b) permits that disclosure, the CORA exception applies. The AG's proposed new

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[6] The AG made these observations in connection with the "other law" exception under Rule 1.6(b)(7), and the majority agrees that CORA is not "other law" pursuant to which a government attorney is required to disclose information relating to the representation.

exception under Rule 1.6(b), however, would eliminate the Rule 1.6(a) prohibition, suggesting that the CORA exception might not apply. As a result, for public lawyers subject to CORA, the proposed *permissive* exception could translate into a *mandatory* obligation to produce fee information requested pursuant to CORA.

Although we do not perceive a *legal* basis for distinguishing between government and private attorneys or between public and private clients with respect to disclosure of fee information, the subcommittee spent considerable time discussing the *practical* differences between government lawyers who represent public versus private clients.

We appreciate the minority's arguments regarding the public's interest in transparency with respect to legal services rendered to public clients, and the benefits of revealing aggregate billing information for those services. The minority report states that "strong public policy arguments support *permitting* the disclosure of aggregate billing information by public entities[,]" Minority Report at 10 (emphasis added), and, of course, the AG is free to encourage its public clients to consent to the disclosure of that billing information (or the AG's public clients may disclose that information themselves), in which case the AG will achieve its objective of increased transparency.

Other government lawyers—the OSPD, the ADC, the OCR, and the ORPC— represent private individuals.[7] Attorneys in those offices function as if they were private lawyers representing private clients, and they have a duty to provide their clients all the protections that private clients receive under the Rules. *See, e.g.*, C.R.S. § 21-1-101(1) ("the state public defender at all times shall . . . provide legal services to indigent persons accused of crime that are commensurate with those available to nonindigents"); C.R.S. § 21-2-101(1) ("the alternate defense counsel at all times shall . . . provide to indigent persons accused of crime legal services that are commensurate with those available to nonindigents"); *In re Advisory Op. No. 544*, 511 A.2d 609, 611 (N.J. 1986) ("It is also beyond question that indigent, needy, or otherwise eligible clients [of government lawyers], assisted by attorneys without fees, are entitled to the same protections as clients who retain private

[7] In fiscal year 2014-2015, the OSPD handled 159,814 cases; the ADC handled 16,680 cases; and the OCR handled 14,653 cases, totaling almost 200,000 cases. The ORPC is a new agency that began in July of 2016 and has no reliable statistics at this time.

counsel."); Rest. § 111, cmt. b (the duty to not disclose confidential client information "applies whether or not the client paid a fee").

For this reason, we place considerably less weight on the minority's policy argument in favor of transparency of government. Even assuming a public interest in knowing how much a government client has spent in fees and expenses on a particular legal matter, no comparable public interest exists when the client is an indigent defendant in a criminal case receiving constitutionally mandated representation, or a child or parent in dependency and neglect proceedings.[8]

To the extent that there is a public interest in assessing the efficiency of the OSPD, the ADC, the OCR, or the ORPC, we understand that those agencies provide aggregate financial information that poses no risk of violating Rule 1.6 because it discloses no information related to particular clients. For example, the OSPD's public webpage contains a link to that agency's detailed budget, with links to various supporting documents. *See* http://www.coloradodefenders.us/information/budget/; *see also* https://www.colorado.gov/apps/oit/transparency/index.html (link to the State of Colorado's Tranparency Online Project Site, providing expenditures of every State agency). Similarly, the AG's Office publishes detailed budget requests, which include a list of the specific aggregate amount that office spent in representing each State agency during the prior year. *See* http://coag.gov/resources/budget-accounting/2016-2017-budget-request.

But even more fundamentally, even if there were a public interest in transparency in *all* matters involving government lawyers (in matters for both public and private clients), we do not believe that Rule 1.6 should be amended to further that goal. Rule 1.6 exists to protect clients and to promote the sharing of information between client and lawyer. *See* CRPC 1.6, cmt. [2]. The proposed amendment would lessen that protection in the interest of a competing priority that is wholly unrelated to the representation.

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[8] CORA contains over 25 exceptions to production of records. *See* C.R.S. § 24-72-204(2)(a)(I)-(IX), -204(3)(a)(I)-(XXI). Some of these exceptions are mandatory and others are permissive but all demonstrate that the public does not always have a right of access. If, for example, "market analysis data generated by the department of transportation" is information that deserves an exception, *see* C.R.S. § 24-72-204(2)(a)(V), it cannot seriously be argued that maintaining confidentiality in an attorney-client relationship is not deserving of the same protection.

In that respect, it differs from the various exceptions to Rule 1.6(a), which appear in Rule 1.6(b). All of those exceptions except for the final one ("to comply with other law or a court order") address circumstances arising out of the representation. *See* Colo. RPC 1.6(b)(1)-(6). The "other law or court order" exception could extend to circumstances unrelated to the representation, but Rule 1.6 does not pronounce that other law. Also, the "other law" exception in Rule 1.6(b)(7) would merely permit, but not require, a lawyer to disclose otherwise protected information.

Similarly, if a court were to issue an order, for example, under CORA, to disclose the type of billing information covered by the AG's proposed amendments (or for that matter, any information that the lawyer believes is protected from disclosure by Rule 1.6), the government lawyer representing a private client would be permitted to disclose the information in order to comply with the order. And, facing the likelihood of punishment for contempt of court, there is a heightened chance that the lawyer would choose to invoke the "other law" exception. We believe, however, that these are decisions to be made on a case-by-case basis by the courts and the government lawyers—not through a rule amendment.

F. The Authority Relied on in the Minority Report Is Either Not On-Point or Not Persuasive.

The minority report relies most heavily on *Harris v. The Baltimore Sun*, 330 Md. 595, 625 A.2d 941 (Ct. App. 1993), in which the Maryland Court of Appeals considered a newspaper's public records request for a public defender's billing records related to a particular high-profile client. The court held that under Maryland's version of Rule 1.6, which tracks the Colorado rule, the disclosure of information violates Rule 1.6(a) "only if it poses a risk of harm to a client's interests." 625 A.2d at 946 (quoting Wolfram, *Modern Legal Ethics*, § 6.7.2 at 301 (1986)). Minority Report at 7. We seriously question the persuasive force of *Harris* for at least these reasons:

- The "harm" standard majority that the majority in *Harris* accepted is inconsistent with Colorado law, which recognizes no such exception to the literal language of Rule 1.6(a), the comments to the rule, and the other authorities discussed and cited above. To the majority's knowledge, no court has cited with approval Professor Wolfram's suggestion of incorporating a harm standard into Rule 1.6 in the 23 years since *Harris* was decided.

- *Harris* was a divided opinion. Three of seven justices wrote a vigorous dissent, which included these persuasive points:

> In pursuing the worthy purpose of securing the broadest possible media access to public information, the majority damages one of the most fundamental aspects of the attorney-client relationship, the attorney's duty of confidentiality to a client, and has all but repealed Rule 1.6. Ignoring the clear and explicit language of the Rule, as well as the "Comment" adopted by this Court, the majority holds that a lawyer may freely reveal any information relating to representation of a client unless "there is a risk or potential for harm to the client's interests. . . ." 330 Md. 595, 608-09, 625 A.2d 941, 947. That construction not only contradicts the language of the Rule—it renders the Rule superfluous. Other rules clearly preclude a lawyer from doing anything that exposes the client to "a risk or potential for harm." *Id.* For example, Rule 1.8(b) says, "[a] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation." The confidentiality rule, Rule 1.6, was meant to impose a far broader prohibition against free disclosure of information relating to a client than the majority imposes. Rule 1.6 is quite simple, straightforward, and direct. It is a guarantee of confidentiality that clients can readily understand.
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> * * *
>
> The existing exceptions to the rule of confidentiality are adequate. . . . In light of these existing exceptions, I see no basis for, and no reason for, the majority's holding, which effectively creates a new exception to Rule 1.6[.]
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> * * *
>
> The majority uses Professor Charles W. Wolfram's treatise . . . as the source for its interpretation of Rule 1.6[.] . . . Even Professor Wolfram acknowledges, however, that Rule 1.6(a) "if read literally, goes much farther and prohibits a lawyer

> from revealing all client information . . ." subject only to the exceptions provided in the rule.

Id. at 612, 615, 616.

- As noted above, *Harris* arose in the context of a statutory public records request. The Court did not adopt an absolute rule that fee information is not "information relating to the representation" under Rule 1.6(a). Rather, the majority remanded for a determination of whether the fee information requested in that case could be harmful to the client. *Id.* at 607-10.[9] Here, however, the AG seeks a rule change that would permit (and perhaps require, under CORA) a lawyer to disclose fee information in every situation, without consideration of the potential harm to the client.

- *Harris* was decided in 1993. No Maryland decision has cited *Harris* in the succeeding twenty-plus years.

The minority report also relies on *United States v. Gonzales*, 150 F.3d 1246 (10th Cir. 1998), in which a newspaper requested from the court, pursuant to the Criminal Justice Act (CJA), the billing records and sealed backup documents, motions, orders, and transcripts regarding appointed defense counsel's fees and services. Minority Report at 6-7. The Tenth Circuit determined that, although the press had no constitutional, common law, or statutory right to these records, the trial court did not abuse its discretion in ordering that the single page payment vouchers, with any necessary protective orders, be released to the press at the end of the defendant's sentencing hearing. *Id.* at 1266-67. It further held that the court *had* abused its discretion in ordering disclosure of the specific information supporting the requests for payment. *Id.* at 1265-66. *Gonzales* is not on-point because the request for the billing information was submitted to the judge, not the attorneys; it was decided under the CJA, not Rule 1.6; and there is no indication the defendants or their counsel asserted the protection of Rule 1.6. Indeed, the newspaper conceded that it could not obtain the requested information from counsel: "The Journal does not seriously dispute that it cannot get the type of data it seeks here from the Department of Justice with

[9] There is no record of any further proceedings and the Maryland Public Defenders Office has no record of this case being further litigated or of any billing information actually being released to the Baltimore Sun.

respect to prosecution costs, or from [the] Federal Public Defender Offices[.]" *Id.* at 1254 (footnotes omitted).

The minority report cites a number of cases decided under the attorney-client privilege. *See* Minority Report at 8-9 & n.7. However, as discussed above, the duty of confidentiality under Rule 1.6 is distinct from and broader than the evidentiary privilege.

The minority report cites a Texas Open Records Decision as authority for the proposition that "an attorney's ethical duty of confidentiality must yield to the public's right to access government information under that state's open records law." Minority Report at 9. However, the Texas decision illogically assumes that the open records law falls under the ethics rule's "other law" exception, even though the open records statute expressly exempts from disclosure "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas [ethics rules]." Texas Open Records Dec. No. 676, at 3-4 (Nov. 30, 2002). We also note that the Texas decision is confined to government lawyers representing government clients. *See id.* at 2 (referring to "the client governmental body"); 3 (same); 4 (same), 13 (in summary of decision, referring to "a governmental body client").

The Colorado cases cited in the minority report regarding the State's general commitment to public access to government records, *see* Minority Report at 10, do not involve attorneys' records at all, much less consider a government lawyer's duty under Rule 1.6.

G. The AG's Proposed Language Is Ambiguous and Will Create Confusion.

As discussed above, the Original Proposed Comment reads:

> The total amount of fees or costs incurred by a public entity on a particular matter is not "information relating to the representation of a client" which must be maintained as confidential under Rule 1.6(a).

See Exh. A. The Proposed Rule would permit a lawyer to disclose client-related information:

> (9) to comply with a request for information made under other law when the information sought is the total number of attorney hours expended or the total amount of costs incurred on a particular matter by a public law office on behalf of a client.

Minority Report at 10-11. And the Revised Proposed Comment reads:

> Rule 1.6(b)(8) recognizes that there may be circumstances in which a lawyer may reveal some client information to comply with other law. When a request is made to a public law office under other law for the total number of attorney hours expended or the total amount of costs incurred on a particular matter by the office on behalf of a client, a lawyer may comply with that request without violating Rule 1.6.

Id. at 12.

The majority is concerned that the language used in the three proposals is ambiguous and will lead to confusion among lawyers.

For example:

- The Original Proposed Comment refers to "[t]he total amount of fees or costs incurred *by a public entity*[.]" However, the OSPD, ADC, OCR, and ORPC provide free legal services to individual clients and no fees or costs are "incurred by a public entity"—both because those agencies' clients do not "incur[ ]" any fees and because those clients are not "public entit[ies]." Therefore, the Original Proposed Comment does not apply to those fees and costs; yet, the AG's March 15, 2016 letter suggests that the AG believes that its proposed comment language would exclude from Rule 1.6(a) fees and costs for any legal services provided by *any* public attorney.

- Does "fees or costs *incurred* by a public entity," as used in the Original Proposed Comment, mean fees or costs that the public entity has actually paid to a public law office or private attorney or firm?

- What does "public law office," as used in the Proposed Rule and Revised Proposed Comment, mean? Does it include private law firms when they represent public entities? Does it include designated legal counsel or legal departments within various government agencies?

- What does "total number of attorney hours expended," as used in the Proposed Rule and Revised Proposed Comment, mean? Does that mean hours actually spent on the matter, hours billed to the client, or something else? Does it include paralegal time? How does it compare to "aggregate billing information," the phrase repeatedly used in the minority report and defined in that report (but not in any of the proposed amendments) as "the total number of hours billed plus other outlays on a particular matter, without any granular or detailed information of the work performed or expert consultation or costs and without elucidation of itemized expenditures or expenses"? Minority Report at 3.

- What is a "particular matter," as used in all the proposed amendments? When does a "particular matter" begin or end?

- Under the analysis set forth above, which could change a permissive disclosure under the Proposed Rule and Revised Proposed Comment into a mandatory production of information under CORA, would it be confusing to denominate the exception stated in the Proposed Rule and Revised Proposed Comment as merely permissive? Would those proposed amendments require a public lawyer subject to CORA to disclose fee-related information "to comply" with a CORA request that is deficient in one or more unrelated respects? Would they preclude the lawyer from asserting independent objections to disclosure?

- The AG vigorously argues that there is a conflict between Rule 1.6 and CORA. The Majority disagrees and instead asserts that the proposed amendment would create conflicts that does not otherwise exist. Rule 1.6 prohibits disclosure of confidential client information except in specific situations. Neither "aggregate billing information" nor "total amount of costs incurred on a particular matter" are exceptions under Rule 1.6. CORA provides that disclosure of information is not allowed if "prohibited by rules

promulgated by supreme court or by the order of any court." CRS §24-72-204(1)9(c). Consequently an attorney's duty is clear under both Rule 1.6 and CORA: this information cannot be disclosed.

VII. Conclusion

For the reasons summarized above, the majority recommends against adoption of the AG's proposed amendments.

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CYNTHIA H. COFFMAN
Attorney General

DAVID C. BLAKE
Chief Deputy Attorney General

MELANIE J. SNYDER
Chief of Staff

FREDERICK R. YARGER
Solicitor General

STATE OF COLORADO
DEPARTMENT OF LAW

RALPH L. CARR
COLORADO JUDICIAL
CENTER
1300 Broadway, 10th Floor
Denver, Colorado 80203
Phone (720) 508-6000

Office of the Attorney General

March 15, 2016

Marcy G. Glenn
Chair, Supreme Court Rules of Professional Conduct Standing Committee
Holland & Hart
555 17th Street, Suite 3200
Denver, CO 80202

RE: *Proposal for an amendment to the comments to Colorado Rule of Professional Conduct 1.6*

Dear Ms. Glenn:

I am writing to request that the Supreme Court Rules of Professional Conduct Standing Committee consider an important issue affecting government entities. Specifically, I request that the Committee consider a comment to the Rules of Professional Conduct clarifying whether a public law office may disclose the total amount of fees or costs incurred on a particular legal matter.

The Colorado Attorney General's Office frequently is asked to disclose the amount of time its attorneys have spent on a particular legal matter, as well as the total amount of expenses incurred in particular litigation. We have been asked for this information, for example, in the context of highly-publicized litigation concerning same-sex marriage, gun control, and the environment. Requests for this information typically are posed by members of the media or citizens under the Colorado Open Records Act ("CORA"), or by the General Assembly under its inherent authority to request information in furtherance of its official duties. These requests are common for public agencies and elected officials at all levels of government.

It has been the long-standing policy of this Office to provide this information whenever doing so is consistent with the Rules of Professional Conduct. I, as well as my predecessor, strongly believe that the public should have access to basic information about legal services expenditures by public entities. These services are

EXHIBIT A

provided at taxpayer expense, and although government lawyers owe their clients a duty of confidentiality, aggregate billing information is not the type of confidential information that should be shielded from public view.[1]

The Rules of Professional Conduct, however, can be understood to place limits on the disclosure of even aggregate billing information that does not reveal specific litigation strategy or other privileged information, and the Rules impose these limits regardless of whether billing information concerns a private or public legal expenses. Specifically, Rule 1.6 prohibits attorneys from revealing "information relating to the representation of a client," and this duty of confidentiality is broader than the protections afforded by the attorney-client privilege. *See, e.g.*, Rule 1.6, cmt. 3.[2]

Public law offices face competing concerns in this area. *See, e.g., Gleason v. Judicial Watch, Inc.*, 292 P.3d 1044, 1045 (Colo. App. 2012) (noting that requests for records of public legal agencies involve friction between two important interests – the public's "important interest" in "the openness of its government, in part to find out what the government is doing" and the need for confidentiality of some records). These concerns are not addressed by Rule 1.6's categorical rule of confidentiality.

The tension between the need for confidentiality on the one hand and transparency in public affairs on the other has resulted in recent years in proposed legislation that would subject the Judicial Branch and public law offices to increased disclosure requirements. The proposals vary in their sweep, but do not appear to fully take into account the duty of confidentiality imposed by the Rules of Professional Conduct. I believe that a relatively modest clarification to the Rules of Professional Conduct is preferable to large scale changes to the law governing public entities, many of which may result in unintended consequences.

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[1] I define aggregate billing information as the total number of hours billed plus other outlays on a particular matter, without any granular or detailed information of the work performed or expert consultation or costs and without elucidation of itemized expenditures or expenses.

[2] Although Rule 1.6(b)(7) permits (but does not require) disclosure of confidential information in order to comply with "other law," it is not clear that CORA qualifies as "other law" that would permit disclosure of aggregate fee information. CORA itself provides that inspection of public records should be denied when a rule promulgated by the Supreme Court, such as Rule 1.6, would prohibit disclosure. § 24-72-204(1)(c), C.R.S.

Case law supports a modest change clarifying that aggregate fee information need not be maintained as confidential. *First*, aggregate information about the legal expenses of public agencies is not the type of sensitive information that implicates the justifications for Rule 1.6's categorical rule of confidentiality.[3] Aggregate billing information – particularly after a matter has concluded – does not reveal client confidences or provide access to litigation strategy. *Cf. United States v. Gonzales*, 150 F.3d 1246, 1266 (10th Cir. 1998) (upholding, in the context of the Criminal Justice Act, a trial court's exercise of its discretion to release total amounts spent on a particular defendant's case at the conclusion of a sentencing hearing).

As a result, some courts have recognized that disclosure of aggregate billing information is not prohibited in all circumstances by Rule 1.6. *Harris v. Baltimore Sun Co.*, 625 A.2d 941 (Md. 1993), involved a newspaper's request under a public information statute that a public defender's office disclose total expenses, including expert witness expenses, incurred in the defense of a capital murder trial. Maryland's highest court determined that disclosure of the information was not necessarily barred by Rule 1.6, provided that disclosure would not pose a risk of harm to the client's interests. *Id.* at 947-48 (noting that for the type of information requested, Rule 1.6's "prohibition is not absolute").

Second, case law in Colorado and many other jurisdictions holds that basic information relating to an attorney's billing does not implicate client confidences and may be disclosed in litigation in response to a court order.[4] "Fee arrangements

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[3] Colorado formal ethics opinions have not directly addressed this issue. The CBA Ethics Committee has found that billing statements that include detailed or substantive information relating to a representation should be held confidential under Rule 1.6. Colorado Ethics Opinion 107, p. 4-341. That opinion, however, did not consider the disclosure of only aggregate billing information.

[4] Courts generally have found that the attorney-client privilege does not prevent testimony or discovery relating to attorney billing records. *See, e.g., In re Marriage of Schneider*, 831 P.2d 919, 921 (Colo. App. 1992) (finding no error in admission of testimony by attorney about the amount of fees paid by his client); *Roe v. Catholic Health Initiatives Colo.*, 281 F.R.D. 632, 636 (D. Colo. 2102) ("[I]nformation that shows the fee amount, the general nature of the services performed, and the case on which the services were performed is not privileged" provided that the billing entries do not reflect the client's motive in seeking legal advice, litigation, strategy, or the specific nature of the services provided). Courts similarly have permitted the disclosure of billing records under public open records laws over objections that the records are privileged. *See, e.g., Cypress Media v. City of Overland Park*, 997 P.2d 681, 692 (Kan. 2000) ("[F]ee arrangements are viewed as merely incidental to the attorney-client relationship and do not usually involve disclosure of confidential communications arising from the professional relationship."); *Commonwealth v.*

usually fall outside the scope of the [attorney-client] privilege because such information ordinarily reveals no confidential professional communication between attorney and client...." *In re Grand Jury Matter*, 926 F.2d 348, 352 (4th Cir. 1991) (refusing to quash subpoena served on attorneys seeking amounts of fees paid).[5]

Third, there are strong public policy arguments for permitting the disclosure of aggregate billing information by public entities. CORA, for example, demonstrates our state's established commitment to public access of government records. *See, e.g,. Benefield v. Colo. Republican Party*, 329 P.3d 262, 264 (Colo. 2014). The presumption in favor of public disclosure is particularly strong when the expenditure of public funds is at issue. *Freedom Newspapers v. Tollefson*, 961 P.2d 1150, 1156 (Colo. App. 1998). These same interests have been recognized in other jurisdictions. "[T]he public has a right to know how the [government] is spending taxpayer money in pending or completed litigation" so that it may "voice its concern or approval" about that spending. *ACLU v. County of L.A. Bd. of Supervisors*, 2014 Cal. Super. LEXIS 339, at *11, 17-18 (Cal. App. Dep't Super. Ct. 2014) (internal citations omitted). And when the billing information "contain[s] information that may provide insight into the attorney's protected litigation strategy, that information can be easily redacted." *Id.*

Public law offices are government entities that should operate with as much transparency and accountability as may be permitted within the bounds of ethical representation. Providing access to aggregate information about the cost of public legal services serves several important interests. It encourages informed debate on

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Scorsone, 251 S.W.3d 328, 330 (Ky. App. 2008) (approving of Attorney General Opinion directing that attorney billing records must be disclosed in response to an open records request when the billing records reflect the general nature of legal services rendered, but that substantive matters protected by attorney-client privilege may be redacted); *Tipton v. Barton*, 747 S.W.2d 325, 332 (Mo. Ct. App. 1988) (finding that billing statements were not privileged because they "are extraneous to [the lawyer's] legal advice or work product"); *see also, e.g., Schein v. N. Rio Arriba Elec. Coop., Inc.*, 932 P.2d 490, 495 (N.M. 1997) (permitting disclosure of billing records to a shareholder and noting that "[i]nquiries into the general nature of legal services provided do not violate the attorney-client privilege because they involve no confidential information.").

[5] Additionally, in some analogous settings, billing information is not required to be maintained as confidential. *See* 18 U.S.C. § 3006A(d)(4) (permitting disclosure of fees for appointed counsel in United States district courts under the Criminal Justice Act); *see also United States v. Cal. Rural Legal Assistance, Inc.*, 722 F.3d 424 (D.C. Cir. 2013) (upholding right of federal inspectors to access federal Legal Services Corporation information, including client identity, financial records and time records).

public policy issues, promotes accountability of elected officials and government agencies, and legitimizes the important work that government agencies and their lawyers do.

In sum, the disclosure of aggregate billing information on matters does not pose a risk of harm to the clients of government lawyers. Given the important interest in government transparency, and Colorado's particularly strong commitment to protecting that interest, I am requesting that the Supreme Court Rules of Professional Conduct Standing Committee consider an amendment to the comments to Rule 1.6. The comment would clarify that aggregate billing information for public legal services is not subject to Rule 1.6, provided that it does not actually reveal any specific information that would harm a client's interest. As an initial proposal, a comment could state,

> *The total amount of fees or costs incurred by a public entity on a particular matter is not "information relating to the representation of a client" which must be maintained as confidential under Rule 1.6(a).*

I would welcome the opportunity to speak with the Standing Committee about this proposal and would appreciate their consideration in clarifying the parameters of Rule 1.6 for public entities.

Sincerely,

CYNTHIA H. COFFMAN
Attorney General

cc: The Honorable Justice Nathan Coats (by separate cover)
The Honorable Justice Monica Marquez (by separate cover)

HOLLAND&HART LLP
THE LAW OUT WEST

Marcy G. Glenn
Phone 303-295-8320
Fax 303-975-5475
mglenn@hollandhart.com

March 21, 2016

Cynthia H. Coffman
Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, CO 80203

Re: Proposal for an Amendment to the Comments to Colorado Rule of Professional Conduct 1.6

Dear Attorney General Coffman:

Thank you for your March 15, 2016 letter, which requested the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct to consider additional commentary to Rule 1.6, to clarify that a public law office may disclose the total amount of fees or costs incurred on a particular legal matter.

This item will be on the agenda for the next meeting of the Standing Committee, on April 29. Following our usual protocol for proposed amendments to rules and comments, I will distribute your letter to the Standing Committee, I anticipate that at the April 29 meeting we will form a subcommittee to evaluate your proposal, and you will be invited to serve on that subcommittee or to designate another attorney in the Attorney General's Office to serve. For that reason—because the subcommittee's consideration of your proposal will not begin until after the April 29 meeting—it is far from essential for you (or another attorney in your office) to be present at that meeting. However, all Standing Committee meetings are public and you are welcome to attend, either in person or by phone. Please let me know if you would like more detailed information regarding the time and place of the April 29 meeting, and call-in information.

Thank you again for your letter. I appreciate your concerns and I look forward to working with you on this project.

Sincerely,

Marcy G. Glenn
of Holland & Hart LLP

cc: The Honorable Nathan B. Coats
The Honorable Monica Márquez

8583993_1

February 16, 2017

MEMORANDUM

TO: Colorado Supreme Court Standing Committee on the Rules of Professional Conduct

FROM: The Office of the Colorado Attorney General, Steven Zansberg

RE: Minority Report of Rule 1.6 Subcommittee

The Colorado Attorney General requests that the Supreme Court Standing Committee on the Rules of Professional Conduct consider a proposal to add an exception to Rule 1.6(b) that would permit a lawyer for a public law office to disclose aggregate billing information relating to a particular legal matter without violating Rule 1.6's prohibition against revealing information relating to the representation of a client. Alternatively, the Colorado Attorney General urges the Committee to consider a comment adopting the same principle.

I. The public's interest in transparency and its impact on public law practices.

Disclosure of information about a legal representation is governed by two considerations. First is the attorney-client privilege, which encourages a client's frank and honest communications with legal counsel by prohibiting compelled testimony of a lawyer regarding a representation. Second is Rule 1.6, which further requires an attorney to maintain "information relating to the representation" as confidential.

When an attorney represents a private client, these two considerations ensure that no information about the representation is public, except information reflected in public documents or information that the client wishes to share. Thus, private-sector clients have a justified expectation that information about the representation will remain private. Private-sector lawyers are not regularly called upon to answer questions about the representation, including questions about the narrow issue under consideration here: aggregate billing information relating to the representation.

Lawyers representing public entities operate in a different environment, one in which transparency and accountability are not only expected, but also required. The lawyer for a government agency may represent a variety of clients, including individuals, agencies, boards, or at times, the public as a whole. *See, e.g.,* Colo. RPC

1.13, cmt. 9. Even when the client is an individual, government lawyers face demands for transparency in order that the public may adequately assess the operation and efficiency of their government. *See* Kathleen Clark, *Government Lawyers and Confidentiality Norms*, 85 Wash. U. L. Rev. 1033, 1046 (2007) ("While the overriding norm regarding lawyer-client information is secrecy unless there is a good reason for disclosure, the overriding norm regarding government information in the modern era is disclosure unless there is a good reason for secrecy.")

In this setting, the established public policy of the state requires that information about government services must be open and accessible to the public. § 24-72-201, C.R.S.; *see also Benefield v. Colo. Republican Party*, 329 P.3d 262, 264 (Colo. 2014) (noting that the public policy of the state favors access to public records); §§ 24-6-201, -401, C.R.S. (describing statewide policy behind Colorado Sunshine Law); § 24-101-401(1), C.R.S. (providing that information about publicly funded contracts is a matter of public record). The Colorado Open Records Act ("CORA") mandates that all public records are open for inspection unless the record falls within a specific exception that serves the public's interests. § 24-72-203, C.R.S.; *see also Jefferson Cnty. Educ. Ass'n v. Jefferson Cnty. Sch. Dist. R-1*, 378 P.3d 835, 839 (Colo. App. 2016) (recognizing the "strong general rule that public records should be disclosed"). The public has a particularly strong interest in information that sheds light on the expenditure of taxpayer funds. *Denver Pub. Co. v. Univ. of Colo.*, 812 P.2d 682, 685 (Colo. App. 1990) (observing that "the public's right to know how public funds are expended is paramount..."). The policy in favor of open information about public funds encourages informed debate about important issues and ultimately promotes confidence in the work of government.

In accordance with this public policy, government lawyers routinely are asked to provide, and are obligated to disclose, a variety of information about their work. The Attorney General's Office, for example, fields approximately 200 CORA requests every year in which the public and press seek information about the Office's representation of its clients. As an elected official, the Attorney General herself speaks publicly about matters of statewide importance. The Attorney General's Office must request and explain its budget to the Joint Budget Committee and answer questions about the office and its operations; representatives of the office regularly interact with members of the General Assembly or testify before legislative committees regarding matters of public importance.

One of the pieces of information routinely requested of the Attorney General's Office is the amount of time spent or the expenses incurred on a particular matter. Such requests are commonly made under CORA by citizens, interested groups, and most often, members of the press. The Attorney General's Office has been asked for information relating to its billing and costs incurred, for example, in the context of highly-publicized litigation concerning same-sex marriage, gun control, and the

environment. These requests are commonly made to public agencies and elected officials at all levels of government.

In these situations, government lawyers must respect the attorney-client privilege and protect the confidential information of a client, but they are obligated to do so while simultaneously respecting their duty to the public to provide information that permits citizens to understand and evaluate the conduct of their government.[1] Reconciling these competing duties requires the exercise of judgment by government lawyers, often in difficult situations, which lawyers representing private clients simply do not face. *See Gleason v. Judicial Watch, Inc.*, 292 P.3d 1044, 1045 (Colo. App. 2012) (noting that requests for records of public legal agencies involve friction between two important interests – the public's "important interest in the openness of its government, in part to find out what the government is doing" and the need for confidentiality of some records).

The need to balance these competing interests comes into particularly sharp focus when the information at issue is aggregate billing information. Aggregate billing information is the total number of hours billed plus other outlays on a particular matter, without any granular or detailed information of the work performed or expert consultation or costs and without elucidation of itemized expenditures or expenses. It has been the long-standing policy of the Office of the Attorney General to provide aggregate billing information for a representation whenever doing so is consistent with the Rules of Professional Conduct. Although the Office protects information subject to the attorney-client privilege, the Office believes, based on Colorado's broad open government laws, that it is obligated to provide the public with this basic information about legal services paid by taxpayers. These services are provided at the public's expense, and aggregate billing should not be shielded from public view, especially in those circumstances in which there is no particular or articulable risk of harm to the client. The Attorney General's practice is consistent with the practices of attorneys general in other states[2] and with public law offices at other levels of government. In fact, most other public law offices do not appear to have grappled in a systematic way with the strictures of Rule 1.6 when information is requested pursuant to open records laws.

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[1] *Cf.* Rule 1.6 cmt. 16A (observing that lawyers sometimes face conflicting obligations to their clients, the courts, and more generally, "our system of justice").

[2] *See, e.g., Commonwealth v. Scorsone*, 251 S.W.3d 328, 330 (Ky. App. 2008) (approving of Attorney General Opinion directing that attorney billing records must be disclosed in response to an open records request when the billing records reflect the general nature of legal services rendered, but that substantive matters protected by attorney-client privilege may be redacted); *see also* Texas Attorney General Open Records Decision No. 676, discussed *infra*.

The tension between the need for confidentiality on the one hand and transparency in public affairs on the other has resulted in recent years in proposed legislation that would subject the Judicial Branch and public law offices to increased disclosure requirements.[3] The proposals vary, but none appear to fully take into account the duty of confidentiality imposed by the Rules of Professional Conduct. As a result, the Attorney General's Office believes that an amendment to the Rules of Professional Conduct or its comments is preferable to large scale changes to the law governing public entities, which may result in unintended consequences. Some members of the subcommittee suggested that this issue should be resolved by the General Assembly, perhaps by amending CORA. The Attorney General believes, however, that the Judicial Branch is well suited to narrowly address the debate without creating unintended consequences, and that the Branch has authority to do so through the rulemaking process. Moreover, an amendment to the Rules of Professional Conduct is an appropriate mechanism to address this issue, as it is a broad reading of the text of Rule 1.6 that currently presents a barrier to the transparency in government otherwise dictated by state statute.

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[3] The majority report mischaracterizes the Attorney General's motivations for this proposal. The Attorney General was primarily motivated to seek clarity on this subject to ensure that the conduct of attorneys in the Attorney General's Office falls within the bounds of the Rules of Professional Conduct. While true that the Attorney General's proposal would (and we argued should) treat all public law offices equally, the proposal was not directed at the Office of the Public Defender, as was suggested by some members of the subcommittee. Moreover, the majority report states that the Attorney General is motivated by the Office's support for "legislation that would subject the Judicial Branch and public law offices to increased disclosure requirements." (Maj. Rpt. p.9). This is neither an accurate recitation of the minority report nor an accurate reflection of the Attorney General's motivations.

II. The apparent conflict between Rule 1.6 and CORA.

Rule 1.6 restricts the disclosure of "information relating to the representation of a client." The subcommittee majority takes the view that Rule 1.6 covers disclosure of the aggregate billing information of public-sector attorneys, even when that information does not reveal specific litigation strategy or other privileged information and does not otherwise prejudice the client.[4] As currently written, Rule 1.6 does not permit a distinction based on whether billing information concerns private or public legal expenses. Neither Colorado courts nor the Office of Attorney Regulation Counsel have yet faced the question of whether and when aggregate billing information by public law offices may be disclosed consistent with Rule 1.6, but both the courts and the Office of Attorney Regulation Counsel have otherwise broadly interpreted the rule.

The broad nature of Rule 1.6 conflicts with the transparency mandated by CORA and the principles of good government embodied in Colorado's sunshine laws. Among the exceptions to the requirements for confidentiality in Rule 1.6(b), subsection (8) permits (but does not require) disclosure of confidential information in order "to comply with other law." CORA can be understood as a source of "other law" that would permit disclosure of aggregate billing information. But CORA itself creates ambiguity on that subject. It provides that inspection of public records should be denied when a rule promulgated by the Supreme Court, such as Rule 1.6, would prohibit disclosure. § 24-72-204(1)(c), C.R.S. As a result, CORA and Rule 1.6 each point to the other: CORA points to the Rules of Professional Conduct as a possible source requiring the shielding of information, while Rule 1.6 points to CORA as a possible source requiring disclosure of information. No court has yet resolved the ambiguity.

Under Rule 1.6, a client may consent to the disclosure of confidential information. Obtaining client consent is not always straightforward in these situations, however, and is often equally in tension with principles of transparency. *See Clark, supra*, at 1086-90 (describing the "complex legal regime" governing the disclosure of government information, which presents difficulties for obtaining client consent). For example, a broad CORA request for billing information on all work done by a particular section of the Attorney General's Office could implicate

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[4] The majority report states that the very fact of the Attorney General's proposal implies that the Attorney General views current Rule 1.6 as prohibiting the disclosure of aggregate fee information. (Maj. Rpt. p.12). This is not a full representation of the Attorney General's position. The Attorney General is concerned that reading Rule 1.6 without any limits, which is the approach suggested by the majority, would have the effect of prohibiting such disclosure. As a result, the Attorney General seeks clarification through a rule change that Rule 1.6 does not prohibit the disclosure of aggregate fee information.

many different clients, making obtaining informed consent difficult at best. CORA mandates a deadline of three business days for a response; the circumstances permitting extensions are limited, and in any event, may not be extended beyond an additional seven days. § 24-72-203(3)(b), C.R.S. In some situations, multiple clients may be represented on the same matter and may not uniformly consent. The client whose information is the subject of the request may be a board, which could not be called into executive session within the required timeframe to provide consent. Additional questions may arise: What if the matter involves a disagreement between agencies that required conflict barriers and outside counsel? May a newly-elected Governor waive the confidentiality of information involved in the representation of a former Governor? Is a CORA requestor billed for time resolving informed consent issues, even when no information is released?

If a client denies consent under any of these scenarios, the Attorney General may not disclose the fact of non-consent. This leaves the public without the information to determine what level of government is refusing to share information. Additionally, CORA obligates the Attorney General to disclose the legal grounds for a denial of access to records when the rationale for a denial is requested. § 24-72-204(4), C.R.S. In some situations, a disclosure that records are being withheld based on Rule 1.6 may imply that the client has not consented, which may itself be a violation of Rule 1.6. These practical problems demonstrate the very real problems public law offices face, and they illustrate the tension between the responsibility to provide open access to information about government and the requirement of maintaining client confidentiality.

III. Authority supporting a change in the scope of Rule 1.6 regarding aggregate billing information.

Although few states have directly grappled with this issue, there is some authority supporting a modest change clarifying that aggregate billing information need not be maintained by public law offices as confidential client information. *First*, aggregate information about the legal expenses of public agencies is not the type of sensitive information that implicates the justifications for Rule 1.6's categorical rule of confidentiality.[5] Aggregate billing information – particularly after a matter has concluded – does not reveal client confidences or provide access to litigation strategy. *Cf. United States v. Gonzales*, 150 F.3d 1246, 1266 (10th Cir. 1998) (upholding, in the context of the Criminal Justice Act, a trial court's exercise

[5] Formal ethics opinions issued by the CBA Ethics Committee have not directly addressed this issue. The Committee concluded that billing statements with detailed or substantive information relating to a representation should be held confidential under Rule 1.6. Colorado Ethics Opinion 107, p. 4-341. That opinion, however, did not consider the disclosure of only aggregate billing information.

of its discretion to release total amounts spent on a particular defendant's case by court-appointed defense attorneys at the conclusion of a sentencing hearing).

The Maryland Supreme Court determined in *Harris v. Baltimore Sun Co.*, 625 A.2d 941 (Md. 1993), that disclosure of aggregate billing information is not prohibited in all circumstances by Rule 1.6. *Harris* is the only authority located by either the majority or the minority of the subcommittee that directly addresses whether billing information may be revealed notwithstanding Rule 1.6.[6] The case involved a newspaper's request under a public information statute for the total expenses, including expert witness expenses, incurred by a public defender's office in the defense of a capital murder trial. Maryland's highest court determined that disclosure of the information was not necessarily barred by Rule 1.6, provided that disclosure would not pose a risk of harm to the client's interests. *Id.* at 947-48 (noting that for the type of information requested, Rule 1.6's "prohibition is not absolute"). Although the current Model Rules do not consider harm or detriment to a client in determining whether confidential client information may be shared, potential prejudice to a client (or lack thereof) should be considered by public lawyers in determining whether to make a permissive disclosure under the Attorney General's proposal as described below.

The majority report extensively cites *Lawyer Disciplinary Board v. McGraw*, 461 S.E.2d 850, 859-61 (W. Va. 1995), in which a state attorney general was publicly reprimanded for failing to hold client information in confidence. That case, however, did not involve the disclosure of billing information. It instead involved an Attorney General's unauthorized communication to a third party about a client's intent to take a particular position in litigation. *Id.* at 850. The Colorado Attorney General's Office takes no issue with either the broad pronouncements in *McGraw* holding that an Attorney General must conform her conduct to the Rules of Professional Conduct, *see id.* at 862, or the proposition that public lawyers must hold substantive information about a representation in confidence. Rather, the Attorney General's proposal advocates a different understanding of the nature of aggregate billing information for public law offices in relation to Rule 1.6.

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[6] The majority's statement that no other court has cited *Harris* on this point with approval is not entirely accurate. *See In re Bryan*, 61 P.3d 641, 649 (Kan. 2003) (citing *Harris* for the proposition that "Rule '1.6 should be read to prohibit to [sic] those needless revelations of client information that incur some risk of harm to the client'"); *In re Discipline of Two Attorneys*, 660 N.E.2d 1093, 1096-97, n.4 (Mass. 1995) (noting the lack of authority in the area and citing to *Harris* as having required the potential for some harm to the client's interest before concluding that the attorneys' use of information at issue was detrimental to the interests of the client).

Disclosure of aggregate billing information does not conflict with the purpose of the confidentiality rule. Rule 1.6's mandate is designed to encourage full and frank communication between a client and lawyer. Colo. RPC 1.6, cmt. 2. The rule "contributes to the trust that is the hallmark of the client-lawyer relationship" and aids the lawyer in effectively advising his or her client. *Id.* In the case of a public client, however, revelation of aggregate billing information would neither inhibit communication between lawyer and client nor impede the lawyer's effective representation. Moreover, whether the client is an individual, entity, or the state as a whole, representation by a public law office is generally dictated by statute. Clients understand (or should understand) at the outset that a public law office, and thus, taxpayer funds are being used to provide the representation. In these circumstances, disclosure by a public law office of the amount of taxpayer funds expended on a matter does not change the client's expectations of confidentiality. Given Colorado's public records laws, the disclosure of aggregate billing information does not dis-incentivize the client to share information with the lawyer, impede the lawyer's effective representation, or otherwise harm or prejudice the client. Thus, the purpose of the confidentiality rule is not undermined when a public law office discloses aggregate billing information in response to a public records request.

Second, case law in Colorado and many other jurisdictions holds that basic information relating to an attorney's billing does not implicate client confidences and may be disclosed in a variety of contexts.[7] "Fee arrangements usually fall

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[7] Most relevant, courts have permitted the disclosure of billing records under public open records laws over objections that the records are privileged. *See, e.g., Cypress Media v. City of Overland Park*, 997 P.2d 681, 692 (Kan. 2000) ("[F]ee arrangements are viewed as merely incidental to the attorney-client relationship and do not usually involve disclosure of confidential communications arising from the professional relationship."); *Tipton v. Barton*, 747 S.W.2d 325, 332 (Mo. Ct. App. 1988) (finding that billing statements were not privileged because they were "extraneous to [the lawyer's] legal advice or work product").

This is consistent with case law relating to fee disputes. Courts generally conclude that the attorney-client privilege does not prevent testimony or discovery relating to attorney billing records. *See, e.g., In re Marriage of Schneider*, 831 P.2d 919, 921 (Colo. App. 1992) (finding no error in admission of testimony by attorney about the amount of fees paid by his client); *Roe v. Catholic Health Initiatives Colo.*, 281 F.R.D. 632, 636 (D. Colo. 2102) (information that "shows the fee amount, the general nature of the services performed, and the case on which the services were performed is not privileged" provided that the billing entries do not reflect the client's motive in seeking legal advice, litigation strategy, or the specific nature of the services provided).

Application of these principles has led to rulings permitting disclosure in other contexts as well. *See Schein v. N. Rio Arriba Elec. Coop., Inc.*, 932 P.2d 490, 495

outside the scope of the [attorney-client] privilege because such information ordinarily reveals no confidential professional communication between attorney and client...." *In re Grand Jury Matter*, 926 F.2d 348, 352 (4th Cir. 1991) (refusing to quash subpoena served on attorneys seeking amounts of fees paid).[8]

In line with these holdings, the Texas Attorney General's Office has concluded that an attorney's ethical duty of confidentiality must yield to the public's right to access government information under that state's open records law. Texas Open Records Decision No. 676 at 3-4 (Nov. 30, 2002). The Texas open records statute contains an exception protecting information from public disclosure if a government attorney would be prohibited from disclosing the information under the state's rules of professional conduct. Tex. Gov't Code Ann. § 552.107. The Texas Attorney General's Open Records Decision nonetheless concluded that the rule of professional conduct regarding confidentiality does not prohibit disclosure of information that would otherwise be subject to production to the public. Texas Open Records Decision No. 676 at 3-4. As a result, the Texas opinion expressly recognized that non-privileged information in an attorney fee bill may be disclosed by a public entity. *Id.* at 5.

Third, the Rules of Professional Conduct acknowledge that legal representation by public agencies is different in some contexts, and therefore, the Rules already make some allowances for the special circumstances that public law offices face.[9] The Scope of the Rules expressly recognizes that other sources of law may alter the usual responsibilities in an attorney-client relationship when a government lawyer provides the representation. "[T]he responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships ... authority in various respects is generally vested in the attorney general... and the same may be true of

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(N.M. 1997) (permitting disclosure of billing records to a shareholder and noting that "[i]nquiries into the general nature of legal services provided do not violate the attorney-client privilege because they involve no confidential information.").

[8] Federal law likewise recognizes that, when it comes to public legal services, billing information is not required to be maintained as confidential. *See* 18 U.S.C. § 3006A(d)(4) (permitting disclosure of fees for appointed counsel in United States district courts under the Criminal Justice Act); *see also United States v. Cal. Rural Legal Assistance, Inc.*, 722 F.3d 424, 429 (D.C. Cir. 2013) (upholding right of federal inspectors to access federal Legal Services Corporation information, including client identity, financial records and time records).

[9] For example, public law offices are permitted additional latitude in managing conflicts of interest. Colo. RPC 1.11; Preamble and Scope, § 18. The Rules similarly note that in other contexts, a public law practice may differ from a private representation. *See, e.g.*, Colo. RPC 1.13, cmt. 9.

other government law officers... These Rules do not abrogate any such authority." Preamble and Scope, § 18.

The District of Columbia has adopted a version of Rule 1.6 that explicitly recognizes the unique responsibilities of government lawyers. It permits government lawyers to disclose confidential information "when permitted or authorized by law." D.C. RPC 1.6(e)(2)(B). This suggests that public lawyers may fulfill their obligations to provide transparency in government when directed to do so by other laws. *See also* Clark, *supra*, at 1089-90 (arguing that open-records and other disclosure laws constitute consent by the client of a government lawyer to disclosure of confidential information in accordance with those laws).

Finally, strong public policy arguments support the disclosure of aggregate billing information by public entities. As outlined above, Colorado has an established commitment to public access of government records. *See, e.g., Benefield*, 329 P.3d at 264. The presumption in favor of public disclosure is particularly strong when the expenditure of public funds is at issue. *Freedom Newspapers v. Tollefson*, 961 P.2d 1150, 1156 (Colo. App. 1998). Public law offices are government entities that are obligated to operate with as much transparency and accountability as may be permitted within the bounds of ethical representation. Providing access to aggregate information about the cost of public legal services serves several important interests. It encourages informed debate on public policy issues, promotes accountability of elected officials and government agencies, and legitimizes the important work that government agencies and their lawyers do. Government lawyers should not be forced to risk discipline when acting to fulfill their duties to provide information in the public interest.

IV. The Attorney General's Proposal.

The Attorney General's Office requested that the Supreme Court Rules of Professional Conduct Standing Committee consider a proposal that would recognize the tension public lawyers face between their concurrent responsibilities to provide transparency and client confidentiality. The Attorney General initially proposed an amendment to the comments to Rule 1.6. As discussion within the subcommittee has progressed and in recognition that the majority takes the view that Rule 1.6 is broad and absolute, the Attorney General recognizes that a revision to the rule itself may be the appropriate means to grapple with this issue.

The Attorney General, therefore, proposes the following exception to Rule 1.6(b):

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

...

(9) to comply with a request for information made under other law when the information sought is the total number of attorney hours expended or the total amount of costs incurred on a particular matter by a public law office on behalf of a client.

The proposed additional subsection to Rule 1.6(b), thus would permit – but not require – disclosure of aggregate billing information. Although Rule 1.6's overarching goal is the protection of client confidences, the other exceptions enumerated in Rule 1.6(b) make plain that there are important public policy instances that require some flexibility in the rule. These other exceptions similarly serve goals other than to protect a client's confidences.

The majority expresses concern that an additional permissive exception in Rule 1.6(b) would lead to mandatory disclosure of aggregate fee information when a request for that information is made under CORA. (Maj. Rpt. p.16). The Attorney General does not agree. The proposed additional exception in Rule 1.6(b) is permissive, and would make disclosure no more mandatory than under the other exceptions enumerated in Rule 1.6(b). As outlined above, CORA requires disclosure of public records unless the "inspection is prohibited by rules promulgated by the supreme court." § 24-72-204(1)(c). Because the proposed exception to Rule 1.6(b) does not absolutely prohibit disclosure, a public lawyer should not automatically proceed to disclosure when a CORA request is received. *See* Rule 1.6 cmt. 16A (observing that the fact that disclosure is "permitted, required, or prohibited under one rule does not end the inquiry" and explaining that a "lawyer must determine whether and under what circumstances other rules or other law permit, require, or prohibit disclosure"); *see also* Rule 1.6 cmt. 17 ("Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(8). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this rule.").

Some members of the subcommittee have suggested that the disclosure of information should be made on an individual basis taking into account the particular circumstances of each case. The Attorney General believes that this is certainly true for requests for information other than billing records. Public law offices regularly grapple with difficult and nuanced questions relating to the disclosure of information within their possession that require special consideration of the facts of each request. But the disclosure of aggregate billing records is different. For all the reasons set forth in this report, the nature of aggregate billing information is such that its disclosure ordinarily does not work harm to a client, regardless of whether the client is an individual or an entity. In those rare instances

in which disclosure of aggregate billing information may prejudice a client, the permissive nature of the proposed amendment permits an attorney to assert Rule 1.6 and protect client confidentiality by withholding information in those instances.

The majority raises several additional concerns about the scope of the Attorney General's proposal, such as whether private lawyers hired to represent either a government entity or an individual would fall within the proposed rule and whether the total number of attorney hours expended would include paralegal hours. (Maj. Rpt. pp.23-24). These are valid questions and the Attorney General remains committed to discussion of these and other questions about the scope of her proposal. However, the subcommittee discussion did not reach this level of detail, focusing instead solely on whether the overarching concept behind the Attorney General's proposal should be adopted.

Recognizing Colorado's practice of following the ABA Model Rules, the Attorney General alternatively requests that her proposal be considered as a comment to the rules. Such a comment related to current Rule 1.6(b)(8) could read: *Rule 1.6(b)(8) recognizes that there may be circumstances in which a lawyer may reveal some client information to comply with other law. When a request is made to a public law office pursuant to other law, such as an open records law, for the total number of attorney hours expended or the total amount of costs incurred on a particular matter by the office on behalf of a client, a lawyer may comply with that request without violating Rule 1.6.* Such a comment would recognize the important value of transparency in government while retaining the same features of the proposed amendment to the rule.

The Attorney General appreciates the time and thoughtful consideration given by the subcommittee members to her proposal.

Marcy Glenn

From: Marcy Glenn
Sent: Monday, November 14, 2016 3:53 PM
To: 'moss, edward'
Subject: New USDC Local Rules

Hi, Ed,

I'm sure you are aware of this already, but the federal court has adopted changes to its local rules that will take effect on December 1. Among those are amendments to Local Atty Rule 2, which adopts the Colo. RPC as the standards for lawyers practicing in federal court, but then states several exceptions to the applicability of those rules. There are some important changes, including:

1. The proposed federal local rule still rejects Colo. RPC 1.2(c), on unbundling, but now states: ". . . except that, if ordered, and subject to D.C. COLO.LAttyR 5(a) and (b), an attorney may provide limited representation to an unrepresented party or an unrepresented prisoner in a civil action." A new provision in Amended Local Attorney Rule 5(a), in turn, now addresses when an attorney may provide limited representation to an unrepresented party or an unrepresented prisoner in a civil action—pursuant to motion and court order. Unfortunately, by opting out of Colo. RPC 1.2(c) in its entirety, the proposed federal local rule continues to also reject the Colorado rule's first sentence, which applies both within and outside the confines of unbundling: "A lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." I've now twice commented to the federal court that it should retain this sentence in the court's local rules, but the court has again opted to reject all of Colo. RPC 1.2(c).

2. The proposed federal local rule no longer includes these Colo. RPC in its exceptions:

* Colo. RPC 4.2, Comment [9A] (communicating with person to whom counsel is providing limited representation)
* Colo. RPC 4.3, Comment [2A] (dealing with person to whom counsel is providing limited representation)
* Colo. RPC 4.4(b) (notifying sender of inadvertently disclosed document); and
* Colo. RPC 6.5 (limiting scope of representation)

I was glad to see these changes, which I had suggested at the time of the last revisions (2014) and which the federal court clerk asked me to suggest again this year.

I'm sorry I won't be at the meeting on Saturday, but feel free to include this summary in our meeting materials if you think it would be useful. The revised rules are available at http://www.cod.uscourts.gov/CourtOperations/RulesProcedures/LocalRules.aspx.

Marcy

Marcy G. Glenn
Holland & Hart LLP
555 17th Street, Suite 3200
Denver, CO 80202
Phone (303) 295-8320
Fax (303) 295-8261
E-mail: mglenn@hollandhart.com

SECTION ~~IV~~V – ATTORNEY RULES
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

I. SCOPE, PURPOSE, AND CONSTRUCTION

D.C.COLO.LAttyR 1
SCOPE OF ATTORNEY RULES

(a) **Title and Citation.** These rules shall be known as the Local Rules of Practice of the United States District Court for the District of Colorado-Attorney. These rules shall be cited as D.C.COLO.LAttyR Rule, Subdivision, Paragraph, Subparagraph, Item (e.g., D.C.COLO.LAttyR 15(g)(1)(B)(ii)).

(b) **Effective Date.** Unless otherwise stated, these rules are effective as of December 1 of each year.

(c) **Scope.** These rules shall apply to all attorneys who are admitted to the bar of this court, or who purport to appear in the United States District Court or the United States Bankruptcy Court for the District of Colorado.

(d) **Effect on Authority of Court.** Nothing stated in these rules shall be deemed to negate or diminish the express or inherent disciplinary powers of the court or a judicial officer.

II. STANDARDS OF PROFESSIONAL CONDUCT

D.C.COLO.LAttyR 2
STANDARDS OF PROFESSIONAL CONDUCT

(a) **Standards of Professional Conduct.** Except as provided by Subdivision (b) or order or rule of the United States Bankruptcy Court for the District of Colorado, the Colorado Rules of Professional Conduct (Colo. RPC) are adopted as standards of professional responsibility for the United States District Court and the United States Bankruptcy Court for the District of Colorado.

(b) **Exceptions.** The following provisions of the Colorado Rules of Professional Conduct (Colo. RPC) are excluded from the standards of professional responsibility for the United States District Court and the United States Bankruptcy Court for the District of Colorado:

(1) Colo. RPC 1.2(c) (limiting scope of representation), except that, if ordered, and subject to D.C.COLO.LAttyR 5(a) and (b), an attorney may provide limited representation to an unrepresented party or an unrepresented prisoner in a civil action;

(2) Colo. RPC 1.2(d), Comment [14] (counseling and assisting client regarding Colorado Constitution art. XVIII, §§ 14 and 16 and related statutes, regulations, or orders, and other state or local provisions implementing them), except that a lawyer may advise a client regarding the validity, scope, and meaning of Colorado Constitution art. XVIII, §§ 14 and 16 and the statutes, regulations, orders, and other state or local provisions implementing them, and, in these circumstances, the lawyer shall also advise the client regarding related federal law and policy.;

~~(3) Colo. RPC 4.2, Comment [9A] (communicating with person to whom counsel is providing limited representation);~~

~~(4) Colo. RPC 4.3, Comment [2A] (dealing with person to whom counsel is providing limited representation);~~

~~(5) Colo. RPC 4.4(b) (notifying sender of inadvertently disclosed document); and~~

~~(6) Colo. RPC 6.5 (limiting scope of representation).~~

III. BAR OF THE COURT, GOOD STANDING, RESIGNATION

D.C.COLO.LAttyR 3
REQUIREMENTS FOR BAR OF THE COURT

(a) Application. An applicant for admission to the bar of this court shall be a person licensed by the highest court of a state, federal territory, or the District of Columbia, on active status in a state, federal territory, or the District of Columbia, and a member of the bar in good standing in all courts and jurisdictions where the applicant has been admitted. Each applicant shall complete an approved form provided by the clerk and shall pay all fees established by the court.

(b) Consent to Jurisdiction; Certification of Familiarity with Local Rules. An attorney who applies for admission to the bar of this court:

(1) consents to this court's exercise of disciplinary jurisdiction over any alleged misconduct;

Marcy G. Glenn
Phone (303) 295-8320
Fax (303) 975-5475

mglenn@hollandhart.com

November 14, 2014

VIA HAND DELIVERY AND EMAIL TO
LocalRule_Comments@cod.uscourts.gov

Clerk of the Court
United States District Court
Attn: Edward Butler, Esq.
Alfred A. Arraj U.S. Courthouse Annex
901 19th Street
Denver, CO 80294

Re: Proposed Amendment to Local Rule D.C.COLO.LAttyR.2 of the United States District Court for the District of Colorado

Dear Mr. Butler:

I submit the following comments concerning subsections (1), (5), and (6) of proposed Local Rule D.C.COLO.LAttyR.2(b). I apologize for submitting these comments after the November 10, 2014 deadline, but urge you and the Court to consider them nevertheless. I have served as the Chair of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct since 2003, when that committee was formed. However, I submit these comments on my own behalf. The Standing Committee as a whole has not reviewed proposed Local Rule D.C.COLO.LAttyR.2(b).

The three subsections of D.C.COLO.LAttyR.2(b) on which I comment exclude the following provisions of the Colorado Rules of Professional Conduct (Colo.RPC) from the standards of professional responsibility for the Court:

Subsection (1) – Excludes Colo.RPC 1.2(c)

Subsection (5) – Excludes Colo.RPC 4.4(b)

Subsection (6) – Excludes Colo.RPC 6.5

These exceptions from the Court's adoption of the Colo.RPC are not new. The Court included these exceptions in its Administrative Order 2007-6, albeit using somewhat different wording. After the Court adopted that 2007 Order, I came to believe that the three exceptions were not precisely drafted. The Court's current revision of its Local Rules provides an

opportunity to revise those exceptions to more accurately state what I believe the Court intends to provide.

Subsection (1). In Administrative Order 2007-6, the Court stated that it was not adopting Colo.RPC 1.2(c) because it was among the rules "adopted to permit limited representation by counsel," or "unbundling" of legal services. The rule reads in its entirety: "(c) A lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b)." Only the second sentence of the rule addresses unbundled legal services. The first sentence, which is virtually the same as Rule 1.2 of the ABA Model Rules of Professional Conduct, states the broader proposition that a lawyer and client may agree to limit the scope of the representation, for example, by agreeing that the lawyer will represent the client in the trial phase of the proceedings but not in a potential appeal. By excluding all of Colo.RPC 1.2(c), the Court has precluded any agreement between the lawyer and the client regarding the scope of the representation, even in a representation that does not involve unbundled legal services for a pro se litigant. If this was the Court's intention, then no revision would be necessary, but I would urge the Court to reconsider that intention, as I believe the first sentence of Colo.RPC 1.2(c) states a salutary principle, unrelated to unbundled legal services. But if the Court intended solely to reject the portion of the rule permitting unbundling, then I suggest limiting the excluded portion of Colo.RPC 1.2(c) to the second sentence.

Subsection (5). Administrative Order 2007-6 stated that "[t]his court will not require adherence to Rule 4.4(b)" [because] "Rule 26 of the Federal Rules of Civil Procedure and interpretive case law provide comprehensive procedures regarding the issue of inadvertent production of privileged and protected information." Proposed subsection (5) to D.C.COLO.LAttyR.2(b) lacks an explanation but I assume that the 2007 commentary remains relevant. If yes, I believe that the exclusion of Colo.RPC 4.4(b) is both over- and under-inclusive. It is over-inclusive in rejecting Colo.RPC 4.4(b) in its entirety, because Federal Rule 26(b)(5)(B) addresses inadvertently produced information "in discovery" only, while Colo.RPC 4.4(b) also addresses documents inadvertently transmitted outside the discovery context. It is under-inclusive by declining to adopt only Colo.RPC 4.4(b), and not also Colo.RPC 4.4(c), at least insofar as those rules apply to documents inadvertently produced in discovery. While Colo.RPC 4.4(b) states a lawyer's general duty upon the receipt of a document that the lawyer knows or should reasonably know was inadvertently sent, Colo.RPC 4.4(c) addresses the more specific circumstance in which the lawyer received actual notice from the sender that the document was inadvertently sent. Therefore, I suggest revising the exception to read: "Colo.RPC 4.4(b), to the extent that rule could be applied to information produced in discovery." I further suggest adding an exception for "Colo.RPC 4(c), to the extent that rule could be applied to information produced in discovery."

Subsection (6). Administrative Order 2007-6, after excluding Colo.RPC 6.5, quoted Comment [2] to that rule, which reads: "A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c)." The inclusion of this quote suggests that the Court's rejection of Rule 6.5 might have been an outgrowth of its rejection of the rules facilitating unbundling. However, Rule 6.5 does not deal with unbundled legal services; rather, it contemplates formal representation of a client "under the auspices of a program sponsored by a nonprofit organization or court," through which the lawyer "provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter." As explained in Comment [1] to that rule, it applies to "legal-advice hotlines, advice-only clinics, or pro se counseling programs" in which "a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation." Significantly, Colo.RPC 6.5 and its Comment [2] are identical to the ABA Model Rule versions of that rule and comment – and ABA Model Rule 1.2(c), referenced in Comment [2] to Rule 6.5, does not include the Colorado-specific unbundling sentence that the Court has rejected. In other words, the reference to Colo.RPC 1.2(c) in Comment [2] to Colo.RPC 6.5 is to the first sentence of Colo.RPC 1.2(c), which does not relate to unbundled legal services. Therefore, I suggest that the Court remove its exclusion of Colo.RPC 6.5 from its adoption of the Colo.RPC.

I appreciate the opportunity to share these suggestions and would be happy to provide further information on these or other points if the Court desires.

Respectfully,

Marcy G. Glenn
Holland & Hart LLP

MGG:dc

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ADOPTED AS REVISED

RESOLUTION

RESOLVED, That the American Bar Association amends Rule 8.4 and Comment of the ABA Model Rules of Professional Conduct as follows (insertions underlined, deletions ~~struck through~~):

Rule 8.4: Misconduct

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;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; ~~or~~

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) ENGAGE IN CONDUCT THAT THE LAWYER KNOWS OR REASONABLY SHOULD KNOW IS HARASSMENT OR DISCRIMINATION ~~harass or discriminate~~ on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This ~~Rule~~ PARAGRAPH does not limit the ability of a lawyer to accept, decline, or withdraw from a representation in accordance with Rule 1.16. THIS PARAGRAPH DOES NOT PRECLUDE LEGITIMATE ADVICE OR ADVOCACY CONSISTENT WITH THESE RULES.

DELETIONS STRUCK THROUGH; ADDITIONS UNDERLINED

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Comment

...

[3] Discrimination and harassment by lawyers in violation of paragraph (g) undermines confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others ~~because of their membership or perceived membership in one or more of the groups listed in paragraph (g).~~ Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct ~~towards a person who is, or is perceived to be, a member of one of the groups.~~ Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

[4] Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. ~~Paragraph (g) does not prohibit conduct undertaken to promote diversity.~~ LAWYERS MAY ENGAGE IN CONDUCT UNDERTAKEN TO PROMOTE DIVERSITY AND INCLUSION WITHOUT VIOLATING THIS RULE BY, FOR EXAMPLE, IMPLEMENTING INITIATIVES AIMED AT RECRUITING, HIRING, RETAINING AND ADVANCING DICVERSE EMPLOYEES OR SPONSORING DIVERSE LAW STUDENT ORGANIZATIONS.

~~[5] Paragraph (g) does not prohibit legitimate advocacy that is material and relevant to factual or legal issues or arguments in a representation.~~ A TRIAL JUDGE'S FINDING THAT PEREMPTORY CHALLENGES WERE EXERCISED ON A DISCRIMINATORY BASIS DOES NOT ALONE ESTABLISH A VIOLATION OF PARAGRAPH (G). A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law. A lawyer may charge and collect reasonable fees and expenses for a representation. Rule 1.5(a). Lawyers also should be mindful of their professional obligations under Rule 6.1 to provide legal services to those who are unable to pay, and their obligation under Rule 6.2 not to avoid appointments from a tribunal except for good cause. *See* Rule 6.2(a), (b) and (c). A lawyer's representation of a client does not constitute an endorsement by the lawyer of the client's views or activities. *See* Rule 1.2(b).

...

Colorado

Rule 8.4. Misconduct

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;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process; or

(h) engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law.

Source: Committee comment amended October 17, 1996, effective January 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Lawyers are subject to discipline when they 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, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by word or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) and also may violate paragraph (d). Legitimate advocacy respecting the foregoing factors does not violate paragraphs (d) or (g). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Model Rules

APRL Audience Sees Merit in Anti-Bias Rule But Probes Real-World Effects It Could Have

Should lawyers be subject to discipline if they "harass or knowingly discriminate against" anyone belonging to a specified class of people while engaged in "conduct related to a lawyer's practice of law, including the operation and management of a law firm or law practice"?

That's the question the ABA House of Delegates, which sets policy for the organization, may face later this year. A resolution to add such language to Model Rule of Professional Conduct 8.4 seems likely to land on the agenda for the bar group's Annual Meeting in August.

Currently, Model Rule 8.4 doesn't have an anti-bias provision. Instead, the subject is addressed in one of the official comments accompanying the black-letter rule.

The ABA Standing Committee on Ethics and Professional Responsibility has floated its idea of what a new subsection (g) should say, and that wording was subjected to close scrutiny at a Feb. 5 panel discussion presented by the Association of Professional Responsibility Lawyers in San Diego.

Evolution of a Standard. When the ABA adopted the Model Rules of Professional Conduct in 1983, panelist Myles Lynk noted, they contained no reference to discrimination, bias or prejudice.

Fifteen years later, he said, in light of an increasing feeling among some that this omission was an "oversight," the ABA adopted Comment [3] to Model Rule 8.4, which states:

> A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice.

The comment goes on to state that "legitimate advocacy" does not violate the rule and that a trial court's finding that a lawyer exercised peremptory challenges based on discrimination, without more, also will not establish a violation of the rule.

Lynk is a professor at Arizona State University's College of Law and chairs the ABA ethics committee.

Comment [3] remained controversial even after its adoption, Lynk told the audience. State bar disciplinary authorities generally have interpreted the language to mean that to constitute a disciplinable offense, the lawyer's objectionable conduct must have occurred in or been related to a judicial proceeding.

Since the adoption of Comment [3], Lynk said, nearly half the states have adopted language not merely in the comment but in the black letter of their ethics rules addressing lawyers' bias or prejudice.

Although those jurisdictions' approaches vary widely, he said, "22 states and the District of Columbia said the Model Rules don't go far enough" on the issue.

Lynk also noted the ABA has amended its Criminal Justice Standards to state that prosecutors or defense counsel should not, through words or conduct, exhibit bias or prejudice on the basis of race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status.

After hearing in December from a working group that included representatives from APRL, the National Organization of Bar Counsel and the ABA's "Goal III" entities—the Commission on Women in the Profession, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Disability Rights and the Commission on Sexual Orientation and Gender Identity—the ABA's ethics committee issued a draft proposal to amend Model Rule 8.4 and Comment [3]. See 32 Law. Man. Prof. Conduct 19.

Each of the APRL panelists was a member of the working group.

Under the ethics committee's current proposal, Model Rule 8.4 would sport a new section (g), stating:

> It is professional misconduct for a lawyer to[,] . . . in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

Amendments to Comment [3] would flesh out the prohibition, including a sentence making clear that the ban

Would It Be Constitutional?

Several of those who spoke at the APRL program on the proposed ABA anti-bias rule asked about the effect it would have on lawyers' freedom of speech.

In particular, Ellen Brotman of Griesing Law in Philadelphia said she wondered whether lawyers exchanging e-mails making fun of or degrading racial minorities or women would be found to have violated the rule under the proposed amendment.

Myles Lynk pointed out that existing standards on lawyer advertising (Model Rules 7.1 et seq.), prosecutors (Model Rule 3.8(f)), and statements about judges (Model Rule 8.2(a)) restrict lawyer speech to some extent. He said "lawyers do not have unlimited First Amendment rights" but also noted that the ABA ethics committee eliminated the reference to "words" and included in the new comment a statement that the rule does not apply to conduct protected by the First Amendment.

Dennis Rendleman, ethics counsel for the ABA Center for Professional Responsibility, suggested "It may come down to whether someone uses their law practice e-mail or personal e-mail."

Allison Martin Rhodes expressed concern that bar prosecutions under Rule 8.4 are often "political, driven by prosecutorial discretion and who's in the prosecutor's office at the time and what their interests are."

Katie Uston said the conduct might violate the rule but "we cannot police or prosecute everything. We're not going to change a bigot or a racist by prosecuting them."

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on bias of the type specified in the rule is unethical in the operation or management of a law office as well as other aspects of law practice.

Positives. "There are lots of great things about" the working group's proposal, said panelist Mark Wojcik, a professor at John Marshall Law School in Chicago and former member of the ABA Commission on Sexual Orientation and Gender Identity.

Foremost among them, he said, is moving the anti-discrimination provisions from the comment to the text of the rule. "The comments are important, but it's the rules that matter," he stated.

Wojcik also cited the expansion of the categories protected to include ethnicity, gender identification and marital status—none of which is currently identified in Comment [3]—as a positive.

Too Weak? But Wojcik said he is concerned that the committee's proposed language "harass or knowingly discriminate against" is weaker than the current language in the comment, which is "bias or prejudice" manifested "by words or conduct."

"It's a harder standard to prove" that will make it "harder for people to bring cases," he said. Wojcik said he'd like to see the standard broadened to include actual or perceived harassment or discrimination.

"Is this a workable standard" for disciplinary authorities? moderator Donald D. Campbell asked panelist Katie Uston, who is an assistant bar counsel for the Virginia State Bar. Campbell is a partner of Collins Einhorn Farrell P.C. in Detroit.

"You'd have to have concrete allegations" regarding how the lawyer's alleged conduct related to the practice of law," Uston replied. "Plenty of folks file complaints against attorneys and don't have much of a leg to stand on" because they're "just angry and want to lash out," she said.

Get Specific. Campbell asked an audience member, Allison Martin Rhodes of Holland and Knight in Portland, Ore., for her take on the proposed rule.

"From a defense perspective, I would much rather be defending the manifestation of something as amorphous as 'bias or prejudice,' " Rhodes said. "I think this new language is going to be easier to prosecute because of the clear meaning." Uston said she agreed.

Lynk concurred that the current "bias or prejudice" language is "amorphous" and "squishy."

He said the committee reworded the prohibition for the sake of specificity, because a considerable body of law already exists under Title VII and other anti-discrimination statutes and regulations defining "harassment" and "discrimination."

"We thought it was necessary to be definite as to what it was we were prohibiting," he said.

Intersection With Employment Law. Some panelists and audience members expressed reservations about the proposal's inclusion of harassment or knowing discrimination in the operation and management of a law office, found in the proposed amendment to Comment [3].

Rhodes said if the proposed language is adopted "we're all going to become employment lawyers."

She asked the panelists and attendees to consider a scenario in which a former law firm associate sues a firm partner for sexual harassment and assault, among other allegations, and obtains a civil finding of sexual harassment.

"Do we need this rule" to prosecute such allegations as misconduct, she asked, and "Should the bar be retrying this case?"

Uston said employment matters may require "days of hearings." She opined that bar disciplinary authorities' limited resources should not be spent prosecuting matters that are already covered by other statutes and rules and in which existing agencies already have expertise. "I don't want to be prosecuting employment cases," she stated.

Unanswered Questions

Audience members raised several questions about the practical effects of proposed Model Rule 8.4(g) for which no one had a clear answer. Examples:

- Would a disciplinary prosecution under this rule have collateral estoppel effect if the lawyer is the subject of an EEOC action or Title VII case? Some panelists said it might.
- Some law firms are under pressure to make public their workers' salaries. If it turns out a firm is paying one class of lawyer staff more than others, does that violate the rule?
- Many law firms require lawyers to retire at 65. Does the rule prohibit that?
- Would the amended rule force lawyers to take on clients they don't want?

Myles Lynk said the committee included language in the comment referencing Model Rule 1.16 to make clear that a lawyer's ability to withdraw from or decline a representation would not be affected.

An audience member suggested that settlements in employment disputes, which are strongly encouraged and facilitated in mediation by the EEOC, might be hampered by pending disciplinary matters because a customary term of settlement is to include any and all controversies between the parties.

"It would not be OK to make a condition of [settlement of an employment matter] that the individual withdraw the bar complaint," the attendee said.

Uston agreed that such a condition would itself be a violation of the ethics rules.

'Unworkable' Standard. Mark L. Tuft of Cooper, White & Cooper LLP in San Francisco asked from the audience whether the ABA ethics committee had considered prohibiting "unlawful" discrimination. Wojcik said "It's lawful to discriminate against gay people in many states."

Lynk responded, "We felt that would be unworkable" and that "it denigrated our responsibility to the profession" to include only unlawful conduct in defining this area of professional misconduct.

He observed that under Model Rule 8.4(c), engaging in conduct involving dishonesty is prohibited, period. "It doesn't have to be unlawful, it just has to be dishonest," Lynk said.

Campbell asked whether placing the word "knowingly" after the term "harass" but before the word "discriminate" in the proposed amendment was significant.

Lynk said it was. He said the committee reasoned that whether an action is harassment depends on the point of view of the target, not the actor. The committee believed that standard should be strict, he said.

But "we had a much harder time with" the standard for discrimination, he added. "Social science research tells us there is implicit bias in all of us. We all need to become better people," but that alone, he said, shouldn't be grounds for discipline.

Additionally, he said, legitimate hiring practices—such as considering only candidates who have clerked for supreme court justices, or a Montana firm's hiring only summer associates whose goal is to remain in Montana—may have a negative impact on some covered categories of qualified candidates.

Lynk said the ethics committee concluded the rule should focus on conduct that is intended to have a discriminatory effect.

Even that focus has proved "very controversial," he said, in part because there are existing laws that address intentional discrimination.

But Wojcik observed that some jurisdictions do not have such laws and said the rule as amended would cover conduct by lawyers in those jurisdictions. For example, he said "In many states it's legal to get married if you're gay, but you can then lawfully get fired by your law firm the next day." He also said that because the amendment is limited to "conduct related to a lawyer's practice of law" it would not apply to a judge harassing a lawyer in chambers or a law school dean subjecting a student to harassment.

Juror Strikes. An audience member asked whether a "Batson" finding might have a preclusive effect on an attorney facing disciplinary charges under the proposed Rule 8.4(g). (In *Batson v. Kentucky*, 476 U.S. 79 (1986), the supreme court held that a prosecutor may not use peremptory challenges to exclude jurors solely because of their race, a prohibition the court extended to attorneys conducting civil trials in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).)

Lynk noted that the proposal deletes the current provision in the comment which says a trial judge's finding that peremptory challenges have been exercised on a discriminatory basis does not alone establish a violation of the rule.

He said a number of judges told the committee of their frustration after referring findings of bias in exercising peremptory challenges to bar disciplinary agencies, only to have the agencies dismiss them because of that sentence in the comment. "So we took it out and left it to the discretion of bar counsel in each jurisdiction."

Categories. From the audience, Ronald C. Minkoff of Frankfurt Kurnit Klein + Selz P.C. in New York stated "I am very troubled by including categories such as gender identity and socioeconomic status, where there is not a clear body of law saying what's prohibited."

Minkoff said "you can discriminate" on the basis of socioeconomic status because a criminal defendant is entitled to counsel but is not entitled to the services of a particular high-priced lawyer whom he can't afford to pay.

Lynk said the committee "would welcome more discussion" of the proposed amendment, especially on whether to include socioeconomic status.

BY HELEN W. GUNNARSSON

To contact the reporter on this story: Helen W. Gunnarsson in San Diego at Helen.Gunnarsson@americanbar.org

To contact the editor responsible for this story: Kirk Swanson at kswanson@bna.com

The proposal to amend Model Rule 8.4, and public comments submitted to date, are available at http://www.americanbar.org/groups/professional_responsibility/committees_commissions/ethicsandprofessionalresponsibility/modruleprofconduct8_4.html.

Lawyer-Client Relationship

Money Laundering Presents Dangers To Attorneys Who Can't Spot Warning Signs

Because most practicing lawyers handle money, they had better educate themselves on the warning signs of illegal money laundering, speakers at a National Organization of Bar Counsel meeting in San Diego said Feb. 5.

Days after CBS broadcast a "60 Minutes" program highlighting the risk that shady characters will try to use lawyers in the U.S. to further their money laundering schemes, speakers with experience on both sides of federal money laundering investigations and prosecutions highlighted what attorneys need to know so they can stay away from representations that bear the marks of potentially risky financial transactions.

Defining It. Money laundering takes many shapes but may be broadly defined as converting money resulting from criminal activity into legitimate assets, obscuring the funds' source in the process, according to moderator Wendy J. Muchman, chief of litigation and professional education at the Illinois Attorney Registration and Disciplinary Commission.

Muchman said understanding and being able to recognize indicia of money laundering are important not only for practitioners but also for lawyer regulators and disciplinary prosecutors because lawyers may become involved in these schemes—whether intentionally or through willful blindness or negligence—and client funds held in lawyer trust accounts used in money laundering schemes may thereby be placed at risk.

Panelist Kevin Rosenberg said the federal Money Laundering Control Act of 1986, 18 U.S.C. § 1956, criminalizes actions by individuals or companies that involve funds from "specified unlawful activity," a term that includes nearly 200 different federal offenses. Rosenberg is a former deputy chief in the Organized Crime Drug Enforcement Task Force at the Los Angeles U.S. attorney's office. He now practices with Lowenstein & Weatherwax in Los Angeles.

"The actual offense is the financial transaction," said observed panelist Daniel Silva. "There has to be a transfer of an asset. If there's no transaction, there's no crime," he said. Silva is an assistant U.S. attorney in San Diego.

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THOMAS N. SCHEFFEL & ASSOCIATES, P. C.

THOMAS N. SCHEFFEL
JOSEPH WEBER
PETER B. CASSEL
WILLIAM G. DORNAN
KYLE M. WINTERS
KATELYN B. RIDENOUR
JASON A. FREEMAN
ARIELLE J. DENIS
NATALIE L. DECKER
H.J. LEDBETTER

ATTORNEYS AND COUNSELORS AT LAW
BELCARO PLACE
3801 EAST FLORIDA AVENUE, SUITE 600
DENVER, COLORADO 80210-2544
(303) 759-5937
FAX (303)759-9726
http://www.tnslaw.com

OF COUNSEL:
CHARLES E. KING
ROBERT A. LEES
BRADLEY S. ABRAMSON
L. FRANK BERGNER, JR
JEFFERY L. WEEDEN
LENNY A. BEST
MICHAEL J. NORTON
GILL & LEDBETTER LLP

December 15, 2016

Via Email (MGlenn@hollandhart.com)
and U.S. Mail

Marcy G. Glenn, Esq.
Chair, Colorado Supreme Court
Standing Committee on
The Colorado Rules of Professional Conduct
Holland & Hart LLP
P.O. Box 8749
Denver, CO 80201-8749

Re: ABA Model Rule 8.4(g)

Dear Ms. Glenn:

I am an attorney in the private practice of law and, since 1975, have been admitted to, among other courts, the Colorado Supreme Court. I am also a member of the Colorado Bar Association and am currently engaged in the private practice of law with a law firm in Denver.

I understand that, at its November 4, 2016 meeting, the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct considered the potential adoption of ABA Model Rule 8.4(g). It is the purpose of this letter to urge you to reject this proposal.

The ABA proposal would provide that it is professional misconduct for a lawyer to "(g) harass or discriminate on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." The ABA proposal goes far beyond current Colorado RPC 8.4(g) which, though problematical and ambiguous, seems to limit its application to "conduct, in the representation of a client . . . directed to . . . any persons involved in the legal process . . ."

In practical terms, an attorney who, whether or not in connection with the representation of a client, criticizes "Black Lives Matters" or proposed amnesty for illegal aliens or a proposal that biological men be enabled to use restrooms and locker rooms of young girls would likely be deemed to have "discriminate[d] on the basis of race, sex, . . . national origin, ethnicity, . . . sexual orientation, gender identity, . . . or socioeconomic status."

As I understand this ABA proposal, a perceived violation of the ABA proposal could lead to automatic disbarment or other discipline if an attorney simply states that attorney's sincere religious belief or opinion on any of these foregoing controversial issues. I understand that disciplinary action against an attorney is a significant, emotional, and often life-altering consequence. Yet, I am concerned that the ABA proposal would invite frivolous complaints against attorneys who hold sincere religious beliefs and, from time to time, express those beliefs. As any employment lawyer can verify, people often complain of harassment and discrimination whenever they dislike certain outcomes or even certain people.

As the attached March 10, 2016 letter from the Christian Legal Society to the ABA Ethics Committee on this ABA proposal identifies, the ABA proposal could punish attorneys for, among other things:

- Serving on boards of churches, religious schools and colleges, and other religious institutions that provide incredible benefits to society and yet may hold beliefs that run afoul of this ABA proposal.

- Publicly speaking on political, social, cultural, and religious topics in ways that arbitrarily found to violate this ABA proposal.

- Holding membership in religious, social, or political organizations whose beliefs are deemed inconsistent with this ABA proposal

As a member of the Christian Legal Society, I ask that you take this entire letter into consideration and make it a part of the record of your Committee in any deliberations on this ABA proposal. As a follower of Jesus, I believe in the truthfulness of Scripture, in the sanctity of life, in the critical importance of the Biblical view of marriage, family, and gender, and in religious freedom for all Americans.

The ABA proposal is a clear and extraordinary threat to free speech and to religious liberty, particularly to those who, like me acknowledge that we are imperfect human beings, but nevertheless unabashedly affirm the Lordship of Jesus Christ in our lives.

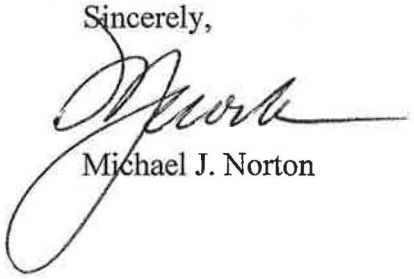
The idea that certain opinions which may not currently be favored by some in leadership positions in our culture could trigger draconian sanctions against an attorney for holding and

expressing those sincerely-held beliefs is abhorrent to the First Amendment and its guarantee, in the Bill of Rights, to religious freedom.

I respectfully request that your Committee reject this ABA proposal. In this regard and as you may know, the following have, to date, opposed adoption of this ABA proposal: the Illinois State Bar Association, the Pennsylvania Supreme Court Disciplinary Board, and the South Carolina Bar's committee on Professional Responsibility.

If you have questions or I may provide additional information, do not hesitate to contact me.

Sincerely,



Michael J. Norton

Enclosure - March 10, 2016 Christian Legal Society Letter

cc: James C. Coyle, Esq. (with enclosure) (via email: j.coyle@csc.state.co.us)

CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

March 10, 2016

ABA Ethics Committee
Center for Professional Responsibility
American Bar Association
17th Floor
321 North Clark Street
Chicago, Illinois 60654
Attn: Dennis A. Rendleman, Ethics Counsel

Re: Comments of the Christian Legal Society on Proposed Rule 8.4(g) and Comment (3)

Dear Committee Members:

The Christian Legal Society ("CLS") is a non-profit, interdenominational association of Christian attorneys, law students, and law professors, networking thousands of lawyers and law students in all 50 states since its founding in 1961. Among its many activities, CLS engages in two nationwide public ministries through its Christian Legal Aid ministry and its Center for Law & Religious Freedom.

Demonstrating its commitment to helping economically disadvantaged persons, the goal of CLS's Christian Legal Aid program is to meet urgent legal needs of the most vulnerable members of our society. CLS provides resources and training to help sustain approximately 60 local legal aid clinics nationwide. This network increases access to legal aid services for the poor, marginalized, and victims of injustice in America. Based on its belief that the Bible commands Christians to plead the cause of the poor and needy, CLS encourages and equips individual attorneys to volunteer their time and resources to help those in need in their communities. Legal issues addressed include: avoiding eviction or foreclosure; maintaining employment; negotiating debt-reduction plans; petitioning for asylum for those persecuted abroad; confronting employers or landlords who take advantage of immigrants; helping battered mothers obtain restraining orders; and advocating on behalf of victims of sex trafficking.

Demonstrating its commitment to pluralism and the First Amendment, for forty years, CLS has worked, through its Center for Law & Religious Freedom, to protect the right of all citizens to be free from discriminatory treatment based on their religious expression and religious exercise. CLS was instrumental in passage of the federal Equal Access Act of 1984 that protects the right of both religious and LGBT student groups to meet on public secondary school campuses. Equal Access Act ("EAA"), 20 U.S.C. §§ 4071-74. *See* 128 Cong. Rec. 11784-85 (1982) (Senator Hatfield statement) (recognizing CLS's role in drafting the EAA). *See, e.g., Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (EAA protects religious student groups' meetings); *Straights and Gays for Equality v. Osseo Area Sch. No. 279*, 540 F.3d 911 (8th Cir. 2008) (EAA protects LGBT student groups' meetings).

For forty years, CLS has protected free speech, religious exercise, assembly, and expressive association rights for all citizens, regardless of their race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status. The motivation for these comments regarding the proposed changes to Rule 8.4 is rooted in CLS's deep concern that the proposed rule will have a detrimental impact and a chilling effect on attorneys' ability to continue to engage in free speech, religious exercise, assembly, and expressive association in the workplace and the broader public square. Moreover, the proposed rule contradicts longstanding ethical considerations woven throughout the Rules of Professional Conduct.

Because the Committee has not demonstrated an empirical need for the proposed changes to the rule and comment, CLS recommends that no changes be made.

But if the proposed rule and comment are to be adopted, CLS recommends numerous changes be made to the draft Rule 8.4(g) and the draft comment. The need for these important changes is explored throughout the discussion that follows, and the changes are summarized in the "Summary of Recommendations" at the conclusion of this letter.

The Proposed Rule's Negative Impact on Attorneys Generally

Before discussing the harm to attorneys' First Amendment rights that the proposed rule will certainly cause, we will briefly touch upon non-First Amendment harms that the proposed rule will likely cause.

1. The wisdom of imposing a "cultural shift" on all attorneys should give pause. From a broad perspective, the rule, if adopted, will break new and untested ground in terms of the purpose of the Rules of Professional Conduct. Typically, the Rules of Professional Conduct are grounded in one of three ethical philosophies: client-protective rules, officer-of-the-court rules, or profession-protective rules. But the proposed rule does not seem grounded in any of these existing models. Rather, it seems to inject a rule of conduct that is better understood as advancing a particular theory of social justice. Or, as the Memorandum of December 22, 2015, explains the proposed rule, there is "*a need for a cultural shift in understanding the inherent integrity of people* regardless of their race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability[.]" Memorandum, Standing Committee on Ethics and Professional Responsibility, Draft Proposal to Amend Model Rule 8.4, Dec. 22, 2015, at 2 (hereinafter "Mem.").[1]

[1] We confess that we do not know what the term "the inherent integrity of people" means. We assume that the term is actually supposed to be something else, such as "the inherent equality of people," or "the inherent worth of people," or "the inherent dignity of people." If so, CLS affirms its shared belief in the inherent equality, dignity, and worth of every human being, a concept deeply rooted in Christianity, and reflected in the Declaration of Independence's foundational statement that all persons "are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Declaration of Independence of 1776, The Organic Laws of the United States of America.

The wisdom of imposing a "cultural shift" on 1.3 million opinionated, individualistic, free-thinking lawyers should give pause. If history teaches any lesson, it is the grave danger created when a government, or a people group, or a movement tries to impose uniform cultural values on other people. The Twentieth Century provided searing lessons of inhumane repression through forced "cultural shifts," regardless of whether those efforts came from the right or the left of the political spectrum. As Justice Jackson pithily observed, "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943). Justice Jackson's famous words are as true today as they were seventy years ago: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

2. A cardinal principle is to avoid new disciplinary rules or rule amendments that will do decidedly more harm than good. The proposed rule change almost certainly will create a huge imbalance between comparatively few instances where the rule punishes misconduct as intended, as opposed to numerous instances where the rule is wielded as a weapon against lawyers by disgruntled job applicants, rejected clients, opposing parties, or opposing counsel. The Committee does not provide any documentation of the need for the proposed rule, which suggests that there currently are relatively few instances when it has been necessary to punish a lawyer who truly is abusing his or her license in a manner to cause harm to others through harassment or discrimination. Specifically, the Committee cites no examples of discrimination or harassment in the legal profession, examples of people in these categories who are being denied access to the courts, or instances of misconduct by lawyers in this regard. On the other hand, it is completely foreseeable that the proposed rule will trigger thousands of complaints against lawyers by job applicants, rejected clients, and opposing parties, all claiming that a lawyer's conduct constituted harassment or knowing discrimination in one or more of the prohibited categories. Even if frivolous, these cases will be difficult and expensive to defend. And, because complainants have immunity, there will be no recourse against frivolous complaints.

Furthermore, as will be explained below, the harm is not just that the proposed rule hands disgruntled persons a tool for harassing lawyers in their everyday practice of law. The proposed rule also poses a real threat that lawyers will be disciplined for public speech on current political, social, religious, and cultural issues, as well as for their free exercise of religion, expressive association, and assembly.

3. The proposed rule is inconsistent with the existing Rules of Professional Conduct. It is generally accepted that a lawyer has no duty to accept a representation. The comment to Model Rule 6.2 provides: "A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant." Similarly, ABA Model Rule of Professional Conduct

1.16(b)(4) allows a lawyer to withdraw from a representation when a client insists on pursuing action that, while lawful, the lawyer considers "repugnant," or with which the lawyer has a "fundamental disagreement." Under the proposed rule, will these standards now be limited to exclude any situation touching on one of the protected categories?

Subjecting an attorney to discipline for refusing to represent a client is a new idea, one that flies in the face of longstanding deference to professional autonomy and freedom of conscience. In fact, Model Rule 6.2(c) recognizes that when a lawyer is forced to take on a cause that is "repugnant" to the lawyer, it may impair the lawyer's ability to represent the client. The proposed rule and comment also conflict with Model Rules 1.7(a)(2), 1.10(a)(1), and 1.10 cmt. [3], which specifically reference how "personal" and "political" beliefs of a lawyer can result in that lawyer's having a personal conflict of interest that renders her unable to represent the client.

The Rules of Professional Conduct should encourage lawyers to practice law according to conscience, in order to increase the number of lawyers, encourage zealous representation, enhance client choice, and expand access to justice for all. The proposed rule moves the profession in the opposite direction while infringing on professional autonomy and freedom of conscience without good cause.

Relatedly, ABA Model Rule of Professional Conduct 2.1 authorizes lawyers to give advice by referring to "moral" considerations. Is that rule to be limited also, or will the lawyer who gives moral advice be subject to discipline if the advice ventures into advice that some might perceive to be "harassing" or "discriminatory" regarding a protected category?

Because these questions are too important to leave unaddressed, we urge the addition of the following language to the proposed comment: "Consistent with longstanding principles behind the Rules of Professional Conduct, declining representation based on religious, moral, or ethical considerations is not proscribed by this rule."

4. The current comment's language "when such actions are prejudicial to the administration of justice" should be incorporated into the proposed rule. The Committee proposes deleting from the current comment that a lawyer violates the rule only when conduct is "prejudicial to the administration of justice." It admits that the text of the proposed revision is broader, encompassing all activity "related to the practice of law." Mem. at 4. This longstanding limitation should not be eliminated but instead should be included in the proposed rule itself. The "prejudicial to the administration of justice" language recognizes that, in almost every conceivable case when an individual might be denied service by one attorney (*e.g.*, refusal to author an amicus brief advocating social policy with which the attorney disagrees for religious reasons), another attorney is ready, willing, and able to take on that representation. In such situations, the administration of justice is in no way prejudiced.

Moreover, the "prejudicial to the administration of justice" language has long been included in the text of Rule 8.4(d). Thus, the meaning of the limitation has been discussed for

years by courts and ethicists. The introduction of the more expansive term "in conduct related to the practice of law" creates problematic uncertainty in the proposed rule's application, as addressed below. Including "prejudicial to the administration of justice" in the proposed rule will help minimize needless friction about whether challenged conduct is protected by the First Amendment and, thus, excepted from the scope of the revised rule.

The Proposed Rule's Negative Impact on Attorneys' First Amendment Rights

Two prominent weaknesses of the proposed rule, if adopted, necessitate addressing the proposed rule's inevitable conflict with attorneys' First Amendment rights.

1. The proposed rule's operative phrase, "harass or knowingly discriminate," poses significant threats to attorneys' freedoms of speech, expressive association, assembly, and free exercise of religion. To begin, "knowingly" should modify both "harass" and "discriminate." Just as a lawyer should not be disciplined for unintentional discrimination, neither should she be disciplined for unintentional harassment. For that reason, in the proposed rule, "knowingly" should be added to modify "harass," as well as "discriminate."

Second, the elasticity of the term "harass" needs to be addressed in the comment if the proposed rule is to have any hope of surviving either a facial or an as applied challenge to the proposed rule's unconstitutional vagueness or its infringement on free speech. To ameliorate the constitutional problems created by the term "harass," the proposed comment should adopt the United States Supreme Court's definition of "harassment" in the Title IX context, which is "harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

For purposes of the proposed rule, therefore, the proposed comment should state: "The term 'harass' includes only conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to the administration of justice." This language makes clear that "harassment" has an objective, rather than a subjective, standard. The consequences of disciplinary action against an attorney are too great to leave the definition of "harass" open-ended or subjective. "Harassment" should not be "in the eye of the beholder," whether that be the attorney or the alleged victim of harassment, but instead should be determined by an objective standard, as provided by the Supreme Court's seventeen-year-old definition of "harassment."

The need for such an objective definition of "harass" is apparent when one considers the courts' uniform rejection of university speech codes over the past two decades. The courts have found that speech codes violate freedom of speech because of the overbreadth of "harassment"

proscriptions and the potential for selective viewpoint enforcement.[2] For example, after noting the Supreme Court's application of the overbreadth doctrine to prevent a "chilling effect on protected expression," *DeJohn v. Temple Univ.*, 537 F.3d 301, 313-314 (3d Cir. 2008) (citing *Broadrick v. Okla.*, 413 U.S. 601, 630 (1973)), the Third Circuit quoted then-Judge Alito's words in *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001):

> "Harassing" or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable."

DeJohn, 537 F.3d at 314 (quoting *Saxe*, 240 F.3d at 209, (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). The *DeJohn* court went on to explain, "[b]ecause overbroad harassment policies can suppress or even chill core protected speech, and are susceptible to selective application amounting to content-based or viewpoint discrimination, the overbreadth doctrine may be invoked in student free speech cases." *Id.* A lawyer's free speech should be no less protected than that of a student.

2. By expanding its coverage to include all "conduct related to the practice of law," the proposed rule encompasses nearly everything a lawyer does, including conduct and speech protected by the First Amendment. As the Committee observes, "[t]he draft proposal would expand the coverage of the rule from conduct performed 'in the course of representing a client' to conduct that is 'related to' the practice of law." Mem. at 3. The Committee illustrates the broad scope of the rule by a variety of descriptions of lawyers' roles: "representatives of clients, officers of the legal system, and *public citizens* 'having special responsibility for the quality of justice'"; "advisors, advocates, negotiators, and evaluators for clients"; "third-party neutrals"; and "officers of the legal system, [who] participate in activities related to the practice of law through court appointments, bar association activities, *and other, similar conduct*." *Id.* (emphases supplied). It is unclear what conduct is not reached by "conduct related to the practice of law," particularly in light of the fact that the Committee has consciously rejected the more discrete description of scope "in the course of representing a client." *Id.* Because the phrase "conduct related to the practice of law" is so broad and undefined, the proposed

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[2] *See, e.g., McCauley v. Univ. of V.I.*, 618 F.3d 232, 250, 252 (3d Cir. 2010); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1185 (6th Cir. 1995); *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005, 1021 (N.D. Cal. 2007); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 872 (N.D. Tex. 2004); *Blair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 370-71 (M.D. Pa. 2003); *Pro-Life Cougars v. Univ. of Houston*, 259 F. Supp. 2d 575, 584 (S.D. Tex. 2003); *Booher v. Bd. of Regents, N. Ky. Univ.*, 1998 WL 35867183 (E.D. Ky. 1998); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis. Sys.*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 866 (E.D. Mich. 1989).

comment's reference to excepting conduct protected by the First Amendment is wholly inadequate. The phrase simply makes the proposed rule ripe to create confusion and uncertainty that is an unacceptable and unnecessary result.

a. Attorneys' service on boards of religious institutions may be subject to discipline if the proposed rule is adopted. Many lawyers sit on the boards of their churches, religious schools and colleges, and other religious non-profits. As a volunteer on religious institutions' boards, a lawyer may not be "representing a client," but may nonetheless be engaged in "conduct related to the practice of law." These ministries provide incalculable good to people in their local communities, as well as nationally and internationally. But they also face innumerable legal questions and regularly turn to the lawyers serving as volunteers on their boards for pro bono guidance.

For example, a lawyer may be asked to help craft her church's policy regarding whether its clergy will perform same-sex marriages or whether it will allow receptions for same-sex marriages in its facilities. A religious college may ask a lawyer on its board of trustees to review its housing policy or its student code of conduct. While drafting and reviewing legal policies may qualify as "conduct related to the practice of law," surely a lawyer should not be disciplined for volunteer legal work she performs for her church or her alma mater.

Equally importantly, a lawyer should not have to worry about whether her volunteer work treads too closely to the vague line of "conduct related to the practice of law." If the proposed rule is not clear that a lawyer's free exercise of religion, expressive association, assembly, and speech are protected when serving religious institutions, the chilling effect on her exercise of her First Amendment rights will be unacceptably high.

b. Attorneys' public speech on political, social, cultural, and religious topics may be subject to discipline if the proposed rule is adopted. Similarly, lawyers often are asked to speak to various community groups about current legal issues of the day, or to participate in panel discussions about the pros and cons of various legal positions on sensitive social issues of the day. Lawyers are asked to speak *because they are lawyers*, "public citizens 'having special responsibility for the quality of justice.'" Mem. at 3. Moreover, sometimes such speaking engagements are undertaken to increase the visibility of the lawyer's practice and create new business opportunities.

It seems highly likely that public speaking on legal issues falls within "conduct related to the practice of law." But even if some public speaking falls inside the line of "conduct related to the practice of law," while other public speaking falls outside the line, how is a lawyer to know? May a lawyer participate in a panel discussion only if all the lawyers on the panel speak in favor of the inclusion of "sexual orientation" as a protected category in a nondiscrimination law being debated in one of the 28 states that lack such a provision? Is the lawyer subject to discipline if she speaks against amending a nondiscrimination law to include "sexual orientation," "gender

identity," or "marital status"? Would a lawyer's testimony before a state legislature or municipal commission be protected if it opposed amending these laws?

The proposed rule creates a cloud of doubt that will inevitably chill lawyers' public speech on one side of these current political and social issues, while simultaneously creating no disincentive for lawyers who speak on the opposing side of these controversies. Thus, the proposed rule institutionalizes viewpoint discrimination for lawyers' public speech on some of the most important current political and social issues. "Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). Again, the proposed rule's chilling effect on lawyers' free speech will be unacceptably high.

c. The proposed comment highlights a troubling gap between protected and unprotected speech under the proposed rule. This legitimate concern about whether a lawyer's public speech falls within "conduct related to the practice of law" highlights a substantial gap in the proposed rule's coverage that further threatens attorneys' First Amendment rights. The proposed comment states that the proposed rule "does not prohibit lawyers from referring to any particular status or group when such references are *material* and *relevant* to factual or legal issues or arguments *in a representation.*" But lawyers often speak when they are not "in a representation" of a client but are merely offering their own views – *as a lawyer and a "public citizen"* — on sensitive legal issues. By including the qualifying phrase "in a representation," the comment may reasonably be inferred to mean that the proposed rule does "prohibit lawyers from referring to any particular status or group" when engaged in "conduct related to the practice of law" but not specifically "in a representation." This inference is supported by the Committee's particular emphasis on the distinction between the current comment's scope, that is, the narrower scope of "in the course of representing a client," and the proposed rule's broader scope as described by the phrase "in conduct related to the practice of law." This gap in protection for lawyers' speech seems to have been intentionally created by adding the phrase "in a representation" in the proposed comment. The sentence should be deleted from the comment.

d. Attorneys' membership in religious, social, or political organizations may be subject to discipline if the proposed rule is adopted: The proposed rule raises legitimate concerns about whether an attorney may be disciplined for her membership in a religious organization that chooses its leaders according to its religious beliefs, or that holds to the religious belief that marriage is only between a man and a woman, or some other religious belief implicated by the proposed rule's strictures. Religious organizations are sometimes denied access to the public square because they require their leaders to be religious. *Compare Alpha Delta Chi v. Reed,* 648 F.3d 790 (9th Cir. 2011) (religious student group could be denied recognition because of its religious membership and leadership requirements) *with CLS v.*

Walker, 453 F.3d 853 (7th Cir. 2006) (religious student group could not be denied recognition because of its religious leadership requirements).

According to some government officials, this basic exercise of religious liberty – the right of a religious group to choose its leaders according to its religious beliefs -- is "religious discrimination." But it is simple common sense and basic religious liberty that a religious organization's leaders should agree with its religious beliefs. As the Supreme Court has observed:

> The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission. When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us. The church must be free to choose those who will guide it on its way.

Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 132 S. Ct. 694, 710 (2012).

The proposed rule also raises severe doubts about the ability of lawyers to participate in political or social organizations that promote traditional values regarding sexual conduct and marriage. Last year, the California Supreme Court adopted a disciplinary rule that prohibits all California judges from participating in Boy Scouts because of the organization's values regarding sexual conduct. Calif. Sup. Ct., Media Release, "Supreme Court Eliminates Ethics Exception that Permitted Judges to Belong to Nonprofit Youth Organizations that Discriminate," Jan. 23, 2015, *available at* http://www.courts.ca.gov/documents/sc15-Jan_23.pdf. Will the proposed rule subject lawyers to disciplinary action for participating with their children in youth organizations that teach traditional values regarding sexual conduct or marriage? Will the proposed rule subject lawyers to disciplinary action for belonging to a political organization that advocates for laws that promote traditional values regarding sexual conduct and marriage? The answers to these questions are not assuaged by the insuffient assurance in the proposed comment that conduct protected by the First Amendment will not be the subject of disciplinary action, particularly when the California Supreme Court is threatening disciplinary action against judges who participate in Boy Scouts.

e. The inadequacies of "material and relevant" as speech protections. The Committee explains that the proposed comment speaks in terms of not reaching "references [that] are material and relevant to factual or legal issues or arguments in a representation." Mem. at 5. In the Committee's opinion, this is a clearer standard than the current comment's statement that "[l]egitimate advocacy" is not covered. We would disagree that either a "material" or "relevant" standard is sufficiently clear when it comes to protecting free speech from suppression. Both are almost certainly unconstitutionally vague. But if forced to choose the

lesser of two evils, we would urge the retention of "legitimate advocacy" because it at least would seem to protect all advocacy, rather than causing the speaker to have to wonder what speech might be deemed "irrelevant" or "immaterial" and, thus, discipline-worthy. The Committee is correct that "material and relevant" are "concepts already known in the law." *Id.* But that does not mean they satisfy the First Amendment's requirements regarding free speech, particularly on political, social, cultural, and religious issues, or the Fourteenth Amendment's requirement that laws not be unconstitutionally vague.

f. The comment's assurance that the rule "does not apply to . . . conduct protected by the First Amendment" is completely inadequate to protect basic First Amendment rights. The Committee's assertion that the addition to the proposed comment of the language that "the Rule does not apply . . . to conduct protected by the First Amendment" is enough to "make[] clear that a lawyer does retain a 'private sphere' where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment and not subject to the Rule" fails to give sufficient protection to our most basic civil liberties. For several reasons, the proposed rule and comment must be amended to give more than lip service to First Amendment rights for the reasons already discussed above and because:

1) *The First Amendment protects much more than a lawyer's "private sphere" of conduct.* The First Amendment actually places real limits on the government's ability to limit a lawyer's speech and conduct through bar rules. See *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 469 (1988) (First Amendment applied to state bar disciplinary actions through the Fourteenth Amendment). The Committee suggests that the scope of the comment's exception for "conduct protected by the First Amendment" is limited to a lawyer's "private sphere" of life. Mem. at 5. This suggests that "religious expression" and other related freedoms do not intersect with a lawyer's public, professional life. That is a common, but decidedly untrue, perception. Christians are enjoined by Scripture to bring their religious beliefs and practices to bear in their professions – indeed, to see their professions as their ministries of service to others – and to apply their Christian principles to the practice of their professions.

2) *The First Amendment protects much more than political speech.* A lawyer does not relinquish her right to speak freely when she receives her license to practice law. To the extent any restrictions are allowed, they are the same as applied to other individuals, except when they are appropriately tailored to the needs of the practice of the profession itself. Even when commercial speech such as attorney advertising is involved, restrictions "may be no broader than necessary to prevent . . . deception." *In re R.M.J.*, 455 U.S. 191, 203 (1982). Moreover, the "State must assert a substantial interest and the interference of speech must be in proportion to the interest served. Restrictions must be narrowly dawn, and the State lawfully may regulate only to the extent regulation furthers the State's substantial interest." *Id.*; *see also Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (lawyer's commercial speech "may not be subjected to blanket suppression"). Of course, here we are not concerned with commercial speech, and so the full protections of the First Amendment apply. But if lawyers' commercial

speech has been protected, how much more should their religious and political speech be protected as it relates to the practice of law?

The Comment says the rule "does not apply to . . . *conduct* protected by the First Amendment." (Emphasis added.) It is unclear whether "conduct" includes "speech," especially when the current comment's text that used the phrase "*words or* conduct" is to be eliminated, leaving the impression that "words or" was deliberately eliminated. (Emphasis added.) Clarification that "conduct" includes "speech" should be made in some form.

3) *The First Amendment protects much more than religious expression.* Reinforcing and undergirding the free speech and assembly protections is the additional First Amendment right (also applied to the States through the Fourteenth Amendment) to be free of regulation of the free exercise of religion. Associating with others who share one's religious faith or joining a group like CLS is typically a religious exercise for those individuals who do so. It cannot properly be targeted for discipline merely because CLS (or similar organizations) require their leaders and members to share the organizations' religious beliefs and standards of conduct.

It should be counterintuitive to accuse religious organizations of improper "religious discrimination." It is only *invidious* discrimination that is not constitutionally protected, and *religious* discrimination by *religious* organizations is, by definition, not invidious; rather, it is protected by both federal and state constitutions. Nondiscrimination policies proscribing discrimination on the basis of religion must be interpreted in light of the fact that such policies are intended to *protect* citizens when being religious, not to penalize them for being religious. A contrary "application of the nondiscrimination policy against faith-based groups undermines the very purpose of the nondiscrimination policy: protecting religious freedom." Joan W. Howarth, *Teaching Freedom: Exclusionary Rights of Student Groups*, 42 U.C. Davis L. Rev. 889, 914 (2009); *see also* Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, ch. 4 in Austin Surat, ed., *Legal Responses to Religious Practices in the United States* 194 (Cambridge Univ. Press 2012), *available at* http://papers.ssrn.com/so13/papers.cfm?abstract_id=2087599.

Moreover, it is basic religious liberty, not invidious discrimination, for religious organizations to require their leaders to agree with their religious beliefs. In its unanimous ruling in *Hosanna-Tabor*, the Supreme Court held that federal nondiscrimination laws did not outweigh the right of religious institutions to select their leaders. 132 S. Ct. at 710.

The free exercise of religion protects not only group exercises; it also reaches to individual actions and choices. This is at least implicitly acknowledged in the current Model Rules, which repeatedly recognize that a lawyer's decision whether to accept a representation is often a complex calculus involving moral and ethical judgments and enjoin attorneys to apply their moral judgments and consciences. For instance, the Model Rules' Preamble provides as follows:

> Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, *a lawyer is also guided by personal conscience* . . . . [¶ 7 (emphasis added).]
>
> . . . .
>
> Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to *the lawyer's own interest in remaining an ethical person* . . . . Such issues must be resolved through the exercise of sensitive professional and *moral* judgment . . . . [¶ 9 (emphasis added).]
>
> . . . .
>
> The Rules [of Professional Conduct] do not, however, exhaust the *moral and ethical considerations that should inform a lawyer*, for no worthwhile human activity can be competently defined by legal rules. The Rules simply provide a framework for the *ethical* practice of law. [¶ 16 (emphasis added).]

The First Amendment protects both a lawyer's conscience and her putting it into operation in the practice of law. Legitimate differences of opinion exist in our country concerning issues of sexual conduct. Unsurprisingly, many attorneys' views regarding sexual conduct reflect their religious convictions. A lawyer should not be compelled to undertake a representation that would require her to advocate viewpoints or facilitate activities that violate her religious convictions. Neither should a lawyer be compelled to undertake a representation that she considers to be immoral, unethical, or contrary to the public interest. Any new rule and comment should make clear that a lawyer's individual choices based on her sincerely held religious beliefs are protected by the First Amendment and may not be punished by the government, acting through a state bar's disciplinary code. A lawyer's objections based on moral or ethical considerations should likewise be protected.

Any such constitutional limitation (or associated limitation based on other law) should be put in the text of the rule itself, rather than in the respective comment. As the Committee notes, a major impetus for the proposed rule's elevation of the anti-discriminatory text that appears in the present comment to a rule is that comments are not authoritative, but only provide guidance for interpretation. Mem. at 1. The protection of constitutional rights should be given the same dignity and, for the same reasons, should be included in the rule itself rather than relegated to the comment.

4) *The First Amendment protects rights of association and assembly.* The First Amendment's right of assembly has also been incorporated and applied to the States through the Fourteenth Amendment. *DeJonge v. Ore.*, 299 U.S. 353 (1937); *see also Thomas v. Collins*, 323 U.S. 516 (1945); *Hague v. CIO*, 307 U.S. 496 (1939); *Herndon v. Lowry*, 301 U.S. 242 (1937). This right includes both the right to assemble peaceably for political, religious, and other purposes (at least for non-commercial purposes, *see Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984)), and the right not to define a group's leadership and membership. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *cf. NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449 (1958) (upholding right not to keep membership identities private). Indeed, the ABA's amicus brief in *Hague v. CIO* championing the right of assembly is widely regarded as one of the most influential briefs of the last century. *See* John D. Inazu, *Liberty's Refuge* 54-55 (Yale Univ. Press 2012).

5) *Additional federal and state protections for speech, free exercise, association, and assembly will be triggered by the proposed rule change.* Many state constitutions have broader protections than those in the federal constitution's First Amendment. Federal statutes such as the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* (2012), also provide broader protection of freedoms enumerated in the First Amendment than the amendment itself provides. *See generally Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). It obviously would not be appropriate for the rule to cover conduct protected by applicable laws or state constitutions, even if it were not protected by the federal constitution. Words or conduct so protected cannot be "professional misconduct" and cannot be made subject to a "balancing" against nondiscrimination purposes, but must be fully excepted from application of any rule adopted. Therefore, a reference only to "First Amendment" limitations is problematically narrow.

The Proposed Rule's Negative Impact on Attorneys' Fourteenth Amendment Rights

Disciplinary proceedings by State bars are state actions that affect the property and reputational/liberty interests of the attorney involved. *See In re R.M.J.*, 455 U.S. 191, 203-204 (1982); *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *Schware v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 238-39 (1957); *Doe v. DOJ*, 753 F.2d 1092, 1111-12 (D.C. Cir. 1985). Thus, the due process protections of the Fourteenth Amendment of the U.S. Constitution adhere to such proceedings, including the disciplinary rules themselves. *See* U.S. Const. amend. XIV § 1.

A disciplinary rule that "either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Cramp v. Bd. of Pub. Instruction of Orange Cnty., Fla.*, 368 U.S. 278, 287 (1961). As the Supreme Court recently summarized:

> Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them

> so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2317-18 (2012); *see also Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1082 (1991) (reasoning that a "vague" disciplinary rule "offends the Constitution because it fails to give fair notice to those it is intended to deter and creates the possibility of discriminatory enforcement") (O'Connor, J., concurring); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (when a "law interferes with the right of free speech or of association a more stringent vagueness test should apply"); *Reno v. ACLU*, 521 U.S. 844, 871-72 (1997). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (internal quotation marks omitted) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

Summary of Recommendations

Because the Committee has not demonstrated an empirical need for the proposed changes to the rule and comment, CLS recommends that no changes be made.

But if the proposed rule and comment are to be adopted, CLS recommends the following with regard to the draft Rule 8.4(g) and its associated draft comments:

- Add to the proposed rule explicit protection for lawyers' right to freedom of speech, assembly, expressive association, and exercise of religion, by adding the following: "except when such conduct is undertaken because of the lawyer's sincerely held religious beliefs, or is speech or conduct protected by the First Amendment or other applicable federal or state laws."

- Add to the proposed comment the following language: "Consistent with longstanding principles behind the Rules of Professional Conduct, declining representation based on religious, moral, or ethical considerations is not proscribed by this rule."

- Add to the proposed comment the following language to protect lawyers' freedom of speech, assembly, expressive association, and exercise of religion: "This rule does not apply to speech or conduct undertaken by a lawyer because of his or her sincerely held religious beliefs, or speech or conduct otherwise protected by the First Amendment, including the rights of free speech, assembly, expressive association, press, and petition, or speech or conduct otherwise protected by applicable federal or state laws."

- Replace the proposed rule's language "in conduct related to the practice of law" with the current comment's language "in the course of representing a client."

- Add "knowingly" before "harass."

- Add to the proposed comment the following definition of the term "harass," as defined in the context of Title IX by the United States Supreme Court in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999): "The term 'harass' includes only conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to the administration of justice."

- Add to the proposed rule that a lawyer violates the rule only "when such conduct is prejudicial to the administration of justice," as the current comment states.

- Retain the current comment's sentence, slightly modified to align with the proposed rule, "Legitimate advocacy respecting the listed factors in the rule does not violate paragraph (g)," while deleting from the proposed comment, for reasons explained in Part II.2.c. & e., *supra*, the sentence "Paragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation."

- Retain the current comment's use of the term "words and conduct," modifying it to "speech and conduct," as opposed to the proposed comment's use of the term "conduct."

With these changes, the proposed rule and comment would read as follows:

"(g) in the course of representing a client, knowingly harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status, when such conduct is prejudicial to the administration of justice, except when such conduct is undertaken because of the lawyer's sincerely held religious beliefs, or is speech or conduct protected by the First Amendment or other applicable federal or state laws."

Comment

"[3] Paragraph (g) applies only to conduct in the course of representing a client. Consistent with longstanding principles behind the Rules of Professional Conduct, declining representation based on religious, moral, or ethical considerations is not proscribed by this rule. This rule does not apply to speech or conduct undertaken by a lawyer because of his or her sincerely held religious beliefs, or speech or conduct otherwise protected by the First Amendment, including the rights of free speech, assembly, expressive association, press, and petition, or speech or conduct otherwise

protected by applicable federal or state laws. Legitimate advocacy respecting the listed factors in the rule does not violate paragraph (g). The term "harass" includes only conduct that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to the administration of justice."

Thank you for your consideration of our concerns and suggested modifications to proposed Rule 8.4(g) and its associated draft comment.

Respectfully submitted,

/s/ David Nammo

David Nammo
CEO & Executive Director
Christian Legal Society
8001 Braddock Road, Ste. 302
Springfield, Virginia 22151
(703) 642-1070
dnammo@clsnet.org

HOLLAND&HART LLP

Marcy G. Glenn
Phone (303) 295-8320
Fax (303) 975-5475

mglenn@hollandhart.com

December 19, 2016

Via U.S. Mail and E-Mail (mnorton@tnslaw.com)

Michael J. Norton, Esq.
Thomas N. Scheffel & Associates, P.C.
Belcaro Place
3801 East Florida Avenue, Suite 600
Denver, CO 80210-2544

Re: ABA Model Rule 8.4(g)

Dear Mr. Norton:

Thank you for your December 15, 2016 letter concerning ABA Model Rule 8.4(g). Consideration of that Model Rule amendment was on the agenda for the November 4, 2016 meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct (the CRPC Standing Committee), but we did not reach that agenda item before the meeting adjourned. Therefore, we will continue that item to our next meeting, which is scheduled for February 24, 2017. My expectation is that, at that time, we will follow our typical practice in considering ABA Model Rule amendments, *i.e.*, we will form a subcommittee to study the ABA amendment, what other states have done thus far, and the arguments for and against recommending adoption of the ABA amendment or some other amendment. I will be certain to forward your letter to the chair of that subcommittee, who might be in touch to solicit your further input or involvement.

Thank you again for taking the time to share your concerns with the Standing Committee.

Very truly yours,

Marcy G. Glenn
of Holland & Hart LLP

MGG:ko
cc: James C. Coyle, Esq.
Via Email (j.coyle@csc.state.co.us)

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THOMAS N. SCHEFFEL & ASSOCIATES, P. C.

ATTORNEYS AND COUNSELORS AT LAW
BELCARO PLACE
3801 EAST FLORIDA AVENUE, SUITE 600
DENVER, COLORADO 80210-2544
(303) 759-5937
FAX (303)759-9726
http://www.tnslaw.com

THOMAS N. SCHEFFEL
JOSEPH WEBER
PETER B. CASSEL
WILLIAM G. DORNAN
KYLE M. WINTERS
KATELYN B. RIDENOUR
JASON A. FREEMAN
ARIELLE J. DENIS
NATALIE L. DECKER
H.J. LEDBETTER

OF COUNSEL:
CHARLES E. KING
ROBERT A. LEES
BRADLEY S. ABRAMSON
L. FRANK BERGNER, JR
JEFFERY L. WEEDEN
LENNY A. BEST
MICHAEL J. NORTON
GILL & LEDBETTER LLP

December 21, 2016

Via Email (MGlenn@hollandhart.com)

Marcy G. Glenn, Esq.
Chair, Colorado Supreme Court
Standing Committee on
The Colorado Rules of Professional Conduct
Holland & Hart LLP
P.O. Box 8749
Denver, CO 80201-8749

Re: ABA Model Rule 8.4(g)

Dear Ms. Glenn:

Thank you for your professional courtesy in responding to my December 15, 2016 letter concerning the potential adoption of ABA Model Rule 8.4(g).

I wanted to share the enclosed "Preserve Freedom, Reject Coercion" statement adopted recently by 75 prominent religious and thought leaders. This statement powerfully articulates the First Amendment freedom concerns that I expressed in my letter to you.

If I can assist the Standing Committee in any way, please let me know. Best wishes for a Merry Christmas and a great 2017.

Sincerely,

Michael J. Norton

Enclosure – "Preserve Freedom, Reject Coercion"

cc: James C. Coyle, Esq. (with enclosure) (via email: j.coyle@csc.state.co.us)

(http://www.colsoncenter.org/?webSyncID=e016dab0-9a8a-b35e-c85d-470a6b155a63&sessionGUID=3532397e-e092-61a7-cc07-03520a2329ce)

Preserve Freedom, Reject Coercion

More than 75 prominent religious and thought leaders have come together as charter signatories of "Preserve Freedom, Reject Coercion," a statement that affirms every American's freedom to peacefully live their lives according to their beliefs and opposes government coercion or censorship of fellow citizens who have different views. These leaders are united by the idea that all laws must respect freedom and promote justice for every citizen, no matter who they are.

You can stand with these leaders by adding your signature to "Preserve Freedom, Reject Coercion." To do so, read the document (below)

Thank you for signing the statement to protect every American's constitutional freedoms from government coercion. We will keep you up to date on the latest developments to defend the rights of every American citizen.

Ask awesomely... Create a typeform

By filling out this form, you are standing with every American who knows that when religious freedom is compromised for any of us, it is compromised for all of us. Thanks for standing with us, and please know that we will not rent or sell your email address. We ask for it purely to keep you up to date on the progress of this project and related efforts to protect and expand religious liberty.

PRESERVE FREEDOM, REJECT COERCION

As Americans, we cherish the freedom to peacefully express and live by our religious, philosophical, and political beliefs—not merely to hold them privately. We write on behalf of millions of Americans who are concerned about laws that undermine the public good and diminish this freedom for individuals and organizations alike.

We affirm that every individual is created in the image of God and as such should be treated with love, compassion, and respect. We also affirm that people are created male and female, that this complementarity is the basis for the family centered on the marital union of a man and a woman, and that the family is the wellspring of human flourishing. We believe that it is imperative that our nation preserve the freedoms to speak, teach, and live out these truths in public life without fear of lawsuits or government censorship.

In recent years, there have been efforts to add sexual orientation and gender identity as protected classifications in the law—either legislatively or through executive action. These unnecessary proposals, often referred to as SOGI policies, threaten basic freedoms of religion, conscience, speech, and association; violate privacy rights; and expose citizens to significant legal and financial liability for practicing their beliefs in the public square. In recent years, we have seen in particular how these laws are used by the government in an attempt to compel citizens to sacrifice their deepest convictions on marriage and what it means to be male and female—people who serve everyone, regardless of sexual orientation or gender identity, but who cannot promote messages, engage in expression, or participate in events that contradict their beliefs or their organization's guiding values.

Creative professionals, wedding chapels, non-profit organizations, ministries serving the needy, adoption agencies, businesses, schools, religious colleges, and even churches have faced threats and legal action under such laws for declining to participate in a same-sex wedding ceremony; for maintaining policies consistent with their guiding principles; and for seeking to protect privacy by ensuring persons of the opposite sex do not share showers, locker rooms, restrooms, and other intimate facilities. Under SOGI laws, people of good will can face personal and professional ruin, fines, and even jail time, and organizations face the loss of accreditation, licensing, grants, contracts, and tax-exemption.

SOGI laws empower the government to use the force of law to silence or punish Americans who seek to exercise their God-given liberty to peacefully live and work consistent with their convictions. They also create special preference in law for categories based on morally significant choices that profoundly affect human relations and treat reasonable religious and philosophical beliefs as discriminatory. We therefore believe that proposed SOGI laws, including those narrowly crafted, threaten fundamental freedoms, and any ostensible protections for religious liberty appended to such laws are inherently inadequate and unstable.

SOGI laws in all these forms, at the federal, state, and local levels, should be rejected. We join together in signing this letter because of the serious threat that SOGI laws pose to fundamental freedoms guaranteed to every person.

America has stood as a beacon of liberty to the world because our Constitution protects people's freedom to peacefully—and publicly—work and live according to their convictions. We represent diverse efforts to contribute to the flourishing of our neighbors, communities, nation, and world. We remain committed to preserving in law and stewarding in action the foundational freedoms that make possible service of the common good, social harmony, and the flourishing of all.

Daniel L. Akin
President, Southeastern Baptist Theological Seminary

Anthony Allen
President, Hannibal-LaGrange University

Jason K. Allen
President, Midwestern Baptist Theological Seminary

Ryan T. Anderson
William E. Simon Senior Research Fellow in American Principles and Public Policy, The Heritage Foundation

Bruce Riley Ashford
Provost, Southeastern Baptist Theological Seminary

Mark L. Bailey
President, Dallas Theological Seminary

Robert Benne
Institute of Lutheran Theology

Gerard V. Bradley
Professor of Law, University of Notre Dame

Rick Brewer
President, Louisiana College

Michael Bryant
Executive Vice President, Charleston Southern University

Thomas Buchanan
Senior Editor, *Touchstone Magazine*

Rosaria Champagne Butterfield
Author and speaker

Most Rev. Charles J. Chaput
Archbishop of Philadelphia, Chairman, United States Conference of Catholic Bishops Committee on Laity, Marriage, Family Life, and Youth

D. A. Carson
President, The Gospel Coalition

Joshua D. Chatraw
Executive Director, Center for Apologetics and Cultural Engagement, Liberty University

Derry Connolly
President, John Paul the Great Catholic University

Barry K. Creamer
President, Criswell College

Jim Daly
President, Focus on the Family

Most Rev. Frank J. Dewane
Bishop of Venice, Chairman, United States Conference of Catholic Bishops Committee on Domestic Justice and Human Development

Kevin DeYoung
Senior Pastor, University Reformed Church (East Lansing, Mich.)

David S. Dockery
President, Trinity Evangelical Divinity School

Daniel J. Egeler, EdD
President, Association of Christian Schools International

Rev. Wilbur David Ellsworth
Pastor, Holy Transfiguration Orthodox Christian Church (Warrenville, Ill.)

Anthony Esolen
Professor of English, Providence College

William Fahey
President, Thomas More College of Liberal Arts

Gene C. Fant, Jr.
Provost, Palm Beach Atlantic University

Thomas Farr
Professor of the Practice of Religion and International Affairs, Edmund A. Walsh School of Foreign Service, Georgetown University

Robert A. J. Gagnon
Associate Professor of New Testament, Pittsburgh Theological Seminary

Sister Mary Sarah Galbraith
President, Aquinas College

Robert P. George
McCormick Professor of Jurisprudence, Princeton University and Former Chairman of the U.S. Commission on International Religious Freedom

Timothy George
Founding Dean, Beeson Divinity School, Samford University

David Goodwin
President, Association of Classical Christian Schools

Franklin Graham
President/CEO, Samaritan's Purse and the Billy Graham Evangelistic Association

Loren Gresham
President, Southern Nazarene University

Rev. Dr. Matthew C. Harrison
President, The Lutheran Church-Missouri Synod

Anne Hendershott
Professor of Sociology and Director of the Veritas Center for Ethics in Public Life, Franciscan University of Steubenville

James Hitchcock
Professor of History, St. Louis University

Edith M. Humphrey
William F. Orr Professor of New Testament, Pittsburgh Theological Seminary

John Jackson
President, William Jessup University

David Lyle Jeffry
Distinguished Professor of Literature and Humanities, Honors Program, Baylor University

Philip W. Kell
President, California Baptist Foundation

Jerry A. Johnson
President and CEO, National Religious Broadcasters

Daniel R. Kempton, Ph.D.
Vice President, Academic Affairs, Franciscan University of Steubenville

James M. Kushiner
Executive Director, Fellowship of St. James/Executive Editor, *Touchstone Magazine*

Peter J. Leithart
President, Theopolis Institute

Stephen D. Livesay
President, Bryan College

Most Rev. William E. Lori
Archbishop of Baltimore, Chairman, United States Conference of Catholic Bishops Ad Hoc Committee for Religious Liberty

Fred Luter
Pastor, Franklin Avenue Baptist Church (New Orleans, LA) and Former President, Southern Baptist Convention

John MacArthur
President, The Master's University & Seminary

Barbara C. McMillin
President, Blue Mountain College

Benjamin R. Merkle
President, New Saint Andrews University

Eric Metaxas
Author and Nationally Syndicated Radio Host

C. Ben Mitchell
Provost and Vice President for Academic Affairs, Union University

Albert Mohler
President, The Southern Baptist Theological Seminary

Russell Moore
President, Ethics and Religious Liberty Commission of the Southern Baptist Convention

Jeff Myers
President, Summit Ministries

Most Rev. George V. Murry, S.J.
Bishop of Youngstown, Chairman, United States Conference of Catholic Bishops Committee on Catholic Education

Bradley Nassiff
Professor of Biblical and Theological Studies, Northpark University

Samuel W. "Dub" Oliver
President, Union University

Paige Patterson
President, Southwestern Baptist Theological Seminary

Everett Piper
President, Oklahoma Wesleyan University

Leon J. Podles
President, Crossland Foundation

Mary Podles
Author and Art Historian

Patrick Henry Reardon
Pastor, All Saints Antiochian Orthodox Church (Chicago)

Patrick J. Reilly
President, The Cardinal Newman Society

R. R. Reno
Editor, *First Things*

John Mark Reynolds
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President, National Hispanic Christian Leadership Conference, Hispanic Evangelical Association

Mike Rouse
President, American Association of Christian Schools

William Saxby
Dean, School of Humanities, Colorado Christian University

Alan Sears
President, CEO, and General Counsel, Alliance Defending Freedom

Rev. Sean O. Sheridan, TOR
President, Franciscan University of Steubenville

Robert B. Sloan
President, Houston Baptist University

Kevin L. Smith
Executive Director, Baptist Convention of Maryland/Delaware

Robert Smith, Jr.
Charles T. Carter Professor of Divinity, Beeson Divinity School, Samford University

Timothy L. Smith
President, University of Mobile

John Stonestreet
President, Colson Center for Christian Worldview

Carol M. Swain
Professor of Law and Political Science, Vanderbilt University

Justin Taylor
author, editor, blogger, The Gospel Coalition

Peter W. Teague
President, Lancaster Bible College/Capital Seminary and Graduate School

H. James Towey
President, Ave Maria University

Todd Wagner
Pastor of Watermark Church

Roland C. Warren
President & CEO, Care Net

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REAL-LIFE STORIES

Carl and Angel Larsen
(http://adflegal.org/detailspages/case-details/telescope-media-group-v.-lindsey) Telescope Media Group v. Lindsey (with video)

Baronelle Stutzman (http://adflegal.org/detailspages/client-stories-details/barronelle-stutzman) (with video)

Brush and Nib Studio (http://adflegal.org/detailspages/client-stories-details/brush-nib-studio) (video here (http://www.brushandnib.com/meet-us/))

Fort Des Moines Church of Christ v. Jackson (http://adflegal.org/detailspages/case-details/fort-des-moines-church-of-christ-v.-jackson) (with video)

Horizon Christian Fellowship v. Williamson (http://adflegal.org/detailspages/case-details/horizon-christian-fellowship-v.-williamson) (with video)

FOR FURTHER READING

Sometimes a Question is Better than an Answer
(http://www.breakpoint.org/bpcommentaries/breakpoint-commentaries-search/entry/13/29295) John Stonestreet | BreakPoint | May 17, 2016

Almost Everything the Media Tell You about Sexual Orientation and Gender Identity is Wrong
Ryan T. Anderson | The Daily Signal | August 22, 2016 (http://dailysignal.com/2016/08/22/almost-everything-the-media-tells-you-about-sexual-orientation-and-gender-identity-is-wrong/)

Turning American Law Upside Down for the Transgendered
(http://www.nationalreview.com/article/434246/religious-freedom-more-important-transgender-rights) David French | National Review | April 19, 2016

Sexual Orientation and Gender Identity (SOGI) Laws Threaten Freedom
(http://www.heritage.org/research/reports/2015/11/sexual-orientation-and-gender-identity-sogi-laws-threaten-freedom) Ryan T. Anderson, Heritage Foundation *Backgrounder*

Liberty and SOGI Laws: An Impossible and Unsustainable "Compromise"
(http://www.thepublicdiscourse.com/2016/01/16225/) Ryan T. Anderson and Robert P. George, *Public Discourse*

SOGI Laws: A Subversive Response to a Nonexistent Problem
(http://www.thepublicdiscourse.com/2016/09/17865/) James Gottry, *Public Discourse*

Marcy Glenn

From: Marcy Glenn
Sent: Monday, February 06, 2017 6:07 PM
To: 'Bryon Large'
Cc: 'Amanda Gonzalez'
Subject: RE: Standing Rules Committee

Hi, Bryon and Amanda,

Thanks very much for your email. Consideration of the ABA's amendment to Model Rule 8.4(g) was on the agenda for the November 4, 2016 meeting of the Colorado Supreme Court's CRPC Standing Committee, but we did not reach that agenda item before the meeting adjourned. Therefore, we will continue that item to our next meeting, which is scheduled for February 24, 2017. My expectation is that, at that time, we will follow our typical practice in considering ABA Model Rule amendments, *i.e.*, we will form a subcommittee to study the ABA amendment, what other states have done thus far, and the arguments for and against recommending adoption of the ABA amendment or some other amendment. I will be certain to forward your email to the chair of that subcommittee, once it is formed, and I am confident that he or she will be in touch to solicit your further input and involvement on behalf of the Colorado LGBT Bar Association and the Colorado Hispanic Bar Association.

Thank you again for taking the time to share your concerns with the Standing Committee.

Marcy

Marcy G. Glenn
Holland & Hart LLP
555 17th Street, Suite 3200
Denver, CO 80202
Phone (303) 295-8320
Fax (303) 295-8261
E-mail: mglenn@hollandhart.com

From: Bryon Large [mailto:b.large@csc.state.co.us]
Sent: Monday, February 06, 2017 12:14 PM
To: Marcy Glenn
Cc: Amanda Gonzalez
Subject: Standing Rules Committee

Good afternoon Ms. Glenn,

I understand that the Standing Rules Committee is reviewing the ABA's changes to Model Rule 8.4(g) and considering them for potential modification to Colorado's rules. I am the Immediate Past President of the Colorado LGBT Bar Association. This issue has come up for discussion among the leaders of the various diversity bar associations. Amanda Gonzalez, copied here, is the current chair of the ethics committee for the Colorado Hispanic Bar Association. We would love to offer our input to the Standing Rules Committee from the diversity bars' perspective, if appropriate. We also would be happy to volunteer to assist your committee in any way possible, particularly if a sub-committee will be reviewing and reporting back.

Please let us know how we can be of assistance.

Best regards,

Bryon

Bryon M. Large, Esq.
Assistant Regulation Counsel
Colorado Supreme Court
Office of Attorney Regulation Counsel
1300 Broadway, Suite 500
Denver, CO 80203
(303) 457-5800
(303) 928-7916 (Direct)
Email: b.large@csc.state.co.us

"Perhaps no professional shortcoming is more widely resented than procrastination."
- C.R.P.C. 1.3, Comment 3

THE DENVER POST established 1892
"There is no hope for the satisfied man."
Post founder Frederick G. Bonfils, 1860-1933

The Post Editorials

A wake-up call for rule change

What do triple ax murderers and child predators have in common in Jefferson County? The protection of Colorado's professional conduct rules for attorneys that have been so badly misinterpreted over the years that today they are a detriment to the safety of our children.

Certainly Colorado attorneys should be barred from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation." A few bright lines come to mind: a civil attorney going undercover to dredge up evidence in a lawsuit or a defense attorney misrepresenting a plea deal to a defendant for nefarious reasons.

Heinous grounds for disbarment, clearly.

But the two cases out of Jefferson County fall far short of that bright line.

We recently learned that Jefferson County District Attorney Pete Weir is shutting down his highly successful sting operation, nicknamed CHEEZO. In more than a decade, the child sex offender internet investigations unit has arrested and convicted more than 900 offenders.

To do the work, law enforcement officers would visit online chat rooms frequented by kids, pretend to be young teen girls and then wait to be contacted by grown men attempting to lure them into meetings.

But one of the offenders CHEEZO caught has filed a notice of complaint with the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct. Weir said he was told if that complaint were filed, the board would likely rule that employees of the DA's office cannot use deceit to snare these online sex offenders.

At issue is the fact that the CHEEZO unit was funded by the DA's office. Had the investigators been working for a sheriff's office, the rules would have allowed them to do their work.

We first opined on the interpretation of the rule in 2001 when an assistant district attorney, Mark Pautler, pretended to be a defense attorney on the phone to then at-large triple ax-murderer William "Cody" Neal.

The Pautler case has set precedent for the Weir case.

Pautler was present when law enforcement had Neal on the phone trying to convince him to turn himself in. Neal said he wanted to speak to a public defender first. But with none readily available, Pautler got on the phone and assumed the persona of defense attorney "Mark Palmer."

Yes, Pautler lied. But he didn't try to elicit details to help the prosecution from Neal, and he didn't maintain the charade a moment longer than necessary to secure Neal into custody.

We disagreed that his laudable actions should've been prevented by the ethics rule.

Such a view was shared by others faced with similar dilemmas. Former Gov. Bill Ritter, then a district attorney himself, testified in Pautler's defense, saying he had once promised an armed robber that he wouldn't prosecute. After the danger had passed, Ritter did prosecute.

When Pautler was disciplined by the Colorado Supreme Court and put on an attorney practice version of probation for a year, we were aghast: "So here are the rules. Don't save any more lives for the balance of this year, Mr. Pautler, and you will be restored to the ranks of brain-dead pettifoggers for whom the letter of the law is all and the spirit is nothing."

Strong words indeed, but the rule has remained unchanged all these years. Today Weir hopes an exception will be added for law enforcement activities so that his team can continue netting these bad guys. We do too.

But until wiser heads prevail, here are the rules: Don't catch any more pedophiles, Mr. Weir, and you won't get your wrist slapped by this board of stubborn counsel who had 15 years to amend this failed rule and did nothing.

Denver Post 1/1/17

Second Opinion

HOLLAND&HART LLP

Marcy G. Glenn
Phone (303) 295-8320
Fax (303) 975-5475

mglenn@hollandhart.com

January 5, 2017

Via U.S. Mail and E-Mail (cplunkett@denverpost.com)

Chuck Plunkett
Editorial Page Editor
Denver Post
101 West Colfax Avenue, Suite 800
Denver, CO 80202

Re: Request for Corrections

Dear Chuck:

Thank you for speaking with me yesterday concerning the Post's first editorial of the year, entitled, "A wake-up call for rule change." As I explained during our call, I appreciate the distress voiced by the Editorial Board about state ethics rules that prohibit lawyers from engaging in deceptive conduct, because they may inhibit enforcement of criminal laws (in the recent incident involving the "CHEEZO" sting operation) or the protection of the public (in a 2001 incident involving assistant district attorney Mark Pautler). This is a valid concern and the CHEEZO and Pautler situations illustrate the tension between the need to protect the public from dishonest lawyers, and the good-faith desire of attorneys involved in law enforcement to use some degree of "harmless" deception to enforce our laws.

Thank you for offering to allow me to write a "My Turn" response to the editorial, in order to clarify several factual inaccuracies. **On further reflection, I have decided against writing a "My Turn" article or a letter to the editor.** However, I would appreciate it if the Post would note its own corrections to the following misstatements in both the print and on-line versions of the editorial:

First, the statement that "one of the offenders CHEEZO caught has filed a notice of complaint with the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct" is incorrect. The Standing Committee does not receive complaints about attorney conduct. It exists solely to consider and recommend to the Supreme Court potential changes to the ethics rules. The separate Supreme Court Office of Attorney Regulation Counsel (OARC) receives complaints and pursues lawyer disciplinary cases. (I do not know whether the OARC has received a complaint in the CHEEZO matter, however.)

Second, the editorial describes the Standing Committee as a "board of stubborn counsel who had 15 years to amend this failed rule and did nothing." In fact, over eighteen months in

2011 and 2012, the Standing Committee, through a blue ribbon subcommittee that included law enforcement representatives, studied various potential amendments that would have allowed government lawyers to use deception in lawful investigative activities. Although a majority of the Standing Committee ultimately voted against recommending any rule change, the committee generated extensive work product, which it made available to the Supreme Court and is publicly available on the Standing Committee's website.

The Post would do the public a service by correcting the misstatements noted above.

I commend the Editorial Board for drawing attention to an issue that is *important*. The tone of the editorial suggests that the issue is also *easy*. It is not. As the Standing Committee's work product confirmed, reasonable minds can disagree on whether and when lawyers should be allowed to lie and deceive, even in the interest of law enforcement.

Please note that my communications are in my individual capacity. Although I chair the Standing Committee, I am not writing or requesting these corrections on behalf of either the Standing Committee or the Supreme Court.

Thank you,

Marcy G. Glenn

Marcy G. Glenn
of Holland & Hart LLP

MGG:ko

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Corrections

The Denver Post will correct all errors occurring in its news columns. If you find a problem with a story — an error of fact or a point requiring clarification — please call the city desk at 303-954-1201.

• Because of incorrect information from a source, a news story on Dec. 17 on Page 4A, and a subsequent editorial on Jan. 1 on Page 3D, incorrectly identified the committee that would receive a complaint about Jefferson County District Attorney Pete Weir's child sex offender internet investigations unit. The Colorado Supreme Court Office of Attorney Regulation Counsel would consider a complaint.

Denver Post 1/13/17

IN THE COURTS

DA Investigations End, but Ethics Debate Could Come

After Jefferson County ended its sex offender investigations, some wonder what's next

BY TONY FLESOR
LAW WEEK COLORADO

According to a Colorado Supreme Court committee, prosecutors need to play it straight when trying to catch a predator.

Jefferson County's Child Sex Offender Internet Investigation unit, known as CSOII, or CHEEZO, was shut down in mid-December as a response to a complaint filed with the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct.

The unit had been operating since 1996 and since then has been used to help arrest and convict more than 900 offenders in Jefferson County.

The unit was run by Mike and Cassandra Harris, two law enforcement officers, but operated within the Jefferson County District Attorney's Office. This organization within the DA Pete Weir's office led to a professional conduct complaint and the end of the unit's covert investigations.


PETE WEIR

As part of its operations, members of the unit would pose as children online in order to lure and catch child sex offenders. But according to a criminal defense attorney, the actions represented the prosecutors themselves and were in violation of the Rules of Professional Conduct.

Defense attorney Phil Cherner, who practices in criminal law with Vicente Sederberg, filed the complaint with the Colorado Supreme Court's committee. According to Rule 8.4(c), an attorney shall not "engage in conduct involving dishonesty, fraud, deceit or deception. Because the Jefferson County District Attorney was running the unit out of his office, the office was responsible for CHEEZO's actions under the rule.

The unit has since shut down its covert investigations, and investigator Troy Cooper said the office has not made any decision if, or in what capacity, CHEEZO will operate in 2017. According to the District Attorney's Office's website, the unit is active in public safety and prevention, though it has ceased its undercover operations.

"The unit is in limbo in how to proceed from here," Cooper said.

That question of how to proceed, though, might be one for the rules committee itself rather than the DA's office. According to Charles Luce, an attorney at Moye White who also writes an attorney ethics blog, said he believes the court is correct in its application of the rule, but it is now the time to discuss revising the rule itself.

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ETHICS
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"Despite the harshness of the way the court applied the rule, it has done so correctly. But that's the first step," Luce said. "If that's how the rule is being applied, should the rule be revised?" Luce cited two prior cases with two separate outcomes to highlight the possibilities for the CHEEZO unit and future situations where attorneys use investigators to collect information. He compared the CHEEZO unit to common law enforcement practices that involve posing as someone else to catch someone or attorneys' use of private investigators.

In one Colorado case, People v. Pautler, the court used the rule to suspend a deputy district attorney after he posed as a public defender in order to convince a murder suspect to surrender to authorities attempting to arrest him. In Pautler, the court said that there are no exceptions to the rule, even in extreme circumstances.

An Oregon case where a private attorney posed as a chiropractor to aid a fraud investigation, however, led to a rule change in the state. The Oregon Supreme Court said, similarly to Colorado's, that there are no exceptions to the state's rule. The court did, however, revise its rule shortly after to allow attorneys to advise or supervise a covert investigation.

While Oregon has adapted its rule to allow for attorneys, and prosecutors specifically, to use investigators to gather information in a way that law enforcement agencies might, Colorado's rule keeps attorneys from involving themselves at all. And according to Luce, the Colorado Supreme Court now has two test cases that show the direct effects of the rule.

The latest, he said, "makes the Internet safe for child molesters," and that should be enough to inspire a discussion about whether to adopt a rule similar to Oregon's.

Colorado's rule matches the American Bar Association's model rule 8.4(c). A handful of other jurisdictions joined Oregon in adding carve-outs for government attorneys working in law enforcement purposes shortly after it amended its rule, though, including Washington, D.C., Utah and Virginia.

"Now we have the opportunity to do something and ought to do so," Luce said. "When the rules of ethics are at cross-purposes with justice, it's time to revise them. •

— Tony Flesor, TFlesor@circuitmedia.com

HOLLAND&HART LLP
THE LAW OUT WEST

Marcy G. Glenn
Phone 303-295-8320
Fax 303-975-5475
mglenn@hollandhart.com

November 19, 2012

VIA U.S. MAIL AND EMAIL

The Honorable Nathan B. Coats
Colorado Supreme Court
101 W. Colfax Avenue, Ste. 800
Denver, CO 80202-5315

The Honorable Monica Márquez
Colorado Supreme Court
101 W. Colfax Avenue, Ste. 800
Denver, CO 80202-5315

Re: Considered, But Rejected, Potential Amendments to CRPC 8.4(c), to Facilitate "Pretexting"

Dear Justices Coats and Márquez:

I write on behalf of the Court's Standing Committee on the Colorado Rules of Professional Conduct (the Standing Committee). Enclosed are the following materials, which relate to the Standing Committee's consideration of potential amendments to the Colorado Rules of Professional Conduct (CRPC), to address the issue of "pretexting" by lawyers:

1. Final Report of the Pretexting Subcommittee (the Subcommittee), distributed for discussion at the Standing Committee's January 6, 2012 meeting (Enclosure 1).

2. Supplemental Report of the Pretexting Subcommittee, distributed for discussion at the Standing Committee's July 13, 2012 meeting (Enclosure 2).

3. Approved Minutes of the Standing Committee's May 6, 2011 meeting. *See* pages 13-14 (Enclosure 3).

4. Approved Minutes of the Standing Committee's January 6, 2012 meeting. *See* pages 4-17 (Enclosure 4).

5. Approved Minutes of the Standing Committee's July 13, 2012 meeting. *See* pages 3-23 (Enclosure 5).

The Standing Committee voted against recommending any pretexting-related rule changes to the Court. However, in light of (a) the substantial work devoted to potential

amendments to CRPC 8.4(c), and (b) the division of strongly held views among members of the Standing Committee on whether to recommend those amendments, the Standing Committee concluded that it would share its work product with the Court, for the Court to review and use as it deems appropriate.

The enclosed materials document the intense study the Subcommittee made before making recommendations to the Standing Committee, and the Standing Committee's prolonged discussions before ultimately voting against recommending any rule changes. Therefore, I will provide only a brief summary of the background to these considered, but rejected, proposed rule amendments.

Background. The Intellectual Property Section of the CBA approached the Standing Committee with concerns that certain CRPC precluding deceptive conduct might limit efforts that attorneys sometimes undertake in civil litigation in order to gain information, and to comply with their obligations under Rule 11 of the Colorado Rules of Civil Procedure, before commencing a civil action. For example, before filing suit to challenge trademark infringement, attorneys may use "testers" to feign interest in the purportedly infringing product. Pretexting also occurs in connection with lawsuits under federal and state statutes that preclude employment, public accommodation, and housing discrimination: before filing suit, attorneys representing the plaintiff might send a tester to attempt to rent an apartment (or apply for a job or rent a hotel room) from the purportedly discriminating defendant. In the criminal context, prosecutors regularly rely on deceptive conduct by law enforcement personnel, including, for example, through the use of undercover informants. These activities could be deemed to violate CRPC 4.1 (prohibiting lawyers, in the course of representing a client, from knowingly making "a false statement of material fact" to a third person); CRPC 8.4(c) (defining as professional misconduct a lawyer's engagement in "conduct involving dishonesty, fraud, deceit or misrepresentation"); and other CRPC.

The Subcommittee examined the issue over eighteen months. The Subcommittee was comprised of both Standing Committee members (both lawyers and judges) and non-members with an interest in the pretexting issue. In addition, the Subcommittee solicited and obtained the views of a wide range of additional attorneys, including the United States Attorney for the District of Colorado, the Federal Public Defender for the District of Colorado, Regional Counsel for Region VIII of the United States Department of Housing and Urban Development, the Colorado Attorney General, the State Public Defender, the Colorado Criminal Defense Bar, the Colorado District Attorney's Council, the CBA Intellectual Property Section, and the International Trademark Association. Written comments received by the Subcommittee are compiled as Attachment A to the Supplemental Report (Enclosure 2). The Subcommittee studied the issue in depth, including by examining other states' ethics rules that address pretexting issues. Attachment B to the Supplemental Report is a chart summarizing rules and ethics opinions in those states that have addressed the issue.

Subcommittee Recommendations. At the Standing Committee's January 6, 2012 meeting, a majority of the Subcommittee initially proposed the following exception (in italics) to CRPC 8.4(c):

> It is professional misconduct for a lawyer to:
>
> * * *
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, *except that a lawyer may direct, advise, or supervise others in lawful covert activity that involves misrepresentation or deceit, when either:*
>
> *(1)(A) the misrepresentation or deceit is limited to matters of background, identification, purpose, or similar information, and (b) the lawyer reasonably and in good faith believes that (i) a violation of civil or constitutional law has taken place or is likely to take place in the immediate future, and (ii) the cover activity will aid in the investigation of such a violation; or*
>
> *(2)(A) the lawyer is a government lawyer and the lawyer reasonably and in good faith believes that (i) the action is within the scope of the lawyer's duties in the enforcement of law, and (ii) the purpose of the covert activity is either to gather information related to a suspected violation of civil, criminal, or constitutional law, or to engage in lawful intelligence-gathering.*

Two Subcommittee members believed that any exception should be limited to either government attorneys or government attorneys involved in criminal prosecutions that implicate public safety. At the Standing Committee's January 6, 2012 meeting, the Subcommittee's proposal failed to garner the support of a majority of the Standing Committee, which asked the Subcommittee to further study the issue; obtain broader input from affected attorneys, clients, and law enforcement agencies; and address particular concerns.

At the Standing Committee's July 13, 2012 meeting, a majority of the Subcommittee proposed the following exception (in italics) to CRPC 8.4(c):

> It is professional misconduct for a lawyer to:
>
> * * *

> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, *except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities*;

A two-member minority of the Subcommittee proposed the following narrower exception (in italics) to CRPC 8.4(c):

> It is professional misconduct for a lawyer to:
>
> * * *
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, *except that a lawyer representing the government may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities*;

Alternatively, if the exception were not limited to government lawyers engaged in law enforcement activities, the Subcommittee's minority recommended making no rule change.

Standing Committee Action. After lengthy discussion and intense debate at its July 13, 2012 meeting, a majority of the Standing Committee voted against recommending any amendments to the Court. However, as noted above, the Standing Committee voted to provide its work product to the Court. The arguments for and against the various proposed amendments are set forth in detail in the enclosed materials.

The attached documents are lengthy and, for the Court's convenience, I am sending both hard and electronic copies of this letter and attachments.

Sincerely,

Marcy G. Glenn
of Holland & Hart LLP

MGG:dc
Enclosures
cc: Members of the Standing Committee (with enclosures)

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FINAL REPORT OF PRETEXTING SUBCOMMITTEE

The pretexting subcommittee[1] respectfully submits the following report.

I. Summary

In seeking to obtain information through covert activities ("pretexting"), attorneys -- particularly criminal prosecutors and other government attorneys involved in law enforcement -- will often be in a position to advise clients, investigators, or non-lawyer assistants concerning conduct involving misrepresentation and nondisclosure, which is both inherent in many investigations and intended to mislead the targets. The subcommittee recommends that the Rules of Professional Conduct should be revised to address when such advice may be given, while continuing to prohibit direct lawyer participation in any deception or subterfuge. Specifically, the subcommittee proposes language that would create a limited exception to R.P.C. 8.4(c) and clarifying comments.

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[1] Tom Downey chaired the subcommittee. Members included: J. Haried; A. Scoville: A. Rothrock; D. Stark; H. Berkman; J. Sudler; J. Posthumous; M. Berger; R. Polidori; M. Dulin; J. Zavislan; M. Kirsch; A. Rocque and J. Webb.

II. Background

The subcommittee was formed in response to an inquiry from the Colorado Bar Association Intellectual Property Section as to how rules such as R.P.C. 4.1, 4.2, 4.3, 5.3, and 8.4(c) might limit certain efforts to gather evidence before commencing a civil action, and thereby assure compliance with C.R.C.P. 11. For example, counsel representing a trademark holder might arrange to purchase an unlicensed product that infringed on the trademark using a person who misrepresented matters such as his or her identity, purpose for purchasing, desire to become a distributor of such products, and lack of affiliation with counsel. *See, Apple Corps Limited v. International Collectors Society*, 15 F.Supp. 2d 456, 475 (D.N.J. 1998) (describing such investigative techniques, and concluding, "If plaintiffs' investigators had disclosed their identity and the fact that they were calling on behalf of plaintiffs, such an inquiry would have been useless to determine [defendant's] day-to-day practices."); *Accord Gidatex v. Campaniello Imports, Ltd.*, 82 F.Supp. 2d 119 (S.D.N.Y. 1999); *but see, Hill v. Shell Oil Co.*, 209 F.Supp. 2d 876, 879-880 (N.D. Ill. 2002). (concluding, "Lawyers (and investigators) cannot trick protected employees into doing things or saying things

they otherwise would not do or say. ... They probably can employ persons to play the role of customers seeking services on the same basis as the general public"); *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F.Supp. 2d 1147, 1155-60 (D.S.D. 2001) (finding violations of South Dakota analogs to rules 4.2, 4.3, 5.3, and 8.4); *In re Curry*, 880 N.E.2d 388, 404-05 (Mass. 2008) (disbarring attorney because, unlike "investigators who pose as members of the public in order to reproduce pre-existing patterns of conduct, [the attorney] built an elaborate fraudulent scheme whose purpose was to elicit or potentially threaten the [subject] into making statements that he otherwise would not have made"). *See generally*, "Cheat the Beatles: Ethics in Investigations," Alec Rothrock, Essay D3, Essays on Legal Ethics and Professional Conduct in Colorado, First ed. (CLE in Colo., Inc. Supp. 2008). Particular concern was expressed within the subcommittee because of our supreme court's statement, "[w]e stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so." *In re Pautler*, 47 P.3d 1175, 1183 (Colo. 2002)(deputy district attorney sanctioned for misrepresenting that

he was a public defender to barricaded and armed murder suspect in the context of surrender negotiations).

Initially, the subcommittee considered whether to elicit input from stakeholders in other practice areas who might have similar concerns. Although one member urged staying within the initial inquiry, a majority of the subcommittee concluded otherwise. Consequently, members contacted the United States Equal Employment Opportunity Commission (EEOC), the United States Department of Housing and Urban Development (HUD), and the Office of the Colorado Attorney General.

The EEOC's Denver Regional Office responded that it did not use testers, and had not for some time. The United States Attorney for the District of Colorado responded for HUD and on his own behalf with a lengthy letter, which urged that the Rules be changed to permit attorney involvement in pretext investigations. (*See* Attachment 1.) His representatives attended the subcommittee's later meetings.

A representative of the Colorado Attorney General attended several subcommittee meetings, acknowledged that the propriety of attorney involvement in pretext investigations has been a long-

standing concern, and verbally endorsed the U.S. Attorney's position. He did not submit anything in writing, but described pretext investigations in areas of consumer fraud and securities fraud. For example, in one investigation a staff member presented herself as the relative of a senior citizen to induce the target of the investigation to make a sales presentation that was being examined as a possible fraud on seniors.

The subcommittee determined that a handful of states have addressed this issue through rule provisions allowing attorney involvement in "lawful investigative activities," investigations "authorized by law," and "lawful intelligence-gathering activity," or merely providing that rule 8.4(c) is not violated unless the misrepresentation "reflects adversely on the lawyer's fitness to practice law." Most of these states allow attorneys to act as advisors but not as direct participants. Likewise, most such states, namely Michigan, North Dakota, Oregon, Virginia, and Wisconsin, permit such conduct by all attorneys, while in two (Alabama[2] and

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[2] In Alabama, notwithstanding that the exception that applies only to prosecutors, an ethics opinion suggests that any lawyer may employ private investigators to pose as customers under the pretext of seeking services on the same basis or in the same manner as a

Florida), protection is limited to government attorneys. (*See* table, Attachment 2.)

In all, at least ten states have either a rule, comment, or ethical opinion suggesting that all attorneys may at least supervise pretext investigations, and another five have a rule, comment, or ethical opinion reaching the same conclusion with respect to government attorneys. In several other states, there may have been less reason to address the issue through a rule change because cases held, usually in the course of evidentiary motions, that advising, retaining, or instructing investigators who pose as members of the public to reproduce pre-existing patterns of unlawful conduct does not violate the state ethical rules.[3]

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member of the general public. *Compare* Alabama R.P.C. 3.8(2)(a) *with* Alabama Op. RO-2007-05 (Sept. 12, 2007).

[3] *See, e.g., Apple Corps Ltd.*, 15 F.Supp. 2d at 474-76 (New Jersey); *Gidatex*, 82 F.Supp. 2d 119 (New York); *Hill*, 209 F.Supp. 2d at 879-880 (Illinois); *cf. In re Curry*, 880 N.E.2d at 404-05 (disbarring attorney but distinguishing the "elaborate fraudulent scheme" present there from the situations approved of in *Gidatex*, *Apple Corps* and *Havens Realty Corp v. Coleman*, 455 U.S. 363, 373-75 (1982)). In other cases, courts in other states decided that the rules were violated, or decided to exclude evidence on the basis of conduct they saw as violating the rules. *See e.g., Midwest Motor Sports, Inc.*, 144 F.Supp. 2d at 1155-60 (South Dakota).

The subcommittee's proposals in section V below draw on these rules.

III. Preliminary Considerations

The subcommittee first considered factors that weigh against making changes to any rule or comment, primarily the strength of some language in *Pautler*, the absence of any similar protective provisions in the ABA Model Rules, and the number of states enacting protective provisions, which remains a small minority.

However, one member pointed out that in *Pautler*, 47 P.3d at 1179 fn. 4, the supreme court recognized, "Utah and Oregon have construed or changed their ethics rules to permit government attorney involvement in undercover investigative operations that involve misrepresentation and deceit." Rather than disapproving of such actions, the court described these exceptions as "limited [] to circumstances inapposite here." *Id.* Likewise, a majority of the subcommittee concluded that its charter and the related concerns of stakeholders were far removed from the facts of *Pautler* in at least two ways. First, the attorney in *Pautler* was sanctioned for directly participating in the misrepresentation. Second, the purpose of the

misrepresentation was not investigating to obtain further information.

Further, a majority of the subcommittee felt that Colorado attorneys are entitled to clarification where tension exists between the plain language of any rule and the unique challenges of particular practice areas. The subcommittee also agreed that the objective of paralleling the ABA Model Rules (uniformity) was not a major concern. The proposed changes would lessen rather than increase the risk of lawyer discipline, and pretext investigations seem unlikely to implicate interstate practice.

The subcommittee also discussed whether its focus should be on "limit[ing] the attorney's role to 'supervising' or 'advising,' [but] not permitting direct participation by attorneys." *Id.*, citing Or. DR 1-102(d). Of the states that have taken action, most adopted this approach. *See* attachment 2. However, because under R.P.C. 8.4(a) and R.P.C. 5.3(c) an attorney cannot perform through an agent an action that would violate any Rule if done by that attorney directly, several members questioned whether this was a principled distinction.

Nevertheless, the majority concluded that any exception limited to supervising or advising was defensible on three grounds. First, continuing the prohibition against direct misrepresentations by attorneys would bolster public confidence in the profession. Second, this limitation would avoid problems attendant to an attorney becoming a witness. *See* R.P.C. 3.7. Third, a benefit of allowing lawyer supervision and advice may be keeping pretext investigations within other legal boundaries, such as avoiding entrapment.

The subcommittee also considered whether any exception should appear in the text of a rule, in a comment, or both. One member observed that a comment creating an exception to the plain language of a rule would be at odds with Preamble and Scope [21] ("The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.") In the majority's view, any exception should appear in the rule, as illustrated in Section V below, coupled with explanatory comments and a definition.[4]

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[4] One stakeholder expressed concern that the representative of O.A.R.C., who could not attend the subcommittee's final meeting, had never addressed the force of a definition contained only in a comment.

IV. Possible Changes to Rules Other Than R.P.C. 8.4(c)

The subcommittee noted that stakeholder input focused on R.P.C. 8.4(c), consistent with the actions of most states as discussed above. The *Pautler* decision upheld discipline under this Rule. Hence, the subcommittee considered, but ultimately rejected, changes to R.P.C. 3.8, Special Responsibilities of a Prosecutor; R.P.C. 4.1, Truthfulness in Statements to Others; R.P.C. 4.2, Communications with Persons Represented by Counsel; R.P.C. 4.3, Dealing with Unrepresented Persons; and R.P.C. 5.3, Responsibilities Regarding Nonlawyer Assistants. A brief discussion of the subcommittee's consideration of each of these rules follows.

Given the focus on government attorneys in some states that have changed their rules, the subcommittee considered changing R.P.C. 3.8. For the reasons discussed below, the subcommittee decided that the specific language of R.P.C. 8.4(c) needed to be addressed. However, an exception to that language clearly applicable to criminal prosecutors might warrant a cross-referencing comment in R.P.C. 3.8.

R.P.C. 4.1 deals with "a false statement of material fact." Because the operative terms in R.P.C. 8.4(c), "dishonesty, fraud, deceit, or misrepresentation," are broader, the subcommittee concluded that changing R.P.C. 4.1 would not remove uncertainty concerning the application of Rule 8.4(c). Further, the subcommittee rejected redefining or limiting "material," as used in R.P.C. 4.1(a), to exclude conduct inherent in pretext investigations. Although the court did so in *Apple Corp Limited,* 15 F.Supp. 2d at 476, this approach would be difficult to reconcile with *In re Fischer*, 202 P.3d 1186, 1201 (Colo. 2009)("A statement is material if it could have influenced the listener.") If changes to R.P.C. 8.4(c) are approved, however, a cross referencing comment in R.P.C. 4.1 might also be appropriate, such as, "The prohibition in this Rule is subject to the exception in R.P.C. 8.4(c) for 'lawful covert activity.'"

With respect to Rule 4.2, some stakeholders told the subcommittee that pretext investigations would not be directed at a potential criminal defendant whom the supervising lawyer knows to be represented by counsel in the matter that is the subject of the investigation. However, other stakeholders expressed concern over how representation "in the matter," (which is not defined in the

comments to Rule 4.2), would be determined where the target of the investigation retains counsel but a proceeding has not yet begun. And one member pointed out the anomaly that investigating compliance with a court order by a represented party already adjudged to have violated the law would be more difficult, *cf. Apple Corps Ltd.*, 15 F.Supp. 2d at 474-76, than investigating a not-yet-represented party merely suspected to have done so.

On balance, the subcommittee favored the interests advanced in R.P.C. 4.2 over any investigative needs that might arise after the target of the investigation had obtained counsel in the particular matter that is the subject of the investigation. However, the subcommittee chose not to address when counsel has been retained in the particular matter that is the subject of the investigation.[5]

Because the proposed changes to R.P.C. 8.4(c) discussed below do not permit direct lawyer participation in pretext

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[5] *Compare* Comment [4] to R.P.C. 4.2 ("the existence of a controversy between a government agency and a private party [] does not prohibit a lawyer from communicating with nonlawyer representatives of the other regarding a separate matter") *with* Comment [5] to R.P.C. 4.2 ("communications authorized by law" may include actions of investigative agents, acting on behalf of a lawyer representing governmental entities, "*prior to* the commencement of criminal or civil enforcement proceedings." (emphasis added))

investigations, but expressly contemplate the involvement of non-lawyer assistants, the subcommittee concluded that R.P.C. 4.3 probably would not be implicated. Also, insofar as pretext investigations conceal lawyer involvement, the target of the investigation would not be likely to be aware of, much less misunderstand, that lawyer's role.

Finally, because the subcommittee determined that the proposed exception to R.P.C. 8.4(c) would allow lawyers to direct, advise, or supervise *others*, whose conduct might place the lawyer in violation of R.P.C. 5.3, but not directly participate in, lawful covert activity, the subcommittee determined that the exception must also apply to R.P.C. 8.4(a)(violation of a rule by knowingly assisting or inducing another to do so). Under the subcommittee's proposal, because the lawyer could advise others to engage in certain types of misrepresentation or deceit, the lawyer would not violate the general rule of R.P.C. 5.3(a lawyer is responsible for conduct of a non-lawyer assistant) if the person acted consistently with the lawyer's advice.

However, one member expressed concern that exempting lawyer conduct in this area from R.P.C. 8.4(a) could dilute the

lawyer's responsibilities under R.P.C. 5.3. For example, a lawyer might have instructed an investigator to act consistently with the exception, but later learn that the investigator had engaged in conduct beyond that allowed by the exception. The subcommittee concluded that the lawyer's instructions would satisfy the "reasonable efforts" standard of R.P.C. 5.3(b). But if the lawyer failed to take reasonable remedial action, notwithstanding such knowledge of the investigator's actual conduct, the lawyer could be subject to discipline under R.P.C. 5.3(c)(1)("the lawyer ... with knowledge of the specific conduct, ratifies the conduct involved.") For the same reason, the lawyer might be subject to discipline if the lawyer only learned of the investigator's actions after the investigation had ended, but the lawyer nevertheless used the fruits of the investigation.

V. Possible Changes to R.P.C. 8.4(c)

Due to the subcommittee's relatively small size and the diversity of viewpoints within it, the subcommittee seriously considered presenting alternatives, rather than a single recommendation, to the committee of the whole. Ultimately, the subcommittee aligned itself behind the following proposal.

Nevertheless, the subcommittee wishes to preface that proposal with a review of various concerns.

The subcommittee considered the view that "the literal application of the prohibition of R.P.C. 8.4(c) to any 'misrepresentation' by a lawyer, regardless of its materiality, is not a supportable construction of the rule," particularly in light of R.P.C. 4.1(a)'s prohibition on "false statement[s] of *material* fact or law," (emphasis added), which would otherwise be rendered inoperative if *any* misrepresentation were a violation. *Apple Corps*, 15 F.Supp.2d at 475-76. The court in *Apple Corps* seemed to accept that "RPC 8.4(c) does not apply to misrepresentations solely as to identity or purpose and solely for evidence-gathering purposes," *id.* at 475, "especially where it would be difficult to discover the violations by other means." *Id. See also Gidatex*, 82 F.Supp. 2d at 125-26.

However, the subcommittee rejected an "the end justifies the means" approach to misrepresentations inherent in pretext investigations as irreconcilable with *Pautler*. The subcommittee was also troubled that merely raising the materiality threshold to protect pretexting would not provide adequate guidance and could not be reconciled with *Fisher*. Instead, the proposal limits private

attorneys to misrepresentations about "matters of background, identification, purpose, or similar information," and it applies other limiting principles to all lawyers.

As indicated, the exceptions adopted in several states are limited to "lawful investigations." The subcommittee saw value in this limitation because, at least in the criminal context, it provides a frame of reference to determine proper lawyer action. For example, the substantive law of entrapment restricts action of a government agent that would induce a suspect to commit a crime.

However, the subcommittee also recognized that a lawyer who had directed a pretext investigation should not be exposed to discipline solely because a court made a post hoc determination that the investigation had not complied with such a substantive legal principle. Hence, the subcommittee opted for a reasonable, good faith belief qualification on "lawful" for purposes of discipline. The citations in the comment to *Davis* and *Leon* raise the legal principle that while a search warrant may suffer from a fatal flaw, the underlying search may still be lawful based on the good faith belief of the officer who executes the warrant.

The subcommittee had the greatest difficulty drawing meaningful distinctions among the different societal interests furthered by investigations involving deception or subterfuge. For example:

- Although criminal prosecutors most often enforce laws that protect public safety, they also deal with violations of criminal laws, such as securities fraud, having primarily economic consequences.
- Other government lawyers enforce civil laws that usually have only economic consequences. However, some civil law violations, such as consumer fraud involving prescription drugs could have adverse public health or safety consequences beyond having paid for a worthless product.
- Some private attorneys bring statutory claims that equally further the strong public interest in areas such as employment discrimination, housing discrimination, securities fraud, and antitrust, or that are rooted in the prevention of consumer fraud that may arise from trademark infringement.

The subcommittee reconciled these difficulties with a proposal that is more permissive as to government attorneys and more

restrictive as to non-government attorneys, in lieu of alternative proposals or a minority report. However, the subcommittee includes two strongly held minority views: first, any exception should be limited to government attorneys; or, second, it should be limited to government attorneys involved in criminal prosecutions that implicate public safety. With these caveats, the subcommittee proposes the following "exception" language and explanatory comments:

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may direct, advise, or supervise others in lawful covert activity that involves misrepresentation or deceit, when either:

(1) (A) the misrepresentation or deceit is limited to matters of background, identification, purpose, or similar information, and (B) the lawyer reasonably and in good faith believes that (i) a violation of civil or constitutional law has taken place or is likely to take place in the immediate future, and (ii) the covert activity will aid in the investigation of such a violation; or

(2) (A) the lawyer is a government lawyer and the lawyer reasonably and in good faith believes that (i) the action is within the scope of the lawyer's duties in the enforcement of law, and (ii) the purpose of the covert activity is either to gather information related to a suspected violation of civil, criminal, or constitutional law, or to engage in lawful intelligence-gathering.

[TO FOLLOW EXISTING COMMENT 2]

[2A] "Covert activity" means an effort to obtain information through the use of misrepresentations or other subterfuge. Whether covert activity is "lawful" will be determined with reference to substantive law, such as search and seizure. However, a lawyer will not be subject to discipline if the lawyer provided direction, advice, or supervision as to the covert activity based on the lawyer's objectively reasonable, good faith belief that the activity was lawful, even if the covert activity is later determined to have been unlawful. The objective reasonableness and good faith of the lawyer's conduct is also determined with reference to substantive law. *See, e.g., Davis v. United States,* __ U.S. __, 131 S. Ct. 2419, 2429 (2011); *United States v. Leon,* 468 U.S. 897, 918-22 (1984).

[2B] A lawyer may not participate directly in covert activity. However, Rule 8.4(c) does not limit the application of Rule 1.2(d) (allowing a lawyer to discuss the legal consequences of any proposed criminal or fraudulent conduct with a client or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law).

[2C] A lawyer whose conduct falls within the exception to Rule 8.4(c) does not violate Rule 8.4(a)(knowingly assist or induce another to violate these rules). In all other respects, the lawyer's conduct must comply with these rules. For example, a lawyer who directs, advises, or supervises others in covert activity directed at a person or organization the lawyer knows to be represented in the matter that is the subject of the covert activity may violate Rule 4.2. Further, if a lawyer who has directed, advised, or supervised a person engaging in covert activity learns that such person's conduct has exceeded the limitation in Rule 8.4(c)(1)(A), the lawyer may violate Rule 5.3 by failing to take reasonable remedial action.

While the subcommittee hopes that the compromises inherent in this language are apparent and reasonably self-explanatory, the

phrase "lawful intelligence gathering" may be neither. It reflects strong input from stakeholders in the law enforcement community. While those stakeholders acknowledged that this activity may usually involve national security considerations, they opposed any such limiting language in the rule based on examples such as:

1. Health-care investigations of patterns of overdose deaths and doctor "pill mills" where an undercover agent will pose as a patient seeking excessive quantities of narcotic medications to learn whether any doctors are over-prescribing. *See United States v. Jahani & Peper,* District of Colorado case number 11-cr-00302-CMA.
2. IRS investigations where statistical data shows that an unusually high percentage of a return preparer's returns have refunds, so an undercover agent poses as a tax payer to learn whether fraudulent returns are being created.
3. Hazardous waste investigations where an undercover agent poses as a foreign national to learn whether anyone in the domestic waste industry is willing to illegally ship hazardous waste overseas.

4. Fencing investigations where an undercover agent opens a pawn shop and holds himself out as a fence to learn whether burglars are fencing stolen property.

Respectfully Submitted,

Thomas E. Downey, Jr.

Thomas E. Downey, Jr.

December 19, 2011

SUPPLEMENTAL REPORT OF THE

PRETEXTING SUBCOMMITTEE

The pretexting subcommittee[1] respectfully submits the following supplemental report.

I. Summary

In seeking to obtain information through covert investigative activities ("pretexting"), attorneys will often be in a position to advise clients or procure investigations by investigators or nonlawyer assistants. Conduct involving misrepresentation and nondisclosure may be inherent in many investigations and is often intended to mislead the targets, at least to the extent of causing them to treat the investigator as a member of the public or ordinary customer. The subcommittee recommends revising rule 8.4(c) of the Rules of Professional Conduct to address when such advice may be given, while continuing to prohibit dishonesty, fraud, deceit or misrepresentation by the lawyer himself or herself.

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[1] This report supplements the Final Report of the Pretexting Subcommittee, Colorado Supreme Court Standing Committee on the Rules of Professional Conduct (Dec. 19, 2011) [hereinafter Final Report]. Tom Downey chaired the subcommittee. Members included: H. Berkman; J. Haried; M. Kirsch; A. Rocque; A. Rothrock; A. Scoville; D. Stark; J. Sudler; J. Webb; and J. Zavislan.

After presenting its report to the Standing Committee in December 2011, and after substantial deliberation and consideration of comments received from a variety of stakeholders, the subcommittee has revised the proposed amendment to R.P.C. 8.4(c). The revised proposal is less ambitious than the subcommittee's initial proposal, insofar as it is simpler, avoids several criticisms received in stakeholder comments, and requires no Comment changes. Section III of this report presents the revised proposal, and discusses and responds to some of the criticisms received primarily from the criminal defense bar.

However, unlike the initial report, which presented a single proposal, a minority of the subcommittee recommends one of two alternatives, presented in section V: (a) limit this amendment to government attorneys involved in law enforcement, or, failing that, (b) take no action. These alternatives reflect the minority's position that, even as revised, the proposal is too broad.

The changes arose because, as suggested at the Standing Committee's last meeting, the subcommittee solicited, received, and

carefully examined input from the following additional stakeholders:[2]

- Attorney General of Colorado: Letter from John W. Suthers (March 20, 2012) [AG]
- Colorado Criminal Defense Bar: Letter from Dan Schoen (Feb. 16, 2012) [CCDB]
- Colorado District Attorney's Council: Letter from Larry R. Abrahamson (March 22, 2012) [CDAC]
- Family Law Section, Colorado Bar Association: E-mail from Brenda L. Storey (Feb. 6, 2012) [CoBar Family]
- Intellectual Property Section, Colorado Bar Association: Letter from Nina Y. Wang (March 16, 2012) [CoBar IP]
- International Trademark Association: Letter from Alan C. Drewsen (March 19, 2012) [INTA]
- Marksmen: E-Mail from Ken Taylor (March 8, 2012) [Marksmen]

[2] Hereinafter, comments will be cited using the name indicated in brackets, in the form, for example, "Oracle Comment." The Colorado Trial Lawyers Association and the Colorado Defense Lawyers Association were contacted, but did not provide a response.

- Office of the Federal Public Defender, Districts of Colorado and Wyoming: Letter from Raymond P. Moore (Feb. 8, 2012) [FedDefender]
- Office of the State Public Defender: Memorandum from Frances Smylie Brown (Feb. 17, 2012) [StateDefender]
- Oracle Corporation: Letter from Todd Adler (March 14, 2012) [Oracle]
- RE/MAX, LLC: Letter from Adam Lindquist Scoville (March 20, 2012) [RE/MAX]
- Standing Committee of the Criminal Justice Act Panel, United States District Court for the District of Colorado (Feb. 27, 2012) [CJA Standing Committee]
- State of Colorado, Office of the Alternate Defense Counsel: Letter from Lindy Frolich (Feb. 15, 2012) [OADC]
- U.S. Department of Justice, United States Attorney, District of Colorado (April 18, 2011) [USA1]
- U.S. Department of Justice, United States Attorney, District of Colorado (March 13, 2012) [USA2]

Comments by various stakeholders are incorporated throughout the report. All responses are provided as Attachment A to this report.

In addition, the subcommittee considered that Missouri has amended its rule, as noted in the updated table of other states' rules, comments, and ethics opinions found in Attachment B.

II. Background[3]

The subcommittee was formed in response to an inquiry from the Colorado Bar Association Intellectual Property Section as to how rules such as R.P.C. 4.1, 4.2, 4.3, 5.3, and 8.4(c) might limit certain efforts to gather evidence before commencing a civil action, and thereby assure compliance with C.R.C.P. 11. For example, counsel representing a trademark holder might arrange for the purchase of an unlicensed product that infringed on the trademark using a person who misrepresented matters such as his or her identity, purpose for purchasing, desire to become a distributor of such products, and lack of affiliation with counsel. *See Apple Corps Ltd. v. Int'l Collectors Soc'y*, 15 F.Supp. 2d 456, 475 (D.N.J. 1998) (describing such investigative techniques, and concluding, "If plaintiffs' investigators had disclosed their identity and the fact that

[3] Section II. is adapted from the corresponding section of the subcommittee's Final Report, and is included for the reader's convenience.

they were calling on behalf of plaintiffs, such an inquiry would have been useless to determine [defendant's] day-to-day practices."); *Accord Gidatex v. Campaniello Imports, Ltd.*, 82 F.Supp. 2d 119 (S.D.N.Y. 1999). However, courts—even courts that have condoned such investigations—have also excluded the resulting evidence or found ethical violations when the investigations have gone too far. *See Hill v. Shell Oil Co.*, 209 F.Supp. 2d 876, 879-880 (N.D. Ill. 2002) (concluding, "Lawyers (and investigators) cannot trick protected employees into doing things or saying things they otherwise would not do or say. ... They probably can employ persons to play the role of customers seeking services on the same basis as the general public"); *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F.Supp. 2d 1147, 1155-60 (D.S.D. 2001) (finding violations of South Dakota analogs to rules 4.2, 4.3, 5.3, and 8.4); *In re Curry*, 880 N.E.2d 388, 404-05 (Mass. 2008) (disbarring attorney because, unlike "investigators who pose as members of the public in order to reproduce pre-existing patterns of conduct, [the attorney] built an elaborate fraudulent scheme whose purpose was to elicit or potentially threaten the [subject] into making statements that he otherwise would not have made"). *See, generally*, "Cheat

the Beatles: Ethics in Investigations," Alec Rothrock, Essay D3, Essays on Legal Ethics and Professional Conduct in Colorado, First ed. (CLE in Colo., Inc. Supp. 2008).

Particular concern was expressed within the subcommittee because of our supreme court's statement, "[w]e stand resolute against any suggestion that licensed attorneys in our state may deceive or lie or misrepresent, regardless of their reasons for doing so." *In re Pautler*, 47 P.3d 1175, 1183 (Colo. 2002)(sanctioning deputy district attorney for misrepresenting that he was a public defender to a barricaded and armed murder suspect in the context of surrender negotiations).

The subcommittee determined that a handful of states have addressed this issue through rule provisions allowing attorney involvement in "lawful investigative activities," investigations "authorized by law," and "lawful intelligence-gathering activity," or merely providing that rule 8.4(c) is not violated unless the misrepresentation "reflects adversely on the lawyer's fitness to practice law." Most of these states allow attorneys to act as advisors but not as direct participants. Likewise, most such states, namely Michigan, North Dakota, Oregon, Virginia, and Wisconsin,

permit such conduct by all attorneys, while in three (Alabama,[4] Missouri, and Florida), protection is limited to government attorneys. *See* Attachment B.

In all, at least ten states have either a rule, a comment, or an ethics opinion suggesting that all attorneys may at least supervise pretext investigations, and another six have a rule, comment, or ethics opinion reaching the same conclusion with respect to government attorneys. In several other states, there may have been less reason to address the issue through a rule change because cases held, usually in the course of evidentiary motions, that advising, retaining, or instructing investigators who pose as members of the public to reproduce pre-existing patterns of unlawful conduct does not violate the state ethical rules.[5]

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[4] In Alabama, notwithstanding that the exception that applies only to prosecutors, an ethics opinion suggests that any lawyer may employ private investigators to pose as customers under the pretext of seeking services on the same basis or in the same manner as a member of the general public. *Compare* Alabama R.P.C. 3.8(2)(a) *with* Alabama Op. RO-2007-05 (Sept. 12, 2007).

[5] *See, e.g., Apple Corps Ltd.*, 15 F.Supp. 2d at 474-76 (New Jersey); *Gidatex*, 82 F.Supp. 2d 119 (New York); *Hill*, 209 F.Supp. 2d at 879-880 (Illinois); *cf. In re Curry*, 880 N.E.2d at 404-05 (disbarring attorney but distinguishing the "elaborate fraudulent scheme" present there from the situations approved of in *Gidatex, Apple Corps* and *Havens Realty Corp v. Coleman*, 455 U.S. 363, 373-75 (1982)). In other cases, courts in other states decided that the rules were violated, or decided to exclude evidence on the basis of conduct they saw as violating the rules. *See e.g., Midwest Motor Sports, Inc.*, 144 F.Supp. 2d at 1155-60 (South Dakota). Other cases discuss evidence obtained by such means, without analyzing the ethical propriety of any lawyer involvement.

III. Revised Proposed Amendment to R.P.C. 8.4(c)

The subcommittee has narrowed its initial proposal to the following change to the Rule, without any change in the Comment:

Colo. RPC 8.4

> It is professional misconduct for a lawyer to:
>
> . . . . . .
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, *except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities*;

Numerous aspects of the original proposal were carefully reconsidered in arriving at this substantially simpler language and abandoning the proposed Comment changes. The subcommittee believes that the revised proposal better balances the competing considerations raised by stakeholder comments.

A. Explanation of the Revised Proposal

In settling on this text, the subcommittee contemplated that the text contains three boundaries on the proposed exception: 1)

the exception applies only to "investigative activities;" 2) the exception does not allow direct participation, but only allows the lawyer to "advise, direct, or supervise" the activity; and 3) the investigative activity must be "lawful." Because the committee believes that these limitations are expressly stated and their meaning should be reasonably clear from the plain text of the proposed rule, the committee now believes no additional comments to the rule will be necessary. However, to aid in the Standing Committee's consideration, and to facilitate the suggestion of comments if the Standing Committee believes the limitations are not as clear as the subcommittee perceives them to be, we explain each in turn.

1. "Investigative Activities"

The term "investigative activities" is fairly broad, and its function as part of the proposed rule is not to prescribe the specific investigative techniques that the lawyer may advise, direct or supervise. Yet, in the spectrum of conduct that may be actionable under R.P.C. 8.4(c), there is much that the term "investigative activities" excludes. The subcommittee's discussion and

understanding is that the vast bulk of cases prosecuted under Rule 8.4(c) are cases involving lawyers who, for example, lie to their clients or misuse client funds. *See, e.g.*, People v. Katz, 58 P.3d 1176, 1189 (Colo.O.P.D.J. 2002)(attorney disbarred for knowing conversion of funds in dispute between him and co-counsel, misconduct based on deceit, dishonesty, and fraud, commingling of property, and attempted conversion). Such cases do not involve "investigative activity" of the type that might be eligible for the exception. Even *Pautler* did not involve an investigation, and the Colorado Supreme Court expressly distinguished the kind of "attorney involvement in undercover investigative operations that involve misrepresentation or deceit" that would qualify for other states' exceptions, as "circumstances inapposite" to Pautler's conduct. *See* 47 P.3d at 1179 and n. 4. The main purpose of limiting the proposed exception to "investigative activity" is to ensure that such cases—and indeed any situation other than the use of non-lawyer investigators—would continue to constitute violations of Rule 8.4(c).

2. "Advise, direct, or supervise"

As with the initial proposal, the exception in the current proposal covers lawyers who "direct, advise, or supervise others," but does not allow their direct participation. The subcommittee continues to believe that, so long as a lawyer is not a direct participant, the *degree* of lawyer's involvement should not otherwise be restricted, and so the phrase "direct, advise, or supervise," remains in both this and the minority proposal. Section V., *infra.*

However, stakeholders who opposed the overall proposal took the view that forbidding the lawyer from participating directly does not render the proposal acceptable. As one commentator put it, allowing the lawyer to advise, direct, or supervise pretext investigations is "wordsmithing which will only prove to create a distinction without a difference." FedDefender Comment at 2 (posing the example of a law enforcement officer engaging in an online child pornography sting with a lawyer looking over his shoulder, advising what to type).

As between allowing the lawyer to participate directly in the pretext, allowing only indirect advice, direction, or supervision, or forbidding pretexting entirely, the subcommittee first notes that no

change to the Rules of Professional Conduct could accomplish the latter. *See* RE/MAX Comment at 2 (failing to allow lawyers ethically to oversee pretext investigations "will not render such investigations unlawful"). The current rule and *Pautler* have also led to an environment where lawyers actively distance themselves from oversight even of investigations that may later be used as evidence in their cases. Given this, a majority of the subcommittee continues to believe that allowing a lawyer to supervise the investigation increases the likelihood that the activities being supervised will remain lawful. While forbidding direct participation may not make the proposal palatable in the eyes of its opponents, the subcommittee nevertheless viewed it as an important measure to protect the public perception of the profession.[6]

3. "Lawful"

The current proposal only applies to conduct of others that is "lawful." The subcommittee discussed at length defining "lawful," but ultimately concluded that any definition would create more problems that it solved, as some stakeholders observed about the

[6] Allowing only indirect involvement also avoids problems attendant to an attorney becoming a witness. *See* Final Report at 9; R.P.C. 3.7.

initial proposal's citation to criminal cases invoking the good faith exception to the exclusionary rule. FedDefender Comment at 4.

Nevertheless, limiting lawyers to advising, directing or supervising conduct that is "lawful" has three main advantages: First, the subcommittee now believes that what is lawful can and should be determined on a case-by-case basis, by reference to the existing substantive constitutional, legislative, and common law. In other words, action is lawful if the investigator is entitled to take it; i.e. it is not tortious or proscribed by statute, constitution, or other law.[7] While the state of the law is not always settled, this gives attorneys and courts far more guidance than a *sui generis* standard that begs fresh definition in a Comment to the Rules or by the courts.

This leads to the second advantage of allowing investigative activity that is "lawful": even if the underlying substantive law is not completely transparent with respect to every possible tort or statute

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[7] One commentator suggested that a rule that allows covert activity would increase a lawyer's exposure to discipline by encouraging them inadvertently to advise others to commit illegal acts. *See* StateDefender Comment at 3 (*citing* Gramm-Leach-Bliley Act, 15 U.S.C. §6801 et seq. (2006): Telephone Records and Privacy Protection Act of 2006, 18 U.S.C. §1039 (2006); and *Quigley v. Rosenthal*, 327 R.3d 1044 (10th Cir. 2003)). On the contrary, because such activity is illegal, the lawyer would not be covered by the exception, and although there may be exceptions, *see Quigley*, it is reasonable to assume that consulting a lawyer as to the permissibility of an action is more likely to *increase* compliance than *decrease* it.

as applied to every combination of facts, lawyers already have a special responsibility to know what the law is (and if the law is not clear, to advise accordingly). Investigators, furthermore, are not privileged to perform unlawful acts and can reasonably be expected to make it their business to know what investigative tactics are lawful and what are unlawful. The subcommittee also noted that of the states whose rules allow lawyer involvement in pretexting, none has attempted to define when such activity is lawful.

The third advantage to the "lawful" standard is that it incorporates the kind of two-tier standard the subcommittee aimed to present in the original proposal, without complicated new criteria. In other words, there are many actions and statements that law enforcement officers can lawfully make that would be unlawful for private citizens, including private investigators. Yet, dishonesty and illegality are not the same thing; even without law enforcement powers, the kinds of misrepresentations most likely to be effective in legitimate investigations procured by private lawyers, *see* Marksmen Comment, are often not fraudulent or illegal. Therefore, in the context of pretexting in civil disputes, the contextually-sensitive standard of what is lawful is a more valuable

limiting principle on what misrepresentation should be allowed than the phrase "background, identification, purpose or similar information," which several stakeholders criticized as extremely broad.

B. Response to Comments on the Proposal

The subcommittee briefly responds to certain comments received concerning the initial proposal, to the extent relevant to the current proposal, as follows.

1. Need for the Proposed Change

While several stakeholders disputed any need for a change to R.P.C. 8.4(c),[8] contrary views have been communicated to the subcommittee by government attorneys, private attorneys who practice intellectual property law, and clients concerned over protecting their intellectual property.

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[8] *See* FedDefender Comment at 2 (citing "absence of a substantial and demonstrated need," and noting, "I have perceived no inability on the part of law enforcement or prosecutors to bring criminal charges, to conduct investigations, to garner intelligence, or otherwise to conduct their day to day activities. If *Pautler* or the current rule were some major impediment, I would have expected some significant effort to bring about change long before the passage of a decade"); StateDefender Comment at 2 ("It does not appear from this report that the AUSA, HUD or the AG denied that its attorneys were participating in, had participated in or had supervised others in covert activities nor did those agencies allege that the language of the existing Rule 8.4 had impeded any lawful covert investigations."); *see also* CJA Standing Committee Comment (endorsing FedDefender and StateDefender comments); CCDB Comments (same); OADC Comment (same).

a. Comments from Government Lawyers

Attorney General Suthers echoed the view of United States Attorney Walsh that it is "vital for government agents to consult attorneys in my office while conducting covert investigations." USA2 Comment at 1 (quoting AG Comment at 1); *see also* CDAC Comment ("The advice requested from District Attorneys by our law enforcement agencies as they perform these very sensitive covert investigations is crucial to a successful prosecution"). The Attorney General expressed concern that *Pautler*'s broad language continues to be cited, inaccurately in his view, as "erecting an impenetrable barrier to my attorneys providing appropriate guidance to investigators engaged in covert investigations." AG Comment at 1-2. The United States Attorney, citing R.P.C. 5.3, 8.4(a), and 8.4(c), said, "This well established practice of attorney involvement in covert investigations, however, is arguably in tension with the Rules as currently written." USA2 Comment at 2.

The subcommittee shares the concern that a government attorney's merely giving advice to law enforcement investigators could constitute "conduct *involving* dishonesty, fraud, deceit or misrepresentation," (emphasis added), under R.P.C. 8.4(c), either

alone or in combination with R.P.C. 8.4(a) or 5.3. Despite the broad language of *Pautler*, many members see this result as anomalous because "[m]ost courts have recognized that ruses are a sometimes necessary element of police work." *People v. Zamora*, 940 P.2d 939, 942 (Colo. App. 1996).

b. Comments from Private Lawyers

Other stakeholders (private attorneys, associations, investigators and companies), have reiterated that, as observed in the subcommittee's initial report, R.P.C. 8.4(c) "may prevent an attorney from conducting an appropriate prefiling investigation in claims related to intellectual property rights." CoBar IP Comment at 1. Such an inquiry typically includes using a private investigator to "contact the online seller, exchange communication with the seller and purchase infringing or counterfeit goods to ultimately identify the seller . . . to understand the scope of use of the protected trademark." Id.[9] These investigations "are crucial in

[9] *See also* INTA Comment at 1 ("Pretext investigations in trademark cases occur generally when trademark owners and lawyers hire investigators to pose as consumers, purchasers, or counterfeiters to ascertain how the alleged infringer or counterfeiter presents himself to the consuming public or to ascertain the source of infringing or counterfeiting goods."); Marksmen Comment ("My company has conducted approximately 75,000 investigations. ... Marksmen... has adopted what the courts have said is proper standard in terms of approaching a target

helping brand owners prevent the harm that results from consumer confusion or trademark counterfeiting...." INTA Comment at 1. Thus, "Rule 8.4(c) may have the unintended effects of materially hampering the protection of intellectual property rights and decreasing the value of intellectual property." CoBar IP Comment at 2. The consequence of rejecting a limited amendment "will not [be to] render such investigations unlawful but it will prevent organizations from employing their attorneys in an oversight role to help ensure that such investigations are conducted in a lawful and ethical manner." RE/MAX Comment at 2. Although no reported attorney discipline case in Colorado has turned on a private lawyer's involvement with a pretext investigation, such cases have arisen in other jurisdictions.[10]

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company under pretext: •Limit contact to low level employees; •Pose as consumer seeking information; •Only record what is said in standard sales context; •Do not seek extended admissions; •Do not engage in elaborate deceptions; •Be especially careful if litigation already commenced.").

[10] *See, e.g., Bratcher v. Kentucky Bar Ass'n*, 290 S.W.2d 648 (Ken. 2009) (violation of Rule 4.2 through equivalent of Colo. RPC 8.4(a) by hiring investigator to contact represented employer regarding nature of references given to callers regarding plaintiff); *In re Curry*, 880 N.E.2d 388, 408 (Mass. 2008) ("An investigator is 'another' for purposes of" former Mass. equivalent of Colo. RPC 8.4(a)); *In re Ositis*, 40 P.3d 500, 503-04 (Or. 2002) (by directing private investigator to interview opposing party posing as a journalist, lawyer violated Oregon Code equivalent of Rule 8.4(a) by violating equivalent of Colo. RPC 8.4(c) "through the acts of another"); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995) ("[I]f the investigator acts as the lawyer's 'alter ego,' the lawyer is ethically responsible for the investigator's conduct."). In addition, a minority of cases ruling on the admissibility of evidence gathered as the result of pretext investigations have excluded the evidence on the basis that the conduct violated the

A majority of the subcommittee also shares these concerns. However, as discussed in section III below, two members now believe that only the weightier policy considerations underlying the needs of law enforcement, not the lesser needs of private attorneys and their clients in some practice areas, warrant a Rule change that would allow greater attorney involvement in pretext investigations.

2. Departure from the ABA Model Rules

The subcommittee submits that opposition to the proposed amendment based on dissimilarity with the ABA Model Rules, *see* StateDefender Comment at 2, is overstated.

The Standing Committee's December 30, 2005 report to the supreme court recommending changes based on the 2000 revision of the Model Rules addressed uniformity as follows:

> Early in the process, the Standing Committee (like the Ad Hoc Committee) unanimously concluded that uniformity between jurisdictions adopting the New Model Rules is important. Uniformity enables the meaningful use of precedent from courts and ethics

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rules of professional conduct. *See, e.g., Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 347 F.3d 693, 698-99 (8th Cir. 2003) (lawyer violated Rules 4.2 and 8.4(c) through Rules 5.3 and 8.4(a) through conduct of private investigator); *McClellan v. Blazin' Wings, Inc.*, 675 F. Supp. 2d 1074, (D. Colo. 2009) (where private investigator hired by lawyers contacted represented persons in course of investigation, lawyers violated Colo. RPC 4.1, 4.2 and 8.4(c) "through the acts of another" under Colo. RPC 8.4(a)).

> committees in other jurisdictions. Moreover, the increase in multi-jurisdictional law practice (recognized by this Court when it adopted C.R.C.P. 220 through 222) renders uniform ethics rules beneficial to the Court and the bar alike.
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> To effectuate this preference for uniformity, the Committee utilized an informal presumption: Unless existing Colorado law or public policy – as established by prior rules, Court decisions, or Colorado Bar Association ("CBA") Ethics Committee opinions – justified a departure from a New Model Rule, the Committee would recommend adoption of the New Model Rule. However, this presumption was rebuttable and the Committee occasionally recommended a unique Colorado rule instead of a New Model Rule based on a determination that the recommended rule would be substantially better than the New Model Rule; but even in these situations, the Committee carefully weighed the benefits against the detriments of a non-uniform rule. The Committee also considered uniformity with respect to the comments to the rules; but the comments, by definition, do not establish black-letter standards and, therefore, the Committee deemed uniformity in the comments to be less critical.

Nevertheless, since 2005 the Standing Committee has recommended several such rule changes, and the supreme court has adopted them, without engaging in the policy analysis urged by one stakeholder, *see* FedDefender Comment at 5, as necessary to

depart from the Model Rules. For example, R.P.C. 3.8 was revised extensively in 2010, and R.P.C. 1.5 was revised in 2011.

The most compelling reason for a Colorado-specific rule is the uncertainty resulting from specific Colorado precedent—the *Pautler* case. Dicta in *Pautler* suggests any involvement in any misrepresentation is categorically prohibited, but also suggests that this categorical prohibition may not apply to indirect involvement with covert investigations. *Compare* 479 P.3d at 1182 *with id.* at 1179 & n. 4.

Further, a majority of the subcommittee continues to believe that Colorado lawyers who act under the proposed amendment would be doing so, for conflicts of law purposes, in Colorado. The mere use of an interstate communications device, as one stakeholder suggested, *see* StateDefender Comment at 3, by the person who engaged in the pretext at a lawyer's direction would not make the lawyer accountable for compliance with ethical rules of other jurisdictions unless the "predominant effect" of the lawyer's conduct occurred in another jurisdiction. *See* R.P.C. 8.5(b)(2). The subcommittee's suggestion that the proposed amendment would

reduce lawyer discipline proceeded from the belief that it removes uncertainty.

3. Relevance of a Lawyer's Intent

As revised, the proposed exception, covering only the lawyer's advice, direction, or supervision of "lawful investigative activities," no longer hinges on the intent of the lawyer.[11]

4. Availability of the Proposed Exception to Plaintiff/Prosecutors and Defense

Although the initial report discusses concerns of prosecutors and private attorneys who would be preparing a plaintiff's case, as some stakeholders have pointed out, defense counsel in civil and criminal disputes could invoke the proposed exception on the same footing as any private attorney. For example, in representing a

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[11] It is worth noting, however, that it would have been inaccurate to characterize even the original proposal as containing "a subjective 'good faith' standard for the lawyer's belief that his/her actions were lawful and in compliance with the exceptions noted in the amendments," StateDefender Comment at 4; *see also* FedDefender Comment at 4-5; CCDB Comment (endorsing comments of the Federal and State Public Defenders); OADC Comment (same). The original proposal required that the lawyer "reasonably and in good faith believes" that the action was within the scope of the scope of the lawyer's law enforcement duties (government), or that the law had been violated and the activity would aid the investigation (private), requiring a belief that is at once objective and subjective. Under R.P.C. 1.0 (h) "Reasonably" ... "denotes the conduct of a reasonably prudent and competent lawyer," and under 1.0 (i) "Reasonably believes" . . . "denotes . . . that the circumstances are such that the belief is reasonable." To the extent that the original proposal was overly nuanced concerning intent, the current proposal in any event avoids this concern.

client whose employee has filed a worker's compensation claim but was not yet represented, such a lawyer might direct an investigator to approach the claimant and ask for assistance, such as changing a tire, that would be inconsistent with the claimant's purported physical limitations. Likewise, a criminal defense attorney could use lawful covert means to investigate a violation of her client's constitutional rights, such as Fourth Amendment violations.

Although the text of the rule does not distinguish between prosecution and defense, or plaintiffs and defendants, the substantive law of what is "lawful" provides a significant distinction. What is lawful for a private citizen (including a private investigator) is much narrower than what is lawful for a police detective.

5. Interrelation with Rule 4.2 Concerning Communications with Represented Parties.

The current proposal does not create or imply any new exception to Rule 4.2. Hence, the subcommittee concluded that the Comment language in the initial proposal that "covert activity may violate Rule 4.2" was unnecessary. One stakeholder complained that the proposal "leaves open the critical question whether a

lawyer can supervise an investigation to prove a violation of a consent decree or injunction," assuming the defendant was represented in the original litigation. Oracle Comment at 5. If, under Rule 4.2, a failure to comply with an injunction is the same matter as the original litigation—and thus the defendant is represented 'in the matter,' this "puts a potentially debilitating restriction on pretexting investigations in situations like the one at issue in *Apple Corps.*" *Id.* at 6 (citing *Apple Corps. Ltd. v. Int'l Collectors Soc'y*, 15 F.Supp.2d 456 (D.N.J. 1998)). However, the subcommittee previously considered this issue and determined that the additional policy interests in protecting the attorney-client relationship that come into play once the target of the investigation has obtained counsel help outweigh the investigative needs of the other party. *See* Final Report at 11-12.[12]

[12] In addition to R.P.C. 4.2, the subcommittee previously considered other rule or comment changes, including to R.P.C. 3.8, 4.1, 4.3, 5.3, and 8.4(a). *See* section III.B.6, *infra*; Final Report, section IV., at 10-14. As discussed below and in the Final Report, the consensus in the subcommittee was against recommending changes to any other rule or comment.

6. *Whether Concerns over* Pautler *Could Effectively be Addressed by Comment Changes Only*

Before adopting the current proposal, the subcommittee also considered at length whether concerns of both government lawyers and private lawyers could be addressed by the addition of comments to R.P.C. 8.4 and 5.3, without more broadly endorsing lawyer participation in pretexting by a change in Rule 8.4(c).

According to Comment [1] to R.P.C. 8.4(a), lawyers are subject to discipline "when they request or instruct *an agent* to [violate the Rules] on the lawyer's behalf." (Emphasis added.) For prosecutors, clarification could be achieved by adding to this comment a statement that representatives of law enforcement agencies are not "agents" of a prosecutor or other government lawyer involved in law enforcement.[13]

However, such changes would not resolve private lawyers' concerns over discipline based on their dealings with investigators. Comment [1] to R.P.C. 5.3 lists "investigators" among persons

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[13] R.P.C 8.4(a)'s prohibition is arguably broader than the comment language, insofar as it prohibits violating or attempting to violate the Rules "through the act of another" (emphasis added) and not merely the acts of an "agent." For the purpose of this discussion, however, we assume that R.P.C. 8.4(a) would be interpreted consistently with the comment.

whom "[l]awyers generally employ," and thus, who act for the lawyer, "whether employees or independent contractors."

Ultimately, the subcommittee rejected this approach as unduly conflating agency analysis with professional responsibility. In other words, regardless of whether an exception could be achieved through such an interpretation, the subcommittee took the view that the lawyer ought not be able to escape responsibility for supervising his or her investigator, simply because the investigator would not be considered the lawyer's agent. The subcommittee concluded that legality of the conduct in which the lawyer was involved presented a more meaningful limitation than whether the actor was the lawyer's agent.

7. Differing Interests of Government and Private Attorneys

The suggestion by two subcommittee members to limit the proposed exception to lawyers representing the government is founded chiefly on the greater degree of deception allowed of law enforcement, as contrasted with private investigators. The majority of the subcommittee readily agrees that law enforcement is afforded

much broader latitude to dissemble. But this does not mean: a) that all dishonesty by a private investigator is unlawful; b) that the boundaries of what conduct would be unlawful are so unclear that courts cannot be trusted to apply them; or c) that no advice, direction, or supervision of pretext investigations by private attorneys should be tolerated.[14]

The paucity of case law specifically concerning the tort liability of investigators does not mean the standard is unclear. After all, private investigators are ordinary citizens and enjoy no special privilege or immunity from tort or criminal responsibility. Thus, courts seeking to determine if the investigator's activity is lawful need not search in vain for a special standard for investigative activity; they can rely on the wealth of ordinary common law and statute.

Moreover, there are strong policy reasons to recognize the need for an exception to apply to private as well as government attorneys. In many cases, pretext investigations can be the only way of

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[14] The minority report points to judicial recognition that law enforcement may engage in deception. *See, infra,* section V.A. Although cases are fewer, the majority of them hold the investigations to be permissible, or that some may be permissible but the lawyers or investigators went too far in the particular case. *See* section II. and n. 3, *supra* (citing cases).

gathering evidence of illegal deception or fraud, such as trademark counterfeiting, or housing discrimination. *See* INTA Comment ("[S]uch investigations may be used to gather evidence not otherwise discoverable...."). Public policy favors allowing a limited range of legal but dishonest conduct, where it is only in the conduct of investigations, and it is, after all, aimed at someone who the lawyer reasonably thinks is engaged in illegal deception of the public, if it is necessary to prevent that illegal deception.

Finally, the majority notes that no stakeholder has proposed limiting the exception to government attorneys. Quite the opposite; the vast bulk of comments opposing the amendment were from the criminal defense bar, concerned with possible abuse by government attorneys. In fact, by specifically limiting the proposed exception to "lawyers representing the government," the minority introduces a distinction that was criticized by several stakeholders: that the exception applies only to prosecutors and not to defense attorneys.

IV. CONCLUSION

The subcommittee has come to see, as the elephant in the room, the reality that lawyers who use investigators often expect

that the investigator will engage in conduct which a lawyer could not do directly. A regime in which the lawyer can be sanctioned merely for advising or supervising even lawful misrepresentation results in the lawyer maintaining distance from such conduct by giving the investigator only oblique instructions or, in the civil context, relying on the client or outside counsel to hire and instruct the investigator more specifically. The changes to Rule 8.4(c) discussed above would remove these artifices and permit lawyers to advise, direct, or supervise investigators concerning lawful investigative activity. Such advice and direction would enable lawyers to be held more accountable for investigations they procure or advise and, through that oversight, would probably make the investigations less likely to violate the law.

V. Minority Report

Two members submit the following minority report.

A. Limit Any Change to Government Lawyers Involved in Law Enforcement

These members consider the revised proposal, *see* Section III., *supra*, to be overly broad. They propose a narrower exception to R.P.C. 8.4(c) that would read:

> Colo. RPC 8.4
>
> It is professional misconduct for a lawyer to:
>
> . . .
>
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, *except that a lawyer* ***representing the government*** *may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities;* . . . .

The phrase "a lawyer representing the government" avoids potential uncertainty in the phrase "government lawyer," which could be interpreted as applying to lawyers who are paid by, but do not represent, the government, such as public defenders, alternative defense counsel, and legal services lawyers. *See* Missouri Rule

8.4(c) (recently amended to include an exception for a lawyer "for a criminal law enforcement agency, regulatory agency, or state attorney general," who may "advise others about" or "supervise another in an undercover investigation if the entity is authorized by law to conduct undercover investigations").

While both government lawyers and private lawyers in certain civil areas have legitimate angst over the breadth of R.P.C. 8.4(c), especially in light of *Pautler*, the interests of the former differ because courts have long acknowledged—as did the Ethics Committee in Formal Opinion 112—that law enforcement officers may dissemble. "Although deception by the police is not condoned by the courts, the limited use of ruses is supported by the overwhelming weight of authority. Most courts have recognized that ruses are a sometimes necessary element of police work []." *People v. Zamora*, 940 P.2d 939, 942 (Colo. App. 1996). The

comment to Missouri Rule 8.4(c) similarly observes, "The exception involves current, acceptable practice of these entities."[15]

In contrast, these members have not found any authority suggesting that private investigators acting for lawyers in civil matters may engage in deceit. Hence, at a minimum, a lawyer who directs or supervises such activity could, in some circumstances, be causing tortious conduct to occur. *See generally*, "Liability of one hiring private investigator or detective for tortious acts committed in course of investigation," 73 A.L.R. 3d 1175. *See also Sequa Corp. v. Lititech, Inc.*, 807 F. Supp. 653, 663 (D. Colo. 1992) ("Law enforcement authorities are afforded license to engage in unlawful or deceptive acts to detect and prove criminal violations. Private attorneys are not.").

But these members' position does not depend on the assumption that all deceptive conduct by investigators in civil matters is necessarily tortious or in any other way unlawful.

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[15] *See, e.g., People v. Nelson*, 2012 COA 37 (officer obtained suspect's consent to open door by knocking and saying, "maintenance"); *People v. Roth*, 85 P.3d 571, 572-73 (Colo. App. 2003) ("Police officers, acting with the intent to interdict persons transporting drugs to a music festival, posted large signs on a road stating 'Narcotics Checkpoint, One Mile Ahead' and 'Narcotics Canine Ahead.' The signs were part of an elaborate ruse because there was no checkpoint or other impediment to the free flow of traffic. The purpose of the signs was to allow police officers, dressed in camouflage clothing and hidden on a nearby hill, to monitor the reactions of persons traveling past the signs.").

Rather, these members perceive such conduct to be dishonest, and their desire to limit the exception to government lawyers is informed by the plain language of R.P.C. 8.4(c) -- "dishonesty, fraud, deceit, or misrepresentation." Because the legality of private conduct involving fraud, deceit, or misrepresentation could be ascertained from statutes and the common law of torts, the Rule's use of the term "dishonesty," which alone is neither the basis of any tort nor an element of any crime, must go further. *See People v. Katz*, 58 P.3d 1176, 1189 (Colo. O.P.D.J. 2002) (adopting the following definition of "dishonesty" from a disciplinary matter, *In the Matter of Shorter*, 570 A.2d 760, 769 (D.C. App. 1990), "it encompasses conduct evincing 'a lack of honesty, probity or integrity in principle; a lack of fairness and straightforwardness . . . .'").

The Rules do not define "dishonesty." Nor has our supreme court done so in a disciplinary case.[16] A line of Oregon disciplinary cases distinguishes fraud from dishonesty. While the former involves affirmative misrepresentation, the latter encompasses "conduct that indicates a disposition to lie, cheat, or defraud;

[16] In the insurance context, our supreme court has equated it to "wrongful purpose and moral obliquity." *Western Sur. Co. v. May Mercantile Ass'n*, 283 P.2d 959, 960 (Colo. 1955).

untrustworthiness; or a lack of integrity." *In re Complaint as to Conduct of Skagen*, 342 Or. 183, 203, 149 P.3d 1171, 1184 (2006).

These members view even lawful deception by private investigators as involving conduct that still lacks "fairness and straightforwardness," *In the Matter of Shorter*, 570 A.2d at 769, and indicates "a predisposition to lie." *In re Complaint as to Conduct of Skagen*, 342 Or. at 203, 149 P.3d at 1184. Therefore, these members depart from the majority because they believe that a civil lawyer who directs or supervises even lawful pretexting diminishes the profession as a whole by suborning the investigator's dishonesty. This problem may be exacerbated because the majority's emphasis on whether investigative activities are "lawful" leaves the sponsoring lawyer with no reason to ask the harder question -- are the activities "dishonest"?

Although the distinction may be a matter of degree, these members also believe that pervasive judicial acceptance of deception by law enforcement puts the government lawyer directing or supervising dishonest investigative activities on a higher moral plane than his or her civil counterpart. Further, government lawyers have incentives that do not exist in civil litigation to monitor

potentially illegal conduct by their investigators. Because a government investigator acts as an arm of the state, such conduct could lead to suppression of evidence based on constitutional violations. However, because misconduct by a private investigator does not raise constitutional concerns, similar sanctions have not been consistently imposed in civil proceedings involving private litigants. Hence, the civil lawyer is rarely at risk that investigative misconduct will become a fatal flaw in the case.

While the members supporting a limitation to government attorneys engaged in law enforcement have some sympathy for difficulties faced by the intellectual property lawyers, as discussed at length in various stakeholder comments, the current proposal is not cabined to any area of civil practice. Even the limiting language in the initial proposal, "matters of background, identification, purpose, or similar information," would not lead to such a restriction. An area of very likely potential abuse would be dissolution of marriage cases. Given the high degree of animosity in such cases, one can only imagine the deceptions that could be put to use and the correlative diminution in the public perception of the integrity of lawyers who were involved.

In sum, these members reject extending "the end justifies the means" rationale, beyond the unique needs of lawyers who represent the government. *See Hamilton v. Miller*, 477 F.2d 908, 909 fn. 1 (10th Cir. 1973) ("It would be difficult indeed to prove discrimination in housing without this means [pretext applicant] of gathering evidence."). They are gravely concerned that giving all private attorneys the ability to direct, advise, or supervise persons in lawful covert activity would eventually lead to abuse and a decline in the morality and stature of the profession.

If the minority proposal is rejected, then these members favor taking no further action.

B. Take No Further Action

Any change to the Rules, comments, or both, that broadens lawyer involvement in pretexting, (i.e., covert investigations), raises an overarching policy question noted by several stakeholders. In the words of one, "The public persona of lawyers is already relatively poor, and we are concerned that an amendment that specifically allows a lawyer to direct, advise, or supervise others in

lawful covert activity that involves misrepresentation or deceit will only make this worse." CoBar Family Comment.[17]

As discussed in the initial report, the majority still believes that Colorado lawyers are entitled to more guidance than the current Rules and Comments provide, especially in light of *Pautler.* The minority agrees in principle, but notes the absence of any R.P.C. 8.4(c) case in Colorado involving a covert investigation.

The majority further submits that the above characterization of the policy issue disregards the benefit that enabling lawyers to supervise and give legal advice to those engaged in investigations that involve pretexting would reduce the potential for improper conduct. The minority responds that this aspirational view is incapable of verification. While the majority also takes comfort in the requirement that such activity must, to afford the lawyer any protection from disciplinary action under R.P.C. 8.4(c), be "lawful," the minority would reiterate that, for the reasons discussed in section V.A, the ultimate issue should be "dishonesty," not legality.

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[17] *See also In re Pautler*, 47 P.3d 1175, 1179 (2002) ("Lawyers themselves are recognizing that the public perception that lawyers twist words to meet their own goals and pay little attention to the truth, strikes at the very heart of the profession -- as well as at the heart of the system of justice.").

The majority recognizes the concern of some stakeholders that for the Standing Committee to have considered this issue, but then chosen to do nothing further, could be perceived as an endorsement of the broadest possible interpretation of *Pautler*. Such a perception could reduce the comfort that some government lawyers find in Formal Ethics Opinion 112, "Surreptitious Recording of Conversations or Statements," (July 19, 2003) ("The bases for the Committee's recognition of a 'criminal law exception' are the widespread historical practice of surreptitious recording in criminal matters, coupled with the Committee's belief that attorney involvement in the process will best protect the rights of criminal defendants."), or that other lawyers involved in investigations may take from the explicit, if brief, comment in *Pautler* distinguishing the attorney's actions from other states' exceptions for the supervision of covert investigations. *See Pautler*, 47 P.3d at 1179 and n.4.

The minority believes that drawing any inferences from inaction by the Standing Committee would be very speculative. The somewhat analogous rule of statutory construction applies only where the legislature has taken "action in amending a previously

construed statute without changing the portion that was construed." *People v. Swain*, 959 P.2d 426, 431 (Colo. 1998). Further, the OARC's representative on the Standing Committee has declined to take a position. This suggests that if the Standing Committee does nothing, OARC would simply continue to exercise reasonable prosecutorial discretion. After all, notwithstanding the shadow cast by *Pautler*, stakeholder comments confirm that covert investigations are ongoing, in both government and private proceedings.

The minority remains persuaded by the perception, and perhaps reality, of diluting lawyers' honesty. If the broadest language in *Pautler* applies to all supervision of pretext investigations (which is the core question at issue), then the proposed change in the R.P.C. 8.4(c) could be characterized as a calculated retreat from holding lawyers to the highest standard of honesty. Hence, the minority submits that, if a change is not limited to government lawyers, the status quo should be preserved because the cure would be worse than the disease.

Respectfully Submitted,

/s/

Thomas E. Downey

ATTORNEY FEE AGREEMENTS

FOR DISCUSSION WITH THE SUPREME COURT STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

For discussion February 24, 2017

At the November 4, 2016 committee meeting, a discussion involved Conduct Rule 1.5 and inclusion of directions for flat fees. From that discussion, a conversation emerged about basic guidelines for client fee agreements in general. As part of these conversations, several questions came up concerning the dearth of direction for lawyer-client fee agreements in our current rules.

The discussions involve primarily C.R.C.P. 1.5 and focus on subsection 1.5(b): "When the lawyer has not regularly represented the client the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation." The Conduct Rules give very little additional guidance with respect to fee or engagement agreements. Lawyers and law firms are essentially left to their own devices and creativity for the expression of a working agreement between lawyer and client pertaining to the legal service to be rendered. Colorado Rules of Professional Conduct do not provide comprehensive direction on agreements for legal fees or for legal representation.

Under these circumstances, questions abound with respect to suggestions for composing agreements between clients and lawyers that express the totality of the arrangement for the provision of services and the compensation by payment of agreed fees. These questions involve issues of whether all of the terms of understanding should be in writing, whether those terms should contain formal requisite contents such as scope of service, time limits, staffing, client identification, dispute resolution, and, in fact, the very necessity for an agreement in the first place.

One specifically repetitious issue is directed at the description of the scope of the work or service that the client needs to have and that the lawyer agrees to provide. This discussion can evolve into an insoluble issue as to whether it is practically feasible to use boilerplate type of expressions to sufficiently describe the extent of service the client needs under a vast variety of situations.

The conduct rules do not suggest how to expressly describe legal services and they may not be suitable to do so. It simply may not be feasible to craft universally described services applicable to the vast array of specific client services contemplated by a particular agreement. It may not be feasible to describe the extent of legal service lawyers are engaged to provide that cover the entire spectrum of human and commercial alternatives. Because of these limitations the discussion of communications between lawyer and client to describe the relationship between them is not formulated or exemplified in the rules or the comments to the rules.

Nonetheless, the existing Colorado conduct rules do at least mention certain characteristics that can form the nucleus of a workable service agreement between lawyer and client. Rule 1.5(b) directs the lawyer to communicate to the client the basis or rate of the fees and expenses the lawyer will expect to charge for the legal service. The rule also requires that this message be in writing and that it be delivered either before or within a reasonable time after the commencement of the representation.

But the rule does not give any guidance to an expression or description of the legal service itself. That is to say the rule does not require an expression of the scope of the service or any suggestion as to how the service should be rendered. What might be regarded as the most important aspect of the new client-lawyer relationship - what the lawyer undertakes to do for the client - is not mentioned in the current rule. There simply is no ordained mandate to do so. And

from the information currently available from the American Bar Association, it does not appear that such a mandate exists in other jurisdictions except, perhaps California and Florida. Otherwise, other than a written expression of the basis of rate of fees and expenses, the constituents of fee or engagement communications are left to the parties to describe.

These observations suggest it may be time for further discussion about the function and relevancy of fee agreements in light of the application of C.R.C.P. 1.5 and especially 1.5(b). We should probably engage a full dialogue about fee agreements in general and their purpose, construction and requirement in the current practice of law. Should written documentation be required?

David C. Little, Esq.
Anthony Van Westrum, Esq.

West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Colorado Rules of Professional Conduct (Appendix to Chapters 18 to 20) (Refs & Annos)
Client-Lawyer Relationship

Rules of Prof.Cond., Rule 1.2

RULE 1.2. SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

Currentness

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

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

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Credits

Repealed and readopted April 12, 2007, effective January 1, 2008. Comment amended effective March 24, 2014. Comment amended effective April 6, 2016.

Editors' Notes

COMMENT

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

[5A] Regarding communications with clients when a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the providing of legal services to the client, see Comment [6] to Rule 1.1.

[5B] Regarding communications with clients and with lawyers outside of the lawyer's firm when lawyers from more than one firm are providing legal services to the client on a particular matter, see Comment [7] to Rule 1.1.

Agreements Limiting Scope of Representation

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

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not

exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

[14] A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.

Should this co-specific comment be numbered [14A] ?

Publisher's Note: COATS, AND EID, JJ., would not approve Comment [14].

Notes of Decisions (115)

West's Colorado Revised Statutes Annotated
West's Colorado Court Rules Annotated
Colorado Rules of Professional Conduct (Appendix to Chapters 18 to 20) (Refs & Annos)
Client-Lawyer Relationship

Rules of Prof.Cond., Rule 1.5

RULE 1.5. FEES

Currentness

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. Any changes in the basis or rate of the fee or expenses shall also be promptly communicated to the client, in writing.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is otherwise prohibited. A contingent fee agreement shall meet all of the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure, "Rules Governing Contingent Fees."

(d) Other than in connection with the sale of a law practice pursuant to Rule 1.17, a division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the basis upon which the division of fees shall be made, and the client's agreement is confirmed in writing; and

(3) the total fee is reasonable.

(e) Referral fees are prohibited.

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

(g) Nonrefundable fees and nonrefundable retainers are prohibited. Any agreement that purports to restrict a client's right to terminate the representation, or that unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees, is prohibited.

Credits

Repealed and readopted April 12, 2007, effective January 1, 2008. Amended March 10, 2011, effective July 1, 2011; April 6, 2016.

Editors' Notes

COMMENT

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, the basis or rate of the fee must be promptly communicated in writing to the client. When

the lawyer has regularly represented a client, they ordinarily will have reached an understanding concerning the basis or rate of the fee; but, when there has been a change from their previous understanding, the basis or rate of the fee should be promptly communicated in writing. All contingent fee arrangements must be in writing, regardless of whether the client-lawyer relationship is new or established. See C.R.C.P., Ch. 23.3, Rule 1. A written communication must disclose the basis or rate of the lawyer's fees, but it need not take the form of a formal engagement letter or agreement, and it need not be signed by the client. Moreover, it is not necessary to recite all the factors that underlie the basis 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 take into account in finally fixing the fee, or to furnish the client with a simple memorandum or the lawyer's customary fee schedule. When developments occur during the representation that render an earlier disclosure substantially inaccurate, a revised written disclosure should be provided to the client.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

[3A] Repealed.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[6] [No Colorado comment.]

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (d) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In

addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (d) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Advances of Unearned Fees and Engagement Retainer Fees

[10] The analysis of when a lawyer may treat advances of unearned fees as property of the lawyer must begin with the principle that the lawyer must hold in trust all fees paid by the client until there is a basis on which to conclude that the lawyer has earned the fee; otherwise the funds must remain in the lawyer's trust account because they are not the lawyer's property.

[11] To make a determination of when an advance fee is earned, the written statement of the basis or rate of the fee, when required by Rule 1.5(b), should include a description of the benefit or service that justifies the lawyer's earning the fee, the amount of the advance unearned fee, as well as a statement describing when the fee is earned. Whether a lawyer has conferred a sufficient benefit to earn a portion of the advance fee will depend on the circumstances of the particular case. The circumstances under which a fee is earned should be evaluated under an objective standard of reasonableness. Rule 1.5(a).

this needs to refer to the revised rule R.1.15B(a)(1).

Rule 1.5(f) Does Not Prohibit Lump-sum Fees or Flat Fees

[12] Advances of unearned fees, including "lump-sum" fees and "flat fees," are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the written statement of the basis of the fee, if a written statement is required by Rule 1.5(b). See also Restatement (Third) of the Law Governing Lawyers §§ 34, 38 (1998). Rule 1.5(f) does not prevent a lawyer from entering into these types of arrangements.

[13] For example, the lawyer and client may agree that portions of the advance of unearned fees are deemed earned at the lawyer's hourly rate and become the lawyer's property as and when the lawyer provides legal services.

[14] Alternatively, the lawyer and client may agree to an advance lump-sum or flat fee that will be earned in whole or in part based upon the lawyer's completion of specific tasks or the occurrence of specific events,

regardless of the precise amount of the lawyer's time involved. For instance, in a criminal defense matter, a lawyer and client may agree that the lawyer earns portions of the advance lump-sum or flat fee upon the lawyer's entry of appearance, initial advisement, review of discovery, preliminary hearing, pretrial conference, disposition hearing, motions hearing, trial, and sentencing. Similarly, in a trusts and estates matter, a lawyer and client may agree that the lawyer earns portions of the lump-sum or flat fee upon client consultation, legal research, completing the initial draft of testamentary documents, further client consultation, and completing the final documents.

[15] The portions of the advance lump sum or flat fee earned as each such event occurs need not be in equal amounts. However, the fees attributed to each event should reflect a reasonable estimate of the proportionate value of the legal services the lawyer provides in completing each designated event to the anticipated legal services to be provided on the entire matter. See Rule 1.5(a); *Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244, 1252-53 (Colo. 1996) (client's sophistication is relevant factor).

[16] "[A]n 'engagement retainer fee' is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required. An engagement retainer must be distinguished from a lump-sum fee constituting the entire payment for a lawyer's service in a matter and from an advance payment from which fees will be subtracted (see § 38, Comment g). A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed." Restatement (Third) of the Law Governing Lawyers § 34 Comment e. An engagement retainer fee agreement must comply with Rule 1.5(a), (b), and (g), and should expressly include the amount of the engagement retainer fee, describe the service or benefit that justifies the lawyer's earning the engagement retainer fee, and state that the engagement retainer fee is earned upon receipt. As defined above, an engagement retainer fee will be earned upon receipt because the lawyer provides an immediate benefit to the client, such as forgoing other business opportunities by making the lawyer's services available for a given period of time to the exclusion of other clients or potential clients, or by giving priority to the client's work over other matters.

[17] Because an engagement retainer fee is earned at the time it is received, it must not be commingled with client property. However, it may be subject to refund to the client in the event of changed circumstances.

[18] It is unethical for a lawyer to fail to return unearned fees, to charge an excessive fee, or to characterize any lawyer's fee as nonrefundable. Lawyer's fees are always subject to refund if either excessive or unearned. If all or some portion of a lawyer's fee becomes subject to refund, then the amount to be refunded should be paid directly to the client if there is no further legal work to be performed or if the lawyer's employment is terminated. In the alternative, if there is an ongoing client-lawyer relationship and there is further work to be done, it may be deposited in the lawyer's trust account, to be withdrawn from the trust account as it is earned.

Notes of Decisions (158)

Rules of Prof. Cond., Rule 1.5, CO ST RPC Rule 1.5
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