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

AGENDA

October 11, 2013 9:00 a.m.
Colorado Supreme Court Conference Room 4244
Ralph Carr Colorado Judicial Center, 4th Floor
2 East 14th Avenue, Denver
Call-in number: 720-625-5050 - Access Code 35459517#

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1. Approval of minutes – July 26, 2013 meeting [pages 1-21]

2. Report from Subcommittee on OARC- and COLTAF-proposed amendments to CRPC 1.15 [Jamie Sudler, pages 22-49; and materials from prior meetings]

3. Report from Subcommittee on Marijuana [Judge Webb, pages 50-67; and materials from prior meetings]

4. Report from Subcommittee on ABA Amendments to Model Rules [Michael Berger, pages 68-284]

5. Administrative matters: Select next meeting date

6. Adjournment (before noon)

Chair
Marcy G. Glenn
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These submitted minutes have not yet been approved by the Committee

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On July 26, 2013
(Thirty-sixth Meeting of the Full Committee)

The thirty-sixth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, July 26, 2013, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Justice Center.

Present in person at the meeting, in addition to Marcy G. Glenn and Justice Nathan B. Coats, were Federico C. Alvarez, Michael H. Berger, Helen E. Berkman, Gary B. Blum, Cynthia F. Covell, John M. Haried, Judge William R. Lucero, Christine A. Markman, Cecil E. Morris, Jr., Neeti Pawar, Henry R. Reeve, Alexander R. Rothrock, Marcus L. Squarrell, Boston H. Stanton, Jr., David W. Stark, James S. Sudler III, Anthony van Westrum, Eli Wald, Judge John R. Webb, and E. Tuck Young. Excused from attendance were Justice Monica M. Márquez, Nancy L. Cohen, Thomas E. Downey, Jr., and Judge Ruthanne Polidori. Also absent were James C. Coyle, David C. Little, and Lisa M. Wayne.

Present as guests were Diana M. Poole, the director of the Colorado Lawyers Trust Account Foundation; Philip E. Johnson, of the law firm of Bennington Johnson Biermann & Craigmile, LLC, the president of the board of directors of the COLTAF Foundation; and William A. Bianco, of the law firm of Davis, Graham & Stubbs, a member of that board of directors. Also present was Cynthia F. Fleischner, the current chair of the Colorado Bar Association Ethics Committee, and Judge Daniel W. Taubman, of the Colorado Court of Appeals, a former chair of the Colorado Bar Association Ethics Committee.

I. *Meeting Materials; Minutes of May 3, 2013 Meeting; Announcements; Disclosures.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the thirty-fifth meeting of the Committee, held on May 3, 2013. Those minutes were approved as submitted.

II. *Passing of Prof. James E. Wallace.*

The Chair told the members that James E. Wallace, professor emeritus, University of Denver Sturm College of Law, had passed away in May 2013. Prof. Wallace had been one of the original appointees to the Committee when it was formed in 2003 and had been a principal participant in the Committee's long effort to review the American Bar Association's Ethics 2000 Rules of Professional Conduct and adapt them for the Supreme Court's eventual adoption in Colorado. With nods of agreement from the members, the Chair said Prof. Wallace had been a wonderful person.

III. *ABA Model Rules Changes.*

At the Chair's request, Michael H. Berger reported that the subcommittee considering recent changes made by the American Bar Association has drafted a report to the Committee, which draft is now being reviewed by the subcommittee members and will be ready for presentation to the Committee at its next meeting.

IV. *Dependency and Neglect Case Appellate Practice Issues.*

The Chair noted that the Committee had briefly considered, at its twenty-eighth meeting on August 19, 2010, the Supreme Court's opinion in of *A.L.L. v. People, in the Interest of C.Z.*, 226 P.3d 1054 (Colo. 2010). In that dependency and neglect case, the Court determined that

> an appointed appellate lawyer who reasonably concludes a parent's appeal is without merit must nonetheless file petitions on appeal in accordance with C.A.R. 3.4, which requires that petitions on appeal from D & N proceedings include, inter alia, a statement of the nature of the case, concise statements of the facts and legal issues presented on appeal, and a description and application of pertinent sources of law. See C.A.R. 3.4(g)(3).

At that meeting, the Committee had determined to form a subcommittee to develop, in light of that opinion, an appropriate comment to Rule 3.1, which proscribes "[bringing or defending] a proceeding, or [asserting or controverting] an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." But, the Chair now noted, the subcommittee had not yet been staffed, and she called for volunteers now to join the subcommittee under Cynthia F. Covell's chairmanship.

V. *Amendment of Rule 1.15.*

The Chair requested James S. Sudler III, chair of the subcommittee considering revisions to Rule 1.15 — including revisions intended to obtain comparability in the rates paid by banks on COLTAF accounts — to report on the subcommittee's recommendations.

Sudler began by saying that the subcommittee had many meetings, with dedicated service by its members, including, specifically, COLTAF guests Diana Poole, Philip Johnson, and William Bianco.

At its thirty-fourth meeting, on February 1, 2013, the Committee had approved, in principle, the subcommittee's recommendation that existing Rule 1.15 be divided into five separate rules in an effort to make the requirements related to safeguarding client and third-person property more accessible to lawyers. That division, Sudler said, makes sense when one considers the various purposes of the provisions. He explained—

> Rule 1.15 is the basic rule. Rule 1.15B delineates the accounts that a lawyer must maintain. Rule 1.15C deals with the use of a lawyer's trust accounts, providing, for example, restrictions on the means that a lawyer may use to deposit funds into and withdraw funds from those accounts. Rule 1.15D establishes the record-keeping requirements for such accounts and is drawn largely from the ABA model rule. Rule 1.15E is entirely new, delineating the requirements to which a financial institution must accede if it wishes to be approved as an institution that a Colorado lawyer may use for trust accounts.

Sudler noted that, at its thirty-fourth meeting, on February 1, 2013, the Committee had considered putting the provisions dealing with the approval of financial institutions in a chief justice directive, because the provisions establish an approval process that will entail agreements between financial institutions and Regulation Counsel in which lawyers will not have direct interests. Lawyers will be required to utilize

"approved financial institutions" for trust accounts but will not be required to look beyond a list of such institutions, which will be maintained by Regulation Counsel, to determine whether any particular financial institution actually meets the requirements for approval. But, at that meeting, the Committee had recognized that substantive financial matters, such as the fees that approved financial institutions may charge, should be locked down in a rule rather than left to a chief justice directive, yet should be separated from the provisions that govern lawyer conduct; the subcommittee's proposal for Rule 1.15E would accomplish that.

Sudler then embarked on a more detailed review of each of the rules' provisions.

Proposed Rule 1.15A is the basic rule, requiring that the lawyer segregate from the lawyer's own assets all funds and property in which clients or other persons have interests. The content of that rule is derived from Rule 1.15 of the American Bar Association's Model Rules, but existing Colorado Rule 1.15 has already diverged substantially from that ABA text.

Proposed Rule 1.15A(a) continues the basic requirement, found in current Rule 1.15(a), that client and third person property that a lawyer holds in connection with a representation be held separate from the lawyer's own property. But, rather than establish the permitted location of trust accounts, as the current provision does, Rule 1.15A(a) refers to Rule 1.15B for provisions delineating the features of such accounts, including their location.

Proposed Rule 1.15A(b) is a replication of current Rule 1.15(b), requiring prompt delivery of funds and property to the persons entitled to them and a rendering of an accounting thereof.

Proposed Rule 1.15A(c) is drawn from current Rule 1.15(c), dealing with disputes over property held by a lawyer, although it speaks more generally of a "resolution of the [competing] claims" instead of "an accounting and severance of their interests."

Proposed Rule 1.15A(d) is a cross-reference to the other rules — Rule 1.15B, Rule 1.15C, Rule 1.15D, and Rule 1.15E — guiding the lawyer to those provisions with respect to "funds and other property, and to accounts, held or maintained by the lawyer, or caused by the lawyer to be held or maintained by a law firm through which the lawyer renders legal services, in connection with a representation."

Proposed Rule 1.15B delineates the accounts that the lawyer, or the lawyer's law firm, must maintain.

Proposed Rule 1.15B(a) characterizes the two types of accounts that the lawyer or the lawyer's law firm must maintain: trust accounts (Rule 1.15A(a)(1)) and business accounts (Rule 1.15A(a)(2)). The business account provision expands, beyond current Rule 1.15(d)(2), the list of terms that may be used to designate the account into which the lawyer must deposit funds received for legal services by permitting — in addition to"business account," "office account,""operating account," or "professional account" — any "similarly descriptive term that distinguishes the account from a trust account and a personal account."

Proposed Rule 1.15B(b) defines "COLTAF account," using the "pooled" account, "nominal amounts" and "short periods of time" terminology of current Rule 1.15(h)(2) for the definition; but, unlike current Rule 1.15(h)(2), the proposal leaves to another provision — Rule 1.15B(e) — the details about interest and insurance. The proposal abandons the odd structure of current Rule 1.15(h)(2), which states that the lawyer "shall establish" a COLTAF account if "the funds" are not held in accounts in which interest is paid to clients or third persons but which does not also mandate that "the funds" shall

be deposited in such COLTAF account — the closest the current rule comes to such a mandate being found in Rule 1.15(h)(2)(b), which requires that the COLTAF account "shall include" client and third person funds that are nominal in amount or are to be held for a short period of time. In the proposal, the deposit requirement is affirmatively stated in proposed Rule 1.15B(g), which directs all entrusted fund either into a COLTAF account or into a trust account that, as required by proposed Rule 1.15B(h), complies with all of the specifications for trust accounts found in Rule 1.15B(c) through Rule 1.15B(e).

Proposed Rule 1.15B(c) requires that each lawyer trust account be designated a "trust account," with a COLTAF account to be designated a "COLTAF Trust Account." Unlike the current rule, though, the proposal would also permit any "additional descriptive designation that is not misleading."

Proposed Rule 1.15B(d) generally requires that each trust account be maintained in an approved institution — that is, one listed by Regulation Counsel pursuant to the provisions of Rule 1.15E — *unless* the persons whose funds are to be held in trust agree otherwise under these conditions: they are "informed in writing that Regulation Counsel will not be notified of any overdraft on the account" and, additionally, they give their "informed consent" to the holding of their funds in unapproved institutions. Sudler commented that the subcommittee had wrestled with this matter but concluded that there might be circumstances where the entrusting persons had reasons of their own for wanting the funds held in institutions that were not on the approved list and that they should be permitted to do so if they had been warned that Regulation Counsel would not be notified of overdrafts in such cases.

Similarly to the choice offered by proposed Rule 1.15B(d) for use of unapproved institutions, proposed Rule 1.15B(e) permits entrusting persons to decide that their funds will be held in non-insured accounts. That, of course, might be the case where the entrusting persons' preferences are, say, for a foreign institution.

Proposed Rule 1.15B(f), like current Rule 1.15(g), permits the lawyer to make deposits of the lawyer's own funds into a trust account to cover "anticipated service charges or other fees for maintenance or operation" of the account.

Proposed Rule 1.15B(g), as Sudler had indicated earlier, directs all entrusted fund into COLTAF accounts by default — all entrusted funds "shall be deposited in a COLTAF account unless . . . " — but permits use of non-COLTAF accounts if they comply with proposed Rule 1.15B(h). Sudler pointed out that this has been drafted with a view toward compliance with the requirements of judicial opinions regarding the permitted use of "IOLTA" accounts.

Proposed Rule 1.15B(h), permits the use of non-COLTAF accounts if the accounts meet all of the requirements contained in Rule 1.15B(c) through Rule 1.15B(e). There is no requirement that the entrusting persons agree to the use of either a COLTAF or a non-COLTAF account — the choice lies with the lawyer unless the entrusting parties participate in the choice by their agreement with the lawyer. But, Sudler noted, it is likely that lawyers will want to use COLTAF accounts because of the administrative ease of doing so, with the "nominal" interest earnings being distributed to the COLTAF Foundation by the bank without the lawyer's need to participate in accounting and distribution of the earnings. [Later in his remarks, Sudler raised as an open issue the question of whether a lawyer could ever be entitled to share in interest or dividends earned on any trust account; like current Rule 1.15(h)(1), proposed Rule 1.15B(h) provides that the "lawyer and the law firm shall have no right or claim to such interest or dividends."]

Proposed Rule 1.15B(i) contains a "look-back" provision that is very similar to current Rule 1.15(h)(3), directing the lawyer to request a refund from the COLTAF Foundation of interest paid on funds if the funds have "mistakenly" been held so long, or are of such amount, "that interest or

dividends on the funds . . . exceeds the reasonably estimated cost of establishing, maintaining, and accounting" for a trust account in which the interest would have gone to the entrusting parties in the first instance.

Proposed Rule 1.15B(j), like the ninth sentence of current Rule 1.15, contains the lawyer's "deemed consent" to the financial institutions' reporting and production in accordance with the agreement reached with Regulation Counsel pursuant to Rule 1.15E and the lawyer's undertaking to "indemnify and hold harmless the financial institution for its compliance with such reporting and production requirement."

Sudler described proposed Rule 1.15C as the easiest of the proposed rules. It continues the provisions currently found in Rule 1.15(i), which are applicable not just to COLTAF accounts but to all trust accounts, such as the proscription against the use of debit cards, and the requirement for lawyer supervision of trust account transactions and reconciliation.

Proposed Rule 1.15D contains the record-keeping requirements; like the provisions of current Rule 1.15(j) and Rule 1.15(k), the provisions are drawn from ABA Model Rule 1.15. But, Sudler noted, changes have been made to match other Colorado rules changes, such as speaking of "copies of written communications setting forth the basis or rate for the fees charged by the lawyer as required by Rule 1.5(b))" in the provision requiring retention of copies, as well as " copies of all writings, if any, stating other terms of engagement for legal services." In that regard, Sudler pointed out that current Rule 1.15(j)(3) might itself be read to require full-blown "retainer and compensation agreements with clients" when in fact the only writing required by the Rules in that regard is the "writing setting forth the basis or rate for the fees charged by the lawyer" required by Rule 1.5(b). The subcommittee also modified the record-keeping requirements to accommodate banking practices, such as those that now make individual copies of canceled checks available only electronically and not by "photo static" copy.

Proposed Rule 1.15E contains the provisions governing the approval of financial institutions for lawyers' trust accounts. Sudler stressed that the proposal does not give Regulation Counsel any leeway to modify the requirements: The requirements must be met by any agreement with any financial institution if the institution is to be "approved." He added that adoption of proposed Rule 1.15E will necessitate Regulation Counsel pursuing new agreements with the financial institutions with which it currently has agreements, since the existing agreements will not contain all of the proposed requirements.

Sudler commented that the subcommittee had discussed the question of the geographic location of lawyer's trust accounts: Currently, Rule 1.15 provides that trusts account must be "maintained in the state where the lawyer's office is situated . . . ." But what does it mean for an account to be "maintained" in a specific geographical location? Ultimately, the subcommittee decided to require that the account be in a financial institution that does business in Colorado. In discussing this aspect of the rule, the subcommittee focused on the circumstances of a multi-state law firm: The subcommittee agreed that it would be preferable for Colorado-based funds to be positioned where the interest accruals would benefit the Colorado Lawyers Trust Account Foundation, but it recognized that it is difficult, in some cases, to determine the "locale" of a representation or the situs of funds held in connection with the representation. As Sudler put it, the subcommittee wanted "Colorado funds to be held in COLTAF accounts"; it thrashed this question for a long time and, he hoped, its solution is a good one.

Sudler explained that the major conceptual change wrought by the subcommittee's revision is found in proposed Rule 1.15E(c)(7), which provides for "rate comparability" and reads as follows:

> (7) The financial institution agrees to pay on any COLTAF account not less than (i) the highest interest or dividend rate generally available from the financial institution on non-COLTAF accounts when the COLTAF account meets the same eligibility requirements,

> if any, as the eligibility requirement for non-COLTAF accounts; or (ii) the rate set forth in subparagraph (c)(9) below. In determining the highest interest or dividend rate generally available from the financial institution to its non-COLTAF customers, the financial institution may consider factors customarily considered by the financial institution when setting interest or dividends rates for its non-COLTAF accounts, including account balances, provided that such factors do not discriminate between COLTAF accounts and non-COLTAF accounts. The financial institution may choose to pay on a COLTAF account the highest interest or dividend rate generally available on its comparable non-COLTAF accounts in lieu of actually establishing and maintaining the COLTAF account in the comparable highest interest or dividend rate product.

The language is precisely worded, he said, to require that the rate of interest or dividend on a COLTAF account be the same as on a "comparable account" and to establish what is a "comparable account." But, he said, the beauty of the proposal is that the banks do not need to perform the calculation of their "comparable rate"; they can choose, instead, to utilize proposed Rule 1.15E(c)(9) and pay the "benchmark rate, which COLTAF is authorized to set periodically, but not more frequently than every six months, to reflect an overall comparable rate offered by financial institutions in Colorado . . . ."

Proposed Rule 1.15E(c)(8) delineates the four types of accounts that may be used for COLTAF accounts.

Proposed Rule 1.15E(c)(10) lists the "allowable reasonable COLTAF fees" that a bank may charge, under its agreement with Regulation Counsel, against interest and dividends earned on COLTAF accounts. The deductible fees must be computed on a per-account basis; a bank may not deduct fees accrued on one COLTAF account from earnings from another COLTAF account. But a bank is not limited to earnings in determining all of its fees with respect to COLTAF accounts; although other fees cannot be deducted from the COLTAF earnings, "[a]ny fee other than allowable reasonable COLTAF fees are the responsibility of, and the financial institution may charge them to, the lawyer or law firm maintaining the COLTAF account."

Proposed Rule 1.15E(c)(12) leaves it to COLTAF to monitor bank compliance with the COLTAF agreements with Regulation Counsel that give them "approved financial institution" status; Regulation Counsel and lawyers need not perform that task.

Turning to the proposed comments for the revised series of Rule-1.15 rules, Sudler pointed out that the subcommittee omitted current Comment [1] to Rule 1.15, which exceeds the substantive content of the rule itself by gratuitously stating that "[a] lawyer should hold property of others with the care required of a professional fiduciary." The subcommittee also omitted current Comment [7] and its irrelevant reference to a "client's security fund."

The first of the comments that the subcommittee has retained for its revised series of Rule-1.15 rules describes a lawyer's obligation to exercise a "good faith judgment in determining initially whether funds are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing account for the benefit of the client or third person." This text is, Sudler noted, pertinent to the legality of IOLTA accounts under constitutional caselaw; he said that he was not aware of any disciplinary action in Colorado arising in this connection.

The second comment for the revised series of Rule 1.15 Rules deals with the multistate-practice situation. The subcommittee identified two issues that it felt needed to be addressed by the whole Committee, issues that it identified on page 5 of its report to the Committee (page six of the meeting materials): (1) May the person whose funds are held in a trust account consent to the account being one that does not bear interest; and (2) may a lawyer share in the earnings on funds held in a trust account in proportion to the interest that the lawyer may have in those funds?

As to the first of those issues, a number of subcommittee members felt that, if funds need not be in interest-bearing accounts, there would be a disincentive against the holding of funds in accounts from which the interest would flow to the COLTAF Foundation.

The subcommittee's report provided this example of a situation presenting the second issue, a lawyer's entitlement to a share of earnings on a trust account:

> An example of this situation is when a lawyer represents a plaintiff in a personal injury case. The matter settles with a settlement check made to both lawyer and client which may be deposited in non-COLT AF trust account. The lawyer through a contingent fee agreement is entitled to a percentage of the settlement. After the settlement funds are received by the lawyer, but before those funds are disbursed, they may earn interest. Current Rule 1.15 and Proposed Rule 1.15B(h) provide that a lawyer cannot take any of the interest earned on those funds while they are in trust.

Sudler explained that the delay in disbursal might be caused by the need to get an insurance-proceeds check cleared through the trust account institution. Current Rule 1.15 denies the lawyer the right to receive any share of the account earnings, even on that portion that will eventually be disbursed to the lawyer.[1]

The subcommittee could not determine what recommendation to make to the Committee with regard to either of these issues, Sudler said, as he concluded his presentation.

The Chair noted that, at its thirty-fourth meeting, on February 1, 2013, the Committee approved the subcommittee's proposal that current Rule 1.15 be broken into a series of five co-equal rules in an effort to make the provisions regarding the safekeeping of property, including the various account requirements, more comprehensible than they are presently. That division, she added, seems now to be something the Committee could assume had been approved and would not be reversed at this stage of the revision.

Outlining the discussion to follow Sudler's report, the Chair commented that there was a lot in the subcommittee's report and proposal and noted that the Committee members may have made a number of notes in marking up the proposal prior to the meeting. She asked that, given the plethora of changes made by the subcommittee, the members restrict their comments during the meeting to matters of substance and direct wordsmithing to Sudler by email and other communication after the meeting; the subcommittee could review all of the comments and provide, with revised text at the next Committee meeting, a redline reflecting all of the changes made to the draft that was submitted to this meeting.

The Chair opened the floor to questions and immediately took the floor to ask questions of her own.

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1. Rule 1.15(h)(2), C.R.P.C., provides in part [emphasis added]—

(h) COLTAF Accounts:

(1) Except as may be prescribed by subparagraph (2) below, interest earned on accounts in which the funds are deposited (less any deduction for service charges or fees of the depository institution) *shall belong to the clients or third persons whose funds have been so deposited; and the lawyer or law firm shall have no right or claim to such interest.*

(2) If the funds are not held in accounts with the interest paid to clients or third persons as provided in subsection (h)(1) of this Rule, a lawyer or law firm shall establish a COLTAF account, which is a pooled interest-bearing insured depository account for funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time in compliance with the following provisions:

(a) *No interest from such an account shall be payable to a lawyer or law firm.*

In response to the Chair's inquiry whether the numbering of the first of the new 1.15 series should simply be "Rule 1.15" rather than "Rule 1.15A," with the second of the series to be numbered "Rule 1.15A," a subcommittee member defended the numbering system that the subcommittee had proposed, both because it recognizes that each of the rules in the series is of equal dignity with each of the others, as well as with all of the other rules within the Rules of Professional Conduct, and because it identifies the Colorado lawyer account rules, including the trust account rules, as uniquely different from ABA Model Rule 1.15.

The Chair questioned the shortening of the phrase that opens current Rule 1.15(b) — "Upon receiving funds or other property in which a client or third person has an interest," — to "Upon receiving funds or other property of a client or third person" in the correlate, proposed Rule 1.15A(b), deleting the words "has an interest." The Chair suggested that the current phrasing identifies a difference between knowledge that the property belongs to a person and just a mere claim that the person may have a claim to the property. The change, the Chair said, suggests that ownership must now be an objective fact.

Sudler responded that the subcommittee found the current phrasing too ambiguous, seemingly allowing any claimant, by his claim, to create an immediate requirement that the property to which he has made his claim be segregated. Another member of the subcommittee pointed out that the provision deals with the obligation to distribute property promptly to those who are entitled to it — the only implication being that there is no alternative claim to what is to be distributed — leaving it to the next provision, proposed Rule 1.15A(c), to deal with contending claims to property.

The Chair noted that, like current Rule 1.15, the proposal repeatedly uses the term "Regulation Counsel"; the Chair suggested that, if the term is not defined somewhere in the existing Rules,[2] a definition should now be added.

The Chair noted that current Rule 1.15(d)(3) requires a lawyer who has discovered that funds have been held in a COLTAF account "in a sufficient amount or for a sufficiently long time" such that it would have been feasible to hold the funds in a trust account created for the benefit of the persons to whom the funds belong — the Chair characterized the provision as the "look-back" provision — to request COLTAF "to calculate and remit trust account interest already received by it to the lawyer or law firm for the benefit of such client or third person in accordance with written procedures" established by COLTAF. The provision specifically states that the remittance is for the benefit of the person to whom the funds held in the COLTAF account belong. She contrasted that with proposed Rule 1.15B(i), which merely requires the lawyer to request a refund from COLTAF in accordance COLTAF's procedures but omits to note that the lawyer will then hold the remittance for the benefit of the person to whom the funds belong.

Sudler and other subcommittee members agreed with this observation and agreed that reference to the remittance being held for the benefit of the owner of the funds should be reinserted, if only to prevent an unintended adverse inference from the "legislative history" of the texts.

The Chair asked whether the benchmark rate, which proposed Rule 1.15E(c)(9) contemplates may be fixed by COLTAF from time to time, will be posted on the Internet; the draft rule does not require that posting as an aspect of the contemplated agreement between Regulation Counsel and an approved financial institution. Sudler pointed out that the proposal requires Regulation Counsel to "maintain a list of approved financial institutions," but it does not require a posting of the benchmark rate. Philip Johnson, attending the meeting as president of the board of directors of the COLTAF

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2. In the current Rules of Professional Conduct, the term "Regulation Counsel" is used only in Rule 1.15, without definition.

Foundation, agreed that such a posting would be a good idea; the Chair agreed that it need not be made a requirement under proposed Rule 1.15E.

The Chair asked about the location of the six comments that have been proposed by the subcommittee for the entire proposed series of Rule 1.15 rules. Sudler suggested that they might be moved up to follow proposed Rule 1.15A, with a notation that they apply to all of the rules in the series.

The Chair concluded her series questions with the observation that the subcommittee's work product was marvelous, the result of a huge effort.

Referring to proposed Rule 1.15C(c), a member commented that he has represented lawyers who have not known what is required by the "reconciliation" of trust accounts. In response, a member of the subcommittee noted that it had wrestled with what more might be said in that provision but, in the end, had decided "to leave the matter to trust account school." It is, he noted, hard to write accounting rules into these rules of conduct; he suggested that Regulation Counsel might consider making the trust account manual used by the Office of Attorney Regulation Counsel available to the bar without charge. Another member of the subcommittee suggested that it might survey what, if anything, other states have added to their correlative provisions for guidance.

The Chair introduced Cynthia F. Fleischner. Fleischner applauded the proposal that a trust account manual, if indeed Regulation Counsel has one, be made available to the bar; she said the manual would be valuable to law office staff and would more efficiently inform the bar about what reconciliation entails than would an article in a bar publication.

A member approved the earlier statement that the numbering system proposed by the subcommittee was appropriate, as it would flag that the Colorado provisions on lawyer accounts, including trust accounts, are very different from ABA Model Rule 1.15. The Colorado Rules of Professional Conduct will generally follow the ABA numbering system, and the lawyer account rules, with their different numbering, will stand out as being different in substance from the ABA rules. The member added the suggestion that something might be said at the beginning of the series of Rule-1.15 rules to advise the reader about the nature of the package that follows — that this series is different in kind from the other rules.

That member, though, added that he was concerned about proposed Rule 1.15E. He asked whether it was appropriate to include in the Rules of Professional Conduct provisions that do not apply to lawyers. He noted that, in a number of provisions, the Rules make cross-references to substantive provisions lodged elsewhere in the Court's rules of civil procedure;[3] and he suggested that perhaps we could lodge the substance of proposed Rule 1.15E in some other location and make a similar cross-reference to it in these rules.

Sudler responded that the subcommittee had considered that suggestion at some length and then rejected it, in part because this Committee has no authority to deal with other areas of the Court's rules. It realized that the provisions guiding Regulation Counsel in reaching agreements with "approved financial institutions" do not directly apply to lawyers but are relevant to them in that they may maintain accounts only in such institutions, subject to the specific exceptions that the subcommittee has proposed.

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3. *See, e.g.*, the cross-reference in the definition of "professional company" in Rule 1.0(1) to a full definition of that term in C.R.C.P. 265; *and see* the reference in Rule 1.2(c) to the unbundling rules of by C.R.C.P. 11(b) and C.R.C.P. 311(b).

A member of the subcommittee added that inclusion of the requirements for Regulation Counsel's agreement with approved financial institutions in this series of proposed rules has the simple advantage of providing for a coherent whole. Another member of the subcommittee agreed, commenting that she would have preferred lodging this detail in a chief justice directive, but that had not proved feasible and this solution provides for accessibility to the requirements.

Poole added that, while the requirements for agreements between Regulation Counsel and participating financial institutions do not directly apply to lawyers, the Court's only ability to enforce those requirements is by requiring lawyers to place their accounts only with financial institutions that have voluntarily agreed with what the Court thinks are necessary for those accounts, that is, with accounts that meet those requirements.

A member said that he found the subcommittee's recommendation to be a "phenomenal job" and that he liked a lot of the changes that had been made. But he seconded the earlier proposal that something be said at the outset of the series of rules to tell the reader what "these rules mean and why."

That member added that he wanted to clarify the meaning of "severance" and the handling of disputes in proposed Rule 1.15A(c), which compares to current Rule 1.15A(c) as follows:

> (c) When in connection with a representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until there is ~~an accounting and~~ ***a resolution of the claims and, when necessary, a*** severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

He noted that the current rule calls for "an accounting and a severance" of the claimants' interests, while the proposal calls for "a resolution of the claims" and, when necessary, a severance of their interests. The second sentences of the respective provisions, in identical language, calls for separation of the disputed portion of the property until the dispute is resolved. It has been his understanding, he said, that Regulation Counsel believes that "severance" must occur contemporaneously with the withdrawal of funds from a trust account — for example, for the lawyer to withdraw a now-earned "retainer" from a trust account, he must send an invoice "severing" the entitlement to the funds from the client who deposited them there. The member understood that Regulation Counsel believed that the funds could not be withdrawn until the severance — the sending of the invoice — had occurred. Now, he noted, the proposed wording is "until there is an accounting and a resolution of the claims and, when necessary, a severance of their interests." When, he asked, is severance "necessary"? He referred then to the description contained on page 7 of the subcommittee's report (page 8 of the materials provided to the members for this meeting):

> 4. Proposed Rule 1.I5A(c) is basically the same as Current Rule 1.15(c) but has been changed to clarify that claims of a lawyer, client or third party may be resolved short of some sort of formalized severance proceeding.

He was, he said, confused about when severance is needed — indeed, he was confused about the whole provision.

Another member said the provision had confused her, too; when she compared the Colorado provisions to ABA Model Rule 1.15(e),[4] she found the latter simply said, "until the dispute is resolved.

Sudler began his response to these comments by exhaling, "Where to begin . . . ?" He summarized how lawyers at Regulation Counsel deal with these questions — which he characterized as "what should a lawyer do?" and "what does 'severance' mean?" — by saying he was not sure that they all dealt with the questions in the same way. He has, himself, been uncomfortable with the interpretation that leads to the requirement that an invoice be sent before an earned retainer be withdrawn from a trust account deposit. The proposed revision, he said, was the subcommittee's attempt to deal with the matter. Perhaps, he noted, a better solution would be to adopt the ABA terminology, as the other member had suggested, leaving the provision to deal solely with the resolution of disputes to funds and not include the circumstance of allocation when entitlements change — such as occurs when a retainer has been earned — without dispute.

A member who had been a member of the subcommittee noted that the proposed text would cover not only the earning of a retainer but also, for example, the action by which shares of stock are transferred on the books of a corporation and certificates issued in new names. Perhaps that is a "severance" of the kind contemplated by the proposed language.

Yet another member who had been a member of the subcommittee commented on the similar debate that had occurred in the subcommittee's deliberations. Claiming that he was not burdened by the fact of his having been on the subcommittee, he now proposed that the aberrant text be omitted and the provision restored to the ABA model, which deals only with the resolution of disputes and not to other severance actions. The member who had raised the issue approved of that solution.

That member, who had raised the severance issue, commented as an aside that he intended to raise, in the future after the adoption of these rule changes, a proposal to deal with "unclaimed funds" in trust accounts — funds as to which the lawyer either knows the identity of the owner but cannot locate that person or funds as to which, because of, say, an accounting mistake, the owner cannot be identified. This member's purpose would be, he said, to amend the rule to permit such funds to be transferred to the COLTAF Foundation. Another member pointed out that the proposal might implicate the State's escheat laws. When the Chair asked whether the proposer wished to make his proposal at this time, the proposer replied that he felt the current Rule 1.15 project should be completed first, before his proposition was pursued, and that perhaps it could then be pursued by the same subcommittee. He added that he felt the COLTAF Foundation was "leaving money on the table," subject to whatever might be required by escheat law.

Sudler pointed out to the Committee that, just the week of this meeting, a hearing board in a disciplinary case had noted that there is no Colorado commentary or case law establishing what is required by the "full accounting" provision within current Rule 1.15(b).[5] That is in contrast to other

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4. Rule 1.15(e) of the ABA Model Rules of Professional Conduct read—

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

5. Rule 1.15(b), C.R.P.C., states—

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall, promptly or otherwise as permitted by law or by agreement with the client or third person, deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, promptly upon request by the client or third person, render a full accounting regarding such property.

states' rules, which deal comprehensively with that concept. He asked that the subcommittee be directed to look into the concept with a view toward clarifying its meaning.

A member who had not spoken previously also commended the subcommittee's work product and added that he felt the Committee should recommend prompt action by the Court on the proposal. But he added, with respect to trust funds in which a person "claims an interest," that the current rule and the subcommittee's proposal both retain that terminology from the ABA model provision; and he noted that the topic is the subject of Opinion Nº 94 of the Colorado Bar Association's Ethics Committee. He did not regard the phrase "claims an interest" to be surplusage and felt the matter should be considered further.

The Chair asked that members of the Committee send to Sudler, by not later than the end of August, any comments that they might have about the subcommittee's proposal. But she also asked for a straw vote to gain the Committee's general view about the proposed series of Rule 1.15 rules.

Before that vote was taken, a member noted that the Committee had not yet considered two questions that the subcommittee had left for deliberation by the Committee: May a lawyer use, with the consent of those having interest in funds, a non-interest-bearing, non-dividends-bearing trust account?[6] May a lawyer share in the interest or dividend earnings of a trust account holding funds in which she has an interest? The Chair agreed that those questions needed discussion.

A member who had been a member of the subcommittee said that he was comfortable with the idea that funds could be held in non-earning accounts, noting that clients and other funds owners may have reasons for avoiding reportable income. As to the second of the questions, this member said that, in some cases, the lawyer may have, as a matter of law, a claim on a portion of the funds, albeit subject to conditions precedent to withdrawal or to unresolved disputes. The member postulated the case in which the lawyer's representation is "terminated on the courthouse steps" after funds are deposited in a settlement. It is a fiction, the member said, to assume that the lawyer can never have an interest in the deposited funds.

To those comments, another member who had been a member of the subcommittee asked that the two questions be considered one at a time. As to the first question, this member said that permitting funds to be held in non-earning accounts would create a loophole disadvantaging COLTAF. In her view, there should be earnings, and they should go either to the persons owning the funds or to COLTAF. The COLTAF possibility comes only when the funds are small in amount or are to be held for a short time. She likened the matter to the prudent-man standard of fiduciaries holding funds, suggesting that the funds should not be put under the bed, with no earnings. If the persons owing the funds do not want the earnings, they should go instead to COLTAF.

Another member of the subcommittee said that he had come down on the other side of this particular question when it was being discussed by the subcommittee. If the client or another person is

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6. The question was posed on page 5 of the subcommittee's report as follows:

> The Subcommittee considered a similar issue: whether a client who is receiving the interest on the account should be allowed to consent to funds being held in a noninterest bearing account. Neither the Current Rule nor the Proposed Rule contains such a provision. The Committee as whole should determine whether to allow such a provision. The Subcommittee recognizes that theoretically a client should be allowed to consent to client funds being held in a non-interest bearing account when the client would otherwise be entitled to the interest. However, a significant amount of discussion by the Subcommittee concerned whether allowing such consent might undermine the use of COLTAF accounts for those funds that are appropriate for COLT AF accounts. Several members of the Subcommittee were opposed to permitting a client to consent to non-interest-bearing accounts.

putting the funds in the lawyer's trust, that person should be able to decide how the funds are to be handled. The member noted that, at the subcommittee's discussion, others had suggested that clients and others may have legitimate reasons for avoiding income that might entail reporting to United States or state tax authorities if earned. What, he asked, would be the reason for denying these persons the right to make that decision?

A member asked Poole for the COLTAF Foundation's position on the question. Poole replied that the Foundation would be concerned that permission within the rule to put funds in non-earning accounts might become standard in lawyers' engagement agreements simply to avoid the need to maintain COLTAF accounts. The Foundation would prefer that the default be that funds be deposited in interest-bearing COLTAF accounts, if they are not held in accounts from which earnings are paid to those having interests in the funds.

The member who had expressed his comfort with the idea of non-earning accounts said he shared Poole's concern, but he noted that, if the proposal were amended to permit funds to be held in an non-earning account, it would require the owner's "informed consent" for the use such an account. The matter, he thought, could not just be hidden away in a fee agreement. To that, a guest asked how a regulator would be able to discern whether the consent had been properly obtained or simply made a part of an engagement form.

Another member of the subcommittee simply said that he found it exceedingly strange that the Court would preclude a property owner from deciding that his funds would not be invested in an interest- or dividend-earning account.

Two guests noted that questions have been raised about the taxability of earnings that might have gone to funds owners but are diverted to COLTAF.

The member who had expressed his skepticism about the court precluding an owner from deciding to put funds in a non-earning account added that he thought that the loss of funds to COLTAF because of a rule permitting the use of non-earning accounts would be small, as a practical matter.

A member who had not been a member of the subcommittee expressed his concern about what he saw as a loophole. He agreed, he said, that an engagement agreement provision could not, of itself, be the requisite "informed consent" to the use of a non-earning account; but that just meant the lawyer would have to proceed to give the information required to obtain "informed consent"[7] — and that would result in the loophole that he was concerned about. To a member's suggestion that a comment be included to deal with this possibility, given informed consent, this member replied that it would have to be a very complicated comment. He concluded by saying that he desired that clients have control over their own money but that he thought the default here should be that interest would be earned on that money while it is in the lawyer's trust.

Another member expressed his concern that permitting non-earning accounts could undermine the "mandatory nature" of the COLTAF account, to the disadvantage of the interests of the bar. The argument for client autonomy, he thought, was a false one; that autonomy could be attained in other

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7. "Informed consent" is defined in Rule 1.0(e), C.R.P.C. as follows:

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

ways. In his view, the COLTAF account was proper (a) for small amounts, (b) for amounts to be held for short periods of time, and (c) when the client did not want earnings.

The discussion then shifted to the second question that the subcommittee had posed, the lawyer's right to share in interest or dividends earned on funds in which the lawyer has a claim.[8]

A member who had been a member of the subcommittee commented that she had been the major opponent to the idea that a lawyer could share in account earnings in proportion to the lawyer's interest in the deposited funds. She was of the view that it was absolutely not possible for the lawyer to have an interest in the deposited funds, under the Court's rules, bankruptcy principles, and the like.[9] She said that Tenth Circuit Court decisions have been to the effect that settlement funds are entirely the funds of the parties to the settlement, with their lawyers having no property interest in those funds. A lawyer might have a lien on his client's funds, she agreed, but no part of the funds themselves was the lawyer's property. Any indication that the lawyer could have an interest in deposited settlement funds would be contrary to those principles. If one owns the principal, one owns the interest thereon, she said.

To that, another member pointed out that creditor law recognizes equitable claims as property interests. Bankruptcy law will not get to where the previous member wished her argument to go, he said.

To all of that, another member asked how apportionment might be administered. Sudler answered that the situation could apply only to funds that were not in a COLTAF account, for, in a COLTAF account, all earnings would go to the COLTAF Foundation.

On a straw vote, the concept of amending the rules to permit a lawyer to share in earning from trust account funds in which he had an interest was defeated.

A member asked whether a lawyer's engagement agreement could specify that the lawyer was entitled to share in trust account earnings in proportion to his interest in the account principal. Sudler replied that such sharing would violate both current Rule 1.15(h)(1) and the subcommittee's proposal. A member pointed out that the argument that had been made — that no part of the funds in a trust account can, as a matter of law, belong to the lawyer — was a question of law; the member asked whether our vote would be a modification of law. A second straw vote was taken and, again, the Committee determined not to change the proposal to permit a lawyer to share in earnings from trust account funds.

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8. The question was posed on page 5 of the subcommittee's report as follows:

> It is not unusual for a lawyer to hold funds in trust for a period of time in which the lawyer has an interest. An example of this situation is when a lawyer represents a plaintiff in a personal injury case. The matter settles with a settlement check made to both lawyer and client which may be deposited in non-COLT AF trust account. The lawyer through a contingent fee agreement is entitled to a percentage of the settlement. After the settlement funds are received by the lawyer, but before those funds are disbursed, they may earn interest. Current Rule 1.15 and Proposed Rule 1.15B(h) provide that a lawyer cannot take any of the interest earned on those funds while they are in trust. The subcommittee discussed the issue that the lawyer may be entitled to interest on the portion of the settlement that belongs to the lawyer. The Proposed Rule I.15B(h) does not allow that. The Subcommittee discussed this issue at some length There was significant support for either resolution.

9. Current Rule 1.15(c) recognizes that a lawyer may have an interest in deposited funds; it provides, in part, "When in connection with a representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests."

The Committee then approved the direction that the subcommittee had taken in its proposal, with incorporation of the points discussed by the Committee at this meeting.

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

After a short break, the Chair turned the discussion over to Judge Webb and the further report of the Amendment 64 subcommittee, the subcommittee considering what, if any, changes might be made to the Rules of Professional Conduct to reflect that the Colorado Constitution has been changed to permit both medical and recreational use of marijuana.[10]

Webb began by referring the members to page 48 of the materials that the Chair had provided for this meeting for the beginning of the subcommittee's supplemental report. On that initial page, the subcommittee had summarized the charge it had received from the Committee at its thirty-fifth meeting, on May 3, 2013, as follows:

> - Review and, as necessary, revise proposed Rule 8.6 and the accompanying comments to implement the Standing Committee's vote, which took out the phrase "for engaging in conduct," and then approved, but only in principle, the concept of a safe harbor for lawyers who advise clients · concerning their conduct involving marijuana, which is compliant with state law but violates federal law.
> - Prepare an alternative, narrower version of Comment [2A] to Rule 8.4 so that the safe harbor would protect only a lawyer's private conduct involving cultivation, possession, and use of marijuana, compliant with the Colorado Constitution, but would not exempt a lawyer's commercial conduct involving marijuana, such as owning or operating a licensed distribution facility. The Standing Committee did not take a straw vote on this question, but directed the subcommittee to present this alternative, based on concerns expressed by some members of the Standing Committee about lawyers who might become entrepreneurs in this industry.

As directed by the Committee at its thirty-fifth meeting on May 3, 2013, the subcommittee deleted from its proposal for Rule 8.6 the phrase "for engaging in conduct" — the change being shown on the redline provided to the Committee on page 5 of the subcommittee's report (page 51 of the meeting materials) — but the subcommittee proposed no other changes to the text of that rule. It did, however, propose changes to the accompanying comment, the thrust of which would be to clarify that the rule applies only to lawyers' advice to clients and does not apply to a lawyer's personal conduct.

As to Rule 8.4, Webb said the subcommittee responded not to any particular Committee vote but, rather, to the tenor of the Committee's discussion at the prior meeting. He noted that there had been strong views that, perhaps, the "safe harbor" provided by that rule should be limited to a lawyer's personal conduct and not extend to a lawyer's commercial, for-profit activities. To that end, the subcommittee had made some changes to its proposed additional comment to Rule 8.4, changes that were set forth on pages 6 and 7 of its report (pages 52 and 53 of the meeting materials). Webb noted that the changes to the comment do not reflect any principled basis for them, referring to the discussion on the fourth page of the subcommittee's report (page 50 of the meeting materials).[11]

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10. As stated in the minutes of the Thirty-Fourth Meeting of the Committee, on February 1, 2013, the Committee "determined to form a subcommittee to consider such issues relating to the legalization of marijuana in Colorado as the subcommittee chooses to consider."

11. The subcommittee's report states—

> A majority of the subcommittee recognizes that the dilemma of state-law-compliant conduct which violates federal law exists in both private, noncommercial and commercial conduct. Although distinguishing between them

At the Chair's request, Webb turned back to proposed Rule 8.6, noting that he would have more to say about Rule 8.4 later but asking the Committee first to discuss proposed Rule 8.6.

A member noted that the text of proposed Rule 8.6 does not actually refer to the specific, marijuana, provisions of Article XVIII of the Colorado Constitution but, rather, refers to *any* "specific provision of the Colorado Constitution . . . [by which conduct] is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone, may violate federal criminal law." Yet, the member pointed out, the proposed Comment [1] characterizes the rule itself as one that "specifically addresses" the two marijuana provisions of the Constitution. Webb replied that, to his knowledge, only the marijuana provisions in the constitution have the state/Federal dichotomy that has led to the proposal for the changes to the rules, In the future, he said, there might be other such dichotomies, and he agreed that those could be dealt with as they arose and that the current proposal for the text of the rule could be changed to deal only with the marijuana amendments to the Constitution.

A member said the proposal seems to give the "illusion" to lawyers that it offers a safe harbor and protects the lawyer from the wider risks of advising about marijuana issues. He suggested this example: A banking client calls a lawyer for assistance in making a loan to a land owner for a marijuana grow facility, a facility that the owner/borrower will lease to a licensed marijuana grower. Any lawyer undertaking to provide that advice to the bank will find that she must consider Federal law as well as Colorado law. This member asked how far one might go with this, noting that our rule and comment would not discuss the Federal consequences of such a legal representation. He suggested that, in the example, the lawyer would have to advise the bank that the grow facility might be subject to Federal forfeiture, with the consequent loss of security to the bank for the loan. Or, the lawyer might find herself subpoenaed by a grand jury. With these kinds of possible consequences, the member asked, what kind of advice must the lawyer give to the client; he added that his concern was that our text might lead the practitioner to feel that all was well and there could be no adverse consequences from providing advice in a case such as the member posed. While it might not be a disciplinary issue, because of the accommodating changes made to the Rules of Professional Conduct, there may be other, serious consequences from giving advice in this fraught area of the law, risks about which those Rules would not give warning.

A member noted that the subcommittee's new proposal for Comment [1] to proposed Rule 8.6 characterizes the proposed rule as "specifically address[ing] the need for legal advice in connection with" the two constitutional amendments, implying, perhaps, that the rule does not encompass legal advice that might be given about the marijuana activities that are permitted by those amendments, such as advice about contract law that might be needed by a licensed marijuana establishment. To avoid such an implication, the member suggested deleting that phrasing.

Webb replied that the subcommittee had added that phrasing in response to the strong comments made at the prior Committee meeting and that it was in accord with the medical marijuana ethics opinion that had been issued by the Colorado Bar Association Ethics Committee.

The member who had earlier noted that the proposed text of Rule 8.6 itself did not distinguish between the marijuana amendments and any constitutional provision that might be at variance from Federal law said he would like to see the text be limited to the marijuana amendments.

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does not have a principled basis under the constitutional amendments, it has a pragmatic one. And presenting a pragmatic approach may assist the Supreme Court, when it considers a recommendation from the Standing Committee.

Responding to the comment by a member that Comment [1] to proposed Rule 8.6 referred specifically to advice about the two constitutional amendments and not to other legal advice about marijuana-related conduct, a guest noted that the text of Rule 1.2(d)[12] has not been clear to many lawyers. The comment, he suggested, could be revised to say that Rule 8.6 specifically addresses the need for legal advice "because of the ambiguity of Rule 1.2," without stating more.

The member who had made the earlier comment agreed that the guest's suggestion might help alleviate the problem, but he asked why it would not, then, be placed as a comment to Rule 1.2.

Webb replied to these remarks by saying the subcommittee had proposed that a comment be added to Rule 1.2 to provide a cross-reference to Rule 8.6, with its provisions permitting counseling and assisting clients in connection with conduct involving marijuana.

To all of that discussion, a member provided a different reading of the subcommittee's Comment [1] to proposed Rule 8.6: The text of the proposed rule, he noted, does not itself say that the advice is limited only to advice *about* the two constitutional amendments. Rather, it specifically permits

> counseling or assisting a client to engage in conduct, that by virtue of a specific provision of the Colorado Constitution (and in implementing legislation or regulations) is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, solely because that same conduct, standing alone, may violate federal criminal law.

The comment, the member said, does not constrict that counsel and assistance to questions about the meaning of the two constitutional amendments but merely gives an example of why there may be a need for such counsel and assistance.

A member who had been a member of the subcommittee said he agreed that the proposal would permit lawyers to give counsel and assistance generally about marijuana use and commerce and not just be limited to advice about the meaning of the two constitutional amendments. He had no doubt about that. He said the subcommittee had backed away from inclusion of the concept within Rule 1.2 or its commentary because it would be hard to delineate between the context at hand — the dichotomy created by the marijuana amendments between Colorado and Federal law — without using a "forty page article" on the nuances between counsel and assistance. Accordingly, he said, the subcommittee determined to use a comment to proposed Rule 8.6 and a cross-reference with Rule 1.2.

A member who had not previously spoken commented on the prior observation that lawyers might be misled, by these rules, into ignoring applicable Federal law when giving advice and assistance to their clients. The member pointed out that the opening sentence of proposed Rule 8.6 begins, "Notwithstanding any other provision of these rules . . . ," and he suggested that, perhaps, the text should make it clear that the leeway given relates only to Colorado discipline, not to other rules, including other rules of discipline applicable in the Federal courts. Another member suggested that the point be made by referring specifically to discipline meted out by Colorado Regulation Counsel. To that suggestion, another member objected, pointing out that the Federal authorities know how to distinguish their rules from local rules; and yet another member noted that a specific reference here to discipline by Colorado Regulation Attorney would simply raise questions about whether *other* rules had some different reach.

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12. The provision reads—

(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.

Webb asked for a vote on the subcommittee's proposed Rule 8.6 and comments, with the amendments that the Committee had thus far discussed.

The member who had earlier noted that the text of the proposed rule does not distinguish between the specific, marijuana, provisions of the Colorado Constitution and any other "specific provision of the Colorado Constitution" that might condone conduct that is violative of Federal law asked that the language be changed from that generality to a reference only to the two marijuana provisions. He wished to see the provision actually refer only to what the Committee had actually been discussing. He added that he was speaking just as a member of the Committee and not as the representative of any particular authority.

A member who was also a member of the subcommittee moved the adoption of the subcommittee's proposal for Rule 8.6 and its comments; he added that he could support the narrowing from the proposal's generality to specific references to the marijuana amendments, noting that the concept had been discussed by the subcommittee.

After some discussion about the proper form of the motion, it was agreed that the motion up for approval was the subcommittee's text of Rule 8.6 — without consideration of the proposed comments — but with a narrowing of the rule's text to references only to the marijuana amendments to the Colorado Constitution. The motion was narrowly adopted.

A member then moved for the adoption of the subcommittee's proposed comments to its proposed Rule 8.6.

Two members, who had been members of the subcommittee, said that, with the change to the text of proposed Rule 8.6 itself to specify the two marijuana amendments, it would be unnecessary, confusing, and repetitive to retain proposed Comment [1] specifying those two amendments. In response, the movant remarked that he liked that portion of Comment [1] that highlighted the need for lawyers to be able to give counsel and assistance, but he withdrew his motion.

Another member then proposed the deletion of proposed Comment [1], the renumbering of proposed Comment [2] as Comment [1] and its adoption. That motion passed.

The Chair invited guest Fleischner to review the deliberations of the Colorado Bar Association Ethics Committee regarding the marijuana issues. Fleischner began by commenting that, as Judge Taubman had explained at the Committee's previous meeting on May 3, 2013, the CBA Ethics Committee had contemplated direct changes to Rule 1.2(d) regarding a lawyer's counseling and advising a client about marijuana-related conduct; but, she noted, this Committee had determined not to take that course. In its Opinion № 124, the CBA Ethics Committee concluded that a lawyer's personal, medical use of marijuana that complied with Colorado law adopted under Article XVIII, § 14, of the Colorado Constitution would not violate Rule 8.4(b). At its meeting in June 2013, the CBA Ethics Committee determined to extend Opinion № 124, by an addendum, to include a lawyer's personal, recreational use of marijuana under the constitutional amendment adopted by the voters in November 2013, Article XVIII, § 16. The CBA Ethics Committee is also working on an opinion, to be issued as Opinion № 125, that would conclude that a lawyer does not violate Rule 1.2(d) by counseling a client in activity that is within the scope of the constitutional amendments, although it would not countenance "negotiating" for a client in that context. Fleischner noted that the latter opinion had been considered further at the committee's July 2013 meeting and was likely to be considered further at its September 2013 meeting.

Judge Taubman added that, at the annual meeting of the American Bar Association House of Delegates to be held in August, a resolution from the King County, Washington, Bar Association will be proposed by which the American Bar Association would urge lawyer disciplinary authorities not to take disciplinary action against lawyers who counsel and assist clients about compliance with state laws legalizing the possession and use of marijuana.

Webb then turned the Committee's attention to the proposals for addition of a Comment [2A] to current Rule 8.4. He said that, as originally proposed by the subcommittee, the comment would have precluded discipline for *any* marijuana activity by a lawyer that was permitted by the Colorado Constitution. But, at its thirty-fifth meeting, on May 3, 2013, the Committee had directed the subcommittee to narrow the safe harbor to personal, non-commercial use,[13] and, in response, the subcommittee's current proposal for Comment [2A] is limited to "private, non-commercial conduct of a lawyer" under the specified marijuana amendments to the Colorado Constitution.

Webb and other members of the subcommittee had looked for other words to substitute for "non-commercial" such as "non-profit." But, Webb said, on the eve of this Committee meeting, a member, who had not been a member of the subcommittee, had suggested to the subcommittee that, instead of looking for words to characterize the permitted conduct, the comment could simply refer to the specific constitutional provisions establishing the Colorado law on marijuana use. The member's proposal was that Comment [2A] read as follows:

> [2A] Conduct of a lawyer which, by virtue of either of the provisions of the Colorado Constitution that are cited below, is either (a) permitted, or (b) within an affirmative defense to prosecution under state criminal law, and which is in compliance with legislation or regulations implementing such provisions, does not reflect adversely on the lawyer's honesty, trustworthiness, or fitness in other respects, solely because that same conduct, standing alone, may violate federal criminal law. The provisions referred to above are the following: Article XVIII. Miscellaneous, Section 14, Medical use of marijuana for persons suffering from debilitating medical conditions, Subsection 14(4); and Article XVIII, Miscellaneous, Section 16, Personal use and regulation of marijuana, Subsection 16(3). The phrase "solely because" clarifies that a lawyer's personal, noncommercial use of marijuana, while itself permitted under state law, may cause a lawyer to violate other state laws, such as prohibitions upon driving while impaired, and other rules, such as the lawyer's duties of competence and diligence, which may subject the lawyer to discipline. See Rules1.1 and 1.3. The phrase "standing alone" is explained in Comment [2] to Rule 8.6.

A member referred to the proposals from the subcommittee and from the other member, each of which would refer to conduct "which may violate federal criminal law." But, this member said, the conduct in question *clearly* would violate Federal law, and he asked whether that would change the meaning of the proposals. In response, another member said he understood that the intent of the proposals was that even a conviction proving violation of Federal law would not be subject to Colorado discipline. The member who had raised the point said he would want to see the language be clarified to that end.

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13. The minutes of the thirty-fifth meeting of the Committee, on May 3, 2031, state—

> Webb said that, if the direction of the Committee was to make a distinction between a lawyer's personal use of marijuana (permitted) and his personal involvement in commercial marijuana activities (disciplinable), that could be done.
>
> Upon a vote, the Committee determined to return the matter to the subcommittee to develop alternatives on how to deal with a lawyer's personal use of marijuana and a lawyer's personal involvement in commercial marijuana activities.

Webb said the intent of the proposals is to recognize a distinction between permitted personal use of marijuana and other, entrepreneurial, activity. He observed that the possibility of a lawyer being prosecuted for personal marijuana use within the constitutional permissions was vanishingly small, but that, he added, is aided by the decision not to protect entrepreneurial use. The proposals, he confirmed, would preclude discipline for personal use permitted under Colorado law, even if that resulted in a conviction under Federal law.

A member suggested that the phrasing be "private, not-for-profit" conduct, and Webb indicated his approval of that language — if the lawyer's conduct is not for profit, it would be permitted. A sale, however, would be different.

The member who had proposed, as an alternative, that Comment [2A] simply refer to § 14(4) and § 16(3) of Article XVIII explained the reasoning behind his proposal: He had considered, he said, other available statutory language that distinguishes between personal and other activities, such as the phrasing "personal, family, or household use" that is found in consumer legislation. But, he realized, the marijuana amendments themselves make the necessary distinctions, and further characterization by additional adjectives in the comment was unnecessary.

A member approved of the suggested alternative to Comment [2A], saying that the effort to distinguish between permitted nonprofit activity and disciplinable profit activity was a trap that the alternative avoided. Another member added his approval.

But another member said she thought that the member's proposed alternative for Comment [2A] was not likely to be understood by lawyers; they would, she said, simply conclude by the comment that they can engage in marijuana activity as can any other person under Colorado law. This member suggested that some additional indication of restriction, such as that the lawyer cannot provide a marijuana "establishment," be added.

To that, the member who had suggested the alternative replied that he thought that any lawyers who wished to conduct commercial activities, activities that we feel a lawyer should not engage in, would surely look beyond the text of the comment to the cited constitutional provisions as they planned their conduct and that they, therefore, would be very well informed about what was permitted and what was disciplinable.

The Chair put to the Committee the general question of whether it supported the broad approach, which would permit a Colorado lawyer to engage in any marijuana-related activity condoned by Colorado law. By a vote, the Committee determined that it did not support such a rule.

Webb then moved for the adoption of the proposal that Comment [2A] to Rule 8.4 simply refer to § 14(4) and § 16(3) of Article XVIII, as the member had proposed. Before action was taken on his motion, a member who had been a member of the subcommittee said he would like to look at text that incorporated some statement highlighting that a lawyer could not engage in commercial activity.

The member who had made the proposal that the comment contain only the sectional references suggested that the Committee let the subcommittee consider whether such additional text was "worth the candle." He suggested that the matter be sent back to the subcommittee with the flexibility to decide whether an indication of prohibited activity — that is, activity that would not be permitted by Article XVIII, § 14(4) or § 16(3) but was commercial activity permitted only under Article XVIII, § 16(4) — would be useful.

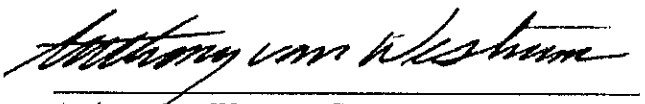
A member questioned the delay that would result from sending the matter back to the subcommittee. The Chair replied by noting that the subcommittee's subsequent deliberations could be circulated and approved by emails before the next meeting of the Committee. She added that perhaps the phrasing "personal, non-commercial use" could be changed to "personal or medical" use.

By a vote, the suggestion to return the matter to the subcommittee for consideration of language that might be added, to the proposed references in Comment [2A] to § 14(4) and § 16(3) of Article XVIII, to indicate the range of permitted or precluded activity was approved, the supposition being that the subcommittee's further deliberations might then be subject to email approval.

VII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 12:00 p.m. The next scheduled meeting of the Committee will be on Friday, October 11, 2013, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These submitted minutes have not yet been approved by the Committee.]

To: Colorado Supreme Court Standing Rules Committee
From: Jamie Sudler, Chair of Rule 1.15 Subcommittee
Date: October 2, 2013
Subject: Revisions to Proposed Rules 1.15A, B, C, D and E, and New Rule 1.5(f)

Introduction. The Rule 1.15 Subcommittee presented a package of rule changes to the Committee at its July 26, 2013 meeting. During that meeting members of the Committee were encouraged to forward any comments to the Subcommittee by the end of August. Only the Committee Chair submitted comments.

On September 11, 2013, the Subcommittee met to discuss the Chair's comments and to discuss an issue raised at the July 26 meeting. That issue was whether a lawyer should be required to notify a client when the lawyer takes advanced fees out of the lawyer's trust account. The Subcommittee is recommending an addition to Rule 1.5(f) based upon its discussion of that issue. *See below: Rule 1.5(f).*

Attached to this memo are:

- Ex. 1: Clean Copy of Proposed Rules 1.15A, B, C, D and E
- Ex. 2: Redlined Version of Proposed Rules 1.15A, B, C, D and E
- Ex. 3: Proposed Rule 1.5(f)

Rules 1.15A, B, C, D and E. The revisions to Proposed Rules 1.15A, B, C, D and E are minor. The most significant revision was the placement of the comments after Rule 1.15A with references to the comments after each rule. (Perhaps the main revision considered and rejected by the Subcommittee was the numbering of the Rules. The Chair had suggested that the first proposed rule should be numbered 1.15 with the subsequent rules 1.15A, B, C and D. The subcommittee decided to retain the proposed numbering.)

Rule 1.5(f).[1] At the Committee meeting on July 26, 2013, a member raised the issue that there was no requirement in Proposed Rules 1.15A, B, C, D, and E that a lawyer, who accepts advanced fees for work not done, notify a client when transferring funds from trust to operating account at the time the funds or a portion of them are earned. This issue comes up both in hourly and flat fee arrangements. It was noted that the Office of Attorney Regulation Counsel has previously taught many Continuing Legal Education classes in which it is stated that a lawyer must notify a client before transferring funds from trust account to operating account. However, this interpretation of the language in current Rule 1.15(c) may not be explicit on this point.

[1] The Subcommittee was not tasked with reviewing Rule 1.5(f); however, it is submitted that the substance of the proposed provision concerns how a lawyer handles funds advanced by a client and belongs in Rule 1.5 rather than one of the proposed 1.15s.

A majority of the Subcommittee decided that it was appropriate to require a lawyer to give notification in writing to the client when 1) advanced fees have been earned, and 2) a transfer of funds from trust to operating account was made.

The Subcommittee considered placing this provision as an addition to Rule 1.15C but decided instead to recommend placement at the end of Rule 1.5(f).

The Subcommittee majority determined that a lawyer should notify the client within a reasonable time before or after earning the funds and transferring them. The justification for this determination is that the lawyer should communicate with the client about what was their property and is now being treated as the lawyer's property.

The concept of what a "reasonable time" for the notice is not defined. It would be difficult to do so and many lawyers or firms have different billing practices that are not viewed as inappropriate. For instance, one firm may send the client a bill or a notice one month about the work done to earn fees, and then transfer the earned fees from trust to operating account the next month. Another firm may transfer the funds one week and then send out a bill the following week or at the end of the month.

A minority of the Subcommittee opposed Proposed Rule 1.5(f). The minority expressed the view that such a requirement was burdensome on lawyers particularly if the lawyer has already notified the client in a flat fee agreement of the earmarks describing when fees are earned. The minority stated that the client was already on notice of the points at which the money was earned and need not be informed when the earmark had been reached and the money transferred.

Conclusion. The Subcommittee forwards Proposed Rules 1.15A, B, C, D, E to the Committee for recommendation to the Supreme Court. A majority of the Subcommittee forwards Rule 1.5(f) to the Committee for recommendation to the Supreme Court.

DRAFT, 9/30/13

Proposed
RULE 1.15A

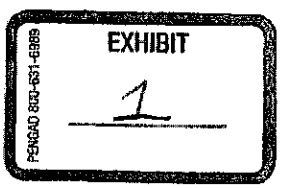
General Duties of Lawyers Regarding Property of Clients and Third Parties
(See also Rules 1.15B, 1.15C 1.15D and 1015E)

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in trust accounts maintained in compliance with Rule 1.15B. Other property shall be appropriately safeguarded. Complete records of such funds and other property of clients or third parties shall be kept by the lawyer in compliance with Rule 1.15D.

(b) Upon receiving funds or other property of a client or third person, a lawyer shall, promptly or otherwise as permitted by law or by agreement with the client or third person, deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, promptly upon request by the client or third person, render a full accounting regarding such property.

(c) When in connection with a representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until there is a resolution of the claims and, when necessary, a severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(d) The provisions of Rule 1.15B, Rule 1.15C, Rule 1.15D, and Rule 1.15E apply to funds and other property, and to accounts, held or maintained by the lawyer, or caused by the lawyer to be held or maintained by a law firm through which the lawyer renders legal services, in connection with a representation.



COMMENT

Note: The following six comments are applicable to this Rule 1.15A and to Rule 1.15B, Rule 1.15C, Rule 1.15D, and Rule 1.15E.

[1] Trust accounts containing funds of clients or third persons held in connection with a representation must be interest-bearing or dividend-paying for the benefit of the clients or third persons or, if the funds are nominal in amount or expected to be held for a short period of time, for the benefit of the Colorado Lawyer Trust Account Foundation. A lawyer should exercise good faith judgment in determining initially whether funds are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing account for the benefit of the client or third person. The lawyer should also consider such other factors as (i) the costs of establishing and maintaining the account, service charges, accounting fees, and tax report procedures; (ii) the nature of the transaction(s) involved; and (iii) the likelihood of delay in the relevant proceedings. A lawyer should review at reasonable intervals whether changed circumstances require further action respecting the deposit of such funds, including without limitation the action described in paragraph 1.15B(i).

[2] If a lawyer or law firm participates in Interest on Lawyer Trust Account ("IOLTA") programs in more than one jurisdiction, including Colorado, IOLTA funds that the lawyer or law firm holds in connection with the practice of law in Colorado should be held in the lawyer or law firm's COLTAF account (as defined in Rule 1.15B(2)(b). The lawyer or law firm should exercise good faith judgment in determining which IOLTA funds it holds in connection with the practice of law in Colorado.

[3] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[4] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. See Rule 1.16(d) for standards applicable to retention of client papers.

[6] The duty to keep separate from the lawyer's own property any property in which any other person claims an interest exists whether or not there is a dispute as to ownership of the property. Likewise, although the second sentence of Rule 1.15A(c) deals specifically with disputed ownership, the first sentence of that provision — requiring some form of accounting — applies even if there is no dispute as to ownership. For example, if the lawyer receives a settlement check made payable jointly to the lawyer and the lawyer's client, covering both the lawyer's fee and the client's recovery, the lawyer must provide an accounting to the client before taking the lawyer's fee from the joint funds. Typically the check will be deposited in the lawyer's trust account and, following an accounting to the client with respect to the fee, the lawyer will "sever" the fee by withdrawing the amount of the fee from the trust account and depositing it in the lawyer's operating account. *See* Rule 1.15A(b) and Rule 1.15D for specific provisions regarding accounting and record-keeping.

Proposed
RULE 1.15B

Account Requirements

(a) Every lawyer in private practice in this state shall maintain in the lawyer's own name, or in the name of the lawyer's law firm:

(1) A trust account or accounts, separate from any business and personal accounts and from any other fiduciary accounts that the lawyer or the law firm may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which the lawyer shall deposit, or shall cause the law firm to deposit, all funds entrusted to the lawyer's care and any advance payment of fees that has not been earned or advance payment of expenses that have not been incurred. A lawyer shall not be required to maintain a trust account when the lawyer is not holding such funds or payments.

(2) A business account or accounts into which the lawyer shall deposit, or cause the law firm to deposit all funds received for legal services. Each business account, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a "business account," an "office account," an "operating account," or a "professional account," or with a similarly descriptive term that distinguishes the account from a trust account and a personal account.

(b) One or more of the trust accounts may be a Colorado Lawyer Trust Account Foundation ("COLTAF") account. A "COLTAF account" is a pooled trust account for funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time, and as such would not be expected to earn interest or pay dividends for such clients or third persons in excess of the reasonably estimated cost of establishing, maintaining, and accounting for trust accounts for the benefit of such clients or third persons. Interest or dividends paid on a COLTAF account shall be paid to COLTAF, and the lawyer and the law firm shall have no right or claim to such interest or dividends.

(c) Each trust account, as well as all deposits slips and checks drawn thereon, shall be prominently designated as a "trust account," provided that each COLTAF account shall be designated as a "COLTAF Trust Account." A trust account may bear any additional descriptive designation that is not misleading.

(d) Except as provided in this paragraph (d), each trust account, including each COLTAF account, shall be maintained in a financial institution that is approved by the Regulation Counsel pursuant to Rule 1.15E. If each client and third person whose funds are in the account is informed in writing by the lawyer that Regulation Counsel will not be notified of any overdraft on the account, and with the informed consent of each such client and third person, a trust account in which interest or dividends are paid to the clients or third persons need not be in an approved institution.

(e) Each trust account, including each COLTAF account, shall be an interest-bearing, or dividend-paying, insured depository account; provided that, with the informed consent of each

client or third person whose funds are in the account, an account in which interest or dividends are paid to clients or third persons need not be an insured depository account. For the purpose of this provision, an "insured depository account" shall mean a government insured account at a regulated financial institution, on which withdrawals or transfers can be made on demand, subject only to any notice period which the financial institution is required to reserve by law or regulation.

(f) The lawyer may deposit, or may cause the law firm to deposit, into a trust account funds reasonably sufficient to pay anticipated service charges or other fees for maintenance or operation of the account. Such funds shall be clearly identified in the lawyer's or law firm's records of the account.

(g) All funds entrusted to the lawyer shall be deposited in a COLTAF account unless the funds are deposited in a trust account described in paragraph (h) of this Rule. The foregoing requirement that funds be deposited in a COLTAF account does not apply in those instances where it is not feasible for the lawyer or the law firm to establish a COLTAF account for reasons beyond the control of the lawyer or law firm, such as the unavailability in the community of a financial institution that offers such an account; but in such case the funds shall be deposited in a trust account described in paragraph (h) of this Rule.

(h) If funds entrusted to the lawyer are not held in a COLTAF account, the lawyer shall deposit, or shall cause the law firm to deposit, the funds in a trust account that complies with all requirements of paragraphs (c), (d), and (e) of this Rule and for which all interest earned or dividends paid (less deductions for service charges or fees of the depository institution) shall belong to the clients or third persons whose funds have been so deposited. The lawyer and the law firm shall have no right or claim to such interest or dividends.

(i) If the lawyer or law firm discovers that funds of a client or third person have mistakenly been held in a COLTAF account in a sufficient amount or for a sufficiently long time so that interest or dividends on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining, and accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person), the lawyer shall request, or shall cause the law firm to request, a refund from COLTAF to the COLTAF account of the interest or dividends in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.

(j) Every lawyer or law firm maintaining a trust account in this state shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements by financial institutions mandated by Rule 1.15E and shall indemnify and hold harmless the financial institution for its compliance with such reporting and production requirement.

Note: See comments following Rule 1.15A.

Proposed
RULE 1.15C

Use of Trust Accounts

(a) A lawyer shall not use any debit card or automated teller machine card to withdraw funds from a trust account. Cash withdrawals from trust accounts and checks drawn on trust accounts payable to "Cash" are prohibited. All trust account funds intended for deposit shall be deposited intact without deductions or "cash out" from the deposit, and the duplicate deposit slip that evidences the deposit shall be sufficiently detailed to identify each item deposited.

(b) All trust account withdrawals and transfers shall be made only by a lawyer admitted to practice law in this state or by a person supervised by such lawyer. Such withdrawals and transfers may be made only by authorized bank or wire transfer or by check payable to a named payee. Only a lawyer admitted to practice law in this state or a person supervised by such lawyer shall be an authorized signatory on a trust account.

(c) No less than quarterly, a lawyer admitted to practice law in this state or a person supervised by such a lawyer shall reconcile the trust account records both as to individual clients or other persons and in the aggregate with the bank statements issued by the bank in which the trust account is maintained.

Note: See comments following Rule 1.15A.

Proposed
RULE 1.15D

Required Records

(a) A lawyer shall maintain, or shall cause the lawyer's law firm to maintain, in a current status and retain for a period of seven years after the event that they record:

(1) An appropriate record-keeping system identifying each separate person for whom the lawyer or the law firm holds funds or other property and adequately showing the following:

(A) For each trust account the date and amount of each deposit; the name and address of each payor of the funds deposited; the name and address of each person for whom the funds are held and the amount held for the person; a description of the reason for each deposit; the date and amount of each charge against the trust account and a description of the charge; the date and amount of each disbursement; and the name and address of each person to whom the disbursement is made and the amount disbursed to the person.

(B) For each item of property other than funds, the nature of the property; the date of receipt of the property; the name and address of each person from whom the property is received, the name and address of each person for whom the property is held and, if interests in the property are held by more than one person, a statement of the nature and extent of each person's interest in the property, to the extent known; a description of the reason for each receipt; the date and amount of each charge against the property and a description of the charge; the date of each delivery of the property by the lawyer; and the name and address of each person to whom the property is delivered by the lawyer.

(2) Appropriate records of all deposits in and withdrawals from all other bank accounts maintained in connection with the lawyer's legal services, specifically identifying the date, payor, and description of each item deposited as well as the date, payee, and purpose of each disbursement;

(3) Copies of all written communications setting forth the basis or rate for the fees charged by the lawyer as required by Rule 1.5(b), and copies of all writings, if any, stating other terms of engagement for legal services;

(4) Copies of all statements to clients and third persons showing the disbursement of funds or the delivery of property to them or on their behalves;

(5) Copies of all bills issued to clients;

(6) Records showing payments to any persons, not in the lawyer's regular employ, for services rendered or performed; and

(7) Paper copies or electronic copies of all bank statements and of all canceled checks.

(b) The records required by this Rule shall be maintained in accordance with one or more of the following recognized accounting methods: the accrual method, the cash basis method, or the income tax method. All such accounting methods shall be consistently applied. Bookkeeping records may be maintained by computer provided they otherwise comply with this Rule and provided further that printed copies can be made on demand in accordance with this Rule. They shall be located at the principal Colorado office of the lawyer or of the lawyer's law firm.

(c) Upon the dissolution of a law firm, the lawyers who rendered legal services through the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with this Rule and Rule 1.16A. Upon the departure of a lawyer from a law firm, the departing lawyer and the lawyers remaining in the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with this Rule and Rule 1.16A.

(d) Any of the records required to be kept by this Rule shall be produced in response to a subpoena duces tecum issued by the Regulation Counsel in connection with proceedings pursuant to C.R.C.P. 251. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding, and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege of the lawyer's client.

Note: See comments following Rule 1.15A.

Proposed
Rule 1.15E

Approved Institutions

(a) This Rule applies to each trust account that is subject to Rule 1.15B, other than a trust account that is maintained in other than an approved financial institution pursuant to the second sentence of Rule 1.15B(d).

(b) Each trust account shall be maintained at a financial institution that is approved by the Regulation Counsel, pursuant to the provisions and conditions contained in this Rule. The Regulation Counsel shall maintain a list of approved financial institutions, which it shall renew not less than annually. Offering a trust account or a COLTAF account is voluntary for financial institutions.

(c) The Regulation Counsel shall approve a financial institution for use for lawyers' trust accounts, including COLTAF accounts, if the financial institution files with the Regulation Counsel an agreement, in a form provided by the Regulation Counsel, with the following provisions and on the following conditions:

(1) The financial institution does business in Colorado;

(2) The financial institution agrees to report to the Regulation Counsel in the event a properly payable trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored. That agreement shall apply to all branches of the financial institution and shall not be canceled except on thirty-days notice in writing to the Regulation Counsel.

(3) The financial institution agrees that all reports made by the financial institution shall be in the following format: (i) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (ii) in the case of an instrument that is presented against insufficient funds but that is honored, the report shall identify the financial institution, the lawyer or law firm for whom the account is maintained, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Report of a dishonored instrument shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any. If no such time is provided by law for notice of dishonor, or if the financial institution has honored an instrument presented against insufficient funds, then the report shall be made within five banking days of the date of presentation of the instrument.

(4) The financial institution agrees to cooperate fully with the Regulation Counsel and to produce any trust account records on receipt of a subpoena for the records issued by the Regulation Counsel in connection with any proceeding pursuant to C.R.C.P. 251. Nothing herein shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule, but such charges shall not be a transaction cost to be charged against funds payable to the COLTAF program.

(5) The financial institution agrees to cooperate with the COLTAF program and shall offer a COLTAF account to any lawyer or law firm who wishes to open one.

(6) With respect to COLTAF accounts, the financial institution agrees:

(A) To remit electronically to COLTAF monthly interest or dividends, net of allowable reasonable COLTAF fees as defined in subparagraph (c)(10) of this Rule, if any; and

(B) To transmit electronically with each remittance to COLTAF a statement showing, as to each COLTAF account, the name of the lawyer or law firm on whose account the remittance is sent; the account number; the remittance period; the rate or rates of interest or dividends applied; the account balance or balances on which the interest or dividends are calculated; the amount of interest or dividends paid; the amount and type of fees, if any, deducted; the amount of net earnings remitted; and such other information as is reasonably requested by COLTAF.

(7) The financial institution agrees to pay on any COLTAF account not less than (i) the highest interest or dividend rate generally available from the financial institution on non-COLTAF accounts when the COLTAF account meets the same eligibility requirements, if any, as the eligibility requirement for non-COLTAF accounts; or (ii) the rate set forth in subparagraph (c)(9) below. In determining the highest interest or dividend rate generally available from the financial institution to its non-COLTAF customers, the financial institution may consider factors customarily considered by the financial institution when setting interest or dividends rates for its non-COLTAF accounts, including account balances, provided that such factors do not discriminate between COLTAF accounts and non-COLTAF accounts. The financial institution may choose to pay on a COLTAF account the highest interest or dividend rate generally available on its comparable non-COLTAF accounts in lieu of actually establishing and maintaining the COLTAF account in the comparable highest interest or dividend rate product.

(8) A COLTAF account may be established by a lawyer or law firm and a financial institution as:

(A) A checking account paying preferred interest rates, such as market based or indexed rates;

(B) A public funds interest-bearing checking account such as an account used for other non-profit organizations or government agencies;

(C) An interest-bearing checking account such as a negotiable order of withdrawal (NOW) account, or business checking account with interest; or

(D) A business checking account with an automated investment feature in overnight daily financial institution repurchase agreements or money market funds. A daily financial institution repurchase agreement shall be fully collateralized by U.S. Government Securities (meaning U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States government) and may be established only with an approved institution that is

"well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. A "money market fund" is a fund maintained as a money market fund by an investment company registered under the Investment Company Act of 1940, as amended, which fund is qualified to be held out to investors as a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act. A money market fund shall be invested solely in U.S. Government Securities, or repurchase agreements fully collateralized by U.S. Government Securities, and, at the time of the investment, shall have total assets of at least two hundred fifty million dollars ($250,000,000).

(9) In lieu of a rate set forth in paragraph (c)(7)(i), the financial institution may elect to pay on all deposits in its COLTAF accounts, a benchmark rate, which COLTAF is authorized to set periodically, but not more frequently than every six months, to reflect an overall comparable rate offered by financial institutions in Colorado net of allowable reasonable COLTAF fees. Election of the benchmark rate is optional, and financial institutions may choose to maintain their eligibility by paying the rate set forth in paragraph (c)(7)(i).

(10) "Allowable reasonable COLTAF fees" are per-check charges, per-deposit charges, fees in lieu of minimum balances, federal deposit insurance fees, sweep fees, and reasonable COLTAF account administrative fees. The financial institution may deduct allowable reasonable COLTAF fees from interest or dividends earned on a COLTAF account, provided that such fees (other than COLTAF account administrative fees) are calculated and imposed in accordance with the approved institution's standard practice with respect to comparable non-COLTAF accounts. The financial institution agrees not to deduct allowable reasonable COLTAF fees accrued on one COLTAF account in excess of the earnings accrued on the COLTAF account for any period from the principal of any other COLTAF account or from interest or dividends accrued on any other COLTAF account. Any fee other than allowable reasonable COLTAF fees are the responsibility of, and the financial institution may charge them to, the lawyer or law firm maintaining the COLTAF account.

(11) Nothing contained in this Rule shall preclude the financial institution from paying a higher interest or dividend rate on a COLTAF account than is otherwise required by the financial institution's agreement with the Regulation Counsel or from electing to waive any or all fees associated with COLTAF accounts.

(12) Nothing in this Rule shall be construed to require the Regulation Counsel or any lawyer or law firm to make independent determinations about whether a financial institution's COLTAF account meets the comparability requirements set forth in paragraph (c)(7). COLTAF will make such determinations and at least annually will inform Regulation Counsel of the financial institutions that are in compliance with the comparability provisions of this Rule.

(13) Each approved financial institution shall be immune from suit arising out of its actions or omissions in reporting overdrafts or insufficient funds or producing documents under this Rule 1.15(E). The agreement entered into by a financial institution with the Regulation Counsel shall not be deemed to create a duty to exercise a standard of care and shall not constitute a contract for the benefit of any third parties that may sustain a loss as a result of lawyers overdrawing lawyer trust accounts.

Note: See comments following Rule 1.15A.

DRAFT, ~~7/2/13~~ *9/30/13*

REDLINED

Proposed
RULE 1.15A

General Duties of Lawyers Regarding Property of Clients and Third Parties
(See also Rules 1.15B, 1.15C 1.15D and 1015E)

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in trust accounts maintained in compliance with Rule 1.15B. Other property shall be appropriately safeguarded. Complete records of such funds and other property of clients or third parties shall be kept by the lawyer in compliance with Rule 1.15D.

(b) Upon receiving funds or other property of a client or third person, a lawyer shall, promptly or otherwise as permitted by law or by agreement with the client or third person, deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, promptly upon request by the client or third person, render a full accounting regarding such property.

(c) When in connection with a representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until there is a resolution of the claims and, when necessary, a severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(d) The provisions of Rule 1.15B, Rule 1.15C, Rule 1.15D, and Rule 1.15E apply to funds and other property, and to accounts, held or maintained by the lawyer, or caused by the lawyer to be held or maintained by a law firm through which the lawyer renders legal services, in connection with a representation.

EXHIBIT
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COMMENT

***Note:** The following six comments are applicable to this Rule 1.15A and to Rule 1.15B, Rule 1.15C, Rule 1.15D, and Rule 1.15E.*

[1] Trust accounts containing funds of clients or third persons held in connection with a representation must be interest-bearing or dividend-paying for the benefit of the clients or third persons or, if the funds are nominal in amount or expected to be held for a short period of time, for the benefit of the Colorado Lawyer Trust Account Foundation. A lawyer should exercise good faith judgment in determining initially whether funds are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing account for the benefit of the client or third person. The lawyer should also consider such other factors as (i) the costs of establishing and maintaining the account, service charges, accounting fees, and tax report procedures; (ii) the nature of the transaction(s) involved; and (iii) the likelihood of delay in the relevant proceedings. A lawyer should review at reasonable intervals whether changed circumstances require further action respecting the deposit of such funds, including without limitation the action described in paragraph 1.15B(i).

[2] If a lawyer or law firm participates in Interest on Lawyer Trust Account ("IOLTA") programs in more than one jurisdiction, including Colorado, IOLTA funds that the lawyer or law firm holds in connection with the practice of law in Colorado should be held in the lawyer or law firm's COLTAF account (as defined in Rule 1.15B(2)(b). *The lawyer or law firm should exercise good faith judgment in determining which IOLTA funds it holds in connection with the practice of law in Colorado.*

[3] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[4] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. See Rule 1.16(d) for standards applicable to retention of client papers.

[6] The duty to keep separate from the lawyer's own property any property in which any other person claims an interest exists whether or not there is a dispute as to ownership of the property. Likewise, although the second sentence of Rule 1.15A(c) deals specifically with disputed ownership, the first sentence of that provision — requiring some form of accounting — applies even if there is no dispute as to ownership. For example, if the lawyer receives a settlement check made payable jointly to the lawyer and the lawyer's client, covering both the lawyer's fee and the client's recovery, the lawyer must provide an accounting to the client before taking the lawyer's fee from the joint funds. Typically the check will be deposited in the lawyer's trust account and, following an accounting to the client with respect to the fee, the lawyer will "sever" the fee by withdrawing the amount of the fee from the trust account and depositing it in the lawyer's operating account. See Rule 1.15A(b) and Rule 1.15D for specific provisions regarding accounting and record-keeping.

Proposed
RULE 1.15B

Account Requirements

(a) Every lawyer in private practice in this state shall maintain in the lawyer's own name, or in the name of the lawyer's law firm:

(1) A trust account or accounts, separate from any business and personal accounts and from any other fiduciary accounts that the lawyer or the law firm may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which the lawyer shall deposit, or shall cause the law firm to deposit, all funds entrusted to the lawyer's care and any advance payment of fees that has not been earned or advance payment of expenses that have not been incurred. A lawyer shall not be required to maintain a trust account when the lawyer is not holding such funds or payments.

(2) A business account or accounts into which the lawyer shall deposit, or cause the law firm to deposit all funds received for legal services. Each business account, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a "business account," an "office account," an "operating account," or a "professional account," or with a similarly descriptive term that distinguishes the account from a trust account and a personal account.

(b) One or more of the trust accounts may be a Colorado Lawyer Trust Account Foundation ("COLTAF") account. A "COLTAF account" is a pooled trust account for funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time, and as such would not be expected to earn interest or pay dividends for such clients or third persons in excess of the reasonably estimated cost of establishing, maintaining, and accounting for trust accounts for the benefit of such clients or third persons. Interest or dividends paid on a COLTAF account shall be paid to COLTAF, and the lawyer and the law firm shall have no right or claim to such interest or dividends.

(c) Each trust account, as well as all deposits slips and checks drawn thereon, shall be prominently designated as a "trust account," provided that each COLTAF account shall be designated as a "COLTAF Trust Account." A trust account may bear any additional descriptive designation that is not misleading.

(d) Except as provided in this paragraph (d), each trust account, including each COLTAF account, shall be maintained in a financial institution that is approved by the Regulation Counsel pursuant to Rule 1.15E. If each client and third person whose funds are in the account is informed in writing *by the lawyer* that Regulation Counsel will not be notified of any overdraft on the account, and with the informed consent of each such client and third person, a trust account in which interest or dividends are paid to the clients or third persons need not be in an approved institution.

(e) Each trust account, including each COLTAF account, shall be an interest-bearing, or dividend-paying, insured depository account; provided that, with the informed consent of each client or third person whose funds are in the account, an account in which interest or dividends are paid to clients or third persons need not be an insured depository account. For the purpose of this provision, an "insured depository account" shall mean a government insured account at a regulated financial institution, on which withdrawals or transfers can be made on demand, subject only to any notice period which the financial institution is required to reserve by law or regulation.

(f) The lawyer may deposit, or may cause the law firm to deposit, into a trust account funds reasonably sufficient to pay anticipated service charges or other fees for maintenance or operation of the account. Such funds shall be clearly identified in the lawyer's or law firm's records of the account.

(g) All funds entrusted to the lawyer shall be deposited in a COLTAF account unless the funds are deposited in a trust account described in paragraph (h) of this Rule. The foregoing requirement that funds be deposited in a COLTAF account does not apply in those instances where it is not feasible for the lawyer or the law firm to establish a COLTAF account for reasons beyond the control of the lawyer or law firm, such as the unavailability in the community of a financial institution that offers such an account; but in such case the funds shall be deposited in a trust account described in paragraph (h) of this Rule.

(h) If funds entrusted to the lawyer are not held in a COLTAF account, the lawyer shall deposit, or shall cause the law firm to deposit, the funds in a trust account that complies with all requirements of paragraphs (c), (d), and (e) of this Rule and for which all interest earned or dividends paid (less deductions for service charges or fees of the depository institution) shall belong to the clients or third persons whose funds have been so deposited. The lawyer and the law firm shall have no right or claim to such interest or dividends.

(i) If the lawyer or law firm discovers that funds of a client or third person have mistakenly been held in a COLTAF account in a sufficient amount or for a sufficiently long time so that interest or dividends on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining, and accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person), the lawyer shall request, or shall cause the law firm to request, a refund *from COLTAF to the COLTAF account* of the interest or dividends ~~from COLTAF~~ in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.

(j) Every lawyer or law firm maintaining a trust account in this state shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements by financial institutions mandated by Rule 1.15E and shall indemnify and hold harmless the financial institution for its compliance with such reporting and production requirement.

Note: See comments following Rule 1.15A.

Proposed
RULE 1.15C

Use of Trust Accounts

(a) A lawyer shall not use any debit card or automated teller machine card to withdraw funds from a trust account. Cash withdrawals from trust accounts and checks drawn on trust accounts payable to "Cash" are prohibited. All trust account funds intended for deposit shall be deposited intact without deductions or "cash out" from the deposit, and the duplicate deposit slip that evidences the deposit shall be sufficiently detailed to identify each item deposited.

(b) All trust account withdrawals and transfers shall be made only by a lawyer admitted to practice law in this state or by a person supervised by such lawyer. Such withdrawals and transfers may be made only by authorized bank or wire transfer or by check payable to a named payee. Only a lawyer admitted to practice law in this state or a person supervised by such lawyer shall be an authorized signatory on a trust account.

(c) No less than quarterly, a lawyer admitted to practice law in this state or a person supervised by such a lawyer shall reconcile the trust account records both as to individual clients or other persons and in the aggregate with the bank statements issued by the bank in which the trust account is maintained.

Note: See comments following Rule 1.15A.

Proposed
RULE 1.15D

Required Records

(a) A lawyer shall maintain, or shall cause the lawyer's law firm to maintain, in a current status and retain for a period of seven years after the event that they record:

(1) An appropriate record-keeping system identifying each separate person for whom the lawyer or the law firm holds funds or other property and adequately showing the following:

(A) For each trust account the date and amount of each deposit; the name and address of each payor of the funds deposited; the name and address of each person for whom the funds are held and the amount held for the person; a description of the reason for each deposit; the date and amount of each charge against the trust account and a description of the charge; the date and amount of each disbursement; and the name and address of each person to whom the disbursement is made and the amount disbursed to the person.

(B) For each item of property other than funds, the nature of the property; the date of receipt of the property; the name and address of each person from whom the property is received, the name and address of each person for whom the property is held and, if interests in the property are held by more than one person, a statement of the nature and extent of each person's interest in the property, to the extent known; a description of the reason for each receipt; the date and amount of each charge against the property and a description of the charge; the date of each delivery of the property by the lawyer; and the name and address of each person to whom the property is delivered by the lawyer.

(2) Appropriate records of all deposits in and withdrawals from all other bank accounts maintained in connection with the lawyer's legal services, specifically identifying the date, payor, and description of each item deposited as well as the date, payee, and purpose of each disbursement;

(3) Copies of all written communications setting forth the basis or rate for the fees charged by the lawyer as required by Rule 1.5(b)), and copies of all writings, if any, stating other terms of engagement for legal services;

(4) Copies of all statements to clients and third persons showing the disbursement of funds or the delivery of property to them or on their ~~behalf~~ *behalves*;

(5) Copies of all bills issued to clients;

(6) Records showing payments to any persons, not in the lawyer's regular employ, for services rendered or performed; and

(7) Paper copies or electronic copies of all bank statements and of all canceled checks.

(b) The records required by this Rule shall be maintained in accordance with one or more of the following recognized accounting methods: the accrual method, the cash basis method, or the income tax method. All such accounting methods shall be consistently applied. Bookkeeping records may be maintained by computer provided they otherwise comply with this Rule and provided further that printed copies can be made on demand in accordance with this Rule. They shall be located at the principal Colorado office of the lawyer or of the lawyer's law firm.

(c) Upon the dissolution of a law firm, the lawyers who rendered legal services through the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with this Rule and Rule 1.16A. Upon the departure of a lawyer from a law firm, the departing lawyer and the lawyers remaining in the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with this Rule and Rule 1.16A.

(d) Any of the records required to be kept by this Rule shall be produced in response to a subpoena duces tecum issued by the Regulation Counsel in connection with proceedings pursuant to C.R.C.P. 251. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding, and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege of the lawyer's client.

Note: See comments following Rule 1.15A.

Proposed
Rule 1.15E

Approved Institutions

(a) This Rule applies to each trust account that is subject to Rule 1.15B, other than a trust account that is maintained in other than an approved financial institution pursuant to the second sentence of Rule 1.15B(d).

(b) Each trust account shall be maintained at a financial institution that is approved by the Regulation Counsel, pursuant to the provisions and conditions contained in this Rule. The Regulation Counsel shall maintain a list of approved financial institutions, which it shall renew not less than annually. Offering a trust account or a COLTAF account is voluntary for financial institutions.

(c) The Regulation Counsel shall approve a financial institution for use for lawyers' trust accounts, including COLTAF accounts, if the financial institution files with the Regulation Counsel an agreement, in a form provided by the Regulation Counsel, with the following provisions and on the following conditions:

(1) The financial institution does business in Colorado;

(2) The financial institution agrees to report to the Regulation Counsel in the event a properly payable trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored. That agreement shall apply to all branches of the financial institution and shall not be canceled except on thirty-days notice in writing to the Regulation Counsel.

(3) The financial institution agrees that all reports made by the financial institution shall be in the following format: (i) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (ii) in the case of an instrument that is presented against insufficient funds but that is honored, the report shall identify the financial institution, the lawyer or law firm for whom the account is maintained, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Report of a dishonored instrument shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any. If no such time is provided by law for notice of dishonor, or if the financial institution has honored an instrument presented against insufficient funds, then the report shall be made within five banking days of the date of presentation of the instrument.

(4) The financial institution agrees to cooperate fully with the Regulation Counsel and to produce any trust account records on receipt of a subpoena for the records issued by the Regulation Counsel in connection with any proceeding pursuant to C.R.C.P. 251. Nothing herein shall preclude a financial institution from charging a lawyer or law firm for the reasonable

cost of producing the reports and records required by this Rule, but such charges shall not be a transaction cost to be charged against funds payable to the COLTAF program.

(5) The financial institution agrees to cooperate with the COLTAF program and shall offer a COLTAF account to any lawyer or law firm who wishes to open one.

(6) With respect to COLTAF accounts, the financial institution agrees:

(A) To remit electronically to COLTAF monthly interest or dividends, net of allowable reasonable COLTAF fees as defined in subparagraph (c)(10) of this Rule, if any; and

(B) To transmit electronically with each remittance to COLTAF a statement showing, as to each COLTAF account, the name of the lawyer or law firm on whose account the remittance is sent; the account number; the remittance period; the rate or rates of interest or dividends applied; the account balance or balances on which the interest or dividends are calculated; the amount of interest or dividends paid; the amount and type of fees, if any, deducted; the amount of net earnings remitted; and such other information as is reasonably requested by COLTAF.

(7) The financial institution agrees to pay on any COLTAF account not less than (i) the highest interest or dividend rate generally available from the financial institution on non-COLTAF accounts when the COLTAF account meets the same eligibility requirements, if any, as the eligibility requirement for non-COLTAF accounts; or (ii) the rate set forth in subparagraph (c)(9) below. In determining the highest interest or dividend rate generally available from the financial institution to its non-COLTAF customers, the financial institution may consider factors customarily considered by the financial institution when setting interest or dividends rates for its non-COLTAF accounts, including account balances, provided that such factors do not discriminate between COLTAF accounts and non-COLTAF accounts. The financial institution may choose to pay on a COLTAF account the highest interest or dividend rate generally available on its comparable non-COLTAF accounts in lieu of actually establishing and maintaining the COLTAF account in the comparable highest interest or dividend rate product.

(8) A COLTAF account may be established by a lawyer or law firm and a financial institution as:

(A) A checking account paying preferred interest rates, such as market based or indexed rates;

(B) A public funds interest-bearing checking account such as an account used for other non-profit organizations or government agencies;

(C) An interest-bearing checking account such as a negotiable order of withdrawal (NOW) account, or business checking account with interest; or

(D) A business checking account with an automated investment feature in overnight daily financial institution repurchase agreements or money market funds. A daily financial institution

repurchase agreement shall be fully collateralized by U.S. Government Securities (meaning U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States government) and may be established only with an approved institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. A "money market fund" is a fund maintained as a money market fund by an investment company registered under the Investment Company Act of 1940, as amended, which fund is qualified to be held out to investors as a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act. A money market fund shall be invested solely in U.S. Government Securities, or repurchase agreements fully collateralized by U.S. Government Securities, and, at the time of the investment, shall have total assets of at least two hundred fifty million dollars ($250,000,000).

(9) In lieu of a rate set forth in paragraph (c)(7)(i), the financial institution may elect to pay on all deposits in its COLTAF accounts, a benchmark rate, which COLTAF is authorized to set periodically, but not more frequently than every six months, to reflect an overall comparable rate offered by financial institutions in Colorado net of allowable reasonable COLTAF fees. Election of the benchmark rate is optional, and financial institutions may choose to maintain their eligibility by paying the rate set forth in paragraph (c)(7)(i).

(10) "Allowable reasonable COLTAF fees" are per-check charges, per-deposit charges, fees in lieu of minimum balances, federal deposit insurance fees, sweep fees, and reasonable COLTAF account administrative fees. The financial institution may deduct allowable reasonable COLTAF fees from interest or dividends earned on a COLTAF account, provided that such fees (other than COLTAF account administrative fees) are calculated and imposed in accordance with the approved institution's standard practice with respect to comparable non-COLTAF accounts. The financial institution agrees not to deduct allowable reasonable COLTAF fees accrued on one COLTAF account in excess of the earnings accrued on the COLTAF account for any period from the principal of any other COLTAF account or from interest or dividends accrued on any other COLTAF account. Any fee other than allowable reasonable COLTAF fees are the responsibility of, and the financial institution may charge them to, the lawyer or law firm maintaining the COLTAF account.

(11) Nothing contained in this Rule shall preclude the financial institution from paying a higher interest or dividend rate on a COLTAF account than is otherwise required by the financial institution's agreement with the Regulation Counsel or from electing to waive any or all fees associated with COLTAF accounts.

(12) Nothing in this Rule shall be construed to require the Regulation Counsel or any lawyer or law firm to make independent determinations about whether a financial institution's COLTAF account meets the comparability requirements set forth in paragraph (c)(7). COLTAF will make such determinations and at least annually will inform Regulation Counsel of the financial institutions that are in compliance with the comparability provisions of this Rule.

(13) Each approved financial institution shall be immune from suit arising out of its actions or omissions in reporting overdrafts or insufficient funds or producing documents under this Rule 1.15(E). The agreement entered into by a financial institution with the Regulation Counsel shall

not be deemed to create a duty to exercise a standard of care and shall not constitute a contract for the benefit of any third parties that may sustain a loss as a result of lawyers overdrawing lawyer trust accounts.

~~COMMENT~~

~~[1] Trust accounts containing funds of clients or third persons held in connection with a representation must be interest-bearing or dividend-paying for the benefit of the clients or third persons or, if the funds are nominal in amount or expected to be held for a short period of time, for the benefit of the Colorado Lawyer Trust Account Foundation. A lawyer should exercise good faith judgment in determining initially whether funds are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing account for the benefit of the client or third person. The lawyer should also consider such other factors as (i) the costs of establishing and maintaining the account, service charges, accounting fees, and tax report procedures; (ii) the nature of the transaction(s) involved; and (iii) the likelihood of delay in the relevant proceedings. A lawyer should review at reasonable intervals whether changed circumstances require further action respecting the deposit of such funds; including without limitation the action described in paragraph 1.15B(i).~~

~~[2] If a lawyer or law firm participates in Interest on Lawyer Trust Account ("IOLTA") programs in more than one jurisdiction, including Colorado, IOLTA funds that the lawyer or law firm holds in connection with the practice of law in Colorado should be held in the lawyer or law firm's COLTAF account. The lawyer or law firm should exercise good faith judgment in determining which IOLTA funds it holds in connection with the practice of law in Colorado.~~

~~[3] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.~~

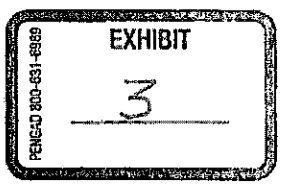
~~[4] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.~~

~~[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. See Rule 1.16(d) for standards applicable to retention of client papers.~~

~~[6] The duty to keep separate from the lawyer's own property any property in which any other person claims an interest exists whether or not there is a dispute as to ownership of the property. Likewise, although the second sentence of Rule 1.15A(c) deals specifically with disputed ownership, the first sentence of that provision — requiring some form of accounting — applies even if there is no dispute as to ownership. For example, if the lawyer receives a settlement check made payable jointly to the lawyer and the lawyer's client, covering both the lawyer's fee and the client's recovery, the lawyer must provide an accounting to the client before taking the lawyer's fee from the joint funds. Typically the check will be deposited in the lawyer's trust account and, following an accounting to the client with respect to the fee, the lawyer will "sever" the fee by withdrawing the amount of the fee from the trust account and depositing it in the lawyer's operating account. See Rule 1.15A(b) and Rule 1.15D for specific provisions regarding accounting and record-keeping~~
Note: See comments following Rule 1.15A.

Proposed Rule 1.5(f)

(f) Fees are not earned until the lawyer confers a benefit on the client or performs a legal service for the client. Advances of unearned fees are the property of the client and shall be deposited in the lawyer's trust account pursuant to Rule 1.15(f)(1)[*wrong cite in current rule, should be changed]* until earned. If advances of unearned fees are in the form of property other than funds, then the lawyer shall hold such property separate from the lawyer's own property pursuant to Rule 1.15(A). The lawyer shall give written notice to the client that i) fees have been earned and ii) funds will be or have been transferred from the lawyer's trust account, or property other than funds will be transferred to pay earned amounts, within a reasonable time before or after the transfer.



SECOND SUPPLEMENTAL REPORT OF AMENDMENT 64 SUBCOMMITTEE

This supplemental report has been prepared for purposes of the email vote, before our next meeting, on the final versions of proposed Comment [2] to Rule 8.4, proposed new Rule 8.6, and proposed Comment [1] to new Rule 8.6.

I. Background

The meeting of July 26, 2013 addressed all these proposals, but did not finally resolve the language of proposed Comment [2]. According to the draft minutes of that meeting:

- The committee approved a motion to amend proposed Rule 8.6 by moving the citations to the medical marijuana and recreational marijuana amendments from Comment [1] into the text of the rule, which obviated any further need for Comment [1]. As so amended, the proposed new rule and former Comment [2] (renumbered as Comment [1]) were approved for presentation to the Supreme Court.

- The committee's discussion of proposed Comment [2] recognized that commercial activity would not be included, and focused on whether the comment should merely cite the sections of the medical marijuana and recreational marijuana amendments addressing noncommercial conduct, as proposed by the subcommittee, or should include language describing the conduct -- *i.e.*, medical use and personal use of marijuana -- that would not alone be the basis for disciplinary action under Rule 8.4(b). This discussion ended with direction that the subcommittee propose specific language, which could be circulated for an email vote before the committee's next meeting.

II. Proposed Comment [2] to Rule 8.4

Following the July 26th meeting, the subcommittee approved and sent proposed language to Committee Chair Marcy Glenn and Committee Secretary Tony van Westrum. Extensive emails ensued between and among Marcy, Tony, Michael Berger, and John Webb. Although many nuances were raised, the dialogue reduced to

whether lawyers should be allowed to engage in commercial conduct not subject to licensure, under subsections 16(4)(a) and (f) of the recreational marijuana amendment; whether the comment should deal with including within "medical use" activities as a care giver; and whether "personal use" included activities such as cultivation. *See* Colo. Const., art. XVIII, § 16(3) (listing activities that go beyond the common understanding of "use.").

A majority of participants in this exchange concluded that, consistent with the consensus at the July 26 meeting, no commercial activity should be included; the caregiver nuance should not be addressed; and any doubt that personal use and medical use are terms of art, as defined and described in the amendments, could be resolved by putting these phrases in quotes and adding a reference to the definition of "medical use" in section 14(1)(b) of the medical marijuana amendment. (It was noted that subsection 14(4) specifically defines the "medical use of marijuana" permitted under that subsection; and subsection 16(3) of the recreational marijuana amendment does the same thing under the heading "Personal Use.") This process led to the following:

Rule 8.4, new Comment [2A]: A lawyer's "medical use" or "personal use" of marijuana that, by virtue of any of the following provisions of the Colorado Constitution, is either permitted or within an affirmative defense to prosecution under state criminal law, and which is in compliance with legislation or regulations implementing such provisions, does not reflect adversely on the lawyer's honesty, trustworthiness, or fitness in other respects, solely because that same conduct, standing alone, may violate federal criminal law: (1) Article XVIII. Miscellaneous, Section 14, Medical use of marijuana for persons suffering from debilitating medical conditions, Subsection 14(1)(b); (2) Article XVIII. Miscellaneous, Section 14, Medical use of marijuana for persons suffering from debilitating medical conditions, Subsection 14(4); or (3) Article XVIII, Miscellaneous, Section 16, Personal use and regulation of marijuana, Subsection 16(3).

III. Proposed Rule 8.6

In revising the proposed new rule and its sole surviving comment for inclusion in the email ballot, Marcy recognized a potential ambiguity in the scope of the rule arising from whether it would apply only to proposed client activity that complied with the amendments (and implementing statutes and regulations), as contrasted with such activity that reasonably appeared to be

compliant. Ensuing discussion among the persons named above resolved this concern by adding the language underlined:

> **Rule 8.6**: Notwithstanding any other provision of these rules, a lawyer shall not be in violation of these rules or subject to discipline for counseling or assisting a client to engage in conduct that, by virtue of (1) Article XVIII. Miscellaneous, Section 14, Medical use of marijuana for persons suffering from debilitating medical conditions, or (2) Article XVIII, Miscellaneous, Section 16, Personal use and regulation of marijuana, the lawyer reasonably believes to be either permitted or within an affirmative defense to prosecution under state criminal law, and which the lawyer reasonably believes is in compliance with legislation or regulations implementing such provisions, solely because that same conduct, standing alone, may violate federal criminal law.

> **Rule 8.6, new Comment [1]**: The phrase "standing alone" clarifies that this rule does not preclude disciplinary action if a lawyer counsels or assists a client to engage in conduct that the lawyer reasonably believes is permitted by the Colorado Constitution, and that conduct contravenes federal law other than those prohibiting use, possession, cultivation, or distribution of marijuana.

IV. The Subcommittee's Position

Because OARC will oppose both the proposed comment and new rule, Jamie Sudler has declined to participate in the subcommittee's action following the July 26 meeting. One member voted "no." All other members voted in favor of the language set forth above.

Respectfully submitted September 23, 2013

/s/

John R. Webb

ANTHONY VAN WESTRUM

To: Colorado Supreme Court Standing Committee on Rules of Professional Conduct
From: Anthony van Westrum
Date: September 24, 2013
Re: Opposition to proposals regarding marijuana-related conduct

I have voted in opposition to the Second Supplemental Report of the Amendment 64 Subcommittee, dated September 23. 2013. I am no Thomas Jefferson, but I think that a decent respect to the opinions of the Committee requires that I should declare the causes which impel me to this separation from the Subcommittee's proposals.

1. It is not an immutable requirement of the United States Constitution or the Colorado Constitution that lawyers who violate Federal law be prosecuted by the Colorado Regulation Counsel and at risk of losing their Colorado license to practice law. The only thing that is remotely like that requirement is found in Rule 8.4(d), which, we all know, says that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

   But that Rule 8.4(d) is just a pronouncement by our local court, the Colorado Supreme Court. That Court can modify the principle it has enunciated in Rule 8.4(d) as it sees fit, without the world coming to an end.

   More specifically, that Court could conclude that a lawyer's engaging in any and all conduct that the citizens of Colorado have condoned for all of the state's citizens — including, without exception, all of its lawyers — would not reflect adversely on the lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects" (I've never understood what the phrase "in other respects" adds, by the way, but I'll ignore it here). Such conduct would seemingly not impact a doctor's fitness as a doctor, a priest's fitness as a priest, a politician's fitness as a politician; why should it make a lawyer any less competent to counsel about any aspect of the law or, more to the point, any less honest and trustworthy than any other citizen of the state?

2. That the Court could modify the text of Rule 8.4(d) as it saw fit is, of course, is the fact that lies behind the Subcommittee's proposal that a Comment [2A] [incorrectly referred to as "proposed Comment [2]" in the introductory paragraph of the Subcommittee's report] be added to that rule that would say, okay, we won't consider a lawyer's toking a joint — is that the terminology? I don't know; I might be the only Committee member who's actually never done it, and I've no personal stake in this matter — to reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer if the lawyer conforms to Colorado's (enlightened) laws permitting citizens to do that without fear of retribution by Colorado authorities.

3. But the Subcommittee would not extend that protection to activities other than the lawyer's own use, to activities that are sanctioned by Colorado law for all citizens of this state, such as those commercial activities permitted, with a proper license, under Article XVIII § 16(4)(b) – (d), *nor even to* those activities that are sanctioned by Colorado law for every Colorado citizen *without* a license under Article XVIII § 16(4)(a) and (f).

   That is, the Subcommittee would have this Committee recommend to the Court that thumbing your lawyer's nose at Federal law that prevents your private enjoyment of marijuana does not reflect adversely on your fitness as a lawyer but participating in formal commerce, lawfully and

in conformity with all the requirements of that commerce, including providing employee benefits, complying with equal opportunity regulations, withholding taxes and paying your own taxes, complying with zoning laws — all that — somehow would reflect adversely on your fitness to be a lawyer if that commerce involved marijuana. I submit that the Subcommittee (following the Committee's July charge) has it *backwards*: Lawful commercial activities should be permitted of the lawyer — I'd include even the licensed activities, but I'm not a dreamer — while purely personal conduct, toking up, should be prohibited as a manifestation of the Court's expectation that Colorado lawyers be impeccable in their personal conduct. (Admittedly, as a nonsmoker, I've no personal stake in this matter, so this is easy for me to say.)

4. I also submit that something is lost to the public, to the proper and lawful functioning of what will be a significant part of public commerce, when lawyers are prevented from engaging in marijuana commerce alongside other citizens. United States Attorney General Eric Holder has said that he will allow the marijuana-legalization experiments in Colorado and Washington State to proceed without Federal intrusion only so long as the states vigorously enforce appropriate regulation. The Guidance from the Department of Justice stressed this point:

> The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice. Jurisdictions that have implemented systems that provide for regulation of marijuana activity must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

It is critical, of course, to the Colorado experiment that Colorado lawyers be permitted to counsel and assist Colorado marijuana commerce in the activities that Colorado law now permits; and the Subcommittee's proposed Rule 8.6 goes a long way toward that end. But much more would be gained for Colorado's effort to see that its marijuana commerce is in fact compliant with law if Colorado lawyers were permitted to engage in it directly, alongside other entrepreneurs. As entrepreneurs themselves, they would be vigilant against noncompliance by their competitors.

5. Something is also lost to Colorado's young attorneys, so many of whom are struggling to survive financially in a brutally bad market for young lawyers, with most of those also being burdened by student loans that are larger than any home mortgage I've ever had. I know, because I've had conversations with them, that there are young law graduates, licensed as lawyers, who have hoped to make some bread by selling some weed. For reasons that have nothing to do with whether that activity would actually adversely impact their worth as lawyers, the Subcommittee's proposal (following, I admit, the charge of the Whole Committee at its July meeting) would say, can't do that.

6. As to the activities that are permitted by § 16(4)(a) and (f) to all Colorado citizens, other than lawyers, without a license, I know of rural lawyers who have interests in farm implement stores and even more who own farmland that they lease to tenant farmers. Those implement dealers, we will tell them, will have to be sure their products are not being used as accessories in the growing of marijuana, for such a sale would be covered by § 16(4)(a). Those farmland owners, we will tell them, will have to be sure that their tenants do not grow marijuana (and that will be particularly tough on our brethren in southeastern Colorado, owning farmland withered by a

1930s-like drought, where marijuana may be the only sustainable crop. Selling hoes to a marijuana grower, or leasing farmland to a marijuana grower, will not actually adversely impact these lawyers/ worth as lawyers, but the Subcommittee's proposal will say, can't do that.

(I dearly wish I had read both § 14 and § 16 more carefully than I did the night before the July meeting, when I developed my proposal — accepted by the Whole Committee at that meeting — that Comment [2A] specifically refer to activities permitted under § 14(4) and § 16(3. I would also have included the patient-care activities of § 14 and would have included at least the non-licensed activities contemplated by § 16(4)(a) and (f), and there is a good possibility, I think, that the Committee would have agreed to include those provisions as well But, I did not, and I did not succeed in getting the Subcommittee to retrofit them when I suggested that to the Subcommittee in its post-meeting deliberations.)

7. In addition to my opposition to the position taken by the Subcommittee — in admitted compliance with its charge from the Whole Committee — to exclude protection for any § 16(4) activities, I oppose the subcommittee's addition of paraphrasing to Comment [2A], the addition of the unnecessary references to "medical use" or "personal use." There is no need to paraphrase what the subsequently-cited constitutional provisions provide for in considerable detail; those provisions speak well enough on their own, and any lawyer who is actually interested in what he can and cannot do in this fraught area can surely be charged with reading the words of those provisions, particularly if he is bent on commercial activity and not just toking a joint.

I explained my concerns about this as follows in an email to the Subcommittee in the course of my interloping in the Subcommittee's discussions:

> . . . I have been concerned that the addition of the words "medical or personal use of marijuana" at the beginning of Comment [2A] to Rule 8.4 merely clouds the clarity that would be provided by unadulterated reference to the constitutional provisions as I had suggested before the July meeting: "Conduct of a lawyer which, by virtue of either of the provisions of the Colorado Constitution that are cited below, is either (a) permitted, ..." Where some see an effort simply to provide guidance to the foolish lawyer who might be bent on commercial activity but never read the constitutional provisions governing that activity, others may see an intention to parse all of the activities permitted under the constitutional spheres of "medical use" and "personal use" and to exclude all the things permitted within those spheres other than smoking the weed.
>
> The referenced provisions permit, in addition to "use," a number of other activities—
>
> Under § 14(1)(b), "Medical use" means the acquisition, possession, production, *use*, or transportation of marijuana or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a patient's debilitating medical condition . . . ." That is, *use* plus a bunch of other activities.
>
> Under § 16(3), the list of permitted activities is even longer:
>
> > (a) Possessing, *using*, displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana.
> >
> > (b) Possessing, growing, processing, or transporting no more than six marijuana plants, with three or fewer being mature, flowering

plants, and possession of the marijuana produced by the plants on the premises where the plants were grown, provided that the growing takes place in an enclosed, locked space, is not conducted openly or publicly, and is not made available for sale.

(c) Transfer of one ounce or less of marijuana without remuneration to a person who is twenty-one years of age or older.

(d) Consumption of marijuana, provided that nothing in this section shall permit consumption that is conducted openly and publicly or in a manner that endangers others.

(e) Assisting another person who is twenty-one years of age or older in any of the acts described in paragraphs (a) through (d) of this subsection.

I admit that the proposed Comment [2A] refers to "medical" "use" — albeit with an interloping disjunction "or" and the word "personal" between those words — and thus must logically include all the activities that are encompassed within the specific § 14(1)(b) definition of "medical use." But I wonder about the lawyer who is not a user but is a "primary care giver." I haven't parsed § 14 carefully in this regard, but I suspect that the provisions governing a primary care giver's permitted activities do not include what is defined in § 14(1)(b) as "medical use."

The situation under § 16 is even more cloudy regarding "personal use." Section 16 does not use the phrase "personal use" except in the caption for § 16(3); the operative parts of the provision specifically permit "using" marijuana but also permit possession, displaying, purchasing, or transporting marijuana; possessing, growing, processing, or transporting marijuana plants; transferring marijuana to folk over twenty years of age; consuming marijuana (which must somehow be different from "using," right?), and for-free assisting another over-twenty-year-old to get high, too. There are quantity limits for the various activities, of course. And the explicit, non-commercial permissions run not only to the weed itself but also to marijuana accessories.

I would ask that the Committee's report to the Court very clearly state that the words "medical or personal use" are used in the comment not in a narrowing sense but simply to be helpful to the lawyer in understanding that there is a distinction between personal and commercial activity, a distinction that the constitutional provisions themselves establish by the division of those two kinds of activities into two separate subsections of § 16. I think the explanation should include a specific statement that the intention is to permit all of the activities permitted by § 14 and § 16(3), the word "use" being helpful shorthand for all of those activities.

8. Switching now to the nitty wording of proposed Comment [1] to proposed Rule 8.6, I think it should read as follows—

Rule 8.6, new Comment [1]: The phrase "standing alone" clarifies that this rule does not preclude disciplinary action if a lawyer counsels or assists a client to engage in conduct that ~~the lawyer reasonably believes is permitted by the Colorado Constitution, and that conduct~~ contravenes federal law other than those prohibiting use, possession, cultivation, or distribution of marijuana.

I say that because the paraphrasing that I would omit is overly broad (as well as unnecessary): Rule 8.6 would *not* extend, as the paraphrasing implies it would, to just any conduct that Colorado law might permit but which would violate Federal law — there's a whole lot of Federal law that Colorado law does not touch on — but only to that conduct implicating the two cited Colorado constitutional provisions.

For all of that, I oppose the proposals made by the Subcommittee in its Second Supplemental Report. This has been a big task. It is perhaps one of the few things we've done that will have direct impact on both lawyers in our state and the citizens of our state in this bold new experiment, an experiment taking place in a national spotlight. We should get it very right, and I don't think that's been done yet.

Marcy Glenn

From: Marcy Glenn
Sent: Saturday, September 28, 2013 7:24 AM
To: Alexander Rothrock; Anthony van Westrum; Boston Stanton; Cecil Morris; Cheryl Lilburn (Assistant to Jim Coyle); Cheryl Stevens (updates to website); Chris Markman (Staff Attorney); Cindy Atwell (Blum); Corey Longhurst (Assistant to Justice Márquez); Cynthia Covell; Danny Paulson (Assistant to Judge Coats); David Little; David Stark; Debra Callenius; Eli Wald; Federico Alvarez; Gary B. Blum; Helen E. Berkman; Henry Reeve; Hon. John Webb; Hon. Monica Márquez; Hon. Nathan Coats; Hon. William Lucero; James C. Coyle; Jamie Sudler (John Gleason's office); John Haried; Lisa Wayne; Marcus L. Squarrell; Marcy Glenn; Michael Berger; Nadine Cignoni (Assistant to John Gleason); Nancy Cohen; Neeti Pawar; Ruthanne Polidori; Tammy Bailey (Administrator to Judge Lucero); Thomas E. Downey, Jr.; Tuck Young
Subject: FW: Second Supplemental Report of Marijuana Rules Subcommittee
Attachments: arav092413 AvW Opposition Memo (2).pdf; SECOND SUPPLEMENTAL REPORT OF (2).pdf

I'm following up on my email below, to which the response has been tepid. I've also added another voting option in light of Tony's September 24, 2013 email and attached memo, which (a) explains his opposition to the proposed amendments, but (b) in the alternative, proposes certain additional amendments. I've attached Tony's memo for your convenience.

As an alternative to rejecting the amendments as proposed in the Subcommittee's Second Supplemental Report, Tony has proposed two changes:

1. "I would ask that the Committee's report to the Court very clearly state that the words "medical or personal use" are used in the comment not in a narrowing sense but simply to be helpful to the lawyer in understanding that there is a distinction between personal and commercial activity, a distinction that the constitutional provisions themselves establish by the division of those two kinds of activities into two separate subsections of § 16. I think the explanation should include a specific statement that the intention is to permit all of the activities permitted by § 14 and § 16(3), the word "use" being helpful shorthand for all of those activities."

The Second Supplemental Report arguably already does what Tony has proposed, although not in his exact language. It states:

"A majority of participants in this exchange concluded that, consistent with the consensus at the July 26 meeting, no commercial activity should be included; the caregiver nuance should not be addressed; and any doubt that personal use and medical use are terms of art, as defined and described in the amendments, could be resolved by putting these phrases in quotes and adding a reference to the definition of "medical use" in section 14(1)(b) of the medical marijuana amendment. (It was noted that subsection 14(4) specifically defines the "medical use of marijuana" permitted under that subsection; and subsection 16(3) of the recreational marijuana amendment does the same thing under the heading "Personal Use.")"

2. The following revision to Comment [1] to Rule 8.6:

Rule 8.6, new Comment [1]: The phrase "standing alone" clarifies that this rule does not preclude disciplinary action if a lawyer counsels or assists a client to engage in conduct that ~~the lawyer reasonably believes is permitted by the Colorado Constitution, and that conduct~~ contravenes federal law other than those prohibiting use, possession,

cultivation, or distribution of marijuana.

I have added Tony's alternative proposals to the voting options below. If anyone who has already voted by email (thank you!) wishes to change his or her vote based on Tony's alternative proposals, please just let me know. I am still hoping to accomplish this by email but perhaps the silence from a fair number of you is a passive statement that you prefer further discussion and do not believe an email vote is practical. I have added that as an additional voting option, too.

Marcy

Marcy G. Glenn
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From: Marcy Glenn
Sent: Monday, September 23, 2013 3:59 PM
To: Alexander Rothrock; Anthony van Westrum; Boston Stanton; Cecil Morris; Cheryl Lilburn (Assistant to Jim Coyle); Cheryl Stevens (updates to website); Chris Markman (Staff Attorney); Cindy Atwell (Blum); Corey Longhurst (Assistant to Justice M?rquez); Cynthia Covell; Danny Paulson (Assistant to Judge Coats); David Little; David Stark; Debra Callenius; Eli Wald; Federico Alvarez; Gary B. Blum; Helen E. Berkman; Henry Reeve; Hon. John Webb; Hon. Monica M?rquez; Hon. Nathan Coats; Hon. William Lucero; James C. Coyle; Jamie Sudler (John Gleason's office); John Haried; Lisa Wayne; Marcus L. Squarrell; Marcy Glenn; Michael Berger; Nadine Cignoni (Assistant to John Gleason); Nancy Cohen; Neeti Pawar; Ruthanne Polidori; Tammy Bailey (Administrator to Judge Lucero); Thomas E. Downey, Jr.; Tuck Young
Subject: Second Supplemental Report of Marijuana Rules Subcommittee

Greetings and welcome, Autumn. I'm attaching the Second Supplemental Report of the Subcommittee on Marijuana Amendments, which is self-explanatory. In accordance with the Committee's direction at the July 26, 2013 meeting, we will have an email vote on the proposed amendments set forth in the attached report, with a goal of submitting those proposed amendments to the Court by later this week or early next week, if they are approved.

Some may wonder why we should have an electronic vote when we are so close to the next meeting date, on October 11. I believe we should for at least these reasons: (1) We've discussed the marijuana-related rules extensively already; (2) the subcommittee's proposals follow the direction the full Committee gave at the July meeting, so they should not be controversial, at least to those who already voted to approve the rule/comments subject to limited further word-smithing; (3) a majority of the full Committee voted to have an email vote; and (4) doing so will permit us to spend more time at the October meeting on the amendments proposed by the subcommittee studying recent amendments to the ABA Model Rules.

So please let me know your votes as soon as you've had time to review the report.

_____ - Proposed Comment [2] to Rule 8.4

_____ - Proposed Rule 8.6

_____ - Proposed Comment [1] to proposed Rule 8.6

_____ - All proposed amendments

_____ - Tony's proposed changes (as explained above)

____ - Return all proposals for further discussion at the October 11 meeting

Many thanks,
Marcy

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August 5, 2013

Marcy G. Glenn, Chair
Standing Committee on Rules of Professional Conduct
Holland & Hart LLP
555 Seventeenth Street
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Justice Nathan B. Coats, Liaison
Standing Committee on Rules of Professional Conduct
Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

Justice Monica Márquez, Liaison
Standing Committee on Rules of Professional Conduct
Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

Dear Ms. Glenn, Justice Coats, Justice Márquez and other Standing Committee Members,

On behalf of Colorado NORML (National Organization for the Reform of Marijuana Laws), it has come to our attention that the Colorado Supreme Court: Standing Committee on Rules of Professional Conduct has formed an Amendment 64 Subcommittee tasked with considering some of the many issues relating to the legalization of marijuana . Colorado NORML supports the Subcommittee's work and respectfully requests the opportunity to participate in this rulemaking process to the extent the Committee deems appropriate, be it in the form of public testimony or any other services that would assist the Committee in its task. CO NORML also urges the Committee to adopt the comments recently proposed.

Since its founding in 1970, NORML has been an advocate for the tens of millions of Americans who use marijuana responsibly. To this capacity, it has studied the issue of legalization from scientific, policy and legal perspectives and has a wealth of knowledge to offer the Committee. Recently, Colorado NORML was proud to participate in the Governor's Task Force on the implementation of Amendment 64 as the representative of marijuana consumers. Colorado NORML Board Members, individually and collectively, have played an integral role in the public debate regarding the evolution of Colorado public policy regarding lawful marijuana use and its role in Colorado.

A critical part of this public policy discussion is currently being addressed by the Committee as it debates the role of the attorney when engaging in conduct that is explicitly protected by the Colorado Constitution, yet prohibited by federal law. Towards this end, the Amendment 64 Subcommittee met and submitted a recommendation that the Colorado Rules of Professional Ethics be modified to introduce two new comments:

1. A new comment to Rule 8.4 clarifying that a lawyer will not be deemed dishonest, untrustworthy, or unfit as a lawyer solely because the lawyer engages in personal conduct that may violate federal law, but is permitted under a specific provision of the state constitution.

2. A new Rule 8.6 clarifying that notwithstanding any other Rule, a lawyer will not be subject to discipline for engaging in personal conduct, or for advising clients concerning activity, that may violate federal law, but which is permitted under a specific provision of the state constitution.

Colorado NORML wishes to commend the Committee in placing this important issue on its agenda and promoting its discussion. As Colorado marijuana law evolves, it is inevitable that the volume of Constitutional amendments, statutory law, agency regulations, local ordinances and codes, case law and administrative policies will exponentially increase and grow more complex. In the crosshairs of this complicated legal framework are the citizens who wish to exercise their State rights and avail themselves of Colorado law. This cannot be undertaken lightly; however, as those who are not in strict compliance with Colorado law may suffer extreme financial consequences, loss of reputation and business opportunities and even criminal prosecution and incarceration. Government agents and representatives are not permitted to dispense legal advice regarding this complicated framework, and reliance on their interpretations is not a defense to criminal prosecution. Further, government staff's positions on Colorado law may be inaccurate due to human error, bias or ulterior motives.

We believe it is critical that citizens have competent legal counsel when seeking to avail themselves of their Colorado Constitutional rights. It is the role of legal counsel to explain how to comply with the myriad of ever-changing and complex Colorado laws regarding the lawful use of marijuana. Without an attorney to advise Coloradoans on how to stay compliant with Colorado marijuana law, our citizens face serious legal repercussions and avoidable consequences. Advising the public on how to keep abreast of, and in compliant with, complex developing law is the very foundation of the legal profession. Remove this safeguard and Colorado citizens unnecessarily subject themselves to extreme penalties while trying to exercise their State Constitutional rights.

Recognizing the complexity of our marijuana laws, and the dire consequences that can befall Coloradoans if they get it wrong, many Colorado attorneys have knowingly chosen to advise Colorado citizens of their rights under Colorado's marijuana laws, despite the federal prohibition on marijuana. These attorneys operate under the ever-present fear that their licenses to practice law are in jeopardy because they have chosen to honor their duty to the State Constitution and to the people of Colorado, in helping them understand and exercise their Colorado Constitutional and legal rights.

This is an opportunity for the Committee to recognize that the practice of law in Colorado is fundamentally based on the ability of Colorado citizens to seek legal advice regarding activity that, if unlawful, may have a disastrous result to their life, liberty and pursuit of happiness. These devastating results have a ripple effect through our community in the form of broken families, financial ruin, costly incarceration and generational dysfunction. Colorado attorneys are a critical safeguard between Colorado citizens and ruinous outcomes. We support you in recognizing a rule that allows these attorneys to practice law without fear that the Sword of Damocles hanging over their heads will drop in the form of an Office of Attorney Regulation sanction or disbarment.

In conclusion, Colorado NORML supports the Amendment 64 Subcommittee in its task and offers its support in whatever manner the Committee deems appropriate.

Thank you for your attention to this important matter. Please direct all communication on this matter to the following NORML Board member, who will act as lead counsel for us in this matter:

Craig Bennett Small (#40894)
Law Office of Craig Small, LLC
595 Canyon Boulevard
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Phone Number: 303-442-8900
Fax Number: 303-325-7004
Email: craigsmall@cbslaw.net

Sincerely,

On behalf of Colorado NORML Board of Directors:

Rachel Gillette, Craig Small, Lenny Frieling, Mark Miller, Jeri Shepherd, Sean McAllister, Lauren Davis, Lauren Maytin, Jason Savela, Titus Peterson, Brian Schowalter and Teri Robnett.

HOLLAND&HART LLP
THE LAW OUT WEST

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September 24, 2013

Craig Bennett Small
Law Office of Craig Small, LLC
595 Canyon Boulevard
Boulder, CO 80302

Re: Proposed Amendments to the Colorado Rules of Professional Conduct

Dear Mr. Small:

Thank you for your August 5 letter concerning Colorado NORML's support of potential proposed amendments to the Colorado Rules of Professional Conduct (CRPC) to address certain legal ethics issues as a result of the legalization of limited marijuana use under Colorado law. I will be sharing your letter with the full Standing Committee on the CRPC before our next meeting on October 11, 2013. I will advise you if and when the full Committee votes to refer to the Colorado Supreme Court proposed marijuana-related amendments to the CRPC. In that event, I expect (but cannot guarantee) that the Supreme Court would schedule a public hearing before taking action on those proposed amendments.

I appreciate NORML's interest in these issues.

Very truly yours,

Marcy G. Glenn
of Holland & Hart LLP

MGG:dc
cc: Justice Monica Márquez
Justice Nathan B. Coats

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

REPORT AND RECOMMENDATIONS OF THE NEW ABA MODEL RULES SUBCOMMITTEE

October 3, 2013

Introduction

In August 2012 and February 2013, the ABA House of Delegates amended the ABA Model Rules of Professional Conduct (Amended ABA Rules). The Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct (Committee) appointed a subcommittee to study and make recommendations regarding the adoption of the Amended ABA Rules in Colorado.[1] This Report sets forth the recommendations of the Subcommittee.

Subcommittee Process

The Subcommittee reviewed each of the Amended ABA Rules and made an initial decision whether the changes were such that no further study was necessary (generally because of clarifying wording changes that did not effect any change in substance) or whether further study was required. In cases where the Subcommittee determined that further study was required, a working group was established, comprised of between two and four members of the Subcommittee, to study the designated Rule and to report to the Subcommittee. Each working group delivered a written report to the full Subcommittee, which discussed the recommendations of the working group. This report imports much of what is contained in the working group reports. The Subcommittee was unanimous with respect to its recommendations on some of the Amended ABA Rules, and was divided as to others. When the Subcommittee was other than unanimous, this Report notes that fact and the substance of and basis for the minority view. In some instances, the Subcommittee elected to present drafting alternatives to the full Committee.

In addition to considering the ABA changes, the Subcommittee sought and obtained authority from the Standing Committee to consider additional changes to Colo. RPC 4.4. The Subcommittee proposes substantial changes to Rule 4.4; those changes together with

[1] The Subcommittee is comprised of Judge John Webb; Judge Ruthanne Polidori; David Stark; David Little; Alec Rothrock; Dick Reeve; Marcy Glenn; Tony van Westrum; Tom Downey; Jamie Sudler; Cecil Morris; and Michael Berger, Chair.

recommendations regarding the ABA changes to Model Rule 4.4, will be presented to the Standing Committee in a Supplemental Report.

The Subcommittee was mindful that uniformity in the Rules of Professional Conduct among the states is beneficial, but it viewed the presumption of uniformity as rebuttable if there are good reasons to deviate from the Amended ABA Rules.[2]

Rules and Comments Amended by the ABA

The ABA amended the following rules and comments in August 2012 and February 2013:

- **Rule 1.0(n).** Making clarifying changes to the definition of "writing."
- **Rule 1.0, Comment [9].** Making clarifying changes relating to the definition of "screened."
- **Rule 1.1, Comments [6], [7], and [8].** Comments [6] and [7] are new and address the hiring on behalf of a client of lawyers outside of the lawyer's firm and the scope of representation by the lawyer from a different firm. Amendments to Comment [8] address maintaining competence and the risks and benefits associated with relevant technologies.
- **Rule 1.4, Comment [4].** Replacing the phrase "client telephone calls" with the phrase "client communications."
- **Rule 1.6(b)(7).** Permitting the disclosure of protected information to detect and resolve conflicts arising from changes in the lawyer's employment or in the composition of a law firm.
- **Rule 1.6(c).** New subsection to address a lawyer's obligation to prevent inadvertent or unauthorized disclosure of, or unauthorized access to, protected Rule 1.6 information.
- **Rule 1.17, Comment [7].** Inserting cross-reference to new Rule 1.6(b)(7).

[2] The principle of uniformity is addressed in the Standing Committee's December 30, 2005 report to the Court on the adoption of the "Ethics 2000" changes to the Colorado Rules of Professional Conduct: "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 committees in other jurisdictions. Moreover, the increase in multi-jurisdictional law practice . . . renders uniform ethics rules beneficial to the Court and the bar alike."
http://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=24.

- **Rule 1.18.** Substituting the word "consults" for the word "discuss" and substituting the phrase "learned information from" for "had discussions with."
- **Rule 1.18, Comment [2].** Providing additional guidance on when a person becomes a prospective client and when a consultation is deemed to have occurred. Also, introducing a new concept to the Rules (but not to the law of lawyering), expressly providing that a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."
- **Rule 4.4.** Adding "electronically stored information" after the word "document."
- **Rule 4.4, Comments [2] and [3].** Addressing metadata for the first time in the ABA Rules, and adding a reference to "electronically stored information."
- **Rule 5.3, Comments [3] and [4].** Making significant changes regarding the duties of lawyers with managerial authority and addressing the supervision of non-lawyer assistants and independent contractors; introducing the concept of "monitoring" of non-lawyer assistants and independent contractors.
- **Rule 5.5.** Addressing limited practice by lawyers licensed in another United States jurisdiction.
- **Rule 7.1, Comment [3].** Replacing the phrase "prospective client" with the word "public."
- **Rule 7.2, Comments [2], [3], [5], [6], and [7].** Making clarifying, non-substantive changes in Comments [2], [3], [6], and [7]; in Comment [5], introducing the concept of "lead generation".
- **Rule 7.3.** Making clarifying changes to text. Changing title of rule to "Solicitation of Client." Adding a definition of "solicitation" and replacing the phrase "prospective client" with the phrase "target of the solicitation."
- **Rule 7.3, Comment [1].** Refining the definition of "solicitation."
- **Rule 8.5, Comment [5].** Providing that in determination of conflicts of interest, choice of law agreement between lawyer and client may be considered.

Summary of Subcommittee Recommendations

Rule 1.0 (i) Adopt the clarifying changes in Amended ABA Rule 1.0(h) (definition of writing) and Comment [9] (screening).

Rule 1.1 (i) Adopt the ABA changes to Comments [6] and [7].

(ii) Adopt Amended ABA Comment [8] but revise it to remove the "risks and benefits" language and to add Colorado-specific language regarding a lawyer's duty to maintain competence concerning new technologies.

(iii) Adopt Amended ABA Comment [9], with Colorado-specific revisions.

Rule 1.2 Add new, Colorado-specific Comments [5A] and [5B], cross-referencing Rule 1.1, Comments [6] and [7].

Rule 1.4 (i) Adopt ABA clarifying changes to Comment [4].

(ii) Add new, Colorado-specific Comments [6A] and [6B], cross-referencing Comments [6] and [7] to Rule 1.1.

Rule 1.6 (i) Adopt Amended ABA Rule 1.6(b)(7) with minor wording changes.

(ii) Strike existing Colorado Comment [5A] as unnecessary.

(iii) Move existing Colo. RPC 1.6(b)(7) to new paragraph 1.6(b)(8) to maintain uniformity with Amended ABA Rules.

(iv) Adopt Amended ABA Rule 1.6(c).

(v) Adopt Amended ABA Comments [13] and [14], which explain new Rule 1.6(b)(7).

(vi) Adopt Amended ABA Comment [16] (now Comment [18]) with wording changes to conform to recommended wording changes to the text of Amended ABA Rule 1.7(c).

(vii) Adopt Amended ABA Comment [19] (existing Colorado Comment [17]).

Rule 1.17 Adopt the ABA clarifying changes to Comment [7].

Rule 1.18 Adopt Amended ABA Rule 1.18 and Comment [2].

Rule 5.3 (i) Adopt ABA Amended Comment [3].

(ii) Reject ABA Amended Comment [4] and replace it with a Colorado-specific comment.

Rule 5.5 Reject ABA changes; leave existing Colorado Rule 5.5 unchanged.

Rule 7.1 Retain the current Colorado Rule and Comment. Adopt ABA Comment [3] (to be renumbered as Comment [8]).

Rule 7.2 (i) Adopt ABA clarifying changes to Comments [1] and [2].

(ii) Adopt ABA substantive changes to Comment [5] relating to "lead generation."

Rule 7.3 (i) Retain the current Colorado Rule and Comment.

(ii) Add ABA Comment [1] which defines solicitation.

(iii) Adopt clarifying changes that more clearly distinguish "prospective client" from the broader class of persons who are recipients of communications under Rule 7.3.

Rule 8.5 Reject ABA change to Comment [5] and leave Colo. RPC 8.5 unchanged

Appendix A shows the amendments made by the ABA. Appendix B displays the existing Colorado Rules of Professional Conduct, marked to show the proposed changes recommended by the Subcommittee. Appendix C contains the Reports of the ABA 20/20 Commission relating to the Amended ABA Rules.

Subcommittee Analysis of Amended ABA Rules

Rule 1.0

The ABA amended Rule 1.0(n), the definition of "writing," to include "electronic communications" and to delete "e-mail" because e-mail is just one species of electronic communications. The Subcommittee recommends adoption of this change. The ABA also amended Comment [9] which explains that "screened" includes screening of electronic information. The Subcommittee also recommends adoption of this change.

Rule 1.1

The ABA added two new comments to Rule 1.1 – Comments [6] and [7] – and amended existing Comment [6] (now Comment [8]). New Comment [6] provides that a lawyer ordinarily should obtain the client's informed consent before retaining another lawyer to assist in a representation. The comment also provides useful guidance in determining when such a hiring is reasonable and appropriate. The Subcommittee believes the new comment is useful, accurately states the appropriate ethical rules in this respect, and recommends its adoption.

New Comment [7] provides the common sense advice that when lawyers from more than one firm are providing services to a client on a matter, the lawyers should consult with each other regarding the scopes of their respective representation and the allocation of responsibilities between them. While these concepts seem obvious, there is no harm in including a comment to that effect and the Subcommittee recommends its adoption.

Comment [8] (existing Comment [6]) addresses a lawyer's responsibility to keep abreast of changes in the law and its practice. ABA Amended Comment [8] also addresses changing technologies, which can provide challenges to lawyers in a number of respects, particularly involving confidentiality. The Subcommittee, however, was troubled by the ABA's addition of the phrase "benefits and risks" which suggest that lawyers have a duty to weigh such benefits and risks every time they send an email or otherwise use electronic communications technologies, which the Subcommittee viewed as an inappropriate burden on lawyers. As a result, the Subcommittee recommends that Comment [8] be amended to read as follows:

Maintaining Competence.

> [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and changes in communications and other relevant technologies, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.2

The Subcommittee recommends the addition of Colorado-specific Comments [5A] and [5B]. These Comments provide cross-references to proposed Comments [6] and [7] to Rule 1.1.

Rule 1.4

The Subcommittee recommends adoption of minor wording changes by the ABA in the last sentence of Comment [4]. This change recognizes that lawyers communicate with clients other than by telephone, and that all client communications should be promptly acknowledged or responded to. The Subcommittee also recommends the addition of Colorado-specific Comments [5A] and [5B]. These Comments provide cross-reference to proposed Comments [6] and [7] to Rule 1.1.

Rule 1.6

New ABA Rule 1.6(b)(7) creates an express exception to the duty of confidentiality for information necessary "to detect and resolve conflicts of interest arising from the lawyer's change of employment. . . ." New ABA Rule 1.6(c) requires a lawyer to make reasonable efforts to prevent inadvertent disclosures.

a. ABA Rule 1.6(b)(7):

The new exception provides:

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . (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 would not compromise the attorney-client privilege or otherwise prejudice the client.

There are two new ABA comments, which read:

> [13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.
>
> [14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

The current Colorado Rules presaged these amendments in Comment [5A], which reads:

> A lawyer moving (or contemplating a move) from one firm to another is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to conduct a conflicts check to determine whether the lawyer or the new firm is or would be disqualified. Thus, for conflicts checking purposes, a lawyer usually may disclose, without express client consent, the identity of the client and the basic nature of the representation to insure compliance with Rules such as Rules 1.7, 1.8, 1.9,

> 1.10, 1.11 and 1.12. Under unusual circumstances, even this basic disclosure may materially prejudice the interests of the client or former client. In those circumstances, disclosure is prohibited without client consent. In all cases, the disclosures must be limited to the information essential to conduct the conflicts check, and the confidentiality of this information must be agreed to in advance by all lawyers who receive the information.

The Subcommittee identified the following differences between the current Colorado rules and comments and the ABA amended rule and comments:

- Basis – The ABA has recognized an additional exception, while Colo. RPC 1.6 Comment [5A] couches it as one type of impliedly authorized disclosure under Colo. RPC 1.6(a).
- Structure – The ABA has put the exception in the rule itself, while Colo. RPC 1.6 Comment [5A] recognizes the disclosure as permitted only in a comment, although the rule itself permits impliedly authorized disclosures (one type of which this disclosure purports to be).
- Application – The ABA permits disclosure both when a lawyer changes firms and when there are changes in the composition or ownership of a firm, while Colo. RPC 1.6 Comment [5A] applies only when the lawyer changes firms.
- Timing – The ABA permits disclosure "only once substantive discussions . . . have occurred." Colo. RPC 1.6 Comment [5A] allows disclosure earlier – when the lawyer is "contemplating a move."
- Scope of disclosure – The ABA ordinarily limits disclosure to "the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated." Colo. RPC 1.6 Comment [5A] permits a more limited disclosure, of "the identity of the client and the basic nature of the representation," but not whether the matter has terminated, though that is arguably part of "the basic nature of the representation." Both the ABA and Colo. RPC limit the purpose of disclosure to information needed to check for conflicts, though the Colo. RPC comment uses the word "essential" rather than "reasonably necessary."
- Agreement to confidentiality – Colo. RPC 1.6 Comment [5A] requires "all lawyers who receive the information" to agree in advance to its confidentiality.

- Independently obtained information - The ABA expressly excludes from the scope of this rule information that the lawyer obtains independently. Colo. RPC 1.6 Comment [5A] is silent on this point.
- Privileged information – The ABA prohibits disclosure of information that "would compromise the attorney-client privilege." Colo. RPC 1.6 Comment [5A] permits the disclosure of only "non-privileged information."

With this background, the Subcommittee recommends the adoption of the New ABA Rule, for these reasons:

a. To get this provision into the rule itself, rather than just in a comment.

b. To make clear that it is an express exception rather than merely an impliedly authorized disclosure. That rationale has never really worked because 1.6(a) permits disclosures that are "impliedly authorized to carry out the representation," not to allow a lawyer to change firms.

c. To broaden the application from moving lawyers to changes in ownership or composition of a firm.

d. To narrow the timing of permitted disclosures – only after "substantive discussions" have occurred.

e. To broaden the scope of allowed disclosures, to include whether the matter has terminated.

f. To change "essential" disclosures to "reasonably necessary" disclosures.

g. To remove the Colorado Rules comment's language about lawyers agreeing to confidentiality.

h. To make clear that the exception does not apply to independently obtained information.

i. For the sake of uniformity.

j. And, finally, because the Subcommittee concluded that the new ABA rule and comments are better drafted than the Colorado comment.

However, the Subcommittee recommends changing the following underscored language in the ABA rule and comment in limited respects:

> Rule 1.6(b)(7): "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . (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 would not compromise the attorney-client privilege or otherwise prejudice the client."
>
> Comment [13]: ". . . Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client . . ."

The Subcommittee has three concerns with the underscored language. *First*, we believe that "compromise the attorney-client privilege" is a vague phrase. *Second*, we don't think that any prejudice should suffice—only material prejudice; we believe this would be consistent with the reference in existing Colorado Comment [5A] to a "disclosure that may materially prejudice the client." *Third*, the use of "would" and "would not" with respect to prejudice to the client seems too narrow to us; we believe the rule should prohibit a disclosure that is "reasonably likely to materially prejudice the client," not merely one that certainly "would" materially prejudice the client. Accordingly, the Subcommittee recommends that revised Colo. RPC 1.6(b)(7) read:

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

The Subcommittee also recommends the revision of the quoted sentence from Comment [13] to read:

> Moreover, the disclosure of any information is prohibited if it is protected by the attorney-client privilege or otherwise is reasonably likely to materially prejudice the client . . [MI].

b. Model Rule 1.6(c):

New ABA Rule 1.6(c) reads:

> 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.

The ABA renumbered former Comment [16] as Amended ABA Comment [18] and revised it to read as follows:

> *Taking Reasonable Means to Preserve Confidentiality*
>
> [18] Paragraph (c) requires a lawyer to take reasonable measures to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

In addition, former ABA Comment [17] has been renumbered as Amended ABA Comment [19] and has been revised to add a new final sentence:

> [19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security

measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

The Subcommittee recommends the adoption of new subsection (c). It addresses an important subject and furthers the presumption in favor of uniformity.

The Subcommittee recommends one change to newly numbered Comment [18]. The first sentence of that comment requires a lawyer to "act competently" to safeguard client information. However, the new rule requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to representation of a client"—not to "act competently" in that regard. Accordingly, the Subcommittee recommends changing "act competently" to "take reasonable measures" in Comment [18]. We note that we are proposing a change to language that was in existing Colorado Comment [16] before the ABA's recent amendments, but we believe this change is appropriate because it is necessary to render that preexisting comment language consistent with new language in the amended rule.

The Subcommittee also recommends the adoption of the additional language in Amended ABA Comment [19]. Although it is duplicative in some respects with Comment [18], the Subcommittee views the comment as correct and for uniformity sake recommends its adoption. (This eliminates the search for meaning that might occur if Colorado did not adopt Comment [19]).

Rule 1.17

The Subcommittee recommends the adoption of the ABA's changes to Comment [7]. These changes are clarifying in nature and add a cross-reference to new ABA Rule 1.6(b)(7) which addresses information necessary to detect and resolve conflicts arising from a lawyer's change in law firm or ownership of a law firm.

Rule 1.18

The Subcommittee recommends the adoption of the changes to Amended ABA Rule 1.18 and its comments.

The Subcommittee concluded that the changes to ABA Rule 1.18 and its comments are beneficial and noncontroversial. They do not conflict with established principles of legal ethics in Colorado, and the interest in uniformity among jurisdictions provides a compelling reason to adopt them as written.

The theme of the changes to ABA Model Rule 1.18 is to "help lawyers understand how to avoid the inadvertent creation of such relationships [with prospective clients] in an increasingly technology-driven world, and to ensure that the public does not misunderstand the consequences of communicating electronically with a lawyer." ABA 20/20 Commission Report, Resolution 105B, p. 1. This is a salutary goal and Amended ABA Rule 1.18 accomplishes this objective in three ways.

First, in reference to preliminary communications between a lawyer and a person who may or may not qualify as a "prospective client," the Rule and Comment replace the word "discuss" (and its variants) with the word "consult" (and its variants). The term "consults" is a more precise word to describe the purpose of a prospective client's communication to a lawyer. The ABA 20/20 Commission stated that "[t]his change would make clear what [ABA Comm. on Ethics & Prof'l Resp., Formal Op. 10-457 (2010)] concluded: a prospective client-lawyer relationship can arise even when an oral discussion between a lawyer and client has not taken place. The word 'consults' makes this point more clearly than the word 'discusses' and anticipates future methods of interaction between lawyers and the public. . . . In sum, the word 'consults,' when paired with the proposed new Comment language, will give lawyers more guidance as to how they can engage in online marketing without inadvertently giving rise to a prospective client relationship." ABA Report, Resolution 105B, pp. 2, 3.

Second, new language in Comment [2] distinguishes between invited and uninvited communications to help determine whether a person who communicates with a lawyer (or law firm) is or is not a prospective client. This change was motivated by a desire to adapt the Model

Rules to "new forms of marketing" such as internet advertising and electronic communications. Report, Resolution 105B, p. 1.

Third, a new sentence in Comment [2] states that a "person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a 'prospective client.'" A leading treatise states that "[c]ourts and other authorities have had little difficulty seeing through this ruse, typically finding that inasmuch as the consultation was not actually for the purpose of obtaining legal services, any information disclosed does not fall under the protection of the confidentiality, former client, or prospective client rules." 1 G. Hazard & W. Hodes, *The Law of Lawyering*, § 21A.4, p. 21A-9 (3d ed. 2011) (emphasis in original). The treatise states that former ABA Comment [2] (existing Colorado Comment [2]) "suggested as much," but that this new sentence makes the point explicitly. *Id.*[3] Although this sentence does not seem closely related to the problems of the "increasingly technology-driven world," it is welcome language nonetheless.

Rule 5.3

The ABA renumbered and rearranged Comments [1] and [2] to Rule 5.3, and added new Comments [3] and [4]. The renumbering and the modifications to Amended ABA Comment [1] (formerly Comment [2]) are not remarkable and should assist lawyers in the practice of retaining non-lawyers outside the firm to provide legal services. The Subcommittee recommends the adoption of the ABA changes to existing Comments [1] and [2].

Amended ABA Comment [3] appropriately reminds lawyers of the responsibilities they assume when securing services from non-lawyers outside of the firm itself. In the view of the Subcommittee, it provides needed guidance and the Subcommittee recommends its adoption.

Amended ABA Comment [4] contains a new concept not previously defined or even mentioned in the ABA Rules: a lawyer's monitoring of non-lawyers outside the firm.

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[3] Similarly, referring to this sentence, the ABA 20/20 Commission explained, "Many ethics opinions have recognized that lawyers owe no duties to those who engage in this sort of behavior. . . . In fact, some states have incorporated this concept into their own versions of Model Rule 1.18." Report, Resolution 105B, p. 3.

The Subcommittee does not recommend the adoption of Amended ABA Comment [4]. It is not helpful (and may be harmful) to impose an obligation of "monitoring" without defining the concept or addressing its contours under varying facts. Instead, the Subcommittee recommends the adoption of a different Comment [4A], which would read as follows:

> [4A] Where the client directs the selection of a particular non-lawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility, as between the client and the lawyer, for the supervisory activities described in Comment [3] above relative to that provider. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Rule 5.5

Existing Colorado Rule 5.5 differs substantially from both the prior and new versions of ABA Rule 5.5. The Colorado Rule recognizes that much of the substance of ABA Rule 5.5 is addressed in Rules 220 through 223 of the Colorado Rules of Civil Procedure. Those rules are not within the purview of the Committee. Therefore, the Subcommittee does not recommend the adoption of any of the changes to ABA Rule 5.5.

Rule 7.1

The text of Colorado Rule 7.1 differs substantially from ABA Rule 7.1 because Colorado Rule 7.1 provides substantially more substance and guidance. The Subcommittee recommends that the text and comments to Colorado Rule 7.1 be retained. The existing comments to Colorado Rule 7.1 generally track the comments to ABA Rule 7.1. The ABA made a clarifying change to Comment [3] to ABA Rule 7.1, replacing the words "a prospective client," with the words "the public." Existing Colorado Rule 7.1 does not include ABA Comment [3], but it provides useful information and is consistent with Colorado Rule 7.1, and the Subcommittee therefore recommends the adoption of ABA Comment [3] with the clarifying changes made by the ABA.

Rule 7.2

The ABA made no changes to the text of ABA Rule 7.2. However, it made several changes to the Rule's comments. Most of these changes are clarifying in nature, brought about by the increasing use of the Internet for lawyer advertising purposes. These changes are beneficial; they are faithful to Colorado law, we see no downside to them, and accordingly the Subcommittee recommends their adoption.

The ABA made one substantive change to Comment [5]. The ABA addressed, for the first time in the Rules, the concept of "lead-generation" and the new comment provides that lead-generation is permitted provided that (a) the lead generator does not recommend the lawyer, (b) any payment to the lead generator is consistent with Rules 1.5(e) (division of fees), and 5.4 (professional independence), and (c) the lead generator's communications are consistent with Rule 7.1. The ABA Commission's Report provides an excellent discussion of the reasons for these changes, as well as alternatives that the ABA considered, but rejected. Although the Subcommittee is sure that some people will be put off by the term "lead generation," it is fairly descriptive in nature and accurately identifies or explains what, in fact, is going on in the real world. For those who abhor advertising by lawyers, this is one more step down the slope. For those who either support or are resigned to increased levels of lawyer advertising (which in large part is constitutionally protected), the inclusion of guidance as to when the use of lead generation is consistent with a lawyer's ethical obligations is salutary. The bottom line for the Subcommittee is that this issue needs to be addressed, and we are not confident that the Standing Committee can do a better job of addressing it than has the ABA.

There is also a uniformity issue here. Many law firms transcend state boundaries. To the extent that the rules regarding advertising and solicitation can be consistent among the states, that is a good thing. Because we think the ABA appropriately dealt with the issue of lead-generation, the Subcommittee recommends the adoption of the ABA changes to Rule 7.2.

Rule 7.3

Colorado Rule 7.3 differs substantially from the ABA Rule. Unlike the ABA Rule, the Colorado Rule prohibits certain solicitations arising from personal injury or death. The Colorado

Rule also contains disclaimer requirements and retention requirements not contained in the ABA Rule. As with Colorado Rule 7.1, the Subcommittee recommends that existing Colorado Rule 7.3 be retained.

There are, however, several changes made by the ABA to its Rule 7.3 that should be adopted in Colorado. The ABA meaningfully, and we think accurately, changed the title of Rule 7.3 to "Solicitation of Clients" and, for the first time, provided a definition of "solicitation" in Amended ABA Comment [1]. These changes clearly are beneficial and the Subcommittee recommends their adoption.[4] The ABA also made clarifying changes to the text of the rule, distinguishing the technical concept of a "prospective client" under Rule 1.18 from the broader class of persons who are recipients of communications governed by Rule 7.3. The Subcommittee recommends these changes as well.

The only controversy with respect to the changes to the Comment to Rule 7.3 is in Amended ABA Comment [3] (existing Colorado Comment [2]). That comment makes clear that communications, however made, that do not involve real-time contact and do not violate other laws regarding solicitation, do not constitute prohibited solicitations. The only issue that we are aware of here is that some have posited that computer generated responses can now be customized to such an extent that they may be the equivalent of face-to-face or live telephone communications and should be treated accordingly. The ABA Business Law Section, in its comments on the ABA rules, made this observation. Nevertheless, the House of Delegates approved the changes recommended by the Ethics 20/20 Commission. The Subcommittee recommends the adoption of these ABA changes; if the Committee becomes aware in the future of abuses along the lines suggested by the ABA Business Law Section, it can react to those abuses, but at the moment these possible abuses are purely hypothetical in nature.

Rule 8.5

The ABA amended Comment [5] to add the following underscored text:

> [5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which

[4] The adoption of ABA Comment [1] would cause a renumbering of the existing Colorado comments.

> the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

The Subcommittee considered several courses of action with respect to this ABA change. Some members favored expanding the new ABA sentence to eliminate the apparent limitation on the use of such agreements to conflicts issues. A majority of the Subcommittee concluded that such an expanded sentence would be ill-advised because it would invite lawyers to contract around numerous ethical rules. (The ABA Report specifically stated that such agreements would be considered only to resolve conflicts issues, precisely to avoid contracting around other ethics rules.)

A majority of the Subcommittee also concluded that the ABA amendment to Comment [5] was improperly underinclusive. There may be situations in which an agreement between a lawyer and a client *may* be relevant to resolving choice of law issues relating to matters other than conflicts; the Subcommittee was not comfortable absolutely prohibiting (through negative inference) the use of such an agreement in situations addressing ethical issues other than conflicts.

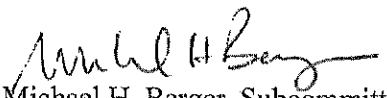
Accordingly, a majority of the Subcommittee recommends the rejection of Amended ABA Comment [5].

Non-ABA Housekeeping Matter – Rule 4.3, Comment [1]

It was brought to the attention of the Chair of the Standing Committee that there is a typographical error in existing Comment [1] to Colorado Rule 4.3. The reference to "Rule 1.13(d)" should read "Rule 1.13(f)." This housekeeping matter has been referred to this Subcommittee.

The Subcommittee recommends that Comment [1] be corrected to read "Rule 1.13(f)."

Respectfully submitted,



Michael H. Berger, Subcommittee chair

Appendix A

AUGUST 2012 AMENDMENTS TO
ABA MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.0 Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and ~~e-mail~~ electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

...

Screened

...

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other ~~materials~~ information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other ~~materials~~ information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

...

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

...

Retaining or Contracting With Other Lawyers

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

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[~~6~~ 8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.4 Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment

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Communicating with Client

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[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. ~~Client telephone calls should be promptly returned or acknowledged.~~ A lawyer should promptly respond to or acknowledge client communications.

...

Rule 1.6 Confidentiality of Information

(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:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or 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;

(3) 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;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) 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; or

(6) to comply with other law or a court order; or

(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 would not compromise the attorney-client privilege or otherwise prejudice the client.

(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.

Comment

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Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than

the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[153] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[164] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[175] 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)(6). 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. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[186] Paragraph (c) requires a ~~A~~ lawyer ~~must~~ to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[197] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[2018] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

...

Rule 1.17 Sale of Law Practice

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

Comment

...

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to ~~client-specific~~ detailed information relating to the representation, ~~and~~ ~~to~~ such as the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

...

Rule 1.18: Duties to Prospective Client

(a) A person who ~~discusses~~ consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with~~ learned information from a prospective client shall not use or reveal that information ~~learned in the consultation~~, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's ~~discussions~~ consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] ~~Not all persons who communicate information to a lawyer are entitled to protection under this Rule.~~ A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not

occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. ~~A person who communicates~~ Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client," ~~within the meaning of paragraph (a).~~ Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

...

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit ~~the initial interview~~ the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition ~~conversations~~ a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

...

Rule 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Comment

...

[2] Paragraph (b) recognizes that lawyers sometimes receive a documents or electronically stored information that ~~were~~ was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information ~~original document~~, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been ~~wrongfully~~ inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is ~~email or other electronic modes of transmission~~ subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it ~~the document~~ that it was inadvertently sent ~~to the wrong address~~. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

...

Rule 5.3 Responsibilities Regarding Nonlawyer Assistancets

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

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

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

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

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

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

Comment

[~~2~~1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts ~~to establish internal policies and procedures designed to provide~~ to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters ~~will~~ act in a way compatible with the professional obligations of the lawyer. ~~with the Rules of Professional Conduct.~~ See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1~~,~~ (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over ~~the work of a nonlawyer,~~ such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of ~~a nonlawyer~~ such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers Within the Firm

[~~1~~2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that ~~provide legal services in this jurisdiction that~~:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

Comment

...

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting

another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

...

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. See, e.g., The ABA Model Rule on Practice Pending Admission.

...

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services ~~to prospective clients~~ in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services ~~to prospective clients~~ in this jurisdiction is governed by Rules 7.1 to 7.5.

...

Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

...

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public. ~~a prospective client.~~

...

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal services plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Comment

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are ~~is~~ now ~~one of~~ among the most powerful media for getting information to the public, particularly persons of low and moderate income;

prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. ~~Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule.~~ But see Rule 7.3(a) for the prohibition against ~~the~~ a solicitation ~~of a prospective client~~ through a real-time electronic exchange initiated by the lawyer. ~~that is not initiated by the prospective client.~~

...

Paying Others to Recommend a Lawyer

[5] Except as permitted under paragraphs (b)(1)-(b)(4), ~~L~~lawyers are not permitted to pay others for ~~channeling professional work~~ recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, ~~banner ads,~~ Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 ~~for the~~ (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another). ~~who prepare marketing materials for them.~~

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek ~~prospective clients~~ to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by ~~laypersons~~ the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. ~~prospective clients.~~ See, e.g.,

the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public ~~prospective clients~~; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals ~~prospective clients~~ to lawyers who own, operate or are employed by the referral service).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with ~~prospective clients~~ the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public ~~prospective clients~~ to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

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Rule 7.3 ~~Direct Contact with Prospective~~ Solicitation of Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact, solicit professional employment ~~from a prospective client~~ when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment ~~from a prospective client~~ by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the ~~prospective client~~ target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone ~~a prospective client~~ known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[~~1~~2] There is a potential for abuse when a solicitation involves ~~inherent in~~ direct in-person, live telephone or real-time electronic contact by a lawyer with someone ~~a prospective client~~ known to need legal services. These forms of contact ~~between a lawyer and a prospective client~~ subject ~~the layperson~~ a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person ~~prospective client~~, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence

upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[~~2~~3] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation ~~of prospective clients~~ justifies its prohibition, particularly since lawyers have ~~advertising and written and recorded communication permitted under Rule 7.2 offer~~ alternative means of conveying necessary information to those who may be in need of legal services. ~~Advertising and written and recorded~~ In particular, communications~~,~~ can ~~which may be~~ be mailed ~~or autodialed~~ or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public ~~a prospective client~~ to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting ~~the prospective client~~ the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm ~~the client's~~ a person's judgment.

[~~3~~4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public ~~prospective client~~, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct-in-person, live telephone or real-time electronic ~~conversations between a lawyer and a prospective client~~ contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[~~4~~5] There is far less likelihood that a lawyer would engage in abusive practices against ~~an individual who is~~ a former client, or a person with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to ~~its~~ their members or beneficiaries.

[~~5~~6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with ~~a prospective client~~ someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication ~~to a client~~ as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication ~~prospective client~~ may violate the provisions of

Rule 7.3(b).

[67] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. ~~a prospective client~~. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[78] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[89] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

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AUGUST 2012 AMENDMENTS
TO OTHER ABA POLICIES

ABA Model Rule on Practice Pending Admission [NEW]

1. A lawyer currently holding an active license to practice law in another U.S. jurisdiction and who has been engaged in the active practice of law for three of the last five years, may provide legal services in this jurisdiction through an office or other systematic and continuous presence for no more than [365] days, provided that the lawyer:

   a. is not disbarred or suspended from practice in any jurisdiction and is not currently subject to discipline or a pending disciplinary matter in any jurisdiction;

   b. has not previously been denied admission to practice in this jurisdiction or failed this jurisdiction's bar examination;

   c. notifies Disciplinary Counsel and the Admissions Authority in writing prior to initiating practice in this jurisdiction that the lawyer will be doing so pursuant to the authority in this Rule;

   d. submits within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction a complete application for admission by motion or by examination;

   e. reasonably expects to fulfill all of this jurisdiction's requirements for that form of admission;

   f. associates with a lawyer who is admitted to practice in this jurisdiction;

   g. complies with Rules 7.1 and 7.5 of the Model Rules of Professional Conduct [or jurisdictional equivalent] in all communications with the public and clients regarding the nature and scope of the lawyer's practice authority in this jurisdiction; and

   h. pays any annual client protection fund assessment.

2. A lawyer currently licensed as a foreign legal consultant in another U.S. jurisdiction may provide legal services in this jurisdiction through an office or other systematic and continuous presence for no more than [365] days, provided that the lawyer:

   a. provides services that are limited to those that may be provided in this jurisdiction by foreign legal consultants;

   b. is a member in good standing of a recognized legal profession in the foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;

   c. submits within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction a complete application for admission to practice as a foreign legal consultant;

d. reasonably expects to fulfill all of this jurisdiction's requirements for admission as a foreign legal consultant; and

e. meets the requirements of paragraphs 1(a), (b), (c), (f), (g), and (h) of this Rule.

3. Prior to admission by motion, through examination, or as a foreign legal consultant, the lawyer may not appear before a tribunal in this jurisdiction that requires *pro hac vice* admission unless the lawyer is granted such admission.

4. The lawyer must immediately notify Disciplinary Counsel and the Admissions Authority in this jurisdiction if the lawyer becomes subject to a disciplinary matter or disciplinary sanctions in any other jurisdiction at any time during the [365] days of practice authorized by this Rule. The Admissions Authority shall take into account such information in determining whether to grant the lawyer's application for admission to this jurisdiction.

5. The authority in this Rule shall terminate immediately if:

a. the lawyer withdraws the application for admission by motion, by examination, or as a foreign legal consultant, or if such application is denied, prior to the expiration of [365] days;

b. the lawyer fails to file the application for admission within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction;

c. the lawyer fails to remain in compliance with Paragraph 1 of this Rule;

d. the lawyer is disbarred or suspended in any other jurisdiction in which the lawyer is licensed to practice law; or

e. the lawyer has not complied with the notification requirements of Paragraph 4 of this Rule.

6. Upon the termination of authority pursuant to Paragraph 5, the lawyer, within [30] days, shall:

a. cease to occupy an office or other systematic and continuous presence for the practice of law in this jurisdiction unless authorized to do so pursuant to another Rule;

b. notify all clients being represented in pending matters, and opposing counsel or co-counsel of the termination of the lawyer's authority to practice pursuant to this Rule;

c. not undertake any new representation that would require the lawyer to be admitted to practice law in this jurisdiction; and

d. take all other necessary steps to protect the interests of the lawyer's clients.

7. Upon the denial of the lawyer's application for admission by motion, by examination, or as a foreign legal consultant, the Admissions Authority shall immediately notify Disciplinary Counsel that the authority granted by this Rule has terminated.

8. The Court, in its discretion, may extend the time limits set forth in this Rule for good cause shown.

Comment

[1] This Rule recognizes that a lawyer admitted in another jurisdiction may need to relocate to or commence practice in this jurisdiction, sometimes on short notice. The admissions process can take considerable time, thus placing a lawyer at risk of engaging in the unauthorized practice of law and leaving the lawyer's clients without the benefit of their chosen counsel. This Rule closes this gap by authorizing the lawyer to practice in this jurisdiction for a limited period of time, up to 365 days, subject to restrictions, while the lawyer diligently seeks admission. The practice authority provided pursuant to this Rule commences immediately upon the lawyer's establishment of an office or other systematic and continuous presence for the practice of law.

[2] Paragraph 1(f) requires a lawyer practicing in this jurisdiction pursuant to the authority granted under this Rule to associate with a lawyer who is admitted to practice law in this jurisdiction. The association between the incoming lawyer and the lawyer licensed in this jurisdiction is akin to that between a local lawyer and a lawyer practicing in a jurisdiction on a temporary basis pursuant to Model Rule of Professional Conduct 5.5(c)(1).

[3] While exercising practice authority pursuant to this Rule, a lawyer cannot hold out to the public or otherwise represent that the lawyer is admitted to practice in this jurisdiction. See Model Rule of Professional Conduct 5.5(b)(2). Because such a lawyer will typically be assumed to be admitted to practice in this jurisdiction, that lawyer must disclose the limited practice authority and jurisdiction of licensure in all communications with potential clients, such as on business cards, websites, and letterhead. Further, the lawyer must disclose the limited practice authority to all potential clients before agreeing to represent them. See Model Rules 7.1 and 7.5(b).

[4] The provisions of paragraph 5 (a) through (d) of this Rule are necessary to avoid prejudicing the rights of existing clients or other parties. Thirty days should be sufficient for the lawyer to wind up his or her practice in this jurisdiction in an orderly manner.

ABA Model Rule on Admission by Motion

1. An applicant who meets the requirements of (a) through (g) of this Rule may, upon motion, be admitted to the practice of law in this jurisdiction. The applicant shall:

    (a) have been admitted to practice law in another state, territory, or the District of Columbia;
    (b) hold a J.D. or LL.B. degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the applicant matriculated or graduated;
    (c) have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for ~~five~~ three of the ~~seven~~ five years immediately preceding the date upon which the application is filed;
    (d) establish that the applicant is currently a member in good standing in all jurisdictions where admitted;
    (e) establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any jurisdiction;
    (f) establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and
    (g) designate the Clerk of the jurisdiction's highest court for service of process.

For purposes of this ~~r~~Rule, the "active practice of law" shall include the following activities, if performed in a jurisdiction in which the applicant is admitted and authorized to practice, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted in that jurisdiction; however, in no event shall any activities that were performed pursuant to the Model Rule on Practice Pending Admission or in advance of bar admission in some state, territory, or the District of Columbia be accepted toward the durational requirement:

    (a) Representation of one or more clients in the private practice of law;
    (b) Service as a lawyer with a local, state, territorial or federal agency, including military service;
    (c) Teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;
    (d) Service as a judge in a federal, state, territorial or local court of record;
    (e) Service as a judicial law clerk; or
    (f) Service as in-house counsel provided to the lawyer's employer or its organizational affiliates.

3. For purposes of this ~~r~~Rule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.

4. An applicant who has failed a bar examination administered in this jurisdiction within five years of the date of filing an application under this rRule shall not be eligible for admission on motion.

FURTHER RESOLVED: That the American Bar Association urges jurisdictions that have not adopted the Model Rule on Admission by Motion to do so, and urges jurisdictions that have adopted admission by motion procedures to eliminate any restrictions that do not appear in the Model Rule on Admission by Motion.