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

AGENDA

February 1, 2013, 9:00 a.m.
OARC Conference Room, 1560 Broadway, 19th Floor
Call-in number: 877-820-7831, then dial Room Number 7413906#

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1. Approval of minutes – November 16, 2012 meeting [to be distributed separately]

2. November 19, 2012 cover letter to Supreme Court concerning work of Pretexting Subcommittee (without attachments) [pages 1-4]

3. November 19, 2012 letter to Supreme Court concerning housekeeping amendment to CRPC 1.13, cmt. [3] [pages 5-7]

   [Agenda Item 6(a) to be taken out of order]

4. Report from Subcommittee on OARC- and COLTAF-proposed amendments to C.R.P.C. 1.15 [John Gleason; Jamie Sudler; Diana Poole, COLTAF Executive Director; and Phil Johnson, COLTAF Board President, pages 8-29]

5. Report from Subcommittee on August 2012 Amendments to ABA Model Rules [Michael Berger]

6. New business:

   a. Potential new comment to CRPC 8.4(b), concerning an attorney's use of marijuana [Judge Webb, pages 30-44] [To be taken out of order, after Agenda Item 3]

   b. Potential amendment to CRPC 1.2(c), concerning unbundled legal services [David Little, pages 45-48]

   c. Potential amendment to CRPC 5.5(a)(3), concerning assisting in the unauthorized practice of law [Tony van Westrum, pages 49-50]

7. Administrative matters:

a. Select next meeting date

8. Adjournment (before noon)

Chair
Marcy G. Glenn
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November 19, 2012

VIA U.S. MAIL AND EMAIL

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

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

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

Dear Justices Coats and Márquez:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Marcy G. Glenn
of Holland & Hart LLP

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

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November 19, 2012

VIA U.S. MAIL AND EMAIL

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

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

Re: Typographical Error in CRPC 1.13, cmt. [3]

Dear Justices Coats and Márquez:

I write on behalf of the Court's Standing Committee on the Colorado Rules of Professional Conduct (the Standing Committee).

At its November 16, 2012 meeting, the Standing Committee voted to notify the Court of a typographical error in Comment 3 to Rule 1.13 of the Colorado Rules of Professional Conduct (CRPC). That paragraph currently reads:

> [3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (19) makes clear, however, that, when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

As proposed by the Standing Committee to the Court in December 2005, this comment was intended to be identical to Comment 3 to ABA Model Rule 1.13. However, the draft comment tendered to the Court inexplicably included the reference to "Paragraph (19)," quoted above,

while the ABA Model Rule's Comment [3] instead refers to "Paragraph (b)." The Colorado comment's current reference to "Paragraph (19)" is inaccurate. It should be changed to read "Paragraph (b)," which is the subject of the sentence in which it appears.

For the Court's convenience, I attach a redlined version of the proposed comment amendment, and am sending both hard and electronic copies of this letter and attachment.

Sincerely,

Marcy G. Glenn
of Holland & Hart LLP

MGG:dc
Enclosure
cc: Members of the Standing Committee (with enclosure)

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PROPOSED AMENDMENT TO CRPC 1.13, COMMENT [3], SHOWN IN REDLINE

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (~~1~~9b) makes clear, however, that, when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

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Report of the Rule 1.15 Subcommittee

February 1, 2013

The Rule 1.15 subcommittee[1] respectfully submits the following report to the Standing Rules Committee.

Background. At the November 16, 2012, meeting of the Standing Rules Committee, a discussion occurred concerning proposed amendments to Rule 1.15. The discussion was triggered by a letter from the Colorado Lawyer Trust Account Foundation ("COLTAF") asking for consideration of rule changes to require lawyers to hold their COLTAF accounts in financial institutions that pay interest or dividend rates on those accounts that are the same as those paid on comparable non-COLTAF accounts. After discussion this subcommittee was created to consider and, if appropriate, to suggest changes to the Rules to assure that COLTAF accounts are paid comparable rates of interest.

Rule Changes. The subcommittee has considered how to change Rule 1.15 to accomplish interest comparability and also how to make Rule 1.15 less cumbersome.

Attached to this report are the following:

- Letter dated September 5, 2012, to Marcy Glenn, Chair Colorado Supreme Court Standing Rules Committee from COLTAF without attachments
- Current Rule 1.15
- Proposed Rule 1.15A
- Proposed Rule 1.15B
- Proposed Rule 1.15C
- Proposed Rule 1.15D, and

[1] Jamie Sudler chaired the subcommittee. Members included A. Rothrock; A. van Westrum, M. Squarrell; H. Berkman; D. Little, D. Poole; P. Johnson; W. Blanco; C. Morris; M. Funk; T. Young; M. Hart; N. Cohen.

- Proposed Chief Justice Directive concerning Colorado lawyer's trust accounts.

An overview of the proposed changes is as follows:

1) Old Rule 1.15 is separated into four new rules: 1.15A, 1.15B, 1.15C and 1.15D. This separation covers four general areas: 1) safeguarding funds, 2) trust account requirements; 3) use of trust accounts; and 4) record keeping for accounts. (The new numbering is consistent with what is now Rule 1.16A.)

2) A Chief Justice Directive ("CJD") is proposed that would contain various requirements for an agreement between OARC and banks that have trust and COLTAF accounts. Only banks that signed such agreements would be approved. These requirements concern reporting to OARC when a trust account balance falls below $0.00; interest comparability; and, payment of interest on COLTAF accounts to COLTAF.

The subcommittee is proposing the separation of the old Rule 1.15 into four shorter and more readable rules. The goal is to make it easier for lawyers to understand how to use and manage trust accounts.

The proposed amendments add no obligations to lawyers that they do not currently have under current Rule 1.15. Lawyers now are obligated under Rule 1.15(h)(2)(c) to direct the bank at which they have their COLTAF account to remit interest to COLTAF. Under the new rules the institution would be obligated to make this remittance in order to be an approved institution as provided in the Chief Justice Directive. After the change the lawyer will simply check OARC's website to assure that his/her COLTAF institution is approved.

The proposed changes would remove from the Rules of Professional Conduct the requirement that a financial institution report to OARC when a trust account drops below zero, or when a lawyer writes an NSF check on the trust account. Instead, this requirement would be in the CJD containing the conditions for approval of a financial institution to offer trust accounts.

The CJD requires that financial institutions that wish to offer COLTAF accounts pay interest or dividends comparable to that paid on other similar accounts. This was the main reason that this proposed revision process began.

The subcommittee did not come to agreement as to the appropriate treatment of possible bank fees and services charges. Current Rule 1.15(h)(2)(c)(i) states:

> (c) A lawyer or law firm depositing funds in a COLTAF account shall direct the depository institution:
>
> (i) to remit interest, net of service charges or fees, if any are charged, computed in accordance with the institution's standard accounting practice, at least quarterly, to COLTAF; . . .

Section 9 of the proposed CJD requires an approved financial institution to remit interest net of "allowable reasonable COLTAF fees." There are three alternatives included. The first one was proposed by COLTAF. and defines "allowable reasonable COLTAF fees" as follows:

> "Allowable reasonable COLTAF fees" are sweep fees[2] in amounts not to exceed those assessed against comparable non-COLTAF accounts and a reasonable fee to cover the cost of complying with the remittance and reporting requirements associated with the COLTAF account. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the COLTAF account. Fees in excess of the earnings accrued on one COLTAF account for any period shall not be taken from the principal of any COLTAF account or from earnings accrued on any other COLTAF account.

The second alternative was discussed as a possible solution to a problem discussed by one member of the subcommittee and mentioned below. This alternative eliminates the word "sweep" and also the second sentence from the first alternative.

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[2] Sweep fees are charged for business checking accounts with an automated investment feature in overnight daily financial institution repurchase agreements of money market funds. *See* proposed CJD section 7) d.

The third alternative has also been proposed by COLTAF to be more specific about the fees financial institutions may deduct from interest remitted to COLTAF.

One member of the subcommittee raised the concern that banks may start imposing fees or charges on COLTAF accounts if they have to pay higher interest on those accounts, and opposed the language in the proposed CJD that would make all but certain delineated fees the responsibility of the lawyer. The countervailing concern is that the failure to delineate the fees that can be deducted from the interest otherwise payable to COLTAF would leave COLTAF exposed to the possible imposition of unreasonable fees by the banks. There is also the issue of what those delineated fees should be. The alternative language proposed attempts to limit the fees that may be charged against the interest on COLTAF accounts to those basic fees that are imposed on comparable accounts , and leaves to the lawyers, as a cost of doing business, fees for optional or special services, like wire transfers.

Three alternatives are set forth in section 9 of the proposed CJD because the subcommittee determined that this issue should be discussed by the Standing Rules Committee as a whole.

One member of the subcommittee opposed the reorganization of the rules that would include a CJD. That member opposed using a CJD as granting too much authority to a Chief Justice.

Conclusion. The subcommittee sends these proposed changes to the full Standing Rules Committee for discussion. Should the Standing Rules Committee approve interest comparability, then the suggested rule changes with the proposed CJD accomplish that goal. Additionally, the subcommittee looked favorably on the reorganization of Rule 1.15 even if interest comparability is not approved.

Respectfully submitted,

James Sudler

COLTAF
Colorado Lawyer Trust Account Foundation

September 5, 2012

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

Re: Proposed Amendments to Rule of Professional Conduct 1.15,
Safekeeping Property

Dear Ms. Glenn and Members of the Standing Committee:

The Colorado Lawyer Trust Account Foundation (COLTAF) and the Supreme Court Office of Attorney Regulation Counsel (OARC) are proposing amendments to Colorado Rule of Professional Conduct 1.15 to require lawyers to hold their COLTAF accounts in financial institutions that pay interest or dividend rates on those accounts that are the same as those paid on comparable non-COLTAF accounts. The rule change will ensure the fair treatment of COLTAF accounts, and will help maximize the resources available for Colorado's civil legal aid delivery system.

COLTAF first explored the concept of requiring rate comparability in Colorado back in 2006 and 2007, when only twelve other states had adopted comparability rules. In the fall of 2006, COLTAF hired an experienced IOLTA program consultant (IOLTA, or Interest on Lawyers Trust Accounts, is the generic name for programs like COLTAF) to study the expected revenue impact of a comparability rule in Colorado. That expert found a significant "comparability gap" (the difference between rates paid on large COLTAF accounts as opposed to the rates paid on comparable non-COLTAF accounts), and estimated that a comparability rule would result in a net revenue gain for COLTAF of $1.78 million per year.

The COLTAF Board, and in particular its Banking Committee, spent many months considering and debating the consultant's report and drafting a proposed rule, with considerable help from experts at the American Bar Association (ABA) and the National Association of IOLTA Programs (NAIP). In April of 2007, the COLTAF Banking Committee decided to defer further consideration of a proposed rule change in Colorado until COLTAF transitioned to a more sophisticated data base that would be required to effectively implement a comparability rule. The Committee concluded that

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deferral would also allow Colorado to learn more from other states, as more and more were in the process of adopting and implementing their own comparability rules.

Thirty-three states have now adopted comparability, and many of the questions that COLTAF grappled with in 2006 and 2007 have been answered by the experience in other states. The revenue impact has, of course, varied dramatically, depending on whether a particular rule was implemented when prevailing rates were much higher or in the current ultra-low rate environment. A comparability requirement does not ensure higher IOLTA rates; it simply ensures equity between rates paid on IOLTA accounts and those paid on comparable non-IOLTA accounts.

In the fall of 2010, COLTAF hired another IOLTA program consultant, this one with a particular expertise in comparability. This consultant concluded that, although of minimal short-term value given the current rate environment, a comparability rule would make economic sense for Colorado over the longer term. He determined that, under a mid-range of interest rates, comparable COLTAF rates should exceed non-comparable COLTAF rates (based on historical averages) by more than a full percentage point, generating approximately $800,000 annually in additional interest. In higher rate environments, he concluded, that amount could easily be doubled to over $1.6 million. He emphasized that a comparability rule is probably more desirable now than it was in 2007, because given the new economic and regulatory environment in which banks are operating, COLTAF is unlikely to experience even as much success as it has in the past asking banks to voluntarily increase the rates paid on their COLTAF accounts. The bankers on COLTAF's Board echo this new reality.

With this new report in hand, with the consultant's continued assistance, and again with significant input from ABA and NAIP experts, the COLTAF Banking Committee revised its earlier draft of a proposed comparability rule to incorporate the wisdom and experience gained by other states during the intervening five years. This revised draft, which has been approved by the COLTAF Board and fully vetted by Regulation Counsel, is attached.

The proposed changes will have little or no impact on lawyers and law firms, as they will not be required to determine whether their banks are paying comparable rates on their COLTAF accounts. COLTAF will have the responsibility of working with financial institutions to verify that the COLTAF accounts they offer are paying comparable rates, and OARC will continue to have the enforcement responsibility if a bank that chooses to offer COLTAF accounts fails to comply with the requirements of Rule 1.15.

In addition to a redlined copy of the proposed rule, we have also enclosed a document entitled "The Case for COLTAF Interest Rate Comparability," which addresses some of the most frequently asked questions about comparability, and a list of the states that have already adopted IOLTA rate comparability.

We respectfully request your prompt consideration and approval of the proposed amendments so that COLTAF and, more importantly, the civil legal aid delivery system, will be in a position to benefit as soon as the interest rate environment begins to improve.

Sincerely,

Philip E. Johnson, Esq.
COLTAF Board President

John S. Gleason, Esq.
Regulation Counsel

West's Colorado Revised Statutes Annotated Currentness
West's Colorado Court Rules Annotated
Colorado Rules of Professional Conduct (Appendix to Chapters 18 to 20) (Refs & Annos)
Client-Lawyer Relationship
→→ RULE 1. 15. SAFEKEEPING PROPERTY

General Duties of Lawyers Regarding Property of Clients and Third Parties

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate trust account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such funds and other property of clients or third parties shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.

(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.

(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 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.

Required Bank Accounts

(d) Every lawyer in private practice in this state shall maintain in a financial institution doing business in Colorado, in the lawyer's own name, or in the name of a partnership of lawyers, or in the name of an entity authorized pursuant to C.R.C.P. 265 of which the lawyer is a member, or in the name of the lawyer or entity by whom the lawyer is employed or with whom the lawyer is associated:

(1) A trust account or accounts, separate from any business and personal accounts and from any fiduciary accounts that the lawyer may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which the lawyer shall deposit 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 if the lawyer never receives such funds or payments; and,

(2) A business account or accounts into which all funds received for professional services shall be deposited. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a "professional account," an "office account," or an "operating account."

(e) With respect to trust accounts established pursuant to this Rule:

(1) One or more of the trust accounts may be a Colorado Lawyer Trust Account Foundation ("COLTAF") account or accounts, as described in Rule 1. 15(h)(2). All COLTAF accounts shall be designated "COLTAF Trust Account."

(2) All such trust accounts, whether general or specific, as well as all deposits slips and checks drawn thereon, shall be prominently designated as a "trust account." Nothing herein shall prohibit any additional descriptive designation for a specific trust account.

(3) Trust accounts shall be maintained only in financial institutions doing business in Colorado that are approved by

the Regulation Counsel based upon policy guidelines adopted by the Board of Trustees of the Colorado Attorneys' Fund for Client Protection. Regulation Counsel shall annually publish a list of such approved institutions. A financial institution shall be approved if it shall file with the Regulation Counsel an agreement, in a form provided, to report to the Regulation Counsel in the event any properly payable trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored; any such 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. The agreement shall further provide that all reports made by the financial institution shall be in the following format: (1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (2) in the case of an instrument that is presented against insufficient funds but which instrument is honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any; if an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds. In addition, each financial institution approved by the Regulation Counsel must cooperate with the COLTAF program and must offer a COLTAF account to any lawyer who wishes to open one. In addition to the reports specified above, approved financial institutions shall agree to cooperate fully with the Regulation Counsel and to produce any trust account or business account records on receipt of a subpoena therefore 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. 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 this Rule and shall indemnify and hold harmless the financial institution for its compliance with such reporting and production requirement. A 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. 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.

(4) The name of institutions in which such accounts are maintained and identification numbers of each account shall be recorded on a statement filed with the annual attorney registration payment pursuant to C.R.C.P. 227(2). Such information shall be available for use in accordance with paragraph (j) of this Rule. For each COLTAF account, the statement shall indicate the account number, the name the account is under, and the depository institution.

Trust Account Requirements and Management; COLTAF Accounts

(f) All trust accounts shall be maintained in interest-bearing, insured depository accounts; provided, that with the consent of the client or third person whose funds are in the account, an account in which interest is paid to the client or third person need not be an insured depository account. All COLTAF accounts shall be insured depository accounts. For the purpose of this Rule, "insured depository accounts" shall mean government insured accounts at a regulated financial institution, on which withdrawals or transfers can be made on demand, subject only to any notice period which the institution is required to reserve by law or regulation.

(g) A lawyer may deposit funds reasonably sufficient to pay anticipated service charges or other fees for maintenance or operation of such account into trust accounts. Such funds shall be clearly identified in the lawyer's records of the account.

(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.

(b) The account shall include funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time with the intent that such funds not earn interest in excess of the reasonably estimated cost of establishing, maintaining and accounting for trust accounts for the benefit of such clients or third parties.

(c) A lawyer or law firm depositing funds in a COLTAF account shall direct the depository institution:

(i) To remit interest, net of service charges or fees, if any are charged, computed in accordance with the institution's standard accounting practice, at least quarterly, to COLTAF; and

(ii) To transmit with each remittance to COLTAF a statement showing the name of the lawyer or law firm on whose account the remittance is sent and the rate of interest applied.

(d) The provisions of this subparagraph (h)(2) shall not apply in those instances where it is not feasible to establish a trust account for the benefit of COLTAF for reasons beyond the control of the lawyer or law firm, such as the unavailability of a financial institution in the community that offers such an account.

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

(4) Information necessary to determine compliance or justifiable reasons for noncompliance with subparagraph (h)(2) shall be included in the annual attorney registration statement. COLTAF shall assist the Colorado Supreme Court in determining whether lawyers or law firms have complied in establishing the trust account required under subparagraph (h)(2). If it appears that a lawyer or law firm has not complied where it is feasible to do so, the matter may be referred to the Regulation Counsel for investigation and proceedings in accordance with C.R.C.P. 251.

(i) Management of Trust Accounts.

(1) ATM or Debit Cards. A lawyer shall not use any debit card or automated teller machine card to withdraw funds from a trust account.

(2) 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 and may be made only by authorized bank or wire transfer or by check payable to a named payee.

(3) Cash withdrawals and checks made payable to "Cash" are prohibited.

(4) Cancelled Checks. A lawyer shall request that the lawyer's trust account bank return to the lawyer, photo static or electronic images of cancelled checks written on the trust account. If the bank provides electronic images, the lawyer

shall either maintain paper copies of the electronic images or maintain the electronic images in readily obtainable format.

(5) Persons Authorized to Sign. 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;

(6) Reconciliation of Trust Accounts. No less than quarterly, a lawyer or a person authorized by the lawyer shall reconcile the trust account records both as to individual clients and in the aggregate with the lawyer's trust account bank statement(s).

Required Accounting Records; Retention of Records; Availability of Records

(j) A lawyer, whether practicing as a sole practitioner, in a partnership, or through an entity authorized pursuant to C.R.C.P. 265, shall maintain in a current status and retain for a period of seven years after the event that they record:

(1) Appropriate receipt and disbursement records of all deposits in and withdrawals from all trust accounts and any other bank account that concerns the lawyer's practice of law, specifically identifying the date, payor and description of each item deposited as well as the date, payee, and purpose of each disbursement. All trust account monies intended for deposit shall be deposited intact without deductions or "cash out" from the deposit and the duplicate deposit slip that evidences the deposit must be sufficiently detailed to identify each item deposited;

(2) An appropriate record-keeping system identifying each separate person or entity for whom the lawyer holds money or property in trust, for all trust accounts, showing the payor of all funds deposited in such accounts, the names and addresses of all persons for whom the funds are or were held, the amount of such funds, the description and amounts of charges or withdrawals from such accounts, and the names of all persons to whom any such funds were disbursed;

(3) Copies of all retainer and compensation agreements with clients (including written communications setting forth the basis or rate for the fees charged by the lawyer as required by Rule 1.5(b);

(4) Copies of all statements to clients showing the disbursement of funds to them or on their behalf;

(5) Copies of all bills issued to clients;

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

(7) All bank statements and photo static copies or electronic copies of all canceled checks.

(k) The financial books and other 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, and 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 each lawyer, partnership, professional corporation, or limited liability corporation.

(l) Dissolutions and Departures. Upon the dissolution of a law firm, the lawyers in the law firm shall make arrangements for the maintenance or disposition of records and client files in accordance with subsection (j) of this Rule and Rule 1.16A. Upon the departure of a lawyer from a law firm, the departing lawyer and the lawyers in the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with subsection (j) of this Rule and Rule 1.16A.

(m) Availability Of Records. 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.

CREDIT(S)

Repealed and readopted April 12, 2007, effective January 1, 2008. Amended effective November 6, 2008; February 10, 2011.

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box except when some other form of safekeeping is warranted by special circumstances. "Property" generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts.

[2] Trust accounts containing funds of clients or third persons held in connection with a representation must be interest-bearing for the benefit of the client or third person or for the benefit of the Colorado Lawyer Trust Account Foundation where the funds are nominal in amount or expected to be held for a short period of time. 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 subparagraph 1. 15(h)(3).

[3] Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[4] 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 shall be promptly distributed.

[5] 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.

[6] 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.

[7] A "client's security fund" provides a means through the collective efforts of the bar to reimburse

persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

[8] It is to be noted that 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. 15(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.

Proposed
RULE 1.15A

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

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate trust account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such funds and other property of clients or third parties shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.

(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.

(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 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.

Proposed
RULE 1.15B

Account Requirements

(a) Every lawyer in private practice in this state shall maintain in a financial institution doing business in Colorado, in the lawyer's own name, or in the name of a partnership of lawyers, or in the name of an entity authorized pursuant to C.R.C.P. 265 of which the lawyer is a member, or in the name of the lawyer or entity by whom the lawyer is employed or with whom the lawyer is associated:

(1) A trust account or accounts, separate from any business and personal accounts and from any fiduciary accounts that the lawyer may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which the lawyer shall deposit 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 if the lawyer never receives such funds or payments; and,

(2) A business account or accounts into which all funds received for professional services shall be deposited. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a "professional account," an "office account," or an "operating account."

(b) With respect to trust accounts established pursuant to this Rule:

(1) One or more of the trust accounts may be a Colorado Lawyer Trust Account Foundation ("COLTAF") account or accounts. A "COLTAF account" is a pooled interest-bearing or dividend paying 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 or dividends from such an account shall be payable to a lawyer or law firm.

(b) The account shall include funds of clients or third persons with the intent that such funds not earn interest or pay dividends in excess of the reasonably estimated cost of establishing, maintaining and accounting for trust accounts for the benefit of such clients or third parties.

(c) All COLTAF accounts shall be designated "COLTAF Trust Account."

(2) All such trust accounts, whether general or specific, as well as all deposits slips and checks drawn thereon, shall be prominently designated as a "trust account." Nothing herein shall prohibit any additional descriptive designation for a specific trust account.

(3) Attorneys shall maintain trust accounts only in financial institutions doing business in Colorado that are approved by the Regulation Counsel based upon policy guidelines adopted by Chief Justice Directive. Regulation Counsel shall annually publish a list of such approved institutions.

(c) All trust accounts, including COLTAF accounts, shall be maintained in interest-bearing, or dividend paying insured depository accounts; provided, that with the consent of the client or third person whose funds are in the account, an account in which interest or dividends are paid to the client or third person need not be an insured depository account.

(d) For the purpose of this Rule, "insured depository accounts" shall mean government insured accounts at a regulated financial institution, on which withdrawals or transfers can be made on demand, subject only to any notice period which the institution is required to reserve by law or regulation.

(e) A lawyer may deposit funds reasonably sufficient to pay anticipated service charges or other fees for maintenance or operation of such account into trust accounts. Such funds shall be clearly identified in the lawyer's records of the account.

(f) Interest or dividends on Trust and COLTAF Accounts:

(1) Except as may be prescribed by subparagraph (2) below, interest earned or dividends paid 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 or dividends.

(2) If the funds are not held in accounts with the interest or dividends paid to clients or third persons as provided in subsection (f)(1) of this Rule, a lawyer or law firm shall establish a COLTAF account. The provisions of this subparagraph shall not apply in those instances where it is not feasible to establish a trust account for the benefit of COLTAF for reasons beyond the control of the lawyer or law firm, such as the unavailability of a financial institution in the community that offers such an account..

(g) If a lawyer or law firm discovers that funds of any client or third person have mistakenly been held in a trust account for the benefit of COLTAF in a sufficient amount or for a sufficiently long time so that interest or dividends on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining and accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person) the lawyer or law firm shall request COLTAF to calculate and remit trust account interest or dividends already received by it to the lawyer or law firm for the benefit of such client or third person 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.

(h) 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 this Rule and shall indemnify and hold harmless the financial institution for its compliance with such reporting and production requirement.

Proposed
RULE 1.15C

Use of Trust Accounts

(a) ATM or Debit Cards. A lawyer shall not use any debit card or automated teller machine card to withdraw funds from a trust account.

(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 and may be made only by authorized bank or wire transfer or by check payable to a named payee.

(c) Cash withdrawals and checks made payable to "Cash" are prohibited.

(d) A lawyer shall request that the lawyer's trust account bank return to the lawyer, photo static or electronic images of cancelled checks written on the trust account. If the bank provides electronic images, the lawyer shall either maintain paper copies of the electronic images or maintain the electronic images in readily obtainable format.

(e) 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;

(f) No less than quarterly, a lawyer or a person authorized by the lawyer shall reconcile the trust account records both as to individual clients and in the aggregate with the lawyer's trust account bank statement(s).

Proposed
RULE 1.15D

Required Records

(a) A lawyer, whether practicing as a sole practitioner, in a partnership, or through an entity authorized pursuant to C.R.C.P. 265, shall maintain in a current status and retain for a period of seven years after the event that they record:

(1) Appropriate receipt and disbursement records of all deposits in and withdrawals from all trust accounts and any other bank account that concerns the lawyer's practice of law, specifically identifying the date, payor and description of each item deposited as well as the date, payee, and purpose of each disbursement. All trust account monies intended for deposit shall be deposited intact without deductions or "cash out" from the deposit and the duplicate deposit slip that evidences the deposit must be sufficiently detailed to identify each item deposited;

(2) An appropriate record-keeping system identifying each separate person or entity for whom the lawyer holds money or property in trust, for all trust accounts, showing the payor of all funds deposited in such accounts, the names and addresses of all persons for whom the funds are or were held, the amount of such funds, the description and amounts of charges or withdrawals from such accounts, and the names of all persons to whom any such funds were disbursed;

(3) Copies of all retainer and compensation agreements with clients (including written communications setting forth the basis or rate for the fees charged by the lawyer as required by Rule 1.5(b);

(4) Copies of all statements to clients showing the disbursement of funds to them or on their behalf;

(5) Copies of all bills issued to clients;

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

(7) All bank statements and photo static copies or electronic copies of all canceled checks.

(b) The financial books and other 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, and 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 each lawyer, partnership, professional corporation, or limited liability corporation.

(c) Dissolutions and Departures. Upon the dissolution of a law firm, the lawyers in the law firm shall make arrangements for the maintenance or disposition of records and client files in accordance with subsection (j) of this Rule and Rule 1.16A. Upon the departure of a lawyer from a law firm, the departing lawyer and the lawyers in the law firm shall make appropriate arrangements for the maintenance or disposition of records and client files in accordance with subsection (j) of this Rule and Rule 1.16A.

(d) Availability Of Records. 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.

SUPREME COURT OF COLORADO
OFFICE OF THE CHIEF JUSTICE

DIRECTIVE CONCERNING COLORADO LAWYERS TRUST ACCOUNTS

Pursuant to Colo. RPC 1.15B(b)(3) attorneys who establish trust accounts at financial institutions in the State of Colorado shall do so at a financial institution approved by the Office of Attorney Regulation Counsel. This Directive includes the guidelines upon which such financial institutions shall be approved. The Office of Attorney Regulation Counsel shall maintain a list of approved financial institutions for trust accounts and COLTAF (Colorado Lawyer Trust Account Foundation) accounts. Offering a trust account or a COLTAF account is voluntary for financial institutions.

A financial institution shall be approved for use for attorneys' trust accounts or COLTAF accounts if it shall file with the Regulation Counsel an agreement, in a form provided, with the following provisions and on the following conditions:

1) The financial institution shall agree to report to the Regulation Counsel in the event any properly payable trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored; any such 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.

2) The financial institution shall further agree that all reports made by the financial institution shall be in the following format: (1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (2) in the case of an instrument that is presented against insufficient funds but which instrument is honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any; if an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds.

3) The financial institution must agree to cooperate with the COLTAF program and must offer a COLTAF account to any lawyer who wishes to open one.

4) The financial institution shall agree to cooperate fully with the Regulation Counsel and to produce any trust account or business account records on receipt of a subpoena therefore 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 Directive, but such charges shall not be a transaction cost to be charged against funds payable to the COLTAF program.

5) The financial institution shall agree:

a) To remit electronically to COLTAF monthly interest or dividends, net of allowable reasonable COLTAF fees as defined in section (9) of this Directive, 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 of interest or dividends applied; the account balance on which the interest or dividends are calculated; the amount of interest or dividends paid; the amount and type of allowable reasonable COLTAF fees, if any, deducted; the amount of net earnings remitted; and such other information as is reasonably required by COLTAF.

6) The financial institution shall agree to pay on any COLTAF account (i) the highest interest or dividend rate generally available from the financial institution on non-COLTAF accounts when the account meets the same eligibility requirements, if any, or (ii) the rate set forth in paragraph (8) of this Directive. In determining the highest interest or dividend rate generally available from the financial institution to its non-COLTAF customers, the institution may consider, in addition to the balance in the COLTAF account, factors customarily considered by the institution when setting interest or dividends rates for its non-COLTAF accounts, provided that such factors do not discriminate between COLTAF accounts and non-COLTAF accounts and that these factors do not include the fact that the account is a COLTAF account. The financial institution may choose simply 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.

7) A COLTAF account may be established by a lawyer 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 eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. A "money market fund" is an investment company registered under the Investment Company Act of 1940, as amended, that is qualified to hold itself 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).

8) In lieu of the rate set forth in section (6) above, the financial institution may choose to pay on all of its COLTAF deposits 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 section (6) above.

9) ***Alternative 1 - COLTAF initial proposal***

"Allowable reasonable COLTAF fees" are sweep fees in amounts not to exceed those assessed against the comparable non-COLTAF accounts used to satisfy paragraph (6) above and a reasonable fee to cover the cost of complying with the remittance and reporting requirements set forth in paragraph (5) above. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the COLTAF account. Fees in excess of the earnings accrued on one COLTAF account for any period shall not be taken from the principal of any COLTAF account or from earnings accrued on any other COLTAF account.

Alternative 2 - COLTAF initial proposal with the bracketed language omitted

"Allowable reasonable COLTAF fees" are [sweep] fees in amounts not to exceed those assessed against the comparable non-COLTAF accounts used to satisfy paragraph (6) above and a reasonable fee to cover the cost of complying with the remittance and reporting requirements set forth in paragraph (5) above. [All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the COLTAF account.] Fees in excess of the earnings accrued on one COLTAF account for any period shall not be taken from the principal of any COLTAF account or from earnings accrued on any other COLTAF account.

Alternative 3 – COLTAF proposal following subcommittee meeting 1/23/2012

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

10) Nothing contained in this Directive shall preclude a financial institution either from paying a higher interest or dividend rate on a COLTAF account than is otherwise required by this Directive or from electing to waive any or all fees associated with COLTAF accounts.

11) Nothing in this Directive 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 of this Directive. COLTAF shall make all such determinations and shall at least annually inform Regulation Counsel of the financial institutions that are in compliance with the comparability provisions of this Directive.

12) An 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 Directive. 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.

This Directive is applicable to trust and COLTAF accounts established or in use as of _____.

Done at Denver, Colorado this ____ day of _____, 2013.

_____
Michael L. Bender, Chief Justice

AMENDMENT 64 / R.P.C. 8.4(b)

Once Amendment 64 (copy attached) becomes effective[1], lawyers who engage in conduct permitted by this amendment could still be subject to discipline under R.P.C. 8.4(b)[2], because such conduct violates federal criminal law[3]. The background for this anomaly is discussed at length in Formal Opinion No. 124 -- A Lawyer's Medical Use of Marijuana. (copy attached)

Comment [2] to R.P.C. 8.4(b) explains that while "[m]any kinds of illegal conduct reflect adversely on fitness to practice law . . . some kinds of offenses carry no such implication." This distinction was adopted in Opinion No. 124, which cited *People v. Hook*, 91 P.3d 1070, 1073-74 (Colo. OPDJ 2004) (lawyer's committing the felony of illegal discharge of a firearm does not by itself determine

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[1] Amending the Rules of Professional Conduct could be premature, given the possibility that the U.S. Justice Department may seek to have some or all of Amendment 64 declared void under the supremacy clause.

[2] "It is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

[3] Federal criminal could be amended to exempt from prosecution action that conforms to state law, as representative DeGette has proposed.

professional discipline that should be imposed). Although the opinion did not cite any authority involving use of marijuana by a lawyer in conformity with state law, it concluded:

> [A] lawyer's medical use of marijuana in compliance with Colorado law does not, in and of itself, violate Colo. RPC 8.4(b).1 Rather, to violate Colo. RPC 8.4(b), there must be additional evidence that the lawyer's conduct adversely implicates the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

Nevertheless, the Ethics Committee recognized that it "cannot speak to how the Colorado Supreme Court Office of Attorney Regulation Counsel ... may regard the lawful use of medicinal marijuana by attorneys under either the Colorado Rules or other disciplinary rules." Similarly, whether a hearing board would discipline an attorney for violating R.P.C. 8.4(b) based on conduct protected by Amendment 64 is unknown. The resulting uncertainty could chill exercise of the conduct permitted by Amendment 64.

Whether lawyers should be held to a higher standard in this or other areas is a policy question. *Cf.* Formal Opinion No. 112 -- Surreptitious Recording of Conversations or Statements. Subject to

how that question is answered, certainty could be established by an additional comment to R.P.C. 8.4(b). For example:

> [2A] A lawyer shall not be subject to discipline for engaging in conduct that is illegal under federal criminal law, if the Colorado Constitution precludes prosecution of that conduct under state criminal law.

Amendment 64: The Regulate Marijuana Like Alcohol Act of 2012

Ballot Title and Submission Clause

Shall there be an amendment to the Colorado constitution concerning marijuana, and, in connection therewith, providing for the regulation of marijuana; permitting a person twenty-one years of age or older to consume or possess limited amounts of marijuana; providing for the licensing of cultivation facilities, product manufacturing facilities, testing facilities, and retail stores; permitting local governments to regulate or prohibit such facilities; requiring the general assembly to enact an excise tax to be levied upon wholesale sales of marijuana; requiring that the first $40 million in revenue raised annually by such tax be credited to the public school capital construction assistance fund; and requiring the general assembly to enact legislation governing the cultivation, processing, and sale of industrial hemp?

Full Text of Initiative

Be it Enacted by the People of the State of Colorado

Article XVIII of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:

Section 16. Personal use and regulation of marijuana

(1) Purpose and findings.

(a) IN THE INTEREST OF THE EFFICIENT USE OF LAW ENFORCEMENT RESOURCES, ENHANCING REVENUE FOR PUBLIC PURPOSES, AND INDIVIDUAL FREEDOM, THE PEOPLE OF THE STATE OF COLORADO FIND AND DECLARE THAT THE USE OF MARIJUANA SHOULD BE LEGAL FOR PERSONS TWENTY-ONE YEARS OF AGE OR OLDER AND TAXED IN A MANNER SIMILAR TO ALCOHOL.

(b) IN THE INTEREST OF THE HEALTH AND PUBLIC SAFETY OF OUR CITIZENRY, THE PEOPLE OF THE STATE OF COLORADO FURTHER FIND AND DECLARE THAT MARIJUANA SHOULD BE REGULATED IN A MANNER SIMILAR TO ALCOHOL SO THAT:

(I) INDIVIDUALS WILL HAVE TO SHOW PROOF OF AGE BEFORE PURCHASING MARIJUANA;

(II) SELLING, DISTRIBUTING, OR TRANSFERRING MARIJUANA TO MINORS AND OTHER INDIVIDUALS UNDER THE AGE OF TWENTY-ONE SHALL REMAIN ILLEGAL;

(III) DRIVING UNDER THE INFLUENCE OF MARIJUANA SHALL REMAIN ILLEGAL;

(IV) LEGITIMATE, TAXPAYING BUSINESS PEOPLE, AND NOT CRIMINAL ACTORS, WILL CONDUCT SALES OF MARIJUANA; AND

(V) MARIJUANA SOLD IN THIS STATE WILL BE LABELED AND SUBJECT TO ADDITIONAL REGULATIONS TO ENSURE THAT CONSUMERS ARE INFORMED AND PROTECTED.

(c) IN THE INTEREST OF ENACTING RATIONAL POLICIES FOR THE TREATMENT OF ALL VARIATIONS OF THE CANNABIS PLANT, THE PEOPLE OF COLORADO FURTHER FIND AND DECLARE THAT INDUSTRIAL HEMP SHOULD BE REGULATED SEPARATELY FROM STRAINS OF CANNABIS WITH HIGHER DELTA-9 TETRAHYDROCANNABINOL (THC) CONCENTRATIONS.

(d) THE PEOPLE OF THE STATE OF COLORADO FURTHER FIND AND DECLARE THAT IT IS NECESSARY TO ENSURE CONSISTENCY AND FAIRNESS IN THE APPLICATION OF THIS SECTION THROUGHOUT THE STATE AND THAT, THEREFORE, THE MATTERS ADDRESSED BY THIS SECTION ARE, EXCEPT AS SPECIFIED HEREIN, MATTERS OF STATEWIDE CONCERN.

(2) Definitions. AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES,

(a) "COLORADO MEDICAL MARIJUANA CODE" MEANS ARTICLE 43.3 OF TITLE 12, COLORADO REVISED STATUTES.

(b) "CONSUMER" MEANS A PERSON TWENTY-ONE YEARS OF AGE OR OLDER WHO PURCHASES MARIJUANA OR MARIJUANA PRODUCTS FOR PERSONAL USE BY PERSONS TWENTY-ONE YEARS OF AGE OR OLDER, BUT NOT FOR RESALE TO OTHERS.

(c) "DEPARTMENT" MEANS THE DEPARTMENT OF REVENUE OR ITS SUCCESSOR AGENCY.

(d) "INDUSTRIAL HEMP" MEANS THE PLANT OF THE GENUS CANNABIS AND ANY PART OF SUCH PLANT, WHETHER GROWING OR NOT, WITH A DELTA-9 TETRAHYDROCANNABINOL CONCENTRATION THAT DOES NOT EXCEED THREE-TENTHS PERCENT ON A DRY WEIGHT BASIS.

(e) "LOCALITY" MEANS A COUNTY, MUNICIPALITY, OR CITY AND COUNTY.

(f) "MARIJUANA" OR "MARIHUANA" MEANS ALL PARTS OF THE PLANT OF THE GENUS CANNABIS WHETHER GROWING OR NOT, THE SEEDS THEREOF, THE RESIN EXTRACTED FROM ANY PART OF THE PLANT, AND EVERY COMPOUND, MANUFACTURE, SALT, DERIVATIVE, MIXTURE, OR PREPARATION OF THE PLANT, ITS SEEDS, OR ITS RESIN, INCLUDING MARIHUANA CONCENTRATE. "MARIJUANA" OR "MARIHUANA" DOES NOT INCLUDE INDUSTRIAL HEMP, NOR DOES IT INCLUDE FIBER PRODUCED FROM THE STALKS, OIL, OR CAKE MADE FROM THE SEEDS OF THE PLANT, STERILIZED SEED OF THE PLANT WHICH IS INCAPABLE OF GERMINATION, OR THE WEIGHT OF ANY OTHER INGREDIENT COMBINED WITH MARIJUANA TO PREPARE TOPICAL OR ORAL ADMINISTRATIONS, FOOD, DRINK, OR OTHER PRODUCT.

(g) "MARIJUANA ACCESSORIES" MEANS ANY EQUIPMENT, PRODUCTS, OR MATERIALS OF ANY KIND WHICH ARE USED, INTENDED FOR USE, OR DESIGNED FOR USE IN PLANTING, PROPAGATING, CULTIVATING, GROWING, HARVESTING, COMPOSTING, MANUFACTURING, COMPOUNDING, CONVERTING, PRODUCING, PROCESSING, PREPARING, TESTING, ANALYZING, PACKAGING, REPACKAGING, STORING, VAPORIZING, OR CONTAINING MARIJUANA, OR FOR INGESTING, INHALING, OR OTHERWISE INTRODUCING MARIJUANA INTO THE HUMAN BODY.

(h) "MARIJUANA CULTIVATION FACILITY" MEANS AN ENTITY LICENSED TO CULTIVATE, PREPARE, AND PACKAGE MARIJUANA AND SELL MARIJUANA TO RETAIL MARIJUANA STORES, TO MARIJUANA PRODUCT MANUFACTURING FACILITIES, AND TO OTHER MARIJUANA CULTIVATION FACILITIES, BUT NOT TO CONSUMERS.

(i) "MARIJUANA ESTABLISHMENT" MEANS A MARIJUANA CULTIVATION FACILITY, A MARIJUANA TESTING FACILITY, A MARIJUANA PRODUCT MANUFACTURING FACILITY, OR A RETAIL MARIJUANA STORE.

(j) "MARIJUANA PRODUCT MANUFACTURING FACILITY" MEANS AN ENTITY LICENSED TO PURCHASE MARIJUANA; MANUFACTURE, PREPARE, AND PACKAGE MARIJUANA PRODUCTS; AND SELL MARIJUANA AND MARIJUANA PRODUCTS TO OTHER MARIJUANA PRODUCT MANUFACTURING FACILITIES AND TO RETAIL MARIJUANA STORES, BUT NOT TO CONSUMERS.

(k) "MARIJUANA PRODUCTS" MEANS CONCENTRATED MARIJUANA PRODUCTS AND MARIJUANA PRODUCTS THAT ARE COMPRISED OF MARIJUANA AND OTHER INGREDIENTS AND ARE INTENDED FOR USE OR CONSUMPTION, SUCH AS, BUT NOT LIMITED TO, EDIBLE PRODUCTS, OINTMENTS, AND TINCTURES.

(l) "MARIJUANA TESTING FACILITY" MEANS AN ENTITY LICENSED TO ANALYZE AND CERTIFY THE SAFETY AND POTENCY OF MARIJUANA.

(m) "MEDICAL MARIJUANA CENTER" MEANS AN ENTITY LICENSED BY A STATE AGENCY TO SELL MARIJUANA AND MARIJUANA PRODUCTS PURSUANT TO SECTION 14 OF THIS ARTICLE AND THE COLORADO MEDICAL MARIJUANA CODE.

(n) "RETAIL MARIJUANA STORE" MEANS AN ENTITY LICENSED TO PURCHASE MARIJUANA FROM MARIJUANA CULTIVATION FACILITIES

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AND MARIJUANA AND MARIJUANA PRODUCTS FROM MARIJUANA PRODUCT MANUFACTURING FACILITIES AND TO SELL MARIJUANA AND MARIJUANA PRODUCTS TO CONSUMERS.

(o) "UNREASONABLY IMPRACTICABLE" MEANS THAT THE MEASURES NECESSARY TO COMPLY WITH THE REGULATIONS REQUIRE SUCH A HIGH INVESTMENT OF RISK, MONEY, TIME, OR ANY OTHER RESOURCE OR ASSET THAT THE OPERATION OF A MARIJUANA ESTABLISHMENT IS NOT WORTHY OF BEING CARRIED OUT IN PRACTICE BY A REASONABLY PRUDENT BUSINESSPERSON.

(3) Personal use of marijuana. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, THE FOLLOWING ACTS ARE NOT UNLAWFUL AND SHALL NOT BE AN OFFENSE UNDER COLORADO LAW OR THE LAW OF ANY LOCALITY WITHIN COLORADO OR BE A BASIS FOR SEIZURE OR FORFEITURE OF ASSETS UNDER COLORADO LAW FOR PERSONS TWENTY-ONE YEARS OF AGE OR OLDER:

(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.

(4) Lawful operation of marijuana-related facilities. NOTWITHSTANDING ANY OTHER PROVISION OF LAW, THE FOLLOWING ACTS ARE NOT UNLAWFUL AND SHALL NOT BE AN OFFENSE UNDER COLORADO LAW OR BE A BASIS FOR SEIZURE OR FORFEITURE OF ASSETS UNDER COLORADO LAW FOR PERSONS TWENTY-ONE YEARS OF AGE OR OLDER:

(a) MANUFACTURE, POSSESSION, OR PURCHASE OF MARIJUANA ACCESSORIES OR THE SALE OF MARIJUANA ACCESSORIES TO A PERSON WHO IS TWENTY-ONE YEARS OF AGE OR OLDER.

(b) POSSESSING, DISPLAYING, OR TRANSPORTING MARIJUANA OR MARIJUANA PRODUCTS; PURCHASE OF MARIJUANA FROM A MARIJUANA CULTIVATION FACILITY; PURCHASE OF MARIJUANA OR MARIJUANA PRODUCTS FROM A MARIJUANA PRODUCT MANUFACTURING FACILITY; OR SALE OF MARIJUANA OR MARIJUANA PRODUCTS TO CONSUMERS, IF THE PERSON CONDUCTING THE ACTIVITIES DESCRIBED IN THIS PARAGRAPH HAS OBTAINED A CURRENT, VALID LICENSE TO OPERATE A RETAIL MARIJUANA STORE OR IS ACTING IN HIS OR HER CAPACITY AS AN OWNER, EMPLOYEE OR AGENT OF A LICENSED RETAIL MARIJUANA STORE.

(c) CULTIVATING, HARVESTING, PROCESSING, PACKAGING, TRANSPORTING, DISPLAYING, OR POSSESSING MARIJUANA; DELIVERY OR TRANSFER OF MARIJUANA TO A MARIJUANA TESTING FACILITY; SELLING MARIJUANA TO A MARIJUANA CULTIVATION FACILITY, A MARIJUANA PRODUCT MANUFACTURING FACILITY, OR A RETAIL MARIJUANA STORE; OR THE PURCHASE OF MARIJUANA FROM A MARIJUANA CULTIVATION FACILITY, IF THE PERSON CONDUCTING THE ACTIVITIES DESCRIBED IN THIS PARAGRAPH HAS OBTAINED A CURRENT, VALID LICENSE TO OPERATE A MARIJUANA CULTIVATION FACILITY OR IS ACTING IN HIS OR HER CAPACITY AS AN OWNER, EMPLOYEE, OR AGENT OF A LICENSED MARIJUANA CULTIVATION FACILITY.

(d) PACKAGING, PROCESSING, TRANSPORTING, MANUFACTURING, DISPLAYING, OR POSSESSING MARIJUANA OR MARIJUANA PRODUCTS; DELIVERY OR TRANSFER OF MARIJUANA OR MARIJUANA PRODUCTS TO A MARIJUANA TESTING FACILITY; SELLING MARIJUANA OR MARIJUANA PRODUCTS TO A RETAIL MARIJUANA STORE OR A MARIJUANA PRODUCT MANUFACTURING FACILITY; THE PURCHASE OF MARIJUANA FROM A MARIJUANA CULTIVATION FACILITY; OR THE PURCHASE OF MARIJUANA OR MARIJUANA PRODUCTS FROM A MARIJUANA PRODUCT MANUFACTURING FACILITY, IF THE PERSON CONDUCTING THE ACTIVITIES DESCRIBED IN THIS PARAGRAPH HAS OBTAINED A CURRENT, VALID LICENSE TO OPERATE A MARIJUANA PRODUCT MANUFACTURING FACILITY OR IS ACTING IN HIS OR HER CAPACITY AS AN OWNER, EMPLOYEE, OR AGENT OF A LICENSED MARIJUANA PRODUCT MANUFACTURING FACILITY.

(e) POSSESSING, CULTIVATING, PROCESSING, REPACKAGING, STORING, TRANSPORTING, DISPLAYING, TRANSFERRING OR DELIVERING MARIJUANA OR MARIJUANA PRODUCTS IF THE PERSON HAS OBTAINED A CURRENT, VALID LICENSE TO OPERATE A MARIJUANA TESTING FACILITY OR IS ACTING IN HIS OR HER CAPACITY AS AN OWNER, EMPLOYEE, OR AGENT OF A LICENSED MARIJUANA TESTING FACILITY.

(f) LEASING OR OTHERWISE ALLOWING THE USE OF PROPERTY OWNED, OCCUPIED OR CONTROLLED BY ANY PERSON, CORPORATION OR OTHER ENTITY FOR ANY OF THE ACTIVITIES CONDUCTED LAWFULLY IN ACCORDANCE WITH PARAGRAPHS (a) THROUGH (e) OF THIS SUBSECTION.

(5) Regulation of marijuana.

(a) NOT LATER THAN JULY 1, 2013, THE DEPARTMENT SHALL ADOPT REGULATIONS NECESSARY FOR IMPLEMENTATION OF THIS SECTION. SUCH REGULATIONS SHALL NOT PROHIBIT THE OPERATION OF MARIJUANA ESTABLISHMENTS, EITHER EXPRESSLY OR THROUGH REGULATIONS THAT MAKE THEIR OPERATION UNREASONABLY IMPRACTICABLE. SUCH REGULATIONS SHALL INCLUDE:

(I) PROCEDURES FOR THE ISSUANCE, RENEWAL, SUSPENSION, AND REVOCATION OF A LICENSE TO OPERATE A MARIJUANA ESTABLISHMENT, WITH SUCH PROCEDURES SUBJECT TO ALL REQUIREMENTS OF ARTICLE 4 OF TITLE 24 OF THE COLORADO ADMINISTRATIVE PROCEDURE ACT OR ANY SUCCESSOR PROVISION;

(II) A SCHEDULE OF APPLICATION, LICENSING AND RENEWAL FEES, PROVIDED, APPLICATION FEES SHALL NOT EXCEED FIVE THOUSAND DOLLARS, WITH THIS UPPER LIMIT ADJUSTED ANNUALLY FOR INFLATION, UNLESS THE DEPARTMENT DETERMINES A GREATER FEE IS NECESSARY TO CARRY OUT ITS RESPONSIBILITIES UNDER THIS SECTION, AND PROVIDED FURTHER, AN ENTITY THAT IS LICENSED UNDER THE COLORADO MEDICAL MARIJUANA CODE TO CULTIVATE OR SELL MARIJUANA OR TO MANUFACTURE MARIJUANA PRODUCTS AT THE TIME THIS SECTION TAKES EFFECT AND THAT CHOOSES TO APPLY FOR A SEPARATE MARIJUANA ESTABLISHMENT LICENSE SHALL NOT BE REQUIRED TO PAY AN APPLICATION FEE GREATER THAN FIVE HUNDRED DOLLARS TO APPLY FOR A LICENSE TO OPERATE A MARIJUANA ESTABLISHMENT IN ACCORDANCE WITH THE PROVISIONS OF THIS SECTION;

(III) QUALIFICATIONS FOR LICENSURE THAT ARE DIRECTLY AND DEMONSTRABLY RELATED TO THE OPERATION OF A MARIJUANA ESTABLISHMENT;

(IV) SECURITY REQUIREMENTS FOR MARIJUANA ESTABLISHMENTS;

(V) REQUIREMENTS TO PREVENT THE SALE OR DIVERSION OF MARIJUANA AND MARIJUANA PRODUCTS TO PERSONS UNDER THE AGE OF TWENTY-ONE;

(VI) LABELING REQUIREMENTS FOR MARIJUANA AND MARIJUANA PRODUCTS SOLD OR DISTRIBUTED BY A MARIJUANA ESTABLISHMENT;

(VII) HEALTH AND SAFETY REGULATIONS AND STANDARDS FOR THE MANUFACTURE OF MARIJUANA PRODUCTS AND THE CULTIVATION OF MARIJUANA;

(VIII) RESTRICTIONS ON THE ADVERTISING AND DISPLAY OF MARIJUANA AND MARIJUANA PRODUCTS; AND

(IX) CIVIL PENALTIES FOR THE FAILURE TO COMPLY WITH REGULATIONS MADE PURSUANT TO THIS SECTION.

(b) IN ORDER TO ENSURE THE MOST SECURE, RELIABLE, AND ACCOUNTABLE SYSTEM FOR THE PRODUCTION AND DISTRIBUTION OF MARIJUANA AND MARIJUANA PRODUCTS IN ACCORDANCE WITH THIS SUBSECTION, IN ANY COMPETITIVE APPLICATION PROCESS THE DEPARTMENT SHALL HAVE AS A PRIMARY CONSIDERATION WHETHER AN APPLICANT:

(I) HAS PRIOR EXPERIENCE PRODUCING OR DISTRIBUTING MARIJUANA OR MARIJUANA PRODUCTS PURSUANT TO SECTION 14 OF THIS ARTICLE AND THE COLORADO MEDICAL MARIJUANA CODE IN THE LOCALITY IN WHICH THE APPLICANT SEEKS TO OPERATE A MARIJUANA ESTABLISHMENT; AND

(II) HAS, DURING THE EXPERIENCE DESCRIBED IN SUBPARAGRAPH (I), COMPLIED CONSISTENTLY WITH SECTION 14 OF THIS ARTICLE, THE PROVISIONS OF THE COLORADO MEDICAL MARIJUANA CODE AND CONFORMING REGULATIONS.

(c) IN ORDER TO ENSURE THAT INDIVIDUAL PRIVACY IS PROTECTED, NOTWITHSTANDING PARAGRAPH (a), THE DEPARTMENT SHALL NOT REQUIRE A CONSUMER TO PROVIDE A RETAIL MARIJUANA STORE WITH PERSONAL INFORMATION OTHER THAN GOVERNMENT-ISSUED IDENTIFICATION TO DETERMINE THE CONSUMER'S AGE, AND A RETAIL MARIJUANA STORE SHALL NOT BE REQUIRED TO ACQUIRE AND RECORD PERSONAL INFORMATION ABOUT CONSUMERS OTHER THAN INFORMATION TYPICALLY ACQUIRED IN A FINANCIAL TRANSACTION CONDUCTED AT A RETAIL LIQUOR STORE.

(d) THE GENERAL ASSEMBLY SHALL ENACT AN EXCISE TAX TO BE LEVIED UPON MARIJUANA SOLD OR OTHERWISE TRANSFERRED BY A MARIJUANA CULTIVATION FACILITY TO A MARIJUANA PRODUCT MANUFACTURING FACILITY OR TO A RETAIL MARIJUANA STORE AT A RATE NOT TO EXCEED FIFTEEN PERCENT PRIOR TO JANUARY 1, 2017 AND AT A RATE TO BE DETERMINED BY THE GENERAL ASSEMBLY THEREAFTER, AND SHALL DIRECT THE DEPARTMENT TO ESTABLISH PROCEDURES FOR THE COLLECTION OF ALL TAXES LEVIED. PROVIDED, THE FIRST FORTY MILLION DOLLARS IN REVENUE RAISED ANNUALLY FROM ANY SUCH EXCISE TAX SHALL BE CREDITED TO THE PUBLIC SCHOOL CAPITAL CONSTRUCTION ASSISTANCE FUND CREATED BY ARTICLE 43.7 OF TITLE 22, C.R.S., OR ANY SUCCESSOR FUND

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DEDICATED TO A SIMILAR PURPOSE. PROVIDED FURTHER, NO SUCH EXCISE TAX SHALL BE LEVIED UPON MARIJUANA INTENDED FOR SALE AT MEDICAL MARIJUANA CENTERS PURSUANT TO SECTION 14 OF THIS ARTICLE AND THE COLORADO MEDICAL MARIJUANA CODE.

(e) NOT LATER THAN OCTOBER 1, 2013, EACH LOCALITY SHALL ENACT AN ORDINANCE OR REGULATION SPECIFYING THE ENTITY WITHIN THE LOCALITY THAT IS RESPONSIBLE FOR PROCESSING APPLICATIONS SUBMITTED FOR A LICENSE TO OPERATE A MARIJUANA ESTABLISHMENT WITHIN THE BOUNDARIES OF THE LOCALITY AND FOR THE ISSUANCE OF SUCH LICENSES SHOULD THE ISSUANCE BY THE LOCALITY BECOME NECESSARY BECAUSE OF A FAILURE BY THE DEPARTMENT TO ADOPT REGULATIONS PURSUANT TO PARAGRAPH (a) OR BECAUSE OF A FAILURE BY THE DEPARTMENT TO PROCESS AND ISSUE LICENSES AS REQUIRED BY PARAGRAPH (g).

(f) A LOCALITY MAY ENACT ORDINANCES OR REGULATIONS, NOT IN CONFLICT WITH THIS SECTION OR WITH REGULATIONS OR LEGISLATION ENACTED PURSUANT TO THIS SECTION, GOVERNING THE TIME, PLACE, MANNER AND NUMBER OF MARIJUANA ESTABLISHMENT OPERATIONS; ESTABLISHING PROCEDURES FOR THE ISSUANCE, SUSPENSION, AND REVOCATION OF A LICENSE ISSUED BY THE LOCALITY IN ACCORDANCE WITH PARAGRAPH (h) OR (i), SUCH PROCEDURES TO BE SUBJECT TO ALL REQUIREMENTS OF ARTICLE 4 OF TITLE 24 OF THE COLORADO ADMINISTRATIVE PROCEDURE ACT OR ANY SUCCESSOR PROVISION; ESTABLISHING A SCHEDULE OF ANNUAL OPERATING, LICENSING, AND APPLICATION FEES FOR MARIJUANA ESTABLISHMENTS, PROVIDED, THE APPLICATION FEE SHALL ONLY BE DUE IF AN APPLICATION IS SUBMITTED TO A LOCALITY IN ACCORDANCE WITH PARAGRAPH (i) AND A LICENSING FEE SHALL ONLY BE DUE IF A LICENSE IS ISSUED BY A LOCALITY IN ACCORDANCE WITH PARAGRAPH (h) OR (i); AND ESTABLISHING CIVIL PENALTIES FOR VIOLATION OF AN ORDINANCE OR REGULATION GOVERNING THE TIME, PLACE, AND MANNER OF A MARIJUANA ESTABLISHMENT THAT MAY OPERATE IN SUCH LOCALITY. A LOCALITY MAY PROHIBIT THE OPERATION OF MARIJUANA CULTIVATION FACILITIES, MARIJUANA PRODUCT MANUFACTURING FACILITIES, MARIJUANA TESTING FACILITIES, OR RETAIL MARIJUANA STORES THROUGH THE ENACTMENT OF AN ORDINANCE OR THROUGH AN INITIATED OR REFERRED MEASURE; PROVIDED, ANY INITIATED OR REFERRED MEASURE TO PROHIBIT THE OPERATION OF MARIJUANA CULTIVATION FACILITIES, MARIJUANA PRODUCT MANUFACTURING FACILITIES, MARIJUANA TESTING FACILITIES, OR RETAIL MARIJUANA STORES MUST APPEAR ON A GENERAL ELECTION BALLOT DURING AN EVEN NUMBERED YEAR.

(g) EACH APPLICATION FOR AN ANNUAL LICENSE TO OPERATE A MARIJUANA ESTABLISHMENT SHALL BE SUBMITTED TO THE DEPARTMENT. THE DEPARTMENT SHALL:

(I) BEGIN ACCEPTING AND PROCESSING APPLICATIONS ON OCTOBER 1, 2013;

(II) IMMEDIATELY FORWARD A COPY OF EACH APPLICATION AND HALF OF THE LICENSE APPLICATION FEE TO THE LOCALITY IN WHICH THE APPLICANT DESIRES TO OPERATE THE MARIJUANA ESTABLISHMENT;

(III) ISSUE AN ANNUAL LICENSE TO THE APPLICANT BETWEEN FORTY-FIVE AND NINETY DAYS AFTER RECEIPT OF AN APPLICATION UNLESS THE DEPARTMENT FINDS THE APPLICANT IS NOT IN COMPLIANCE WITH REGULATIONS ENACTED PURSUANT TO PARAGRAPH (a) OR THE DEPARTMENT IS NOTIFIED BY THE RELEVANT LOCALITY THAT THE APPLICANT IS NOT IN COMPLIANCE WITH ORDINANCES AND REGULATIONS MADE PURSUANT TO PARAGRAPH (f) AND IN EFFECT AT THE TIME OF APPLICATION, PROVIDED, WHERE A LOCALITY HAS ENACTED A NUMERICAL LIMIT ON THE NUMBER OF MARIJUANA ESTABLISHMENTS AND A GREATER NUMBER OF APPLICANTS SEEK LICENSES, THE DEPARTMENT SHALL SOLICIT AND CONSIDER INPUT FROM THE LOCALITY AS TO THE LOCALITY'S PREFERENCE OR PREFERENCES FOR LICENSURE; AND

(IV) UPON DENIAL OF AN APPLICATION, NOTIFY THE APPLICANT IN WRITING OF THE SPECIFIC REASON FOR ITS DENIAL.

(h) IF THE DEPARTMENT DOES NOT ISSUE A LICENSE TO AN APPLICANT WITHIN NINETY DAYS OF RECEIPT OF THE APPLICATION FILED IN ACCORDANCE WITH PARAGRAPH (g) AND DOES NOT NOTIFY THE APPLICANT OF THE SPECIFIC REASON FOR ITS DENIAL, IN WRITING AND WITHIN SUCH TIME PERIOD, OR IF THE DEPARTMENT HAS ADOPTED REGULATIONS PURSUANT TO PARAGRAPH (a) AND HAS ACCEPTED APPLICATIONS PURSUANT TO PARAGRAPH (g) BUT HAS NOT ISSUED ANY LICENSES BY JANUARY 1, 2014, THE APPLICANT MAY RESUBMIT ITS APPLICATION DIRECTLY TO THE LOCALITY, PURSUANT TO PARAGRAPH (e), AND THE LOCALITY MAY ISSUE AN ANNUAL LICENSE TO THE APPLICANT. A LOCALITY ISSUING A LICENSE TO AN APPLICANT SHALL DO SO WITHIN NINETY DAYS OF RECEIPT OF THE RESUBMITTED APPLICATION UNLESS THE LOCALITY FINDS AND NOTIFIES THE APPLICANT THAT THE APPLICANT IS NOT IN COMPLIANCE WITH ORDINANCES AND REGULATIONS MADE PURSUANT TO PARAGRAPH (f) IN EFFECT AT THE TIME THE APPLICATION IS RESUBMITTED AND THE LOCALITY SHALL NOTIFY THE DEPARTMENT IF AN ANNUAL LICENSE HAS BEEN ISSUED TO THE APPLICANT. IF AN APPLICATION IS SUBMITTED TO A LOCALITY UNDER THIS PARAGRAPH, THE DEPARTMENT SHALL FORWARD TO THE LOCALITY THE APPLICATION FEE PAID BY THE APPLICANT TO THE DEPARTMENT UPON REQUEST BY THE LOCALITY. A LICENSE ISSUED BY A LOCALITY IN ACCORDANCE WITH THIS PARAGRAPH SHALL HAVE THE SAME FORCE AND EFFECT AS A LICENSE ISSUED BY THE DEPARTMENT IN ACCORDANCE WITH PARAGRAPH (g) AND THE HOLDER OF SUCH LICENSE SHALL NOT BE SUBJECT TO REGULATION OR ENFORCEMENT BY THE DEPARTMENT DURING THE TERM OF THAT LICENSE. A SUBSEQUENT OR RENEWED LICENSE MAY BE ISSUED UNDER THIS PARAGRAPH ON AN ANNUAL BASIS ONLY UPON RESUBMISSION TO THE LOCALITY OF A NEW APPLICATION SUBMITTED TO THE DEPARTMENT PURSUANT TO PARAGRAPH (g). NOTHING IN THIS PARAGRAPH SHALL LIMIT SUCH RELIEF AS MAY BE AVAILABLE TO AN AGGRIEVED PARTY UNDER SECTION 24-4-104, C.R.S., OF THE COLORADO ADMINISTRATIVE PROCEDURE ACT OR ANY SUCCESSOR PROVISION.

(i) IF THE DEPARTMENT DOES NOT ADOPT REGULATIONS REQUIRED BY PARAGRAPH (a), AN APPLICANT MAY SUBMIT AN APPLICATION DIRECTLY TO A LOCALITY AFTER OCTOBER 1, 2013 AND THE LOCALITY MAY ISSUE AN ANNUAL LICENSE TO THE APPLICANT. A LOCALITY ISSUING A LICENSE TO AN APPLICANT SHALL DO SO WITHIN NINETY DAYS OF RECEIPT OF THE APPLICATION UNLESS IT FINDS AND NOTIFIES THE APPLICANT THAT THE APPLICANT IS NOT IN COMPLIANCE WITH ORDINANCES AND REGULATIONS MADE PURSUANT TO PARAGRAPH (f) IN EFFECT AT THE TIME OF APPLICATION AND SHALL NOTIFY THE DEPARTMENT IF AN ANNUAL LICENSE HAS BEEN ISSUED TO THE APPLICANT. A LICENSE ISSUED BY A LOCALITY IN ACCORDANCE WITH THIS PARAGRAPH SHALL HAVE THE SAME FORCE AND EFFECT AS A LICENSE ISSUED BY THE DEPARTMENT IN ACCORDANCE WITH PARAGRAPH (g) AND THE HOLDER OF SUCH LICENSE SHALL NOT BE SUBJECT TO REGULATION OR ENFORCEMENT BY THE DEPARTMENT DURING THE TERM OF THAT LICENSE. A SUBSEQUENT OR RENEWED LICENSE MAY BE ISSUED UNDER THIS PARAGRAPH ON AN ANNUAL BASIS IF THE DEPARTMENT HAS NOT ADOPTED REGULATIONS REQUIRED BY PARAGRAPH (a) AT LEAST NINETY DAYS PRIOR TO THE DATE UPON WHICH SUCH SUBSEQUENT OR RENEWED LICENSE WOULD BE EFFECTIVE OR IF THE DEPARTMENT HAS ADOPTED REGULATIONS PURSUANT TO PARAGRAPH (a) BUT HAS NOT, AT LEAST NINETY DAYS AFTER THE ADOPTION OF SUCH REGULATIONS, ISSUED LICENSES PURSUANT TO PARAGRAPH (g).

(j) NOT LATER THAN JULY 1, 2014, THE GENERAL ASSEMBLY SHALL ENACT LEGISLATION GOVERNING THE CULTIVATION, PROCESSING AND SALE OF INDUSTRIAL HEMP.

(6) Employers, driving, minors and control of property.

(a) NOTHING IN THIS SECTION IS INTENDED TO REQUIRE AN EMPLOYER TO PERMIT OR ACCOMMODATE THE USE, CONSUMPTION, POSSESSION, TRANSFER, DISPLAY, TRANSPORTATION, SALE OR GROWING OF MARIJUANA IN THE WORKPLACE OR TO AFFECT THE ABILITY OF EMPLOYERS TO HAVE POLICIES RESTRICTING THE USE OF MARIJUANA BY EMPLOYEES.

(b) NOTHING IN THIS SECTION IS INTENDED TO ALLOW DRIVING UNDER THE INFLUENCE OF MARIJUANA OR DRIVING WHILE IMPAIRED BY MARIJUANA OR TO SUPERSEDE STATUTORY LAWS RELATED TO DRIVING UNDER THE INFLUENCE OF MARIJUANA OR DRIVING WHILE IMPAIRED BY MARIJUANA, NOR SHALL THIS SECTION PREVENT THE STATE FROM ENACTING AND IMPOSING PENALTIES FOR DRIVING UNDER THE INFLUENCE OF OR WHILE IMPAIRED BY MARIJUANA.

(c) NOTHING IN THIS SECTION IS INTENDED TO PERMIT THE TRANSFER OF MARIJUANA, WITH OR WITHOUT REMUNERATION, TO A PERSON UNDER THE AGE OF TWENTY-ONE OR TO ALLOW A PERSON UNDER THE AGE OF TWENTY-ONE TO PURCHASE, POSSESS, USE, TRANSPORT, GROW, OR CONSUME MARIJUANA.

(d) NOTHING IN THIS SECTION SHALL PROHIBIT A PERSON, EMPLOYER, SCHOOL, HOSPITAL, DETENTION FACILITY, CORPORATION OR ANY OTHER ENTITY WHO OCCUPIES, OWNS OR CONTROLS A PROPERTY FROM PROHIBITING OR OTHERWISE REGULATING THE POSSESSION, CONSUMPTION, USE, DISPLAY, TRANSFER, DISTRIBUTION, SALE, TRANSPORTATION, OR GROWING OF MARIJUANA ON OR IN THAT PROPERTY.

(7) Medical marijuana provisions unaffected. NOTHING IN THIS SECTION SHALL BE CONSTRUED: (a) TO LIMIT ANY PRIVILEGES OR RIGHTS OF A MEDICAL MARIJUANA PATIENT, PRIMARY CAREGIVER, OR LICENSED ENTITY AS PROVIDED IN SECTION 14 OF THIS ARTICLE AND THE COLORADO MEDICAL MARIJUANA CODE; (b) TO PERMIT A MEDICAL MARIJUANA CENTER TO DISTRIBUTE MARIJUANA TO A PERSON WHO IS NOT A MEDICAL MARIJUANA PATIENT; (c) TO PERMIT A MEDICAL MARIJUANA CENTER TO PURCHASE MARIJUANA OR MARIJUANA PRODUCTS IN A MANNER OR FROM A SOURCE NOT AUTHORIZED UNDER THE COLORADO MEDICAL MARIJUANA CODE; (d) TO PERMIT ANY MEDICAL MARIJUANA CENTER LICENSED PURSUANT TO SECTION 14 OF THIS ARTICLE AND THE COLORADO MEDICAL MARIJUANA CODE TO OPERATE ON THE SAME PREMISES AS A RETAIL MARIJUANA STORE.; OR (e) TO DISCHARGE THE DEPARTMENT, THE COLORADO BOARD OF HEALTH, OR THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT FROM THEIR STATUTORY AND CONSTITUTIONAL DUTIES TO REGULATE MEDICAL MARIJUANA PURSUANT TO SECTION 14 OF THIS ARTICLE AND THE COLORADO MEDICAL MARIJUANA CODE.

(8) Self-executing, severability, conflicting provisions. ALL PROVISIONS OF THIS SECTION ARE SELF-EXECUTING EXCEPT AS SPECIFIED HEREIN, ARE SEVERABLE, AND, EXCEPT WHERE OTHERWISE INDICATED IN THE TEXT, SHALL SUPERSEDE CONFLICTING STATE STATUTORY, LOCAL CHARTER, ORDINANCE, OR RESOLUTION, AND OTHER STATE AND LOCAL PROVISIONS.

(9) Effective date. UNLESS OTHERWISE PROVIDED BY THIS SECTION, ALL PROVISIONS OF THIS SECTION SHALL BECOME EFFECTIVE UPON OFFICIAL DECLARATION OF THE VOTE HEREON BY PROCLAMATION OF THE GOVERNOR, PURSUANT TO SECTION 1(4) OF ARTICLE V.

The Colorado Lawyer

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[Page 28]

In and Around the Bar
CBA Ethics Committee

Formal Opinion No. 124—A Lawyer's Medical Use of Marijuana, Adopted

Introduction

The CBA Ethics Committee (Committee) has been asked to opine whether a lawyer who, under Colorado law, may cultivate, possess, and use small amounts of marijuana solely to treat a debilitating medical condition may do so without violating the Colorado Rules of Professional Conduct (Colorado Rules, Rule, or Colo. RPC). The Committee first summarizes the relevant federal law criminalizing possession and use of marijuana. Next, the Committee summarizes Colorado law applicable to the medical use of marijuana. The Committee then identifies ethics rules and case law that frame its analysis of when a lawyer's medical use of marijuana may violate the Colorado Rules.

The Committee has tried to analyze the ethics issues without being drawn into the public debate about the value or efficacy of medical marijuana. There are strong opinions for and against the medical use of marijuana. The conflict between federal and state law is just one example.

The Committee recognizes that the public discourse about the use of marijuana, even medical marijuana, frequently considers the issue of impairment. Use and misuse of marijuana—or, for that matter, any other psychoactive substance, including alcohol, prescription medications, and certain over-the-counter drugs—even when permitted by law, can affect a lawyer's reasoning, judgment, memory, or other aspects of the lawyer's physical or mental abilities. A lawyer's medical use of marijuana, like the use of any other psychoactive substance, raises legitimate concerns about a lawyer's professional competence and ability to comply with obligations imposed by the ethics rules. Consequently, this opinion includes a discussion of the Colorado Rules and relevant ethics opinions addressing lawyer impairment.

Our conclusion is limited to the narrow issue of whether personal use of

marijuana by a lawyer/patient violates Colo. RPC 8.4(b). This opinion does not address whether a lawyer violates Rule 8.4(b) by counseling or assisting clients in legal matters related to the cultivation, possession, or use by third parties of medical marijuana under Colorado law.

Syllabus

Federal law treats the cultivation, possession, and use of marijuana for any purpose, even a medical one, as a crime. Although Colorado law also treats the cultivation, possession, and use of marijuana as a crime, it nevertheless permits individuals to cultivate, possess, and use small amounts of marijuana for the treatment of certain debilitating medical conditions. Cultivation, possession, and use of marijuana solely for medical purposes under Colorado law, however, does not guarantee an individual's protection from prosecution under federal law. Consequently, an individual permitted to use marijuana for medical purposes under Colorado law may be subject to arrest and prosecution for violating federal law.

This opinion concludes that a lawyer's medical use of marijuana in compliance with Colorado law does not, in and of itself, violate Colo. RPC 8.4(b).[1] Rather, to violate Colo. RPC 8.4(b), there must be additional evidence that the lawyer's conduct adversely implicates the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

A lawyer's use of medical marijuana in compliance with Colorado law may implicate additional Rules, including Colo. RPC 1.1, 1.16(a)(2), and 8.3(a). Colo. RPC 1.1 is violated where a lawyer's use of medical marijuana impairs the lawyer's ability to provide competent representation. If a lawyer's use of medical marijuana materially impairs the lawyer's ability to represent the client, Rule 1.16(a)(2) requires the lawyer to withdraw from the representation. If another lawyer knows that a lawyer's use of medical marijuana has resulted in a Colo. RPC violation that raises a substantial question as to the using lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, then the other lawyer may have a duty under Colo. RPC 8.3(a) to report those violations to the appropriate disciplinary authority.

Analysis

A. Federal Law

The federal government regulates marijuana possession and use through the Controlled Substances Act, 21 USC § 811 (CSA). The CSA classifies "marihuana" as a Schedule I controlled substance. 21 USC § 812(b). Federal law prohibits physicians from dispensing a Schedule I controlled substance, including marijuana, by prescription. United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 491 (2001) (no medical necessity exception to CSA prohibition of marijuana). The CSA makes it a crime, among other things, to possess and use marijuana even for medical reasons. Id.; 21 USC §§ 841 to 864. In Gonzales v. Raich, 545 U.S. 1 (2005), the U.S. Supreme Court recognized the authority of the federal government to prohibit marijuana for all purposes, even medical ones, despite valid state laws authorizing the medical use of marijuana.[2]

B. Colorado Law

The Colorado Uniform Controlled Substances Act of 1992 (UCSA) substantially mirrors the federal CSA. See CRS §§ 18-18-101 to -605. Colorado's UCSA, like the federal CSA, treats marijuana as a "controlled substance." See CRS § 18-18-102(5). Like federal law, Colorado law criminalizes the possession and use of marijuana. See CRS § 18-18-406.

Unlike federal law, however, the Colorado Constitution provides that a "patient may engage in the medical use of marijuana, with no more marijuana than is medically necessary to address a debilitating medical condition." Colo. Const. art. XVIII, § 14(4)(a). An individual must obtain "written documentation" from a physician stating that he or she has been diagnosed with a debilitating medical condition that might benefit from the medical use of marijuana. *Id.* at § 14(3)(b)(I). A "debilitating medical condition" is defined as:

> (I) Cancer, glaucoma, positive status for human immunodeficiency virus, or acquired immune deficiency syndrome, or treatment for such conditions;
>
> (II) A chronic or debilitating disease or medical condition, or treatment for such conditions, which produces, for a specific patient, one or more of the following, and for which, in the professional opinion of the patient's physician, such condition or conditions reasonably may be alleviated by the medical use of marijuana: cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis; or
>
> (III) Any other medical condition, or treatment for such condition, approved by the state health agency, pursuant to its rule making authority or its approval of any petition submitted by a patient or physician as provided in this section.

Id. at § 14(1)(a).

"Medical use" is defined as:

> 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, which may be authorized only after a diagnosis of the patient's debilitating medical condition by a physician or physicians. . . .

Id. at § 14(1)(b).

The Colorado statutes codify the medical use exemption for marijuana in the Constitution. A Colorado patient is exempted from application of Colorado law criminalizing cultivation, possession, and use of marijuana if the individual can establish that the cultivation, possession, or use was solely for medical purposes as permitted by Colorado law. *See* CRS §12-43.3-102(b).

C. Colo. RPC

Colo. RPC 1.1 requires lawyers to represent their clients using "the legal knowledge, skill, thoroughness and preparation reasonably necessary" for

the task.

Colo. RPC 1.16 prohibits a lawyer from representing a client where the lawyer's "physical or mental condition materially impairs the lawyer's ability" to do so.

Colo. RPC 8.4(b) provides 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[.]" Colo. RPC 8.4(b) sets out a two-part test. First, there must be evidence of a criminal act. Second, the evidence must establish that the criminal act reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. *See, e.g., People v. Andersen*, 58 P.3d 537, 541 (Colo. OPDJ 2000) (stating in *dictum* that not all convictions of the criminal laws necessarily justify the conclusion that Colo. RPC 8.4(b) has also been violated).

D. Misconduct

All lawyers admitted to practice law in Colorado take an oath that they will support the U.S. and Colorado Constitutions. They also swear to faithfully and diligently adhere to the Colo. RPC at all times. Unfortunately, the Colo. RPC do not provide lawyers with clear guidance on proper ethical conduct when federal and Colorado laws conflict as they do in the unique circumstance regarding an individual's medical use of marijuana.

The Supremacy Clause of the U.S. Constitution unambiguously provides that if there is any conflict between federal and state law, federal law prevails. *Gonzales v. Raich*, 545 U.S. 29. Consequently, even if a lawyer is permitted to cultivate, possess, and use small amounts of marijuana under Colorado law solely for medical use, such medical use may nevertheless constitute a violation of federal criminal law.

The Committee concludes, however, that a Colorado lawyer's violation of federal criminal law prohibiting the cultivation, possession, and use of marijuana where the lawyer's cultivation, possession, or use is for a medical purpose permitted under Colorado law does not necessarily violate Colo. RPC 8.4(b). The Committee reads Colo. RPC 8.4(b) as requiring a nexus between the violation of law and the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. *See People v. Hook*, 91 P.3d 1070, 1073-74 (Colo. OPDJ 2004) (the fact that a lawyer may have committed the felony of illegal discharge of a firearm does not by itself determine the professional discipline he should receive); *People v. Senn*, 824 P.2d 822, 825 (Colo. 1992) (linking a lawyer's discharge of a firearm directly over his wife's head during an argument to a "critical failure of judgment" and "a contempt for the law which was at odds with [his] duty to uphold the law").

Colorado has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available to relieve severe pain and suffering. No controlling judicial authority has yet held that Colorado law permitting medical use of marijuana for persons suffering from debilitating conditions is unconstitutional, preempted, void, or otherwise invalid. Consequently, even if a lawyer's cultivation, possession, or use of medical marijuana to treat a properly diagnosed debilitating medical condition under Colorado law may constitute a federal crime, the Committee does not see a nexus between the lawyer's conduct and his or her "honesty" or "trustworthiness," within the meaning of Colo. RPC 8.4(b),

provided that the lawyer complies with the requirements of Colorado law permitting and regulating his or her medical use of marijuana. The Committee also does not see a nexus between the lawyer's conduct and his or her "fitness as a lawyer in other respects," provided that (a) again, the lawyer complies with the requirements of Colorado law permitting his or her medical use of marijuana, and (b) in addition, the lawyer satisfies his or her obligation under Colo. RPC 1.1 to provide competent representation. *E.g., Iowa Sup. Ct. v. Marcucci*, 543 N.W.2d 879, 882 (Iowa 1996) ("The term 'fitness' as used in [Rule 8.4(b)] . . . embraces more than legal competence.").

Although not directly on point, cases addressing parenting time, where medical use of marijuana is an issue, similarly prohibit restrictions on parenting time simply because a parent is permitted to use and uses medical marijuana pursuant to state law. *In re Marriage of Parr*, 240 P.3d 509, 512 (Colo.App. 2010) (before parenting time could be restricted, requiring evidence that use of medical marijuana represented a threat to the physical and emotional health and safety of the child, or otherwise suggested a risk of harm).

E. Impairment

Colo. RPC 1.16's prohibition against representing a client when "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client" reflects the position that allowing lawyers who do not possess the requisite capacity to make professional judgments and/or follow the standards of ethical conduct harms clients, undermines the integrity of the legal system, and denigrates the legal profession.

Under the Rules, not every debilitating medical condition, treatment regimen, use of medicine, or combination of these factors, will result in mental impairment adversely affecting a lawyer's professional behavior. To violate Rule 1.16, the condition and/or treatment must "materially impair[]" the lawyer's ability to represent a client. *See* Colo. RPC 1.16(a)(2). *See also* American Bar Ass'n (ABA) Comm. on Ethics and Prof. Resp., Formal Op. 03-429, "Obligations With Respect to Mentally Impaired Lawyer in the Firm" (2003). In that circumstance, a lawyer must not undertake or continue representation of a client.

Every lawyer has a personal responsibility to ensure that the lawyer's physical condition or the substances the lawyer ingests or consumes do not adversely affect the lawyer's ability to follow the ethics rules. Impaired and unimpaired lawyers alike are required, among other things, to act competently. Colo. RPC 1.1. If a lawyer cannot do that because of a substantial impairment, Colo. RPC 1.16(a)(2) requires the lawyer to withdraw from the representation and take "reasonably practical" steps to protect the client's interests. Colo. RPC 1.6(d). As for the lawyer, there are sources of assistance to help deal with the impairment.[3]

Unfortunately, some lawyers will be unaware of, or will deny, the fact that their ability to represent clients is materially impaired. They may be unwilling or unable to take appropriate action to decline representation or withdraw. *See* ABA Formal Op. 03-429 at 3. When the materially impaired lawyer is unable or unwilling to deal with the consequences of that impairment, the firm's partners and the impaired lawyer's supervisors have obligations under Colo. RPC 5.1(a) and (b) to take reasonable steps to ensure that the impaired lawyer complies with the ethics rules.[4]

If the firm's lawyers believe they have prevented the impaired lawyer from substantially violating any ethical rules while the impaired lawyer was practicing in the firm, the firm's lawyers have no duty to report the lawyer's condition to the authorities. *See* ABA Formal Op. 03-429 at 4-5. However, if the firm's lawyers believe that the impaired lawyer has violated the ethical rules in a way that raises a substantial question about the lawyer's fitness to practice law, they are required to report the lawyer's condition to the appropriate disciplinary authority. *See* ABA Formal Op. 03-429 at 5; Colo. RPC 8.3(a).

Colo. RPC 8.3(a) addresses the more general obligation of any lawyer with knowledge that another lawyer's conduct has violated the ethics rules. The rule requires a lawyer to report another lawyer to "the appropriate professional authority" when the lawyer "knows" that the other lawyer's violation of the ethics rules raises a "substantial question as to that [other] lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." A lawyer outside the firm who is aware of another lawyer's impairment and who knows that another lawyer has violated the ethical rules in a manner that raises a "substantial question" regarding the lawyer's "honesty, trustworthiness, or fitness as a lawyer" has a duty to report the violation to the appropriate authority. Only those violations that raise a "substantial question" as to the lawyer's ability to represent clients, however, must be reported.

"Substantial" refers to the seriousness of the offense, not to the amount of evidence of which the lawyer is aware. Colo. RPC 8.3, cmt. [3]. An impaired lawyer's failure to refuse or terminate representation of clients ordinarily raises a "substantial question" about the lawyer's fitness as a lawyer. *See* ABA Comm. on Ethics and Prof. Resp., Formal Op. 03-431 "Lawyer's Duty to Report Another Lawyer Who May Suffer From Disability or Impairment" n.6 (2003).

"Knows" refers to actual knowledge, which may be inferred from circumstances. Colo. RPC 1.0(f). The reporting lawyer may know of the impaired lawyer's misconduct through first-hand observation or through a third party. *See* ABA Formal Op. 03-431 at n.12. The "actual knowledge" standard can be difficult to apply. On one hand, knowledge that a lawyer uses medical marijuana or drinks heavily, for instance, does not necessarily reflect knowledge that the lawyer is impaired in his or her ability to represent clients. *See* ABA Formal Op. 03-431 at 3. On the other hand, behavior such as frequently missing court deadlines, failing to make requisite filings, failing to perform tasks agreed to be performed, or failing to address issues that would be raised by competent counsel may supply the requisite knowledge that another lawyer is impaired. *Id.* at 2. In determining whether a lawyer "knows" of another lawyer's impairment that has caused a violation of the ethics rules, the lawyer with the potential reporting obligation is not expected to be able to identify impairment with the precision of a medical professional. *Id.* at n.10.

Before deciding whether to report the other lawyer to the appropriate disciplinary authority under Colo. RPC 8.3, a lawyer may consider raising the issue with the impaired lawyer or the impaired lawyer's firm, or may consider reporting the affected lawyer's impairment to an approved lawyer's assistance program. If the lawyer speaks with the seemingly impaired lawyer, that lawyer may be able to explain the circumstances giving rise to the other lawyer's conclusion regarding impairment. However, the impaired lawyer's denial or explanation may not remove the need to report if the first lawyer continues to conclude that the other lawyer has violated the Rules in

a manner that raises a substantial question regarding the other lawyer's fitness to represent clients. ABA Formal Op. 03-431 at text following n.13.

If, after analysis of the appropriate Colo. RPC, a lawyer feels compelled to report a substantially impaired lawyer to the appropriate disciplinary authority, he or she should consider the ethics issues surrounding client confidentiality. *Id.* at n.16. If information relating to the representation will be disclosed, the reporting lawyer should consider whether there is a need to get the client's permission to disclose this information. *See* Colo. RPC 1.6. *See also* ABA Formal Ops. 03-429 and 03-431.

The Committee cannot speak to how the Colorado Supreme Court Office of Attorney Regulation Counsel or other disciplinary authorities may regard the lawful use of medicinal marijuana by attorneys under either the Colorado Rules or other disciplinary rules. *See* CRCP 251.5(b) (grounds for discipline).

Formal Ethics Opinions are issued for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel, and do not provide protection against disciplinary actions.

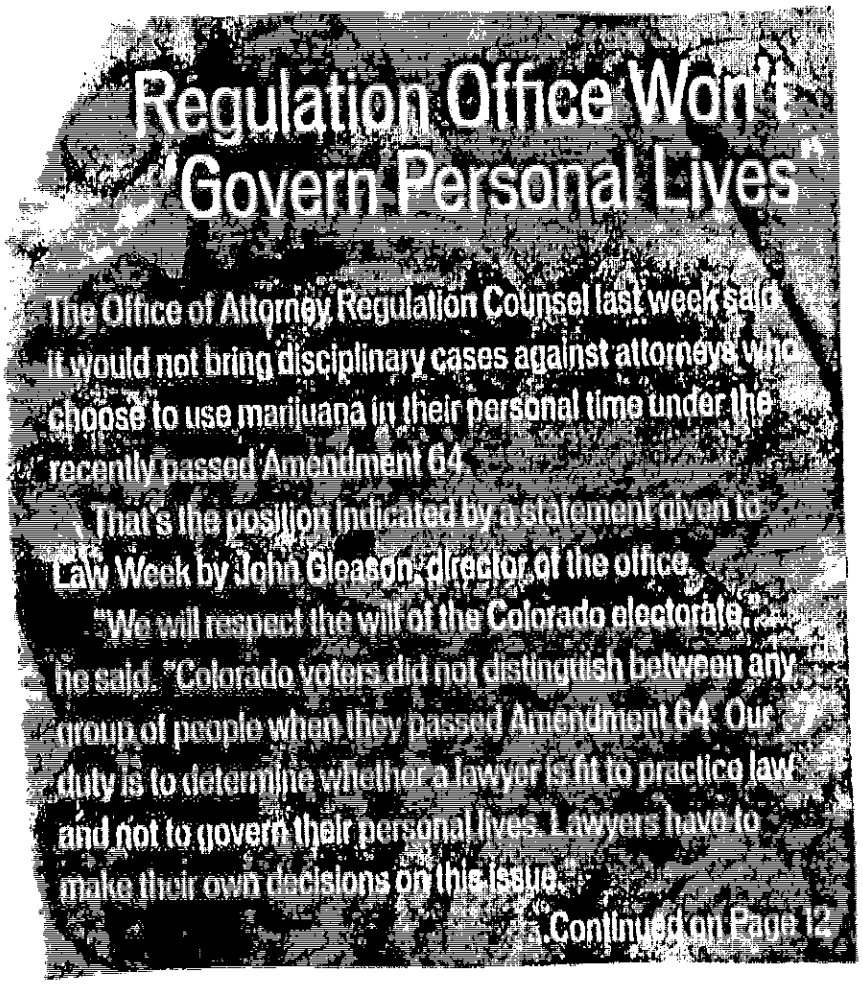
Notes

1. Under Colo. RPC 8.4(b), 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."

2. As of October 2011, sixteen states and the District of Columbia allowed the use of medical marijuana. "U.S. Attorneys in California Set Crackdown on Marijuana," *New York Times* A-9 (Oct. 8, 2011); "Echoes of Prohibition in Nation's Pot Policies," *The Denver Post* 9-B (Oct. 8, 2011).

3. The Colorado Lawyer Assistance Program (COLAP) provides "[I]mmediate and continuing assistance to members of the legal profession who suffer from physical or mental disabilities that result from disease, disorder, trauma or age and that impair their ability to practice." CRCP 254(2)(a).

4. Colo. RPC 5.1(a) and (b) describe the obligation of managerial and supervisory attorneys to ensure ethical conduct within the firms they manage and by the lawyers they supervise. Lawyers with managerial authority have an affirmative obligation to make reasonable efforts to establish internal policies and procedures designed to give reasonable assurance that all lawyers in the firm, not just impaired lawyers, fulfill the requirements of the Rules. Supervisory lawyers are obliged to make reasonable efforts to ensure that the conduct of the lawyers they supervise conforms with the Rules.



MARIJUANA

CONTINUED FROM COVER...

In last month's elections, Colorado residents voted to legalize the sale and possession of small amounts of marijuana. Since then, media stories have been teasing out the legal ramifications of the new amendment. Experts have spoken about how employers will handle their drug-testing policies, how the state and federal government could square off, and how cities opposed to retail marijuana shops will respond. Lawyers are at the heart of all those issues.

But what about the impact on lawyers themselves? Gleason's statement last week represents the first official word on how such cases would be handled by the body prosecuting attorney ethics.

Left unclear however is how firms will deal with their internal drug policies and whether attorneys will be allowed to advise clients about opening retail marijuana shops still considered illegal under federal law.

"There are definitely some tough issues here," said Alec Rothrock, a shareholder at Burns Figa & Will who delivered a talk last week about ethics and medical marijuana.

Mixed messages

The regulation office's position may not be surprising given that its reasoning mirrors that expressed by many politicians in the state, most of whom opposed the measure.

The state's Democratic congressional representatives have already drafted legislation to exempt the state from the Controlled Substances Act. They were joined by a critic of the amendment, GOP Rep. Mike Coffman, who said he respects the voters' choice. Gov. John Hickenlooper, also an opponent of the measure, nonetheless said he would help implement the new policy per voters' demands.

The regulation office runs on a complaint-driven system. It said, for instance, that even if the neighbor of a lawyer were to complain to the office about that lawyer using marijuana, the office's priority remains the fitness of a lawyer to practice.

Of course, as Hickenlooper pointed out in his now famous "Don't break out the Cheetos" statement, the federal government still considers marijuana use illegal. And the regulation office did say if a lawyer is convicted of a crime in federal or state court, the office will initiate disciplinary proceedings.

How that proceeding would end up is another matter.

In July, the Colorado Bar Association's Ethics Committee issued a formal opinion about the use of medical marijuana by attorneys. It concluded that medical-marijuana use in compliance with the Colorado law might be committing a federal crime, but Rothrock, who sits on the ethics committee, said committing a crime doesn't necessarily violate the rules of professional conduct.

Rule 8.4(b) says that the criminal act has to "reflect adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer." Essentially, if attorneys' off-duty use doesn't cause them to file motions late or fail to keep in touch with a client, they're OK.

"I don't think it's a leap to say that the same principles would apply to recreational use of marijuana," Rothrock said.

Uncertain territory

Just because the regulation office isn't going to sanction an attorney for off-duty use of marijuana doesn't necessarily mean firms won't.

Employment law attorneys in the area are telling their business clients that their drug-testing policies are probably legal as long as any "no-drug policy" is based on federal law. Even if firms can govern marijuana use on an employee's personal time, will they? Most of the nearly 20 firms contacted for this story either didn't respond or declined to comment officially. Many, however, said they haven't yet discussed the impact of the amendment on their employees.

It's a discussion that needs to happen, said Jim Johnson, managing partner at Otten Johnson Robinson Neff + Ragonetti. He said there have been talks at his firm around the proverbial water cooler but nothing formal.

"But I suspect we won't regulate personal time," he said. "Of course, if you're engaging in that off-duty, and it's becoming a problem at work, then we'll be concerned."

Not (yet) a focus for regulation

Rothrock is getting a lot of calls from lawyers about another unsettled question. How do they grapple with advising clients in the marijuana industry?

He said there's a distinction between the law and enforcement. He believes

MARIJUANA

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working to help establish a marijuana business is pretty clearly against federal law. But he hasn't seen any case before attorney regulation solely because an attorney counseled a client about the medical-marijuana laws.

"My sense is that attorney regulation counsel isn't hot and bothered about prosecuting attorneys who are helping clients in the medical marijuana industry," he said.

He speculates the counsel would treat attorneys advising clients under Amendment 64 the same.

> "My sense is that attorney regulation counsel isn't hot and bothered about prosecuting attorneys who are helping clients in the medical marijuana industry."
> — Alec Rothrock

The bar association's ethics committee is considering whether to issue a formal opinion on the ethics of an attorney counseling clients in the medical marijuana field, said Daniel Taubman, a judge on the Colorado Court of Appeals and chair of the ethics committee. He wasn't sure whether the committee would extend its inquiry to recreational marijuana as well. •

Marcy Glenn

From: Marcy Glenn
Sent: Thursday, July 05, 2012 10:18 AM
To: Alexander Rothrock; Anthony van Westrum; Boston Stanton; Cecil Morris; Cheryl Stevens (updates to website); Chris Markman (Staff Attorney); Cynthia Covell; 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; Jamie Sudler (John Gleason's office); John Gleason; John Harled; Linda Roots (Assistant to Justice Coats); Lisa Wayne; Marcus L. Squarrell; Marcy Glenn; Mark Lyda (Assistant to Justice Márquez); 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: CRPC Standing Committee - Agenda and Materials for July 13, 2012 Meeting

Please see Dave Little's email below and add this to your agenda for next week's meeting under "New Business."

Thanks,
Marcy

Marcy G. Glenn
Holland & Hart LLP
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-----Original Message-----
From: David LITTLE [mailto:dlittle@montgomerylittle.com]
Sent: Thursday, July 05, 2012 9:55 AM
To: Marcy Glenn
Subject: Re: CRPC Standing Committee - Agenda and Materials for July 13, 2012 Meeting

Marcy, this may not be of much significance, but effective at the first of the year, the Court amended Rule 121 to allow limited appearance in a court proceeding (virtually simultaneous entry and withdrawal in a single appearance) on behalf of a pro se party. Would it be appropriate to add a reference to this process by adding language to CRPC 1.2 (c) something like: "...and may appear for a limited purpose in a court proceeding on behalf of a pro se party as permitted by C.R.C.P. 121 sec. 1-1 (5)"?

Just a thought, thanks,

Dave Little

Limited Scope Representation Under the Proposed Amendment to C.R.C.P. 121, § 1-1

by Adam J. Espinosa and Daniel M. Taubman

An article in the September 2011 issue of *The Colorado Lawyer*[1] addressed the need for limited representation of clients in Colorado courts and the ethical considerations when providing "unbundled legal services." Unbundled legal services, a term increasingly known as limited scope representation, means an attorney is providing less than the full scope of legal services to a client during the course of the representation. C.R.C.P. 11(b) and Colo. RPC 1.2(c) expressly permit limited scope representation. This article addresses practical considerations for attorneys providing limited scope representation related to the Colorado Supreme Court's proposed amendment to C.R.C.P. 121, § 1-1.

Proposed Amendment

This summer, the Colorado Supreme Court proposed an amendment to C.R.C.P. 121, § 1-1, that would allow for automatic withdrawal for attorneys providing limited scope representation to clients.[2] The proposed amendment would add a new paragraph five to C.R.C.P. 121, § 1-1, and would read as follows:

> 5. Notice of Limited Representation Appearance and Withdrawal as Attorney for Pro Se Party.
>
> In accordance with C.R.C.P. 11(b), an attorney may undertake to provide limited representation to a pro se party involved in a court proceeding. Upon the request of and with the consent of a pro se party, an attorney may make a limited appearance for the pro se party in one or more specified proceedings, if the attorney files and serves with the court and the other parties and attorneys (if any) a notice of the limited appearance prior to or simultaneous with the proceeding(s) for which the attorney appears. At the conclusion of such proceeding(s) the attorney's role terminates without the necessity of leave of court, upon the attorney filing a notice of completion of limited appearance. Service on an attorney who makes a limited appearance for a party shall be valid only in connection with the specific proceeding(s) for which the attorney appears.

Purpose of Amendment

The proposed amendment addresses concerns and perceptions that have limited some attorneys' willingness to assist in *pro bono* or *pro se* matters. The primary concern is whether the court would allow them to withdraw from a case at the completion of the limited representation. This perception has restricted the effectiveness of the limited representation rules and has undermined the policy concerns addressed by those rules, as well as access to our courts and to our system of justice.

If adopted, the proposed amendment would ensure that attorneys would be permitted to withdraw from a case when they were engaged in limited scope representation. This would quell the concern attorneys may have about limited scope representation and would encourage more attorneys to assist in *pro bono* and *pro se* matters. Consequently, this would increase access to justice for Colorado citizens and improve the efficiency of our courts.

Current Rules

Although C.R.C.P. 11(b) and Colo. RPC 1.2(c) permit limited representation, neither addresses the ability of the attorney to withdraw when the limited representation is complete. Under the current rules, when an attorney files an entry of appearance, signs a pleading,[3] or appears before a court on a matter,[4] the attorney has entered a general appearance. The rules currently do not provide for a limited representation entry of appearance or withdrawal. If an attorney wishes to withdraw from an active case where there is no co-counsel or substitution of counsel, the attorney must file a motion to withdraw and serve it on the attorney's client and the opposing party or his or her attorney.[5] The client and the opposing party or his or her attorney have fifteen days to object to the attorney's motion to withdraw.[6] After the expiration of the fifteen-day objection period, the court has discretion to grant the attorney's motion to withdraw.[7]

Under the proposed amendment to C.R.C.P. 121, § 1-1, an attorney may enter his or her appearance for a specific proceeding and then be permitted to withdraw without leave of the court after that specific proceeding is complete. For example, an attorney could represent a client on an emergency motion related to the children in a domestic relations case. If the attorney complied with the proposed amendment to the rule, he or she could appear at the hearing and withdraw automatically after the hearing was complete.

About the Authors

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Comparable Mandatory Withdrawal Rules in Other States

The Colorado Supreme Court's proposed amendment is modeled on the rules of eleven states and a Massachusetts' Supreme Judicial Court order, which permit lawyers to terminate their limited scope representation without leave of court.[8] Some of these rules require that the notice of completion of limited services filed with the court include the name and address of the person who has been provided limited representation. The proposed Colorado rule does not require the provision of such information, presumably because it already will have been provided to the court.

In contrast, some states provide that an attorney's limited appearance ends when the lawyer files a substitution of attorney notice (substituting the client) or a withdrawal of appearance notice. For example, Nevada requires that a copy of the limited service retainer agreement be attached to the notice and that copies of the notice be served on the client and on all parties or their lawyers.[9] California requires that a lawyer move to withdraw from limited representation; in some cases, a hearing is required.[10]

Possible Issues and Proposed Solutions

If approved, the Colorado Supreme Court's proposed rule will present three important considerations for practitioners. These issues are discussed below.

Service of Process

In the event of limited scope representation, opposing attorneys in litigation must determine on whom to serve process or other court papers. If an attorney has entered an appearance at the beginning of a case for a limited purpose—such as representing a client in a motion for temporary orders in a dissolution of marriage case, or representing a client in connection with a motion to dismiss—the opposing party must serve papers on the attorney providing limited representation with respect to that specific proceeding. However, if unrelated proceedings occur simultaneously, the opposing attorney must send pleadings related to those issues directly to the *pro se* litigant. In the event that the opposing party's attorney is unsure whom to serve, he or she should contact the limited scope representation attorney for clarification.

Communication With Attorney or Pro Se Party

The opposing attorney may face a similar question as to whom to contact regarding communications, such as scheduling court hearings or settlement negotiations, because Colo. RPC 4.2 prohibits a lawyer from communicating with a person the lawyer knows to be represented by another lawyer.[11] As is the case with respect to service of process or other court papers, the opposing attorney should communicate directly with the limited representation attorney with respect to the specific limited representation; however, the opposing attorney should communicate with the *pro se* party with respect to other proceedings or issues. When unsure how to proceed, the opposing attorney should contact the limited representation attorney for clarification or confirmation.

Retainer Agreement

Under Colo. RPC 1.5(b), when a lawyer has not regularly represented a client, the basis or rate of fee and expenses must be communicated to the client in writing before or within a reasonable time after representation begins. This provision applies to a limited-services agreement. Thus, a retainer agreement should include the basis and rate of the attorney fee, as well as describe the services for which the fee is being charged.

Although not required by Colo. RPC 1.5, the lawyer providing limited services should define the scope of limited representation in the retainer agreement.[12] As noted, a lawyer may provide limited scope representation pursuant to Colo. RPC 1.2(c), as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b). Additionally, the lawyer may wish to include in the retainer agreement a discussion of services not provided pursuant to a limited representation agreement, as well as address the inherent risks and benefits of limited representation.

Conclusion

The proposed changes to C.R.C.P. 121, § 1-1(5), are intended to make attorneys more comfortable providing limited scope representation to clients. Attorneys engaged in limited representation will have an unqualified right to withdraw from the representation at the completion of a limited proceeding. If the rule modification increases the number of attorneys providing limited representation, then *pro se* litigants, including many low-income litigants, will obtain greater access to justice. At the same time, courts will benefit from more efficient litigation.

Notes

1. Espinosa, "Ethical Considerations When Providing Unbundled Legal Services," 40 *The Colorado Lawyer* 75 (Sept. 2011), available at www.cobar.org/tcl/tcl_articles.cfm?articleid=7208.

2. On June 29, 2011, the Colorado Supreme Court issued a Notice of Proposed Rule and Request for Public Written Comment. A copy of the proposed rule can be found at www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes.cfm.

3. *See* C.R.C.P. 121, § 1-1(1), Entry of Appearance.

4. Limited representation under C.R.C.P. 11(b) shall not constitute an entry of appearance by an attorney; however, if the attorney appears with the *pro se* party at any proceeding before the court, it will constitute an entry of appearance pursuant to C.R.C.P. 121, § 1-1.

5. *See* C.R.C.P. 121, § 1-1(2)(b), Withdrawal From an Active Case.

6. *See* C.R.C.P. 121, § 1-1(2)(b)(IV), Withdrawal From an Active Case.

7. *See supra* note 5.

8. Alaska R.C.P. 81(e)(1)(D); Fla. Family Law Rules of Procedure 12.040(e); Iowa R.C.P. 1.404(4); Mass. Sup.Jud.Ct. Order in re: Limited Assistance Rep. ¶ 2 (eff. May 1, 2009); Mo. R.C.P. 55.03(b), Mo. Rule 4-1.16(c); Mont. R.C.P. 4.3 (eff. Oct. 1, 2011); Neb. RPC 3-501.2(e); N.H. R.C.P. 17(f); N.M. R.C.P. 1.089.C; N.M. Magis.Ct.R. 2-108 and N.M. Met.Ct.R. 3-108; Utah R.C.P. 74(b); Wash. Rules CR 70.1(b) Family Law, and CRLJ 70.1(b); Wyo. Unif. Dist.Ct.R. 102(c).

9. *See* Nev. Rule of Practice, 8th Jud. Dist. 5.28(b).

10. *See* Cal. Rules of Court 5.71 and 3.36.

11. Colo. RPC 4.2 cmt. [9] provides that a *pro se* litigant receiving limited representation is considered to be unrepresented for purposes of this rule unless the lawyer has knowledge to the contrary.

12. Mo. RPC 1.2, cmt., contains a model retainer agreement entitled Notice and Consent to Limited Representation, to be signed by the limited representation attorney and the client. *See also* N.H. RPC 1.2(g) (same); Wyo. RPC 1.2 App. 1 (same). ■

To: Marcy G. Glenn, Chair, SCSCRPC
From: Anthony van Westrum
Date: January 23, 2013
Re: Mis-reference (and more?) in C.R.P.C. 5.5(a)(3)

C.R.P.C. 5.5(a)(3) reads [emphasis added]—

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

I question the reference to "subpart (a) of this Rule." "This Rule" is, clearly, C.R.P.C. 5.5. "Subpart (a)" of "this Rule" is, clearly, the portion of the C.R.P.C. 5.5 of which clause (3), quoted above, is a part. In its entirety, "subpart (a)" reads—

> (a) A lawyer shall not:
> (1) practice law in this jurisdiction without a license to practice law issued by the Colorado Supreme Court unless specifically authorized by C.R.C.P. 220, C.R.C.P. 221, C.R.C.P. 221.1, C.R.C.P. 222 or federal or tribal law;
> (2) practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction;
> (3) assist a person who is not authorized to practice law pursuant to subpart (a) of this Rule in the performance of any activity that constitutes the unauthorized practice of law; or
> (4) allow the name of a disbarred lawyer or a suspended lawyer who must petition for reinstatement to remain in the firm name.

Thus the reference to "subpart (a)" is, at least in part, self-referential. I do that a lot, myself (see?), but I don't think the Rules should do so.

I assume a correct reference would be to "subpart (a)***(1)*** of this Rule," since that clause (a)(1) is the only portion of subpart (a) of C.R.P.C. 5.5 that speaks to authority to practice law — although, of course, subpart (a)(1) is not (contrary to its billing in subpart (a)(3)) itself authority to practice law but is only a reference to provisions elsewhere that provide authority to practice law: the licensure provisions, referenced by the statement of licensure, and the other, special rules within the Rules of Civil Procedure that permit certain practice activities, in certain contexts, without licensure. (I deal with that, below.)

But I note, too, that the classification of C.R.P.C. 5.5(a) as a "subpart" is not a classification that is found anywhere else in the Rules; by my search of the Rules, this is the only usage of that term "subpart". Elsewhere, the first-level subdivisions of Rules (always identified by lower-case letters) are called "paragraphs," and the second-level divisions (always identified by arabic numerals) are called "subparagraphs." I find only one reference to a level-three division — in Comment [12] to C.R.P.C. 1.2 ("The last *clause* of paragraph (d) . . . ") — and I've dutifully used the word "clause" above in this memo. Again, no "subparts."

In short, it seems to me that *subparagraph* (a)(3) of C.R.P.C. 1.5 could simply read—

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

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But my suggestion raises another, substantive question, or highlights a question left buried in the current formulation of C.R.P.C. 5.5(a)(3): Does the prohibition against assistance in conduct that is the unauthorized practice of law apply just to assistance (or just to UPL conduct) occurring only in Colorado or does it extend to activity in *any* jurisdiction? The current formulation — by its reference to clause (a)(1), which lists all the ways one may be authorized to practice law *in Colorado* — seems to contemplate only Colorado-related conduct, *but* it ends with operative words that actually prohibit assistance of unauthorized practice of law in *any* jurisdiction, unbounded. My reformulation has only exposed that operation. (Interestingly, the current formulation does not prohibit me from assisting my *Colorado-licensed colleague* in conduct which constitutes the unauthorized practice of law in, say, Nebraska.)

I think we need to determine whether the prohibition is intended to be only Colorado-bound or to extend to conduct that is violative of the UPL principles of other jurisdictions as well. If our goal is one of extension, then my reformulation works; if not, we need to state the boundary, which could be done as follows:

> (a) A lawyer shall not:
> * * * *
> (3) assist a person in the performance of any activity that constitutes the unauthorized practice of law ***in Colorado***; or

C.R.P.C. 8.5 provides the choice-of-law principles for the Colorado Rules of Professional Conduct:

> RULE 8.5. DISCIPLINARY AUTHORITY; CHOICE OF LAW
> (a) A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.
> (b) In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:
> (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
> (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

I don't know what that really means, but I suspect that Colorado need not worry about my conduct that may assist a person in violating the UPL principles of another jurisdiction; surely that jurisdiction can watch out for itself. Thus, I would opt for my last reformulation above: It's wrong to assist a person in the performance of any activity that constitutes the unauthorized practice of law in Colorado.