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

REVISED AGENDA

January 21, 2011, 9:00 a.m.
OARC Conference Room, 1560 Broadway, 19th Floor – Follow the Signs

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1. Approval of minutes of August 19, 2010 meeting [to be distributed separately]

2. Report on status of proposed amendments to CRPC 1.5(b) [Marcy Glenn]

3. Report on status of proposed amendments to CRPC 1.15(k), 1.15(*l*), and Comment [1] to CRPC 1.15; Proposed New CRPC 1.16A; Proposed Amendments to CRPC 3.6(b) and (c); and Proposed Amendments to CRPC 3.8(f), and Comment [5] to CRPC 3.8 [Marcy Glenn, pages 1-49]

4. Report from Code of Judicial Conduct Subcommittee [Judge Webb, pages 50-69]

5. Report from CRPC 8.4(b) and CRCP 251.5(b) subcommittee [Alec Rothrock]:

   a. April 14, 2010 letter from Alec Rothrock to Marcy G. Glenn and David W. Stark [June 7, 2010 packet, pages 7-11]

   b. August 11, 2010 subcommittee report [August 19, 2010 packet, pages 1-6]

6. New business:

   a. Request from CBA Intellectual Property Section for potential comments to CRPC 4.1 and/or 4.3 concerning the use of "testers" [John Posthumus, pages 70-71]

   b. Request from Supreme Court to consider ABA Model Rule on provision of legal services following major disasters [pages 72-89]

   c. Request from Trial Lawyers of Colorado for potential adoption of Iowa RPC regarding attorney advertising [pages 90-108]

   d. Potential adoption of new CRPC 3.3 provision and/or comment regarding disclosure of privileged information [Michael Berger]

7. Administrative matters:

   a. Select next meeting date

8. Adjournment (before noon)

Chair
Marcy G. Glenn
Holland & Hart LLP
P.O. Box 8749
Denver, Colorado 80201
(303) 295-8320
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Kim E. Ikeler
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April M. McMurrey
Katrin Miller Rothgery
Matthew A. Samuelson
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November 9, 2010

The Honorable Michael L. Bender
Colorado Supreme Court
101 West Colfax Avenue, Suite 800
Denver, CO 80202

The Honorable Nathan B. Coats
Colorado Supreme Court
101 West Colfax Avenue, Suite 800
Denver, CO 80202

RE: Proposed Amendments to CRPC 1.15(k), 1.15(l), and Comment [1] to CRPC 1.15; Proposed New CRPC 1.16A; Proposed Amendments to CRPC 3.6(b) and (c); and Proposed Amendments to CRPC 3.8(f), and Comment [5] to CRPC 3.8

Dear Justices Bender and Coats:

We write on behalf of the Court's Standing Committee on the Colorado Rules of Professional Conduct (the Standing Committee). Enclosed are two sets of proposed amendments to the Colorado Rules of Professional Conduct (CRPC): (1) Revisions to CRPC 1.15(k) and (l), and Comment [1] to CRPC 1.15, and a proposed new Rule 1.16A; and (2) revisions to CRPC 3.6(b) and (c), CRPC 3.8(f), and Comment [5] to CRPC 3.8. The Standing Committee recommends these changes for the following reasons:

CRPC 1.15 and 1.16A. These proposed amendments relate to the retention and destruction of client files. They originated with a recommendation of the Colorado Bar Association (CBA) Ethics Committee, which was then approved by the CBA Executive Council for transmission to the Court, through the Standing Committee. A Standing Committee subcommittee chaired by Marcus L. Squarrel studied the proposed changes in detail and made various suggested changes to the CBA-proposed amendments. The full Standing Committee discussed the proposed changes at length over a series of meetings, and approved proposed amendments that were originally submitted to the Court on January 10, 2010. However, in light of concerns expressed by prosecutors and the criminal defense bar, the subcommittee was charged with soliciting input from those

groups and taking another look at the proposed amendments. The full Standing Committee discussed and approved additional proposed changes at its August 19, 2010 meeting.

Proposed new Rule 1.16A and its Comments [1] through [5] establish definitive standards regarding the recurring question of how long a lawyer must maintain a client's files before destroying them. The current rules do not adequately address the practical problems faced by attorneys on how long client files must be retained and when it is necessary (or unnecessary) to obtain client consent before the destruction of files. Subject to the exceptions described below for certain criminal matters, the proposed rule generally requires a lawyer to retain a client's files unless (a) the lawyer delivers the files to the client, (b) the client authorizes destruction of the files in a signed writing, or (c) the lawyer has given written notice to the client of the lawyer's intent to destroy the files no less than thirty days after the date of the notice. The proposed rule permits a lawyer to destroy files without notice to the client at any time more than ten years after the termination of representation in the matter. In all cases, the proposed rule precludes destruction unless there are no pending or threatened legal proceedings known to the lawyer that relate to the matter. Notwithstanding the provisions described above, the proposed rule requires a lawyer in a criminal defense matter to retain a client's files for specified time periods, ranging from five years after sentencing to the life of the client, for specific criminal matters. The proposed rule does not supersede specific retention requirements imposed by other rules. The comments to the proposed rule provide guidance on all of these provisions.

The proposed deletion of Rule 1.15(j)(8) eliminates the current requirement that the lawyer maintain for a period of seven years copies of those portions of a current or former client's files that are reasonably necessary for a complete understanding of the financial transactions pertaining to the representation. The Standing Committee believes that this provision is vague and not helpful to lawyers. The proposed amendments to Rule 1.15(*l*) clarify lawyers' obligations with respect to client files upon dissolution of a law firm or departure of a lawyer from a firm.

CRPC 3.6 and 3.8.

A member of the Colorado Bar requested the Standing Committee to examine the interplay of CRPC 3.6(c) and 3.8(f), in light of the member's concern about the permissible scope of prosecutorial comments concerning pending criminal matters. A Standing Committee subcommittee chaired by David W. Stark studied the issue and made various suggested changes to CRPC 3.6 and 3.8. The full Standing Committee discussed the proposed changes at length and approved proposed amendments at its August 19, 2010 meeting. As more fully discussed in the subcommittee's report, the proposed amendments state that CRPC 3.8(f)'s prohibition against extrajudicial

comments that have a substantial likelihood of heightening public condemnation of the accused is modified by the safe-harbor provisions of CRPC 3.6(b) and 3.6(c). This approach furthers the objectives of the CRPC, provides needed clarity, and minimizes First Amendment issues.

We are enclosing a paper red-line version of the proposed changes for each rule, as well as emailing a complete copy in the Court's required format to Justice Bender's assistant. We also enclose the August 9, 2010 report (without attachments) of the Standing Committee subcommittee that recommended the changes to CRPC 3.6 and 3.8. We respectfully ask the Court to favorably consider the proposed changes.

Very truly yours,

John S. Gleason
Regulation Counsel

Marcy Glenn
Committee Chair

REPORT OF RPC 3.6/3.8 SUBCOMMITTEE

I. Introduction

The subcommittee reviewed and considered four options to address the issues raised by the interplay of Colo. RPC 3.6 and 3.8. We recommend changes to Rules 3.6(b), 3.6(c), 3.8(f), and Comment [5] that would give clear guidance to public prosecutors by stating that Rule 3.8(f)'s prohibition against extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused is modified by the safe harbor provisions of Colo. RPC 3.6(b) and 3.6(c). This approach furthers the objectives of the Rules, provides needed clarity and minimizes First Amendment issues.

II. The Purpose of the Subcommittee

Our charter was framed by a nonmember's request for the committee to consider whether Rule 3.6(b)(2) – which permits extrajudicial statements of "information contained in a public record" – should be limited to preclude a prosecutor from adding unnecessary information to the public record and, on that basis, justifying extrajudicial statements that repeat such information, although those statements prejudice the defendant. The nonmember provided an example of a case where a prosecutor had made extrajudicial statements that portrayed a defendant negatively by drawing on a very detailed probable cause affidavit.

III. Background

The public record exception in Rule 3.6(b)(2) has been broadly construed. *Attorney Grievance Comm'n v. Gansler*, 835 A.2d 548, 567 (Md. 2003). Nevertheless, it "could become a license for the prosecutor to read from a detailed indictment at a news conference." *See, e.g.*, 2 G. Hazard & W. Hodes, *The Law of Lawyering*, § 32.6 (3d. ed.) Likewise, "defense counsel may file pleadings and other papers with the court that tell the story from the defendant's perspective." A. Bernabe-Riefkohl, *Symposium, Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech*, 33 Loy. U. Chi. L.J. 323, 373 (Winter 2002) (footnotes and internal citations omitted). Further, this area of attorney regulation has significant First Amendment implications. *See, e.g.*, R. Cassidy, *The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle*, Boston College Law School Faculty Papers (2008) (suggesting that discipline for violating Rule 3.8(f) would not survive First Amendment scrutiny).

IV. Applicable Rules

Initially, the subcommittee considered whether such abuse could be regulated under Rule 3.8(f), which obligates a prosecutor to "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused," unless the statement is "necessary to inform the public of the nature and extent of the prosecutor's action" or "serve[s] a legitimate law enforcement purpose." Repeating public

record information could heighten "public condemnation of the accused." Unfortunately, the interplay between Rule 3.6 and Rule 3.8 is unclear.

The first sentence of Comment [5] to Rule 3.8 provides that "Paragraph (f) supplements Rule 3.6." However, according to the last sentence in this comment, "Nothing in this comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or (c)." No authority was found relying on the first sentence of the Comment [5] to subordinate the safe harbors in Rule 3.6 to the prohibition of Rule 3.8(f). Indeed, substantial contrary authority exists. *See, e.g., The Law of Lawyering*, § 34.9 (2009 Supp., 3d. ed.) ("Nonetheless, Comment [5] to Rule 3.8 reminds that Rule 3.6 lists some pretrial statements that are permitted to be made, and that this Rule is not intended to negate Rule 3.6.").

V. Our Process

The subcommittee addressed four options: (1) doing nothing; (2) attempting to close the public record loophole; (3) clarifying that Rule 3.8(f) trumps Rule 3.6(b) and (c); and (4) clarifying that Rule 3.6(b) and (c) trump Rule 3.8(f).

A. Doing Nothing

The subcommittee rejected this option, for several reasons. First, as elected officials to whom the press frequently turns, district attorneys need clear standards. Second, public trust in the judicial process is eroded when

elected officials take a "no comment" approach, which could be due to lack of clear standards. Third, a subcommittee member offered that within the Office of Attorney Regulation Counsel (OARC), some disagreement has existed over the relationship between Rule 3.6 and Rule 3.8.

B. Closing the Loophole

Next, the subcommittee considered and rejected various proposals of language that might prevent a prosecutor or a defense attorney from including extraneous information in the public record solely as a foundation to make extrajudicial statements permissible under Rule 3.6(b)(2). From a drafting standpoint, each proposal had significant problems. Additionally, some members suggested that imposing discipline under these proposals would be difficult based on attorney-client privilege, executive privilege, and work product protection for communications between a prosecutor and the police officer or investigator who had prepared the questioned public record. Other members rejected this view. Most agreed that OARC would face a challenging task in pursuing a disciplinary complaint because of the need to prove the intent of the lawyer, whether prosecutor or defense counsel, who caused allegedly extraneous information to be included in the public record. No member of the subcommittee sought to present a minority report on such language.

C. Prioritizing Rule 3.8(f)

The subcommittee then considered changes to Rule 3.6 and Comment [8] to clarify that the restriction in Rule 3.8(f) prevails over the safe harbors in Rule 3.6(b) and (c). Although these changes seemed workable as a matter of drafting, from a policy perspective, the subcommittee was not persuaded to recommend them for reasons, including those discussed above under the "doing nothing" option, as well as recognition that prosecutors often have a legitimate reason for using public record information to educate the public. One member referred to a case in which a convicted rapist had been released on bond because the focal point of a postconviction proceeding was recantation by the victim.

Members also expressed concern that giving Rule 3.8(f) priority over Rule 3.6(b) and (c) would exacerbate First Amendment problems in imposing discipline. In addition, the subcommittee was not persuaded that a systemic problem of abuse among prosecutors in Colorado, state or federal, had been identified.

D. Prioritizing Rule 3.6(b) and (c)

Finally, the subcommittee considered and agreed to recommend changes to Rules 3.6(b), 3.6(c), 3.8(f), and Comment [5] that would clearly subordinate the prohibition in Rule 3.8(f) to the safe harbors in Rule 3.6(b) and 3.6(c). This approach furthers the objectives discussed above and minimizes First Amendment issues. And, even if this recommendation were

adopted, a lawyer who includes clearly superfluous and prejudicial information in a public record might still be disciplined under Rule 8.4(d) ("engage in conduct that is prejudicial to the administration of justice"). Although no member opposed this recommendation, several members abstained.

The recommended language, Version B, redlined against the current Rules and Comments, is attached as an appendix to this report. The language discussed in subsection C that was considered and rejected, Version A, is also attached, as are the current versions of the Rules and Comments.

DATED this 9th day of August, 2010.

Respectfully submitted,

David W. Stark
Subcommittee Chair

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Rule 3.6. Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a) and Rule 3.8(f), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a) and Rule 3.8(f), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Source: Entire rule and comment replaced and adopted June 12, 1997, effective January 1, 1998; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive

statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

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(b) Notwithstanding paragraph (a) and Rule 3.8(f), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a) and Rule 3.8(f), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Source: Entire rule and comment replaced and adopted June 12, 1997, effective January 1, 1998; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the Rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive

statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

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

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

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

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

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

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

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

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

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

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

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

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

(A) disclose the evidence to the defendant, and

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

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

Source: (f) and comment amended and adopted and (2) deleted, effective February 19, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

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

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

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

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

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

[5] Paragraph (f) supplements ~~Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding.~~ the prohibition in Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding, but does not limit the protection of Rule 3.6(b) or Rule 3.6(c). In the context of a criminal prosecution, a prosecutor's extra judicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public condemnation of the accused. Nevertheless, a prosecutor shall not be subject to disciplinary action on the basis that the prosecutor's statement violated paragraph (f), if the statement was permitted by Rule 3.6(b) or Rule 3.6(c). ~~Nothing~~ in

~~this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).~~

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

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

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

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

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

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

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

ANNOTATION

Annotator's note. Rule 3.8 is similar to Rule 3.8 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

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Paragraph (d) should be read as containing a requirement that a prosecutor disclose exculpatory, outcome-determinative evidence that tends to negate the guilt or mitigate the punishment of the accused in advance of the next critical stage of the proceeding, consistent with the materiality standard adopted with respect to the rules of criminal procedure. In re Attorney C, 47 P.3d 1167 (Colo. 2002).

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There was no prosecutorial misconduct when the district attorney and police had no knowledge of any evidence that would negate the defendant's guilt or reduce his punishment. People v. Wood, 844 P.2d 1299 (Colo. App. 1992).

Prosecutor should see that justice is done by seeking the truth. The duty of a prosecutor is not merely to convict, but to see that justice is done by seeking the truth of the matter. People v. Elliston, 181 Colo. 118, 508 P.2d 379 (1973).

No evidence proving defendant's innocence shall be withheld from him. It is the duty of both the prosecution and the courts to see that no known evidence in the possession of the state which might tend to prove a defendant's innocence is withheld from the defense before or during trial. People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1972).

A prosecutor must be careful in his conduct to ensure that the jury tries a case solely on the basis of the facts presented to it. People v. Elliston, 181 Colo. 118, 508 P.2d 379 (1973).

The district attorney has the duty to prevent conviction on misleading or perjured evidence. The duty of the district attorney extends not only to marshalling and presenting evidence to obtain a conviction, but also to protecting the court and the accused from having a conviction result from misleading evidence or perjured testimony. DeLuzio v. People, 177 Colo. 389, 494 P.2d 589 (1972).

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

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

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

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

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

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

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

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

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

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

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

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

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

(A) disclose the evidence to the defendant, and

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

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

Source: (f) and comment amended and adopted and (2) deleted, effective February 19, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

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

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

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

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

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

[5] Paragraph (f) supplements the prohibition in Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding, but does not limit the protection of Rule 3.6(b) or Rule 3.6(c). In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public condemnation of the accused. Nevertheless, a prosecutor shall not be subject to disciplinary action on the basis that the prosecutor's statement violated paragraph (f), if the statement was permitted by Rule 3.6(b) or Rule 3.6(c).

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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.~~; and,~~

~~(8) Copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial~~ transactions ~~pertaining thereto.~~

(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 lawfirm shall make ~~any partnership of lawyers or of any professional corporation or limited liability corporation, the former partners or shareholders shall make appropriate~~ arrangements for the maintenance or disposition of records and client files in accordance with ~~by one of them or by a successor firm of the records specified in~~ 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.

Source: (a) amended and (g) to (j) added June 25, 1998, effective January 1, 1999; (f) added June 25, 1998, effective July 1, 1999; IP(f), (f)(3), and (f)(6) amended and adopted May 13, 1999, effective July 1, 1999; (e)(3) corrected and effective November 9, 1999; (f)(7) added and adopted April 18, 2001, effective July 1, 2001; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008; (d)(2) and (i)(6) amended and effective November 6, 2008.

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.

ANNOTATION

Law reviews. For article, "Settlement Ethics", see 30 Colo. Law. 53 (December 2001). For article, "Problems with Trust Accounts that Come to the Attention of Regulation Counsel", see 34 Colo. Law. 39 (April 2005). For article, "Non-Monetary Compensation for Legal Services How Many Chickens Am I Worth?", see 35 Colo. Law. 95 (January 2006).

Annotator's note. Rule 1.15 is similar to Rule 1.15 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Supreme court has made the underlying ethical principle of this rule explicit: An attorney earns a fee only when the attorney provides a benefit or service to the client. In re Sather, 3 P.3d 403 (Colo. 2000).

Under this rule, all client funds, including engagement retainers, advance fees, flat fees, lump sum fees, etc., must be held in trust until there is a basis on which to conclude that the attorney "earned" the fee. In re Sather, 3 P.3d 403 (Colo. 2000).

This rule requires that attorneys segregate client funds, including those paid as advance fees, from the attorney's property; however, this holding is made prospective. In re Sather, 3 P.3d 403 (Colo. 2000).

In limited circumstances, an attorney may earn a fee before performing any legal services (engagement retainers) or the attorney and client may agree that the attorney may treat advance fees as the attorney's property before the attorney earns the fees by supplying a benefit or performing a service. However, the fee agreement must clearly explain the basis for this arrangement and explain how the client's rights are protected by the arrangement. But, under either arrangement, the fees are always subject to refund if excessive or unearned and the attorney cannot communicate otherwise to a client. In re Sather, 3 P.3d 403 (Colo. 2000).

Attorneys cannot enter into "non-refundable" retainer or fee agreements. In re Sather, 3 P.3d 403 (Colo. 2000).

Failure to provide accounting with respect to fees charged and failure to return unearned fees in conjunction with neglect of civil rights suit warranted a 30-day suspension. People v. Fritsche, 849 P.2d 31 (Colo. 1993).

Public censure appropriate for failure by respondent to return clients' original tax returns in a timely manner and to inform the clients that the tax returns were in fact missing, in addition to other conduct violating rules. People v. Berkley, 858 P.2d 699 (Colo. 1993).

Public censure appropriate where attorney neglected and made misrepresentations in two separate legal matters. People v. Eagan, 902 P.2d 841 (Colo. 1995).

Public censure appropriate where the attorney filed the client's retainer in the operating account, rather than the trust account, and when the client fired the attorney and asked for a refund on the retainer, the attorney wrote the client a refund check that was returned for insufficient funds. People v. Pooley, 917 P.2d 712 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules, where mitigating factors were present, warrants public censure. People v. Davis, 950 P.2d 586 (Colo. 1998).

Depositing personal funds into COLTAF account, paying personal bills from that account, and then knowingly failing to respond to the investigation into the use of the account justifies 60-day suspension with conditions of reinstatement. People v. Herrick, 191 P.3d 172 (Colo. O.P.D.J. 2008).

Commingling personal and client funds in trust account and writing 45 insufficient funds checks on trust account warrants six-month suspension where court found that no clients complained about misuses of funds, all checks were eventually honored, and attorney agreed to make restitution to bank for fees and cooperated in disciplinary proceedings. Court found that 120 days would have been insufficient in light of attorney's two prior admonitions and one prior private censure. People v. Davis, 893 P.2d 775 (Colo. 1995).

Suspension for one year and one day appropriate when attorney neglected to return client files upon request. People v. Honaker, 847 P.2d 640 (Colo. 1993); People v. Fager, 925 P.2d 280 (Colo. 1996).

Suspension for one year and one day is warranted for commingling and misuse of client funds. The hearing board found that the respondent acted recklessly, rather than knowingly, in misappropriating client funds. People v. Zimmermann, 922 P.2d 325 (Colo. 1996).

Suspension for one year and one day appropriate where attorney violated paragraphs (a) and (b) by not returning or accounting for client funds held for emergencies after the clients fired the attorney and for negligently converting other client funds to the attorney's own use. People v. Johnson, 944 P.2d 524 (Colo. 1997).

Disbarment appropriate where attorney accepted fees from a number of clients prior to terminating her legal practice, failed to inform her clients of such termination, failed to refund clients' retainer fees, failed to place clients' funds in separate account, and gave clients' files to other lawyers without clients' consent. People v. Tucker, 904 P.2d 1321 (Colo. 1995).

When a lawyer accepts fees from clients and then abandons those clients while keeping their money and causing serious harm, disbarment is appropriate. People v. Steinman, 930 P.2d 596 (Colo. 1997).

Disbarment warranted where attorney intended to convert client funds, regardless of whether attorney intended to replace the funds at some point. Even

consideration of attorney's personal and emotional problems was irrelevant where attorney violated this rule by knowingly converting client funds, as well as violating several other rules of professional conduct. People v. Marsh, 908 P.2d 1115 (Colo. 1996).

Disbarment not warranted where there was mitigating evidence concerning attorney's mental and physical disabilities. Instead, the board imposed a three-year suspension with a condition for reinstatement that professional medical evidence be presented that the disabilities do not interfere with the attorney's ability to practice law. People v. Stewart, 892 P.2d 875 (Colo. 1995).

Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 945 P.2d 1385 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Titoni, 893 P.2d 1322 (Colo. 1995); People v. Woodrum, 911 P.2d 640 (Colo. 1996); People v. Todd, 938 P.2d 1160 (Colo. 1997); People v. O'Donnell, 955 P.2d 53 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Wechsler, 854 P.2d 217 (Colo. 1993); People v. Kerwin, 859 P.2d 895 (Colo. 1993); People v. Murray, 912 P.2d 554 (Colo. 1996); People v. Paulson, 930 P.2d 582 (Colo. 1997); People v. Rishel, 956 P.2d 542 (Colo. 1998); People v. Barr, 957 P.2d 1379 (Colo. 1998); People v. Harding, 967 P.2d 153 (Colo. 1998); In re Nangle, 973 P.2d 1271 (Colo. 1999); In re Corbin, 973 P.2d 1273 (Colo. 1999); In re Fischer, 89 P.3d 817 (Colo. 2004).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Kelley, 840 P.2d 1068 (Colo. 1992); People v. Schindelar, 845 P.2d 1146 (Colo. 1993); People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Price, 929 P.2d 1316 (Colo. 1996); People v. Mundis, 929 P.2d 1327 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997). People v. Wallace, 936 P.2d 1282 (Colo. 1997); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Sousa, 943 P.2d 448 (Colo. 1997); People v. Schaefer, 944 P.2d 78 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Singer, 955 P.2d 1005 (Colo. 1998); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Skaalerud, 963 P.2d 341 (Colo. 1998); People v. Gonzalez, 967 P.2d 156 (Colo. 1998); In re Bilderback, 971 P.2d 1061 (Colo. 1999); In re Stevenson, 979 P.2d 1043 (Colo. 1999); In re Haines, 177 P.3d 1239 (Colo. 2008).

Conduct violating this rule is sufficient to justify disbarment. People v. Townshend, 933 P.2d 1327 (Colo. 1997).

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,~~; and~~;

~~(8) Copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto~~.

(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.

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[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.

ANNOTATION

Law reviews. For article, "Settlement Ethics", see 30 Colo. Law. 53 (December 2001). For article, "Problems with Trust Accounts that Come to the Attention of Regulation Counsel", see 34 Colo. Law. 39 (April 2005). For article, "Non-Monetary Compensation for Legal Services How Many Chickens Am I Worth?", see 35 Colo. Law. 95 (January 2006).

Annotator's note. Rule 1.15 is similar to Rule 1.15 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule.

Supreme court has made the underlying ethical principle of this rule explicit: An attorney earns a fee only when the attorney provides a benefit or service to the client. In re Sather, 3 P.3d 403 (Colo. 2000).

Under this rule, all client funds, including engagement retainers, advance fees, flat fees, lump sum fees, etc., must be held in trust until there is a basis on which to conclude that the attorney "earned" the fee. In re Sather, 3 P.3d 403 (Colo. 2000).

This rule requires that attorneys segregate client funds, including those paid as advance fees, from the attorney's property; however, this holding is made prospective. In re Sather, 3 P.3d 403 (Colo. 2000).

In limited circumstances, an attorney may earn a fee before performing any legal services (engagement retainers) or the attorney and client may agree that the attorney may treat advance fees as the attorney's property before the attorney earns the fees by supplying a benefit or performing a service. However, the fee agreement must clearly explain the basis for this arrangement and explain how the client's rights are protected by the arrangement. But, under either arrangement, the fees are always subject to refund if excessive or unearned and the attorney cannot communicate otherwise to a client. In re Sather, 3 P.3d 403 (Colo. 2000).

Attorneys cannot enter into "non-refundable" retainer or fee agreements. In re Sather, 3 P.3d 403 (Colo. 2000).

Failure to provide accounting with respect to fees charged and failure to return unearned fees in conjunction with neglect of civil rights suit warranted a 30-day suspension. People v. Fritsche, 849 P.2d 31 (Colo. 1993).

Public censure appropriate for failure by respondent to return clients' original tax returns in a timely manner and to inform the clients that the tax returns were in fact missing, in addition to other conduct violating rules. People v. Berkley, 858 P.2d 699 (Colo. 1993).

Public censure appropriate where attorney neglected and made misrepresentations in two separate legal matters. People v. Eagan, 902 P.2d 841 (Colo. 1995).

Public censure appropriate where the attorney filed the client's retainer in the operating account, rather than the trust account, and when the client fired the attorney and asked for a refund on the retainer, the attorney wrote the client a refund check that was returned for insufficient funds. People v. Pooley, 917 P.2d 712 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules, where mitigating factors were present, warrants public censure. People v. Davis, 950 P.2d 586 (Colo. 1998).

Depositing personal funds into COLTAF account, paying personal bills from that account, and then knowingly failing to respond to the investigation into the use of the account justifies 60-day suspension with conditions of reinstatement. People v. Herrick, 191 P.3d 172 (Colo. O.P.D.J. 2008).

Commingling personal and client funds in trust account and writing 45 insufficient funds checks on trust account warrants six-month suspension where court found that no clients complained about misuses of funds, all checks were eventually honored, and attorney agreed to make restitution to bank for fees and cooperated in disciplinary proceedings. Court found that 120 days would have been insufficient in light of attorney's two prior admonitions and one prior private censure. People v. Davis, 893 P.2d 775 (Colo. 1995).

Suspension for one year and one day appropriate when attorney neglected to return client files upon request. People v. Honaker, 847 P.2d 640 (Colo. 1993); People v. Fager, 925 P.2d 280 (Colo. 1996).

Suspension for one year and one day is warranted for commingling and misuse of client funds. The hearing board found that the respondent acted recklessly, rather than knowingly, in misappropriating client funds. People v. Zimmermann, 922 P.2d 325 (Colo. 1996).

Suspension for one year and one day appropriate where attorney violated paragraphs (a) and (b) by not returning or accounting for client funds held for emergencies after the clients fired the attorney and for negligently converting other client funds to the attorney's own use. People v. Johnson, 944 P.2d 524 (Colo. 1997).

Disbarment appropriate where attorney accepted fees from a number of clients prior to terminating her legal practice, failed to inform her clients of such termination, failed to refund clients' retainer fees, failed to place clients' funds in separate account, and gave clients' files to other lawyers without clients' consent. People v. Tucker, 904 P.2d 1321 (Colo. 1995).

When a lawyer accepts fees from clients and then abandons those clients while keeping their money and causing serious harm, disbarment is appropriate. People v. Steinman, 930 P.2d 596 (Colo. 1997).

Disbarment warranted where attorney intended to convert client funds, regardless of whether attorney intended to replace the funds at some point. Even

consideration of attorney's personal and emotional problems was irrelevant where attorney violated this rule by knowingly converting client funds, as well as violating several other rules of professional conduct. People v. Marsh, 908 P.2d 1115 (Colo. 1996).

Disbarment not warranted where there was mitigating evidence concerning attorney's mental and physical disabilities. Instead, the board imposed a three-year suspension with a condition for reinstatement that professional medical evidence be presented that the disabilities do not interfere with the attorney's ability to practice law. People v. Stewart, 892 P.2d 875 (Colo. 1995).

Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 945 P.2d 1385 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Titoni, 893 P.2d 1322 (Colo. 1995); People v. Woodrum, 911 P.2d 640 (Colo. 1996); People v. Todd, 938 P.2d 1160 (Colo. 1997); People v. O'Donnell, 955 P.2d 53 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Wechsler, 854 P.2d 217 (Colo. 1993); People v. Kerwin, 859 P.2d 895 (Colo. 1993); People v. Murray, 912 P.2d 554 (Colo. 1996); People v. Paulson, 930 P.2d 582 (Colo. 1997); People v. Rishel, 956 P.2d 542 (Colo. 1998); People v. Barr, 957 P.2d 1379 (Colo. 1998); People v. Harding, 967 P.2d 153 (Colo. 1998); In re Nangle, 973 P.2d 1271 (Colo. 1999); In re Corbin, 973 P.2d 1273 (Colo. 1999); In re Fischer, 89 P.3d 817 (Colo. 2004).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Kelley, 840 P.2d 1068 (Colo. 1992); People v. Schindelar, 845 P.2d 1146 (Colo. 1993); People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Price, 929 P.2d 1316 (Colo. 1996); People v. Mundis, 929 P.2d 1327 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997). People v. Wallace, 936 P.2d 1282 (Colo. 1997); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Sousa, 943 P.2d 448 (Colo. 1997); People v. Schaefer, 944 P.2d 78 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Singer, 955 P.2d 1005 (Colo. 1998); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Skaalerud, 963 P.2d 341 (Colo. 1998); People v. Gonzalez, 967 P.2d 156 (Colo. 1998); In re Bilderback, 971 P.2d 1061 (Colo. 1999); In re Stevenson, 979 P.2d 1043 (Colo. 1999); In re Haines, 177 P.3d 1239 (Colo. 2008).

Conduct violating this rule is sufficient to justify disbarment. People v. Townshend, 933 P.2d 1327 (Colo. 1997).

RULE 1.16A. CLIENT FILE RETENTION

(a) A lawyer in private practice shall retain a client's files respecting a matter unless:

(1) the lawyer delivers the file to the client or the client authorizes destruction of the file in a writing signed by the client and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter; or

(2) the lawyer has given written notice to the client of the lawyer's intention to destroy the file on or after a date stated in the notice, which date shall not be less than thirty days after the date of the notice, and there are no pending or threatened legal proceedings known to the lawyer that relate to the matter.

(b) At any time following the expiration of a period of ten years following the termination of the representation in a matter, a lawyer may destroy a client's files respecting the matter without notice to the client, provided there are no pending or threatened legal proceedings known to the lawyer that relate to the matter and the lawyer has not agreed to the contrary.

(c) Notwithstanding paragraphs (a) and (b) above, a lawyer in a criminal matter shall retain a client's file for the following time periods:

(1) for the life of the client, if the matter resulted in a conviction and a sentence of death, life without parole, or an indeterminate sentence, including a sentence pursuant to the Colorado Sex Offender Lifetime Supervision Act of 1998, 18 1.3-1001 et seq., C.R.S.

(2) for eight years from the date of sentencing, if the matter resulted in a conviction for any other felony and the conviction and/or sentence was appealed;

(3) for five years from the date of sentencing, if the matter resulted in a conviction for any other felony and neither the conviction nor the sentence was appealed.

(d) A lawyer may satisfy the notice requirements of paragraph (a)(2) of this Rule by establishing a written file retention policy consistent with this Rule and by providing a notice of the file retention policy to the client in a fee agreement or a in writing delivered to the client not later than thirty days before destruction of the client's file or incorporated into a fee agreement.

(e) This Rule does not supersede or limit a lawyer's obligations to retain a client's file that are imposed by law, court order, or rules of a tribunal.

COMMENT

[1] Rule 1.16A is not intended to impose an obligation on a lawyer to preserve documents that the lawyer would not normally preserve, such as multiple copies or drafts of the same document. A client's files, within the meaning of Rule 1.16A, consist of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice. A lawyer's obligations with respect to client "property" are distinct. Those obligations are addressed in Rules 1.16(d), 1.15(a) and 1.15(b). "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.

[2] A lawyer may comply with Rule 1.16A by maintaining a client's files in, or converting the file to, electronic form, provided the lawyer is capable of producing a

paper version if necessary. Rule 1.16A does not require multiple lawyers in the same law firm to retain duplicate client files or to retain a unitary file located in one place. "Law firm" is defined in Rule 1.0 to include lawyers employed in a legal services organization or the legal department of a corporation or other organization. Rule 5.1(a) addresses the responsibility of a partner in a law firm to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Generally, lawyers employed by a private corporation or other entity as in-house counsel represent such corporation or entity as employees and the client's files are considered to be in the possession of the client and not the lawyer, such that Rule 1.16A would be inapplicable. Where lawyers are employed as public defenders or by a legal services organization or a government agency to represent third parties under circumstances where the third-party client's files are considered to be files and records of the organization or agency, the lawyer must take reasonable measures to ensure that the client's files are maintained by the organization or agency in accordance with this rule.

[3] Rule 1.16A does not supersede obligations imposed by other law, court order or rules of a tribunal. The maintenance of law firm financial and accounting records covered by Rule 1.15(a) and 1.15(j) is governed exclusively by those rules. Similarly, Rule 1.16A does not supersede specific retention requirements imposed by other rules, such as Rule 5.5(d)(2) (two-year retention of written notification to client of utilization of services of suspended or disbarred lawyer), Rule 4, Chapter 23.3 C.R.C.P. (six-year retention of contingent fee agreement and proof of mailing following completion or settlement of the case) and C.R.C.P. 121, §1-26(7) (two year retention of signed originals of e-filed documents). A document may be subject to more than one retention requirement, in which case the lawyer should retain the document for the longest applicable period. Rule 1.16A does not prohibit a lawyer from maintaining a client's files beyond the periods specified in the Rule.

[4] A lawyer may not destroy a client's file when the lawyer has knowledge of pending or threatened proceedings relating to the matter. The Rule does not affect a lawyer's obligations under Rule 1.16(d) with respect to the surrender of papers and property to which the client is entitled upon termination of the representation. A client's receipt of papers forwarded from time to time by the lawyer during the course of the representation does not alleviate the lawyer's obligations under Rule 1.16A.

[5] The destruction of a client's files under paragraph (a) of Rule 16A is subject to two sets of preconditions. First, the lawyer must have given written notice to the client of the lawyer's intention to destroy the files on or after a date certain, which date is not less than thirty days after the date the notice was given or the client has authorized the destruction of the files in a writing signed by the client. As provided in paragraph (d), the notice requirement in paragraph (a) can be satisfied by timely giving the client a written statement of the applicable file retention policy; for example, that policy could be contained in a written fee agreement. A lawyer should make reasonable efforts to locate a client for purposes of giving written notice when such notice was not provided during the representation. If the lawyer is unable to locate the client, written notice sent to the client's last known address is sufficient under paragraph (a) Rule 1.16A. Second, the lawyer may not destroy the files if the lawyer knows that there are legal proceedings pending or threatened that relate to the matter for which the lawyer

created the files, if the file is subject to paragraph (c) of this Rule, or if the lawyer has agreed otherwise. If these preconditions are satisfied, the lawyer may destroy the files in a manner consistent with the lawyer's continuing obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9. Nothing in this Rule is intended to mandate that a lawyer destroy a file in the absence of a client's instruction to do so. Notwithstanding a client's instruction to destroy or return a file, a lawyer may retain a copy of the file or any document in the file.

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(b) At any time following the expiration of a period of ten years following the termination of the representation in a matter, a lawyer may destroy a client's files respecting the matter without notice to the client, provided there are no pending or threatened legal proceedings known to the lawyer that relate to the matter and the lawyer has not agreed to the contrary.

(c) Notwithstanding paragraphs (a) and (b) above, a lawyer in a criminal matter shall retain a client's file for the following time periods:

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(3) for five years from the date of sentencing, if the matter resulted in a conviction for any other felony and neither the conviction nor the sentence was appealed.

(d) A lawyer may satisfy the notice requirements of paragraph (a)(2) of this Rule by establishing a written file retention policy consistent with this Rule and by providing a notice of the file retention policy to the client in a fee agreement or a in writing delivered to the client not later than thirty days before destruction of the client's file or incorporated into a fee agreement.

(e) This Rule does not supersede or limit a lawyer's obligations to retain a client's file that are imposed by law, court order, or rules of a tribunal.

COMMENT

[1] Rule 1.16A is not intended to impose an obligation on a lawyer to preserve documents that the lawyer would not normally preserve, such as multiple copies or drafts of the same document. A client's files, within the meaning of Rule 1.16A, consist of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice. A lawyer's obligations with respect to client "property" are distinct. Those obligations are addressed in Rules 1.16(d), 1.15(a) and 1.15(b). "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.

[2] A lawyer may comply with Rule 1.16A by maintaining a client's files in, or converting the file to, electronic form, provided the lawyer is capable of producing a

paper version if necessary. Rule 1.16A does not require multiple lawyers in the same law firm to retain duplicate client files or to retain a unitary file located in one place. "Law firm" is defined in Rule 1.0 to include lawyers employed in a legal services organization or the legal department of a corporation or other organization. Rule 5.1(a) addresses the responsibility of a partner in a law firm to "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Generally, lawyers employed by a private corporation or other entity as in-house counsel represent such corporation or entity as employees and the client's files are considered to be in the possession of the client and not the lawyer, such that Rule 1.16A would be inapplicable. Where lawyers are employed as public defenders or by a legal services organization or a government agency to represent third parties under circumstances where the third-party client's files are considered to be files and records of the organization or agency, the lawyer must take reasonable measures to ensure that the client's files are maintained by the organization or agency in accordance with this rule.

[3] Rule 1.16A does not supersede obligations imposed by other law, court order or rules of a tribunal. The maintenance of law firm financial and accounting records covered by Rule 1.15(a) and 1.15(j) is governed exclusively by those rules. Similarly, Rule 1.16A does not supersede specific retention requirements imposed by other rules, such as Rule 5.5(d)(2) (two-year retention of written notification to client of utilization of services of suspended or disbarred lawyer), Rule 4, Chapter 23.3 C.R.C.P. (six-year retention of contingent fee agreement and proof of mailing following completion or settlement of the case) and C.R.C.P. 121, §1-26(7) (two year retention of signed originals of e-filed documents). A document may be subject to more than one retention requirement, in which case the lawyer should retain the document for the longest applicable period. Rule 1.16A does not prohibit a lawyer from maintaining a client's files beyond the periods specified in the Rule.

[4] A lawyer may not destroy a client's file when the lawyer has knowledge of pending or threatened proceedings relating to the matter. The Rule does not affect a lawyer's obligations under Rule 1.16(d) with respect to the surrender of papers and property to which the client is entitled upon termination of the representation. A client's receipt of papers forwarded from time to time by the lawyer during the course of the representation does not alleviate the lawyer's obligations under Rule 1.16A.

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created the files, if the file is subject to paragraph (c) of this Rule, or if the lawyer has agreed otherwise. If these preconditions are satisfied, the lawyer may destroy the files in a manner consistent with the lawyer's continuing obligation to maintain the confidentiality of information relating to the representation under Rules 1.6 and 1.9. Nothing in this Rule is intended to mandate that a lawyer destroy a file in the absence of a client's instruction to do so. Notwithstanding a client's instruction to destroy or return a file, a lawyer may retain a copy of the file or any document in the file.

TO: STANDING COMMITTEE ON RULES OF PROFESSIONAL CONDUCT

FROM: SUBCOMMITTEE ON NEW CODE OF JUDICIAL CONDUCT

RE: CHANGES IN RPC NECESSITATED BY DIFFERENT STANDARDS OF CONDUCT IN THE CODE

DATE: OCTOBER 4, 2010

Summary

The subcommittee[1] was charged with comparing the Colorado Rules of Professional Conduct ("RPC") and the Colorado Code of Judicial Conduct ("Code"), as adopted May 27, 2010. Its objectives were (1) to identify any different and potentially conflicting standards of conduct that might apply simultaneously to either (a) the same person, because the vast majority of judges are attorneys, or (b) different persons, i.e. a judge and an attorney, involved in the

[1] Initially, the subcommittee consisted of standing committee members Marcy Glenn, Federico Alvarez, Alec Rothrock, Eli Wald, John Gleason, and John Webb (chair). William Campbell, executive director of the Commission on Judicial Discipline, joined the subcommittee before this report was prepared.

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same activity; and (2) to address possible changes in RPC that would avoid such application of inconsistent standards.[2]

While several provisions of the Code and RPC address overlapping subjects with somewhat different language, most of these inconsistencies are of doubtful significance. This report includes specific recommendations for limited changes to RPC 1.12 Comment [1] and RPC 3.5(b) Comment [2]. The subcommittee also considered a catch-all RPC 8._, which would clarify that where RPC applies to an attorney serving as a judge but conflicts with an applicable provision of the Code, the judge would not be subject to that provision of RPC. However, such a change seems unnecessary because of jurisdictional boundaries between the Commission on Judicial Discipline (Commission) and the Office of Attorney Regulation Counsel (OARC).

Background

The subcommittee was unable to find any prior attempt to identify and resolve conflicts between standards governing the conduct of attorneys and standards governing the conduct of

[2] Although inconsistency could also be avoided by changes to the Code, recommending such changes would exceed the subcommittee's assignment.

judges, all of whom -- some county judges excepted -- this report will assume are attorneys. The recent substantial revisions to the Code created an opportunity and a need to do so.

Many provisions of RPC and the Code deal with similar subjects, often using the same or comparable language. For example, both require self-reporting of certain criminal convictions. *Compare* C.R.C.P. 251.20(b) *with* Code Rule 1.1(C) (identical language). Both also require cooperation with disciplinary agencies. *Compare* RPC 8.1 (an attorney "shall not . . . knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority") *with* Code Rule 2.16 ("A judge shall be candid and honest with judicial and attorney disciplinary agencies"). Although the latter wording is not identical, it seems to be close enough that a judge is not likely subject to conflicting standards. This report does not identify all such areas of overlap.

Other provisions of RPC and the Code that deal with similar subjects in dissimilar language appear unlikely to create conflicting standards for judges because the provisions address comparable conduct but in different capacities. For example, both RPC 1.6 and Code Rule 3.5 limit disclosure of information. But RPC deals with

information "relating to the representation of a client," while Code Rule 3.5 deals with information "acquired in a judicial capacity," most of which will, in any event, be a matter of public record.

Likewise, both RPC 3.6 and Code Rule 2.10 restrict statements potentially prejudicial to a pending proceeding. The language differs somewhat in that RPC 3.6 deals with information that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding," while Code Rule 2.10 restricts information "that might reasonably be expected to affect the outcome or impair the fairness" of a pending matter. But RPC 3.6 applies to attorneys "participating . . . in the investigation or litigation of a matter," activities not engaged in by judges. Similarly, while both RPC 1.1 and Code Rule 2.5(A) require competence, the former is limited to representing a client. *See also* RPC 1.3. Again, this report does not identify all areas where a judge is unlikely to be subject to conflicting standards because RPC applies to action in a different capacity.

Yet, at least one difference is not so easily resolved. RPC 8.4(b) makes commission of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in

other respects" subject to discipline. Code Rule 1.1(B) provides that "Conduct by a judge that violates a criminal law may, unless the violation is minor, constitutes a violation of the requirement that a judge must comply with the law." The exception for "minor" violations and the term "may" would support an argument favoring more leniency for judges than for attorneys involved in identical criminal conduct.

Finally, as to subjects on which the Code is more restrictive than RPC, one member believes that examples may provide a basis for considering changes to RPC. Under RPC 5.3(b), "a lawyer having direct supervisory authority over the nonlawyer shall make *reasonable efforts* to ensure that the person's conduct is compatible with the professional obligations of the lawyer." (Emphasis added.) According to Code Rule 2.12(A), "A judge shall *require* court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code." (Emphasis added.) Here, "reasonable efforts" suggests more leniency for attorneys.

The obligation to report misconduct also involves different language. Under RPC 8.3(b), "A lawyer who *knows* that a judge has

committed a violation of applicable rules of judicial conduct . . . shall inform the appropriate authority." (Emphasis added.) Code Rule 2.15(C) requires that a judge "who *receives information* indicating a substantial likelihood that another judge has committed a violation of the Code shall take appropriate action." (Emphasis added.) Arguably, the definition of "knows" in RPC 1.0(f) affords an attorney greater latitude to remain silent than a judge would have under the same circumstances. A similar language discrepancy appears in RPC 8.3(a) and Code Rule 2.15(D), both of which deal with obligations of attorneys and judges, respectively, to report professional misconduct by an attorney.[3]

The subcommittee considered that any possibility of a judge being subject to conflicting standards arising from RPC could be resolved by adopting the following catch-all RPC 8._ (or a subparagraph to RPC 8.5)[4]:

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[3] The reference to "Canon 3(B)(3)" in C.R.C.P. 251.4 is no longer accurate and the wording of its first sentence may be overstated in light of Code Rule 2.15(D). However, the standing committee's jurisdiction does not extend to C.R.C.P. 251.4.

[4] The subcommittee also recognizes that such a catch-all rule could be incorporated into C.R.C.P. 251.1, which already provides, "Every attorney serving as a magistrate . . . is subject to the disciplinary and disability jurisdiction of the Supreme Court for conduct

> In all circumstances where a judge is subject to these Rules because the judge is also a lawyer, if the judge is acting in a judicial capacity and the judge's behavior is subject to a specific provision of the Code of Judicial Conduct, then any different standard applicable to that behavior under any of these Rules shall not apply.

The subcommittee did not find a similar approach in any other state. One member was concerned over the anomaly of judges being held to a lower standard than other attorneys for the same misconduct. However, such occurrences are narrowed by the "acting in a judicial capacity" limitation. For example, if a judge committed a criminal act outside of his or her judicial capacity, RPC 8.4(b) would still apply.[5] But in any event, the subcommittee ultimately does not recommend adoption of RPC 8._ because of the

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performed s a magistrate as provided by C.R.M. 5(h)." However, the standing committee's jurisdiction does not include C.R.C.P. 251.1.

[5] In *Petition of the Colorado Bar Ass'n*, 137 Colo. 357, 367, 325 P.2d 932, 937 (1958), the court said, "In so far as the conduct of a judge of any court of record in this state is questioned, . . . this court and the grievance committee of the Bar Association are without power or authority to institute or conduct disciplinary proceedings of any kind . . . The constitution fixes the remedy at impeachment." Although this language has never been disapproved, changes to the disciplinary processes call into question its current viability.

jurisdictional boundaries discussed in the following section of this report.

Jurisdiction

Under Rule of Judicial Discipline 4(a), the commission's jurisdiction does not extend to "[j]udicial conduct that appears to be in violation of the Colorado Rules of Professional Conduct but is not otherwise within the commission's jurisdiction," which shall be referred to OARC. This rule explains that OARC has jurisdiction "over the conduct of a lawyer who is no longer a judge that occurred during the time the lawyer held judicial office, with reference to alleged violations of the Colorado Rules of Professional Conduct, if the commission did not investigate and resolve the matter during the judge's tenure in office."

By negative implication, this language suggests that judicial misconduct which is both within the Commission's jurisdiction and an RPC violation would not be to subject action by the OARC, at least while the judge remained in office, assuming that the commission did "investigate and resolve" the misconduct. However, if the Commission did not do so, then after the judge left office

OARC could probably reach back and address the misconduct. *Cf. People v. Marmon*, 903 P.2d 651 (Colo. 1995).

The reasons for structuring the rule in this way were not investigated by the subcommittee. According to Bill Campbell, the Commission is considering rules that may need clarification, and its recommendation to the supreme court likely will include Rule 4(a). John Gleason advised that OARC often receives complaints against judges who are also lawyers, which parallel complaints filed with the Commission. Under such circumstances, OARC defers to the Commission. As discussed above, in his experience, OARC would take action only if the Commission could not proceed because it lost jurisdiction by virtue of the lawyer ceasing to be a judge.

According to Rule of Judicial Discipline 5(a)(4), "Grounds for Discipline" include "[a]ny conduct that constitutes a violation of the Code of Judicial Conduct." However, section (a)(1) of this rule is very broad, embracing "[w]illful misconduct in office, including misconduct which, although not related to judicial duties, brings the judicial office into disrepute . . . ." Thus, the significance of the "not otherwise within the commission's jurisdiction" predicate for referral to OARC in Rule 4(a) is unclear. For example, the

Commission probably could determine that conduct in violation of RPC, although not also a violation of the Code, constituted such "willful misconduct." *See* Colorado Constitution, Art. VI, sec. 23(3)(d) (Discipline for "willful misconduct in office"). In addition, willful misconduct would usually constitute "impropriety [or] the appearance of impropriety" under Code Rule 1.2.

Recommendations

First, some wording in Comment [1] to RPC 1.12, dealing with restrictions on an attorney's practice when the attorney has previously served as a judicial officer, needs updating. Proposed changes and an explanatory memo appear as Attachment 1. The subcommittee views this proposal as more housekeeping than substantive.

Second, RPC 3.5 creates the possibility that an attorney who engages in an ex parte communication with a judge could be disciplined, even though the judge initiated the communication sua sponte and it was proper under Code Rule 2.9 because "circumstances require it . . . for scheduling, administrative, or emergency purposes." Proposed changes and an explanatory memo

appear as Attachment 2. This is the most significant potential conflict that the subcommittee identified.

Respectfully submitted,

John R. Webb

Burns Figa & Will P.C.

MEMORANDUM

TO: Subcommittee on Code of Judicial Conduct

FROM: Alec Rothrock

DATE: July 2, 2010

SUBJECT: Proposed Changes to Cmt. [1], Colo. RPC 1.12, in Wake of Adoption of New Code of Judicial Conduct

---

1. Colo. RPC 1.12 deals with restrictions on a lawyer's practice when the lawyer has previously served as a judicial officer, mediator, arbitrator or judicial law clerk. This proposal would change two sentences in Comment [1], Colo. RPC 1.12, which refer, respectively, to a prior version of the ABA Model Code of Judicial Conduct and to the now repealed version of the Colorado Code of Judicial Conduct.

2. My proposal is as follows:

> . . . Paragraph III(B) ~~Paragraphs C(2), D(2) and E(2)~~ of the Application Section of the Colorado ~~Model~~ Code of Judicial Conduct provides that Part-Time Judges ~~a part-time judge, judge pro tempore or retired judge recalled to active service,~~ "shall not act as a lawyer in ~~any~~ proceeding in which the judge has~~he~~ served as a judge or in any other proceeding related thereto." Rule 2.11(A)(5)(a) ~~Canon 3(C)(1)(b)~~ of the Colorado Code of Judicial Conduct requires a judge to disqualify himself or herself in a proceeding in which the judge served as a lawyer in the matter in controversy, or the judge was associated with a lawyer who participated substantially as a lawyer in the matter during such association ~~a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter~~. Although phrased differently from this Rule, those Rules correspond in meaning.

(The First Sentence)

3. With respect to the first sentence, Cmt. [1] cross-references paragraphs from the 1990 version of the Model Code. The ABA has since published a 2007 version, which forms the basis for the 2010 Colorado Code.

ATTACHMENT 1

4. The paragraphs in the 2007 Model Code that correspond to the Model Code paragraphs now referenced in Cmt. [1] are paragraphs III(B) and IV(B) of the "Application" section. Comment [1], Colo. RPC 1.12, could simply be revised to refer to these paragraphs. As with Comment [1] to Model Rule 1.12, most states refer in their Comment [1] to corresponding paragraphs in some version of the Model Code.

5. However, a few states--Indiana, Maine, Texas and Virginia and perhaps others--modified this sentence in Comment [1] to refer to corresponding, and often identical, paragraphs in their own version of the Code, instead of the Model Code. Colorado could have done this by referring to paragraphs (B)(5) and (D)(2) of Canon 8 of the pre-July 1, 2010 Colorado Code, which correspond to the Model Code paragraphs currently referenced in Cmt. [1], Colo. RPC 1.12. The corresponding language in the July 1, 2010 version of the Colorado Code is found in paragraph III(B) of the "Application" section.

6. In my opinion, it is better to refer in Cmt. [1], Colo. RPC 1.12, to the July 1, 2010 Colorado Code instead of to the current (2007) version of the Model Code. My reasoning involves the final sentence of Comment [1]. That sentence states that Colo. RPC 1.12 corresponds in meaning to the referenced rules preceding it.

7. Although the relevant language in the current Model Code (III(B) and IV(B) of the Application section) is identical to the corresponding language in the current Colorado Code (III(B) of the Application section), the former applies to two different classes of part-time judges ("Continuing Part-Time Judges" and "Periodic Part-Time Judges"),[1] whereas the latter applies to only one such class ("Part-Time Judges").[2] This distinction may make absolutely no substantive difference. Regardless, the Colorado Supreme Court is on more solid footing commenting on the meaning of the Colorado Code than on the meaning of the Model Code. I assume that similar reasoning led Indiana, Maine, Texas and Virginia to refer in Comment [1] to their respective state Codes instead of to the Model Code.

(The Second Sentence)

8. The second sentence in the portion of Comment [1] quoted above appears to have been added by the Colorado Supreme Court after the Standing Committee submitted its December 30, 2005 package of proposed changes. The sentence does not appear in the Standing Committee's report and is not included in Comment [1] of ABA Model Rule 1.12.[3]

---

[1] See Exhibit A.
[2] See Exhibit A.
[3] http://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm/Committee_ID/24. *See* Comment [1], ABA Model Rule 1.12 ("Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not 'act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto.' Although phrased differently from this Rule, those Rules correspond in meaning.").

9. The reference to Canon 3(C)(1)(b) in Cmt. [1], Colo. RPC 1.12, is to a paragraph in the now repealed version of the Code. The proposed changes to that sentence (a) replace the number of the rule to the July 1, 2010 version of the Colorado Code, and also (b) modify the language consistent with that new rule, which is Rule 2.11(A)(5)(a).

Burns Figa & Will P.C.

MEMORANDUM

TO: Subcommittee on Code of Judicial Conduct

FROM: Alec Rothrock

DATE: June 25, 2010

SUBJECT: Proposed Change to Colo. RPC 3.5 and Comment [2] in Wake of Adoption of New Code of Judicial Conduct

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1. In the wake of the adoption of the "new" Colorado Code of Judicial Conduct (CJC) effective July 1, 2010, I propose the following redline changes to Colo. RPC 3.5(b) and the corresponding Comment paragraph:

RULE 3.5. IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order, or unless a judge communicates ex parte with the lawyer under the authority of Rule 2.9(A)(1) or (4) of the Colorado Code of Judicial Conduct;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate;

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(4) the communication is intended to or is reasonably likely to demean, embarrass, or criticize the jurors or their verdicts; or

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[redacted]

ATTACHMENT 2

(d) engage in conduct intended to disrupt a tribunal.

COMMENT

. . .

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order, or a judge communicates ex parte with the lawyer under the authority of Rule 2.9(A)(1) or (4) of the Colorado Code of Judicial Conduct. Rule 2.9(A)(1) of the CJC authorizes a judge to engage in nonsubstantive ex parte communications with lawyers for scheduling, administrative, or emergency purposes. Rule 2.9(A)(4) of the CJC authorizes a judge to engage in ex parte communications with lawyers, with the consent of the parties, in an effort to settle matters pending before the judge.

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2. The reasons behind this proposal are as follows.

3. CJC Rule 2.9(A) and Colo. RPC 3.5(b) address ex parte communications. The classic ex parte communication is a "communication between counsel and the court when opposing counsel is not present." *See In re Green*, 11 P.3d 1078, 1087 n. 8 (Colo. 2000) (quoting Black's Law Dictionary). Under the CJC, this is only one type of regulated communication. CJC Rule 2.9(A) also prohibits "other communications made to the judge outside the presence of the parties or their lawyers," except for communications with disinterested experts, court staff, other judges—and ethics experts. *See* CJC Rule 2.9(A); *id.* (A)(2), (3) and Comment 6.[1] The latter communications do not correspond to the communications covered by Colo. RPC 3.5(b) and do not implicate that rule.

[1] **Rule 2.9. Ex Parte Communication**

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

4. However, to the degree that CJC Rule 2.9(A) and Colo. RPC 3.5(b) cover classic ex parte communications between counsel and the court when opposing counsel is not present, they are not mirror images of one another. Unlike Colo. RPC 3.5(b), which includes no exceptions, CJC 2.9(A)(1) and (4) permit judges to communicate ex parte with counsel as follows:

> (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
>
> (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
> (b) the judge makes provision to promptly notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.
>
> . . . .

---

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.
(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.
(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.
(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

Comment

. . .

6. A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such consultations are not subject to the restrictions of paragraph (A)(2).

[redacted]

(4) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

5. These discrepancies can present a very difficult situation for the lawyer who wishes neither to offend the judge nor violate Colo. RPC 3.5(b). For example, a judge may wish to schedule a hearing on short notice. CJC 2.9(A)(1) permits the judge to engage in ex parte communications for this purpose. Colo. RPC 3.5(b) does not. This situation is more common in small legal communities than it is in large ones, but it happens in large legal communities as well.

6. The proposed changes to Colo. RPC 3.5(b) and the companion Comment paragraph would eliminate these discrepancies by incorporating CJC 2.9(A)(1) and (4) into Colo. RPC 3.5(b) when the judge invokes them. There is precedent for the proposed changes. DR 7-110(B) of the Colorado Code of Professional Responsibility (identical to DR 7-110(B) of the ABA Model Code) contained an exception for ex parte communications "authorized by law, *or by Section (A)(4) under Canon 3 of the Code of Judicial Conduct.*"[2] CJC 2.9(A) replaced Canon 3, § (A)(4).

7. It is unclear and indeed puzzling why the ABA did not carry over this language into ABA Model Rule 3.5(b), which is identical to Colo. RPC 3.5(b). It is possible the ABA believed that the exception in Model Rule 3.5(b) for ex parte communications authorized by "law" made specific reference to the CJC unnecessary, although the fact that DR 7-110(B) referred to both "law" and the CJC indicates that the drafters of the Code believed otherwise.

8. Be that as it may, some jurisdictions included Code-like language when they adopted a version of ABA Model Rule 3.5 and its Comment. *See* Vermont Rule of Professional Conduct 3.5(b)(1) (prohibiting ex parte communication "with a judge or other person acting in a judicial or quasi-judicial capacity in a pending or impending adversary proceeding, *unless authorized to do so by the Code of Judicial Conduct,* by other law, or by court order"); Cmt [2], Arizona Rule of Professional Conduct 3.5 ("During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the

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[2] Colorado Code of Professional Responsibility DR 7-110(B):

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law, or by Section A(4) under Canon 3 of the Code of Judicial Conduct.

proceeding, such as judges, court-appointed arbitrators, masters or jurors, unless authorized to do so by law or court order. *Lawyers should refer to the Code of Judicial Conduct, Canon 3B(7) for authorized ex parte communications."*).

9. Two other jurisdictions modified their version of ABA Model Rule 3.5 or the companion Comment paragraph to make an exception for ex parte communications authorized by a rule of court. *See* Kansas Rule of Professional Conduct 3.5(c)(4) (excepting communications authorized "by law or court rule"); Cmt [2], Maine Rule of Professional Conduct 3.5 (rule identical to ABA and Colorado Rule 3.5(b) "does not preclude communications permitted by rule of court"). These jurisdictions clearly intended to track the exceptions in DR 7-110(B), whether in the Rule itself (Kansas) or in the Comment (Maine). By referring to court rules, they appear to have intended to invoke, without limitation, the corresponding provision of the Code of Judicial Conduct governing ex parte communications. *See* L. Abramson, "The Judicial Ethics of Ex Parte and Other Communications," 37 *Hous. L. Rev.* 1343, 1389 & n. 185 (Winter 2000) (including Kansas and Maine rules, among others, in reference to jurisdictions that "have attempted to clarify the possible ethical imbalance in the CPR and RPC provisions by adding to the exceptions for permissible ex parte communications an explicit reference to the Code of Judicial Conduct or court rules").

10. In my opinion, it would be inadequate merely to add "rule of court" or "court rule" after the exception in Colo. RPC 3.5(b) for ex parte communications permitted by "law or court order." CJC Rule 2.9(A) does not independently authorize lawyers to do anything. It grants authority to judges only. For this reason I phrased the exception to give authority to the lawyer *only if and when* the judge exercised his or her authority.[3] As the proposed language is worded, a lawyer would not be permitted to initiate an ex parte communication with a judge for scheduling purposes but would be permitted to participate in one that is initiated by a judge. If the consensus is that a lawyer should have independent authority to initiate an ex parte communication for purposes of scheduling, for example, Colo. RPC 3.5(b) should just say so rather than refer to the CJC.

11. The proposed revision to Colo. RPC 3.5(b) refers specifically to subparagraphs (1) and (4) of CJC Rule 2.9(A), instead of "CJC Rule 2.9(A)" or "the Code of Judicial Conduct" (as in the Vermont version). A specific reference limits and clarifies the permitted exceptions. Also, the other exceptions in CJC Rule 2.9(A)—(2), (3) and (5)—are either inapplicable to lawyers—(2) and (3)—or redundant of an exception in Colo. RPC 3.5(b)—(5).

[3] For the same reason, I do not believe that DR 7-110(B)(4) was properly worded, as it referred to authority that was not the lawyer's to exercise. By analogy, it seems self-evident that rules such as Colo. RPC 1.6(b)(7) and 4.2, which permit lawyers to engage in certain otherwise prohibited conduct when authorized to do so by "law or a court order," refer to laws and court orders that authorize the lawyer (individually or as the agent of the client) to do something, not laws and court orders that authorize a third party to do something.

12. Finally, I proposed a revision of Comment [2] to Colo. RPC 3.5, which corresponds to Colo. RPC 3.5(b). The final two sentences of proposed Comment [2] summarize CJC Rule 2.9(A)(1) and (4). They are not essential, and it might be sufficient simply to cite to those rules (as Arizona does). Of course, the scope of Comment [2] should correspond to Colo. RPC 3.5(b) itself. For example, if Colo. RPC 3.5(b) were revised to refer only to CJC Rule 2.9(A) and not to specific subparagraphs of that rule, Comment [2] probably should not refer to specific subparagraphs either.

[redacted]

Lisa Podsiadlik

From: Marcy Glenn
Sent: Thursday, October 21, 2010 1:56 PM
To: Lisa Podsiadlik
Subject: FW: Letter on Behalf of the IP Section of the Colorado Bar Association
Attachments: LTR GLENN RE RULES.pdf; ATT00001..htm

ppa

-----Original Message-----
From: John Posthumus [mailto:jposthumus@sheridanross.com]
Sent: Thursday, October 21, 2010 1:51 PM
To: Marcy Glenn
Cc: Adam Scoville; Michael Dulin
Subject: Letter on Behalf of the IP Section of the Colorado Bar Association

Hi Marcy,

Please see the attached letter.

Thanks,

John

JOHN R. POSTHUMUS
Attorney

SHERIDAN ROSS PC / attorneys at innovation patent / trademark / copyright

1560 BROADWAY, SUITE 1200 / DENVER, CO / 80202-5141 P 303.863.2963 / C 303.472.8416 / F 303.863.0223 / www.sheridanross.com<http://www.sheridanross.com>

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SHERIDAN ROSS pc attorneys at innovation

October 21, 2010

Marcy Glenn, Esq.
Holland & Hart
555 17th St., Suite 3200
Denver, CO 80202

John R. Posthumus
Attorney
Direct: 303.863.2963
jposthumus@sheridanross.com

Via Email

Dear Marcy:

I'm writing to you in your capacity as Chair, Colorado Supreme Court Standing Committee on Rules of Professional Conduct.

I'm the Chair of the Intellectual Property Section of the Colorado Bar Association, which includes over 700 practicing IP lawyers. The IP Section would like to raise an issue for the Standing Committee's consideration.

IP lawyers in Colorado often face an dilemma balancing the requirements of Fed. R. Civ. P. 11 and Rules 4.1 and 4.3 when conducting prefiling investigations for patent, copyright and trademark complaints. Fed. R. Civ. P. 11 requires a lawyer to make a reasonable inquiry before asserting a patent/copyright/trademark infringement claim in a complaint. Often, to satisfy the Rule 11 obligation, an IP lawyer, directly or through non-attorney staff or a private investigator, may need to collect information from unrepresented or represented third parties. For example, in trademark cases, a trademark owner and/or their lawyers may hire investigators to pose as purchasers, or potential purchasers to ascertain how the alleged infringer or counterfeiter markets infringing or counterfeit goods or services to the consuming public or to ascertain the source of infringing or counterfeit goods or services.

A Colorado IP lawyer's obligation under Rule 11 may create tension with the lawyer's obligations under Rules 4.1 and 4.3 of the Colorado Rules of Professional Conduct.

On behalf of its membership, the IP Section seeks guidance from the Standing Committee and one possible direction may be the adoption of comments in Rules 4.1 and/or 4.3.

I am joined in this effort by The IP Section's Secretary/Treasurer Michael Dulin (Hensley Kim & Holzer, LLC) and Project Leader Adam Scoville (RE/MAX, LLC). Should the Standing Committee be inclined to investigate this matter, we stand ready to support these efforts in any way possible.

Sincerely,

SHERIDAN ROSS P.C.

John Posthumus

John R. Posthumus

cc: Adam Scoville, Esq.
Michael Dulin, Esq.

Lisa Podsiadlik

From: Marcy Glenn
Sent: Sunday, October 24, 2010 11:39 AM
To: Lisa Podsiadlik
Subject: FW: ABA Major Disaster Rule
Attachments: ABA Major Disaster Rule.doc; ABA Major Disaster Rule Report-Client Protection.doc; ABA Major Disaster Rule State Implementation.doc

PPA - thanks.

From: John Gleason [john.gleason@csc.state.co.us]
Sent: Sunday, October 24, 2010 11:12 AM
To: Marcy Glenn
Subject: ABA Major Disaster Rule

Good Morning Marcy: The court advised me that they would like to consider the ABA Model Rule regarding major disasters. I am attaching all of the relevant information. Would you kindly place this on the agenda for our next meeting. Thank you. John

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ABA *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*

(Adopted February12, 2007)

RULE ___. PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER

(a) *Determination of existence of major disaster.* Solely for purposes of this Rule, this Court shall determine when an emergency affecting the justice system, as a result of a natural or other major disaster has occurred in:

(1) this jurisdiction and whether the emergency caused by the major disaster affects the entirety or only a part of this jurisdiction, or

(2) another jurisdiction but only after such a determination and its geographical scope have been made by the highest court of that jurisdiction. The authority to engage in the temporary practice of law in this jurisdiction pursuant to paragraph (c) shall extend only to lawyers who principally practice in the area of such other jurisdiction determined to have suffered a major disaster causing an emergency affecting the justice system and the provision of legal services.

(b) *Temporary practice in this jurisdiction following major disaster.* Following the determination of an emergency affecting the justice system in this jurisdiction pursuant to paragraph (a) of this Rule, or a determination that persons displaced by a major disaster in another jurisdiction and residing in this jurisdiction are in need of pro bono services and the assistance of lawyers from outside of this jurisdiction is required to help provide such assistance, a lawyer authorized to practice law in another United States jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Such legal services must be provided on a *pro bono* basis without compensation, expectation of compensation or other direct or indirect pecuniary gain to the lawyer. Such legal services shall be assigned and supervised through an established not-for-profit bar association, *pro bono* program or legal services program or through such organization(s) specifically designated by this Court.

(c) *Temporary practice in this jurisdiction following major disaster in another jurisdiction.* Following the determination of a major disaster in another United States jurisdiction, a lawyer who is authorized to practice law and who principally practices in that affected jurisdiction, and who is not disbarred, suspended from practice or otherwise restricted from practice in any jurisdiction, may provide legal services in this jurisdiction on a temporary basis. Those legal services must arise out of and be reasonably related to that lawyer's practice of law in the jurisdiction, or area of such other jurisdiction, where the major disaster occurred.

(d) *Duration of authority for temporary practice.* The authority to practice law in this jurisdiction granted by paragraph (b) of this Rule shall end when this Court determines that the conditions caused by the major disaster in this jurisdiction have ended except that a lawyer then representing clients in this jurisdiction pursuant to paragraph (b) is authorized to continue the provision of legal services for such time

as is reasonably necessary to complete the representation, but the lawyer shall not thereafter accept new clients. The authority to practice law in this jurisdiction granted by paragraph (c) of this Rule shall end [60] days after this Court declares that the conditions caused by the major disaster in the affected jurisdiction have ended.

(e) Court appearances. The authority granted by this Rule does not include appearances in court except:

(1) pursuant to that court's *pro hac vice* admission rule and, if such authority is granted, any fees for such admission shall be waived; or

(2) if this Court, in any determination made under paragraph (a), grants blanket permission to appear in all or designated courts of this jurisdiction to lawyers providing legal services pursuant to paragraph (b). If such an authorization is included, any *pro hac vice* admission fees shall be waived.

(f) *Disciplinary authority and registration requirement.* Lawyers providing legal services in this jurisdiction pursuant to paragraphs (b) or (c) are subject to this Court's disciplinary authority and the *Rules of Professional Conduct* of this jurisdiction as provided in Rule 8.5 of the *Rules of Professional Conduct.* Lawyers providing legal services in this jurisdiction under paragraphs (b) or (c) shall, within 30 days from the commencement of the provision of legal services, file a registration statement with the Clerk of this Court. The registration statement shall be in a form prescribed by this Court. Any lawyer who provides legal services pursuant to this Rule shall not be considered to be engaged in the unlawful practice of law in this jurisdiction.

(g) *Notification to clients.* Lawyers authorized to practice law in another United States jurisdiction who provide legal services pursuant to this Rule shall inform clients in this jurisdiction of the jurisdiction in which they are authorized to practice law, any limits of that authorization, and that they are not authorized to practice law in this jurisdiction except as permitted by this Rule. They shall not state or imply to any person that they are otherwise authorized to practice law in this jurisdiction.

Comment

[1] A major disaster in this or another jurisdiction may cause an emergency affecting the justice system with respect to the provision of legal services for a sustained period of time interfering with the ability of lawyers admitted and practicing in the affected jurisdiction to continue to represent clients until the disaster has ended. When this happens, lawyers from the affected jurisdiction may need to provide legal services to their clients, on a temporary basis, from an office outside their home jurisdiction. In addition, lawyers in an unaffected jurisdiction may be willing to serve residents of the affected jurisdiction who have unmet legal needs as a result of the disaster or, though independent of the disaster, whose legal needs temporarily are unmet because of disruption to the practices of local lawyers. Lawyers from unaffected jurisdictions may offer to provide these legal services either by traveling to the affected jurisdiction or from their own offices or both, provided the legal services are provided on a *pro bono* basis through an authorized not-for-profit entity or such other organization(s) specifically

designated by this Court. A major disaster includes, for example, a hurricane, earthquake, flood, wildfire, tornado, public health emergency or an event caused by terrorists or acts of war.

[2] Under paragraph (a)(1), this Court shall determine whether a major disaster causing an emergency affecting the justice system has occurred in this jurisdiction, or in a part of this jurisdiction, for purposes of triggering paragraph (b) of this Rule. This Court may, for example, determine that the entirety of this jurisdiction has suffered a disruption in the provision of legal services or that only certain areas have suffered such an event. The authority granted by paragraph (b) shall extend only to lawyers authorized to practice law and not disbarred, suspended from practice or otherwise restricted from practice in any other manner in any other jurisdiction.

[3] Paragraph (b) permits lawyers authorized to practice law in an unaffected jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, to provide pro bono legal services to residents of the affected jurisdiction following determination of an emergency caused by a major disaster; notwithstanding that they are not otherwise authorized to practice law in the affected jurisdiction. Other restrictions on a lawyer's license to practice law that would prohibit that lawyer from providing legal services pursuant to this Rule include, but are not limited to, probation, inactive status, disability inactive status or a non-disciplinary administrative suspension for failure to complete continuing legal education or other requirements. Lawyers on probation may be subject to monitoring and specific limitations on their practices. Lawyers on inactive status, despite being characterized in many jurisdictions as being "in good standing," and lawyers on disability inactive status are not permitted to practice law. Public protection warrants exclusion of these lawyers from the authority to provide legal services as defined in this Rule. Lawyers permitted to provide legal services pursuant to this Rule must do so without fee or other compensation, or expectation thereof. Their service must be provided through an established not-for-profit organization that is authorized to provide legal services either in its own name or that provides representation of clients through employed or cooperating lawyers. Alternatively, this court may instead designate other specific organization(s) through which these legal services may be rendered. Under paragraph (b), an *emeritus* lawyer from another United State jurisdiction may provide *pro bono* legal services on a temporary basis in this jurisdiction provided that the ~~*emeritus* lawyer is authorized to provide *pro bono* legal services in that jurisdiction pursuant to~~ that jurisdiction's *emeritus* or *pro bono* practice rule. Lawyers may also be authorized to provide legal services in this jurisdiction on a temporary basis under Rule 5.5(c) of the *Rules of Professional Conduct.*

[4] Lawyers authorized to practice law in another jurisdiction, who principally practice in the area of such other jurisdiction determined by this Court to have suffered a major disaster, and whose practices are disrupted by a major disaster there, and who are not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, are authorized under paragraph (c) to provide legal services on a temporary basis in this jurisdiction. Those legal services must arise out of and be reasonably related to the lawyer's practice of law in the affected jurisdiction. For purposes of this Rule, the determination of a major disaster in another jurisdiction should first be made by the highest court of appellate jurisdiction in that jurisdiction. For the meaning of "arise out of and reasonably related to," see Rule 5.5 Comment [14], *Rules of Professional Conduct.*

[5] Emergency conditions created by major disasters end, and when they do, the authority created by paragraphs (b) and (c) also ends with appropriate notice to enable lawyers to plan and

to complete pending legal matters. Under paragraph (d), this Court determines when those conditions end only for purposes of this Rule. The authority granted under paragraph (b) shall end upon such determination except that lawyers assisting residents of this jurisdiction under paragraph (b) may continue to do so for such longer period as is reasonably necessary to complete the representation. The authority created by paragraph (c) will end [60] days after this Court makes such a determination with regard to an affected jurisdiction.

[6] Paragraphs (b) and (c) do not authorize lawyers to appear in the courts of this jurisdiction. Court appearances are subject to the *pro hac vice* admission rules of the particular court. This Court may, in a determination made under paragraph (e)(2), include authorization for lawyers who provide legal services in this jurisdiction under paragraph (b) to appear in all or designated courts of this jurisdiction without need for such *pro hac vice* admission. If such an authorization is included, any *pro hac vice* admission fees shall be waived. A lawyer who has appeared in the courts of this jurisdiction pursuant to paragraph (e) may continue to appear in any such matter notwithstanding a declaration under paragraph (d) that the conditions created by major disaster have ended. Furthermore, withdrawal from a court appearance is subject to Rule 1.16 of the *Rules of Professional Conduct.*

[7] Authorization to practice law as a foreign legal consultant or in-house counsel in a United States jurisdiction offers lawyers a limited scope of permitted practice and may therefore restrict that person's ability to provide legal services under this Rule.

[8] The ABA National Lawyer Regulatory Data Bank is available to help determine whether any lawyer seeking to practice in this jurisdiction pursuant to paragraphs (b) or (c) of this Rule is disbarred, suspended from practice or otherwise subject to a public disciplinary sanction that would restrict the lawyer's ability to practice law in any other jurisdiction.

REVISED REPORT 104
January 29, 2007

REPORT

BACKGROUND

In the summer of 2005, Alabama, Louisiana and Mississippi were devastated by Hurricanes Katrina and Rita. The physical damage done in those jurisdictions was catastrophic but the storms also damaged and crippled their legal systems. In response, then American Bar Association President Michael S. Greco formed the ABA Task Force on Hurricane Katrina (the "Task Force"). One of the most significant early efforts of the Task Force was advocating the suspension of unlicensed practice of law rules by various states impacted by the hurricane so that lawyers from other jurisdictions could volunteer to provide pro bono legal services in the affected jurisdictions.[1]

The Task Force soon recognized the need for a model rule that would allow out-of-state lawyers to provide pro bono legal services in an affected jurisdiction and lawyers in the affected jurisdiction whose legal practices had been disrupted by a major disaster to practice law on a temporary basis in an unaffected jurisdiction. Both the highest court of a jurisdiction affected by the major disaster and the highest courts of jurisdictions not affected by the disaster could implement the Rule on an emergency basis. In February 2006, the Task Force approached the ABA Coordinating Council for the Center for Professional Responsibility and requested assistance in drafting such a model rule. In light of its jurisdictional statement that includes the multijurisdictional practice of law and the unlicensed practice of law, the Standing Committee on Client Protection (the "Committee") agreed to undertake the project.

With the assistance of Professor Stephen Gillers, Chair of the ABA Joint Committee on Lawyer Regulation and former member of the Commission on Multijurisdictional Practice, the Committee spent the next several months researching the issues and the law and preparing drafts of model rules. On September 6, 2006, the Committee circulated for comment to all ABA entities and other interested parties a proposed new Model Rule of Professional Conduct 5.8 (Provision of Legal Services Following Determination of Catastrophic Event) and a Model Court Rule with the same title. The ABA entities and other interested parties were requested to comment on the substance of the Model Rule/Model Court Rule and whether the topic should be addressed in a Model Rule of Professional Conduct or in a Model Court Rule.[2]

It was the consensus of the responding entities, including the Standing Committee on Ethics and Professional Responsibility, that the issues to be addressed were administrative matters involving the temporary practice of law and that they should be addressed in a Model Court Rule. The Standing Committee on Ethics and Professional Responsibility believes that the proposed Model Court Rule, if adopted, would effectively facilitate the provision of legal services in urgent

[1] *In the Wake of the Storm: The ABA Responds to Hurricane Katrina.* Report of the ABA Task Force on Hurricane Katrina. www.abanet.org/katrina

[2] The Committee received comments from numerous ABA entities including: the Standing Committees on Ethics and Professional Responsibility, Professional Discipline, Professionalism, Pro Bono and Public Service, Legal Aid and Indigent Defendants, Delivery of Legal Services, the Commissions on Interest on Lawyers' Trust Accounts and Law and Aging, the Task Force on GATS Legal Services Negotiations, the National Organization of Bar Counsel and the Association of Corporate Counsel.

situations, such as the occurrence of natural disasters. The Ethics Committee also believes that because the creation of a mechanism for making legal services available is not an ethical, but essentially an administrative and operational concern of each state's highest court, it is appropriate that the subject be addressed by a Model Court Rule, rather than a Rule of Professional Conduct, and supports its adoption by the House of Delegates. The Ethics Committee agrees that proposed amended Comment [14] to Model Rule of Professional Conduct 5.5, which serves as an important cross-reference to any such rule of court, is a necessary and helpful addition to the Model Rules, and supports its adoption by the House of Delegates as well.

MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER

An emergency affecting the justice system, as a result of a natural or other major disaster, may for a sustained period of time interfere with the ability of lawyers admitted and practicing in the affected jurisdiction to continue to represent clients until the disaster has ended. A natural or other major disaster includes, for example, a hurricane, earthquake, flood, wildfire, tornado, public health emergency or an event caused by terrorists or acts of war. When this happens, lawyers from the affected jurisdiction may need to provide legal services to their clients, on a temporary basis, from an office outside their home jurisdiction. In addition, lawyers in an unaffected jurisdiction may be willing to serve residents of the affected jurisdiction who have unmet legal needs as a result of the disaster or whose legal needs temporarily are unmet because of disruption to the practices of local lawyers.

Lawyers from unaffected jurisdictions may offer to provide these legal services either by traveling to the affected jurisdiction or from their own offices or both, provided the legal services are provided on a pro bono basis through an authorized not-for-profit legal services organization or such other organizations specifically designated by the highest court of the affected jurisdiction.

Under the Model Court Rule, the highest court in the affected jurisdiction shall determine whether an emergency affecting the justice system as a result of a natural or other major disaster has occurred in the jurisdiction, or in a part of the jurisdiction, for purposes of triggering paragraph (b) of the Model Court Rule. The regulation of the practice of law by the judicial branch of government, which includes jurisdictional limits on legal practice, is a fundamental principle recently re-affirmed as policy by the American Bar Association.[3] The court in making a determination whether an emergency affecting the justice system has occurred can take judicial notice of any Presidential proclamations or declarations by the governor or executive officer of an affected jurisdiction.

Paragraph (b) permits lawyers authorized to practice law in an unaffected jurisdiction, and not disbarred, suspended from practice or otherwise restricted from practicing law in any other manner in any other jurisdiction, to provide pro bono legal services to residents of the affected jurisdiction following determination of an emergency affecting the justice system and the provision of legal services. Lawyers permitted to provide legal services pursuant to this Model

[3] Report 201A, *Regulation of the Practice of Law by the Judiciary*, adopted August 12, 2002.

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Court Rule must do so without fee or other compensation, or expectation thereof. Their service must be provided through an established not-for-profit organization that is authorized to provide legal services either in its own name or that provides representation of clients through employed or cooperating lawyers. The rules governing the not-for-profit organization will determine who should be considered an eligible client in light of the circumstances caused by the disaster.

Alternatively, the Court may instead designate other specific organizations through which these legal services may be rendered. Under paragraph (b), an emeritus lawyer from another United State jurisdiction may provide pro bono legal services on a temporary basis in this jurisdiction provided that the emeritus lawyer is authorized to provide pro bono legal services in that jurisdiction pursuant to that jurisdiction's emeritus or pro bono practice rule. Lawyers may also be authorized under paragraph (b) of this Rule to provide legal services on a temporary basis in an affected jurisdiction, or to provide legal services on a pro bono basis to the citizens of an affected jurisdiction who have been displaced to and are temporarily residing in an unaffected jurisdiction.~~, under Rule 5.5(c) of the Rules of Professional Conduct.~~

Lawyers authorized to practice law in an affected jurisdiction, as determined by the highest court of the affected jurisdiction, and whose practices are disrupted by a major disaster there, are authorized under paragraph (c) to provide legal services on a temporary basis in the jurisdiction adopting the Model Court Rule. Those legal services must arise out of and be reasonably related to the lawyer's practice of law in the affected jurisdiction. The Court in the affected jurisdiction shall determine when a major disaster has occurred in another jurisdiction but only after such a determination and the geographical scope of the disaster have been made by the highest court of that other jurisdiction. The authority to engage in the temporary practice of law in an unaffected jurisdiction pursuant to paragraph (c) shall extend only to those lawyers who principally practice in the area of a jurisdiction determined to have suffered an emergency affecting the justice system and the provision of legal services.

Emergency conditions created by major disasters end, and when they do, the authority created by the Model Court Rule also ends with appropriate notice to enable lawyers to plan and to ~~complete pending legal matters. Under paragraph (d), the highest court in the affected~~ jurisdiction determines when those conditions end only for purposes of the Model Court Rule. The authority granted under paragraph (b) shall end upon such determination except that lawyers assisting residents of the affected jurisdiction under paragraph (b) may continue to do so for such longer period as is reasonably necessary to complete the representation. The authority created by paragraph (c) will end 60 days, or as otherwise enacted in the Rule, after the highest court in an unaffected jurisdiction makes such a determination with regard to an affected jurisdiction. The parameters created by the Model Court Rule are intended to be flexible and the highest court in a jurisdiction has the discretion to extend the time period during which out-of-state lawyers may provide pro bono legal services in an affected jurisdiction or during which lawyers displaced by a disaster may practice law on a temporary basis in an unaffected jurisdiction.

Paragraphs (b) and (c) do not authorize lawyers to appear in the courts of the affected jurisdiction. Court appearances are subject to the *pro hac vice* admission rules of the particular court. The highest court may, in a determination made under paragraph (e)(2), include authorization for lawyers who provide legal services in the jurisdiction under paragraph (b) to

appear in all or designated courts of the jurisdiction without need for such *pro hac vice* admission. If such an authorization is included, any *pro hac vice* admission fees shall be waived. A lawyer who has appeared in the courts of an affected jurisdiction pursuant to paragraph (e) may continue to appear in any such matter notwithstanding a declaration under paragraph (d) that the conditions created by the major disaster have ended. Furthermore, withdrawal from a court appearance is subject to Rule 1.16 of the Rules of Professional Conduct.

AMENDMENT TO COMMENTARY OF RULE 5.5 OF THE *RULES OF PROFESSIONAL CONDUCT*

Following the occurrence of a major disaster, lawyers practicing law outside the affected jurisdiction will begin to research what legal services they may provide on a temporary basis to the citizens of the affected jurisdiction. In addition, not-for-profit legal organizations within the affected jurisdiction will begin to research what legal services out-of-state lawyers may provide in their jurisdiction on a temporary basis. At some point, the lawyers and not-for-profit organizations will consult the *Rules of Professional Conduct*. While Rule 5.5 of the *Rules of Professional Conduct* is titled "Unauthorized Practice of Law: Multijurisdictional Practice of Law," Rule 5.5 does not directly address the provision of pro bono legal services by out-of-state lawyers in a jurisdiction affected by a major disaster nor does it address the temporary practice of law in an unaffected jurisdiction by displaced lawyers principally practicing in the affected jurisdiction. The *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster* does address these issues. Upon the suggestion of the Standing Committee on Ethics and Professional Responsibility, whose jurisdictional statement includes recommending to the ABA House of Delegates amendments to the *Rules of Professional Conduct*, the Committee recommends that Comment [14] to Rule 5.5 of the *Rules of Professional Conduct* be amended to include a cross-references to the *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster*.

CONCLUSION

Following Hurricanes Katrina and Rita, thousands of lawyers from across the United States were ~~inspired to offer their legal expertise on a pro bono basis to the citizens of the affected~~ jurisdictions. Unfortunately, in some instances, the delivery of those pro bono legal services was hampered by the existence of unlicensed practice of law statutes and rules. The Committee believes that the adoption of the *Model Court Rule on Provision of Legal Services Following Determination of Major Disaster* will allow lawyers to provide temporary pro bono legal services and that it will allow lawyers whose legal practices have been disrupted by major disasters to continue to practice law on a temporary basis in an unaffected jurisdiction. The Model Court Rule will facilitate the delivery of pro bono legal services while at the same time insuring the proper regulation of the lawyers providing those legal services in an affected jurisdiction and those displaced lawyers practicing law on a temporary basis in an unaffected jurisdiction

Janet Green Marbley, Chair
Standing Committee on Client Protection

February 2007

As of October 20, 2010

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON CLIENT PROTECTION

STATE IMPLEMENTATION OF
ABA *MODEL COURT RULE ON PROVISION OF LEGAL SERVICES FOLLOWING DETERMINATION OF MAJOR DISASTER*

	Adopted Rule (9) (AZ, DE, IA, MN, MO, NJ, OR, TN and WA)	Considering Adoption (18) (AL,CA, DC, FL, GA, HI, IL, LA, MD, MS, MT, NE, NH, NY, ND, OK, TX and VA)	Decided Not To Adopt (2) (MI and NC)	Other Info
AL		X		
AK				
AZ	**Rule 39, Rules of the Supreme Court** http://www.supreme.state.az.us/rules/2008%20Rules%20a/R-07-0017.pdf			
AR				
CA		X		In May 2008 the Board of Governors of the State Bar of California voted to recommend to the California Supreme Court that no action need be taken on the model court rule.
CT				No proposal pending. Connecticut has adopted Section 1-9B of the Superior Court rules, effective January 1, 2011, which provides that in the event that the Governor declares a public health emergency or a civil preparedness emergency, the Chief Justice or in certain circumstances the Chairman of the Rules Committee may call a meeting of the Rules Committee at which that committee will have the

	Adopted Rule (9) (AZ, DE, IA, MN, MO, NJ, OR, TN and WA)	Considering Adoption (18) (AL,CA, DC, FL, GA, HI, IL, LA, MD, MS, MT, NE, NH, NY, ND, OK, TX and VA)	Decided Not To Adopt (2) (MI and NC)	Other Info
				power to adopt, revise and suspend rules deemed necessary in light of the emergency. (See also Public Act 10-43 attached which gives the Chief Justice and the Chief Court Administrator emergency powers.)
DE	**Supreme Court Rule 58** Rule Amendment 58 and DLRPC Rule 5.5.			
DC		X		DC Bar has established a working group to make recommendation to the Board of Governors. Rule 49 may already allow "temporary/ intermittent practice".
FL		X		Florida is recommending adoption and new Rule 1-3.12 has been approved by The Florida Bar Board of Governors at their July 2008 meeting and the existing Rule 4-5.5 was changed to adopt the Model Court Rule. The Rule changes needs to be submitted to the Supreme Court of Florida for approval. The Florida Bar and the Supreme Court of Florida are in negotiations to change the cycle for submitting rule changes from 1 to 2 years. The Florida Bar anticipates submitting the next Rule package to the Supreme Court of Florida within the next 12-24 months.
GA		X		A Bar committee has been working on getting the Court to approve it. If the Court approves the Rule, they will amend the comment to 5.5 as the ABA did.
HI		X		The Hawaii Supreme Court considered the ABA Model Rule on Major Disasters in March 2007 and referred the proposal to the court's Commission on Professionalism. The Commission has not reported back.

	Adopted Rule (9) (AZ, DE, IA, MN, MO, NJ, OR, TN and WA)	Considering Adoption (18) (AL, CA, DC, FL, GA, HI, IL, LA, MD, MS, MT, NE, NH, NY, ND, OK, TX and VA)	Decided Not To Adopt (2) (MI and NC)	Other Info
ID				
IL		X		Materials forwarded to the ISBA's Standing Committee on Professional Responsibility. Their next meeting is scheduled for February 8, 2008.
IA	Iowa Court Rules 31.17, 31.25 (Form 3) and Iowa Rule of Professional Conduct 32:5.5 Comment [14a] (May 14, 2007, effective immediately) http://www.legis.state.ia.us/Rules/Current/court/courtrules.pdf			
KS				
KY				
LA		X		Used the ABA Model Court Rule as a starting point, but suggested modifications to the Court. Pending as of June 15, 2010.
MD		X		Court of Appeals studying the issue.
MA				

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	Adopted Rule (9) (AZ, DE, IA, MN, MO, NJ, OR, TN and WA)	Considering Adoption (18) (AL, CA, DC, FL, GA, HI, IL, LA, MD, MS, MT, NE, NH, NY, ND, OK, TX and VA)	Decided Not To Adopt (2) (MI and NC)	Other Info
MI			X	On November 5, 2009 the Michigan Supreme Court decided not to publish for comment a proposed Major Disaster Rule.
MN	Minnesota Supreme Court Rule on the Provision of Legal Services Following the Determination of a Major Disaster http://www.mncourts.gov/Documents/0/Public/Clerks_Office/2009_12_10_Order_Leg_Svc_Rule.pdf			
MS		On November 27, 2007 the Special Panel on Rules Governing Admission to the Mississippi Bar submitted a report and Recommendations to the Mississippi Supreme Court. The panel recommended the adoption of new Mississippi Rules of Appellate Procedure Rule 46(f): Temporary Admission and Practice upon Declared Emergencies.		On October 15, 2007, the Sup. Ct. of Mississippi adopted an Amendment to Rule 46 of the MS Rules of Appellate Procedure to include a provision for Pro Bono Publicus Attorneys. The purpose of Rule 46(f) is to permit and encourage attorneys who do not engage in the active practice of law in MS to provide legal representation to persons who cannot afford private legal services. See http://www.mssc.state.ms.us/Images/Opinions/143112.pdf Although Rule 46(f) doesn't quite emulate the Katrina Model Court Rule, it does facilitate deployment of out-of-state pro bono lawyers (whether or not there is a declared disaster).
	Adopted Rule effective January 1, 2008 http://www.mobar.org			

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	Adopted Rule (9) (AZ, DE, IA, MN, MO, NJ, OR, TN and WA)	Considering Adoption (18) (AL, CA, DC, FL, GA, HI, IL, LA, MD, MS, MT, NE, NH, NY, ND, OK, TX and VA)	Decided Not To Adopt (2) (MI and NC)	Other Info
MO	/data/esq07/oct19/corrected-order.pdf			
MT		X		**STATE BAR OF MONTANA BOARD OF TRUSTEES September 17,2008 Regular Meeting** The ABA has asked Bars with no reciprocity to consider a disaster plan that would allow for displaced lawyers to temporarily practice law in their respective states. **A motion was made, and seconded, to table this item to the December 2009 board meeting; motion approved.**
NE		X		Volunteer Lawyers Committee is studying.
NV				
NH		X		The NH Supreme Court Advisory Committee on Rules considered the ABA Model Court Rule and in March 2008 referred it to public hearing. Next hearings is 9/910. http://www.courts.state.nh.us/committees/advisoryrules/mar2008m.pdf

	Adopted Rule (9) (AZ, DE, IA, MN, MO, NJ, OR, TN and WA)	Considering Adoption (18) (AL,CA, DC, FL, GA, HI, IL, LA, MD, MS, MT, NE, NH, NY, ND, OK, TX and VA)	Decided Not To Adopt (2) (MI and NC)	Other Info
NJ	Rules Governing the Courts of the State of New Jersey (Effective September 1, 2008). Rule 1:21-10. Provision of Legal Services Following Determination of Major Disaster http://www.law.com/jsp/nj/PubArticleNJ.jsp?id=1202422998686			
NM				
NY		X		On June 30, 2007 the NY State Bar House of Delegates approved a Katrina Model Rule that is similar to the ABA Model Court Rule. On July 3, 2007 the rule was sent to the NY Court of Appeals for approval.
NC			On January 24, 2008 the North Carolina State Bar Issues Steering Comm. decided not to adopt. The Committee believed that existing provisions in the State's administrative rules and Rules of Professional Conduct are sufficient.	
ND		X		The North Dakota Supreme Court has referred the matter to one of it standing committees on more than one occasion but the Rule has not yet been voted on by the

	Adopted Rule (9) (AZ, DE, IA, MN, MO, NJ, OR, TN and WA)	Considering Adoption (18) (AL, CA, DC, FL, GA, HI, IL, LA, MD, MS, MT, NE, NH, NY, ND, OK, TX and VA)	Decided Not To Adopt (2) (MI and NC)	Other Info
				Court.
OH				
OK		X		
OR	Supreme Court Rule 146 http://www.publications.ojd.state.or.us/RULE146.htm			
PA				On PBA Ethics Committee Agenda for the Committee's February 19, 2008 meeting.
SC				
SD				
TN	Tenn. Sup. Ct. R. 47 (Effective January 1, 2010).			
TX		X		(Chief Justice Wallace Jefferson recently appointed Denise Davis as Chair of Task Force to study.)
UT				
VT				
VA		X		As of September 16, 2008, pending in the Virginia Supreme Court. http://www.vsb.org/site/regulation/provision-of-legal-services-following-determination-of-major-disaster
WA	Effective September 1,			

	Adopted Rule (9) (AZ, DE, IA, MN, MO, NJ, OR, TN and WA)	Considering Adoption (18) (AL, CA, DC, FL, GA, HI, IL, LA, MD, MS, MT, NE, NH, NY, ND, OK, TX and VA)	Decided Not To Adopt (2) (MI and NC)	Other Info
	2008 http://www.courts.wa.gov/court_Rules/proposed/2007Nov/APR27.doc			
WV				
WI				
WY				

Supreme Court of Colorado

101 West Colfax Avenue, Suite 800
Denver, CO 80202-5315
michael.bender@judicial.state.co.us

MICHAEL L. BENDER
JUSTICE

TELEPHONE: (303) 837-3741
FACSIMILE: (303) 864-4538

October 28, 2010

Lloyd C. Kordick
Alan Higbie
James Murphy
Trial Lawyers of Colorado
805 S. Cascade Avenue
Colorado Springs, CO 80903

Re: Advertising in Colorado

Dear Mr. Kordick, Mr. Higbie, and Mr. Murphy:

Thank you very much for your suggestion that we consider the Iowa Rules regarding attorney advertising. I am, by copy of this letter, referring your request to Marcy Glenn, who chairs the Supreme Court Rules of Professional Conduct Committee.

Any rules, which the Court promulgates, must be referred to the Court after the committee has studied the new proposed rules and made recommendations to the Court and after an opportunity for a public hearing on the new proposed rules occurs.

Thank you again for your interest in this matter, and we will follow up.

Sincerely yours,

Michael L. Bender

Michael L. Bender

MLB/vad

cc: Marcy Glenn w/enclosures
Justice Nathan B. Coats w/enclosures

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TRIAL LAWYERS OF COLORADO

805 S. Cascade Ave.
Colorado Springs, CO 80903
719-475-8460

October 20, 2010

The Honorable Justice Michael L. Bender
Colorado Supreme Court
101 W. Colfax #800
Denver, CO 80202

RE: Advertising in Colorado

Dear Justice Bender:

The Trial Lawyers of Colorado are trial attorneys practicing primarily in Boulder, Denver, Colorado Springs and Pueblo. Please be kind enough to read our enclosed Petition. The Petition has been thoroughly debated and revised on multiple occasions to attempt to explain what we believe to be a serious problem. We assume that you or other members of the Court may have had occasion to see the advertising to which we refer.

We have also enclosed a copy of the Iowa Rules for Attorney Advertising. We ask you to consult with other judges and consider directly adopting the Iowa Rules for Colorado. This Court has authority under C.R.S. §13-2-102 to adopt appropriate rules *"...for the courts of record in the State of Colorado practice and procedure in civil actions. ..."*. Previous attempts to control and regulate advertising have been unsuccessful. We believe that current advertising violates the spirit of existing rules and regulations. We believe that a normal process for rule making would be inadequate to control or regulate the immediate problem. We would ask the Supreme Court to take direct action to adopt necessary rules.

Therefore, we submit to this Court our Petition on behalf of the Trial Lawyers of Colorado Committee on Advertising.

Very truly yours,

Lloyd C. Kordick

Alan Higbie

James Murphy

PETITION TO THE COLORADO SUPREME COURT

805 SOUTH CASCADE AVENUE
COLORADO SPRINGS, COLORADO 80903
PHONE: (719) 475-8460
FAX: (719) 634-8116

July 30, 2010

Colorado Supreme Court
101 W. Colfax #800
Denver, CO 80202

RE: Proposed Rule Changes to the Canon of Professional Ethics
Regarding Television Advertising

Dear Chief Justice Mullarkey:

The Trial Lawyers of Colorado, (TLC) an informal group of experienced trial attorneys representing Coloradans in civil and criminal matters, have determined with other attorneys to petition the Supreme Court to make significant changes and restrictions on television advertising. Our group has generated support for reform outside of our membership. This proposal and letter reflects several meetings of a group of trial attorneys trying to deal with what they believe is a serious issue which is causing damage to the reputation of the judicial system and injury and misinformation to the public.

PROBLEM: The signatories of this petition observe that the dignity of the judicial system and the public's opinion of attorneys have been damaged by irresponsible, confusing and misleading television advertising.

The U.S. Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 452 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) determined that "*commercial speech*" is protected under the First Amendment. The Court ruled that the public has a right to a free flow of commercial information protected under the First Amendment. In *Bates v. State Bar of Arizona*, 433 US 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), the Supreme Court expanded the "*commercial speech doctrine to lawyer advertising.*" The Supreme Court in *Bates, supra*, continued to allow state bar associations to regulate the contents of attorney advertising, stating in pertinent part at p. 2404:

> *If the naivety of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populous is sufficiently informed as to enable it to place advertising in its proper perspective.*

Bates, supra, found that although advertising is protected under the First Amendment, the bar has a role in regulating advertising to protect the public:

> *...We, of course, do not hold that advertising by attorneys may not be ... regulated in any way. We mention some of the clearly permissible limitations on advertising not foreclosed by our holding:*
>
> *1. Advertising that is false, deceptive, misleading, of course, is subject to restraint. ... In fact, because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising, may be found quite inappropriate in legal advertising.*

Bates, supra, gave examples of misleading advertising:

> *For example, advertising claims as to the quality of services...are not susceptible of measurement or verification; accordingly, such claims may be so lacking to be misleading as to warrant restriction.*

The Supreme Court has upheld multiple limitations on commercial advertising. See *Ohralik v. Ohio State Bar Assoc.*, 436 US 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), which upheld a total ban on in-person solicitation when the primary motivation is the attorney's pecuniary gain. *In Re: R.M.J.*, 455 US 191, 102 S.Ct. 929, 71 L.Ed.2d 65 (1982), where the Court found that although it is improper to completely prohibit an attorney from accurately listing areas of practice, it is appropriate to require disclosure language to avoid misleading the public. *Zauderer* v. *Office of Disciplinary Council*, 471 US 626, 105 S.Ct. 2265, 85 L.Ed. 652 (1985), that upheld the right of the state to require an advertisement for contingent fees to state that an unsuccessful litigant may be responsible for court costs. The Colorado Supreme Court has recognized that television advertising may be misleading to the public and subject an attorney to suit under the Colorado Consumer Protection Act. This Court in *Crowe v. Tull*, 126 P.3d 196 (Colo. 2006) ruled:

> *We exercise our original jurisdiction under Rule 21 to determine that a client may sue his or her attorney for violating the Colorado Consumer Protection Act. ... In this case, the petitioner, Richard Crowe, alleges that respondents, Mark Tull and Azar & Associates employed a statewide marketing program, primarily through television advertising that portrayed the firm as highly skilled at negotiating with insurance companies and promised the firm would obtain full value for its clients' personal injury claims. ... These business practices allegedly constituted an illegal scheme perpetrated on the public and enabled by false and misleading advertising.*

A number of states have passed comprehensive regulations that have been time-tested to preserve the right of the public to make informed decisions, particularly the states of Iowa and Florida have upheld regulations which balances the right of the public to useful commercial advertising but restricts misleading advertising.

THE PROBLEM OF ATTORNEY ADVERTISING IN COLORADO

TV airwaves are inundated with attorney advertising. The original intent of the U.S. Supreme Court in *Bates, supra*, was to permit individuals to have knowledge of the prices charged by attorneys for various legal services and being advised these services were available. Because of

the high cost of TV advertising, it has been effectively limited to personal injury and worker's compensation, where high margins can justify the cost of TV advertising. The problem with this advertising is that it has a direct negative impact on the public's view and understanding of our judicial system. The purpose of our system is to encourage individuals to seek redress of their grievances through orderly and controlled court procedures. Attorneys advertise themselves with names which give the impression of physical strength, power or authority to intimidate. Frank Azar, perhaps Colorado's biggest advertiser, describes himself as "The Strong Arm". This nomenclature "The Strong Arm" is not an earned reputation, but rather a creation of his advertising.[1] The implication is that he has physical power, strength, or power to intimidate which enables him to achieve a better recovery than other attorneys. In commercials he is sometimes compared to a bulldozer and breaks cement walls with a giant arm. Mr. Azar's commercials show him in a helicopter flying to an accident scene, and holding the hand of the victim, as they are placed in the ambulance. The most recent Frank Azar commercial shows Mr. Azar showing up in the emergency room talking to an injured victim's family. The doctors and nurses are discussing the case and one states that the injuries must be serious because Frank Azar was there. This kind of commercial gives the impression that Mr. Azar is held in such regard by members of the medical community and he is so knowledgeable that he knows the extent of the injuries better than the doctors. The doctors hold Azar in such high regard that if he is there, the injury is serious. Such advertising provides the public with no useful information to make rational decisions about legal services. The import of the ad is that Mr. Azar is such a powerful or influential figure that the doctors are considering his presence as an issue in formulating their diagnoses and seriousness of the injuries.

These commercials cast disrepute upon the judicial system and attorneys. In response to this advertising, firms such as Heuser & Heuser depict the attorney (Heuser) on TV carrying a baseball bat. This attorney states that hiring an attorney and getting a recovery "It's just that easy", snapping his fingers. It does not serve any socially valuable purpose to give the impression to the viewing public that receiving an adequate recovery for a personal injury case is as easy as snapping your fingers. Mr. Heuser is shown with a baseball bat which does not provide the public with useful information, but rather is apparently addressed to the Azar commercials. Azar advertises that persons on his ads claim they received a certain dollar amount for their injuries. "*Here's my wreck, and here's my check.*" The Heuser commercials in response have a background voice saying, "*You've heard all this blah-blah-blah*", about attorneys, referring directly to the Azar commercials. Then Heuser produces individuals, who appear to be actors, who say "*I received $50,000, and that's not blah-blah-blah.*" and a series of individuals stating they received so much money and that's not "blah-blah-blah". Mr. Heuser is shown swinging the baseball bat and breaking a window.

The signatories of this Petition are attorneys who pick juries. The most significant TV advertisers generally have little or any actual direct involvement in Colorado jury trials. The attorneys who do a substantial amount of jury trials have found that juries have been directly affected by this advertising. In one commercial, a person is depicted as being involved in an accident and is still behind the steering wheel when he places a call to Frank Azar, who on a split screen is shown answering the phone. This individual does not appear to be injured. The police have not yet been

[1] The "Strong Arm" is a different person in different markets, i.e., John Foy in Atlanta, GA, Brian Loncar in Dallas, TX, etc.

called, nor has he sustained any apparent medical injury. His first telephone call after the accident is to Mr. Azar. These kinds of commercials provoke discussions in the limited *voir dire* in personal injury automobile accident cases. Juries are left with the impression that people who are not injured are entitled and able to seek compensation in court. Plaintiffs who are injured and bringing claims are greeted with suspicion and derision. Most attorneys believe that they have a higher burden with limited *voir dire* to try to sort out these artificially created issues in the minds of jurors.

Our current Colorado regulatory system has not successfully prevented this type of advertising. What does this advertising accomplish? Nowhere in the Heuser, Azar or other advertising, is the client told what percentage fee he is to pay. Nowhere is there competition between these firms to offer better services at a reduced fee. The client does not receive any useful information.

THE PROPOSAL FOR REFORM

The undersigned attorneys propose to restore the dignity of the judicial system and limit public misinformation. The use of such things as baseball bats or a strong arm, have nothing to do with appropriate legal proceedings in a civilized society. The current Colorado regulations regarding advertising found in the Colorado Rules of Professional Conduct 7.1 and 7.2 have proved inadequate. It is not the intent of this Petition to seek affirmative action against any attorney for existing advertising, but to set up a system that prevents such abuses in the future. Colorado's ethical provisions of 7.1-7.2 were adopted many years ago. It appears that several portions of these rules are largely ignored. As this Court noted in a comment to Rule 7.2:

> *Some jurisdictions have extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against 'undignified' advertising. Television is one of the most powerful media for getting information to the public, particularly persons of low to moderate income; prohibiting television advertising, therefore, would impede the flow of information while legal services to many sectors of the public.*

It is our belief that the level and content of advertising has gone well beyond acceptable standards and requires thoughtful and thorough examination which reveals that the spirit of Rules 7.1 and 7.2 are violated by current advertising. Colorado's complaint and enforcement method has been ineffective in restricting or controlling such deceptive

We propose adoption of Iowa Supreme Court rules regarding advertising including Rule 32:7.1 *"Communications Concerning a Lawyer's Services."* This section, a copy of which is attached, would limit abusive and misleading advertising. This rule has been successful in presenting these problems in Iowa. Pertinent to the issue is Rule 32:7.2(e):

> *Information permitted by these rules, articulated only by a single nondramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio or television, or other electronic or telephonic media. In the case of television, no visual display shall be allowed except that allowed in print as*

articulated by the announcer. All such communications shall contain the disclosures required by paragraph (h) when applicable.

The adoption of this rule by Colorado would prohibit the use of props such as "helicopters", "strong arms" and "baseball bats". This has been successfully utilized in Iowa without violating U.S. Supreme Court standards of freedom of expression. We believe that implementation of these rules will result in the public receiving useful and not misleading information. It will result in the public being able to make better informed decisions. It will result in better representation of the public as opposed to their cases being handled by "settlement mills". It will stop the degradation of our judicial system in the eyes of the public.

We, therefore, ask this Court to consider adoption of the Iowa advertising rules.

Respectfully submitted,

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Stephen H. Cook
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Sheila P. Carrigan 12198
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Alyssa A. Roter
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Signature
Michael D. Gross #7301
Print Name & Bar #

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Print Name & Bar #

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Steven T. Nolan
Print Name & Bar #

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LLOYD C KORDICK
Print Name & Bar # 6298

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Alanson Hibbie Jr.
Print Name & Bar # #6635

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HOWARD MORRISON 2161
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Larry Galka, 8146
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Terry Rector #11486
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Print Name & Bar #

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Michael Waters #10745
Print Name & Bar #

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PAUL L. MURPHY #329
Print Name & Bar #

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MARK KANE
Print Name & Bar # 11355

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THOMAS A. DAVIS, III 23563
Print Name & Bar #

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WILLIAM R. RUDGE 16358
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JOHN R. PERRIN 24950
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GREG WALTA #1867
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GERALD R. BLIXT 14886
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GLENN PROSSMAN 16585
Print Name & Bar #

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J. STEPHEN PRICE 3032
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JEFFREY R. HILL 26099
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Print Name & Bar #

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James J Murphy #19277
Print Name & Bar #

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Larry R. Gaddis #1291
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Gary S. Crow #9673
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Thomas J. Herd 9014
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Philip W. Ogden 12098
Print Name & Bar # 12098

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George R. Vaitsholtz
Print Name & Bar # 7179

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Michael J. Harris, #38714
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Gary L. Shupp 8975
Print Name & Bar #

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Jennifer B. James #36105
Print Name & Bar #

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Robert M. Moyers #61
Print Name & Bar #

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Jason Berns, 24070
Print Name & Bar #

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Michael A. Bernigor #1109
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Kansa #1510
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Patrice Maggio 3395
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Jeffrey L Weiss
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Manuel M Weiss 16260
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LORI M. MOORE #17127
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JAMES PARKISH #2543
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Richard M. Lamphere 22144
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Norm Thom 6707
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Toya A Martin 5830
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Eydie Elkins 15971
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Peter A. Goldstein 1406
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Charles D. Trechter 2150
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[illegible] 40642
Print Name & Bar #

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Michael L. Luchetta #16083
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George Meriere 3055
Print Name & Bar #

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Jennifer Charlier Cox #32773
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Signature
Robert L. Hunt 25088
Print Name & Bar #

Signature
Michael Satin 15649
Print Name & Bar #

Signature
Michael Clawson
Print Name & Bar # 2450

Signature
Brian Flannery
Print Name & Bar # 36532

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Kim Whiting
Print Name & Bar # 36462

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ALFRED W. METZGER JR 2336
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Print Name & Bar #

Signature
Leslie Mendes #33393
Print Name & Bar #

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Thomas A. Barnes, Jr. #6590
Print Name & Bar #

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Murray I. Weiner, #14352
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Gregory M. O'Boyle
Print Name & Bar # 29008

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Joseph Lambert #38071
Print Name & Bar #

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JOSEPH J. ARCHULETA #19425
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GARY S. LINK #5828
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John Turner #13017
Print Name & Bar #

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Tim Fields #4037
Print Name & Bar #

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DAWN KUBIK 29565
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STEVEN V. MULLENS 5021
Print Name & Bar #

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William Norland 490
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THOMAS A. NELSON
Print Name & Bar # 17128

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Hon Dennis Rupp 6072
Print Name & Bar #

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John L. Springer
Print Name & Bar # 3458

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Print Name & Bar #

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STEVE BLIDORI 8435
Print Name & Bar #

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Manuel M Weiss 16260
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Cheryl L. Trine, 38150
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Stan A. Goldstein 1406
Print Name & Bar #

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(b) Except as provided in paragraph (a)(2), rule 32:1.10 is inapplicable to a representation governed by this rule.

[Comment][Narrative]

INFORMATION ABOUT LEGAL SERVICES

Rule 32:7.1 Communications Concerning a Lawyer's Services

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

(b) A lawyer shall not communicate with the public using statements that are unverifiable. In addition, advertising permitted under these rules shall not rely on emotional appeal or contain any statement or claim relating to the quality of the lawyer's legal services.

[Comment][Narrative]

Rule 32:7.2 Advertising

(a) The following communications shall not be considered advertising and accordingly are not subject to rules 32:7.2, 32:7.3, and 32:7.4: (1) communications or solicitations for business between lawyers; (2) communications between a lawyer and an existing or former client, provided the lawyer does not know or have reason to know the attorney-client relationship has been terminated; or (3) communications by a lawyer that are in reply to a request for information by a member of the public that was not prompted by unauthorized advertising by the lawyer; information available through a hyperlink on a lawyer's Web site shall constitute this type of communication. Nonetheless, any brochures or pamphlets containing biographical and informational data disseminated to existing clients, former clients, lawyers, or in response to a request for information by a member of the public shall include the disclosures required by paragraph (h) when applicable.

(b) Subject to the limitations contained in these rules, a lawyer may advertise services through written, recorded, or electronic communication, including public media. Any communication made pursuant to this rule shall include the name and office of at least one lawyer or law firm responsible for the content.

(c) Subject to the limitations contained in these rules, a lawyer licensed to practice law in Iowa may permit the inclusion of the lawyer's name, address, telephone number, and designation as a lawyer, in a telephone or city directory, subject to the following requirements:

(1) Only a lawyer's name, address, telephone number, and designation as a lawyer may be alphabetically listed in the residential, business, and classified sections of the telephone or city directory.

(2) Listings in the classified section shall be under the general heading "Lawyers" or "Attorneys," except that a lawyer who has complied with rule 32:7.4(e) may be listed in classifications or headings identifying those fields or areas of practice as listed in rule 32:7.4(a). By further exception, a lawyer qualified under rule 32:7.4 to practice in the field of taxation law also may be listed under the general heading "Tax Preparation" or "Tax Return Preparation" either in lieu of or in addition to the general heading "Lawyers" or "Attorneys."

(3) All other telephone or city directory advertising permitted by these rules, including display or box advertisements, shall include the disclosures required by paragraph (h) when applicable.

(d) Subject to the limitations contained in these rules, a law firm may permit the inclusion of the firm name, address, and telephone number in a telephone or city directory, subject to the following requirements:

(1) The firm name, a list of its members, address, and telephone number may be listed alphabetically in the residential, business, and classified sections of the telephone or city directory.

(2) Listings in the classified section shall be under the general heading "Lawyers" or "Attorneys," except that a law firm may be listed in each of the classifications or headings identifying those fields or areas of practice as listed in rule 32:7.4(a) in which one or more members of the firm are qualified by virtue of compliance with rule 32:7.4(e).

(3) All other telephone or city directory advertising permitted by these rules, including display or box advertising, may contain the firm name, address, and telephone number, and the names of the individual lawyer members of the firm. All display or box advertisements shall include within the advertisement the disclosures required by paragraph (h) when applicable.

(e) Information permitted by these rules, articulated only by a single nondramatic voice, not that of the lawyer, and with no other background sound, may be communicated by radio or television, or other electronic or telephonic media. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications shall contain the disclosures required by paragraph (h) when applicable.

(f) Whether or not the advertisement contains fee information, a lawyer shall preserve for at least three years a copy of each advertisement placed in a newspaper, in the classified section of the telephone or city directory, or in a periodical, a tape of any radio, television, or other electronic or telephonic media commercial, or recording, and a copy of all information placed on the World Wide Web, and a record of the date or dates and name of the publication in which the advertisement appeared or the name of the medium through which it was aired.

(g) The following information may be communicated to the public in the manner permitted by this rule, provided it is presented in a dignified style:

(1) name, including name of law firm, names of professional associates, addresses, telephone numbers, Internet addresses and URLs, and the designation "lawyer," "attorney," "J.D.," "law firm," or the like;

(2) the following descriptions of practice:

(i) "general practice";

(ii) "general practice including but not limited to" followed by one or more fields of practice descriptions set forth in rule 32:7.4(a)-(c); and

(iii) fields of practice, limitation of practice, or specialization, but only to the extent permitted by rule 32:7.4;

(3) date and place of birth;

(4) date and place of admission to the bar of state and federal courts;

(5) schools attended, with dates of graduation, degrees, and other scholastic distinctions;

(6) public or quasi-public offices;

(7) military service;

(8) legal authorships;

(9) legal teaching positions;

(10) memberships, offices, and committee and section assignments in bar associations;

(11) memberships and offices in legal fraternities and legal societies;

(12) technical and professional licenses;

(13) memberships in scientific, technical, and professional associations and societies; and

(14) foreign language ability.

(h) Fee information may be communicated to the public in the manner permitted by this rule, provided it is presented in a dignified style.

(1) The following information may be communicated:

(i) the fee for an initial consultation;

(ii) the availability upon request of either a written schedule of fees, or an estimate of the fee to be charged for specific services, or both;

(iii) contingent fee rates, subject to rule 32:1.5(c) and (d), provided that the statement discloses whether percentages are computed before or after deduction of costs and advises the public that, in the event of an adverse verdict or decision, the contingent fee litigant could be liable for court costs, expenses of investigation, expenses of medical examinations, and costs of obtaining and presenting evidence;

(iv) fixed fees or range of fees for specific legal services;

(v) hourly fee rates; and

(vi) whether credit cards are accepted.

(2) If fixed fees or a range of fees for specific legal services are communicated, the lawyer must disclose, in print size at least equivalent to the largest print used in setting forth the fee information, the following information:

(i) that the stated fixed fees or range of fees will be available only to clients whose matters are encompassed within the described services; and

(ii) if the client's matters are not encompassed within the described services, or if an hourly fee rate is stated, the client is entitled, without obligation, to a specific written estimate of the fees likely to be charged.

(3) For purposes of these rules, the term "specific legal services" shall be limited to the following services:

(i) abstract examinations and title opinions not including services in clearing title;

(ii) uncontested dissolutions of marriage involving no disagreement concerning custody of children, alimony, child support, or property settlement. See rule 32:1.7(c);

(iii) wills leaving all property outright to one beneficiary and contingently to one beneficiary or one class of beneficiaries;

(iv) income tax returns for wage earners;

(v) uncontested personal bankruptcies;

(vi) changes of name;

(vii) simple residential deeds;

(viii) residential purchase and sale agreements;

(ix) residential leases;

(x) residential mortgages and notes;

(xi) powers of attorney;

(xii) bills of sale.

(4) Unless otherwise specified in the public communication concerning fees, the lawyer shall be bound, in the case of fee advertising in the classified section of the telephone or city directory, for a period of at least the time between printings of the directory in which the fee advertisement appears and in the case of all other fee advertising for a period of at least ninety days thereafter, to render the stated legal service for the fee stated in the communication unless the client's matters do not fall within the described services. In that event or if a range of fees is stated, the lawyer shall render the service for the estimated fee given the client in advance of rendering the service.

(i) In the event a lawyer's communication seeks to advise the institution of litigation, the communication must also disclose that the filing of a claim or suit solely to coerce a settlement or to harass another could be illegal and could render the person so filing liable for malicious prosecution or abuse of process.

(j) A lawyer recommended by, paid by, or whose legal services are furnished by an organization listed in rule 32:7.7(d) may authorize, permit, or assist such organization to use means of dignified commercial publicity that does not identify any lawyer by name to describe the availability or nature of its legal services or legal service benefits.

(k) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) in political advertisements when the professional status is germane to the political campaign or to a political issue;

(2) in public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients;

(3) in routine reports and announcements of a bona fide business, civic, professional, or political organization in which the lawyer serves as a director or officer;

(4) in and on legal documents prepared by the lawyer;

(5) in and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof; and

(6) in communications by a qualified legal assistance organization, along with the biographical information permitted under paragraph (g), directed to a member or beneficiary of such organization.

(l) A lawyer shall not compensate or give anything of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item or voluntarily give any information to such representatives which, if published in a news item, would be in violation of rule 32:7.1.

[Comment][Narrative]

Rule 32:7.3 Direct Contact with Prospective Clients

(a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a prospective client.

(b) A lawyer may engage in written solicitation by direct mail or e-mail to persons or groups who may need specific legal services because of a condition or occurrence known to the soliciting lawyer. A lawyer must retain a copy of the written solicitation for at least three years. Simultaneously with the mailing of the solicitation, the lawyer must file a copy of it with the Iowa Supreme Court Attorney Disciplinary Board along with a signed affidavit in which the lawyer attests to:

(1) the truthfulness of all facts contained in the communication;

(2) how the identity and specific legal need of the intended recipients were discovered; and

(3) how the identity and specific need of the intended recipients were verified by the soliciting lawyer.

(c) Information permitted by these rules may be communicated by direct mail or e-mail to the general public other than persons or groups of persons who may be in need of specific or particular legal services because of a condition or occurrence which is known or could with reasonable inquiry be known to the advertising lawyer. A lawyer must simultaneously file a copy of the communication with the Iowa Supreme Court Attorney Disciplinary Board and must retain a copy of the communication for at least three years.

(d) All communications authorized by paragraphs (b) and (c) shall contain the disclosures required by rule 32:7.2(h) when applicable. These communications shall, in addition to other required disclosures, carry the following disclosure in 9-point or larger type: "ADVERTISEMENT ONLY."

[Comment][Narrative]

Rule 32:7.4 Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer practices in or limits the lawyer's practice to certain fields of law as authorized by this rule. Subject to the exceptions and requirements of this rule, a lawyer may identify or describe the lawyer's practice by reference to the following fields of practice:

Administrative Law
Adoption Law
Agricultural Law
Alternate Dispute Resolution
Antitrust & Trade Regulation
Appellate Practice
Aviation & Aerospace
Banking Law
Bankruptcy
Business Law
Civil Rights & Discrimination

Collections Law
Commercial Law
Communications Law
Constitutional Law
Construction Law
Contracts