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

AGENDA

February 26, 2010, 9:00 a.m.
Supreme Court Conference Room

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1. Approval of minutes of August 21, 2009 meeting [materials to be distributed before or at meeting]

2. Report on status of proposed rule amendments approved at August 21, 2009 meeting [Marcy Glenn and John Gleason]:

   a. January 20, 2010 letter from John Gleason to the Supreme Court, with proposed changes [pages 1-19]

   b. February 2010 email exchange with Ted Tow, concerning HB 1251 [pages 20-21]

3. Subcommittee report:

   a. Rule 1.5(b) [Alec Rothrock – materials to be distributed separately, before meeting; Marcy Glenn – pages 22-28]

4. New business:

   a. Proposed amendments to Rules 3.6 and 3.8 [Kory Nelson – pages 29-34]

   b. Other business

5. Administrative matters:

   a. Select next meeting date

6. Adjournment (before noon)

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January 20, 2010

The Honorable Michael L. Bender
Colorado Supreme Court
2 East 14th Avenue, Fourth Floor
Denver, CO 80203

The Honorable Nathan B. Coats
Colorado Supreme Court
2 East 14th Avenue, Fourth Floor
Denver, CO 80203

Re: Proposed Amendments to CRPC 1.15 and 3.8
and Proposed New CRPC 1.16A

Dear Justices Bender and Coats:

I write on behalf of the Chair of the Court's Standing Committee on the Colorado Rules of Professional Conduct (the Standing Committee). Enclosed are proposed amendments to Rules 1.15 and 3.8 of the Colorado Rules of Professional Conduct (CRPC), and a proposed new Rule 1.16A. 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 ultimately approved the proposed amendments being submitted to the Court.

Proposed new Rule 1.16A and its Comments [1] through [4] 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. The proposed rule generally (a) requires an attorney to maintain files for a minimum of two years after the termination of representation in the matter, and (b) sets out procedures by which the lawyer may notify the client of the attorney's intention to destroy files after passage of the two-year period, but (c) 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 rule precludes destruction unless there are no pending or threatened legal proceedings known to the lawyer that relate to the matter. The rule does not supersede specific retention requirements imposed by other rules.

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 3.8. In February 2008 the American Bar Association (ABA) adopted amendments to ABA Model Rule 3.8, governing Special Responsibilities of a Prosecutor, to address concerns about wrongful criminal convictions of innocent defendants. A Standing Committee subcommittee chaired by Judge John R. Webb studied the proposed changes in detail; solicited and received input from various stakeholders, including the Acting United States Attorney for the District of Colorado, the Colorado District Attorneys' Council, the Office of the Colorado Public Defender, and members of the private criminal defense bar; and made various suggested changes to the ABA Model Rule version of the new subsections and comments. The full Standing Committee discussed the

proposed changes at length over a series of meetings, and ultimately approved the proposed amendments being submitted to the Court.

New subsections (g) and (h), and corresponding new and amended comments, concern a prosecutor's duties upon learning 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, or clear and convincing evidence establishing that a convicted defendant did not commit the offense of which the defendant was convicted. Proposed new Comments [3A], [7A], [8A], and [9A], and the proposed amendments to Comments [1], [7], [8], and [9], expand upon and explain proposed new subsections (g) and (h).

I am enclosing a paper red-line version of the proposed changes for each rule and have emailed a complete copy in the Court's required format to Justice Bender's assistant. On behalf of the Chair of the Standing Committee, I respectfully ask the Court to favorably consider the proposed changes.

Sincerely,

John S. Gleason
Regulation Counsel

JSG/nmc
Enclosure
cc: Marcy Glenn, Committee Chair

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 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 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, ~~and~~ 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 ~~. Precisely how far the prosecutor is required to go in this direction~~ is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which ~~in turn~~ 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. 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. 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.

Paragraph (f)(1) is inconsistent with federal law and thus is invalid as applied to federal prosecutors practicing before the grand jury. As applied to proceedings other than those before the grand jury, paragraph (f)(1) is not inconsistent with federal law and does not violate the supremacy clause. Thus, paragraph (f)(1) is valid and enforceable except as it pertains to federal prosecutors practicing before the grand jury. U.S. v. Colo. Supreme Court, 988 F. Supp. 1368 (D. Colo. 1998), aff'd, 189 F.3d 1281 (10th Cir. 1999).

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).

Violation of paragraph (d) requires mens rea of intent. In re Attorney C, 47 P.3d 1167 (Colo. 2002).

Cases Decided Under Former DR 7-103.

While the prosecutor may strike hard blows, he is not at liberty to strike foul ones, for it is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1972).

Prosecutor's zealous prosecution of a case is not improper. People v. Marin, 686 P.2d 1351 (Colo. App. 1983).

A prosecutor's duty is to seek justice, not merely to convict. People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1972); People v. Drake, 841 P.2d 364 (Colo. App. 1992).

If the prosecution witness advises prosecutor that he or she knows or recognizes one of the jurors, the prosecutor has an affirmative duty immediately to notify the court and opposing counsel of the witness' statement. People v. Drake, 841 P.2d 364 (Colo. App. 1992).

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 1.16A. Client File Retention

Except as provided in a written agreement signed by a client, the lawyer shall retain a client's files respecting a matter for a period of not less than two years following the termination of representation in the matter, unless the lawyer previously delivered the files to the client or disposed of the files in accordance with the client's instructions. Notwithstanding any agreement to the contrary, a lawyer shall not destroy a client's files after termination of the lawyer's representation in the matter unless (1) after such termination, the lawyer has given written notice to the client of the lawyer's intention to do so on or after a date stated in the notice, which date shall not be less than thirty days after the date the notice was given, and (2) there are no pending or threatened legal proceedings known to the lawyer that relate to the matter. At any time following the expiration of a period of ten years following the termination of 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. This Rule does not supersede or limit a lawyer's obligations to retain a file that are imposed by law, court order, or rules of a tribunal.

COMMENT

[1] Rule 1.16A provides definitive standards regarding the recurring question of how long a lawyer must maintain a client's files before destroying them. 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. 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.

[2] A lawyer may comply with Rule 1.16A by maintaining a client's file in, or converting it to, a purely 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 by a legal services organization or 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] The two-year period under Rule 1.16A begins upon termination of a representation in a matter, even if the lawyer continues to represent the client in other matters. The rule does not prohibit a lawyer from maintaining a client's files beyond the two-year and ten-year periods in the Rule. For example, in a matter resulting in a felony criminal conviction, a lawyer may retain a client's file for longer than the two-year and ten-year periods because of Crim.P. 35(c) considerations. The Rule does not supersede obligations imposed by other law, court order or rules of a tribunal. A lawyer may not destroy a 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.

[4] Except with respect to files maintained by a lawyer for ten or more years, there are three preconditions to the lawyer's actual destruction of the client's files. First, the two-year retention period, or such shorter period as the client may have agreed to in a signed written agreement, must have expired. Second, sometime after the termination of representation in the matter, 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. The purpose of the timing of the notice is to give the client a meaningful opportunity to recover the file. A lawyer should make reasonable efforts to locate a client for purposes of giving written notice. If the lawyer is unable to locate the client, written notice sent to the client's last known address is sufficient under Rule 1.16A. Third, 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, or if the lawyer has agreed otherwise. If these three 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.

Marcy Glenn

From: Marcy Glenn
Sent: Saturday, February 06, 2010 12:55 PM
To: 'Ted'
Cc: Mark Randall
Subject: RE: File Retention

Hi, Ted and Mark,

Thanks for the helpful background to your questions. Last month the Standing Committee on the CRPC forwarded to the Supreme Court proposed rule amendments related to file retention (as well as the proposed amendments to Rule 3.8, in which you were involved). The proposed new file retention rule (CRPC 1.16A) sets a two-year minimum for file retention (after termination of representation in the matter), requires notice to the client for destruction between two and ten years, and generally permits destruction after ten years without notice. Comment [2] to the proposed rule addresses preservation of files in electronic format; Comment [3] notes the potential for longer retention periods, including in some criminal matters. I don't recall offhand whether any of the current or proposed new rules address whether the obligation rests with the lawyer or the firm. In a moment, I will forward you the proposed rule language, along with John Gleason's January 20, 2010 cover letter (which I drafted), which further describes the proposed rules.

I do believe that this train has left the station and it would be impractical to recall the letter and tinker with the proposed new rule and amendments related to file retention. It took quite a while for the Standing Committee to get to this point and I doubt that the Committee would vote to scrap the current approved rule and revisit the subject at this juncture. However, we are meeting on February 26 and I can put that issue on the agenda if you wish.

Please let me know if you need further info.
Marcy

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HOLLAND&HART

From: Ted [mailto:ted@cdac.state.co.us]
Sent: Friday, February 05, 2010 9:23 AM
To: Marcy Glenn
Cc: Mark Randall
Subject: File Retention

Marcy,

As you know from an earlier conversation, CDAC is running a bill that would require attorneys of record in criminal matters to retain their files for a certain length of time. The current draft requires retention for the life of the defendant in a life sentence or indeterminate sex offense sentence, and 5 years (from sentencing in a case that was not appealed and from mandate in a case that was appealed) for all other felonies. Because of the difficulty, particularly for private counsel, in knowing if and when there was a mandate, we are likely to amend the 5 years to 8 years from the date of sentencing, regardless of whether the case was appealed. The bill has been introduced – HB 1251.

When I sought the support of the criminal law section of the CBA, I was asked to once again raise this issue with you for two reasons. First, there are a couple of sticky issues that Matt Kirsch says he thinks are addressed in the rule your committee is developing: specifically, language clarifying that retention can be electronic in most cases, and language clarifying the who must retain (i.e., a firm or the lawyer). They've asked that I crib your language in those areas. Do you have such language, and would you be able to share that?

Second, it seems the bar would rather see this as a rule than a statute. So I've been asked to explore the feasibility of getting our language appended to the rule you've got going already. Is that route possible at this time? If so, what would be the timeline to get it finished? As I'm concerned about the timing issue, I'm inclined to continue to pursue the statute anyway, but perhaps have a repealer that says if the committee promulgates a rule requiring time periods of at least that length, then the statute would be repealed. If we were to do that, what specific reference would it be – if the Colorado Supreme Court promulgates a rule, or if the [fill in blank] Committee of the Colorado Supreme Court, or something else?

I'd appreciate your thoughts on this if you have a chance. I'll be out of town early next week so I'm cc'ing Mark Randall, my legislative director, on this email. If we can get language, he can work with the drafter to get amendments drafted before the bill's as-yet-unscheduled committee hearing.

Ted Tow
Executive Director
Colorado District Attorneys' Council
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Marcy Glenn

From: Marcy Glenn

Sent: Monday, October 12, 2009 12:54 PM

To: 'Marcus Squarrell'; 'Dick Reeve'; Dick Reeve; 'lmonet20@aol.com'; 'helen.raabe@diadenver.net'; dlittle@mlmpc.com; 'Wald, Eli'

Cc: 'Alec Rothrock'; 'Anthony van Westrum'; Michael Berger

Subject: Draft minority report re: CRPC 1.5(b) amendments

Attachments: 4633300_1.DOC

Attached is my draft of a minority report that would accompany the proposed amendments to CRPC 1.5(b), Comment [3] and CRPC 1.8(a), all related to midstream fee modifications. It is longer than I had hoped , in part because it provides background on the Model Rule, the current rule, and the majority's recommended changes. Please give me your comments on the memo and let me know if you still want to sign on as dissenting members.

I'm copying Alec as the principal drafter of the recommended changes, and Mike Berger and Tony Van Westrum as my unofficial deputies.

A couple of things to keep in mind:

1. We do not have a majority report to support the recommended changes, which seems unfair given the lengthy comments against those changes in the attached draft. Alec, how do you think we should handle this? I'm reluctant to wait until our next meeting for the committee to approve a majority report, so I wonder whether you could draft something for approval via email. Perhaps you could take some of the background in the minority report and use it in a majority report? Plus you would want to add some advocacy in response to the comments in the minority report.

2. Alec and I will be meeting this week to review the approved recommended changes, as well as some minor changes that the Committee inadvertently did not formally approve, namely, replacing the word "disclosure" with "communication" in CRPC 1.5, Comment [2] and adding the lead-in language to CRPC 1.8(a), Comment [1]. (At least I think that's what we've missed.) So I believe that the attached draft will require an additional paragraph noting that the minority does not disagree with the change in CRPC 1.5, Comment [2]. (It already says that the minority disagrees with the new language in CRPC 1.8(a), Comment [1].)

Thanks for your help,
Marcy

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MEMORANDUM

October __, 2009

TO: The Colorado Supreme Court

FROM: Dissenting Members of the Standing Committee on the CRPC

RE: Minority Report on Proposed Amendments to CRPC 1.5(b) and Comment [3A]

At its August 21, 2009 meeting, a majority of the Court's Standing Committee on the Colorado Rules of Professional Conduct (CRPC) voted to approve amendments to CRPC 1.5(b) and Comment [3A] to CRPC 1.5, related to midstream modifications of fee agreements. A minority of Committee members, however, voted against the proposed amendments and in favor of a different approach to the subject. The Committee concluded that it would be useful to the Supreme Court to receive, in addition to the proposed amendments approved by the majority of the Committee, the minority's concerns and recommended amendments, which this memo summarizes.

1. Background to current CRPC 1.5(b) and Comment [3A]. The ABA Model Rules address midstream modifications in a single sentence in Model Rule 1.5(b): "Any changes in the basis or rate of the fee or expenses shall also be communicated to the client." No comment to the Model Rule addresses the issue.

When the Court adopted its own version of the Model Rules, effective January 1, 2008, the Court accepted the Committee's recommended departure from Model Rule 1.5(b) concerning midstream modifications. The Committee recommended, and the Court adopted, the following Colorado-unique language in CRPC 1.5(b): "Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a)." The purpose of this language was to alert lawyers to the fact that a material midstream fee modification, unlike an initial fee agreement, constitutes a business transaction with a client and, therefore, the lawyer must satisfy the procedural and substantive requirements for business transactions with clients, as stated in CRPC 1.8(a), for such modifications. Comment [3A] was adopted to explain the meaning of "material" as used in CRPC 1.5(b). It provides in relevant part that for purposes of that paragraph, "a material change to the basis or rate of the fee is one that is reasonably likely to increase the amount payable by the client or which otherwise makes more burdensome the original financial obligations of the client[,]" and that a change that "is reasonably likely to benefit the client . . . is not material[.]"

Unfortunately, CRPC 1.5(b) and Comment [3A] led to substantial confusion and concern among practicing lawyers who raise their billing rates by a reasonable amount (typically, by up to 5%) on a regular basis (typically, annually). The Committee heard from lawyers who fear that they must comply with CRPC 1.8(a) before each such rate increase, and they are particularly concerned about that rule's requirements that (1) the client be advised of the desirability of seeking and a reasonable opportunity to obtain the advice of outside legal counsel on the business transaction with the lawyer, and (2) the client consent in writing to the essential terms

of the transaction. Obviously, it is cumbersome to have to advise a client to obtain outside legal advice every time a lawyer wants to raise his or her fees, and the requirement of a signed consent for a rate increase exceeds the requirement that the basis or rate of the initial fee be communicated to, but not consented to in writing by, the client. The Committee intended CRPC 1.5(b) to permit lawyers to avoid the application of CRPC 1.8(a) by advising clients at the time of the initial fee agreement that the lawyer could periodically make reasonable upward fee adjustments. To convey that concept, the rule stated that CRPC 1.8(a) would apply to material midstream modifications "[e]xcept as provided in a written fee agreement[.]" Nevertheless, lawyers repeatedly expressed their confusion about whether an initial advance consent would in fact comply with the rule. Moreover, an initial consent to future fee increases would not assist a lawyer who commenced the representation before the current CRPC took effect on January 1, 2008 and with respect to which there is no initial fee agreement containing the client's advance consent to future fee increases.

2. The Committee's recommended amendments. Against this background, the Committee spent many months considering revisions to CRPC 1.5(b) and Comment [3A]. The approach that the majority of the Committee voted to recommend to the Supreme Court makes three changes to the CRPC:

A. It adds language, paraphrased from the Model Rule, requiring the lawyer to communicate any midstream modifications in writing.

B. It changes the language "[e]xcept as provided in a written fee agreement" to "[e]xcept as agreed by a lawyer and a client regarding reasonable periodic increases in the fee or expenses[.]" The majority also recommends removing one sentence from Comment [3A] ("For purposes of Paragraph (b), a material change to the basis or rate of the fee is one that is reasonably likely to increase the amount payable by the client or which otherwise makes more burdensome the original financial obligations of the client."), and replacing that sentence with the following text: "Reasonable periodic increases in the fee or expenses to which the client expressly or impliedly agrees are not subject to Rule 1.8(a). The client's agreement to such periodic increases may be manifested by a provision for such increases in any written fee agreement, any communication required by the first sentence of Rule 1.5(b) to which the client assents, or a course of dealing between the lawyer and client. The reasonableness requirement of Rule 1.5(a) applies to increases in the fee or expenses."

C. It adds the phrase "Except as stated in the last sentence of Rule 1.5(b)" before the fifth text sentence in CRPC 1.8(a).

3. The minority's recommendations. The minority recommends adhering more closely to the Model Rules. Specifically, the minority suggests the following:

A. The minority would delete the second sentence in current CRPC 1.5(b) ("Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a)."), and would replace it with the following

new second sentence: "Any changes in the basis or rate of the fee or expenses shall also be promptly communicated to the client, in writing." This sentence tracks the final sentence in Model Rule 1.5(b) with two exceptions: (1) It adds the word "promptly" to make clear that a lawyer should not delay in advising a client of a midstream modification; and (2) it adds the words "in writing" to require a written notification. (Model Rule 1.5(b) requires a lawyer's initial communication about the basis or rate of the fee to be communicated "preferably in writing," but CRPC 1.5(b) omits the word "preferably" and requires the initial communication to be in writing. The minority saw no reason to treat midstream modifications differently.)

B. The minority would delete Comment [3A].

C. The minority would make no other changes to the CRPC, including the new lead-in phrase to the fifth text sentence in Comment [1] to CRPC 1.8, as proposed by the majority.

4. Advantages to the minority's recommendations. The minority approach achieves simplicity, by eliminating much text from the rule and comment that, as discussed below, is likely to create continued confusion about a lawyer's obligations. It also promotes uniformity by adhering closely to the Model Rule language. It removes from CRPC 1.5(b) any reference to CRPC 1.8(a), but clients will obtain the most important protections of CRPC 1.8(a) nevertheless. Specifically, (1) the requirement that a midstream modification be transmitted in writing provides the protection afforded under CRPC 1.8(a)(1), which requires the transaction and its terms to be "fully disclosed and transmitted in writing to the client"; and (2) the requirement under CRPC 1.5(a) that a fee must be reasonable provides the protection afforded under CRPC 1.8(a)(1), which requires that the transaction and its terms be "fair and reasonable." The minority recommendation would not trigger the CRPC 1.8(a) requirements related to independent counsel, and would not require the client to consent to the modification in writing, but the minority believes that those protections are unnecessary in light of the written-communication and reasonable-fee requirements. (However, without any changes to the rules, CRPC 1.8(a) would continue to apply to a traditional business transaction between lawyer and client that impacts the lawyer's fees, for example, an agreement to pay the lawyer by providing a share of the client's business. This concept is reflected in existing Comment [1] to CRPC 1.8(a), which states that the rule's "requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee.") The minority approach eliminates all issues related to advance consents to future fee increases.

5. Disadvantages to the majority's recommendations. The minority is concerned that the majority proposal does not fix the problem it attempts to address and will result in continued confusion among lawyers. For example, the majority proposal may lead to these questions, which it does not satisfactorily answer:

A. By continuing to state that "any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a)," the majority proposal for CRPC 1.5(b) maintains the statement that has led to serious lawyer confusion since the rule first took effect.

Specifically, the proposed rule continues to engender confusion about what is a "material change[ ]" and how a lawyer may avoid the more onerous aspects of CRPC 1.8(a) *(i.e.*, the need to suggest and provide an opportunity for independent counsel, and the requirement of written client consent) for such material changes. Although the proposed revised comment language tries to answer these questions, as discussed below, the minority believes the comment will create even greater confusion.

B. The majority would retain the current statement in Comment [3A] that "a change in the basis or the rate of the fee or expenses [that] is likely to benefit the client, such as a reduction in the hourly rate . . . is not material and Rule 1.8(a) does not apply[,]" which yields the negative inference that a change in the fee that benefits the lawyer and not the client *is* material and Rule 1.8(a) *does* apply. However, the majority would add the statement that "[r]easonable periodic increases in the fee or expenses to which the client expressly or impliedly agrees are not subject to Rule 1.8(a)." The minority believes these two statements are inconsistent.

C. The majority proposal for Comment [3A] states that a client's "implied[ ]" agreement will render periodic increases in the fee or expenses not subject to CRPC 1.8(a). The minority believes that lawyers will have difficulty determining what constitutes satisfactory implied consent, and that this will lead to non-compliance, reduced protection for clients, and increased risk of disciplinary consequences for lawyers.

D. The majority proposal for Comment [3A] states that "[t]he client's agreement to such periodic increases may be manifested by a provision for such increases in any written fee agreement, any communication required by the first sentence of Rule 1.5(b) to which the client assents, or a course of dealing between the lawyer and client." The minority views the phrase "any communication required by the first sentence of Rule 1.5(b) to which the client assents" as wordy and confusing, since the first sentence of CRPC 1.5(b) requires only "communicat[ion]" by the lawyer, not "assent" by the client, and the new comment language does not explain what is meant by "assent" – must the assent be in writing, must it be express rather than implied, and must it satisfy the requirements for "informed *consent*" as defined in CRPC 1.0(e)? The minority also believes the phrases "any written fee agreement" and "any communication required by the first sentence of Rule 1.5(b) to which the client assents" are somewhat redundant. Finally, the majority proposal states that a "course of dealing between a lawyer and client" may establish the client's agreement to periodic increases in fees or expenses. The minority believes it unwise to introduce the contract principle of course of dealing in stating a lawyer's ethical duties. Here, too, the minority believes that uncertainty about when a course of dealing can establish a client's agreement will create confusion, less protection for clients, and increased exposure to violations for lawyers.

E. The majority proposal states that "[t]he reasonableness requirement of Rule 1.5(a) applies to increases in the fee or expenses." The minority agrees with this statement but believes it is unnecessary and unwise to restate in CRPC 1.5(b). Under the rule of construction "inclusio unius est exclusio alterius," its mention in only CRPC 1.5(b) could lead to the incorrect

conclusion that the reasonableness requirement does not apply to other fee arrangements that do not include a similar express incorporation of CRPC 1.5(a). For example, CRPC 1.5(c) addresses contingent fee agreements, but does not expressly refer to the reasonableness requirement of CRPC 1.5(a); a lawyer might argue, therefore, that a contingent fee need not be reasonable.

For all the reasons stated above, the minority respectfully dissents from the recommended amendments to CRPC 1.5(b) and Comment [3A], and instead suggests the changes discussed above, as reflected in the attached redlined version of those provisions.

Respectfully submitted,

Current CRPC 1.5(b) and Comment [3A]

With Changes Proposed by Minority of the CRPC Standing Committee

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. Any changes in the basis or rate of the fee or expenses shall also be promptly communicated to the client, in writing.

* * *

Deleted: Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a).

Deleted: [3A] For purposes of Paragraph (b), a material change to the basis or rate of the fee is one that is reasonably likely to increase the amount payable by the client or which otherwise makes more burdensome the original financial obligations of the client. When a change in the basis or rate of the fee or expenses is reasonably likely to benefit the client, such as a reduction in the hourly rate or a cap on the fees or expenses that did not previously exist, the change is not material for these purposes and compliance with Rule 1.8(a) is not required.

Marcy Glenn

From: Nelson, Kory A. - Department of Law [Kory.Nelson@denvergov.org]
Sent: Tuesday, October 27, 2009 4:36 PM
To: Marcy Glenn
Subject: RE: Professional Ethics - Suggestions for Amendment to Rules

Thank you for that clarification. I would like to take advantage of that opportunity, as I believe that even just a couple minutes of explanation as to why this recommendation is coming forward now may be helpful to the Committee. Also, if the recommendation is not acted upon, then I can at least accept the Committee's decision knowing that I did everything possible.

Kory Nelson | Assistant City Attorney - Senior
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Please consider the environment before printing this e-mail

[mailto:MGlenn@hollandhart.com]
Sent: Tuesday, October 27, 2009 7:59 AM
To: Nelson, Kory A. - Department of Law
Subject: RE: Professional Ethics - Suggestions for Amendment to Rules

I should have said in my last email that you need not be a passive observer. If you would like to speak to the Committee on the subject of your letter, please let me know.

From: Nelson, Kory A. - Department of Law [Kory.Nelson@denvergov.org]
Sent: Tuesday, October 27, 2009 7:27 AM
To: Marcy Glenn
Subject: RE: Professional Ethics - Suggestions for Amendment to Rules

Thank you for your response.

I would be interested in attending the 2/26/2010 Committee meeting as a passive observer; is the meeting open to the public?

Kory Nelson | Assistant City Attorney - Senior
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[mailto:MGlenn@hollandhart.com]
Sent: Monday, October 26, 2009 7:53 PM
To: Nelson, Kory A. - Department of Law
Subject: RE: Professional Ethics - Suggestions for Amendment to Rules

Dear Mr. Nelson:

I apologize for the delay in responding to your email below. I have reviewed your letter and proposal for amendments to Rule 3.6 and 3.8 of the Colorado Rules of Professional Conduct (CRPC) to guard against prosecutorial abuse related to public statements about pending matters. The Supreme Court's Standing Committee on the CRPC gave its final approval to certain recommended amendments to Rule 3.8 at its August 21,

2009 meeting, before I received your email and attached letter in late-September. At the August meeting, the Committee instructed me to forward the approved recommended amendments to the Supreme Court, and I am in the midst of finalizing those approved recommendations, which should be submitted to the Court shortly. The Committee's next meeting is scheduled for February 26, 2010, and your letter will be on the agenda for that meeting. In short, because your letter arrived after the Committee had approved its recommendations for amendments to Rule 3.8, we will separately consider your suggestions. Many thanks for your interest in these important issues.

Sincerely,

Marcy G. Glenn
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From: Nelson, Kory A. - Department of Law [mailto:Kory.Nelson@denvergov.org]
Sent: Friday, September 25, 2009 3:27 PM
To: Marcy Glenn
Subject: Professional Ethics - Suggestions for Amendment to Rules

Friday, September 25, 2009

Marcy G. Glenn, Chair
Standing Committee on Rules of Professional Conduct
Colorado Supreme Court
C/o Holland & Hart, LLP
555 17th Street
Suite 3200
Denver, CO 80202-3979
MGlenn@hollandhart.com

RE: Suggestions for Amendments to Professional Rules of Conduct

Dear Ms. Glenn:

Yesterday, I spoke with Nancy L. Cohen, Chief Deputy Regulation Counsel of the Office of Attorney Regulation Counsel, who presented a CLE on professional ethics to my office. She recommended that I contact you in regards to determining the process by which I could submit a suggestion for an amendment to the Colorado Rules of Professional Conduct, Rule 3.8 Special Responsibilities of a Prosecutor, and the recommended format in which to do so.

Attached is a PDF document that is my personal letter to you that sets out all the details.

Thank you for your assistance in this matter.

DENVER
THE MILE HIGH CITY

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Friday, September 25, 2009

Marcy G. Glenn, Chair
Standing Committee on Rules of Professional Conduct
Colorado Supreme Court
C/o Holland & Hart, LLP
555 17th Street
Suite 3200
Denver, CO 80202-3979
MGlenn@hollandhart.com

RE: Suggestions for Amendments to Professional Rules of Conduct

Dear Ms. Glenn:

I am writing to you in my sole capacity as an individual attorney licensed to practice in the State of Colorado, who has been a prosecutor for the past 20-years with the Denver City Attorney's Office. While Mr. David Fine, the Denver City Attorney, is aware of my actions, I would like to make it clear that this correspondence should not be construed as any official act on behalf of the Denver City Attorney's Office.

Yesterday afternoon, on Thursday, September 24, 2009, I spoke with Nancy L. Cohen, Chief Deputy Regulation Counsel of the Office of Attorney Regulation Counsel, who presented a CLE on professional ethics to my office. She recommended that I contact you in regards to determining the process by which I could submit a suggestion for an amendment to the Colorado Rules of Professional Conduct, Rule 3.8 Special Responsibilities of a Prosecutor, and the recommended format in which to submit it.

In a nutshell, I would like to submit a recommendation to amend Rule 3.8 such that it would specifically eliminate an existing loophole that relates to Rule 3.6 Trial Publicity, subsection (b)(2) that grants specific permission for a lawyer to state "Information contained in a public record". While Rule 3.6(b)(2) appears, on first blush, to be very reasonable, this rule provides a loophole for prosecutors that would allow them to avoid the restrictions found in the newly added language in Rule 3.8(f), which states as follows:

> The prosecutor in a criminal case shall:
>
> . . .
>
> (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 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.

The loophole is best made visible by the rational conclusion that Rule 3.6(b) (2) allows prosecutors, their investigators, and law enforcement personnel to create the very "public record" that the prosecutor can use to make extra-judicial statements that would otherwise be in violation of Rule 3.8(f). Whether it is the licensed prosecutor who files a pleading containing factual allegations, or attaches an affidavit of a witness or investigator, or the affidavit of a law enforcement officer attached to an application for a search warrant or arrest warrant – the very act of the filing of these documents with the court makes these documents part of a "public record" – thereby giving that very prosecutor the permission, under Rule 3.6(b)(2), to make pre-trial public statements that would otherwise violate Rule 3.8(f).

It would be my recommendation that Rule 3.6 & 3.8 both be amended as follows:

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), a lawyer may state:

. . . .

(2) Information contained in a public record, EXCEPT FOR PROSECUTORS AS RESTRICTED PURSUANT TO RULE 3.8(G)

Rule 3.8 Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

. . . . .

(G) REFRAIN FROM MAKING EXTRA-JUDICIAL STATEMENTS THAT VIOLATE SUBSECTION (F) ABOVE, WHERE THE INFORMATION WAS CONTAINED ONLY IN A PUBLIC RECORD THAT WAS CREATED AS A DIRECT RESULT OF THE FILING OF THE COMPLAINT, PLEADINGS, AFFIDAVITS, OR ANY COMBINATION THEREOF, IN THE CRIMINAL MATTER RELATING TO THE ACCUSED OR THEIR CO-DEFENDANTS.

Without these amendments, the permissive language Rule 3.6(b)(2) could be found to be in conflict with the restrictive language in Rule 3.8(f), and the Office of Attorney Regulation Counsel would likely be stymied into not filing formal charges of ethics violation against the offending prosecutor where their extra-judicial statements, which would otherwise violate Rule 3.8(f), relate to facts contained in affidavits and pleadings filed by the prosecution in the criminal court's file. I simply believe it is morally wrong for a prosecutor to be given the keys for free reign as to extra-judicial statements where the

prosecutor could be individually involved in drafting, editing, and filing of the documents into the "public record", if not supervising their production and filing.

The need to close this loophole became apparent in 2007 during a widely publicized incident where the District Attorney for the 1st Judicial District, Mr. Scott Storey, while acting as a Special Prosecutor, made pre-trial statements in a press conference regarding former Judge Larry Manzanares, who was the target of a criminal investigation revolving around allegations of a stolen lap-top computer. The statements clearly had a substantial likelihood of materially prejudicing Mr. Manzanares' right to have a fair trial; however, the information in the extra-judicial statements was located within an 80-page affidavit of Mr. Storey's investigator filed with the court. Therefore, the permissive language of Rule 3.6(b)(2) provided Mr. Storey with a viable legal defense to an allegation of a violation of Rule 3.6(a), precluding the Office of Attorney Regulation Counsel from taking any disciplinary action against Mr. Storey. While I agreed with the Regulation Counsel's written legal conclusion, I believe such actions by a prosecutor are immoral and they should be made a violation of the Colorado Rules of Professional Conduct. While Rule 3.8(f) goes along way towards this goal, I believe Rule 3.6(b)(2) provides a viable loophole that is ripe for the possibility of abuse – abuse that should be prevented by the amendments I am suggesting.

I do have personal knowledge as to the procedural history of the allegations of ethical violations against District Attorney Scott Storey, stated above, as I was the complainant who brought that case forward to the Office of Regulation Counsel, after speaking with Mr. Gleason and learning that his office could not examine the issue *sua sponte*. After seeing the work of the Standing Committee in adopting the new language in Rule 3.8(f), as stated above, and as a career prosecutor for the past 20 years, I feel it important to take this additional step to clearly close this loophole to prevent any person in Colorado from ever having to be exposed to the possibility of similar wrongs in the future. I would appreciate your assistance in identifying how these amendments can be properly brought before the Standing Committee for substantive consideration through the correct procedure and in the proper format.

Thank you for your assistance in this matter.

Respectfully,

Kory A. Nelson