# ADDITIONAL MATERIALS FOR THE OCTOBER 28, 2022 MEETING

# OF THE

# STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

# ADDITIONAL MATERIALS FOR THE DISCUSSION OF A POSSIBLE RULE ON CIVILITY

These materials concern the
Civil Rules Committee's
Consideration of a Possible New Rule on Civility
in September 2016

# AGENDA

## COLORADO SUPREME COURT
## COMMITTEE ON THE
## RULES OF CIVIL PROCEDURE

Friday, September 30, 2016, 1:30p.m.
Ralph L. Carr Colorado Judicial Center
2 E.14th Ave., Denver, CO 80203
Fourth Floor, Supreme Court Conference Room

I. Call to order

II. Approval of June 24, 2016 minutes [Page 1 to 4]

III. Announcements from the Chair

A. Contingency Fee Rules—transferred to the Rules of Professional Conduct Committee

B. 2017 Schedule
January 27
March 31
June 23
September 29
October 27
November 17

IV. Introduction of members and guests

V. *Warne v. Hall*, 2016 CO 50—General discussion [Page 5 to 43]

VI. Business

A. CRCP 121 §1-27—(Judge Jonathan Shamis) [Page 44 to 47]

B. CRCP 52—(Lee Sternal) [Page 48 to 77]

C. CRCP 53—(Judge Zenisek) [Page 78 to 85]

D. New Form for admission of business records under hearsay exception rule—(Damon Davis and David Little) [Page 86 to 98]

E. Colorado Courts E-Filing System name change—(Judge Berger) [Page 99 to 101]

VII. New Business

## SECTION 1-27
## JUDICIAL EXPECTATIONS FOR PROFESSIONALISM AND CIVILITY

**1. General Principle.**

Attorneys, as members of the legal profession, are representatives of clients, privileged participants in the legal process, and public citizens having special responsibilities for the administration of justice. Judicial officers appropriately expect attorneys appearing before them to act with integrity, honesty, diligence, respect, courtesy, cooperation, and competence in all their professional interactions.

**2. Civility in Legal Proceedings.**

(a) Attorneys will be civil and courteous in their conduct and their communications with the court, court personnel, parties, witnesses, and counsel, whether in person or in writing.

(b) Attorneys will extend reasonable cooperation to all participants in the legal process. For example, attorneys will not unreasonably withhold consent or delay responding to requests for appropriate scheduling or logistical accommodations; attorneys will allow adequate time for response to inquiries or demands; and attorneys will not condition their cooperation or accommodations on disproportionate or unreasonable demands.

(c) Attorneys will not demonstrate disrespect toward the court or other participants in the legal process.

**3. Timeliness.**

(a) Attorneys will be punctual while participating in all aspects of judicial proceedings, including, but not limited to, appearing at hearings, mediations, depositions, conferences, and trial; filing papers or other materials with the court; and communicating with judges, court personnel, counsel, and clients.

(b) Attorneys will avoid unnecessary delay and facilitate the just, speedy, and inexpensive determination of every action. Attorneys will respond in a timely manner to motions, communications, offers of settlement, and other interactions with counsel, and will confer in a timely manner with clients.

(c) Attorneys will not file or serve motions, pleadings, or other papers in such a manner as to unfairly limit the opportunity to respond.

**4. Candor to the Court.**

(a) Consistent with their duties to a client, attorneys will not knowingly allow the court to proceed under a misperception of fact or law.

(b) If the court orders an attorney to prepare a proposed order, as provided in C.R.C.P. 121, Sec. 1-16, that attorney will work cooperatively with all counsel and pro se parties to produce an accurate order that correctly states the findings, conclusions, and orders of the court, and will timely submit the order to the court for its review and approval.

**5. Candor and Fairness to Counsel and Parties.**

(a) Attorneys will not use the discovery rules and procedures, or any other aspect of the judicial process, for the purpose of harassing parties or counsel, or as a means of impeding the timely, efficient, and cost-effective resolution of a case or dispute.

(b) Attorneys will attempt in good faith to stipulate to undisputed matters and to resolve disputes and procedural issues without court intervention.

(c) Attorneys will clearly identify all changes made in any document exchanged or under discussion.

**6. Attorney Conduct in Deposition.**

Attorneys will conduct themselves during deposition practice with the same integrity, honesty, diligence, respect, courtesy, cooperation, and competence expected of attorneys appearing before a court.

***7.*** **Attorney Conduct During Judicial Proceedings.**

(a) Attorneys will make only objections that are concise, specific, and supported by applicable law.

(b) Arguments, objections, and remarks will be directed to the court and not to counsel or parties, or to any other person present in the courtroom.

(c) When examining a witness or addressing the court or other persons present in the courtroom, attorneys will conform to the decorum rules of the court in which they are appearing.

(d) Attorneys will request and receive permission from the court before approaching a witness or court personnel, or before approaching a demonstrative exhibit or aid, unless local custom dictates otherwise or as instructed by the court.

(e) Attorneys will not engage in conduct that will impair the attorney's physical or mental ability to engage in judicial proceedings.

**8. Enforcement.**

(a) **Scope and Effect.** Attorneys should not construe this practice standard as permission to interpose unnecessary or inappropriate motions. Judicial officers should expect that adherence to this practice standard will diminish the filing of a wide variety of motions that impose unnecessary demands on the court's time and resources.

(b) **Judicial Powers and Discretion.** After giving the attorney whose conduct is questioned under this practice standard notice and an opportunity to be heard, the court may impose sanctions it deems appropriate under the circumstances, including, but not limited to:

i. A formal or informal reprimand; or

ii. Monetary sanctions, including, but not limited to, the reasonable costs, including attorney fees, resulting from the attorney's misconduct.

(c) **Factors to be Considered.** In determining the sanctions to be imposed against an attorney who has violated this practice standard, the court will consider all relevant factors, including, but not limited to:

i. The willfulness of the attorney's misconduct;

ii. The effect of the misconduct on the proceedings and affected persons;

iii. Whether the attorney's misconduct was an isolated event or a pattern of behavior; and

iv. Other sanctions imposed in the proceeding against the attorney for misconduct, including, but not limited to, contempt of court.

## COMMITTEE COMMENT

This practice standard does not limit attorneys' obligations to their clients under the Colorado Rules of Professional Conduct. See People v. Schultheis, 638 P.2d 8 (Colo. 1981).

Judicial officers should be mindful that lawyers cannot be sanctioned for exercising their First Amendment right to freedom of speech. For example, attorneys may not be sanctioned for expressing an opinion that a judicial officer is racially biased, bigoted, or has a particular bent of mind. However, under this practice standard, such comments must be expressed professionally. Objectively false statements about a judicial officer are not protected by the First Amendment. See In re Green, 11 P.3d 1078, 1086 (Colo. 2000).

Action taken under this practice standard does not constitute discipline as contemplated by C.R.C.P. 251.6, nor does imposition of a sanction under this practice standard preclude the reporting of an attorney's misconduct to the Office of Attorney Regulation Counsel. The sanctions applicable under this practice standard may be imposed independently or in conjunction with other available remedies.

C.R.C.P. 121, Sec. 1-27(2)(b) does not modify the standard for determining a motion for continuance as set forth in C.R.C.P. 121, Sec. 1-11.

Under C.R.C.P. 121, Sec. 1-27(8)(a), abuse of remedial measures provided by the Colorado Rules of Civil Procedure, including this practice standard, may itself be unprofessional conduct that warrants action from the court pursuant to this practice standard.

Should the attorney misconduct at issue occur during a judicial proceeding, the "opportunity to be heard" referenced in C.R.C.P. 121, Sec. 1-27(8)(b) does not require the court to set a separate hearing concerning the attorney's misconduct. The opportunity to be heard may be given in conjunction with, or at the conclusion of, the hearing in which the alleged misconduct occurred.

In lieu of, or in addition to, the sanctions set forth in C.R.C.P. 121, Sec. 1-27(8)(b), the court may take such other actions to address unprofessional behavior as it deems appropriate, including, but not limited to, referral of the attorneys to bar association professionalism assistance groups, the Colorado Lawyer Assistance Program (COLAP), or other appropriate programs. Referrals to COLAP are particularly appropriate in cases in which the attorney's physical or mental ability to participate in a judicial proceeding is in question, yet conclusive evidence as to the nature of the impairment has not been established. See C.R.C.P. 254.

**From:** Patricia Jarzobski <zobski@me.com>
**Sent:** Friday, September 23, 2016 1:25 PM
**To:** berger, michael
**Subject:** C.R.C.P. Section 1-27 Judicial Expectations for Professionalism and Civility

Dear Judge Berger:

I wanted you to know that the Executive Council of the Colorado Bar Association considered the proposed addition to C.R.C.P. Rule 121 regarding Section 1-27 Judicial Expectations for Professionalism and Civility at our meeting on September 20,2016.

The CBA Executive Council is our governing body that meets every other month. The Executive Council acts when the Board of Governors is not in session.

Peter Goldstein from the CBA/DBA Professionalism Council presented the proposed Rule to the CBA Executive Council. We had a thorough and lively discussion.

Executive Council members expressed concerns. The CBA Executive Council voted to not support the proposed rule.

If you have any questions please let me know. Thank you.

Patricia M. Jarzobski
2016-2017 CBA President

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**Colorado Supreme Court Advisory Committee on the Rules of Civil Procedure**
**September 30, 2016 Minutes**

A quorum being present, the Colorado Supreme Court Advisory Committee on Rules of Civil Procedure was called to order by Judge Michael Berger at 1:30 p.m., in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Judicial Center. Members present or excused from the meeting were:

| **Name** | **Present** | **Excused** |
|---|---|---|
| Judge Michael Berger, Chair | X | |
| Chief Judge (Ret.) Janice Davidson | X | |
| Damon Davis | X | |
| David R. DeMuro | X | |
| Judge J. Eric Elliff | X | |
| Judge Adam Espinosa | X | |
| Judge Ann Frick | X | |
| Judge Fred Gannett | X | |
| Peter Goldstein | X | |
| Lisa Hamilton-Fieldman | | X |
| Richard P. Holme | X | |
| Judge Jerry N. Jones | X | |
| Judge Thomas K. Kane | X | |
| Debra Knapp | X | |
| Richard Laugesen | X | |
| Cheryl Layne | X | |
| Judge Cathy Lemon | X | |
| Bradley A. Levin | X | |
| David C. Little | X | |
| Chief Judge Alan Loeb | X | |
| Professor Christopher B. Mueller | | X |
| Gordon "Skip" Netzorg | X | |
| Brent Owen | X | |
| Stephanie Scoville | X | |
| Lee N. Sternal | X | |
| Magistrate Marianne Tims | | X |
| Jose L. Vasquez | X | |
| Ben Vinci | X | |
| Judge John R. Webb | X | |
| J. Gregory Whitehair | | X |
| Judge Christopher Zenisek | X | |
| **Non-voting Participants** | | |
| Justice Allison Eid, Liaison | X | |
| Jeannette Kornreich | X | |

## I. Attachments & Handouts

A. September 30, 2016 agenda packet
B. Supplemental Material – CBA's position on proposed CRCP 121 §1-27

## II. Announcements from the Chair

- The June 24, 2016 minutes were approved as submitted;
- Chapter 23.3, Rules Governing Contingent Fees, will no longer be amended by the Civil Rules Committee. The Rules of Professional Conduct Committee is responsible for Chapter 23.3. moving forward;
- A sign-up sheet for the CRCP 83 subcommittee chaired by Jeannette Kornreich will be circulated; and
- *Warne v Hall*, 2016 CO 50, was generally discussed by the committee. A subcommittee will be formed to consider rule and form amendments in light of the opinion.

## III. Business

### A. C.R.C.P. 121 § 1-27

Judge Shamis presented the proposal and stated that the rule will promote professionalism in the courtroom, and it can be used to enforce small infractions. The rule was modeled after Wyoming Uniform Rules for District Courts, Rule 801. Wyoming has found the rule helpful and hasn't used it to enforce any sanctions. The rule has been presented to the Chief Judges and they thought it would be helpful; however, the Colorado Bar Association doesn't endorse the rule. The Judicial Branch has an affirmative duty to promote professionalism, and Jim Coyle, who was in attendance, agreed that this rule complements the mission of the Office of Attorney Regulation. Some members thought the rule is too subjective, that conduct cannot be legislated, and the rule will lead to increased motions practice. Others thought it could be helpful, it could start a new conversation related to professionalism, and it would promote efficiency. A subcommittee will be formed to study the issue.

### B. C.R.C.P. 52

Lee Sternal reported that there was a lot of interest around surrounding the subcommittees' work, and a few guests were present today to comment. Discussion centered on stakeholder input, as well as the majority and minority positions. After discussion, there was a motion to replace the last sentence of C.R.C.P. 52 with the text appearing at the top of page 55 of the agenda packet, and add a comment using a modified version of the language appearing at the bottom of page 53 of the agenda packet; the motion passed 13:9. The subcommittee will prepare a revised proposal for the committee to consider based on the motion.

### C. Integrated Colorado Courts E-Filing System name change

The proposed changes to C.R.C.P. 121 §1-26 and C.R.C.P. 305.5 were adopted with one no vote.

**D. C.R.C.P. 53**

Judge Zenisek reported that the subcommittee had met over the summer and it had considered the committee's concerns, such as, access to justice, proportionality, and costs, and a revised proposal was in the agenda packet. There were many questions, and discussion centered on whether the proposal is privatizing the judiciary and when delegation to a master is appropriate in state court. There was lengthy discussion, but due to the late hour this will be taken up at the October meeting.

**E. New Form for Admission of business records under hearsay exception rule**

Tabled to the October 28, 2016 meeting.

**Future Meetings**

October 28, 2016

The Committee adjourned at 4:00p.m.

*Respectfully submitted,*
*Jenny A. Moore*

# ADDITIONAL MATERIALS FOR THE DISCUSSION OF A POSSIBLE RULE OR COMMENT CONCERNING ADVICE REGARDING REPRODUCTIVE HEALTH

**MEMO**

**To: Standing Committee on the Rules of Professional Conduct**
**From: Nancy L. Cohen**
**Re:** Ethical Implications for Colorado lawyers who provide advice related to reproductive health issues based on state laws enacted after *Dobbs v. Jackson Women's Health Organization*

## Factual background

On June 24, 2022, the Supreme Court, in a 6-3 decision, voted to overturn *Roe v. Wade* and *Planned Parenthood v. Casey* in *Dobbs v. Jackson Women's Health Organization*.[1] Holding that the Constitution does not confer a right to an abortion, the Court gave individual states the full power to regulate any aspect of abortion not preempted by federal law. Some states have in turn banned the performance of abortion procedures, some of which employed so called "trigger-laws" that went into effect once *Dobbs* was announced. Texas is one of those states, where the performance of an abortion is now a felony, punishable by up to life in prison and a fine of $100,000.[2]

In response, many national companies, including national law firms, have publicly announced policies that would cover the cost of out of state travel and other expenses should their employees require reproductive health care not available in their home state.[3] (In this memo, I use the statutory definition of "reproductive health care" set forth in C.R.S. § 25-6-402(4).)[4] Political groups that oppose access to reproductive health care have responded to these policies with threats of legal action, particularly against law firms whose lawyers may represent certain individuals, groups or companies.[5] This has resulted in the service of litigation hold letters on at least one national law firm that has been involved in the representation of certain clients.

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[1] 142 S.Ct. 2228 (2022).
[2] Eleanor Klibanoff, *Texans who perform abortions now face up to life in prison, $100,000 fine*, THE TEXAS TRIBUNE, Aug. 25, 2022. https://www.texastribune.org/2022/08/25/texas-trigger-law-abortion/#:~:text=Performing%20an%20abortion%20is%20now,its%20judgment%20in%20Dobbs%20v.
[3] Emma Goldberg, *These Companies Will Cover Travel Expenses for Employee Abortions*, THE NEW YORK TIMES, Aug. 19, 2022. https://www.nytimes.com/article/abortion-companies-travel-expenses.html
[4] The statute defines "Reproductive health care" to mean "health care and other medical services related to the reproductive processes, functions, and systems at all stages of life. It includes, but not limited to, family planning and contraceptive care; abortion care; prenatal, postnatal, and delivery care; fertility care; sterilization services; and treatments for sexually transmitted infections and reproductive cancers."
[5] Justin Wise, *Sidley Targeted as Republicans Warn Firms on Abortion Pledges*, BLOOMBERG LAW, July 8, 2022. https://news.bloomberglaw.com/business-and-practice/sidley-targeted-as-republicans-warn-firms-on-abortion-pledges

Some states have passed laws that make it illegal to ship medications across state lines for a self-managed abortion, and some legislatures are considering laws that will criminalize traveling out of state to receive reproductive health care.[6]

Colorado has taken the opposite approach. In the last legislative session, the right to reproductive health care was codified by state statute.[7] Further, Governor Jared Polis has issued an executive order in response to the actions of various state legislatures criminalizing aspects of reproductive health care post-*Dobbs* that is meant to protect professionals in our state.[8]

Some of the statutes enacted by states opposed to reproductive health care and statutes that were already on the books but not enforced due to federal preemption, are now being enforced. The ethical implications for Colorado lawyers whose practice includes representing out of state individuals, health care professionals, and entities that offer reproductive health care services are significant. For example, someone may file a complaint against an attorney licensed in Colorado who represents doctors practicing reproductive health care for patients who live in states that have reproductive health care bans. Likewise, lawyers advising clients seeking to travel from out of state to receive reproductive health care in Colorado may run the risk of being accused of potential ethical violations. As another example in the transactional context, an attorney representing a reproductive health care provider in a real estate transaction could face claims of ethical violations because the provider offers services to out of state patients. This could be especially complex if the lawyer is also licensed in a jurisdiction that imposes substantial limitations on access to reproductive health care.

Law firms also face practical concerns regarding this type of client representation. Clients could have a negative reaction to a widely known firm policy that is meant to overcome statutes or regulations of a jurisdiction or jurisdictions where the firm has an office, and which enacted prohibitions on certain types of reproductive health care services. Similarly, in light of the concern that Colorado attorneys may become the targets of ethical complaints, law firms may well prohibit their attorneys from assisting those who seek to obtain, or to provide, health care services that are lawful in Colorado, but restricted or banned elsewhere.

This memo provides background information about the ethical issues facing Colorado lawyers whose representation may include people and companies that are involved in reproductive health care. I am asking the Committee to consider a comment to Colo. RPC 1.2, like the comment regarding lawyers representing businesses or people engaged in our state-regulated marijuana industry, for lawyers whose representation relates to reproductive health care.

***Ethics Implications of Dobbs for Law Firm Management and Client Counseling*** [9]

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[6] Melody Schreiber, *US States could ban people from traveling for abortions, experts warn*, THE GUARDIAN, May 3, 2022. https://www.theguardian.com/world/2022/may/03/us-abortions-travel-wave-of-restrictions

[7] *See* Colorado General Assembly, HB22-1279, Reproductive Health Equity Act

[8] *See* Exec. Order D 2022 032.

[9] https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/articles/2022/ethics-implications-dobbs-law-firm-management-client-counseling/

In the wake of the *Dobbs* decision, the Ethics & Professionalism Committee of the American Bar Association published an article addressing the important professional responsibility issues *Dobbs* raises for attorneys and firms whose conduct is now legal in some states, such as ours, while arguably criminal in others, such as every state bordering Colorado other than New Mexico. By way of a summary:

The Problem: Law firms are not just another kind of business.

Lawyers are subject to ethical rules where the lawyers are licensed. This can create an avenue for persons opposed to reproductive health care to file complaints with disciplinary agencies to punish lawyers for advising clients who offer, or seek, reproductive health care, or that may have a business interest in the provision of such care.

Criminal Conduct and the Disciplinary Rules

Rule 8.4 treats most criminal conduct as a violation of legal ethics. The Texas Freedom Caucus has targeted the international law firm of Sidley Austin LLP, which has offices in Texas because the firm publicly declared their policy of covering travel expenses for its attorneys and employees should they seek reproductive health care services outside Texas. A copy of the letter from the Caucus is attached to this memo. The group asserted that the firm's policy is a violation of current state bans on providing abortion care. The group's claim is that the firm's new policy violated pre-*Roe* Texas statutes that criminalized abortion and conduct facilitating abortion. Although Sidley Austin does not have an office in Colorado, there are many national firms located in Texas and other states that limit or altogether ban reproductive health care, that do have offices in Colorado.

Rule 8.4 addresses serious crime. There is a question whether the conduct of assisting employees of a law firm who do not live in Colorado, or representing persons traveling to Colorado from other states for reproductive health care services, would constitute a "serious crime" that "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Considering that 61% of the US population lives in jurisdictions where reproductive health care services are legal,[10] there may be reasonable doubts as to whether laws criminalizing conduct that facilitates travel to a state where abortion care is legal, create a crime of moral turpitude that implicates Rule 8.4. Nevertheless, Colorado lawyers representing patients seeking abortion care and health care providers offering that care have legitimate concerns about the ethical issues their lawful efforts may expose them to.

Justice Kavanaugh noted in his concurrence in *Dobbs* that laws barring residents of a state from traveling to another state to obtain an abortion would violate the constitutional right to interstate travel.[11] This could support arguments that criminal penalties surrounding abortion care do not rise to the level of moral turpitude. However, no other Justice joined the Kavanaugh concurrence and, for that reason and many others, there remain many uncertainties. The Supreme Court will likely be grappling with these questions for years to come.

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[10] https://www.politifact.com/factchecks/2022/jun/27/jonathan-turley/complicated-calculation-determine-what-share-popul/#sources

[11] *See Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, concurring).

Multi-jurisdictional concerns

Liability for firm policies and procedures

In most states, the ethical rules apply to individual attorneys, not law firms. Colo RPC 5.1 and 5.7 deal with obligations of attorneys with respect to the conduct of other attorneys and individual non-attorneys within the firm.

It is helpful to consider this factual scenario: A national law firm is Texas based, and the firm's management committee holds a vote about covering expenses that relate to employees receiving reproductive health care services not available in the state. The Texas based members vote against the policy, but they are outvoted by other members, and covering of reproductive health care expenses becomes a firm policy. Have the Colorado members of the management committee engaged in an ethical violation by enacting a policy for services permitted in Colorado, but sanctioned as criminal in Texas?

Advising clients on reproductive health care-related policies

Many non-legal business entities have announced policies that will cover reproductive health care for their employees, and only did so after consulting with their attorneys, including attorneys in states where certain reproductive services have been criminalized. In other instances, individuals may seek advice from Colorado attorneys before receiving reproductive health care, either for themselves or for a person close to them. Similarly, medical professionals and hospitals are likely to seek advice about these issues from legal counsel as well.

The duty to report professional misconduct

The duty to report the professional misconduct of another attorney encompassed in Model Rule 8.3 affects attorneys in nearly every state.[12] It is hard to imagine a scenario before *Dobbs* where a law firm would be threatened with criminal prosecution because of an internal policy related to the health care policies it adopted for the benefit of its employees. But when law firms and attorneys act in furtherance of reproductive rights, they may, in the wake of *Dobbs*, become targets. Arguments can be made that because conduct is a crime in one jurisdiction but not another, prohibitions on access to reproductive health care do not create the type of crimes that implicate ethical concerns. Still, it is troublesome to lawyers who manage firms with policies that give their employees access to reproductive health care, and to attorneys in firms who advise clients on reproductive health care issues, that their law license might be at risk because they do so.

## Colorado State Law Considerations

[12] Washington state and Georgia are the only two states who do not impose a mandatory reporting requirement on attorneys in this regard. Those states' rule equivalent to Rule 8.3 use "should" instead of "shall." The Georgia rule expressly provides there are no disciplinary penalties for a violation of Rule 8.3. *See Rule 8.3: Reporting Other Lawyers*, Lundberg, fn. 3 (Jan. 2019) (http://lundberglegalethics.com/wp-content/uploads/2019/03/jan.-2019-westlaw-rule-8.3-reporting-other-lawyers.pdf).

**Executive Order D 2022 032**

On July 6, 2022, Governor Polis issued an executive order that is meant to protect health care professionals within the state of Colorado who help facilitate reproductive health care, as well as those who come to the state to seek such care. The Order states that "[n]o one who is lawfully providing, assisting, seeking, or obtaining reproductive health care in Colorado should be subject to legal liability or professional sanction in Colorado or any other state, nor will Colorado cooperate with criminal or civil investigations for actions that are fully legal in our State."

The Order goes on to direct that no state agency or department shall assist or further "any investigation or proceeding initiated in or by another state that seeks to impose criminal or civil liability or professional sanction upon a person or entity for conduct that would be legal in Colorado related to . . . reproductive health care."

The Department of Regulatory Agencies ("DORA") has, for example, implemented this order in the Surgical Assistant and Surgical Technologist Rules and Regulations.[13] Rule 1.11(B) of the regulations states "[t]he regulator shall not deny registration to an applicant or impose disciplinary action against an individual's registration based solely on the applicant or registrant's provision of or assistance in the provision of reproductive health care in this state or any other state or U.S. territory, so long as the care provided was consistent with generally accepted standards of practice as defined in Colorado law and did not otherwise violate Colorado law."

**Colorado Rules of Professional Conduct**

- **Rule 1.2.** Scope of Representation and Allocation of Authority Between Client and Lawyer.
    - Comment 14: A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIll, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. ln these circumstances, the lawyer shall also advise the client regarding related federal law and policy.

Comment 14 to Colo. RPC 1.2 was developed to address the discrepancy between state and federal regulation dealing with marijuana. The comment protects lawyers who advise clients involved in the marijuana industry in Colorado, whether directly or indirectly, under Colorado law, even though federal law prohibits such marijuana businesses. A potential new comment to Rule 1.2 could be similar to what DORA's professional boards are enacting in order to effectively implement the directives of Executive Order D 2022 032. A potential draft of such a comment could read as follows:

[13] *See* 4 CCR 745-1. All other professional health care regulatory boards have either proposed, or adopted, similar protections.

> Comment 15: A lawyer may counsel a client rendering or receiving reproductive health care, as defined in C.R.S. § 25-6-402(4), and may assist a client in conduct the lawyer reasonably believes is permitted by the laws and regulations of Colorado. In these circumstances, if the lawyer also reasonably believes that advice to a client may result in conduct by the client prohibited in another jurisdiction, the lawyer shall advise the client that such conduct is prohibited under other state law.

## Conclusions

Following the decision in *Dobbs*, the ethical landscape for Colorado lawyers is, at best, unclear. This uncertainty could have a chilling effect on the Colorado legal profession because a lawyer's law license may now be threatened when engaging in lawful conduct in Colorado that another state has restricted or altogether prohibited.

TEXAS FREEDOM
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July 7, 2022

Yvette Ostolaza
Chair of the Management Committee
Sidley Austin LLP
2021 McKinney Ave #2000
Dallas, Texas 75201
yvette.ostolaza@sidley.com

Dear Ms. Ostolaza:

It has come to our attention that Sidley Austin has decided to reimburse the travel costs of employees who leave Texas to murder their unborn children. It also appears that Sidley has been complicit in illegal abortions that were performed in Texas before and after the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, No. 19-1392. We are writing to inform you of the consequences that you and your colleagues will face for these actions.

Abortion is a felony criminal offense in Texas unless the mother's life is in danger. *See* West's Texas Civil Statutes, article 4512.1 (1974) (attached). The law of Texas also imposes felony criminal liability on any person who "furnishes the means for procuring an abortion knowing the purpose intended." West's Texas Civil Statutes, article 4512.2 (1974). This has been the law of Texas since 1925, and Texas did not repeal these criminal prohibitions in response to *Roe v. Wade*, 410 U.S. 113 (1973). These criminal prohibitions extend to drug-induced abortions if any part of the drug regimen is ingested in Texas, even if the drugs were dispensed by an out-of-state abortionist. To the extent that Sidley is facilitating abortions performed in violation of article 4512.1, it is exposing itself and each of its partners to felony criminal prosecution and disbarment.

We will also be introducing legislation next session that will impose additional civil and criminal sanctions on law firms that pay for abortions or abortion travel. The legislation that we will introduce will include each of the following provisions.

First. It will prohibit any employer in Texas from paying for elective abortions or reimbursing abortion-related expenses—regardless of where the abortion occurs, and regardless of the law in the jurisdiction where the abortion occurs. This provision will impose felony criminal sanctions on anyone who pays for these abortions to ensure that it remains enforceable against self-insured plans as a generally applicable criminal law.

Second. It will allow private citizens to sue anyone who pays for an elective abortion performed on a Texas resident, or who pays for or reimburses the costs associated with these abortions—regardless of where the abortion occurs, and regardless of the law in the jurisdiction where the abortion occurs. This provision will be modeled after the Texas Heartbeat Act and its private civil-enforcement mechanism.

Third. It will require the State Bar of Texas to disbar any lawyer who has violated article 4512.2 by "furnishing the means for procuring an abortion knowing the purpose intended," or who violates any other abortion statute enacted by the Texas legislature. If the State Bar fails to disbar an attorney who has violated these laws, then any member of the public may sue the officers of the State Bar and obtain a writ of mandamus compelling them to impose the required disciplinary sanctions.

Fourth. The legislation that we will introduce next session will empower district attorneys from throughout the state to prosecute abortion-related crimes—including violations of article 4512.2 of the Revised Civil Statutes—when the local district attorney fails or refuses to do so. It will also eliminate the three-year statute of limitations that currently applies to violations of article 4512.2. The state of Texas will ensure that you and colleagues are held accountable for every abortion that you illegally assisted.

It also appears that Sidley may have aided or abetted drug-induced abortions in violation of the Texas Heartbeat Act, by paying for abortions (or abortion-related travel) in which the patient ingested the second drug in Texas after receiving the drugs from an out-of-state provider. Litigation is already underway to uncover the identity of those who aided or abetted these and other illegal abortions. In light of this pending litigation, as well as any anticipated litigation that might ensue, you and your colleagues at Sidley must preserve and retain all documents, data, and electronically stored information relating in any way to: (1) Any abortions performed or induced in Texas on or after September 1, 2021, in which a fetal heartbeat was detectable (or likely to be detectable if tested), including any such abortions that occurred while Judge Pitman's injunction was in effect from October 6–8, 2021; (2) Any abortions performed or induced in Texas on or after June 24, 2022, including abortions performed while Judge Weems's TRO was in effect from June 28, 2022, through July 1, 2022; (3) Any abortion that occurred on or after September 1, 2021, if there is any possibility that the patient might have opted for a drug-induced abortion and ingested either of the abortion drugs in Texas, even if the drugs were dispensed by a provider outside the state of Texas; and (4) The identity of any person or entity who has aided or abetted the abortions described in (1) – (3), including anyone at your firm, and anyone who paid for or in any way reimbursed the costs of those abortions.

You and your colleagues must preserve these items regardless of the medium, format, or device on which they are stored or hosted, and regardless of whether they appear in documents, drafts, notes, calendar entries, emails, text messages, voicemails, social-media posts, or any other form. Failure to preserve these documents could subject you and your colleagues to significant penalties.

Conduct yourselves accordingly.

Sincerely,

Rep. Mayes Middleton
Chairman, Texas Freedom Caucus

Enclosure: West's Texas Civil Statutes, articles 4512.1 – 4512.6 (1974)

cc: All attorneys at Sidley Austin LLP
Ken Paxton, Attorney General of Texas

deformity or injury, by any system or method, or to effect cures thereof.

2. Who shall diagnose, treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation; provided, however, that the provisions of this Article shall be construed with and in view of Article 740, Penal Code of Texas [1] and Article 4504, Revised Civil Statutes of Texas as contained in this Act.

[1925 P.C.; Acts 1949, 51st Leg., p. 160, ch. 94, § 20(b); Acts 1953, 53rd Leg., p. 1029, ch. 426, § 11.]

[1] See, now, article 4504a.

### Art. 4510b. Unlawfully Practicing Medicine; Penalty

Any person practicing medicine in this State in violation of the preceding Articles of this Chapter shall be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than Fifty Dollars ($50), nor more than Five Hundred Dollars ($500), and by imprisonment in the county jail for not more than thirty (30) days. Each day of such violation shall be a separate offense.

[1925 P.C.; Acts 1939, 46th Leg., p. 352, § 10.]

### Art. 4511. Definitions

The terms, "physician," and "surgeon," as used in this law, shall be construed as synonymous, and the terms, "practitioners," "practitioners of medicine," and, "practice of medicine," as used in this law, shall be construed to refer to and include physicians and surgeons.

[Acts 1925, S.B. 84.]

### Art. 4512. Malpractice Cause for Revoking License

Any physician or person who is engaged in the practice of medicine, surgery, osteopathy, or who belongs to any other school of medicine, whether they used the medicines in their practice or not, who shall be guilty of any fraudulent or dishonorable conduct, or of any malpractice, or shall, by any untrue or fraudulent statement or representations made as such physician or person to a patient or other person being treated by such physician or person, procure and withhold, or cause to be withheld, from another any money, negotiable note, or thing of value, may be suspended in his right to practice medicine or his license may be revoked by the district court of the county in which such physician or person resides, or of the county where such conduct or malpractice or false representations occurred, in the manner and form provided for revoking or suspending license of attorneys at law in this State.

[Acts 1925, S.B. 84.]

## CHAPTER SIX ½. ABORTION

Article
4512.1 Abortion.
4512.2 Furnishing the Means.
4512.3 Attempt at Abortion.
4512.4 Murder in Producing Abortion.
4512.5 Destroying Unborn Child.
4512.6 By Medical Advice.

### Art. 4512.1 Abortion

If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

[1925 P.C.]

### Art. 4512.2 Furnishing the Means

Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

[1925 P.C.]

### Art. 4512.3 Attempt at Abortion

If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

[1925 P.C.]

### Art. 4512.4 Murder in Producing Abortion

If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder.

[1925 P.C.]

### Art. 4512.5 Destroying Unborn Child

Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.

[1925 P.C.]

### Art. 4512.6 By Medical Advice

Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

[1925 P.C.]