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

AGENDA

April 22, 2022, 9:00 a.m.
Via Webex
Webex link:

https://judicial.webex.com/judicial/j.php?MTID=m3c04ae0666bac1bf86a6b152f3bc78cd

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1. Call to Order [Judge Lipinsky].
2. Approval of minutes for January 28, 2022 meeting [attachment 1].
3. Old business:
    a. Technical correction to comment [3] to Rule 1.16A [Alec Rothrock].
    b. Report from the Rule 1.4 subcommittee [Dave Stark and Jessica Yates] [attachment 2].
    c. Report on patent practitioner harmonization proposal [Dan Smith] [attachment 3].
    d. Report on proposed amendment to Rule 1.8(e) [Jon Asher] [attachment 4].
    d. Report on the PALS II committee [Judge Espinosa] [attachment 5].
    e. Report on recent allegations of deceptive practices to steer potential clients to firms [Jessica Yates].
4. New business.

5. Adjournment.

Judge Lino Lipinsky, Chair
Colorado Court of Appeals
lino.lipinsky@judicial.state.co.us

Attachment 1

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
on
January 28, 2022
Sixty-Second Meeting of the Full Committee
Virtual meeting

The sixty-second meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 AM on Friday, January 28, 2022, by Chair Judge Lino Lipinsky de Orlov. The meeting was conducted virtually.

Present at the meeting, in addition to Judge Lino Lipinsky de Orlov and liaison Justice Maria Berkenkotter, were Nancy L. Cohen, Thomas E. Downey, Jr., Judge Adam Espinosa, Margaret B. Funk, Marcy Glenn, A. Tyrone Glover, Erika Holmes, April Jones, Matthew Kirsch, Julia Martinez, Cecil E. Morris, Jr., Noah C. Patterson, Judge Ruthanne N. Polidori, Troy Rackham, Henry Richard Reeve, Alexander R. Rothrock, Marcus L. Squarrell, Jamie S. Sudler, III, Robert W. Steinmetz, Eli Wald**,** Jennifer J. Wallace, Lisa M. Wayne, Frederick R. Yarger, Jessica E. Yates, and E. Tuck Young. Justice Monica Márquez, Cynthia F. Covell, Judge William R. Lucero, Marianne Luu-Chen, David W. Stark, and Judge John R. Webb were excused from attendance. Special guests in attendance were Judge Angela Arkin and Jonathan D. Asher, Executive Director, Colorado Legal Services.

1. Introductory Remarks.

   The Chair informed the Committee that Tom Downey had agreed to continue to serve as Secretary through 2022 and requested volunteers to assume the position commencing in 2023. Member Rackham volunteered to assume the duties of Secretary in 2023 The Chair accepted member Rackham's offer and thanked him for his willingness to take on the position of Secretary.

2. Approval of Minutes of September 24, 2021.

   The Chair had provided the submitted minutes of the sixty-first meeting of the Committee held on September 24, 2021, to the members prior to the meeting. Member Yates noted a misspelling on page 6, requested the deletion of the word "Submitting" in the fourth line on page 7, and, subject to those comments, moved that the minutes be approved as submitted. Member Reeve seconded the motion. The minutes were approved by vote of the Committee.

3. Old Business.

   a. Status Report on the Proposed Revision to Rule 3.8(d).

   The Chair reported that the public hearing scheduled on the proposed revision to Rule 3.8 (d) and comment [3] was scheduled for 3:30 PM on February 8, that the deadline for filing written comments was January 15, 2022, and that the deadline to sign up to speak at the public hearing was January 31, 2022. The Chair noted that the United States Department of Justice had filed a letter opposing the proposed revision to the Rule and comment, the criminal defense bar had filed a letter in support of the proposed revisions, and that those comments and others were available on the website of the Colorado Supreme Court.

   b. Report from the Rule 1.4 Subcommittee.

   Member Yates provided a short report on the activities of the Rule 1.4 Subcommittee and its efforts to draft proposed revisions to Rule 1.4 and proposed disclosures regarding malpractice insurance coverage. She noted that the Subcommittee had considered, and was making modifications to, language adopted by the Commonwealth of Pennsylvania on these issues. Member Yates reported that the Subcommittee was making progress and that it would be prepared to provide a full report to the Committee at the meeting on April 22, 2022.

4. New Business

   a. Report on the Proposed Amendment to Rule 1.8(e).

   Jonathan D. Asher presented a report requesting that the Committee consider revisions to Rule 1.8(e) and its comments. Mr. Asher noted that amendments to Rule 1.8 (e) and its comments dealing with the provision of financial assistance to indigent clients was necessary considering amendments made to the American Bar Association Model Rule 1.8(e) in 2020 and the increased financial needs of indigent clients in the current economic and COVID-19 pandemic conditions. Written materials relating to Mr. Asher's report are contained in Attachment 2 of the meeting materials packet.

   Mr. Asher provided a redlined draft of the ABA Model Rule and comments to highlight the slight changes from the Model Rule being proposed for Colorado Rule 1.8(e) and its comments. Mr. Asher noted that the proposed Colorado Rule would apply in cases where attorneys represent clients with no payment of a fee or through nonprofit legal services, public interest organizations, law school clinics, or other pro bono programs. He noted that the proposed revisions to the Rule would only apply in those types of situations and would limit the assistance provided to indigent clients to "modest gifts" for food, rent, transportation, medicine and other basic living expenses. He noted that the proposed rule would prohibit using the "modest gifts" as an inducement to continue the client-lawyer relationship, seeking reimbursement for the gifts, or publicizing the availability of such gifts to prospective clients. He noted that the proposed Rule carefully delineates the

circumstances under which "modest gifts" are allowable and emphasized that the proposed rule is a realistic, carefully crafted response respecting well-established ethical principles of the attorney-client relationship while providing guidance to attorneys for the infrequent and unique circumstances that arise during the course of their representation of indigent, struggling clients and their families. Mr. Asher concluded his remarks by requesting that the Committee recommend adoption of the proposed revisions to Rule 1.8 (e) and its comments to the Colorado Supreme Court.

Following Mr. Asher's report, a member inquired whether the use of the word "and" at the conclusion of proposed Rule 1.8(e)(2) meant that the provisions of subsections 2 and 3 had to go together. Mr. Asher responded by advising that the provisions of the two Rules did not have to go together and stated that the word choice was a slight tweaking of the ABA Model Rule language.

The Chair proposed the formation of a subcommittee to investigate the proposed revisions to Rule 1.8(e) and related comments and requested volunteers to serve on the subcommittee. A number of members volunteered to serve on the new subcommittee. Member Glenn noted that the issue of attorneys providing financial assistance to clients had been raised with the Committee years ago by attorney Ben Aisenberg. She noted that the Committee had declined to investigate the issue at that time.

Discussion on the issue concluded with the Chair requesting that the new subcommittee meet, investigate the issue, and make a proposal to the full Committee.

b. Report on the PALS II Committee.

Judge Angela Arkin presented a report on the PALS II Subcommittee. Written materials relating to Judge Arkin's presentation are contained in Attachment 3 of the meeting materials packet

In February 2020, the Colorado Supreme Court ordered the creation of a new subcommittee of the Supreme Court Advisory Committee to explore the possible creation of a regulatory process for licensing qualified paraprofessionals to engage in the practice of law in limited circumstances in certain types of domestic relations matters. Pursuant to that order, the Advisory Committees Paraprofessionals and Legal Services (PALS) Subcommittee developed and proposed a new program that would authorize Licensed Legal Paraprofessionals (LLPs) to offer and provide limited representation to parties in certain domestic relations matters. The proposals and recommendations of the PALS Subcommittee were approved by the Supreme Court Advisory Committee on May 21, 2021, and forwarded to the Colorado Supreme Court for further consideration. The Supreme Court, by Order dated June 3, 2021, directed the Advisory Committee to create an additional subcommittee or subcommittees to develop detailed requirements for licensure and practice by LLPs, to create a plan to launch the LLP program, and to draft appropriate Supreme Court rules to govern the LLP program.

Judge Arkin noted that approximately 75% of litigants in domestic relations cases do not have legal representation and that licensed legal paraprofessionals could provide needed assistance in lower-asset marital dissolution cases. She noted that fifteen to twenty other states either have paraprofessionals licensing rules or are considering them and that the PALS Subcommittee had examined and considered those provisions in formulating the proposals for Colorado. She noted that, in most instances, tasks of LLPs are limited to domestic relations matters where the net marital assets are $200,000 or less.

The program under consideration would allow for licensure of LLPs by the Colorado Supreme Court to engage in the limited practice of domestic relations law, either with a law firm or with their own paraprofessionals firm. The scope of practice of LLPs would be limited to uncomplicated domestic relations matters where the combined marital estate is $200,000 or less. The limited tasks that an unsupervised LLP could perform were set forth in detail at pages 3-5 of the PALS Subcommittee report of May 2021 included in Attachment 3. That report also details qualifications, education and training, annual registration, CLE requirements, potential malpractice insurance requirements, and potential ethical rules applicable to LLPs.

Following Judge Arkin's presentation, members of the Committee raised questions relating to whether professional liability insurance was available for LLPs, how much LLPs could charge, the success or failure of similar programs in other states, rules of professional conduct applicable to LLPs, and additional issues associated with organizing, approving, funding, and implementation the LLP program.

There was a brief discussion of the LLP program that had been initiated in Washington state but allowed to sunset in 2020. Judge Arkin noted that many issues prevented that program from continuing, including, but not limiting to, provisions making it difficult to attract potential LLPs and insufficient support from members of the bench and bar.

Judge Espinosa, a member of the Committee and the PALS Subcommittee, noted that he had begun working on potential rules of professional conduct for LLPs. Member Kirsch expressed confidence that the LLP program could be successful in Colorado. He noted, however, that the proposed limit on $200,000 of combined net marital assets may need to be reexamined considering current economic conditions in Colorado, which have resulted in values of single-family residences to increase significantly.

The Chair proposed creation of a subcommittee to address rules of professional conduct for LLPs. Judge Espinosa volunteered to lead the subcommittee. Judge Arkin expressed her support for having members of the Committee work with Judge Espinosa and for his ongoing work on the PALS Subcommittee to establish rules of professional conduct for LLPs. Judge Arkin noted there was a lot of "heavy lifting" left to do to launch the LLP program and that she did not expect the program to be operational before January 2024. The Chair sought and obtained volunteers from members of the Committee to work on the new subcommittee led by Judge Espinosa. Members Kirsch, Wald, Yarger, Wayne, Patterson, and Holmes volunteered to serve on the subcommittee. Judge Arkin agreed to

provide the Chair with additional materials in her possession on the implementation and sunset of the program in Washington.

Judge Arkin concluded her remarks by expressing gratitude for the opportunity to present the LLP program to the Committee and special thanks to member Yates and Judge Espinosa for their contributions to the LLP program. The Chair concluded the discussion by summarizing that a subcommittee of the Committee had been formed to investigate and develop rules of professional conduct for LLPs and stating that he looked forward to its reports at future meetings.

5. Concluding Remarks.

   Prior to adjournment, the Chair expressed his thanks to Ms. Wallace for her work on behalf of the Committee.

6. Adjournment.

   A motion was made and seconded to adjourn the meeting. The meeting was adjourned at 10:26 A.M.

Respectfully submitted,

Thomas E. Downey, Jr., Secretary

Attachment 2

Rule 1.4. Communication

(a) A lawyer shall:

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

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

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

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

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

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

(c) A lawyer in private practice shall inform a new client in writing before or within a reasonable time after commencing the representation if the lawyer is not covered by professional liability insurance of at least $100,000 per claim and $300,000 in the aggregate per year, subject to commercially reasonable deductibles, retention or co-insurance. A lawyer shall maintain a record of these disclosures for seven years after the termination of the representation of a client.

COMMENT

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with

the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations--depending on both the importance of the action under consideration and the feasibility of consulting with the client--this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

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

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance

that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[6A] Regarding communications with clients when a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the providing of legal services to the client, see Comment [6] to Rule 1.1.

[6B] Regarding communications with clients and with lawyers outside of the lawyer's firm when lawyers from more than one firm are providing legal services to the client on a particular matter, see Comment [7] to Rule 1.1.

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or

convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Explanation of Fees and Expenses

[7A] Information provided to the client under Rule 1.4(a) should include information concerning fees charged, costs, expenses, and disbursements with regard to the client's matter. Additionally, the lawyer should promptly respond to the client's reasonable requests concerning such matters. It is strongly recommended that all these communications be in writing. As to the basis or rate of the fee, see Rule 1.5(b).

Disclosures Regarding Insurance

[8] "Private practice" in paragraph (c) does not include lawyers exclusively in government practice or exclusively employed as in-house counsel.

[9] Lawyers may use the following language in making the disclosures required by this rule:

> "Colorado Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have professional liability insurance of at least $100,000 per claim and $300,000 in the aggregate per year and if, at any time, a lawyer's professional liability insurance drops below either of those amounts or a lawyer's professional liability insurance coverage is terminated. You are therefore advised that (name of attorney or firm) does not have professional liability insurance coverage of at least $100,000 per claim and $300,000 in the aggregate per year."

[10] A lawyer or firm maintaining professional liability insurance coverage – whether through the current policy or successor policies - in at least the minimum amounts provided in paragraph (c) is not subject to the disclosure obligations mandated by paragraph (c) if such coverage is subject to commercially reasonable deductibles, retention or co-insurance. Deductibles, retentions or co-insurance offered, from time to time, in the marketplace for professional liability insurance for the size of firm and coverage limits purchased will be deemed to be

commercially reasonable. A professional liability insurance policy with coverage of at least $100,000 per claim and $300,000 in the aggregate is deemed commercially reasonable even if limits of that coverage erode with defense costs.

Rule 1.5. Fees

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COMMENT

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[19] The provisions of other Rules may require a lawyer to include additional terms or statements in communications concerning fees. See Rule 1.4.

Rule 1.4. Communication

(a) A lawyer shall:

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

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

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

(c) A lawyer in private practice shall inform a new client in writing before or within a reasonable time after commencing the representation if the lawyer is not covered by professional liability insurance of at least $100,000 per claim and $300,000 in the aggregate per year, subject to commercially reasonable deductibles, retention or co-insurance. A lawyer shall maintain a record of these disclosures for seven years after the termination of the representation of a client.

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the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

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

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that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

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[6B] Regarding communications with clients and with lawyers outside of the lawyer's firm when lawyers from more than one firm are providing legal services to the client on a particular matter, see Comment [7] to Rule 1.1.

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or

convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Explanation of Fees and Expenses

[7A] Information provided to the client under Rule 1.4(a) should include information concerning fees charged, costs, expenses, and disbursements with regard to the client's matter. Additionally, the lawyer should promptly respond to the client's reasonable requests concerning such matters. It is strongly recommended that all these communications be in writing. As to the basis or rate of the fee, see Rule 1.5(b).

Disclosures Regarding Insurance

[8] “Private practice” in paragraph (c) does not include lawyers exclusively in government practice or exclusively employed as in-house counsel.

[9] Lawyers may use the following language in making the disclosures required by this rule:

> “Colorado Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have professional liability insurance of at least $100,000 per claim and $300,000 in the aggregate per year and if, at any time, a lawyer’s professional liability insurance drops below either of those amounts or a lawyer’s professional liability insurance coverage is terminated. You are therefore advised that (name of attorney or firm) does not have professional liability insurance coverage of at least $100,000 per claim and $300,000 in the aggregate per year.”

[10] A lawyer or firm maintaining professional liability insurance coverage – whether through the current policy or successor policies - in at least the minimum amounts provided in paragraph (c) is not subject to the disclosure obligations mandated by paragraph (c) if such coverage is subject to commercially reasonable deductibles, retention or co-insurance. Deductibles, retentions or co-insurance offered, from time to time, in the marketplace for professional liability insurance for the size of firm and coverage limits purchased will be deemed to be

commercially reasonable. A professional liability insurance policy with coverage of at least $100,000 per claim and $300,000 in the aggregate is deemed commercially reasonable even if limits of that coverage erode with defense costs.

Rule 1.5. Fees

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COMMENT

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[19] The provisions of other Rules may require a lawyer to include additional terms or statements in communications concerning fees. See Rule 1.4.

Attachment 3

COLORADO SUPREME COURT
ATTORNEY REGULATION COUNSEL

Attorney Regulation Counsel
Jessica E. Yates

Chief Deputy Regulation Counsel
Margaret B. Funk

Deputy Regulation Counsel
April M. McMurrey

Deputy Regulation Counsel
Dawn M. McKnight

Deputy Regulation Counsel
Gregory G. Sapakoff

Attorneys' Fund for Client Protection
Unauthorized Practice of Law

Assistant Regulation Counsel

Jill Perry Fernandez
Erin Robson Kristofco
Michelle LeFlore
Jody McGuirk
Michele Melnick
Justin P. Moore
Alan C. Obye
Lisa E. Pearce
Matt Ratterman
Catherine Shea
Jacob M. Vos
Jonathan P. White
Rhonda White-Mitchell
E. James Wilder

March 30, 2022

Dear Members of the Supreme Court Standing Committee on the Rules of Professional Conduct:

Pursuant to the work of the subcommittee formed to address communications about professional liability insurance, the subcommittee hereby tenders this recommendation to the Standing Committee. The proposed rule and comments that would be added to Colo. RPC 1.4 and a cross-referencing comment to Colo. RPC 1.5 are set forth in **Attachment A.**

Membership of the Subcommittee

The subcommittee was comprised of the following members of the Standing Committee:

- Nancy Cohen
- The Hon. Adam Espinosa
- Margaret Funk
- Troy Rackham
- David Stark
- Robert Steinmetz
- Jamie Sudler
- Jessica Yates
- Tuck Young

Objectives of the Subcommittee

The subcommittee was formed after the Supreme Court Advisory Committee on the Practice of Law referred a proposal to require lawyers to communicate about

the availability of professional liability insurance to new and/or current clients. Information about lawyers' decisions on maintaining such insurance is collected annually through the attorney registration process. According to the 2021 registration data provided by the Office of Attorney Regulation Counsel, 17% of private practice lawyers reported that they did not maintain professional liability insurance. Looking at solo practitioners, 39% reported that they did not maintain professional liability insurance.

The subcommittee discussed the potential goals of any given rule change, and agreed that any disclosure requirement that applies only to uninsured/underinsured lawyers could incentivize at least some of them to acquire basic levels of insurance. Most of the subcommittee believed that increasing the number of insured lawyers was the primary goal of any rule change relating to this issue. One subcommittee member believed that clients also should be informed about changes to insurance occurring over the course of representation, and that lawyers should be required issue disclosures to both new and existing clients at the time a new rule becomes effective. Therefore, this transmittal memo covers both the majority perspective and that one person's perspective.

Work of the Subcommittee on Colo. RPC 1.4

The subcommittee met by Zoom approximately four times between November 2021 and March 2022. The subcommittee reviewed rule-based approaches taken by various states, including Pennsylvania and California. The proposed rule and comments reflect the outcome of those discussions.

Majority Proposal with Consensus Notes

There was subcommittee consensus that a certain type of disclosure by uninsured/underinsured lawyers could incentivize them to obtain basic professional liability insurance. The subcommittee noted that the limits of $100,000 per claim/$300,000 in the aggregate were probably the minimum insurance that was available by carriers (in other words, the subcommittee does not believe that there are Colorado lawyers insured at lower amounts). However, for purposes of this transmittal memo, the term "underinsured" refers to the possibility that a lawyer is insured at some lower amount.

The majority of the subcommittee concluded that, notwithstanding the potential benefits of disclosing more rather than less information, many clients would be confused by the details of professional liability insurance, and a rule requiring

additional disclosures in an engagement letter is not likely to eliminate such confusion. Notably, professional liability policies are usually claims-made, so a lawyer might not be covered if a client makes a claim later and the policy that existed at the time of engagement has lapsed. Further, basic policies tend to provide that the cost of defense falls within and erodes policy limits. So many clients could assume that the stated policy limits describe their maximum recoverable amount under insurance, whereas there may be little left under the policy after extensive litigation between the client and the lawyer. Addressing all of these hypotheticals in an engagement letter may cause the client to assume the worst or, at a minimum, create misunderstandings between the client and lawyer that adversely affect the relationship.

Several subcommittee members believed that when clients want information about availability and limits of insurance prior to the engagement decision, they are likely to request that information from the lawyer.

Accordingly, the majority would add a new paragraph (c) to Colo. RPC 1.4:

> *(c) A lawyer in private practice shall inform a new client in writing before or within a reasonable time after commencing the representation if the lawyer is not covered by professional liability insurance of at least $100,000 per claim and $300,000 in the aggregate per year, subject to commercially reasonable deductibles, retention or co-insurance. A lawyer shall maintain a record of these disclosures for seven years after the termination of the representation of a client.*

The majority proposal would add three new comments to Colo. RPC 1.4.

The first, Comment [8], would define "private practice" for purposes of paragraph (c) to exclude in-house counsel and lawyers who work only for the government with no private clients:

> *[8] "Private practice" in paragraph (c) does not include lawyers exclusively in government practice or exclusively employed as in-house counsel.*

The second, Comment [9], would provide "safe harbor" language that a lawyer could include in the lawyer's engagement letter, and if used, would be deemed compliant with the rule:

[9] Lawyers may use the following language in making the disclosures required by this rule:

> *"Colorado Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have professional liability insurance of at least $100,000 per claim and $300,000 in the aggregate per year and if, at any time, a lawyer's professional liability insurance drops below either of those amounts or a lawyer's professional liability insurance coverage is terminated. You are therefore advised that (name of attorney or firm) does not have professional liability insurance coverage of at least $100,000 per claim and $300,000 in the aggregate per year."*

The third, Comment [10], clarifies the meaning of "commercially reasonable" in the proposed paragraph (c):

[10] A lawyer or firm maintaining professional liability insurance coverage – whether through the current policy or successor policies - in at least the minimum amounts provided in paragraph (c) is not subject to the disclosure obligations mandated by paragraph (c) if such coverage is subject to commercially reasonable deductibles, retention or co-insurance. Deductibles, retentions or co-insurance offered, from time to time, in the marketplace for professional liability insurance for the size of firm and coverage limits purchased will be deemed to be commercially reasonable. A professional liability insurance policy with coverage of at least $100,000 per claim and $300,000 in the aggregate is deemed commercially reasonable even if limits of that coverage erode with defense costs.

Finally, the majority proposal would add a comment to Colo. RPC 1.5 concerning fees to prompt lawyers drafting fee agreements to look to Colo. RPC 1.4 for an additional term or statement that may be required to be included:

Rule 1.5. Fees
****
COMMENT
****

[19] The provisions of other Rules may require a lawyer to include additional terms or statements in communications concerning fees. See Rule 1.4.

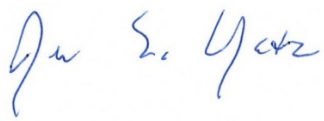
Minority (One Person) Perspective

One person on the subcommittee would have made paragraph (c) apply to clients a lawyer currently has (as opposed to new clients only) as of the effective date of the rule, regardless of when the engagement began. That approach would require lawyers who do not maintain minimum levels of professional liability insurance to send correspondence to all their clients at the time the rule takes effect.

That person also would require lawyers to send correspondence to all current clients if they become uninsured/underinsured after an engagement has commenced – such as if coverage drops below the $100,000/$300,000 minimum policy limits or if coverage terminates.

That person favored such measures to better protect clients through additional information even after the representation had commenced or had been underway for some time.

Sincerely,



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UNITED STATES PATENT AND TRADEMARK OFFICE

UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

August 30, 2021

Christopher M. Turoski
President, National Association of Patent Practitioners
701 Exposition Place, Suite 206
Raleigh, NC 27615

Dear Mr. Turoski:

The United States Patent and Trademark Office (USPTO) is responding to a recent request it received from the National Association of Patent Practitioners (NAPP) during two meetings held on March 11 and April 6, 2021, respectively on the subject of "Practitioner Harmonization." At these meetings, NAPP representatives stated that the Association intends to propose an amendment to Colorado Rules of Professional Conduct Rule 5.4 (Professional Independence of a Lawyer) to permit attorneys licensed in Colorado to form partnerships and share fees with non-lawyers registered by the USPTO (i.e., registered patent agents). We understand that NAPP representatives believe that more people will endeavor to become registered agents if financial opportunities for them and for patent attorneys are equitable. They requested the USPTO's experience regarding fee sharing and partnerships between registered agents and registered attorneys.[1]

The mission of the USPTO is to foster innovation, competitiveness, and economic growth, domestically and abroad, by providing high quality and timely examination of patent and trademark applications, guiding domestic and international intellectual property (IP) policy, and delivering IP information and education worldwide. The USPTO strives to regulate those practicing before it only to the extent necessary to achieve its mission and to balance that aim with protecting the public.

[1] The USPTO does not differentiate between attorneys and non-attorneys when determining whether a person should be authorized to represent others before the agency in patent matters. So long as an individual meets the USPTO's competency and moral qualification standards, he or she can become a registered practitioner. Patent agents, therefore, are registered practitioners who are not attorneys licensed by the highest court in a U.S. state, district, or territory, but may practice patent law before the USPTO. *See Sperry v. Florida*, 140 So.2d 587, 594-95 (Fla. 1962) (The Supreme Court of Florida granted an injunction, preventing the respondent, a registered practitioner who was a non-attorney patent agent, from practicing law without a license. The United States Supreme Court, however, held that Florida could not prohibit him from performing the activities of a patent agent, even though those activities constitute the practice of law, in view of the federal regulation permitting the Commissioner for Patents to authorize practice before the Office by non-attorneys. *Id.* at 594-95).

Legal representation before federal agencies is generally governed by the provisions of 5 U.S.C. § 500, which effectively defers to the individual states as to who may act as an attorney. That statute, however, provides a specific exception for representation in patent matters before the USPTO. 5 U.S.C. § 500(e). The USPTO requires that applicants for registration to practice before it establish, to the satisfaction of the Director of its Office of Enrollment and Discipline (OED), that he or she possesses good moral character and reputation and the legal, scientific, and technical qualifications necessary to render applicants valuable service, and is competent to advise and assist patent applicants in the presentation and prosecution of their applications before the Office. *See* 37 CFR § 11.7.

The General Requirements Bulletin (GRB) sets forth guidance for complying with the provisions of 37 CFR § 11.7, including the ways in which an applicant can prove sufficient training in scientific and technical matters in order to sit for the registration examination, an explanation of the examination, and bars to sitting for the examination.[2] The registration examination is a rigorous competency examination designed to test an applicant's knowledge of applicable patent laws, rules, and procedures, and his or her ability to analyze factual situations and properly apply that knowledge to render valuable service to patent applicants in the preparation and prosecution of their patent applications. 35 U.S.C. § 2(b)(2)(D).

The USPTO regulates the professional conduct of those authorized to practice before the Office in patent matters through the USPTO Rules of Professional Conduct, which permits fee sharing and partnership formation between practitioners.[3] *See* 37 CFR § 11.504 (Professional independence of a practitioner). Because patent agents are considered "practitioners" pursuant to 37 CFR §§ 11.1 and 11.7, the rules governing the conduct of those who practice before the Office in patent matters allow a registered patent agent to share fees and form partnerships with attorneys who are members in good standing with the bar of the highest court of a state. *See* 37 CFR § 11.504. Accordingly, the USPTO Rules of Professional Conduct allow for fee sharing and partnership formation between registered agents and attorney practitioners.

Sincerely,

Andrew Hirshfeld
Performing the Functions and Duties of the
Under Secretary of Commerce for Intellectual
Property and Director of the United States Patent
and Trademark Office

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[2] The General Requirements Bulletin is available at www.uspto.gov/sites/default/files/documents/OED_GRB.pdf.
[3] As set forth in 37 CFR § 11.1, a practitioner is defined as: (1) an attorney or agent registered to practice before the Office in patent matters; (2) an individual authorized under 5 U.S.C.§ 500(b), or otherwise as provided by § 11.14(a), (b), and (c), to practice before the Office in trademark matters or other non-patent matters; or (3) an individual authorized to practice before the Office in a patent case or matters under § 11.9(a).

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April 14, 2021

The Honorable Judge Lino S. Lipinsky de Orlov
Chair, Standing Committee on the Colorado Rules of Professional Conduct
Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203
lino.lipinsky@judicial.state.co.us

Re: Proposed Sub-Committee to Investigate Potential Clarification to the Colorado Rules of Professional Conduct

Dear Judge Lipinsky:

The National Association of Patent Practitioners (NAPP) requests that the Standing Committee on the Colorado Rules of Professional Conduct ("Standing Committee") initiate a sub-committee to investigate clarifying or amending the Colorado Rules of Professional Conduct ("Colorado Rules") to harmonize those with the United States Patent and Trademark Office ("USPTO") Rules of Professional Conduct ("USPTO Rules") (collectively, the "Rules"). Specifically, NAPP requests the Standing Committee clarify the working relationship between Lawyers operating in the jurisdiction of Colorado and Practitioners operating in the jurisdiction of the USPTO. USPTO Practitioners may be divided into two groups: Practitioners that work on trademark matters (Trademark Lawyers) and Practitioners that work on Patent Matters (Patent Lawyers and Patent Agents). NAPP believes the clarification or change will have significant impact on Colorado based Lawyers, Law Firms, USPTO Practitioners, and Colorado's growing Innovation Ecosystem.

I. The Current Conflict Between the Colorado and USPTO Rules Harms Patent Agents, Colorado Law Firms, and the Innovation Ecosystem

Under the current state of affairs, there may exist an incompatibility between the Colorado Rules and the UPSTO Rules. This potential incompatibility is a detriment to Colorado Lawyers, Firms, Colorado industries, inventors, and Colorado-based USPTO Practitioners. The incompatibility is a function of one of the few differences that exists between the two Rules, which is one calls out "Lawyers" and the other "Practitioners." That is, the Colorado Rules state Colorado Lawyers may do the following only with other Colorado Lawyers: form a partnership, share fees, form law firms, buy and sell law firms, have supervisory authority over other Lawyers, have managerial authority in a law firm, etc. In contrast, the USPTO Rules state USPTO "Practitioners" may form a partnership, share fees, form law firms, buy and sell law firms, have supervisory authority over other practitioners, have managerial authority in a law firm, etc. with other Practitioners. For a

more complete comparison, see Table 1 below, comparing the Colorado Rules, the USPTO Rules, and the American Bar Association Rules of Professional Conduct ("ABA Rules").

At first read it makes sense the Colorado Rules positively recite "Lawyers," as the Colorado Rules are directed to Colorado Lawyers. But reading "Lawyers" in a manner as to exclude other licensed practitioners of law (i.e., Patent Agents), in our opinion, limits licensed USPTO Patent Practitioners (both Patent Lawyers and Agents) from fully participating in the federal objectives outlined by the Constitution and Congress. The difference between the Colorado Rules and the USPTO rules stifles Colorado Law Firms, Colorado based Practitioners, and the Colorado Innovation Ecosystem.

Colorado Law Firms are affected because firms have difficulty retaining experienced and productive Patent Agents. By excluding Patent Agents from fee sharing in the law firm setting, the Colorado Rules' impose a ceiling on the Patent Agent profession, which results in Patent Agents seeking better prospects at in-house positions. Unable to retain skilled and knowledgeable Patent Agents, Law Firms suffer myriad harms, such as: losing experienced tutors for new patent practitioners; eliminating a less expensive patent draft person and prosecutor, thereby increasing costs for clients and reducing profits for firms; and reducing diversity at firms. Additionally, Lawyers and law firms are also deprived of the opportunity to buy, sell, and merge with thriving Patent Agent-owned firms. *See* Colorado Rule of Professional Conduct 1.17; Colorado Rule of Professional Conduct 5.4. This can hinder Colorado-based law firms and Lawyers as they are not able to incorporate quickly a thriving patent practice to enhance the Colorado Lawyer's or firm's offering or bolster their existing practice.

Colorado-based Practitioners (Patent Lawyers and Patent Agents) are also affected in multiple ways by this difference between the Colorado Rules and the USPTO Rules. First, the current situation imposes a ceiling on the Patent Agent profession. If the USPTO Rules were followed in Colorado, then Patent Agents could own firms (related to professional independence), be a firm partner (related to professional independence and responsibilities of a partner or supervisory lawyer), benefit from bringing in clients (related to fee sharing), pass their knowledge onto those they supervise (related to supervisory authority), and so forth. If the Colorado Rules are followed in Colorado, then Patent Agents are not afforded these USPTO provided benefits, responsibilities, and growth opportunities. Second, if the Colorado Rules are followed in Colorado, then a Patent Agent can only sell their patent firm to another Patent Agent. Further, a Patent Lawyer or firm cannot acquire or merge with a Patent Agent owned firm. Co-ownership of a patent firm by Lawyer-Patent Agent is also not allowed by the Colorado Rules. Third, Patent Agents employed by firms with Lawyers are not incentivized from bringing clients to the firm as the Colorado Rules recite Lawyers may not share fees with non-Lawyers. This is in opposition to the USPTO Rules, which do allow Practitioners (Patent Lawyers, Patent Agents, and Trademark Lawyers) to share fees.

When a Patent Agent hits the professional ceiling created by the potential conflict between the two sets of Rules, they have three options: (1) stagnate with little to no upward mobility; (2) leave the patent profession completely; or (3) go to law school to remove the ceiling. A stagnating career is not a great option for the Patent Agent, and the loss of a Patent Agent from the profession is a detriment to the legal profession and Innovation Ecosystem. The third option—going to law school to become a Patent Lawyer—also has downsides for the individual, law firms, and the Innovation Ecosystem. Going to law school to remove the Patent Agent ceiling only to return to perform the same work as a Patent Lawyer comes at a high personal cost of significant debt, three plus years of separation from their technical expertise and from patent law, and pressure from a higher billing rate resulting in less time to draft and prosecute complex patent applications. Law Firms also suffer in this scenario, as they now have reduced access to low-cost high-skill practitioners. This also harms inventors, who likewise have reduced access to lower-cost patent experts.

The sum of these effects impacts Colorado's Innovation Ecosystem, which affects large companies, small companies, and individual inventors. The next section focuses on individual inventors, but its logic extends to any inventor (independent or otherwise) or innovative company as well. The USPTO established the Patent Agent profession to provide inventors with a lower cost, highly skilled alternative to Patent Lawyers. As discussed in "101A: American Bar Association Section Of Intellectual Property Law Section Of Litigation Report To The House Of Delegates - RESOLUTION":

> [I]t can be difficult for individual inventors to find law firms that are willing to represent them in preparing and prosecuting patent applications at costs they can afford. Some patent lawyers have little or no interest in directly representing individual inventors, and some patent firms have policies against it.[5] Other firms are willing to represent individual inventors and address cost concerns by using patent agents to serve those cash strapped clients at a greatly reduced rate, but in many instances individual inventors and others must directly employ patent agents to help them with their patent applications. Thus, patent agents are necessary for those applicants who cannot find a lawyer willing to represent them or those applicants who can only afford representation at a significantly reduced rate. Indeed, the Federal Circuit has recognized "the very purpose of Congress's design: namely, to afford clients the freedom to choose between an attorney and a patent agent for representation before the Patent Office." Queen's University, 820 F.3d at 1298.

5: "A number of law firms now have policies against representing individuals (except for the very wealthy)." Individual Inventors: Who Will Represent You Now? Dennis Crouch June 21, 2007 https://patentlyo.com/patent/2007/06/individual-inve.html .

Thus, losing Patent Agents to the Patent Lawyer Profession or to a complete career change reduces the number of affordable patent practitioners. Industry stakeholders feel this every day in Colorado's Innovation Ecosystem. Patent Lawyer billing rates climb to the point where even large and small companies cannot afford to protect their invention and many individual inventors cannot find a firm to help them protect their inventions at a feasible cost. Patents are one of the building blocks of any Innovation Ecosystem, not only because they provide space and time for an inventor or innovator to operate, but also because those protected inventions are donated to the public through publication such that others can build on them, creating a foundation for continuous scientific progress. When inventors cannot benefit from patent protect, inventions either (1) remain trade secrets, such that the invention does not become public knowledge and does not become a building block for other technology, or (2) inventors—usually small or individual inventors—do not pursue their inventions, causing those inventions to disappear or be reinvented, as often happens, by large companies that can afford to patent protect the invention. Small businesses are another building blocks of any Innovation Ecosystem and, therefore, an economy, so this second outcome is also detrimental.

Harmonizing the Colorado Rules with the USPTO Rules with respect to patent Practitioners will strengthen Colorado's Innovation Ecosystem, draw more innovative companies to Colorado, reduce the cost of innovation for large and small companies and individual inventors, increase the number of patent practitioners due to the removal of the career ceiling (currently only 25% of the Patent Practitioner Pool are Patent Agents), and increase diversity in law firms and ease access to legal representation for more diverse innovators. In *In re Queen's University at Kingston*, 820 F.3d 1287, 1300 (Fed. Cir. 2016), the Federal Circuit stated "[t]he Supreme Court's characterization of the activity in *Sperry* coupled with the clear intent of Congress to enable the Office to establish a dual track for patent prosecution by either patent attorneys or non-attorney patent agents confers a *professional status* on patent agents . . . ." This professional status needs to be realized by the State Bars and within law firms to fully embrace the "intent of Congress to enable the Office to establish a dual track for patent prosecution."

II. How to Harmonize the Colorado and USPTO Rules

The Current Rules Are Already Substantially Similar:

As discussed above, both the Colorado Rules and the USPTO rules are substantially similar as they are both based on the American Bar Association Rules of Professional Conduct (the "ABA Rules"). One argument against changing the Colorado Rules relates to Colorado Rule 5.4, "Professional Independence of a Lawyer," and the unintended consequences a change may have. We would point out Rule 5.4 of the Colorado Rules and Rule 11.504 of the USPTO Rules (both reproduced below for ease of comparison) are so similar such that Colorado Lawyers and USPTO Practitioners are appear to be bound by substantially the same rules of professional conduct. In fact, one could argue that due to the similarity with all the rules (Colorado, the USPTO, the ABA, and in fact all other State plus DC Rules of Professional Conduct), the rationale for allowing Colorado

Lawyers to Partner with Lawyers from other State Jurisdictions could be extended to the Practitioners (including Patent Agents) in the jurisdiction of the USPTO.

For comparison purposes, reproduced below are the Colorado and USPTO rules for the Professional Independence of a Lawyer/Practitioner. Colorado Rule 5.4, "Professional Independence of a Lawyer," provides:

> (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
>
> > (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
> > (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;
> > (3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;
> > (4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
> > (5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommend employment of the lawyer in the matter.
>
> (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
>
> (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
>
> (d) A lawyer shall not practice with or in the form of a professional company that is authorized to practice law for a profit, if
>
> > (1) A nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; or

> (2) A nonlawyer has the right to direct or control the professional judgment of a lawyer.
>
> (e) A lawyer shall not practice with or in the form of a professional company that is authorized to practice law for a profit except in compliance with C.R.C.P. 265.
>
> (f) For purposes of this Rule, a "nonlawyer" includes (1)a lawyer who has been disbarred, (2)a lawyer who has been suspended and who must petition for reinstatement, (3) a lawyer who has been immediately suspended pursuant to C.R.C.P. 251.8 or 251.20(d), (4) a lawyer who is on inactive status pursuant to C.R.C.P. 227(A)(6), or (5) a lawyer who, for a period of six months or more, has been (i) on disability inactive status pursuant to C.R.C.P. 251.23 or (ii) suspended pursuant to C.R.C.P. 251.8.5, 227(A)(4), 260.6, or 251.8.6.

Similarly, the analogous USPTO Rule, 37 C.F.R. § 11.504, provides:

> (a) A practitioner or law firm shall not share legal fees with a non-practitioner, except that:
>
> > (1) An agreement by a practitioner with the practitioner's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the practitioner's death, to the practitioner's estate or to one or more specified persons;
> > (2) A practitioner who purchases the practice of a deceased, disabled, or disappeared practitioner may, pursuant to the provisions of § 11.117, pay to the estate or other representative of that practitioner the agreed-upon purchase price;
> > (3) A practitioner or law firm may include non-practitioner employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
> > (4) A practitioner may share legal fees, whether awarded by a tribunal or received in settlement of a matter, with a nonprofit organization that employed, retained or recommended employment of the practitioner in the matter and that qualifies under Section 501(c)(3) of the Internal Revenue Code.
>
> (b) A practitioner shall not form a partnership with a non-practitioner if any of the activities of the partnership consist of the practice of law.
>
> (c) A practitioner shall not permit a person who recommends, employs, or pays the practitioner to render legal services for another to direct or regulate the practitioner's professional judgment in rendering such legal services.

(d) A practitioner shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A non-practitioner owns any interest therein, except that a fiduciary representative of the estate of a practitioner may hold the stock or interest of the practitioner for a reasonable time during administration;
(2) A non-practitioner is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or
(3) A non-practitioner has the right to direct or control the professional judgment of a practitioner.

As can be seen above, the rules related to professional independence are substantially the same for Colorado and the USPTO. Table 1, below, shows a comparison of the sections for the Rules of Professional Conduct between the ABA, the USPTO, and Colorado. A more detail review of the rules themselves will show subtle differences (similar to the differences that appear above for the Professional independence of a lawyers/practitioner) based in part on the independent evolution in each jurisdiction and each jurisdiction's specific purposes. Similar differences can be seen when comparing many Rules of various states and the District of Columbia.

Table 1 – Comparison: Rules of Professional Conduct for the ABA, USPTO and Colorado

Description	**ABA Rule**	**USPTO Rule**	**CO Rules**
Competence	1.1	11.101	1.1
Scope of Representation	1.2	11.102	1.2
Diligence / Neglect	1.3	11.103	1.3
Communication	1.4	11.104	1.4
Fees	1.5	11.105	1.5
Confidentiality	1.6	11.106	1.6
Conflict of Interest	1.7, 1.9(a), 1.10	11.107, 11.109(a), 11.110	1.7, 1.9(a), 1.10
Business Transaction with Client	1.8(a)	11.108(a)	1.8(a)
Influence from Third-Party Payer	1.8(f)	11.108(f)	1.8(f)
Limitation on Liability	1.8(h)	11.108(h)	1.8(h)
USPTO / Gov't Employee	1.11	11.111	1.11

Safekeeping Property	1.15	11.115	1.15(a) – (e) *[Repealed and readopted as Rules 1.15A - 1.15E, effective June 17, 2014]*
Withdrawal / Termi-nation	1.16	11.116	1.16
Candid Advice	2.1	11.201	2.1 *[CO includes additional language w.r.t. litigation, not relevant to the USPTO]*
Evaluation for Use by Third Persons	2.3	11.203	2.3
Lawyer/ Practitioner Serving as Third-Party Neutral	2.4	11.204	2.4
Non-Meritorious Claims	3.1	11.301	3.1
Candor Toward the Tribunal	3.3	11.303	3.3
Fairness to Opposing Party and Counsel	3.4	11.304	3.4
Ex Parte Communications	3.5(a)-(d)	11.305(a)-(b), (d) *[(c) does not apply to USPTO]*	3.5(a)-(d)
Lawyer/ Practitioner as witness	3.7	11.307	3.7
Special Responsibilities of a Prosecutor	3.8	No equivalent rule	3.8
Truthfulness in statements to others	4.1	11.401	4.1
Communication with person represented by a practitioner	4.2	11.402	4.2
Dealing with unrepresented person	4.3	11.403	4.3
Respect for rights of third persons	4.4	11.404	4.4
Responsibilities of partners, managers, and supervisory lawyers/ practitioners	5.1	11.501	5.1

Responsibilities of a Subordinate Lawyer/ Practitioner	5.2	11.502	5.2
Violation in Non-Lawyer Assistance	5.3	11.503	5.3
Professional independence of a Lawyer/ Practitioner	5.4	11.504	5.4
Unauthorized Practice	5.5 (a)-(e)	11.505 *[essentially on (a)]*	5.5 (a)-(e)
Restrictions on right to practice	5.6	11.506	5.6
Responsibilities regarding law-related services	5.7	11.507	5.7
	6.1-6.5	No equivalent rule	6.1-6.5
Communications Concerning a Lawyer's/ Practitioner's Services	7.1	11.701	7.1
Communications concerning a Lawyer's/ Practitioner's services: specific rules.	7.2	11.702	10.32
Solicitation of Clients	7.3	11.703	7.3
Political Contributions to Obtain Legal Engagements or Appointments by Judges	7.6	*Reserved*	7.6
Bar Admission/ Registration and Disciplinary Matters	8.1	11.801	8.1
Judicial and legal officials	8.2	11.802	8.2
Reporting Professional Misconduct	8.3	11.803	8.3
Misconduct *[some differences]*	8.4	11.804 *[includes reciprocal discipline] See also [78 FR 20201, Apr. 3, 2013, as amended at 86 FR 28467, May 26, 2021]*	8.4

Disciplinary Authority; Choice of Law	8.5 *[includes reciprocal discipline]*	*Reserved*	8.5 *[includes reciprocal discipline]*

Comparing the ABA, USPTO, and Colorado Rules on any given subject shows Lawyers and Practitioners are already bound by substantially the same rules of professional conduct.

Defining the Practice of Law:

The Courts have long held registered practitioners who practice before the USPTO ("Office") are practicing law. *See, e.g.*, *Sperry v. Florida*, 373 U.S. 379 (1963); *Sperti Prods., Inc. v. Coca-Cola Co.*, 262 F. Supp. 148, 151 (D. Del. 1966). In addition, it is illegal for those not recognized to practice before the Office to hold themselves out as so recognized. *See* 35 U.S.C. § 33.

In *Koscove v. Bolte*, 30 P.3d 784 (Colo. App. 2001), the Colorado Court of Appeals acknowledged the difficulty of giving an all-inclusive definition of the practice of law and proffered the following definition:

> We believe that generally one who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counseling, advising and assisting him in connection with these rights and duties is engaged in the practice of law. Denver Bar Ass'n v. Public Utilities Commission, 154 Colo. 273, 279, 391 P.2d 467, 471 (1964). See also C.R.C.P. 201.3(2).

We understand the Colorado definition to include Patent Agents when they operate within the jurisdiction of the USPTO, just as it covers Lawyers in Colorado and non-Colorado jurisdictions. We also believe Patent Agents are in a unique position that requires a unique and thoughtful solution such that they may fully operate to satisfy the USPTOs objectives in Colorado.

Thus, while it is clear that a Patent Agent is not a Lawyer, it is also clear a Patent Agent is authorized to practice law, specifically federal law within the jurisdiction of the Patent Office.

Sperry v. Florida and the Supremacy Clause:

Sperry v. Florida ex rel. Florida Bar, 373 U.S. 379 (1963) was a foundational US Supreme Court case that applied the Supremacy Clause to clarify how federally licensed Patent Practitioners are and are not regulated. The *Sperry* Court held:

> A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give "the State's licensing board a virtual power of review over the federal determination" that a person or agency is qualified and entitled to perform certain functions, or which impose upon the performance of activity

> sanctioned by federal license additional conditions not contemplated by Congress. "No State law can hinder or obstruct the free use of a license granted under an act of Congress." . . . Moreover, since patent practitioners are authorized to practice only before the Patent Office, the State maintains control over the practice of law within its borders *except to the limited extent necessary for the accomplishment of the federal objectives*.

Sperry, 373 U.S. at 385, 389 (citations omitted) (emphasis added). Thus, Sperry clarifies the States cannot regulate USPTO Practitioners in a way that is contradictory to federal regulations. In particular, the last emphasized point suggests that regulating Colorado Patent and Trademark Lawyers such that they may not partner, share fees with, etc. with Patent Agents frustrates federal objectives, which can be summarized as fostering innovation by temporarily protecting inventors and their inventions (during the term of patent) and to make public those inventions such that the sciences may progress at a pace they would not otherwise. Arguably, it may be the case the Supremacy Clause does not allow the States to exclude Patent Lawyer-Patent Agents partnerships, and even Trademark Lawyer-Patent Agent partnerships. (The Trademark Lawyer-Patent Agent partnership question should be answered and has been added to our conclusion list below.) Also of note from *Sperry*, the Court says the following about non-lawyer Patent Agents:

> [T]he State is primarily concerned with protecting its citizens from unskilled and unethical practitioners, interests which, as we have seen, the Patent Office now safeguards by testing applicants for registration, and by insisting on the maintenance of high standards of integrity. Failure to comply with these standards may result in suspension or disbarment. 35 U.S.C. 32; 37 CFR 1.348. So successful have the efforts of the Patent Office been that the Office was able to inform the Hoover Commission that "*there is no significant difference between lawyers and nonlawyers either with respect to their ability to handle the work or with respect to their ethical conduct*."

Id. at 402 (emphasis added). Thus, it is suggested that a state's "concern *with protecting its citizens from unskilled and unethical practitioners*" was fully addressed long ago. As discussed above, the Colorado Rules are substantially the same as the USPTO Rules because they both are based on the ABA Rules. See Table 1, above.

Thus, *Sperry* teaches that Patent Agents are authorized to practice law, and that the states cannot regulate Practitioners, presumably Patent Lawyers and Patent Agents, when they interfere with "*accomplishment of the federal objectives.*"

Reciprocal Discipline and the USPTO As "Another Jurisdiction" or a "Foreign Jurisdiction":

Only those deemed by the USPTO qualified to practice before the USPTO with respect to patent matters (i.e., within the jurisdiction of the Patent Office) are officially "registered" by the USPTO and can legally hold themselves out as congressionally authorized and USPTO approved Patent Lawyers and Patent Agents. Patent Lawyers and Patent Agents must meet minimum qualifications to be authorized to practice before the USPTO, including passing an extensive examination on patent laws and USPTO regulations and demonstrating a sufficient technical or scientific background. All "Practitioners" ("Practitioners" include at least Patent Lawyers, Patent Agents, and Trademark Lawyers) are also subject to the same USPTO professional and ethical requirements, which, as noted above, is substantially similar to the ABA and Colorado Rules.

It has been argued that Patent Agents do not have the ethical commitments imposed on Lawyers under the various state bar jurisdictions. It should be noted the Courts recognized "the Patent Office has promulgated the 'USPTO Rules of Professional Conduct,' which conforms to the ABA's Model Rules of Professional Conduct." *In re Queen's University at Kingston*, 820 F.3d 1287, 1301 (Fed. Cir. 2016) (citing 37 C.F.R. § 11.100 *et seq*). Patent Agents failing to maintain the level of professionalism required by the USPTO rules, may be subject to disciplinary action including suspension or revocation of their USPTO registration. Similarly, under "reciprocal discipline," those USPTO registered Patent Lawyers found to violate their State Rules of Professional Conduct are similarly disciplined at the USPTO, and more importantly, those Patent Lawyers disciplined at the USPTO are similarly disciplined at the State level. The USPTO and other State jurisdictions used reciprocal discipline to do exactly as has been described above, that is, to apply the same disciplinary action in a second jurisdiction as has been applied in a first jurisdiction. Colorado applied reciprocal discipline, some examples of which include *People v. Bode* July 21, 2005 (reciprocal discipline in Colorado based on USPTO Discipline), *In the Matter of Fei Qin* Sept. 25, 2019 *(*reciprocal discipline at the USPTO based on Colorado Discipline), *People v. Russell William Warnock* December 12, 2016 (reciprocal discipline in Colorado based on USPTO Discipline), etc. As such, there is precedent that Colorado (as well as many if not all other jurisdictions) consider the USPTO as "another jurisdiction" or a "foreign jurisdiction." In fact, the USPTO relied on *in re Peirce*, Nevada 2006 (which relies on Colorado's *People v. Bode*) to define itself as "another jurisdiction." See, for example, the following comments in the Federal Register:

> Section 11.505 proscribes practitioners from engaging in or aiding the unauthorized practice of law. The rule notes that a practitioner shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so. *The USPTO is another jurisdiction for the purposes of this rule. See, e.g., In re Peirce,* 128 P.3d 443, 444 (Nev. 2006) (concluding that "another jurisdiction" includes the USPTO).
>
> . . .
>
> Comment 8: A comment noted that the Office should present a ``default jurisdiction'' that would provide a body of case law for guidance since not all States

have adopted all of the ABA Model Rules and thus some states may have differences in case law.

Response to Comment 8: The Office appreciates the comment's suggestion to specify a ``default jurisdiction'' since many States may have different interpretations of the ABA Model Rules based upon whether they were adopted in whole or part, or for other reasons. However, the *Office declines to choose a State as a ``default jurisdiction'' as Congress has bestowed upon the Office the authority to govern the recognition and conduct of agents, attorneys and others before the Office and so the Office is its own jurisdiction.* *See* 35 U.S.C. 2(b)(2)(D) and 32; *see also In re Peirce*, 128 P.3d 443, 444 (Nev. 2006) (concluding that the USPTO is ``another jurisdiction''). The Office relies on the provisions adopted, and also refers practitioners to helpful information provided by the ABA Model Rule Comments and Annotations. Additionally, opinions and case law from adopting jurisdictions may be a useful tool in interpreting the rules while a larger body of USPTO-specific precedent is established. State case law and opinions are not binding precedent on the Office.

. . .

Comment 44: A comment noted that the language of Sec. 11.505(c), which discusses the unauthorized practice of law, may inadvertently cause confusion as to members of the bar who are placed on inactive status, but not suspended.

Response to Comment 44: The Office appreciates the comment and is amending the rule to more closely follow ABA Model Rule 5.5(a) by simplifying the language. The Office believes that the ABA Model Rule encompasses the language of Sec. 11.505(b) through (f), as proposed, and makes clear these activities are a violation of the rule. The Office therefore concludes that expressly listing these activities in the final rule is unnecessary. *The final rule states that a practitioner shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so. For purposes of this rule, the USPTO is a jurisdiction.* *See, e.g.*, *In re Peirce*, 128 P.3d 443, 444 (Nev. 2006) (concluding that ``another jurisdiction'' includes the USPTO). Courts have long held that registered practitioners who practice before the Office are practicing law. See, e.g., Sperry v. Florida, 373 U.S. 379 (1963); Sperti Prods., Inc. v. Coca-Cola Co., 262 F. Supp. 148 (D. Del. 1966). In addition, the Office notes that those not recognized to practice before the Office are expressly prohibited from holding themselves out as so recognized. See 35 U.S.C. 33.

Changes to Representation of Others Before The United States Patent and Trademark Office, 78 Fed. Reg. 20,179 (Apr. 3, 2013) (codified at scattered 37 C.F.R. pts. 1, 2, 7, 10, 11, 41) (emphasis added). Thus, the USPTO understands itself as "another jurisdiction" and it appears that Colorado and the other jurisdictions have the same perspective.

Furthermore, the Federal Circuit held in *Queen's University*:

> To the extent Congress has authorized non-attorney patent agents to engage in the practice of law before the Patent Office, reason and experience compel us to recognize a patent-agent privilege that is coextensive with the rights granted to patent agents by Congress. A client has a reasonable expectation that all communications relating to "obtaining legal advice on patentability and legal services in preparing a patent application" will be kept privileged . . . *Whether those communications are directed to an attorney or his or her legally equivalent patent agent* should be of no moment. Indeed, if we hold otherwise, we frustrate the very purpose of Congress's design: namely, to afford clients the freedom to choose between an attorney and a patent agent for representation before the Patent Office. (emphasis added).

This appears to teach the Federal Circuit understands Patent Lawyers and Patent Agents are legally equivalent within the jurisdiction of the USPTO. Thus, the USPTO is "another jurisdiction," equivalent to, if not Superior to (based on the Supremacy Clause), the other jurisdictions.

Partnering with Foreign Patent Lawyers:

Today, Lawyers and law firms partner with and co-own firms with foreign Patent Lawyers. It should be understood many foreign patent lawyers are equivalent to the USPTO Patent Agent. That is, they have not attended a law school, have not taken and passed a non-patent office bar exam, cannot participate in court proceedings, etc. They are individuals with a technical degree that have taken and passed a foreign patent office registration/bar exam. Currently, Colorado Lawyers are allowed to partner with, share fees with, etc. a foreign patent lawyer, essentially a foreign "Patent Agent", but not with a US Patent Agent, even though that US Patent Agent is bound by substantially the same Rules of Professional Conduct as the US Lawyer. Some examples of foreign patent lawyers that are equivalent to US Patent Agents are those registered with the United Kingdon Intellectual Patent Office, the Canadian Intellectual Patent Office, the Chinese Intellectual Patent Office, the Germany Intellectual Patent Office, and the highly regarded European Patent Office (EPO). Accordingly, harmonizing the Colorado Rules with the USPTO Rules also harmonizes the Rules with the rest of the world. It should also be understood the USPTO also allows its Practitioners to partner with Foreign Lawyers ("*USPTO Confirms Agency "Practitioners" May Ethically Partner With Foreign Attorneys*" IP Ethics, Multijurisdictional Practice, Patent Ethics / By Michael E. McCabe, Jr. - https://ipethicslaw.com/uspto-confirms-agency-practitioners-may-ethically-partner-with-foreign-attorneys/).

Thus, while Colorado Lawyers may partner with the Foreign equivalent of a US Patent Agent, they cannot partner with US Patent Agents.

Practitioners and Patent Agents:

A Patent Agent is a "Practitioner" registered and authorized to practice patent law before the USPTO and is, within the jurisdiction of the USPTO, equivalent to a Patent Attorney. Patent Agents have existed since at least 1861 when Congress first provided the Commissioner of Patents the power to refuse to recognize any person as a Patent Agent for poor conduct. Later, the 1952 Patent Act more formally solidified the Patent Agent profession. It should be understood that within the jurisdiction of the USPTO a Patent Lawyer and a Patent Agent are equivalent, both being "Practitioners" and provided the same authority and are bound by the same Rules, as discussed above.

It is a common misunderstanding Patents Agents are only allowed to perform patent drafting and prosecution functions. Patent Agents are in fact authorized to perform all functions within the jurisdiction of the USPTO (see 37 CFR §11.5 - Register of attorneys and agents in patent matters; practice before the Office). These include patentability analysis, drafting and prosecuting patent applications, causing an assignment to be executed for the patent owner and filing the assignment, and representing others before the USPTO's Patent Trial and Appeal Board (PTAB) as only a few examples.

A USPTO "practitioner" is defined by 37 C.F.R. § 11.1 as:

> (1) An attorney or agent registered to practice before the Office in patent matters;
> (2) An individual authorized under 5 U.S.C. 500(b), or otherwise as provided by § 11.14(a), (b), and (c), to practice before the Office in trademark matters or other non-patent matters;
> (3) An individual authorized to practice before the Office in a patent case or matters under § 11.9(a) or (b); or
> (4) An individual authorized to practice before the Office under § 11.16(d).

Points (1) and (2) are most important for the present discussion. Point (1) covers Patent Agents and Patent Attorneys that have passed the USPTO Bar/Registration Exam. Point (2) covers lawyers that "practice before the Office in trademark matters…." No special registration is required to practice before the Office in trademark matters, only that the "individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts." (5 U.S.C. 500(b)) A question to be answered (see below) which may broaden the scope of this discussion is "when does a Lawyer become a Trademark Lawyer," and therefore a Practitioner.

Is it when they first represent another before the Trademark Office or is it any Lawyer that can represent another before the Trademark Office? So, the definition of a "practitioner" includes Patent Lawyers, Patent Agents, and Trademark Lawyers. Arguably, Trademark Lawyers may include any Lawyer in good standing of the bar of the highest court of a State.

NAPP understands this issue is not isolated to Colorado. In other jurisdictions, previous attempts to solve it resulted in an inconsistent patchwork that has created a confused tapestry of Rules. As such, NAPP is also working with the American Bar Association to make changes to the ABA Rules of Professional Conduct via the ABA's Standing Committee on Ethics and Professional Responsibility similar to those discussed here. This is because we recognize the ABA Rules are the standard and adopted by most if not all jurisdictions (the 50 states, the District of Columbia for lawyers and the USPTO for practitioners). In addition, NAPP intends to propose these same changes to each of the other jurisdiction's (the 50 states and the District of Columbia) Rules of Professional Conduct, as it is at the States that the changes need to occur.

Changes to the Colorado Rules as discussed here will have a significant and measurable impact on Colorado small inventors, innovative companies, Colorado law firms having or wanting patent practices, and Colorado's patent practitioners. Long term, this will result in strengthening Colorado's Innovation Ecosystem, increase the appeal of Colorado Law Firms to innovative clients, increase the diversity of patent practitioners, and increase the appeal of the Patent Agent profession in Colorado.

In summary:

(1) Lawyers and Practitioners are bound by substantially the same Rules of Professional Conduct;
(2) A Patent Agent is authorized to practice law, specifically federal law within the jurisdiction of the Patent Office;
(3) *Sperry* teaches that the states cannot regulate Practitioners when those regulations interfere with the "accomplishment of the federal objectives";
(4) The USPTO is "another jurisdiction," at least equivalent to the other jurisdictions; and
(5) While Colorado Lawyers may partner with the Foreign equivalent of a US Patent Agent, they cannot partner with US Patent Agents.

Something must be done to harmonize the two Rules, and such a Rules harmonization would have significant and beneficial impact on Colorado Lawyers, Law Firms, Practitioners, and Colorado's growing Innovation Ecosystem.

Yet Unanswered Questions and Possible Resolutions:

The proposal above is merely a starting point. We outline below additional questions that may be relevant to this discussion going forward.

Unanswered questions:

- When does a Lawyer become a Trademark Lawyer for inclusion in the USPTO Practitioners group?
- Can the Colorado Rules treat the USPTO as "another jurisdiction" as the Supreme Court of Nevada did in *In re Peirce*, 128 P.3d 443, 444 (Nev. 2006)?
- Does the Supremacy Clause restrain Colorado from excluding Patent Lawyer-Patent Agents partnerships and Trademark Lawyer-Patent Agent partnerships?

Possible Amendments:

- Rule 5.4. Professional Independence of a Lawyer: Amend the rules to permit Colorado Lawyers to form partnership, share fees, etc. with non-lawyers practitioners registered within the jurisdiction of the USPTO (i.e., registered patent agents).
- Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law: Clarify that the USPTO is a jurisdiction, and that Patent Agents perform the authorized practice of law as has been determined in a number of State and Supreme Court Cases.
- Rule 1.0. Terminology: Add language clarifying the professional relationship between Colorado Lawyers and USPTO Registered Patent Agent, and/or clarifying that a Patent Agent is not a "non-lawyer," and/or adding language for the special case of Patent Agents.

Possible Clarifications: An advisory opinion or a comment to the Colorado Rules.

We expect further amendments, modifications, and clarifications to stem from this committee's future work and provide the above as a start to a conversation we hope to finish with you.

We understand this issue is not unique to Colorado, but it is rooted in each individual state's (and the District of Columbia's) Rules of Professional Conduct. Colorado is the first step in a long path to addressing Practitioner Harmonization in all jurisdictions and at the ABA.

Please contact us at either 303.554.9389, d.smith@cablelabs.com, or NAPP@NAPP.org if there is any additional information we can provide or if you have any questions for us. We appreciate your attention to this letter and our work.

Sincerely,

Christopher M. Turoski
NAPP President
e-mail: NAPP@NAPP.org

Christopher M. Turoski

David "Dan" Smith
NAPP Advocacy Committee Chair
Director of Patents and Innovation Coach
CableLabs Inc., Kyrio Inc., Gridmetrics Inc., SCTE-ISBE
e-mail: D.Smith@CableLabs.com

David Daniel Smith

Attachment 4

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www.ColoradoLegalServices.org

April 14, 2022

The Honorable Lino S. Lipinsky de Orlov
Chair, Colorado Supreme Court Standing Committee
On the Rules of Professional Conduct
Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203
Sent via email to lino.lipinsky@judicial.state.co.us

Re: Initial Report of the Subcommittee
On Revisions to Colorado Rule 1.8(e)

Dear Judge Lipinsky de Orlov:

On behalf of the Rule 1.8(e) Subcommittee, I am pleased to submit an initial report with our recommendation to revise the Colorado Rules of Professional Conduct, Rule 1.8(e). These revisions are intended to clarify when it is appropriate for an attorney representing an indigent client to provide a modest donation of financial assistance to a client in financial need.

The Subcommittee met on March 2, 2022 and developed the proposed revisions to 1.8(e) as set out in the attached materials. While there was unanimous consensus regarding the need to revise the Rule, Subcommittee members offered alternative wording in some situations, as outlined in the attached materials. Two Subcommittee members were unable to attend the meeting but have reviewed the proposal and are in agreement with the Subcommittee's recommendations.

With this letter, I am enclosing the following materials:

- **Colorado Rule 1.8(e), Redlined, with Proposed Comment Revisions**
- **ABA Model Rule 1.8(e) with Proposed Colorado Revisions**
- **Colorado Rule 1.8(e) with Comments, in Final Draft Form**
- **My original letter to you of January 3, 2022**
- **A list of other States that have revised their Rule 1.8(e) to include the ABA suggested revisions.**

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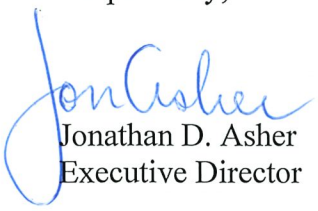
Please let me know what other information the Subcommittee can provide, or if there are additional actions the Subcommittee should undertake prior to a Committee review of the proposed revisions. Thank you.

Respectfully,



Jonathan D. Asher
Executive Director

SUBCOMMITTEE ROSTER:

- Cecil Morris (not in attendance, but in agreement with proposed revisions)
- Nancy Cohen (not in attendance, but in agreement with proposed revisions)
- Noah Patterson
- Marcy Glenn
- Dick Reeve
- April Jones
- Jon Asher, Chair

Colorado Rule 1.8(e), Redlined, with Proposed Comment Revisions

Colorado Court Rules Colorado Rules of Professional Conduct Client-lawyer Relationship

Rule 1.8. Conflict of Interest: Current Clients: Specific Rules

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

3) a lawyer representing an indigent client without payment of a fee, a lawyer representing an indigent client without payment of a fee through a nonprofit legal services or public interest organization and a lawyer representing an indigent client without payment of a fee through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine or other basic living expenses. The lawyer may not:

(i) promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; or

(iii) publicize or advertise a willingness to provide such gifts to prospective clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

Commented [PC1]: The Subcommittee is divided as to whether the word "prospective" should be included here, but a clear majority would eliminate the word "prospective".
One member proposed alternate wording for section iii: "publicize or advertise to prospective clients a willingness to provide such gifts of financial assistance to clients."

COMMENT

Financial Assistance

[10] Lawyers may not subsidize law suits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue law suits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help

ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without payment of a fee, a lawyer representing an indigent client without payment of a fee through a nonprofit legal services or public interest organization and a lawyer representing an indigent client without payment of a fee through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(3) include modest contributions for food, rent, transportation, medicine or similar basic necessities of life. If the gift may have consequences for the client (including but not limited to eligibility for receipt of government benefits, social services, or tax liability), the lawyer should consult with the client regarding these potential consequences before providing the gift. See Rule 1.4.

[12] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstances where they are unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide gifts to prospective clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

Commented [PC2]: The Subcommittee is divided as to whether the word "prospective" should be included here, but a clear majority would eliminate it.
One member proposed alternate wording for section iii: "publicizing or advertising to prospective clients a willingness to provide such gifts of financial assistance to clients..."

ABA Model Rule 1.8(e) with Proposed Colorado Revisions

American Bar Association CPR Policy Implementation Committee
RULE 1.8: CONFLICT OF INTEREST:
CURRENT CLIENTS: SPECIFIC RULES

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

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(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client ~~pro bono~~ without payment of a fee, a lawyer representing an indigent client ~~pro bono~~ without payment of a fee through a nonprofit legal services or public interest organization and a lawyer representing an indigent client ~~pro bono~~ without payment of a fee through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine ~~and~~ or other basic living expenses. The lawyer may not:

(i) ~~may not~~ promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) ~~may not~~ seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; ~~and~~ or

(iii) ~~may not~~ publicize or advertise a willingness to provide such gifts to ~~prospective~~ clients.

Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

Commented [PC1]: The Subcommittee is divided as to whether the word "prospective" should be included here, but a clear majority would eliminate the word "prospective".

COMMENT

Financial Assistance

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Colorado Rule 1.8(e) with Comments, in Final Draft Form

Colorado Court Rules Colorado Rules of Professional Conduct Client-lawyer Relationship

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(ii) seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; or

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Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

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January 3, 2022

The Honorable Lino S. Lipinsky de Orlov
Colorado Court of Appeals
2 East 14th Avenue
Denver, CO 80203
Sent via email to lino.lipinsky@judicial.state.co.us

Re: Adoption of a Revised Rule 1.8(e)

Dear Judge Lipinsky de Orlov:

Thank you for allowing me to present to you, and to the Standing Committee on the Rules of Professional Conduct, my request for, and arguments in support of, adoption of a revised Colorado Rule 1.8(e). The ABA revised Rule on which the proposed revision to the current Colorado Rule is based recognizes that representation of indigent clients often involves responding to challenges that more financially secure clients, most often, do not face.

For a single individual, representation through Colorado Legal Services (CLS) is generally limited to persons with gross income below $1,342 per month, with an additional $473 per month income allowed for each dependent. CLS clients face daunting obstacles in securing adequate housing, medical care, transportation, child care, and other basic needs. These challenges have been magnified by the COVID-19 pandemic, which often led to illness among clients and their families, loss of employment and decreased income, increased housing costs, decreased transportation options, limited medical care, disappearing child care, and other financial and physical and mental health challenges.

CLS staff attorneys and pro bono attorneys who work with indigent clients to help them obtain protection from domestic violence, eviction, loss of income, difficulty in obtaining necessary medical care, and other severe legal circumstances often confront obstacles which many of us would consider minor annoyances – clients who lack bus fare to get to court for their hearing or to get to the CLS office for an appointment or to get home again from the appointment or hearing, clients who cannot afford diapers for their babies, or other modest needs. I believe that the only ethical and moral response to these situations is also the humane response, and that our staff and pro bono attorneys should be able to act, on occasion to alleviate these hardships, ensuring that clients are able to obtain a successful resolution to their legal issue that also allows them a small measure of security and dignity.

Many attorneys, including those at CLS, over the years have found themselves in situations where their indigent clients were in desperate need, and have provided "modest gifts" to these clients. This is especially true during the COVID-19 pandemic with its devastating impact on low-income Coloradans. CLS staff have provided assistance to clients in a number of situations, including help with the purchase of diapers for one client with an infant child. On another occasion, CLS staff collected modest funds to assist a client who was being evicted from her current home but had received a gift from a church to help pay a security deposit and first month's rent on a new apartment, but still needed modest additional funds to pay the security deposit and first month's rent. In another unfortunate situation, CLS staff provided bus fare for a client who had enough money to get to the CLS Denver office, but then had no money to pay for the bus ride home. These modest donations of financial assistance to clients in desperate financial need should not put CLS attorneys and pro bono attorneys in a questionable ethical position.

The ABA revised Rule and the proposed Colorado Rule recognize and accept that these situations arise in cases where attorneys represent clients with no payment of a fee or through a nonprofit legal services or public interest organization, law school clinic, or other pro bono program. The revisions to the Rule apply in these situations only and limit the assistance to be provided to indigent clients to "modest gifts" for food, rent, transportation, medicine, and other basic living expenses. The proposed Rule prohibits using these "modest gifts" as an inducement to continue the client-lawyer relationship, seeking reimbursement for the gifts, or publicizing the availability of such gifts to prospective clients. The ABA and the proposed Colorado Rule have carefully delineated the circumstances under which these "modest gifts" are allowable. The proposed Rule is a realistic and carefully crafted response that respects the well-established ethical principles of the attorney-client relationship, while providing guidance for the infrequent and unique circumstances that arise in representation of indigent, struggling clients and their families.

I urge the Committee to consider revised Colorado Rule 1.8(e) in light of its limited application to the representation of indigent clients, with the adequate guard rails outlined in the proposed revisions to the Colorado Rule, and allow CLS, along with all other Colorado providers of representation to indigent clients, to extend to those clients the modest humanitarian financial assistance as outlined in the proposed Rule.

Respectfully,

Jonathan D. Asher
Executive Director

Enclosures
ABA revised Model Rule 1.8(e)
Colorado proposed revisions to the ABA Model Rule 1.8(e)
Massachusetts revised Rule 1.8(e)
Michigan revised Rule 1.8(e)
New York City Bar Association revised Rule 1.8(e)

American Bar Association CPR Policy Implementation Committee Variations of the ABA Model Rules of Professional Conduct RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and
(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses. The lawyer: (i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) may not publicize or advertise a willingness to provide such gifts to prospective clients. Financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

States adopting or revising Rule 1.8(e):

ALABAMA:
(e), (e)(1) – (e)(2) same as MR
(e)(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer; and (e)(4) in an action in which an attorney's fee is expressed and payable, in whole or in part, as a percentage of the recovery in the action, a lawyer may pay, from his own account, court costs and expenses of litigation. The fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

CALIFORNIA:
Rule 1.8.5, Payment of Personal or Business Expenses Incurred by or for a Client (a) A lawyer shall not directly or indirectly pay or agree to pay, guarantee, or represent that the lawyer or lawyer's law firm will pay the personal or business expenses of a prospective or existing client. (b) Notwithstanding paragraph (a), a lawyer may: (1) pay or agree to pay such expenses to third persons, from funds collected or to be collected for the client as a result of the representation, with the consent of the client; (2) after the lawyer is retained by the client, agree to lend money to the client based on the client's written promise to repay the loan, provided the

lawyer complies with rules 1.7(b), 1.7(c), and 1.8.1 before making the loan or agreeing to do so; (3) advance the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter; and (4) pay the costs of prosecuting or defending a claim or action, or of otherwise protecting or promoting the interests of an indigent person* in a matter in which the lawyer represents the client. (c) "Costs" within the meaning of paragraphs (b)(3) and (b)(4) are not limited to those costs that are taxable or recoverable under any applicable statute or rule of court but may include any reasonable* expenses of litigation, including court costs, and reasonable* expenses in preparing for litigation or in providing other legal services to the client. (d) Nothing in this rule shall be deemed to limit the application of rule 1.8.9.

CONNECTICUT:

(e) same as MR

(e)(1) Same as MR

(e)(2) Same as MR

(e)(3) A lawyer representing an indigent client pro bono; a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization, a law school clinical or pro bono program, or a state or local bar association program; and a lawyer representing an indigent client through a public defender's office may provide modest gifts to the client to pay for food, shelter, transportation, medicine and other basic living expenses. A lawyer may not: (i) promise, assure or imply the availability of such gifts prior to retention, or as an inducement to continue the client-lawyer relationship after retention, or as an inducement to take, or forgo taking, any action in the
matter;
(ii) seek or accept reimbursement from the client, a relative of the client, or anyone affiliated with the client; or (iii) publicize or advertise a willingness to provide such gifts to prospective clients. A lawyer may provide financial assistance permitted by this Rule even if the representation is eligible for fees under a fee-shifting statute.

DISTRICT OF COLUMBIA:

(e) A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) The client gives informed consent after consultation; (2) There is no interference with the lawyer's independence of professional judgment or with the client lawyer relationship; and (3) Information relating to representation of a client is protected as required by Rule 1.6.

LOUISIANA:

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except as follows.

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter, provided that the expenses were reasonably incurred. Court costs and expenses of litigation include, but are not necessarily limited to, filing fees; deposition costs; expert witness fees; transcript costs; witness fees; copy costs; photographic, electronic, or digital evidence production; investigation fees;

related travel expenses; litigation related medical expenses; and any other case specific expenses directly related to the representation undertaken, including those set out in Rule 1.8(e)(3).
(2) A lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.
(3) Overhead costs of a lawyer's practice which are those not incurred by the lawyer solely for the purposes of a particular representation, shall not be passed on to a client. Overhead costs include, but are not necessarily limited to, office rent, utility costs, charges for local telephone service, office supplies, fixed asset expenses, and ordinary secretarial and staff services. With the informed consent of the client, the lawyer may charge as recoverable costs such items as computer legal research charges, long distance telephone expenses, postage charges, copying charges, mileage and outside courier service charges, incurred solely for the purposes of the representation undertaken for that client, provided they are charged at the lawyer's actual, invoiced costs for these expenses. As of February 22, 2022 18 With client consent and where the lawyer's fee is based upon an hourly rate, a reasonable charge for paralegal services may be chargeable to the client. In all other instances, paralegal services shall be considered an overhead cost of the lawyer.
(4) In addition to costs of court and expenses of litigation, a lawyer may provide financial assistance to a client who is in necessitous circumstances, subject however to the following restrictions.
(i) Upon reasonable inquiry, the lawyer must determine that the client's necessitous circumstances, without minimal financial assistance, would adversely affect the client's ability to initiate and/or maintain the cause for which the lawyer's services were engaged.
(ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer's behalf, to secure employment.
(iii) Neither the lawyer nor anyone acting on the lawyer's behalf may offer to make advances or loan guarantees prior to being hired by a client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.
(iv) Financial assistance under this rule may provide but shall not exceed that minimum sum necessary to meet the client's, the client's spouse's, and/or dependents' documented obligations for food, shelter, utilities, insurance, non-litigation related medical care and treatment, transportation expenses, education, or other documented expenses necessary for subsistence.
(5) Any financial assistance provided by a lawyer to a client, whether for court costs, expenses of litigation, or for necessitous circumstances, shall be subject to the following additional restrictions.
(i) Any financial assistance provided directly from the funds of the lawyer to a client shall not bear interest, fees or charges of any nature.
(ii) Financial assistance provided by a lawyer to a client may be made using a lawyer's line of credit or loans obtained from financial institutions in which the lawyer has no ownership, control and/or security interest; provided, however, that this prohibition shall not apply to publicly traded financial institutions where the lawyer's ownership, control and/or security interest is less than 15%. Where the lawyer uses such loans to provide financial assistance to a client, the lawyer should make reasonable, good faith efforts to procure a favorable interest rate for the client.
(iii) Where the lawyer uses a line of credit or loans obtained from financial institutions to provide financial assistance to a client, the lawyer shall not pass on to the client interest charges, including any fees or other charges attendant to such loans, in an amount exceeding the actual charge by the third party lender, or ten percentage points above the bank prime loan rate of interest as reported by the Federal Reserve Board on January 15th of each year in which the loan is outstanding, whichever is less.

(iv) A lawyer providing a guarantee or security on a loan made in favor of a client may do so only to the extent that the interest charges, including any fees or other charges attendant to such a loan, do not exceed ten percentage points (10%) above the bank prime loan rate of interest as reported by the Federal Reserve Board As of February 22, 2022 19 on January 15th of each year in which the loan is outstanding. Interest together with other charges attendant to such loans which exceeds this maximum may not be the subject of the lawyer's guarantee or security.
(v) The lawyer shall procure the client's written consent to the terms and conditions under which such financial assistance is made. Nothing in this rule shall require client consent in those matters in which a court has certified a class under applicable state or federal law; provided, however, that the court must have accepted and exercised responsibility for making the determination that interest and fees are owed, and that the amount of interest and fees chargeable to the client is fair and reasonable considering the facts and circumstances presented.
(vi) In every instance where the client has been provided financial assistance by the lawyer, the full text of this rule shall be provided to the client at the time of execution of any settlement documents, approval of any disbursement sheet as provided for in Rule 1.5, or upon submission of a bill for the lawyer's services.
(vii) For purposes of Rule 1.8(e), the term "financial institution" shall include a federally insured financial institution and any of its affiliates, bank, savings and loan, credit union, savings bank, loan or finance company, thrift, and any other business or person that, for a commercial purpose, loans or advances money to attorneys and/or the clients of attorneys for court costs, litigation expenses, or for necessitous circumstances.

MINNESOTA:
(e), (e)(1), and (e)(2) = Same as MR
(e)(3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by that client.

MISSISSIPPI:
(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, or administrative proceedings, except that:
1. A lawyer may advance court costs and expenses of litigation, including but not limited to reasonable medical expenses necessary to the preparation of the litigation for hearing or trial, the repayment of which may be contingent on the outcome of the matter; and
2. A lawyer representing a client may, in addition to the above, advance the following costs and expenses on behalf of the client, which shall be repaid upon successful conclusion of the matter.
a. Reasonable and necessary medical expenses associated with treatment for the injury giving rise to the litigation or administrative proceeding for which the client seeks legal representation; and
b. Reasonable and necessary living expenses incurred.
The expenses enumerated in paragraph 2 above can only be advanced to a client under dire and necessitous circumstances, and shall be limited to minimal living expenses of minor sums such as those necessary to

prevent foreclosure or repossession or for necessary medical treatment. There can be no payment of expenses under paragraph 2 until the expiration of 60 days after the client has signed a contract of employment with counsel. Such payments under paragraph 2 cannot include a promise of future payments, and counsel cannot promise any such payments in any type of communication to the public, and such funds may only be advanced after due diligence and inquiry into the circumstances of the client.
Payments under paragraph 2 shall be limited to $1,500 to any one party by any lawyer or group or succession of lawyers during the continuation of any litigation unless, upon ex parte application, such further payment has been approved by the Standing Committee on Ethics of the Mississippi Bar. An attorney contemplating such payment must exercise due diligence to determine whether such party has received any such payments from another attorney during the continuation of the same litigation, and, if so, the total of such payments, without approval of the Standing Committee on Ethics shall not in the aggregate exceed $1,500. Upon denial of such application, the decision thereon shall be subject to review by the Mississippi Supreme Court on petition of the attorney seeking leave to make further payments. Payments under paragraph 2 aggregating $1,500 or less shall be reported by the lawyer making the payment to the Standing Committee on Ethics within seven (7) days following the making of each such payment. Applications for approval by the Standing As of February 22, 2022 25 Committee on Ethics as required hereunder and notices to the Standing Committee on Ethics of payments aggregating $1,500 or less, shall be confidential.

MONTANA:
(e), (e)(1), and (e)(2) Same as MR
(e)(3) a lawyer may, for the sole purpose of providing basic living expenses, guarantee a loan from a regulated financial institution whose usual business involves making loans if such loan is reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided that neither the lawyer nor anyone on his/ her behalf offers, promises or advertises such financial assistance before being retained by the client.

NEW JERSEY:
(e)-(e)(2) same as MR
(e)(3) a legal services or public interest organization, a law school clinical or pro bono program, or an attorney providing qualifying pro bono service as defined in R. 1:21-11(a), may provide financial assistance to indigent clients whom the organization, program, or attorney is representing without fee.

NEW YORK:
(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:
(e)(1) Same as MR
(e)(2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and

(e)(3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred; and (4) a lawyer providing legal services without fee, a not-for-profit legal services or public interest organization, or a law school clinical or pro bono program, may provide financial assistance to indigent clients but may not promise or assure financial assistance prior to retention, or as an inducement to continue the lawyer client relationship. Funds raised for any legal services or public interest organization for purposes of providing legal services will not be considered useable for providing financial assistance to indigent As of February 22, 2022 29 clients, and financial assistance referenced in this subsection may not include loans or any other form of support that causes the client to be financially beholden to the provider of the assistance.

NORTH DAKOTA:

(e)(1) & (2) = Same as MR

(3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided that the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided that no promise of financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by the client.

TEXAS:

(d) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation or administrative proceedings, except that:

As of February 22, 2022 38

(1) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

SEE ALSO:

Attached Massachusetts, Michigan and New York City Bar Association proposed revisions.

PROPOSED REVISIONS TO RULE 1.8 AND RELATED COMMENTS

The Supreme Judicial Court's Standing Advisory Committee on the Rules of Professional Conduct is publishing for comment a proposed revision to Rule 1.8(e) of the Massachusetts Rules of Professional Conduct and related comments.

Background. At its annual meeting on August 3-4, 2020, the American Bar Association adopted Resolution 107 approving a limited exception to Rule 1.8(e) of its Model Rules of Professional Conduct. The new exception to the prohibition on a lawyer providing financial assistance to a client in connection with pending or contemplated litigation would permit modest gifts to a pro bono client for food, rent, transportation, medicine and other basic living expenses subject to certain conditions.

Proposed Revisions. The Committee's proposed revisions to Rule 1.8(e) and related comments substantially follow the changes adopted by the ABA, but with some stylistic simplifications of the language used by the ABA in paragraph (3) of Rule 1.8(e) and in Comment 11. The proposed amendments are stated below, followed by redlines (i) showing the changes from the current Massachusetts Rule 1.8(e) and related comments and (ii) showing the changes from the ABA Model Rule 1.8(e) and related comments.

Rule 1.8: Conflict of Interest: Current Clients: Specific Rules

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(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client *pro bono publico* may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses, provided that the lawyer may not:

(i) promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; or

(iii) publicize or advertise a willingness to provide such gifts to prospective clients.

Gifts of financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

COMMENT

[No changes to Comments 1 through 9]

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee may give the client modest gifts for basic living expenses, such as contributions for food, rent, transportation, medicine and similar basic necessities of life. This rule applies to a lawyer in private practice representing an indigent client pro bono. The rule also applies to a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization or through a law school clinical or pro bono program. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide gifts to prospective to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

[No other changes to the Comments to this Rule except renumbering succeeding paragraphs.]

Massachusetts

Proposal Marked for changes from Current Massachusetts Rule 1.8 and Related Comments

Rule 1.8: Conflict of Interest: Current Clients: Specific Rules

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(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; ~~and~~

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client~~.~~; and

(3) a lawyer representing an indigent client *pro bono publico* may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses, provided that the lawyer may not:

(i) promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; or

(iii) publicize or advertise a willingness to provide such gifts to prospective clients.

Gifts of financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

COMMENT

[No changes to Comments 1 through 9]

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer ~~advancing~~lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee may give the client modest gifts for basic living expenses, such as contributions for food, rent, transportation, medicine and similar basic necessities of life. This rule applies to a lawyer in private practice representing an indigent client pro bono. The rule also applies to a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization or through a law school clinical or pro bono program. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide gifts to prospective to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

[No other changes to the Comments to this Rule except renumbering succeeding paragraphs.]

Proposal Marked for changes from ABA Model Rule 1.8 and Related Comments

~~Model~~ Rule 1.8: Conflict of Interest: Current Clients: Specific Rules

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(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client *pro bono*~~, a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization and a lawyer representing an indigent client pro bono through a law school clinical or pro bono program~~ *publico* may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses~~. The~~, provided that the lawyer~~:~~

~~(i)~~ may not :

(i) promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) ~~may not~~ seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; ~~and~~ or

(iii) ~~may not~~ publicize or advertise a willingness to provide such gifts to prospective clients.

~~Financial~~Gifts of financial assistance under this Rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

COMMENT

[No changes to Comments 1 through 9]

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses,

including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] Paragraph (e)(3) provides another exception. A lawyer representing an indigent client without fee, may give the client modest gifts for basic living expenses, such as contributions for food, rent, transportation, medicine and similar basic necessities of life. This rule applies to a lawyer in private practice representing an indigent client pro bono. The rule also applies to a lawyer representing an indigent client pro bono through a nonprofit legal services or public interest organization, and a lawyer representing an indigent client pro bono or through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(3) include modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client, including, e.g., for receipt of government benefits, social services, or tax liability, the lawyer should consult with the client about these. See Rule 1.4.

[12] The paragraph (e)(3) exception is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide gifts to prospective to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings.

[13] Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee-shifting statute. However, paragraph (e)(3) does not permit lawyers to provide assistance in other contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

[No other changes to the Comments to this Rule except renumbering succeeding paragraphs.]

MICHIGAN

PROPOSED AMENDMENT OF MICHIGAN RULES OF PROFESSIONAL CONDUCT (MRPC) RULE 1.8. TO CREATE A NARROW HUMANITARIAN EXCEPTION

Issue

Should the Representative Assembly request that the Michigan Supreme Court amend Michigan Rules of Professional Conduct (MRPC) Rule 1.8 and related commentary to add a narrow humanitarian exception to the general prohibition on providing financial assistance to an indigent client?

RESOLVED, that the State Bar of Michigan supports amendment of the MRPC to add a narrow humanitarian exception to the general prohibition on providing financial assistance to an indigent client.

FURTHER RESOLVED, that the State Bar of Michigan proposes an amendment to Chapter 1 of the MRPC by amending MRPC 1.8(e) as follows:

> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that
>
> > (1) a lawyer may advance court costs and expenses of litigation, the repayment of which shall ultimately be the responsibility of the client~~; and~~
> >
> > (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and
> >
> > (3) a lawyer representing an indigent client may provide modest gifts to the client for food, rent, transportation, medicine and other basic living expenses provided that the lawyer represents the indigent client pro bono, pro bono through a nonprofit legal services or public interest organization, or pro bono through a law school clinical or pro bono program. The legal services must be delivered at no fee to the indigent client and the lawyer:
> >
> > > (i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;
> > >
> > > (ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and
> > >
> > > (iii) may not publicize or advertise a willingness to provide such financial gifts to prospective clients.
> >
> > Financial assistance provided under (3) may be provided even if the indigent client's representation is eligible for a fee under a fee-shifting statute.

FUTHER RESOLVED, that the State Bar of Michigan proposes an amendment to the related commentary of MRPC 1.8 as follows:

A lawyer representing an indigent client, pro bono through a nonprofit legal services or public interest organization, or pro bono through a law school clinical or pro bono program may give the client modest gifts. Gifts permitted under paragraph (e)(3) are limited to modest contributions for food, rent, transportation, medicine and similar basic necessities of life. If the gift may have consequences for the client (including, but not limited to: eligibility for government benefits or social services or tax liability) the lawyer should consult with the client before providing the modest gift. The exception in paragraph (e)(3) is narrow. Modest gifts are allowed in specific circumstances where it is unlikely to create conflicts of interest or invite abuse. Paragraph (e)(3) prohibits the lawyer from (i) promising, assuring or implying the availability of financial assistance prior to retention or as an inducement to continue the client-lawyer relationship after retention; (ii) seeking or accepting reimbursement from the client, a relative of the client or anyone affiliated with the client; and (iii) publicizing or advertising a willingness to provide gifts to prospective clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation or administrative proceedings. Financial assistance, including modest gifts pursuant to paragraph (e)(3), may be provided even if the representation is eligible for fees under a fee shifting statute. Paragraph (e)(3) does not permit lawyers to provide assistance in contemplated or pending litigation in which the lawyer may eventually recover a fee, such as contingent-fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer does not eventually receive a fee.

Synopsis

On August 3, 2020, the American Bar Association (ABA) House of Delegates adopted an amendment to the Model Rules of Professional Conduct to provide a humanitarian exception to the prohibition on a lawyer providing financial assistance to a client. The Diversity & Inclusion Advisory Committee proposes that a parallel amendment be added to the MRPC 1.8. Conflict of Interest: Prohibited Transactions.

The ABA House of Delegates also adopted commentary to the rule amendment, and the Diversity & Inclusion Advisory Committee also recommends that Michigan adopt parallel commentary for MRPC 1.8 that would be added as a second paragraph to the MRPC Commentary to Rule 1.8.

Background

The amendments adopted by the ABA House of Delegates were sponsored by the Standing Committee on Ethics and Professional Responsibility and the ABA Standing Committee on Legal Aid and Indigent Defendants, who offered the following explanation to support the amendment especially in times of acute national economic distress:

> [The] narrow exception to Model Rule 1.8(e) … will increase access to justice for our most vulnerable citizens. [The current rule] forbids financial assistance for living expenses to clients who are represented in pending or contemplated litigation or administrative proceedings. The proposed rule would *permit* financial assistance for

> living expenses *only* to indigent clients, *only* in the form of gifts not loans, *only* when the lawyer is working pro bono without fee to the client, and *only* where there is a need for help to pay for life's necessities. Permitted gifts are modest contributions to the client for food, rent, transportation, medicine, and other basic living expenses if financial hardship would otherwise prevent the client from instituting or maintaining the proceedings or from withstanding delays that put substantial pressure on the client to settle. Similar exceptions, variously worded, appear in the rules of eleven U.S. jurisdictions.
>
> The proposed rule addresses a gap in the current rule. Currently, lawyers
>
> - may provide financial assistance to any transactional client;
> - may invest in a transactional client, subject to Rule 1.8(a);
> - may offer social hospitality to any litigation or transactional client as part of business development; and
> - may advance the costs of litigation with repayment contingent on the outcome or no repayment if the client is indigent.
>
> The only clients to whom a lawyer may not give money or things of value are those litigation clients who need help with the basic necessities of life. Discretion to give indigent clients such aid is often referred to as "a humanitarian exception" to Rule 1.8(e).[footnote omitted]
>
> Supporting a humanitarian exception to Rule 1.8(e), one pro bono lawyer wrote: "There are plenty of situations in which a small amount of money can make a huge difference for a client, whether for food, transportation, or clothes."[footnote omitted] Another wrote: "I hate that helping a client . . . is against the rules."[footnote omitted] And another: "Legal aid attorneys grapple with enough heartache and burdens that they should not also have to worry about whether a minor gift—an expression of care and support for a client in need—could violate the rule."[footnote omitted]
>
> The amendment … is client-centric, focused on the most vulnerable populations, and protects the ability of indigent persons to gain access to justice where they might otherwise be foreclosed as a practical matter because of their poverty.

Additional ABA supporters include the Diversity and Inclusion Center and its constituent Goal III entities (the Coalition on Racial and Ethnic Justice; Commission on Disability Rights; Commission on Hispanic Legal Rights and Responsibilities; Commission on Racial and Ethnic Diversity in the Profession; Commission on Sexual Orientation and Gender Identity; Council for Diversity in the Educational Pipeline; and Commission on Women in the Profession; and the Standing Committee on Pro Bono and Public Service), the Section of Civil Rights and Social Justice, the Commission on Homelessness and Poverty, the Law Students Division, the Commission on Domestic and Sexual Violence, the Standing Committee on Disaster Response & Preparedness, and the Standing Committee on Legal Assistance for Military Personnel. In addition, the Society of American Law Teachers (SALT), the National Legal Aid and Defender Association (NLADA), approximately sixty pro bono lawyers and law school clinicians nationwide, the Legal Aid Society of New York (an organization of more than 1200 lawyers), and APBCo support it.

Eleven jurisdictions currently have a form of humanitarian exception in their rules of professional conduct. Outreach to the bar counsel of these jurisdictions did not reveal any disciplinary problems associated with the narrow exception proposed.

Opposition

None known.

Prior Action by Representative Assembly

None pertaining to the proposed amendment.

Fiscal and Staffing Impact on State Bar of Michigan

No fiscal or staffing impact.

State Bar of Michigan Position

By vote of the Representative Assembly on September 17, 2020

Should the State Bar of Michigan support an amendment to MRPC Rule 1.8 and related commentary to add a narrow humanitarian exception to the general prohibition on providing financial assistance to an indigent client?

(a) Yes

or

(b) No

The remainder of this report will explain each of COSAC's recommendations.

Rule 1.8
Current Clients: Specific Conflict of Interest Rules

In March 2018 the Professional Responsibility Committee of the New York City Bar Association issued a detailed report (the "City Bar Report," attached as Appendix A) recommending a "humanitarian exception" to Rule 1.8(e), as well as a new Comment to Rule 1.8 to explain the exception. The Report was later approved by the City Bar President and represents the position of the City Bar. The new exception to Rule 1.8(e) proposed in the City Bar Report would permit lawyers representing indigent clients on a pro bono basis, lawyers working in legal services or public interest offices, lawyers working in law school clinics, and the legal services offices, public interest offices, and law school clinical programs themselves, to provide financial assistance to indigent litigation clients.

COSAC has carefully considered the City Bar Report and strongly supports the proposal to add a humanitarian exception to Rule 1.8(e). COSAC therefore recommends the City Bar proposal to the House of Delegates with a few relatively minor edits and additions. COSAC has discussed these edits and additions with the City Bar and understands that the City Bar supports COSAC's proposal to amend Rule 1.8(e) as set forth below.

As amended, Rule 1.8(e) would provide as follows:

> (e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:
>
> (1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
>
> (2) A lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; ~~and~~
>
> (3) A lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred;~~.~~ and
>
> (4) A lawyer providing legal services without fee, a not-for-profit legal services or public interest organization, a law school clinical program, a law school pro bono program, or a lawyer employed by or volunteering for such an organization or program, may provide financial assistance to indigent clients, provided that:
>
> (i) the lawyer, organization or program does not promise or assure financial assistance allowed under subparagraph (e)(4) to a prospective client before

retention, or as an inducement to continue the lawyer-client relationship after retention, and

(ii) the lawyer, organization or program does not publicize or advertise a willingness to provide such financial assistance to clients.

The Comment to Rule 1.8 would be amended as follows:

COMMENT

Financial Assistance

[9B] Paragraph (e) eliminates the former requirement that the client remain "ultimately liable" to repay any costs and expenses of litigation that were advanced by the lawyer regardless of whether the client obtained a recovery. Accordingly, a lawyer may make repayment from the client contingent on the outcome of the litigation, and may forgo repayment if the client obtains no recovery or a recovery less than the amount of the advanced costs and expenses. A lawyer may also, in an action in which the lawyer's fee is payable in whole or in part as a percentage of the recovery, pay court costs and litigation expenses on the lawyer's own account. However, ~~like the former New York rule,~~ subparagraphs (e)(1)-(3) limit~~s~~ permitted financial assistance to court costs directly related to litigation. Examples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses under subparagraphs (e)(1)-(3) do not include living or medical expenses other than those listed above.

[10] Except in representations covered by subparagraph (e)(4), ~~L~~lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses, including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee agreements and help ensure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.

[10A] Subparagraph (e)(4) allows certain lawyers and organizations to provide financial assistance beyond court costs and expenses of litigation to indigent clients in connection with contemplated or pending litigation. Examples of financial assistance permitted under subparagraph (e)(4) include payments or loans to cover food, rent, and medicine – but loans must comply with Rule 1.8(a) (governing business transactions with clients). Subparagraph (e)(4) permits lawyers providing legal services without fee, not-for-profit legal services or public interest organizations, and law school clinical or pro bono programs (as well as lawyers employed by or volunteering for such organizations or programs) to provide financial

assistance to indigent clients. The organizations or programs (and lawyers employed by or volunteering for such organizations or programs) may provide such financial assistance even if the organization or program is eligible to seek or is seeking fees under a fee-shifting statute, a sanctions rule, or some other fee-shifting provision. However, subparagraph (e)(4) does not apply to any other legal services provided "without fee." Thus, subparagraph (e)(4) does not permit lawyers or other organizations to provide financial assistance beyond court costs and expenses of litigation in matters in which they may eventually recover a fee, such as contingent fee personal injury cases or cases in which fees may be available under a contractual fee-shifting provision, even if the lawyer or organization ultimately does not receive a fee.

[10B] Subparagraph (e)(4) is narrowly drawn to allow charitable financial assistance to clients in circumstances in which such financial assistance is unlikely to cause conflicts of interest or to incentivize abuses. To avoid incentivizing abuses, such as "bidding wars" between qualifying organizations or pro bono lawyers to attract or keep clients, subparagraph (e)(4) does not permit a lawyer or organization to promise or assure financial assistance to a prospective client as a means of inducing the client to retain the lawyer or to continue an existing lawyer-client relationship. Nor does subparagraph (e)(4) permit a lawyer or organization to publicize or advertise a willingness to provide financial assistance to clients beyond court costs and expenses of litigation in connection with contemplated or pending litigation. However, the restrictions on promises, assurances, advertising, and publicity in subparagraphs (e)(4)(i) and (ii) apply only to financial assistance allowed under subparagraph (e)(4) and not to costs and expenses of litigation that are permitted under subparagraphs (e)(1)-(3).

COSAC Discussion of Rule 1.8(e)

Currently, Rule 1.8(e) allows payment of "court costs and expenses of litigation" for indigent clients represented in connection with contemplated or pending litigation on a pro bono basis but bars other financial assistance to indigent clients as well as other clients. As described in the City Bar Report, the proposed "humanitarian exception" would give certain attorneys and organizations discretion to provide financial assistance to indigent clients represented on a pro bono basis as long as the attorney or organization (i) does not promise financial assistance allowed under Rule 1.8(e)(4) in order to induce a client to commence or continue an attorney-client relationship, and (ii) does not advertise or publicize a willingness to provide such financial assistance.

Some form of humanitarian exception similar to proposed subparagraph (e)(4), with varying terms and limitations, has been adopted by ten other states and the District of Columbia.

COSAC supports the proposed humanitarian exception. COSAC believes that the concerns about attracting clients and fomenting litigation through loans or payments (and the attendant conflicts and professionalism issues that such assistance could raise) would generally not exist for outright payments or loans to (or on behalf of) indigent, non-fee paying litigants for necessities of life such as food, rent, and medicine. (Rule 1.8 already permits lawyers to advance the costs of medical examinations to create evidence or comply with discovery requests, but the rule does not permit lawyers to advance other expenses for medicines or medical treatment.)

Any likelihood of abuse is reduced by the City Bar proposal to prohibit advertising or promises of humanitarian assistance designed to induce a client to retain the lawyer or to continue an existing attorney-client relationship. In addition, COSAC believes that payments of such expenses may sometimes be necessary to enable potentially meritorious litigation to proceed (much as litigation funding already does for many non-indigent clients).

According to the City Bar Report, the public interest bar is said generally to support a humanitarian exception. This claim is based on an ABA nationwide survey of legal aid and public defender organizations and on the City Bar Professional Responsibility Committee's own inquiries of some law school clinics and legal services organizations in New York and New Jersey. The Report notes the prospect that lawyers representing indigent clients with desperate needs could be placed in a difficult position regarding whether to provide financial assistance to their clients (perhaps out of their own pockets), but also notes that law firms and legal services organizations could adopt (and in some cases have adopted) policies that would make decisions on financial assistance less personal, or would assign the decisions on financial assistance to attorneys or administrators who are not involved in the matter in question.

Though not mentioned in the City Bar Report, lawyers and legal service providers may also ethically discuss and actively explore with their clients other available charitable resources that may reduce or eliminate the client's need for financial assistance under subparagraph (e)(4). Nothing in COSAC's recommendation is meant to detract from those efforts. In any case, whether or not the Courts adopt a humanitarian exception, COSAC encourages lawyers to educate themselves and their clients about other charitable organizations that may assist litigants who are struggling financially, and COSAC encourages lawyers to support such organizations and to urge others to support them.

Public comments on Rule 1.8(e) and COSAC's response

New York State Bar Association Committee on Professional Ethics.

The NYSBA ethics committee supports the proposed amendments to Rule 1.8(e) and related Comments but urges COSAC to do three things: (a) define or clarify the meaning of "indigent" in Rule 1.8(e); (b) explain COSAC's view that contingent fee personal injury cases do not qualify for the humanitarian exception; and (c) make clear that a "loan" to a client must comply with Rule 1.8(a) (governing business transactions with clients). Specifically, the ethics committee said:

> With the following observations, we agree with COSAC's proposal, which originates with the New York City Bar's Committee on Professional Responsibility.
>
> The N.Y. Rules of Professional Conduct (the "Rules") do not explicitly define "indigent." So noting in our Opinion 786 (2005), which interpreted the identical predecessor of Rule 1.8(e), we said that the New York courts "have defined the term as 'destitute of property or means of comfortable subsistence; needy; poor; in want; necessities' (citing Healy v. Healy, 99 N.Y.S.2D 874, 877 (Sup Ct. Kings County 1950)." Since then, Comment [3] to Rule 6.1 was added to define "poor person" in the context of pro bono representations. In our Opinion 1044 (2015), at ¶ 8, we opined that a person qualifying as a "poor person" under that Comment would be "indigent" under Rule 1.8(e). We assume that COSAC's proposal uses the term "indigent" in this same ordinary and common sense, but we believe

> that COSAC should expressly so state in a Comment; the matter should not be left to our assumptions.
>
> Also needful of clarity is proposed paragraph (c)(4), which extends to any lawyer providing services without fee to indigent clients, with the explanation in proposed Comment 10A that this does not exclude "an organization or program" that is eligible to seek fees under a fee-shifting statute, common in, among other things, civil rights laws. This is not what the proposed revision of paragraph (c)(4) actually says, so a discordance exists between the proposed Rule and the proposed Comment. Equally unclear is whether a so-called "non-public" interest matter is confined to personal injury contingency cases, and why such cases are invariably of a "non-public" character. Wise public policy may be that such matters are not apt for the "humanitarian exception" but the bar deserves greater guidance than the COSAC proposal puts forth.
>
> That COSAC contemplates that the financial aid may take the form of a loan implicates Rule 1.8(a), to which our Committee has consistently required adherence in loan transactions between a lawyer and client. See, e.g., N.Y. State 1145 ¶ 9 (2018); N.Y. State 1104 ¶ 4 (2016); N.Y. State 1055 ¶ 13 (2015). Although mention is made of other parts of Rule 1.8 in its commentary on the proposed change, COSAC does not say whether the proposal would require compliance with the strict standards of Rule 1.8(a). While we are loath to burden a humanitarian measure with undue complexity, we believe that any business transaction with a client – that is, a transaction other than an act of charity – compels application of Rule 1.8(a). At a minimum, if COSAC disagrees, then we think clarification and explanation is needed.

COSAC has deliberated regarding each of the ethics committee's suggestions and will address each one.

With respect to the term "indigent," COSAC does not believe it is a necessary to clarify the meaning of "indigent." That term has been in Rule 1.8(e) or its predecessor, DR 5-103(B)(2), for at least twenty-five years and has not created problems. Also, as the ethics committee noted, ethics opinions have addressed the meaning of the term "indigent" and have provided substantial guidance that is not readily captured in a short Comment.

With respect to making clear that a "loan" to a client must comply with Rule 1.8(a), COSAC agrees and has added appropriate language to proposed Comment [10A].

With respect to whether personal injury cases serve the public interest, COSAC believes that sometimes they do and sometimes they do not. COSAC has excluded them for the same reason that the New York City Bar excluded them: abuses of the financial assistance exception are least likely to occur when financial assistance to clients is provided by lawyers providing legal services without fee, by not-for-profit legal services or public interest organizations, by law school clinics or law school pro bono programs, or by lawyers working for or with such organizations or programs. Lawyers in the for-profit sector have different incentives and motivations. COSAC understands that a number of jurisdictions allow lawyers to provide financial assistance to a wider variety of needy individual clients (including contingent fee clients) beyond the costs and expenses of litigation, and COSAC recognizes that extending the humanitarian exception to contingent fee lawyers might be an

appropriate step at a later time, but adopting the proposed humanitarian exception would be a big step for New York, and COSAC thinks it best to see how the humanitarian exception works in pro bono and public interest cases before expanding it to the private sector.

New York City Bar

The New York City Bar originated the proposed humanitarian exception and generally supports COSAC's changes to its proposals, but requested the following modifications:

> Proposed Comment 10A to proposed Rule 1.8(e)(4) seems to describe the universe of lawyers who may provide financial assistance to indigent clients more narrowly than does the proposed Rule itself. The proposed Rule provides that such assistance may be provided by, among others, "[a] lawyer providing legal services without a fee...." The third sentence of comment 10A lists the other categories of attorneys who are covered by the rule, but excludes this category (except to the extent that it overlaps with lawyers volunteering for public interest organizations or law school clinical or pro bono programs, which is a separately listed category under the Rule). We suggest clarifying language so that the comment does not create confusion about the ability of a lawyer or law firm providing pro bono services to an indigent client to provide such assistance.

COSAC agrees with the City Bar's suggestion and has made the requested modification to COSAC's earlier proposal.

Rule 3.4
Fairness to Opposing Party and Counsel

COSAC proposes to add a new paragraph (f) to Rule 3.4. The new paragraph would provide as follows:

> Rule 3.4. A lawyer shall not ...
>
> (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
>
> (1) the person is a relative or an employee or other agent of a client; and
>
> (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COSAC also proposes to amend Comment [4] to Rule 3.4 to explain the new provision. As amended, Comment [4] would provide as follows:

> [4] In general, a lawyer is prohibited from giving legal advice to an unrepresented person, other than the advice to secure counsel, when the interests of that person are or may have a reasonable possibility of being in conflict with the interests of the lawyer's client. See Rule 4.3. However, subject to Rule 4.3, a lawyer may inform any person of the right not to

Attachment 5

Memorandum

To: Standing Committee on the Rules of Professional Conduct

From: Adam J. Espinosa, Chair of the LLP Subcommittee

Date: April 14, 2022

Re: Potential Changes to Colorado Attorney Rules of Professional Conduct based on the Proposed Licensed Legal Paraprofessional (LLP) Program

Summary

The LLP Subcommittee has set forth our recommendations for amendments to the Colorado Rules of Professional Conduct in summary fashion and with proposed edits that are redlines of the current attorney rule. Our focus was primarily on attorney rules that might need to be amended, but in some instances a comment to the rule was also flagged for a possible amendment. As you will see, many of the attorney rules of professional conduct will not be affected by the proposed LLP Rules of Professional Conduct and the primary set of rules that would need amendment are the Rule 5 Series set of attorney rules of professional conduct.

Our ask of the Standing Rules Committee is to review our proposals and consider this memo and our initial recommendations as a starting point for a final review by the Standing Rules Committee and a final vote at a future meeting.

Background

The LLP subcommittee of the Standing Committee on the Rules of Professional Conduct was asked to review the proposed LLP Rules of Professional Conduct and make recommendations to this committee for possible changes to the Colorado Rules of Professional Conduct based on the proposed LLP rules. Our task was not to evaluate the proposed LLP Rules of Professional Conduct nor make recommendations to those rules because a separate Colorado Supreme Court Committee was tasked with that responsibility. Our subcommittee is comprised of Erika Holmes, Esq., April Jones, Esq., Matthew Kirsch, Esq., Marcus Squarrell, Esq., Professor Eli Wald, Dave Stark, Esq., Jessica Yates, Esq., and Judge Adam J. Espinosa.

At the outset, our subcommittee was provided a full set of the proposed LLP Rules of Professional Conduct, the LLP Memorandum to the Supreme Court, and the Court's order regarding the implementation of an LLP program. The subcommittee met and decided to do a complete review of each attorney rule of professional conduct, the scope, and the preamble to those rules to determine if the proposed LLP rules would necessitate a change to any of the attorney rules. We divided ourselves into smaller groups where we were each assigned to review a particular set of attorney rules and make recommendations. Those recommendations comprise this memo and are below.

Rules

Preamble

In the preamble to the attorney rules of professional conduct, we may want to consider an amendment to include a reference to LLPs. Our suggestion to paragraph 5 of the preamble is below.

Preamble: A Lawyer's Responsibilities

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, Licensed legal Paraprofessionals, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

Rule 1 Series

We found no relevant rules in the Rule 1 Series set of rules that need amendment but we did identify two subsections that might require an amendment. Those sections are Colo. RPC 1.0(c), the definition of "firm" or "law firm", and Colo. RPC 1.0(g), the definition of "partner". The issue would be whether LLPs are included or excluded from those definitions and whether we want to amend the definitions of these words in a manner consistent with the proposed LLP definitions for these words. The proposed LLP definitions for the above words are below:

"Firm" denotes a partnership, professional company, or other entity or a sole proprietorship through which a lawyer or lawyers, an LLP or LLPs, or a combination of lawyers and LLPs render legal services.

"Partner" denotes a member of a partnership, an owner of a professional company, or a member of an association authorized to practice law, including practice as an LLP.

If the Standing Committee decides to amend these definitions, we will also want to consider amending comments [2] and [4] of Colo. RPC 1.0. Last, the Standing Rules Committee will also want to consider whether we add a clarifying definition of LLPs to Colo. RPC 1.0. A suggestion by a subcommittee member was to state, "for purposes of these rules, LLPs are considered nonlawyer members of the legal profession."

Rule 2 Series

We found no relevant rules in the Rule 2 Series set of rules that need amendment. There was a suggestion that we add a comment to Rule 2.1 that states, "A lawyer may advise a client of the option of engaging a licensed legal paraprofessional (LLP) when it appears a domestic relations matter could be handled, entirely or substantially, by an LLP. When a lawyer advises a client of the option of engaging an LLP, the lawyer should describe the limited legal services that may be performed an LLP and should identify services that could not be performed by an LLP."

Rule 3 Series

We found a few minor instances where we are recommending amendments to Rule 3 Series rules. Specifically, we recommend changing the title of Rule 3.4 to include LLPs and a few minor amendments to Rule 3.7 as reflected below.

Rule 3.4. Fairness to Opposing Party, ~~and~~ Counsel, or LLPs (Title change only)

Rule 3.7. Lawyer as Witness

(b) A lawyer may act as advocate in a trial in which another lawyer or LLP in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

If the amendment to Rule 3.7 is made by the Standing Rules Committee, we will want to consider amending comments 5 and 6 of this rule to include LLPs.

Rule 4 Series

We recommend amendments to a few Rule 4 series rules. The proposed amendments would presume people being assisted by LLPs are represented rather than unrepresented. Further, we presume that an LLP privilege would be created and recognized. We understand the larger LLP Rules Committee is recommending a statutory client-LLP privilege as part of their proposed statutory rules changes needed to implement the program. Below are our recommendations for amendments.

Rule 4.2. Communication with Person Represented by Counsel or An LLP

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer or LLP in the matter, unless the lawyer has the consent of the other lawyer or LLP or is authorized to do so by law or a court order.

Comment 1 and 2 of Rule 4.2 would also need to be amended to include LLPs and client-LLP privilege.

Rule 4.3. Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel or an LLP, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel or an LLP, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment 2 of Rule 4.3 would need amendment to include LLPs.

Rule 4.4. Respect for Rights of Third Persons

The sole recommendation for amendment to this rule relates to Comments 1 and 2 to Rule 4.4 and the need to identify the client-LLP relationship and the need to incorporate LLPs into these comments.

Rule 5 Series

We found several instances where we are recommending changes to the Rule 5 series rules. Our recommended amendments relate to Rules 5.1 through 5.6. Proposed redline amendments are below.

Rule 5.1. Responsibilities of a Partner or Supervisory Lawyer

(a) A partner in a ~~law~~ firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a ~~law~~ firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct and all LLPs conform to the LLP Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer or LLP shall make reasonable efforts to ensure that the other lawyer or LLP conforms to the applicable Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's or LLP's violation of the applicable Rules of Professional Conduct if:

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

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

Rule 5.2. Responsibilities of a Subordinate Lawyer or LLP

(a) A lawyer or LLP is bound by the applicable Rules of Professional Conduct notwithstanding that the lawyer or LLP acted at the direction of another person.

(b) A subordinate lawyer or LLP does not violate the applicable Rules of Professional Conduct if that lawyer or LLP acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants

With respect to nonlawyers and LLPs employed or retained by or associated with a lawyer:

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

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

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

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

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

Rule 5.4. Professional Independence of a Lawyer

(a) A lawyer or ~~law~~ firm shall not share legal fees with a nonlawyer who is not an LLP, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, LLP or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer or LLP may pay to the estate of the deceased lawyer or LLP that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer or LLP;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer or LLP may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer or LLP the agreed-upon purchase price;

(4) a lawyer or ~~law~~ firm may include nonlawyer or nonLLP employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommend employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer other than an LLP if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional company that is authorized to practice law for a profit, if:

(1) A nonlawyer other than an LLP owns any interest therein, except that a fiduciary representative of the estate of a lawyer or LLP may hold the stock or interest of the lawyer or LLP for a reasonable time during administration; or

(2) A nonlawyer has the right to direct or control the professional judgment of a lawyer.

(e) A lawyer shall not practice with or in the form of a professional company that is authorized to practice law for a profit except in compliance with C.R.C.P. 265.

(f) For purposes of this Rule, a "nonlawyer other than an LLP" includes (1) a lawyer or LLP who has been disbarred, (2) a lawyer or LLP who has been suspended and who must petition for reinstatement, (3) a lawyer or LLP who is subject to an interim suspension pursuant to C.R.C.P. 242.22, (4) a lawyer or LLP who is on inactive status pursuant to C.R.C.P. 227(A)(6), (5) a lawyer or LLP who has been permitted to resign under C.R.C.P. 227(A)(8), or (6) a lawyer or LLP who, for a period of six months or more, has been (i) on disability inactive status pursuant to C.R.C.P. 243.6 or (ii) suspended pursuant to C.R.C.P. 227(A)(4), 242.23, 242.24, or 260.6.

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not:

(1) practice law in this jurisdiction without a license to practice law issued by the Colorado Supreme Court unless specifically authorized by C.R.C.P. 204, *et seq.* or federal or tribal law;

(2) practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction;

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

(4) allow the name of a disbarred lawyer or LLP or a suspended lawyer or LLP who must petition for reinstatement to remain in the firm name.

(b) A lawyer shall not employ, associate professionally with, allow or aid a person the lawyer knows or reasonably should know is a disbarred, suspended, or on disability inactive status to perform the following on behalf of the lawyer's client:

(1) render legal consultation or advice to the client;

(2) appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) appear on behalf of a client at a deposition or other discovery matter;

(4) negotiate or transact any matter for or on behalf of the client with third parties;

(5) otherwise engage in activities that constitute the practice of law; or

(6) receive, disburse or otherwise handle client funds.

(c) Subject to the limitation set forth below in paragraph (d), a lawyer may employ, associate professionally with, allow or aid a lawyer or LLP who is disbarred, suspended (whose suspension is partially or fully served), or on disability inactive status to perform research, drafting or clerical activities, including but not limited to:

(1) legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; and

(3) accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing assistance to the lawyer who will appear as the representative of the client.

(3-1) ~~(i)~~ An LLP who is disbarred, suspended or on disability status may only perform the above services subject to the limitations imposed by Rule _____.

(d) A lawyer shall not allow a person the lawyer knows or reasonably should know is disbarred, suspended, or on disability inactive status to have any professional contact with clients of the lawyer or of the lawyer's firm unless the lawyer:

(1) prior to the commencement of the work, gives written notice to the client for whom the work will be performed that the disbarred or suspended lawyer or LLP, or the lawyer or LLP on disability inactive status, may not practice law; and

(2) retains written notification for no less than two years following completion of the work.

(e) Once notice is given pursuant to C.R.C.P. 242.32 or this Rule, then no additional notice is required.

Rule 5.6. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer or LLP to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's or LLP's right to practice is part of the

settlement of a client controversy.

Rule 6 Series

We found no relevant rules or comments in Chapter 6 that need amendment. The Rule 6 Series rules includes recommended Model Pro Bono Policies for Colorado Attorneys, Law Firms and In-House Counsel, and it might be appropriate to add or reference the model for LLPs.

Rule 7 Series

We found only one relevant rule in the Rule 7 series rules that we recommend amending. Specifically, we recommend adding licensed legal paraprofessionals to the list of persons who can be solicited by a lawyer in Rule 7.3(b). A proposed redline amendment is below.

Rule 7.3. Solicitation of Clients

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; ~~or~~

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer; or~~.~~

(4) a licensed legal paraprofessional.

Rule 8 Series

We found two instances in the Rule 8 series rules that we are recommending amendment. We recommend Rule 8.3 be amended to include a lawyer's duty to report another lawyer or LLP that has violated their respective rules of professional conduct. Also, we are recommending that 8.4(a) be amended to make it clear that a lawyer commits misconduct if the lawyer assists another lawyer or LLP in violating their respective rules of professional conduct. Proposed redline amendments are below.

Rule 8.3. Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer or LLP has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's or LLP's honesty, trustworthiness or fitness as a lawyer or LLP in other respects, shall inform the appropriate professional authority.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another lawyer or LLP to do so, or do so through the acts of another;