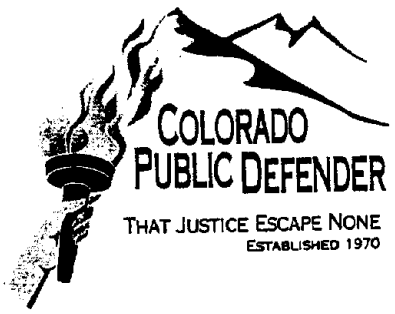

OFFICE OF THE STATE PUBLIC DEFENDER

DAVID S. KAPLAN
STATE PUBLIC DEFENDER

May 25, 2006

Colorado Supreme Court
2 East 14th Avenue, 4th Floor
Denver CO 80203

RE: COMMENT IN OPPOSITION TO PROPOSED PARAGRAH 13 OF THE COMMENT TO RULE 1.6 - CONFIDENTIALITY OF INFORMATION

Dear Madame Chief Justice and Associate Justices of the Colorado Supreme Court,

The Colorado State Public Defender submits this comment in opposition to proposed paragraph 13 of the Comment to Rule 1.6 – Confidentiality of Information. Specifically the Public Defender objects to the Standing Committee's addition of the sentence "For purposes of paragraph (b)(6), a subpoena is a court order" (emphasis added) to the ABA's Comment to Model Rule 1.6.

Colorado Rules of Professional Conduct, Rule 1.6 - Confidentiality of Information, protects from disclosure confidential client information, which, in addition to privileged information and work product, includes "not only matters communicated in confidence by the client but also to all information relating to the representation, whatever its source". Comment to Rule 1.6, paragraph 5. The American Bar Association's (ABA) Ethics 2000 Model Rules of Professional Conduct recommended revisions to Rule 1.6, while preserving this basic tenant of confidentiality of client information, broadened the areas where an attorney had discretion to reveal client confidences. One of the exceptions to confidentiality, previously implied but which is now codified in the Model Rules, is that an attorney has discretion to reveal client confidences "to comply with other law or a court order". The ABA's New Model Rule 1.6 reads in its relevant part:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> ...
>
> (6) to comply with other law or court order.

In the part of the Comment explaining section (b)(6) of Rule 1.6, the ABA explained:

> A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or

> government entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all non-frivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

The same year the ABA released the New Model Rules, 2002, an Ad Hoc committee was formed in Colorado to review the new ABA Rules and make proposals to the Supreme Court regarding any changes to the existing Colorado Rules of Professional Conduct. For the sake of rule uniformity the committee adopted a presumption in favor of recommending the ABA changes unless they conflicted with this court's previous interpretations of the Rules. *see Executive Summary of The ABA Ethics 2000/Colorado Rules of Professional Conduct Committee (4-19-04).* As for Rule 1.6, the Ad Hoc Committee recommended adoption of the new Model Rule and its Comment as proposed by the ABA.

In 2004, this court established the Standing Committee on the Colorado Rules of Professional Conduct, which reviewed the work done by the Ad Hoc committee and made its own recommendation to this court. *see Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct's REPORT AND RECOMMENDATIONS CONCERNING THE AMERICAN BAR ASSOCIATION ETHICS 2000 MODEL RULES OF PROFESSIONAL CONDUCT (12-30-05)(herein after called Standing Committee Report).* As for Rule 1.6, the Standing Committee also recommended adoption of the new Model Rule and its Comment, "subject to certain amendments to the Comments" (emphasis added). *id.* pp32-33. One of the proposed amendments to the Comments was the insertion of the sentence "For purposes of paragraph (b)(6), a subpoena is a court order" so that now the paragraph cited above reads:

> A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal of government entity claiming authority pursuant to other law to compel the disclosure. For purposes of paragraph (b)(6), a subpoena is a court order. (emphasis added) Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all non-frivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(4) permits the lawyer to comply with the court's order.

See Appendix B to Standing Committee Report, p43. In its report to this Court, the Standing Committee explained its addition of this language by stating:

> New Model Rule 1.6(b)(6) creates a new exception that permits the disclosure of protected information "to comply with other law or court order." Paragraph [13] of the New Model Rules Comment discusses court orders to lawyers to disclose protected information, but does not address the lawyer's duty when the lawyer is served with a subpoena that purports to address the lawyer's duty to require the disclosure of protected information either in documents or testimony. Under the procedural rules of most courts, including Colorado courts, an attorney for a party may issue a subpoena without any prior judicial review. In that sense it is different from a court order, which usually must be issued by a judicial officer. At the same time, a subpoena constitutes a court order in the sense that it invokes the authority of the court to compel the recipient to comply, and important consequences may attach to disobedience. The Standing Committee believes that a subpoena should be treated as the equivalent of a court order under New Model Rule 1.6(b)(6).

See Standing Committee Report, pp41-42. The Colorado Public Defender objects to the Standing Committee's proposal to include a sentence in the Comment section of Rule 1.6 declaring that a subpoena is the equivalent of an order issued by a court thereby giving an attorney discretion to reveal client confidences when served with a subpoena.

A subpoena is an order to appear at the time and place stated in the subpoena. A subpoena deuces tecum (SDT) is an order to appear at the time and place stated and bring specifically requested documents. For the convenience of the court and the parties, Colorado allows attorneys to prepare sign and serve subpoenas. A subpoena is <u>not</u> a ruling from the court that the person served has relevant, admissible, non-confidential and/or non-privileged information and it is <u>not</u> a ruling from the court that the testimony and/or documents being subpoenaed can even be legally disclosed to the other side.

Criminal defense attorneys are frequently served with subpoenas and subpoenas deuces tecum when a former client files a post-conviction motion alleging ineffective assistance of counsel. These subpoenas are usually "boiler plate" subpoenas asking for the client's entire file and ordering the attorney to appear and testify regarding all aspects of the representation. It is routine practice in the Colorado State Public Defenders, codified in its personnel rules, to file motions to quash these types of subpoenas.

There are two reasons for requiring that motions to quash be filed in these circumstances. The first is that the present Rule 1.6 as well as the New Model Rule 1.6 authorizes an attorney to reveal confidential client information only to "the extent the lawyer reasonably believes necessary" to answer the claims filed by the client. Oftentimes the subpoenaed attorney has not been served with a copy of the post-

conviction motion, has no ideas what issues the former client is raising and has no idea what needs to be disclosed is answer the charges. Additionally it is rare that a former client makes allegations so wide-sweeping as to warrant a complete waiver of the protections offered by Rule 1.6 so a ruling by the court determining the scope of the waiver is necessary to protect both the lawyer and the client.

The second reason for requiring that attorneys file motions to quash such a subpoena is more emotional. An attorney who has fought long and hard for a client and then that client files a charge of ineffective assistance filed against him/her is usually devastated and angry by the charge. Having a procedure in place that does not allow for an emotional response or the exercise of discretion when served with a subpoena to produce again protects both the client and the lawyer.

Consequently, a subpoena to reveal client confidences is a four step process: the subpoena is served on the attorney, the attorney files a motion to quash, the court determines the extent of the waiver and issues an order requiring disclosure, and the attorney complies with the court order. In this context the "defenses" provided for in the paragraph 13 make sense. The court has ruled on the extent to which the protections of Rule 1.6 have been waived and the only non-frivolous defenses to this ruling would be that the ruling is illegal or the information is protected by another privilege or law.

The danger with explicitly stating in the Rules of Professional Conduct that a subpoena, in and of itself, is the type of court order contemplated by Rule1.6(b)(6) is that an attorney receiving a subpoena requiring him/her to produce for inspection the entire client file may believe that s/he now has discretion to disclose all attorney confidences. What busy attorney understanding that this Court has declared a subpoena the "equivalent" of a court order and understanding that compliance with a court order is an exception to Rule 1.6 and being grieved by a former client, might be tempted to say "what do you want to know" or "here take the file and save me the time and expense of going into court?" That might be a violation of the part of Rule 1.6 that says that client confidential information should be disclosed only the extent necessary to answer the charges, but this court, of all people, should know how difficult it is to prove an "abuse of discretion". Saying that a subpoena is the "equivalent of a court order under New Model Rule 1.6(b)(6)" as the Standing Committee has done, stamps it with a level of legitimacy that it is not entitled to and increases the danger of unnecessary disclosure of client confidences. See *Standing Committee Report, pp41-42.*

Two arguments have been made as to why this amendment can, without causing problems, be included in paragraph 13 of the Comments. The first argument is that since it is found in the part of Comments explaining when an attorney has "discretion" to release client information, it does not mandate the release of anything. This argument ignores the fact that in reality an attorney does not have discretion to disobey a valid court order unless s/he is curious as to what the inside of a jail cell looks like. An attorney can object to the disclosure and can preserve the issue for appeal, but assuming the order is legally entered - even if subsequently found to be erroneous - the attorney must obey it.

The second argument is that, since the Comment contains a list of non-frivolous objections that an attorney should assert on behalf of the client when ordered to disclose client confidences, the client is protected. There are a myriad of problems with this argument; the most obvious being the positioning of these "defenses" in the

Comments and not in the Rule. Even assuming that most attorneys read the Comments to a Rule, the Scope section of the Rules of Professional Conduct states that "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." *See Appendix B to Standing Committee Report, p5.* The argument that raising these defenses is a "recommendation" as opposed to an "imperative" is also born out by the use of the word "should" instead of "shall". *Id.*

Furthermore these "defenses" are very limited when the court order being objected to is a subpoena – that the order is illegal (i.e., not authorized by other law), that the information is protected by the attorney-client privilege or that the information is protected by "other applicable law." Improperly served subpoenas are fairly routine and, if not properly served, the attorney would have the option of honoring the subpoena or not. However, an improperly served subpoena is not illegal, it is just unenforceable. As for the attorney/client privilege defense, Rule 1.6 protects confidential client information and while everything in a client's file is confidential, most of it is not privileged. That leaves a "defense" that the information is protected from disclosure by "other applicable law". Arguably there could be "other applicable laws" that may protect information in a client's file such as another person's privileged medical records. However, the Rules of Professional Conduct are not "laws" so this "defense" does not allow for the most obvious objection: that the information being sought by the subpoena is confidential information under Rule 1.6 and its disclosure is not necessary to answer the allegations against the attorney.

The language in Rule 1.6(b)(6) that an attorney can disclose confidential client information to comply with other law or a court order contemplates that there has been either a court proceeding determining that the information can be released or there is some law in place that clearly requires disclosure of the information. A subpoena is neither of these. A subpoena is an order of the court to appear and/or produce but the content of the subpoena is merely a reflection an attorney's belief of what s/he is entitled to and, in the context of attorney client confidential information, is oftentimes not correct.

To allow an attorney the discretion to turn over a client's file or disclose all confidential information in the file in response to a subpoena goes against one of the core purposes of the Rules of Professional Conduct – to protect the client. The Colorado Public Defenders respectfully requests that this Court delete the sentence "For purposes of paragraph (b)(6), a subpoena is a court order" from paragraph 13 in the Comment section of Rule 1.6.

Sincerely,

Frances Smylie Brown

Frances Smylie Brown
Chief Deputy Colorado State Public Defender