COLORADO SUPREME COURT
ATTORNEY REGULATION COUNSEL

Regulation Counsel
John S. Gleason

Chief Deputy Regulation Counsel
Nancy L. Cohen

Deputy Regulation Counsel
James C. Coyle

Attorneys' Fund for Client Protection
Unauthorized Practice of Law

Assistant
Regulation Counsel

Stephen R. Fatzinger
Lisa E. Frankel
Luain T. Hensel
Kim E. Ikeler
Cynthia D. Mares
Charles E. Mortimer, Jr.
Matthew A. Samuelson
April M. Seekamp
Louise Culberson-Smith
James S. Sudler
Douglas S. Timmerman

May 25, 2006

Colorado Supreme Court
c/o Susan Festag, Clerk of the Court
2 East 14th Avenue, 4th Floor
Denver, Colorado 80203

Re: Proposed Rules of Professional Conduct from the Standing Rules Committee

Dear Chief Justice Mullarkey and Honorable Associate Justices:

The Office of Attorney Regulation Counsel (OARC) respectfully submits its written comments regarding the proposed Colorado Rules of Professional Conduct ("Proposed Rules"). Nancy Cohen and I serve on the Colorado Supreme Court Standing Rules Committee ("Standing Committee"), chaired by Marcy Glenn, and were members of the Standing Committee Subcommittee studying the new Ethics 2000 Model Rules ("Rules Subcommittee"). The Rules Subcommittee, chaired by Michael Berger, reviewed the Rules proposed by the ABA Ethics 2000 Commission and compared those rules with the current Colorado Rules of Professional Conduct ("the Colorado rules"). Generally, OARC agrees with the Standing Committee's Proposed Rules.

OARC agrees with the Standing Committee's presumption of adopting the Model Rules for rule uniformity among jurisdictions. Lawyers are more frequently practicing across state lines; and uniformity of rules, especially in

the 3 series (addressing litigation issues) and Rules 1.6 (confidentiality), 1.7 (conflicts), and 1.13 (entity as client), provides better guidance to Colorado lawyers. The comments set forth below concern Proposed Rules 1.6, Comment 13 to Rule 1.6, 3.3, 3.8(c), 4.1, and 8.4(h) and the definition of "knowing" found in Proposed Rule 1.0, Terminology.

NOTE: OARC's position follows a reference to the Current Colorado Rule or Comment, the Committee's Proposed Rule or Comment and the ABA Ethics 2000 Model Rule.

Rule 1.6 – Confidential Information

Current Rule[1]

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.

(c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceedings concerning the lawyer's representation of the client.

(d) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using such information, except that a lawyer may reveal the information allowed by paragraphs (b) and (c) through such persons.

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[1] Colorado Rules of Prof'l Conduct (C.R.P.C.) Rule. 1.6 (2005).

Proposed Rule

(a) A lawyer shall not reveal information relating to the representation of a client unless the client ~~consents after consultation, except for disclosures that are~~ gives informed consent, the disclosure is impliedly authorized in order to carry out the representation~~, and except as stated in paragraphs (b) and (c).~~ or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the ~~intention~~representation of ~~the lawyer's~~ a client to ~~commit a crime and the information necessary to prevent the crime.~~

~~(c) A lawyer may reveal such information to~~ the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules, other law or a court order;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any ~~proceedings~~ proceeding concerning the lawyer's representation of the client~~.~~; or

~~(d) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer~~

~~from disclosing or using such information, except that a lawyer may reveal the information allowed by paragraphs (b) and (c) through such persons.~~ (6) to comply with other law or a court order.

ABA Ethics 2000 Model Rule[2]

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

[2] MODEL RULES OF PROF'L CONDUCT RULE. 1.6 (2006).

OARC Position

Proposed Rule 1.6 generally follows Ethics 2000 Model Rule 1.6, but there are two significant differences: one change is to the rule and one change is in the comment. Proposed Rule 1.6(b)(4) provides:

> (b) A lawyer may reveal information relating to the representation of a client to the extent reasonably necessary: . . .
>
> (4) to secure legal advice about the lawyer's compliance with these rules, other law or court order. (underlined additional language).

Although initially rejected by the Standing Committee, the Committee later added the words "other law or court order" to Rule 1.6(b)(4). The Committee's discussion regarding the additional language centered on concern that the language allowed too broad a disclosure of client confidences.

OARC agrees that a lawyer should be allowed to seek advice about the lawyer's own compliance with the rules when an ethical issue arises during the attorney-client relationship. As now proposed the rule allows lawyers to disclose any and all confidential information in a variety of situations, without obtaining client consent. OARC is concerned that the proposed rule is so broad as to permit a lawyer to consult with "a shadow lawyer" about the client's legal issues without client consent or knowledge.

OARC suggests two alternatives with respect to Proposed Rule 1.6(b)(4). The first suggestion is that the Court adopt the ABA Ethics 2000 Model Rule

1.6(b)(4) and delete the proposed language, "other law or court order."[3] If, however, the Court adopts Proposed Rule 1.6(b)(4), then OARC recommends the following comment be added after Comment 9:

> [9][A] A lawyer may also secure legal advice about a lawyer's obligation to comply with other law or a court order. If, for example, a lawyer is concerned that the lawyer has committed malpractice, the lawyer may reveal confidential information sufficient to obtain advice about the lawyer's duties. Likewise when a court orders a lawyer to reveal confidential information, the lawyer may reveal such confidential information to his or her lawyer to obtain legal advice. The lawyer may also reveal confidential information to seek advice about a lawyer's compliance with the criminal laws. Part (b)(4) does not authorize a lawyer to retain counsel for the purpose of assisting the lawyer with the client's matter, unless client consent is obtained.

Comment 13 to Rule 1.6

Current

Disclosures Otherwise Required or Authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court

[3] Model Rule 1.6(b)(4) was added by the ABA Ethics 2000 Commission to allow lawyers to secure legal advice about the lawyer's compliance with the rules.

or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Proposed

~~Where a~~ *Disclosure Adverse to Client*

~~*Disclosures Otherwise Required or Authorized*~~ [12]

~~The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, Paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.~~ [13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. For purposes of paragraph (b)(6), a subpoena is a court order. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous 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 Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another~~

~~provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.~~

ABA Ethics 2000 Model Rule

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental 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 nonfrivolous 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.

OARC Position

The Standing Committee modified Comment 13 by adding language to explain that the term "court order" as used in Proposed Rule 1.6(b)(6) includes a subpoena. The added language to Comment 13 states, "For purposes of paragraph (b)(6), a subpoena is a court order."[4] Comment 13 explains that if a lawyer is subpoenaed to testify about attorney-client privilege matters, the lawyer must obtain informed consent of the client. If the information is otherwise confidential but not protected by the attorney-client privilege, the lawyer could reveal the information without client consent. By adding the

[4] Comment 13 in its entirety reads: A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel disclosure. For purposes of paragraph (b)(6), a subpoena is a court order. 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 1.6. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order. (Emphasis added).

language that a "subpoena is a court order," a lawyer may reveal any confidential information that is not covered by the attorney-client privilege to third persons, without first obtaining client consent.[5] OARC believes that this additional language broadens disclosure of client confidences in situations where the client has no knowledge or ability to protest. OARC recommends the phrase "For purposes of paragraph (b)(6), a subpoena is a court order," be deleted.

Rule 3.3 – Candor to the Tribunal

Current Rule[6]

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and later learns that the evidence is false, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

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[5] The additional language to Comment 13 was approved by the Standing Committee before it recommended the proposed language of "other or court order" to paragraph (b)(4).
[6] Colo. RPC Rule 3.3.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Proposed Rule

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal~~;~~

~~(2)~~ or fail to ~~disclose~~ correct a false statement of material fact or law previously made to ~~a~~ the tribunal ~~when disclosure is necessary to avoid assisting a criminal or fraudulent act~~ by the ~~client;~~ lawyer;

(~~3~~2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(43) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or witness called by the lawyer, has offered material evidence and ~~later learns that the evidence is false~~the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

~~(b) The duties stated in paragraph (a~~(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

~~(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.~~

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer ~~which~~ that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

ABA Ethics 2000 Model Rule[7]

(a) A lawyer shall not knowingly:

> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

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[7] MRPC RULE 3.3 (2006).

OARC Position

ABA Ethics 2000 Model Rule 3.3(a)(1) is substantially different from the Colorado Rule, the old Model Rule and the Proposed Rule because the term "material" is deleted from the first phrase of (a)(1).

The Standing Committee voted to retain the word "material" so Proposed Rule 3.3(a)(1) reads as follows: "Make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." (Emphasis added). The Standing Committee's action is based on the Court's interpretation of "knowing" in case law, *See People v. Rader*, 822 P.2d 950 (Colo. 1992); *In re Egbune*, 971 P.2d 1065 (Colo. 1999).[8] However, the fact that the Court has interpreted "knowing" to require a certain state of mind, does not suggest that the Court should avoid the "presumption" of uniformity and add "materiality" to Proposed Rule 3.3(a)(1).

According to the ABA Ethics 2000 Commission's explanation of changes,[9] the word "material" was deleted to bring (a)(1) in conformity with the duty to not offer false evidence as set forth in (a)(3). Twenty-three states have adopted some version of the Model Rules,[10] and of those 23 states, only six use

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[8] The Court held that reckless conduct equates to knowing conduct.

[9] ABA Report 401 Amendment to Model Rules of Professional Conduct (Ethics 2000) to the House of Delegates, 2002 Mid Year Meeting, Philadelphia, Pennsylvania, February 4-5, 2002, the Ethics 2000 Commission.

[10] The 23 states that have adopted new Model Rules ("Ethics 2000") include: AZ, AR, DE, FL, ID, IN, IA, LA, MD, MN, MS, MT, NE, NV, NJ, NC, OR, PA, SC, SD, UT, VA, WY. *See* American

"material" in 3.3(a)(1).[11] OARC respectfully urges the Court to delete the word "material."

Rule 1.0 – Terminology (Definition of Knowing) (Proposed Addition of Comment 7A to the Rule)

Current Rule[12]

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

Proposed Rule

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

ABA Ethics 2000 Model Rule 1.0(f)[13]

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

OARC Position

ABA Ethics 2000 Model Rule 1.0(f) is identical to the Current and Proposed Rules. The Standing Committee believes that Colorado case law has eroded this definition because under Colorado case law, the Court has "[w]ith one important exception [involving knowing misappropriation] . . . considered a reckless state of mind, constituting scienter, as equivalent to 'knowing' for disciplinary purposes." *In re Egbune*, 971 P.2d 1065, 1069 (Colo. 1999). Accordingly, the Standing Committee recommends that Comment 7(A) be

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Bar Association Center for Professional Responsibility, *Status of State Review of Professional Conduct Rules*, May 15, 2006, http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf.

[11] Those six states are FL, MS, NC, NJ, PA, NC.

[12] COLO. RPC Preamble, Scope and Terminology.

[13] MRPC RULE 1.0(f).

added to the terminology section to address the "reckless state of mind" situation:

> 7(A) . . . For purposes of applying the ABA Standards for Imposition of Sanctions, and in determining whether conduct is fraudulent, the Court will continue to apply the *Egbune* line of cases. However, where a rule of professional conduct specifically requires the mental state of "knowledge," recklessness will not be sufficient to establish a violation of that rule and to that extent the *Egbune* line of cases will not be followed.

OARC disagrees with the Standing Committee's recommendation to add Comment 7(A). OARC believes that in circumstances other than misappropriation of property, a "reckless" state of mind should suffice for a violation of any of the rules requiring a "knowing" state of mind.[14] A lawyer should not be able to make misrepresentations by closing his or her eyes to the truth or falsity of the statements being made. OARC believes that if a lawyer's conduct is reckless in determining whether the statements being made are accurate, then a knowing state of mind should be found for purposes of a rule violation. Otherwise, lawyers could allege that they did not realize they made false statements to a tribunal, a third person, on the bar application or on an application for readmission or reinstatement because the lawyer did not know

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[14] Colo. RPC 1.2(d) and (e), 1.8(i), 1.11(b), 1.13(b), 3.6(a), 3.8(a), 4.2, 4.3, 5.1(c)(2), 5.3(c)(2), 6.4, 7.3(c)(1), 8.2 (recklessness) all use the term "knows." Colo. RPC 1.8(a), 1.9(b), 1.10(a), 1.11(a), 1.12(c), 1.16(b)(3), 3.3, 3.4(c), 4.1, 6.3, 7.1(3)(e), 8.1 and 8.4(a) and (f) all use the term "knowingly."

of the actual facts and failed to investigate before making the statement. The respondent, Egbune[15], is a perfect example of why the case law finding recklessness should be followed and not overturned by a comment to the Rules of Professional Conduct.

If the Court concludes that a reckless state of mind is not permitted for any rule that uses the term "knowingly" or "knows", then, for example, a lawyer who refuses to open up mail from a court that contains court orders [directing the lawyer to take certain action] could argue that the lawyer did not knowingly disobey a court order because the lawyer did not have actual knowledge.

Another reason for not adopting Proposed Comment 7(A) is that the Comment states that the Court will continue to apply the *Egbune* line of cases in determining whether certain conduct by a lawyer is fraudulent. Only Colo. RPC 8.4(c) uses the term "fraud." Does the Proposed Comment mean that the *Egbune* line of cases will not apply to a lawyer who engages in dishonest conduct, other than misappropriation of property? If the intent of the Standing Rules Committee is that the *Egbune* line of cases applies to Current and Proposed Rule 8.4(c), then the Comment should read as such.

As the Standing Rules Committee recognizes, other states have included recklessness as part of the knowing standard. The Court's reasoning in *In re Egbune,* supra, is applicable today. If the Court believes that rather than

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[15] Egbune made statements based on pure speculation and without evidence that a lawyer engaged in an improper *ex parte* communication with the court.

addressing "state of mind" issues by case law, the definition should be amended, then OARC recommends the following sentence be added to the definition of "knowingly," "known," and "knows:"

A reckless state of mind can also be considered "knowingly," "known," or "knows," except for misappropriation of property.

3.8 – Special Responsibilities of a Prosecutor

Current Rule[16]

The prosecutor in a criminal case shall:

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

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

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, except that this does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has waived the rights to counsel and silence.

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

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

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[16] Colo. RPC Rule 3.8 (2005).

(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:

(1) the prosecutor reasonably believes:

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

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

(iii) there is no other feasible alternative to obtain the information.

(2) (Deleted.)

Proposed Rule

The prosecutor in a criminal case shall:

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

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

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing~~, except that this does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has waived the rights to counsel and silence.~~;

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

(e) ~~exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extra-judicial statement that the prosecutor would be prohibited from making under Rule 3.6; and~~

~~(f)~~ not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless~~:~~

~~(1)~~ the prosecutor reasonably believes:

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

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

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

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

ABA Ethics 2000 Model Rule[17]

The prosecutor in a criminal case shall:

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

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

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[17] MRPC RULE 3.8.

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

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

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

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

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

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

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

OARC Position

When the Court considered the prior Model Rules in 1991 and 1992, it received correspondence from the Colorado District Attorney's Council about Rule 3.8(c). The Court also received comments from then United States Attorney for the District of Colorado, Michael Norton, who believed old Model Rule 3.8(c) limited a prosecutor's discretion. The concern raised by the

prosecutors is that old Model Rule 3.8(c) was broad enough in its language that it would include misdemeanor and traffic cases or other minor matters in which defendants often tried to structure a plea agreement with a deputy district attorney without the expense of counsel at the initial arraignment. After considering these comments, the Court then decided to add the language now contained in Current Rule 3.8(c). The language in the Current Rule after the phrase "preliminary hearing," is language taken from the Comment and added to the actual rule.

Thirty-eight states adopted old Model Rule 3.8(c). Only Colorado and Massachusetts took language from the comment and added it into the rule.

With respect to the 23 states that have adopted the new ABA Ethics 2000 Model Rules, 19 have adopted 3.8(c).[18] This includes New Jersey, which added "post-indictment" before the word "pre-trial,"[19] and Virginia that has a substantially different rule.[20] The Comment language that now appears in Current Rule 3.8(c) remains in the comment to the ABA Ethics 2000 Model Rule. *See* Comment 2.

OARC recommends that Rule 3.8 be adopted as proposed by the Standing Rules Committee.

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[18] Oregon's Rules lack a provision similar to 3.8(c). *See* Oregon Rules of Professional Conduct (2005).

[19] New Jersey Rules of Professional Conduct Rule 3.8(c) (2004) (stating prosecutors in criminal cases shall "not seek to obtain from an unrepresented accused a waiver of important post-indictment pretrial rights, such as the right to a preliminary hearing").

[20] *See* Virginia Rules of Professional Conduct Rule 3.8(b) (2006) (stating a lawyer engaged in a prosecutorial function shall not "knowingly take advantage of an unrepresented defendant").

Rule 8.4(h) - Misconduct

Current Rule[21]

It is professional misconduct for a lawyer to:

(h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Proposed Rule

(h) engage in any ~~other~~ conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on ~~the lawyer's~~ a lawyer's fitness to practice law.

ABA Ethics 2000 Model Rule

None.

OARC Position

The Standing Committee recommends that Colo. RPC 8.4(h) be deleted from the Colorado Rules and recommends a new rule.

Most states that adopted the prior Model Rules did not include a provision identical or similar to Colorado's Rule 8.4(h). The language from the Rule comes from the former Code of Professional Responsibility (the Code). Of the jurisdictions that adopted the prior Model Rules, six added the Code provision prohibiting a lawyer from engaging in any other conduct that adversely reflects on the lawyer's fitness to practice law.[22]

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[21] Colo. RPC Rule 8.4(h).

[22] The six jurisdictions retaining 8.4(h) are: AB, CO, KS, MA, NM, and VT.

Ohio, which currently follows the Code, recommended that its Supreme Court adopt the Model Rules and include the Rule 8.4(h) language.[23] New York, which also follows the Code, includes the provision.[24] The Minnesota Rules of Professional Conduct contain a version of Rule 8.4(h).[25] The Minnesota provision prohibits a lawyer from committing a discriminatory act prohibited by federal, state or local statute or ordinance that reflects adversely on a lawyer's fitness as a lawyer. Illinois includes in its administrator's formal complaints, the following language: "By the conduct outlined above, respondent has engaged in the following misconduct . . . conduct which tends to defeat the administration of justice or bring the courts or legal profession into disrepute in violation of Supreme Court Rule 770."[26] A violation of Supreme Court Rule 770 forms a basis for discipline. Michigan has a much broader judicial rule than Current Rule 8.4(h) and Washington has a rule that prohibits lawyers from engaging in conduct demonstrating unfitness to practice law.[27]

OARC researched how many times Current Rule 8.4(h) is mentioned in either case law or conditional admissions approved by the Court or Presiding Disciplinary Judge. Approximately 154 cases[28] make reference to Colo. RPC

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[23] *See* Proposed Ohio Rules of Professional Conduct, http://www.sconet.state.oh.us/Atty-Svcs/ProfConduct/proposal/rule_updates_102805/appendix_a.pdf.
[24] New York Code of Professional Responsibility DR 1-102(A)(3) (2006).
[25] Minnesota Rules of Professional Conduct Rule 8.4(h) (2006).
[26] *See* Illinois Supreme Court Rule 770 (2006).
[27] Washington Rules of Professional Conduct Rule 8.4(n) (2006).
[28] Three cases involved reinstatement/readmission matters.

8.4(h). Seventy-nine of those cases were decided before 1999, when the Attorney Regulation system was overhauled. Seventy-nine cases involved conditional admissions that were either approved by the Supreme Court (pre-1999) or by the Presiding Disciplinary Judge.

Often times, a lawyer prefers to enter into a conditional admission in which the lawyer agrees that he or she engaged in conduct that adversely reflected on his or her fitness to practice law, rather than agreeing that the lawyer engaged in professional misconduct that involved dishonesty, fraud, misrepresentation or deceit. The three circumstances where the Proposed Rule may not address lawyer misconduct concern: 1) a lawyer acting as a fiduciary who does not engage in dishonest conduct, 2) the situation (sexual harassment of employees) that arose in *People v. Lowry*, 894 P.2d 758 (Colo. 1995) (this case was decided under the old Colorado Code of Professional Responsibility, DR1-102(a)(6) (a lawyer should not engage in misconduct that adversely reflects on the lawyer's fitness to practice law)), or 3) failure to pay court reporters or experts retained for a client matter.

OARC recognizes that Colorado is in the minority with respect to this particular rule. Nonetheless, it is clear that for its own reasons this Court retained Rule 8.4(h) through various changes to the Rules of Professional Conduct. If the Court removes 8.4(h) it will limit OARC's discretion as well as a point of negotiation for respondent's counsel or a *pro se* respondent.

OARC supports retention of the Current Rule 8.4(h) or, in the alternative, adoption of the Committee's Proposed Rule 8.4(h).

OARC supports the Committee's Proposed Rules except as detailed in this letter. Both Nancy Cohen and I are honored to have participated in this long and difficult task. The members of the Standing Committee and its various subcommittees gave up their time and professional expertise in this worthy effort. Thank you for the opportunity to express our views.

Sincerely,

John S. Gleason
Regulation Counsel

JSG/lh