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

REPORT AND RECOMMENDATIONS CONCERNING THE
AMERICAN BAR ASSOCIATION
ETHICS 2000 MODEL RULES OF PROFESSIONAL CONDUCT

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The Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct respectfully submits to the Colorado Supreme Court this Report and Recommendations Concerning the American Bar Association Ethics 2000 Model Rules of Professional Conduct.

I. Introduction and Process of the Committee

The Colorado Supreme Court (the "Court") adopted the current Colorado Rules of Professional Conduct (the "Current Colorado Rules") effective January 1, 1993. Those rules are primarily based upon the version of the American Bar Association ("ABA") Model Rules of Professional Conduct that was in effect at that time (the "Prior Model Rules"). In 2002, the ABA's House of Delegates approved the most recent version of the ABA Model Rules of Professional Conduct (the "New Model Rules"), which are the work of the ABA's Ethics 2000 Commission. The New Model Rules replace the Prior Model Rules.

As of November 28, 2005, nineteen states and the District of Columbia have adopted some version of the New Model Rules. *See* http://www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf. Another thirty states (including Colorado) currently are studying the New Model Rules for possible adoption. *Id.*

In 2002, at the request of the Court's Office of Attorney Regulation Counsel ("OARC"), the Court appointed an Ad Hoc Committee to review the New Model Rules.[1] That Committee (the "Ad Hoc Committee") prepared a written report with recommendations concerning whether and to what extent the Colorado Supreme Court should adopt the New Model Rules. *See* http://www.courts.state.co.us/supct/committees/profconductdocs/ethics_2000_exec_summary.pdf; http://www.courts.state.co.us/supct/committees/profconductdocs/ethics_2000_clean.pdf.

Shortly before the completion of the Ad Hoc Committee's report, the Court established the Standing Committee on the Colorado Rules of Professional Conduct (the "Standing Committee" or "Committee"), which is now the principal

[1] The members of the Ad Hoc Committee were Chair John S. Gleason, Nancy L. Cohen, Cynthia F. Covell, Anthony E. Davis, Steven K. Jacobsen, Robert R. Keatinge, Cecil E. Morris, Jr., H. Richard Reeve, Alexander R. Rothrock, Daniel A. Vigil, and Anthony van Westrum.

conduit to the Court for recommendations regarding the Current Colorado Rules.[2] Accordingly, the Court referred the Ad Hoc Committee's report to the Standing Committee. A subcommittee (the "Rules Subcommittee" or "Subcommittee") was appointed to intensively study the New Model Rules and review the Ad Hoc Committee's recommendations.[3]

From June 2004 through November 2005, the Rules Subcommittee met monthly and delivered seven written reports to the Standing Committee. At eight half-day meetings between October 2004 and December 2005, the Standing Committee discussed the Subcommittee's recommendations. The recommendations contained in this report were approved by a majority of the members of the Standing Committee attending the meetings when the specific rules were addressed.

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[2] The members of the Standing Committee are Chair Marcy G. Glenn, Colorado Supreme Court Liaisons the Honorable Michael L. Bender and the Honorable Nathan B. Coats, Michael H. Berger, Gary B. Blum, Nancy L. Cohen, Cynthia F. Covell, Mac V. Danford, Thomas E. Downey, Jr., the Honorable Phillip S. Figa, John M. Haried, David C. Little, the Honorable William R. Lucero, Cecil E. Morris, Jr., Kenneth B. Pennywell, the Honorable Ruthanne Polidori, Helen E. Raabe, H. Richard Reeve, John M. Richilano, Alexander R. Rothrock, Boston H. Stanton, Jr., David W. Stark, Anthony van Westrum, Eli Wald, James E. Wallace, Lisa M. Wayne, the Honorable John R. Webb, and Tuck Young.

[3] The members of the Standing Committee's Rules Subcommittee are Chair Michael H. Berger, Nancy L. Cohen, John S. Gleason, Marcy G. Glenn, David C. Little, Cecil E. Morris, Jr., H. Richard Reeve, John M. Richilano, Alexander R. Rothrock, Anthony van Westrum, Eli Wald, James E. Wallace, and the Honorable John R. Webb.

Early in the process, the Standing Committee (like the Ad Hoc Committee) unanimously concluded that uniformity between jurisdictions adopting the New Model Rules is important. Uniformity enables the meaningful use of precedent from courts and ethics committees in other jurisdictions. Moreover, the increase in multi-jurisdictional law practice (recognized by this Court when it adopted C.R.C.P. 220 through 222) renders uniform ethics rules beneficial to the Court and the bar alike.

To effectuate this preference for uniformity, the Committee utilized an informal presumption: Unless existing Colorado law or public policy – as established by prior rules, Court decisions, or Colorado Bar Association ("CBA") Ethics Committee opinions – justified a departure from a New Model Rule, the Committee would recommend adoption of the New Model Rule. However, this presumption was rebuttable and the Committee occasionally recommended a unique Colorado rule instead of a New Model Rule based on a determination that the recommended rule would be substantially better than the New Model Rule; but even in these situations, the Committee carefully weighed the benefits against the detriments of a non-uniform rule. The Committee also considered uniformity with respect to the comments to the rules; but the comments, by definition, do not establish black-letter standards and, therefore, the Committee deemed uniformity in the comments to be less critical.

Following the ABA's recommendations, the Committee has retained the New Model Rules' numbering system wherever possible. Thus, where the Committee recommends additional rules, those additional provisions appear in new numbered or lettered sections. Similarly, where the Committee has recommended the addition of a non-uniform comment, it is given a non-uniform paragraph number (such as [7A], for a new comment placed between New Model Rule Comments [6] and [7]).

Where there were substantial minority views on a particular rule, this report summarizes those minority positions. The detailed minutes of the Standing Committee's meetings, available at http://www.courts.state.co.us/supct/committees/profconductcomm.htm, document the debates and votes on each proposed rule.

This report provides the rules and comments that the Committee recommends in three formats: (1) In Appendix A, a "clean" version; (2) in Appendix B, a blackline version that shows changes, where possible, from the Current Colorado Rules; and (3) in Appendix C, a blackline version that shows changes from the New Model Rules.

II. Summary of Recommendations

Preamble. Adopt New Model Rules Preamble but modify "zealous" representation language.

Scope. Adopt New Model Rules Scope section but modify language relating to use of rule violations in civil proceedings.

Rule 1.0 - Terminology. Adopt New Model Rule. Adopt New Model Rule Comment but add new Paragraph [7A] explaining that when applying Rule 1.0(f), which defines "knowingly," etc., to rules that expressly specify knowledge as the culpable mental state, the Court will no longer follow precedent that has equated knowledge with recklessness.

Rule 1.1 - Competence. Adopt New Model Rule and Comment.

Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer. Adopt New Model Rule but add language to reflect the limited representation of pro se parties authorized in Colorado. Adopt New Model Rule Comment.

Rule 1.3 - Diligence. Adopt New Model Rule and Comment.

Rule 1.4 - Communication. Adopt New Model Rule. Adopt New Model Rule Comment but add new Paragraph 7A to cross-reference to Rule 1.5, concerning Fees and Expenses.

Rule 1.5 - Fees and Expenses. Adopt a version of Rule 1.5 that combines New Model Rule and Current Colorado Rule, to reflect the unique provisions in Current Colorado Rule. Adopt all of New Model Rule Comment except for the paragraph addressing prohibited contingent fees, add portions of Current Colorado

Comment addressing *Sather* issues, and add new Paragraph [3A] to Comment addressing when a change in the basis or amount of the fee is subject to Rule 1.8(a), concerning business transactions with clients.

Rule 1.6 - Confidentiality of Information. Adopt New Model Rule with the addition of the words "other law or court order" in section (b)(4), to authorize a lawyer to secure legal advice regarding compliance with any of the lawyer's legal or ethical responsibilities with respect to the representation. Adopt New Model Rule Comment but add language to Paragraphs [9] (concerning permissive disclosures to secure legal advice about the lawyer's compliance with the Rules) and [15] (concerning the distinctions between prohibited, permissive and mandatory disclosures under various Rules), and add new Paragraph [5A], to address disclosure of client information for purposes of conflict check when a lawyer changes firms.

Rule 1.7 - Conflict Of Interest – Current Client. Adopt New Model Rule and Comment.

Rule 1.8 - Conflicts of Interest: Current Clients: Specific Rules. Adopt New Model Rule but modify section (k) to eliminate imputation of Rule 1.8(a) conflicts (based on a lawyer's business transactions with a client). Adopt New Model Rule Comment but modify Paragraph [20] to reflect recommended change to section (k).

Rule 1.9 - Duties to Former Clients. Adopt New Model Rule and Comment.

Rule 1.10 - Imputation of Conflicts of Interest. Adopt New Model Rule but add a new section (e) that authorizes screening under limited circumstances when a lawyer moves from one private firm to another. Adopt New Model Rule Comment.

Rule 1.11 - Special Conflicts of Interest for Former and Current Government Officers and Employees. Adopt New Model Rule but make minor changes to section (b)(2), concerning notice to the lawyer's former governmental employer. Adopt New Model Rule Comment.

Rule 1.12 - Former Judge, Arbitrator, Mediator or Other Third-Party Neutral. Adopt New Model Rule but make minor changes to section (c)(2), concerning notice to affected parties. Adopt New Model Rule Comment.

Rule 1.13 - Organization as Client. Adopt New Model Rule and Comment but correct single typographical error in section (e) of the Rule.

Rule 1.14 - Client with Diminished Capacity. Adopt New Model Rule and Comment.

Rule 1.15 - Safekeeping Property. Retain Current Colorado Rule but (1) add language recommended by the Colorado Lawyer Trust Account Foundation ("COLTAF") Board of Directors (to satisfy potential constitutional "takings"

concerns), (2) modify as recommended by the OARC to reflect changes in check-clearing procedures made by the Federal Reserve Board, and (3) edit for clarity.

Rule 1.16 - Termination of Representation. Adopt New Model Rule and Comment, but make one non-substantive change to Paragraph [7] of Comment.

Rule 1.17 - Sale of Law Practice. Adopt New Model Rule and Comment, but change notice requirement to the client, to dispense with necessity of a court order.

Rule 1.18 - Duties to Prospective Client. Adopt New Model Rule and Comment.

Rule 2.1 - Advisor. Adopt New Model Rule but add last sentence of Current Colorado Rule 2.1, concerning advice to client of alternative dispute resolution ("ADR") methods in matters involving litigation.

Rule 2.2 - [Rule deleted; prior title is "Intermediary"]. Delete Rule.

Rule 2.3 - Evaluation for Use by Third Persons. Adopt New Model Rule and Comment.

Rule 2.4 - Lawyer Serving as Third-Party Neutral. Adopt New Model Rule and Comment.

Rule 3.1 - Meritorious Claims and Contentions. Adopt New Model Rule and Comment.

Rule 3.2 - Expediting Litigation. Adopt New Model Rule and Comment.

Rule 3.3 - Candor Toward the Tribunal. Adopt New Model Rule but add the word "material" to section (a)(1). Adopt New Model Rule Comment but make conforming changes.

Rule 3.4 - Fairness to Opposing Party and Counsel. Adopt New Model Rule, but modify section (f)(1) in light of Colorado prohibition in criminal cases on advising a witness to refrain from giving information. Adopt New Model Rule Comment but make conforming change to Paragraph [4], and add to Paragraph [3] statement that it is permissible to pay lay witnesses reasonable compensation.

Rule 3.5 - Impartiality and Decorum of the Tribunal. Adopt New Model Rule but with additional restrictions on contacts by lawyers with jurors after the completion of a jury trial. Adopt New Model Rule Comment.

Rule 3.6 - Trial Publicity. Adopt New Model Rule and Comment.

Rule 3.7 - Lawyer as Witness. Adopt New Model Rule and Comment.

Rule 3.8 - Special Responsibilities of a Prosecutor. Adopt New Model Rule and Comment.

Rule 3.9 - Advocate in Nonadjudicative Proceedings. Revise New Model Rule to (1) limit incorporation of other rules to those that are relevant to nonadjudicative proceedings, (2) prohibit a lawyer from engaging in disruptive conduct, and (3) confirm that a lawyer may engage in ex parte communications. Adopt New Model Rule Comment but make conforming changes to Paragraph [1].

Rule 4.1 - Truthfulness in Statements to Others. Adopt New Model Rule and Comment, with minor, clarifying changes to Comment.

Rule 4.2 - Communications with Persons Represented by Counsel. Adopt New Model Rule. Adopt New Model Rule Comment but add language to Paragraph [4] to permit a lawyer to give notice directly to a represented party in compliance with contractually-based notice provisions.

Rule 4.3 - Dealing with Unrepresented Persons. Adopt New Model Rule and Comment.

Rule 4.4 - Respect for Rights of Third Persons. Adopt New Model Rule with new section (c) that addresses a lawyer's ethical duty upon inadvertent receipt of a document from a third party, when the sender notifies the lawyer before the lawyer reviews the document. Adopt New Model Rule Comment with conforming changes to Paragraphs [2] and [3].

Rule 4.5 - Threatening Prosecution. Retain Current Colorado Rule and Comment.

Rule 5.1 - Responsibilities of Partners, Managers, and Supervisory Lawyers. Adopt New Model Rule and Comment.

Rule 5.2 – Responsibilities of a Subordinate Lawyer. Adopt New Model Rule and Comment.

Rule 5.3 – Responsibilities Regarding Nonlawyer Assistants. Adopt New Model Rule and Comment.

Rule 5.4 – Professional Independence of a Lawyer. Retain Current Colorado Rule but add to section (a)(5) new exception taken from New Model Rule to general rule against fee sharing, to permit sharing of court-awarded fees with a nonprofit organization. Retain Current Colorado Comment.

Rule 5.5 – Unauthorized Practice of Law; Multijurisdictional Practice of Law. Retain Current Colorado Rule but (1) revise to require authorization to practice law under C.R.C.P. 220 through 222 or federal or tribal law, and to require removal of disbarred or suspended lawyer's name from firm name, and (2) add new sections (2) through (4) to set forth restrictions on a lawyer's employment of disbarred or suspended lawyers. Retain Current Colorado Comment with conforming changes.

Rule 5.6 – Restrictions on Right to Practice. Adopt New Model Rule and Comment.

Rule 5.7 – Responsibilities Regarding Law-Related Services. Adopt New Model Rule and Comment.

Rule 6.1 – Voluntary Pro Bono Publico Service. Retain Current Colorado Rule and Comment, but (1) add new sentence taken from New Model Rule, recognizing that "[e]very lawyer has a professional responsibility to provide legal

services to those unable to pay," and (2) include language in Rule and Comment regarding the ability of government and public sector lawyers or judges to satisfy their pro bono responsibilities other than through the provision of legal services to persons of limited means.

Rule 6.2 – Accepting Appointments. Adopt New Model Rule, but substitute phrase "unreasonable financial or otherwise oppressive burden" for New Model Rule's phrase "unreasonable financial burden." Adopt Comment to New Model Rule.

Rule 6.3 – Membership in Legal Services Organization. Adopt New Model Rule, but include the words "a lawyer provided by" in section (b). Adopt Comment to New Model Rule, but add "a director" to the description of the categories of positions that a lawyer may hold in a legal services organization without having a client-lawyer relationship with persons served by the organization.

Rule 6.4 – Law Reform Activities Affecting Client Interests. Adopt New Model Rule and Comment, but make several non-substantive changes that clarify the intent of the Rule and correct grammar in the Comment.

Rule 6.5 – Nonprofit and Court-Annexed Limited Legal Services Programs. Adopt New Model Rule and Comment.

Rule 7.1 – Communications Concerning a Lawyer's Services. Retain Current Colorado Rule but (1) move to Proposed Colorado Rule 8.4 the portion of Rule 7.1(a)(2) that prohibits a communication that "states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law," and (2) add to Rule 7.1(c) the prohibition on communications that "resemble legal pleadings or other documents," which appears in Current Colorado Rule 7.3(c)(3). Retain Current Colorado Comment.

Rule 7.2 – Advertising. Adopt New Model Rule and Comment but make several minor changes to conform to Current Colorado Rule.

Rule 7.3 – Direct Contact with Prospective Clients. Adopt New Model Rule but (1) retain the content of Current Colorado Rule 7.3(c)(1) and (2), regarding solicitation in personal injury and wrongful death matters, and (2) make applicable to all solicitations the various requirements and prohibitions that appear in Current Colorado Rule 7.3(c)(4) and (5) and that currently apply only to solicitations in personal injury and wrongful death cases. Adopt New Model Rule Comment.

Rule 7.4 – Communication of Fields of Practice and Specialization. Adopt New Model Rule but retain the language in Current Colorado Rule 7.4(a) and (f). Adopt New Model Rule Comment.

Rule 7.5 – Firm Names and Letterheads. Adopt New Model Rule and Comment.

Rule 7.6 – Political Contributions to Obtain Government Legal Engagements or Appointments by Judges. Adopt New Model Rule and Comment.

Rule 8.1 – Bar Admission and Disciplinary Matters. Adopt New Model Rule and Comment but (1) retain references to "readmission" and "reinstatement" in first paragraph of Current Colorado Rule, and (2) move from Current Colorado Rule to Comment reference to a lawyer's right to make a good faith challenge to a demand for information from a bar admission or disciplinary authority.

Rule 8.2 – Judicial and Legal Officials. Adopt New Model Rule and Comment but revise section (a) of Rule to apply to ". . . a candidate for . . . retention in judicial office."

Rule 8.3 – Reporting Professional Misconduct. Adopt New Model Rule and Comment but retain Current Colorado Rule 8.3(c).

Rule 8.4 – Misconduct. Adopt New Model Rule and Comment, but add new sections (g) and (h) to Rule, to prohibit, respectively, conduct in the representation of a client that exhibits or is intended to appeal to impermissible bias, and conduct that directly, intentionally and wrongfully harms others and adversely reflects on the lawyer's fitness to practice law.

Rule 8.5 – Disciplinary Authority; Choice of Law. Adopt New Model Rule, but delete two headings. Adopt Comment but add paragraph confirming that a lawyer who is not admitted in Colorado and does not comply with C.R.C.P. 220 through 222 may be prosecuted for the unauthorized practice of law.

Rule 9 – Title; How Known and Cited. No changes.

III. Analysis of the Standing Committee's Recommendations

Preamble

The New Model Rules Preamble is quite similar to the Prior Model Rules Preamble and the Current Colorado Preamble. The principal substantive changes reflect the deletion of Prior Model Rule 2.2, which pertained to lawyers acting as intermediaries between clients, and the addition of New Model Rule 2.4, which addresses lawyers acting as "third-party neutrals."

The Standing Committee recommends adoption of the New Model Rules Preamble with one modification. Canon 7 of the prior ABA Model (and Colorado) Code of Professional Responsibility (the "Code") imposed a duty upon lawyers to "represent a client zealously within the bounds of the law." The Prior Model Rules eliminated the duty of "zealous representation," replacing it with duties of diligence and competence. Neither the Prior nor New Model Rules impose or discuss the concept of zealous representation in the text of any rules. However, in both the Prior and New Model Rules, and in the Current Colorado Rules, the

Preamble and Paragraph [1] of the Comment to Rule 1.3 refer to zealous representation.

Some commentators have expressed concerns regarding these references to zealous representation. As courts and the profession increasingly focus upon lawyers' responsibilities to the system of justice, it has been argued that the concept of zealousness does not (or should not) accurately describe the modern role of a lawyer; these critics are concerned that some lawyers use "zealousness" to justify unprofessional, "Rambo"-style conduct. Other critics have argued that, because the Rules themselves do not ever use the words, "zeal," "zealous," or "zealousness," the Preamble and Comments should not assume a duty of zealousness.

A few jurisdictions have removed the "z" words from their Preambles and Comments. *See*, *e.g.*, Montana Rules of Professional Conduct (replacing "zealous" with "dedicated"); Arizona Rules of Professional Conduct (replacing duty of "zealous" representation with the "lawyer's obligation to protect and pursue a client's legitimate interests"). A minority of the Standing Committee would follow the lead of those jurisdictions and delete entirely all references to zealous representation.

A majority of the Standing Committee, however, believes that the concept of zealous representation within the bounds of the law remains a valuable guidepost

for lawyers and, accordingly, recommends retention of the words "zeal," "zealous" and "zealously" in the Preamble and in the Comment to Rule 1.3. However, a majority also believes that it is necessary to add the following underscored language to Paragraph [9] of the Preamble, to make clear that zealous representation *never* justifies unprofessional conduct:

> These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law. <u>Zealousness does not, under any circumstances, justify conduct that is unprofessional, discourteous or uncivil toward any person involved in the legal system.</u>

The Committee recommends adoption of the New Model Rules Preamble, with the foregoing addition to Paragraph [9].

Scope

The Scope sections of the Prior Model Rules and the Current Colorado Rules are identical. The ABA made two principal changes to the Scope section in the New Model Rules. The Standing Committee found one of these changes straightforward and the other controversial.

First, Paragraph [18] in the New Model Rules' Scope section, which discusses the responsibilities of government lawyers, deletes a sentence stating that government lawyers "may also have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so." The

ABA determined that the statement was legally inaccurate. The Standing Committee agrees with that conclusion.

Second, the ABA revised language concerning use of the Rules of Professional Conduct in non-disciplinary proceedings, in particular, civil actions involving the conduct of lawyers. The Prior and New Model Rules (and the Current Colorado Rules) explain that violation of a rule "should not create any presumption" "that a legal duty has been breached." However, the Prior Model Rules went on to state that "[a]ccordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty." The Current Colorado Rule includes this sentence, too. The New Model Rules replace the quoted sentence with the following: "Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." Nationally, the courts are divided as to whether and to what extent evidence of violations of state ethics rules is relevant and admissible in civil actions (usually a malpractice or breach of fiduciary duty case against a lawyer). Some courts have held that because the Rules, by their terms, do not give rise to a cause of action against a lawyer, a lawyer's violation of a rule is not relevant in a civil action and, thus, may not be the basis for an expert opinion on the standard of care. Other courts, however, have held that the Rules establish standards of

conduct for lawyers and, thus, permit the admission of evidence of a lawyer's violation of a rule. To the Standing Committee's knowledge, the Colorado appellate courts have not spoken on the issue.

The above-quoted new sentence in the Scope section of the New Model Rules sides with those courts and commentators that hold that ethics rules establish standards of conduct for lawyers. The new language recognizes the possibility that a court will hold such evidence relevant and admissible in non-disciplinary proceedings – but it does not require a court to do so.

The debate of the Standing Committee on this issue was heated. Appendices D and E to this report are position papers prepared by proponents of, respectively, the majority and minority positions. For the reasons expressed in Exhibit D, a majority of the Standing Committee agrees generally with the change effected by the replaced sentence in the New Model Rules Scope section. However, the Standing Committee believes that the New Model Rules version should not be read as automatically rendering a rules violation relevant in a civil action. Therefore, the Standing Committee recommends modification of the new sentence to include the following underscored language: "Nevertheless, since the Rules do establish standards of conduct by lawyers, <u>in appropriate cases,</u> a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."

The Standing Committee recommends adoption of the New Model Rules Scope section with a change that clarifies that evidence of rules violations should not be automatically deemed relevant in civil proceedings.

Rule 1.0 - Terminology

The Current Colorado and Prior Model Rules contain a Terminology section that has been moved to New Model Rule 1.0. Beyond a change in location, New Model Rule 1.0 includes new definitions of "confirmed in writing," "informed consent," "screened," "tribunal," and "writing." In addition, Rule 1.0(d) amends the definition of "fraud" to clarify that fraud denotes conduct that not only has a "purpose to deceive," but also that constitutes fraud under the "substantive or procedural law of the applicable jurisdiction." The New Model Rule Comment is entirely new and provides useful information regarding a number of the defined terms. The Standing Committee believes that these changes in the definitions, the new Comment, and the move of the Terminology section to New Model Rule 1.0 are beneficial.

New Model Rule 1.0(f) adheres to the definition of "knowingly," "known," and "knows" contained in the Prior Model and Current Colorado Rule: "'Knowingly,' 'know,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." The Standing Committee recommends retention of this definition but is concerned that

the definition has been eroded by a series of Colorado Supreme Court decisions that appear to equate recklessness with actual knowledge.

The determination of a lawyer's state of mind with respect to particular conduct (or inaction) has two distinct and important functions in the application and enforcement of the Rules. *First*, some Rules impose an ethical obligation to act (or refrain from acting) only when the lawyer "knows" of certain factual circumstances. *See*, *e.g.*, Colo.RPC 3.3 (prohibiting a lawyer, *inter alia*, from "knowingly" making a false statement of fact or law to a tribunal, and "knowingly" presenting evidence that the lawyer "knows" to be false). *Second*, even where rules impose ethical duties regardless of the lawyer's state of mind, the level of discipline often depends to a great extent upon that state of mind. *See* ABA Standards for Imposing Lawyer Sanctions (ABA, 1986) ("ABA Standards"); *see*, *e.g.*, *In re Attorney D*, 57 P.3d 395 (Colo. 2002) (relying upon ABA Standards). In a series of decisions, the Court has effectively amended the definition of "knowledge" contained in the Current Colorado Rules. According to the Court, "with one important exception [involving knowing misappropriation of property] we have 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). *See also People v. Small*, 962 P.2d 258, 260 (Colo. 1998); *People v.*

Rader, 822 P.2d 950, 953 (Colo. 1992).[4] While there is substantial judicial precedent outside the context of lawyer discipline that equates reckless and knowing conduct, *see*, *e.g.*, CJI-Civ.4th:19:1, Colorado appears to be one of a very few states that treats recklessness as "knowing" conduct when determining whether a lawyer has violated an ethics rule that specifically requires the mental state of knowledge. *See also*, *e.g.*, *State ex rel. Nebraska State Bar Ass'n v. Holschen*, 230 N.W.2d 75, 79 (Neb. 1975) (divided court holds that careless and recklessly negligent conduct occurred knowingly); *but see id.* at 81 (criticizing majority opinion for ignoring the Nebraska rule's actual knowledge standard) (Clinton, J., dissenting); *see also*, *e.g.*, *In re Conduct of Gatti*, 8 P.3d 966, 974 (Or. 2000) (lawyer may be disciplined for violating Oregon rule that prohibits a lawyer from knowingly making a false statement of law or fact, when the lawyer acts recklessly, even though the Oregon rule requires knowledge).

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[4] The cases cited in the text involved the level of discipline to be imposed, not the construction of the mental standard of "knowledge" contained in any of the disciplinary rules. However, in *Rader*, the Court determined that reckless conduct was sufficient to establish that a lawyer engaged in dishonest conduct, fraud, deceit or misrepresentation. 822 P.2d at 953. In *Small*, the Court stated that "[u]nder certain circumstances, an attorney's conduct can be so careless or reckless that it must be deemed to be knowing and will constitute a violation of a specific disciplinary rule." 962 P.2d at 259-260. Based on these decisions, the OARC regularly takes the position that reckless conduct is generally the equivalent of "knowing" conduct except in the case of misappropriations of client funds – to determine both whether there has been a rule violation and appropriate discipline.

Because the Court is considering the adoption of revised ethics rules, the question naturally arises whether the prior decisions applying the words "knowledge," "knowing," and "knows" under the Current Colorado Rules will be followed under the proposed rules. The Court has at least three options. *First*, it can adopt the New Model Rule definition and, in the interests of uniformity and other policy considerations, can clarify in new comment language that it will not follow its prior precedents equating "recklessness" with "knowledge" for the purpose of establishing a substantive violation of a rule that expressly requires knowledge. *Second*, as a matter of policy, the Court can modify the New Model Rule definition to include reckless conduct within its ambit. *Third*, the Court can adopt New Model Rule 1.0(f) but not address whether prior decisions equating recklessness and knowledge remain applicable.

The Standing Committee recommends the first option: Adoption of New Model Rule 1.0(f) with a new comment 7[A], entitled "Knowledge" and clarifying that, as used in the Rules, "knowledge," "knowing," and "knows" mean what they are defined to mean under Rule 1.0(f) – actual knowledge and not mere recklessness. That choice will render Colorado Rule 1.0(f) uniform with the Model Rule, it will require proof of actual knowledge to establish violations of specific rules that should not subject a lawyer to discipline based on less than

actual knowledge, and it will ensure congruence between the language and application of the Rules.

The Standing Committee also recommends insertion of "1.10(e)" in the list of rules in Paragraph [8] of the Comment, to which the definition of "screened" in Rule 1.0(k) applies.

The Standing Committee recommends adoption of New Model Rule 1.0. Based upon uniformity concerns and for substantive policy reasons, the Committee recommends that the Court add a new Paragraph [7A] to the Comment to clarify that the Court will no longer follow the line of cases that have equated recklessness with knowledge for purposes of proving a violation of a rule that expressly requires knowledge as the culpable mental state. The Committee recommends adding Rule 1.10(e) to the rules referenced in Paragraph [8] of the Comment.

Rule 1.1 - Competence

Current Colorado Rule 1.1 is identical to the Prior Model Rule. The ABA made no changes in the text of New Model Rule 1.1, and made only minor, non-substantive, changes to the Comment.

The Standing Committee recommends adoption of New Model Rule 1.1 and Comment in their entirety.

Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer

Current Colorado Rule 1.2 differs from the Prior Model Rule in several respects. The Court previously amended Current Colorado Rule 1.2(c) to permit the limited representation of pro se parties authorized by C.R.C.P 11 (b) and 311(b). The Court also added a non-bias provision in Current Colorado Rule 1.2(f).

The principal change in New Model Rule 1.2 is to explicitly recognize a lawyer's implied authority to act on a client's behalf. This change is intended to clarify that a lawyer is not required to continually consult with the client to obtain the client's authority to act. Rule 1.2(a) describes limits to this implied authority. The New Model Rule also moves Prior Model Rule (and Current Colorado Rule) section (e), which requires the lawyer to consult with the client regarding the relevant limits on a lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules or other law, to New Model Rule 1.4(a)(5). The ABA extensively amended the Comment to New Model Rule 1.2, including to address disagreements over the means by which the lawyer is to achieve the client's objectives, the lawyer's right to rely on a client's prior authorization to act, limitations placed on the representation as a result of the client's financial condition, and the lawyer's responsibilities upon learning that his

or her services have been used to perpetrate a crime or fraud. The Standing Committee believes this new and revised commentary will be useful.

The Standing Committee recommends adoption of New Model Rule 1.2, with two substantive changes: (1) Retention of the language in the Current Colorado Rule permitting limited representation authorized by C.R.C.P. 11(b) and 311(b); and (2) placement of Current Colorado Rule 1.2(f), which prohibits discriminatory conduct by lawyers, in the more broadly applicable Rule 8.4. The Committee recommends adoption of the Model Rule Comment.

Rule 1.3 - Diligence

The first sentence in Current Colorado Rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.") also appeared in the Prior Model Rule. The second sentence of the Colorado Rule ("A lawyer shall not neglect a legal matter entrusted to that lawyer.") did not appear in the Prior Model Rule. The ABA made no changes and, hence, the second sentence in the Current Colorado Rule is also absent from the New Model Rule. The Standing Committee is not aware of other state rules that include the second sentence in their versions of Model Rule 1.3. The Ad Hoc Committee recommended retention of the non-uniform second sentence of the Colorado Rule. The Standing Committee disagrees because it is unable to discern any purpose to or advantage of the second sentence,

which merely states in the negative the duties of diligence and promptness that the first sentence states positively.

Finding no basis to depart from the presumption of uniformity, the Standing Committee recommends adoption of New Model Rule 1.3 and its Comment in their entirety. No change in substance from the Current Colorado Rule is intended.

Rule 1.4 - Communication

Current Colorado Rule 1.4 is identical to the Prior Model Rule. The Current Colorado Comment largely tracks the Prior Model Rule Comment but includes some additional language, including a paragraph regarding information pertaining to fees charged, costs, expenses, and disbursements.

New Model Rule 1.4 is a substantial improvement over Prior Model Rule 1.4. It separates the duty to communicate into five parts: (1) Informing the client about matters requiring the client's "informed consent"; (2) consulting about the client's objectives; (3) informing the client about the status of a matter; (4) complying with requests for information; and (5) consulting about limitations in the lawyer's representation of the client. The Comment is similarly reorganized and expanded.

The Standing Committee believes the changes in New Model Rule 1.4 are beneficial and therefore recommends adoption of New Model Rule 1.4 and its Comment, with one addition to the Comment. The Committee believes that the

Colorado-unique paragraph regarding communications about fees and costs should be retained in new Paragraph [7A].

Rule 1.5 - Fees and Expenses

Current Colorado Rule 1.5 differs in major respects from the Prior Model Rule. Over the years, the Court has been proactive in the regulation of lawyers' fees, resulting in a number of non-uniform provisions in the Current Colorado Rule. The Standing Committee believes that the existing non-uniform provisions should be retained. Proposed section (b) preserves the Colorado requirement that the basis or rate of the fee and expenses be communicated in writing to the client, when the lawyer has not regularly represented the client. The second sentence of proposed section (b) makes clear that material changes in the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a). Proposed section (c) is tailored to C.R.C.P. Chapter 23.3, which governs contingent fees in Colorado. Proposed section (e) continues the Colorado prohibition on referral fees (although proposed section (d) (which largely incorporates the language of New Model Rule 1.5(e), concerning the division of a fee among lawyers who are not in the same firm) authorizes fee sharing in circumstances that the Current Colorado Rule does not). Proposed section (d) retains the Colorado-specific language that excepts its prohibition on fee-sharing when the division of fees occurs in connection with the sale of a law of a law practice under Rule 1.17. Proposed sections (f) and (g) are

outgrowths of the Court's decision in *In re Sather,* 3 P.3d 403 (Colo. 2000), and should be retained.

Other portions of the New Model Rule improve the Current Colorado Rule. New Model Rule 1.5(a), which uses the same factors to determine the reasonableness of a lawyer's fee as does Current Colorado Rule 1.5, is an improvement because, instead of merely requiring that a lawyer's fee be reasonable, it expressly prohibits a lawyer from making "an agreement for, charg[ing] or collect[ing] an unreasonable fee or an unreasonable amount for expenses." Subject to a minor amendment, New Model Rule 1.5(e), addressing the division of a fee between lawyers not in the same firm, is preferable to the language in Current Colorado Rule 1.5(d), although it may lead to additional situations of fee sharing that some may equate with "referral fees." Finally, the Standing Committee recommends that the title of the Colorado Rule be changed from "Fees" to "Fees and Expenses" because the text of the rule deals with both subjects.

The Standing Committee recommends retention of substantial language from the Current Colorado Rule Comment because that commentary expands upon the unique *Sather*-related provisions in the Current Colorado Rule. The Committee also proposes a new comment paragraph to provide guidelines on when

a change in the basis or amount of the fee is subject to Rule 1.8(a) (concerning business transactions with clients).

The Standing Committee recommends adoption of a version of Rule 1.5 that is a combination of the Current Colorado Rule and the New Model Rule, as summarized above. The Committee recommends retention of the Comment to the Current Colorado Rule, but the addition of a new Paragraph [3A] to address when Rule 1.8(a) is applicable to a change in the basis of the fee negotiated during the course of the representation.

Rule 1.6 - Confidentiality of Information

Section (a) of the Prior Model, Current Colorado, and New Model Rule 1.6 all impose upon the lawyer a general duty to "not reveal information relating to the representation of a client," absent client consent. Under all of those rules, "information relating to the representation of a client" transcends both privileged information and information that is confidential in the ordinary sense. In the following discussion, this report refers to "information relating to the representation of a client" as "protected information."

In their statements of the exceptions to the general rule of non-disclosure, Current Colorado Rule 1.6 differs significantly from Prior Model Rule 1.6, and New Model Rule 1.6 constitutes a major rewrite of Prior Model Rule 1.6. Despite these differences, the Standing Committee recommends adoption of New Model

Rule 1.6 and its Comment, subject to certain amendments to the Comment. The significant differences between the exceptions to the duty of non-disclosure in the various versions of Rule 1.6, and the unique comment language that the Standing Committee recommends, warrant explication of the Committee's protracted discussions.

A. Crime-Fraud Exception to Duty of Non-Disclosure

Current Colorado Rule 1.6(b) provides that "a lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime." This permitted disclosure is both narrow and broad. It broadly applies to any crime, no matter how trivial and regardless of the likelihood that any person or property will be harmed by the crime. At the same time, it does not authorize disclosure to either prevent or ameliorate client conduct that will cause financial loss but will not violate criminal law. Moreover, once the crime is completed, Current Colorado Rule 1.6(b) no longer applies and a Colorado lawyer may not (under Rule 1.6) reveal protected information no matter how serious the consequences of non-disclosure.

Prior Model Rule 1.6(b)(1) was considerably narrower than the Current Colorado Rule. It authorized a lawyer to disclose protected information only "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."

The New Model Rule expands the scope of the exception beyond the limits of Prior Model Rule 1.6(b)(1) in three important respects. *First*, New Model Rule 1.6(b)(1) authorizes disclosures of protected information "to prevent reasonably certain death or substantial bodily harm," regardless of whether the client's anticipated conduct will constitute a crime. *Second*, New Model Rule 1.6(b)(2) permits a lawyer to reveal protected information to the extent necessary "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." *Third*, under New Model Rule 1.6(b)(3), a lawyer may reveal protected information "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." There are no counterparts to the second and third exceptions in Current or Prior Model Rule 1.6.

While recognizing that in many respects the crime-fraud exceptions permitted under New Model Rule 1.6 are substantially broader than those under the Current Colorado Rule, some members of the Standing Committee were concerned because, as discussed above, the New Model Rule is also narrower than the Current Colorado Rule, which would allow disclosure to prevent a client from

committing any crime – even one that is not likely to result in imminent death, substantial bodily harm, or substantial injury to the financial interests or property of another. Those members believe it would be unwise to narrow the crime exception found in Current Colorado Rule 1.6(b). Other members were troubled by the great breadth of Current Colorado Rule 1.6(b), which essentially allows a lawyer to blow the whistle on a client on a trivial matter provided that some obscure statute or ordinance criminalizes the client's conduct.

After much debate, the Standing Committee recommends adoption of New Model Rule 1.6, including the crime-fraud exceptions in subsections (b)(1) through (3), quoted above. The Standing Committee makes this recommendation in part because its initial efforts to maintain the substance of Current Colorado Rule 1.6(b), but to limit the disclosure to "serious" crimes, was less than successful. But more importantly, a majority of the Committee is convinced that New Model Rule 1.6 draws the requisite lines at appropriate points. Where life is in jeopardy or where serious bodily injury is imminent, the rules of confidentiality should be allowed to give way, regardless of whether the client's conduct would be a crime. Similarly, where the lawyer's services are utilized to cause serious financial injury or property damage, lawyers should have professional discretion to prevent or ameliorate such injuries. And, because of the serious interests that support a lawyer's obligation of confidentiality, there should be very good reasons for any

breach of confidentiality. The commission by a client of a minor crime that has little or no potential to injure anyone or anything should not justify a disclosure of protected information.

Moreover, the interests of uniformity are very strong in this setting. In light of the proliferation of multijurisdictional representations, it would create substantial problems to have a Colorado-specific rule on such a critical subject, particularly when most jurisdictions have adopted New Model Rule 1.6 without substantive changes. In addition, the usefulness of precedents from other jurisdictions on difficult issues would be greatly diluted if Colorado were to adopt a non-uniform version of Rule 1.6.

The Committee does recommend an addition to Paragraph [15] of the New Model Comment because the interplay between permissive disclosures under Rule 1.6 and certain mandatory disclosures under Rules 3.3 and 4.1, are not well-understood. All disclosures under Rule 1.6 are permissive; a lawyer can never be subject to discipline because the lawyer did *not* make a disclosure that the rule merely permits. But other rules, most notably Rules 3.3 and 4.1, require a lawyer to make disclosure under certain circumstances. In some cases, the disclosures under those rules are required unless prohibited by Rule 1.6; in other cases the rules explicitly trump Rule 1.6. To provide further guidance on the interplay

between these critical rules, the Standing Committee recommends that Paragraph [15] include the following underscored language:

> [15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). For example, Rule 4.1(b) requires a lawyer to disclose material facts to third persons when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6. *See also* Rules 1.2(d), 8.1 and 8.3. Other rules permit or require disclosure regardless of whether such disclosure is permitted by this Rule. For example, Rule 1.13(c) permits certain disclosures even when such disclosures would otherwise be prohibited by this Rule. And Rule 3.3 requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. *See* Rule 3.3(c).

B. Exception to Duty of Non-Disclosure Where Lawyer Secures Legal Advice

New Model Rule 1.6(b)(4) permits a lawyer to disclose protected information "to secure legal advice about the lawyer's compliance with these Rules." This exception is new. A majority of the Standing Committee agrees with the codification of this exception, but believes that the exception should be

broadened to include legal advice regarding the lawyer's compliance with "other law or a court order." In the view of the majority, a lawyer should be able to obtain counsel not merely to conform the lawyer's actions to the ethics rules, but also to applicable standards of care; the disclosures permitted under New Model Rule 1.6(b)(5) are inadequate because that exception does not apply until *after* a controversy has arisen between client and lawyer. The proposed expansion of the exception stated in section (b)(4) would enable a lawyer to secure legal advice concerning the lawyer's legal duties (beyond the lawyer's ethical duties) *before* a controversy has arisen with the client – it would assist the lawyer in avoiding a breach of the standard of care in the first instance.

The minority was concerned that such an expansion of the new exception would authorize a lawyer, without client consent, to hire and disclose to a "shadow" lawyer protected information. Regardless of whether the lawyer-retained attorney would be bound by Rule 1.6's duty of non-disclosure, in the opinion of the minority, that practice would be inconsistent with a client's reasonable expectations of confidentiality. The minority believes that New Model Rule 1.6(b)(4) strikes the proper balance by limiting the circumstances in which a lawyer may disclose protected information when seeking legal advice, particularly since New Model Rule 1.6(b)(5) permits such disclosures "to establish a claim or

defense on behalf of the lawyer in a controversy between the lawyer and client," in other words, if a dispute arises concerning the lawyer's representation.

The Standing Committee proposes the following revisions to Paragraph [9] of the New Model Rule Comment, set forth in the underscored text below:

> [9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules, other law, or a court order. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with these Rules, other law or a court order. For example, Rule 1.6(b)(4) authorizes disclosures that the lawyer reasonably believes are necessary to seek advice involving the lawyer's duty to provide competent representation under Rule 1.1. In addition, this Rule permits disclosure of information that the lawyer reasonably believes is necessary to secure legal advice concerning the lawyer's broader duties, including those addressed in Rules 3.3, 4.1 and 8.4.

C. Exception to the Duty of Non-Disclosure When a Lawyer Changes Firms and Must Check for Conflicts

When a lawyer seeks to change law firms, it is necessary to determine whether the lawyer's representation of former or current clients will create conflicts for the lawyer and the new firm. However, the new firm cannot check for potential conflicts unless the moving lawyer discloses certain protected information, including at a minimum the names of current and former clients. In

that setting, it would be unduly burdensome to the moving lawyer to have to obtain the consent of every former and current client, particularly since the very fact that the lawyer is considering a move might be confidential. Nor can it be maintained that the client has impliedly consented to the disclosure under Rule1.6(a), where the disclosure is solely for the benefit of the lawyer and prospective firm. However, public policy strongly supports the lawyer's ability to reveal information to perform a conflict check, because the avoidance of conflicts is of paramount importance in a lawyer's representation of clients.

While it is widely known that lawyers contemplating a move currently regularly disclose sufficient information to the prospective firm to complete a conflicts check, there is no language addressing this practice in the Prior Model, Current Colorado, or New Model Rules, or any of their Comments. The Standing Committee considered addressing this issue in Proposed Rule 1.6, through a new exception to the general duty of non-disclosure, but decided instead that the matter could be appropriately addressed in non-uniform comment language. The Committee recommends the addition of non-uniform Paragraph [5A], to read as follows:

> [5A] A lawyer moving (or contemplating a move) from one firm to another is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to conduct a conflicts check to determine whether the lawyer or the new firm is or would be disqualified. Thus, for conflicts checking purposes, a

> lawyer usually may disclose, without express client consent, the identity of the client and the basic nature of the representation to insure compliance with Rules such as Rules 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12. Under unusual circumstances, even this basic disclosure may materially prejudice the interests of the client or former client. In those circumstances, disclosure is prohibited without client consent. In all cases, the disclosures must be limited to the information essential to conduct the conflicts check, and the confidentiality of this information must be agreed to in advance by all lawyers who receive the information.

D. Exception to the Duty of Non-Disclosure to Comply with a Subpoena

New Model Rule 1.6(b)(6) creates a new exception that permits the disclosure of protected information "to comply with other law or a court order." Paragraph [13] of the New Model Rule Comment discusses court orders to lawyers to disclose protected information, but it does not address the lawyer's duty when the lawyer is served with a subpoena that purports 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), and has amended Paragraph [13] accordingly.

The Standing Committee recommends adoption of New Model Rule 1.6 with the addition of the words "other law or court order" in section (b)(4). The Committee also recommends adoption of the Comment, but with modifications to Paragraphs [9], [13] and [15], and the addition of a non-uniform Paragraph [5A].

Rule 1.7 - Conflict of Interest: Current Client

Current Colorado Rule 1.7 is identical to Prior Model Rule 1.7 with one exception: A new section (c) states that a client's consent may not be obtained in circumstances where a disinterested lawyer would conclude that the client should not agree to the representation. Similar language appeared in the Prior Model Rule Comment. The Comment to the Current Colorado Rule is virtually identical to the Prior Model Rule Comment.

The text of New Model Rule 1.7 is different from both the Prior Model and Current Colorado Rules. The ABA Ethics 2000 Commission has reported that it intended no substantive changes in the rule, and that the changes are intended for clarification purposes only. As reorganized, New Model Rule 1.7(a) defines two general categories of "concurrent conflict[s] of interest": (1) Direct adversity conflicts, in which "the representation of one client will be directly adverse to

another client"; and (2) material limitation conflicts, in which "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." These two categories appeared, respectively, in Prior Model Rule (and Current Colorado Rule) 1.7(a) and (b).

New Model Rule 1.7(b) sets forth the requirements for consent to concurrent conflicts; it merges into a single set of consent standards somewhat different consent provisions that appeared separately in Prior Model Rule 1.7(a) (for direct adversity conflicts) and 1.7(b) (for material limitation conflicts); it continues to deem certain conflicts as non-consentable; and, in a significant change from the Prior Model and Current Colorado Rules, it requires all consents to be confirmed in writing. The New Model Rule permits a client to waive (under the circumstances stated) a Rule 1.7(a)(2) conflict that presents "a *significant risk* that the representation of. . . [the client] will be *materially limited* by the lawyer's responsibilities to another client or a third person, or by a personal interest of the lawyer." (Emphasis added.) Several members of the Standing Committee questioned whether a client ever could (or should) waive such a conflict because, by definition, there is a "significant risk" that the representation "will be materially limited" by outside factors. Other members noted that New Model Rule 1.7(b)(1) addresses this issue to some extent because the lawyer must reasonably believe that

the lawyer will be able to provide competent and diligent representation to each affected client. Despite this objective limitation on the consentability of conflicts, some members of the Standing Committee believe that the New Model Rule may permit some conflicted representations that are presently prohibited under Current Colorado Rule 1.7. In response, other members opined that sophisticated clients who want to accept the risks of such a representation should be allowed to do so.

Once again a clear majority of the Standing Committee was convinced that the interests of uniformity trumped the concerns summarized above. Like Rule 1.6, Rule 1.7 addresses one of the most basic obligations of lawyers. Where such core rules are involved, the Standing Committee believes that the Court should deviate from the New Model Rules only if the Court concludes that the proposed rule is wrong and contrary to public policy. The Committee does not believe that to be the case and accordingly recommends adoption of New Model Rule 1.7.

The ABA substantially revised the Comment to New Model Rule 1.7, but those changes, again, primarily clarify rather than change the basic substance of the Comment to the Prior Model Rule. Among the many beneficial new or significantly expanded Comment provisions are Paragraphs [1] (cross-referencing the reader to other relevant rules bearing on conflicts), [5] (addressing conflicts that arise after the representation has commenced), [11] (addressing conflicts that arise when a lawyer is related to opposing counsel), [15-17] (addressing

consentability), [20] (addressing the requirement of written consent), [21] (addressing revocation of consent), [22] (addressing advance consents to future conflicts), [25] (addressing conflicts in class action litigation), [29-33] (addressing conflicts in common representation), and [34] (addressing "corporate family" conflicts). The Standing Committee believes that the additional commentary will assist Colorado lawyers in an area that is complicated, highly fact-specific, and central to the ethical representation of clients.

The Committee recommends revising Paragraph [11] of the Comment to extend its application beyond family relationships, to include cohabiting relationships, consistent with the corresponding Comment to the Current Colorado Rule.

The Committee recommends adoption of New Model Rule 1.7 and its Comment, with the addition to Paragraph [11] of the Comment of a reference to cohabiting relationships.

Rule 1.8 - Conflicts of Interest: Current Clients: Specific Rules

Current Colorado Rule 1.8 is substantially the same as the Prior Model Rule, and the New Model Rule is not substantially different. The New Model Rule clarifies client consent requirements, adds a specific rule prohibiting most sexual relationships with clients, and adds a provision that imputes specific Rule 1.8 conflicts (except sex with clients) to other lawyers associated in the same firm.

The New Model Rule also moves Prior Model Rule 1.8(i), which addressed conflicts involving related lawyers, to the Comment to New Model Rule 1.7.

The New Model Rule Comment is greatly expanded. Among the beneficial new commentary are Paragraphs [1-4] (expanding on the limits on business transactions with clients), [5] (addressing the prohibition on use of information relating to the representation to the disadvantage of the client), [10] (addressing the limits on providing financial assistance to clients), [13] (addressing aggregate settlements), [14-15] (addressing the prohibition on agreements prospectively limiting a lawyer's liability for malpractice), and [17-19] (addressing client-lawyer sexual relationships).

The Committee recommends adoption of New Model Rule 1.8 and its Comment with one exception. New Model Rule 1.8(k) imputes to all members of a firm the Rule 1.8(a) restrictions on business transactions between client and lawyer. This potentially subjects to discipline lawyers in a firm who know nothing about an unrelated business transaction between a client and other members of the firm, which the Standing Committee views as unfair and unwarranted. Irrespective of whether the Rule 1.8(a) prohibitions are imputed, Rule 1.7(b) continues to apply (a proposition made explicit in Paragraph [3] of the Comment to New Model Rule 1.8) and, thus, should cover the rare circumstance where a business transaction between a client and a lawyer will materially and adversely affect the client's

representation by another lawyer in the firm. For these reasons, the Standing Committee recommends the revision of New Model Rule 1.10(k) to state that "[w]hile lawyers are associated in a firm, a prohibition in the foregoing paragraphs (b) through (i) that applies to any one of them shall apply to all of them." This change required comparable edits to Paragraph [20] of the Comment.

The Standing Committee also emphasizes that New Model Rule 1.8(e), which the Committee recommends for adoption, would change the existing Colorado rule. Under Current Colorado Rule 1.8(e), a lawyer may not agree with a client in advance to forego the repayment of costs that the lawyer will pay for the client in a contingent fee case; rather, the lawyer may relieve the client of that obligation only at the conclusion of the case if the repayment obligation would impose a financial hardship on the client. This provision has resulted in a dance of sorts, in which the lawyer (who has no intention of ever enforcing the client's cost repayment obligation), tells the client that while he or she cannot make that determination now (because the client's circumstances could change), if the client's financial circumstances do not change, the obligation will be forgiven. In the Standing Committee's view, there is no good reason to require this charade; the client's interests are advanced by the certainty that the lawyer will not look to the client for repayment of advanced costs and the lawyer simply bears the burden of voluntary, advance agreement.

The Standing Committee recommends adoption of New Model Rule 1.8, with a change to Rule 1.8(k) that eliminates the imputation to all lawyers in a firm of conflicts arising out of transactions between one lawyer and a client. The Committee also recommends adoption of the Comment, with a change to Paragraph [20] to reflect the change made to the text of New Model Rule 1.8(k).

Rule 1.9 - Duties to Former Clients

Current Colorado Rule 1.9 is substantially the same as Prior Model Rule 1.9, and New Model Rule 1.9 is not substantially different from either of those rules. The principal change in the New Model Rule is to tighten the client consent requirements for waiver of a former-client conflict, by requiring "informed consent" (a defined term under the New Model Rules) "confirmed in writing" (also a defined term).

The Current Colorado Rule Comment contains all the provisions that were in the Comment to Prior Model Rule 1.9. The New Model Rule Comment adds a helpful new Paragraph [3] that provides additional guidance on when matters are "substantially related" for purposes of Rule 1.9, a question that has confounded lawyers and courts; rejecting the rigid reasoning of some courts on the substantially-related question, the new commentary states that both the character of the proposed transaction or dispute and the existence of confidential factual information from the prior representation that might "substantially advance" the

client's cause in the subsequent representation are relevant factors. The Comment also clarifies that when a lawyer's representation of one client in a multiple client representation is terminated, the lawyer may not represent a remaining client against a former member of the client group. It also deletes several confusing paragraphs (formerly [4] and [5]) related to the movement of lawyers between firms, and a paragraph (formerly [7]) that placed the burden of proof on disqualification issues on the firm whose disqualification is sought.

The Standing Committee recommends adoption of New Model Rule 1.9 and its Comment in their entirety.

Rule 1.10 - Imputation of Conflicts of Interest

Current Colorado Rule 1.10 is substantially the same as the Prior Model Rule, and the New Model Rule makes no substantial amendments. The principal change is to New Model Rule 1.10(a), which contains a new exception to the general rule that imputes conflicts under Rules 1.7 and 1.9 to all members of a law firm. Under the new exception, there is no imputation where the individually disqualified lawyer's conflict is based on the lawyer's personal interest under Rule 1.7(a)(2). As an example, new Paragraph [3] of the Comment states that the disqualifying interest of a lawyer based upon the lawyer's personal beliefs ordinarily would not be imputed but, on the other hand, the disqualifying interest of a lawyer based on the lawyer's ownership interest in the opposing party would

be imputed. New Paragraph [4] also clarifies that the imputation imposed under New Model Rule 1.10(a) does not apply to conflicts of non-lawyer employees of the firm or to lawyer conflicts if the events giving rise to the conflict occurred while the lawyer was a law student. The Standing Committee supports all of these revisions.

There is considerable controversy among the jurisdictions and commentators as to whether screening should be permitted to overcome imputed disqualification when a lawyer from one private law firm moves to another firm. Like Current Colorado and Prior Model Rules 1.10, New Model Rule 1.10 does not authorize screening in this context. A number of state supreme courts, after review of the New Model Rules, have rejected the ABA position and adopted rules that permit screening in the private lawyer context, under certain and varying circumstances. All jurisdictions that have adopted a version of the New Model Rules permit screening when a government lawyer moves from government service to the private sector; that authorization also appears in both Prior and New Model Rule 1.11.

The reasons for and against unilateral screening (or screening not coupled with client consent) to cure conflicts arising out of firm-to-firm movement of lawyers have been debated almost endlessly over the years. Proponents of screening assert that the realities of modern law practice mandate a modern

approach to this issue. Screening proponents say that the existence of multistate and multinational law firms, coupled with ever-increasing attorney mobility, requires some endorsement of screening to avoid automatic imputed disqualification of masses of lawyers. The alternative, according to the proponents, is to virtually prohibit lawyers from moving between firms; stated more colorfully, lawyers who join a large firm become "Typhoid Marys," forever relegated to that firm for the balance of their careers. Opponents of unilateral screening believe that it sacrifices the rights of the former client, who should be able to take comfort knowing that its former lawyer will not move to a new firm that represents an adverse party in the same or a related matter, which could put the former lawyer in a position to prejudice the former client.

Complicating the matter further is the treatment of this issue by courts, particularly federal courts. A number of courts have not felt constrained to apply the ethics rules of the state in which the court sits when it comes to matters of disqualification of lawyers based on conflicts of interest. (This is true even in jurisdictions, including Colorado, where the federal court has adopted all or part of the state rules of professional conduct.) A number of courts have permitted unilateral screening even when the controlling ethics rules do not authorize screening, reasoning that the courts' interest in attorney disqualification is not necessarily the same as the interest of a state lawyer disciplinary authority. Thus,

lawyers sometimes find themselves in the uncomfortable position of *not* being disqualified by a court (typically, but not always, a federal court) while being subject to the risk of state discipline because the representation constitutes a continuing violation of the state version of Rule 1.10. While this conundrum (which is in most cases self-inflicted) should not be the decisive factor in determining whether to permit unilateral screening, there is an obvious benefit to consistent treatment of the same problem by the courts and state disciplinary authorities. In a similar vein, a number of state bar ethics committees have intimated that screening should be permitted, even when the state ethics rules do not expressly authorize it. Illustrative is CBA Formal Opinion 88.

A majority of the Standing Committee believes that unilateral screening should be permitted in certain limited circumstances. A majority of the Committee also believes that screening should not be permitted where the screened lawyer substantially participated in the former client's representation at the prior firm. Thus, the Standing Committee proposes that New Model Rule 1.10 be modified to permit unilateral screening – and the avoidance of imputed disqualification – where the personally disqualified lawyer's involvement in the matter while at the former firm was greater than the threshold established by Rule 1.9(b),[5] but below

[5] Under New Model Rule 1.9(b)(2), a moving lawyer is not personally disqualified unless, while at the former firm, that lawyer had acquired information

Footnote continued on next page

substantial participation. Under this formulation, a lawyer who substantially participated in the representation at the prior firm cannot be screened without client consent. There undoubtedly will be occasions when it is difficult to determine whether a lawyer substantially participated in the representation. At one end, there is no doubt that a lawyer who had primarily responsibility for the representation would be deemed to have substantially participated. At the other extreme, a first year associate whose work on the case was limited and did not extend to legal strategy, would not be deemed to have substantially participated. The Standing Committee recommends the following new subsection (e) to New Model Rule 1.10:

> (e) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
>
> (1) the matter is not one in which the personally disqualified lawyer substantially participated;
>
> (2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
>
> (3) the personally disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior

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protected by Rules 1.6 and 1.9(c) that is material to the matter. If the moving lawyer is not personally disqualified, then there is no basis under New Model Rule 1.10(a) for imputed disqualification of other members of the lawyer's new firm.

representation and the screening procedures to be employed) to the affected former clients and the former clients' current lawyers, if known to the personally disqualified lawyer, to enable the former clients to ascertain compliance with the provisions of this Rule; and

(4) the personally disqualified lawyer and the partners of the firm with which the personally disqualified lawyer is now associated reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

The Standing Committee concluded that no comment language is necessary to accompany Proposed Rule 1.10(e).

The Standing Committee recommends adoption of New Model Rule 1.10 but with a new section (e) that permits unilateral screening (and the avoidance of imputed disqualification) where a lawyer changes firms but did not substantially participate in the representation of the client at the former firm. The Committee also recommends adoption of the Comment to New Model Rule 1.10 without change.

Rule 1.11 - Special Conflicts of Interest for Former and Current Government Officers and Employees

Current Colorado Rule 1.11 is substantially the same as the Prior Model Rule, both of which permit screening in many circumstances where a government lawyer joins a private law firm. This situation has long been distinguished from

the private lawyer situation, discussed above in connection with Rule 1.10. New Model Rule 1.11(b) continues this treatment.

In addition, the New Model Rule clarifies that for purposes of conflicts of interest and disqualification, individual lawyers who formerly served as public officers or government employees are not subject to New Model Rule 1.9(a) and (b). Both current and former public officers and government employees must comply with the "former client" confidentiality requirements of New Model Rule 1.9(c). The Standing Committee believes that New Model Rule 1.11 would be strengthened by the inclusion of language similar to that used in Proposed Rule 1.10(e)(3) and (4), which defines the notice that a moving lawyer must provide to the lawyer's former clients and their current lawyers, and requires the personally disqualified lawyer and the partners of the new firm to reasonably believe that the anticipated screening is likely to be effective.

The Comment to New Model Rule 1.11 includes helpful revisions and several new provisions, including a clarification in new Paragraph [2] that New Model Rule 1.10 is not applicable to the conflicts addressed in New Model Rule 1.11.

The Standing Committee recommends adoption of New Model Rule 1.11, but recommends revisions in section (b)(2) and (3) to conform to the language used in

Proposed Rule 1.10(e)(3) and (4). The Committee recommends adoption of the Comment to New Model Rule 1.11 in its entirety.

Rule 1.12 - Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

New Model Rule 1.12 is substantially the same as both the Current Colorado and Prior Model Rules, except that the ABA has broadened the reach of the rule to encompass third-party neutrals. The Standing Committee approves of this change. The Committee believes that New Model Rule 1.12, like New Model Rule 1.11, would be strengthened by the inclusion of language similar to that used in Proposed Rule 1.10(e)(3) and (4), to define the notice that a disqualified lawyer must provide to parties in a matter in which the lawyer formerly participated as a judge or third-party neutral, and to require the personally disqualified lawyer and the partners of the new firm to reasonably believe that the anticipated screening is likely to be effective.

The Standing Committee recommends adoption of New Model Rule 1.12 with changes that correspond to the language used in Proposed Rule 1.10(e)(3) and (4). The Committee recommends adoption of the New Model Rule Comment in its entirety.

Rule 1.13 - Organization As Client

Current Colorado Rule 1.13 is identical to Prior Model Rule 1.13. New Model Rule 1.13 makes some important changes that are best considered in their

historical context. Following the corporate scandals that erupted in the early 2000's, the ABA gave much thought to when a lawyer could – or perhaps must – "blow the whistle" on an organizational client. In 2002, Congress enacted the Sarbanes-Oxley Act, which among other things, directed the Securities and Exchange Commission (the "SEC") to promulgate rules of conduct for lawyers representing companies subject to the SEC's jurisdiction, including rules regarding "whistle-blowing" by such lawyers. New Model Rule 1.13 is the ABA's contribution to the changing ethics environment for lawyers representing organizational clients.

New Model Rule 1.13(b) continues to require "up-the-ladder" reporting of proposed or ongoing law violations that are likely to result in substantial injury to the organization. The only exception to this obligation is when the lawyer "reasonably believes that it is not necessary in the best interest of the organization to do so." In a change from the Current Colorado and Prior Model Rules, under New Model Rule 1.13(e), the lawyer's duty to report within the organization continues if the lawyer reasonably believes that he or she was discharged by the client based on the lawyer's actions in accordance with the ethics rule, or if he or she withdrew under circumstances that required the lawyer to report corporate wrongdoing.

The most controversial aspect of New Model Rule 1.13 is what the lawyer may do if the highest authority of the organization refuses to cease or rectify the violation of law. Under Current Colorado and Prior Model Rules 1.13, if up-the-ladder reporting does not rectify the law violation, the lawyer's only recourse is to resign. However, New Model Rule 1.13(c) permits, but does not require, the lawyer to reveal information related to representation of the organizational client to third parties, including law enforcement agencies, irrespective of whether the disclosure would otherwise violate Rule 1.6. But unlike Rule 1.6(b), which is designed to protect persons other than the lawyer's client, disclosure under Rule 1.13(c) is permitted only when the lawyer "reasonably believes [it] necessary to prevent substantial injury *to the organization*." (Emphasis added.)

The Comment includes new provisions that explain the expanded obligations imposed under New Model Rule 1.13. In addition, corresponding to a change in the Scope section of the New Model Rules, Paragraph [9] eliminates the presumption, occasionally floated by courts and others, that the government lawyer's client is the government as a whole, instead of a discrete subpart of the government. The Comment clarifies that the client may be "a specific agency," "a branch of government," or "the government as a whole."

New Model Rule 1.13 is consistent with the final rules promulgated by the SEC under Sarbanes-Oxley. Although many within the ABA sought a rule that

mandated whistle-blowing by a lawyer if the lawyer's client persisted in unlawful or fraudulent conduct, and although the SEC included such a proposal in its draft rules, the agency's final regulation did not adopt that proposal. Instead, like New Model Rule 1.13, the final Sarbanes-Oxley regulations permit but do not require disclosure to the SEC if internal efforts to correct the wrongful behavior are unavailing. New Model Rule 1.13 does not supplant or trump Rule 4.1 in any manner. Thus there will be circumstances where a lawyer must make disclosure in accordance with Rule 4.1 (and Rule 3.3) even when the disclosure is discretionary under Rule 1.13.

There is one typographical error in New Model Rule 1.13. The reference in section(e) to "paragraphs (b) or (c)" should be to "paragraph (b) or (c)," *i.e.*, the singular word "paragraph" should be used.

Like Rules 1.6 and 1.7, Rule 1.13 addresses lawyers' core obligations. There is great value in uniformity among jurisdictions on such important rules. For this reason and because the Standing Committee believes that New Model Rule 1.13 imposes appropriate obligations upon lawyers and correctly draws the required lines, the Committee recommends adoption of New Model Rule 1.13 and its Comment in their entirety, with only one correction to a typographical error in New Model Rule 1.13(e).

Rule 1.14 - Client With Diminished Capacity

Current Colorado Rule 1.14 is identical to the Prior Model Rule, except that the Court added a new subsection (b) to the Colorado rule "to make clear that a lawyer should obtain all possible aid from the client" despite the existence of an impairment. Committee Comment to Colo.RPC 1.14. New Model Rule 1.14(b) broadens the listing of protective actions a lawyer may take on behalf of a client with diminished capacity. The New Model Rule confirms that information relating to the representation of a client with diminished capacity is protected by Rule 1.6, but that the lawyer is impliedly authorized to reveal information deemed reasonably necessary to take protective action to protect the client's interests; new Paragraph [8] of the Comment expands upon the lawyer's duties and options related to disclosures of protected information. The New Model Rule and Comment also capture the essence of section (b) of the Current Colorado Rule, regarding the lawyer's obligation to obtain information from the client to the extent possible despite the client's impairment.

The Committee recommends adoption of New Model Rule 1.14 and its Comment in their entirety.

Rule 1.15 - Safekeeping Property

Current Colorado Rule 1.15 is substantially different from both the Prior and New Model Rules as a result of a variety of changes made by the Court over the

years. The Standing Committee recommends retention of the Current Colorado Rule and Comment, with the changes discussed below.

Like the Standing Committee, the Ad Hoc Committee recommended retention of Current Colorado Rule 1.15. The Ad Hoc Committee recommended an additional comment, addressing the lawyer's duty to keep separate from the lawyer's own property any property in which any third person claims an interest. The Standing Committee agrees that the language proposed by the Ad Hoc Committee provides valuable guidance and should be incorporated into the Comment.

While Rule 1.15 was under study by the Committee, the Board of Directors of COLTAF recommended several changes that were prompted by *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003), where the United States Supreme Court addressed the constitutionality of state-mandated programs regarding interest on lawyers' trust accounts, and provided guidance as to how such state programs could avoid "takings" challenges. During that same period of time, the OARC proposed certain clarifying changes based upon the Federal Reserve Board's enactment of new rules relating to the clearing of checks through the Federal Reserve System. The Standing Committee agrees with the COLTAF-proposed and OARC-proposed changes.

It became obvious to the Standing Committee that Current Colorado Rule 1.15 is in need of some serious editing. The rule is long, complex, and convoluted. As a result, the Committee has completed a substantial rewrite of Rule 1.15, with the objective of maintaining the substance of the Rule while making it much more readable and usable.

The Standing Committee recommends retention of Current Colorado Rule 1.15 and its Comment, with the changes recommended by the Ad Hoc Committee, COLTAF, and the OARC, and with the editing changes made by the Standing Committee.

Rule 1.16 - Termination of Representation

Current Colorado Rule 1.16 tracks the Prior Model Rule in its provisions on mandatory termination of representation, the duty to continue representation when ordered to do so by a tribunal, and the need to take reasonable steps to protect the client's interests upon termination of representation. However, the Colorado Rule differs with respect to permissive withdrawal. Unlike the Prior Model Rule, Section (b) of the Colorado Rule does not allow a lawyer to withdraw solely on the basis that "withdrawal can be accomplished without material adverse effect on the interests of the client"; instead, a lawyer may seek or undertake permissive withdrawal only under the specific enumerated conditions stated in the Colorado Rule. The Comments to the Current Colorado and Prior Model Rules are identical.

The ABA made only minor, largely clarifying, revisions to the New Model Rule and Comment. The Standing Committee recommends adoption of New Model Rule 1.16 despite the change from the Current Colorado Rule regarding the bases for permissive withdrawal, as summarized above. The Committee recommends one change in the heading before Paragraph [7] of the New Model Rule Comment: Substitution of the more accurate word "Permissive" for "Optional."

The Standing Committee recommends adoption of New Model Rule 1.16 and its Comment, with a non-substantive change to the Comment.

Rule 1.17 - Sale of Law Practice

When the Court enacted Current Colorado Rule 1.17 in 1997, it departed extensively from the Prior Model Rule and Comment. Beyond the many differences that already had existed between the Current Colorado and Prior Model Rules, New Model Rule 1.17 adds a new important difference: The Colorado Rule requires that an entire practice be sold but New Model Rule 1.17(b) permits "an area of law practice" to be sold. The Standing Committee recommends adoption of this language in the New Model Rule because the purposes of the rule are served even where a lawyer sells only a discrete part of his or her practice. In the interest of uniformity, the Committee also recommends that the balance of the Current Colorado Rule and Comment, with the exception of section (c) and its

corresponding commentary, discussed below, be amended to conform to the organization and language of the New Model Rule and Comment.

The Standing Committee does not recommend adoption of the portion of New Model Rule 1.17(c) that provides that, if the lawyer cannot give actual notice of the proposed sale to a client, the selling lawyer must obtain a court order to authorize the transfer of the client's file to the purchasing lawyer. Instead, the Committee recommends a provision that presumes client consent if the notice is mailed to the client's last known address and the client does not object to the file transfer within sixty days. The Standing Committee believes such a presumption is appropriate for two reasons. *First*, a client has a duty to keep his or her lawyer advised of the client's whereabouts. *Second*, because the purchasing lawyer has the same duties of confidentiality that the selling lawyer had, transfer of the client's file to the purchasing attorney does not affect the client's rights to confidentiality. Moreover, the client has the right, at any time, to terminate the services of the purchasing lawyer and obtain new counsel. The recommended change to the Rule's notice provision will require corresponding revisions to Paragraphs [7] and [8] of the Comment.

The Standing Committee recommends adoption of New Model Rule 1.17 and its Comment except for modification of the notice requirement in section (b) and the corresponding commentary, as described above.

Rule 1.18 - Duties to Prospective Client

New Model Rule 1.18 has no counterpart in either the Current Colorado or Prior Model Rules. The Standing Committee believes that the New Model Rule and its Comment, which are consistent with Colorado case law on this issue, provide valuable guidance concerning lawyers' duties to prospective clients.

The Standing Committee recommends adoption of New Model Rule 1.18, with a minor change in paragraph (c) recommended by the Ad Hoc Committee. The Standing Committee recommends adoption of the Comment with a minor change to Paragraph 9 of the Comment.

Rule 2.1 - Advisor

When the Court adopted Prior Model Rule 2.1 it added a requirement that in litigation matters the lawyer should advise the client of available ADR mechanisms. The Comment to the Current Colorado Rule incorporates the Comment to the Prior Model Rule but adds two paragraphs – one borrowed from the former Code and addressing the providing of non-legal advice, and the other expanding upon the Colorado-specific rule that a lawyer should advise of available ADR alternatives to traditional litigation.

New Model Rule 2.1 did not change. The Standing Committee recommends adoption of New Model Rule 2.1, but retention of the last sentence of Current Colorado Rule 2.1, which states that a lawyer should advise the client of ADR

options in matters involving litigation. The Committee notes that the use of the word "should" in this sentence is neither mandatory nor permissive, but merely precatory.

The ABA made only one substantive change to the Comment to New Model Rule 2.1: The addition of a sentence stating that "when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation." The Standing Committee believes that this uniform comment language is superior to the Colorado-unique language in the Comment to the Current Colorado Rule.

The Standing Committee recommends adoption of New Model Rule 2.1, with the addition of the last sentence of Current Colorado Rule 2.1, which addresses advice concerning ADR. The Committee also recommends adoption of the Comment to the New Model Rule in its entirety.

Rule 2.2 - Intermediary [Deleted]

The ABA rescinded Prior Model Rule 2.2, which permitted a lawyer to act as an "intermediary" in narrow circumstances. The ABA concluded that the Rule caused unnecessary confusion and that New Model Rule 1.7 better articulates the necessary conflicts analysis before a lawyer undertakes such a role. *The Standing Committee agrees with this analysis and recommends that Current Colorado Rule 2.2 be repealed.*

Rule 2.3 - Evaluation for Use by Third Persons

Current Colorado Rule 2.3 and its Comment are identical to the Prior Model Rule and Comment. The principal change between the Current Colorado and Prior Model Rules, and the New Model Rule, is that, under New Model Rule 2.3(b), the client's "informed consent" is required only when the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely. The Standing Committee believes that this change makes sense for the reasons set forth in new Paragraph [5] in the New Model Rule Comment: When a client requests a lawyer to provide an opinion for the benefit of third parties and the opinion is consistent with the client's interests, there is no good reason to require the client's consent.

The Standing Committee recommends adoption of New Model Rule 2.3 and its Comment in their entirety.

Rule 2.4 - Lawyer Serving as Third-Party Neutral

New Model Rule 2.4 is new. The Standing Committee believes that the new Rule and its Comment provide valuable guidance to lawyers who serve as third-party neutrals. It requires the third-party neutral to disclose that he or she does not represent other participants in the process. The Comment further suggests that in appropriate circumstances, the third-party neutral should explain the difference

between a lawyer's role as a third-party neutral and as a client representative, including the inapplicability of the attorney client privilege.

Consideration of New Model Rule 2.4 raised a related issue regarding C.R.C.P. 265, which permits a law firm to engage only in the practice of law. Most authorities consider the providing of arbitration, mediation and expert witness services to not constitute the practice of law. In the Standing Committee's view, there is no good reason to require lawyers in a law firm to set up a separate entity to provide law-related services such as arbitration, mediation and expert witness services. Therefore, the Committee recommends that C.R.C.P. 265 be amended. This matter has been referred to the Court's Standing Committee on Rules of Civil Procedure, which has appointed a subcommittee to study the matter.

The Standing Committee recommends adoption of New Model Rule 2.4 and its Comment in their entirety.

Rule 3.1 - Meritorious Claims and Contentions

Current Colorado Rule 3.1 is identical to the Prior Model Rule. The Comments to the two rules are also the same, except that the Court added a paragraph borrowed from the former Code that underscored the lawyer's obligation to vigorously seek a client's lawful objectives through lawful means.

New Model Rule 3.1 makes explicit that there must be a basis in both "law and fact" for a position that a lawyer takes. The Current Colorado and Prior Model

Rules state that there must be a "basis" to bring or defend a proceeding, without specifying that the basis must be in both law and fact. The Standing Committee believes that the requirement of a basis in "law and fact" is implicit in Current Colorado Rule 3.1 and, therefore, that there is no substantive change in the New Model Rule. The changes to the Comment to the New Model Rule include (1) an explication of the "law and fact" amendment to the rule, and (2) a statement that the lawyer's obligations under New Rule 3.1 are subordinate to federal or state constitutional law that entitles a criminal defendant to the assistance of counsel and that might be inconsistent with the limits of the rule. In the opinion of the Standing Committee, these are beneficial changes.

The Standing Committee recommends adoption of New Model Rule 3.1 and its Comment in their entirety.

Rule 3.2 - Expediting Litigation

New Model Rule 3.2 is identical to the Current Colorado and Prior Model Rules. The change in the Comment recognizes that, in appropriate circumstances, "a lawyer may properly seek a postponement for personal reasons," but it reaffirms that lawyers should not fail to expedite litigation solely "for the convenience of the advocates," an admonition that also appeared in the Prior Model Rule's Comment.

The Standing Committee recommends adoption of New Model Rule 3.2 and its Comment in their entirety.

Rule 3.3 - Candor Toward the Tribunal

Current Colorado Rule 3.3 is identical to Prior Model Rule 3.3. The Colorado Comment incorporates much of the Prior Model Rule's Comment's language, but adds various Colorado-specific provisions.

New Model Rule 3.3 makes an important substantive change by proscribing *all* false statements of fact and law, whether material or not, while the Prior Model Rule (like the Current Colorado Rule) prohibited only *material* false statements of fact and law. A majority of the Standing Committee voted in favor of retaining the materiality requirement of Current Colorado Rule 3.3 on the basis that a lawyer should not face the risk of discipline for an immaterial false statement. A minority of the Committee favors the New Model Rule, *i.e.*, no materiality requirement, because there is no justification for a lawyer to knowingly make any false statements to a court, whether material or not. The Ad Hoc Committee recommended the adoption of New Model Rule 3.1 without the materiality limiter.

The debate on whether Rule 3.3 should prohibit only material false statements or all false statements was intertwined with the question of whether the culpable mental state of "knowledge" is satisfied by proof of merely reckless conduct. *See supra* at 12 (addressing this issue in connection with Proposed Rule 1.0(k)). Many members of the Standing Committee were concerned that, if the Court adheres to its prior case law equating recklessness with knowledge in most

circumstances, the reach of New Model Rule 3.3 (without the materiality limiter) would be dangerous. However, if the Court clarifies that "knowledge" as used in the proposed Colorado Rules requires actual knowledge and cannot be established through proof of reckless conduct, some Committee members would be comfortable recommending New Model Rule 3.3 as drafted by the ABA, in other words, as applicable to all false statements.

The changes to the Comment to New Model Rule 3.3 are extensive. The Standing Committee believes that the expanded commentary will be useful to lawyers.

The Standing Committee recommends adoption of New Model Rule 3.3, but recommends adding the word "material" in Rule 3.3(a)(1). The Committee recommends conforming changes to theComment.

Rule 3.4 - Fairness to Opposing Party and Counsel

Current Colorado Rule 3.4 is virtually identical to the Prior Model Rule. The Comments to the two rules are also the same, with the exception of an additional paragraph in the Colorado Comment, borrowed from the former Code, that expands upon the practices prohibited by Current Colorado Rule 3.4(e). New Model Rule 3.4 does not change the text of Prior Model Rule 3.4 and it changes the Comment only slightly.

The Ad Hoc Committee recommended adoption of New Model Rule 3.4, with one substantive change. Because Part III of Rule 16 of the Colorado Rules of Criminal Procedure prohibits a lawyer from recommending that any person (other than the defendant) refrain from giving relevant information regarding a criminal matter, New Model Rule 3.4(f)(1) (which allows a lawyer to request a relative, employee, or other agent of a client to refrain from voluntarily giving relevant information to another party) does not accurately reflect existing Colorado law. The Ad Hoc Committee proposed an addition to that section as well as a change to Paragraph [4] of the Comment, to reflect Colorado law. The Standing Committee agrees with those recommendations.

In addition, the Standing Committee concluded that Paragraph [3] of the Comment to New Model Rule 3.4 does not accurately reflect the existing practice in Colorado with respect to the compensation of lay witnesses. In 1998, the CBA Ethics Committee concluded in Formal Opinion 103 that in a civil action a lawyer may reimburse a fact witness not only for expenses incurred but also for the reasonable value of the witness's time expended in testifying and preparing to testify. That opinion appears to be consistent with the weight of modern authority on this issue.

Formal Opinion 103 addressed only civil cases. Some members of the Standing Committee expressed several concerns about applying such a rule to

criminal proceedings. *First*, in almost all cases, the prosecution has far greater resources than the defendant. If the prosecution may compensate fact witnesses, indigent defendants might have a constitutional right to have the state fund equivalent compensation for defense fact witnesses. Aside from the fiscal impact on the state, the administrative burden associated with funding such compensation could adversely impact the business of the criminal courts. *Second*, while paying a fact witness for testimony is tolerable in a civil case, the concept of paying for testimony in a criminal case seemed intolerable to some members given the heightened public policy interests at stake. Yet, other members noted that the payment of fact witnesses – informants – is already an established part of the criminal justice system. After much discussion, the Standing Committee concluded that the Court and its criminal justice committees should consider these serious criminal justice policy questions. If the Court enacts a rule (whether in the Rules of Criminal Procedure, or otherwise) that prohibits the compensation of fact witnesses in criminal cases, it would be unethical for a lawyer to compensate a fact witness in a criminal matter, because the payment would be an "inducement to a witness that is prohibited by law," in violation of Rule 3.4(b).

Accordingly, the Standing Committee recommends that Paragraph [3] of the New Model Rule Comment be amended to add the following underscored language:

> With regard to paragraph (b) it is not improper to pay an expert or non-expert's expenses or to compensate an expert witness on terms permitted by law. It is improper to pay any witness a contingent fee for testifying. A lawyer may reimburse a non-expert witness not only for expenses incurred in testifying but also for the reasonable value of the witness's time expended in testifying and preparing to testify, so long as such reimbursement is not prohibited by law. The amount of such compensation must be reasonable based on all relevant circumstances, determined on a case-by-case basis.

The Standing Committee recommends adoption of New Model Rule 3.4 with changes to reflect the prohibition in criminal cases on advising a witness to refrain from giving information relating to the matter. The Committee also recommends adoption of the Comment to the New Model Rule, with the amendments to Paragraphs [3] and [4] as set forth above.

Rule 3.5 - Impartiality and Decorum of the Tribunal

Current Colorado Rule 3.5 and its Comment are identical to the Prior Model Rule and Comment. New Model Rule 3.5 narrows the prohibition against ex parte communications with a tribunal to the time "during the proceeding." It also recognizes an exception for communications permitted by "court order," and adds a new section (c) concerning communications with a juror or prospective juror after discharge of the jury. The ABA revised the Comment to expand upon these new provisions in the New Model Rule, and to clarify that the preexisting duty to refrain from conduct intended to disrupt a tribunal applies to depositions.

The Ad Hoc Committee recommended a change to New Model Rule 3.5(c) to impose additional restrictions upon lawyers' contacts with jurors. The Standing Committee agrees that additional restrictions upon juror contacts are necessary but does not agree with the language proposed by the Ad Hoc Committee. The Standing Committee recommends adoption of a new section (c)(4) that would prohibit communications with a juror or prospective juror after discharge of the jury if "the communication is intended to or is reasonably likely to demean, embarrass, or criticize the jurors or their verdicts."

The Standing Committee debated at length whether *Stewart v. Rice*, 47 P.3d 316 (Colo. 2002), requires additional prohibitory provisions in Rule 3.5. Dictum in that case may stand for the proposition that it is unethical for a lawyer to communicate (directly or through an agent) with a juror, for the purpose of obtaining evidence to impeach a jury's verdict where the evidence obtained is not admissible under C.R.E. 606(b). A minority of the Standing Committee recommended a new section (c)(5) that would prohibit juror communications where "the communication is for the purpose of soliciting juror testimony, affidavits, or statements to impeach the verdict without a basis under Rule 606(b) of the Colorado Rules of Evidence." A different minority suggested that in addition to, or in lieu of, proposed section (c)(5), quoted above, a new section (c)(6) should prohibit juror communications when "the lawyer or the lawyer's

agent does not inform the juror, at the onset of the communication, that any information provided by the juror may be presented to the court for purposes of setting aside the jury's verdict."

The majority of the Standing Committee rejected both of these minority proposals for several reasons. *First*, it will be difficult, if not impossible, to determine at the outset whether the purpose of the lawyer's communication was to obtain evidence that would be admissible under C.R.E. 606(b) or whether the lawyer was engaging in juror harassment to seek to uncover inadmissible information. *Second*, the Court has rejected an outright ban on juror communications, based on the belief that there is value to communications between lawyers and jurors. (Other courts, including the United States District Court for the District of Colorado, have prohibited all juror contacts without a court order.) Yet, a requirement of a disclaimer, as in proposed section (c)(6), will effectively quash juror communications and is tantamount to a rule that such communications may not occur without a specific court order. If the Court decides to ban juror contacts, then it should enact that ban directly, rather than indirectly through a disclaimer requirement.

The Standing Committee recommends adoption of New Model Rule 3.5 with the addition of a new section (c)(4) as set forth above. The Committee recommends adoption of the Comment in its entirety.

Rule 3.6 - Trial Publicity

Current Colorado Rule 3.6 and its Comment are identical to the Prior Model Rule and Comment. New Model Rule 3.6 makes only one change from the Prior Model Rule: Section 3.6(a) now provides that a "lawyer's assessment of the likelihood that a statement will be disseminated by means of public communication [is to] be judged from the perspective of a reasonable lawyer rather than a reasonable person." Ethics 2000 Commission Reporter's Explanation of Changes, Model Rule 3.6. The ABA added a new Paragraph [8] to the New Model Rule Comment, which cross-references Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

One Standing Committee member pointed out an apparent inconsistency between the Rule and Comment. New Model Rule 3.6(b)(2) is a safe harbor, permitting a lawyer to disclose "information contained in a public record." Records of criminal convictions are generally matters of public record. Yet, Paragraph [5](1) of the Comment indicates that the "criminal record of a party" is information that may have a material prejudicial effect on a proceeding and, thus, may not be disclosed. Despite this apparent inconsistency, which also exists but has apparently not been problematic under the Current Colorado and Prior Model Rules, the Standing Committee voted to recommend the uniform New Model Rule and Comment.

The Committee recommends adoption of New Model Rule 3.6 and its Comment in their entirety.

Rule 3.7 - Lawyer as Witness

Current Colorado Rule 3.7 differs from the Prior Model Rule in a single respect. Accepting the recommendation of the original Colorado Model Rules Committee (the "Barnhill Committee"), the Court reversed the presumption related to imputation of lawyer-witness conflicts in Prior Model Rule 3.7(b). The Prior Model Rule presumed that there was no imputed conflict and permitted another lawyer in the disqualified lawyer-witness's firm to serve as an advocate at trial, "unless precluded from doing so under Rule 1.7 or 1.9." The Current Colorado Rule presumes that there is an imputed conflict and prohibits another lawyer from serving as advocate at trial "unless the requirements of Rule 1.7 or Rule 1.9 have been met." However, because the presumptions under both rules were rebuttable (and despite the Barnhill Committee's perception of the change as "considerabl[e]," Colo.RPC 3.7, Colo. Comm. Cmt.), the difference is more stylistic than substantive. The Current Colorado Comment includes all language in the Prior Model Rule Comment, with additional language that expands upon the potential prejudice to the opposing party when a lawyer serves as both advocate and witness.

The Ad Hoc Committee was of the view that consistency with New Model Rule 3.7 is preferable to any perceived benefit from the reversed presumption in Current Colorado Rule 3.7(b). The Standing Committee agrees; particularly since the reversal of the presumption in Current Colorado Rule 3.7 is unlikely to change the outcome in any case, the interest of uniformity should prevail.

The Standing Committee recommends adoption of New Model Rule 3.7 and its Comment in their entirety.

Rule 3.8 - Special Responsibilities of a Prosecutor

Current Colorado Rule 3.8 follows the Prior Model Rule except that the Court did not adopt section (g) of the Prior Model Rule, which generally prohibited a prosecutor from making extrajudicial statements that are substantially likely to heighten public condemnation of the accused. The Comment to the Current Colorado Rule omits several paragraphs from the Prior Model Rule Comment.

The changes made in New Model Rule 3.8 are of style, not substance. Paragraph [2] and new Paragraph [6] of the Comment to the New Model Rule provide additional explication to prosecutors.

The Standing Committee recommends adoption of New Model Rule 3.8 and its Comment in their entirety.

Rule 3.9 - Advocate in Nonadjudicative Proceedings

Current Colorado Rule 3.9 is identical to the Prior Model Rule. The Comment to the Current Colorado Rule includes the entire Comment to the Prior Model Rule, plus a Colorado-specific paragraph drawn from the former Code that further explains a lawyer's obligations when appearing before administrative or legislative bodies.

New Model Rule 3.9 did not change dramatically. Nevertheless, both the Ad Hoc Committee and the Standing Committee were troubled by certain language that appears in the Current Colorado, Prior Model, and New Model Rules. Those rules incorporate by reference into the context of nonadjudicative proceedings, rules that by their express terms apply only to adjudicative proceedings. The Ad Hoc Committee recommended, and the Standing Committee supports, revisions to New Model Rule 3.9 that largely correct the structural problem. The principal substantive change is to delete the requirement that a lawyer participating in a nonadjudicative proceeding disclose directly adverse and controlling authority, which Rule 3.3(a)(2) requires in an adjudicative proceeding. Aside from the fact that it is not clear what "controlling authority" means in the context of a legislative, rule-making, or other nonadjudicative setting, the requirement makes little sense in such a proceeding. The Standing Committee also supports revisions to Paragraph

[1] of the New Model Rule Comment, to make it consistent with the proposed changes to the text of the rule.

The Standing Committee recommends adoption of New Model Rule 3.9 and its Comment, as amended by the Ad Hoc Committee.

Rule 4.1 - Truthfulness in Statements to Others

Current Colorado Rule 4.1 differs from the Prior Model Rule. When the Court enacted the Colorado Rules in 1992, it accepted the Barnhill Committee's recommendation that *all* false or misleading statements, not only *materially* false or misleading statements, be prohibited. (However, the Court took a different approach with respect to omissions (as opposed to affirmative statements); Current Colorado Rule 4.1(b), like the Prior Model Rule, prohibits a lawyer from knowingly failing to disclose "a *material* fact" when disclosure is necessary to avoid assisting a client's criminal or fraudulent act. (Emphasis added.)) The Comment to Current Colorado Rule 4.1 tracks the language of the Prior Model Rule Comment, except that it omits the word "material" before "fact" when discussing misrepresentations prohibited by the rule.

New Model Rule 4.1 is identical to the Prior Model Rule and continues to proscribe only material false statements of fact or law. The ABA revised the Comment to address partially true but misleading statements or omissions and steps a lawyer should take to avoid assisting in a client's crime or fraud.

A majority of the Ad Hoc Committee recommended deletion of the materiality requirement contained in New Model Rule 4.1(a), so as to conform the Proposed Colorado Rule to the policy decision that the Court made in 1992. The discussion in the Standing Committee tracked the similar discussion regarding the materiality requirement in Proposed Rule 3.3, described *supra* at 40, which the Committee believes should be retained. The Standing Committee recommends consistent treatment on this issue and, therefore, disagrees with the Ad Hoc Committee's recommendation to delete the materiality requirement contained in New Model Rule 4.1.[6]

The Ad Hoc Committee also recommended insertion of the words "or misleading" into New Model Rule 4.1(a), to address statements that are not outright false but are materially misleading. Current Colorado Rule 4.1 contains the "or misleading" language. After consideration, the Standing Committee rejected this recommendation as unnecessary. The Comment to New Model Rule 4.1 makes clear that in some circumstances a misleading statement may constitute a "false statement."

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[6] It could be argued that it is rational to have a materiality requirement in Rule 4.1 but not in Rule 3.3, because a lawyer's duty to a tribunal (the Rule 3.3 situation) is greater than the lawyer's duty to a third party. However, the Standing Committee rejected that proposition.

The Standing Committee does recommend minor changes to the New Model Rule Comment. While the text of New Model Rule 4.1(a) speaks of "false statements of material fact or law," the heading before Paragraph [1] is titled "Misrepresentations." Similarly, the text of Paragraph [1] uses the word "misrepresentations" rather than "false statements." The Standing Committee believes that it is better practice for the text of the rules and the comments to use the same terms. These proposed changes do not change the substance of the Rule or Comment.

The Standing Committee recommends adoption of New Model Rule 4.1 and its Comment, with the minor, non-substantive changes to the Comment discussed above.

Rule 4.2 - Communication with Persons Represented by Counsel

Current Colorado Rule 4.2 is identical to the Prior Model Rule, except that it prohibits ex parte communication with a represented "party" while the Prior Model Rule (as the result of an amendment made after the Colorado Supreme Court enacted the Current Colorado Rules in 1992) prohibits such a communication with a represented "person." However, the Comment to Current Colorado Rule 4.2 makes clear that the rule "covers any person, whether or not a party to a formal proceeding, who is represented by counsel." There are a number of other differences between the Comments to the Current Colorado and Prior Model

Rules. The Colorado Comment explains that a pro se party to whom limited representation has been provided under C.R.C.P. 11(b) or 311(b), is considered to be unrepresented for purposes of Current Colorado Rule 4.2.

The only change in the text of New Model Rule 4.2 is to identify ex parte communications that are authorized by court order as permissible. The Comment is improved by the addition of new or expanded Paragraphs [3] (explaining that the Rule applies even if the represented person initiates or consents to the communication), [4] (explaining that the Rule does not apply to a lawyer from whom the client seeks a second opinion, and does not stop a lawyer from advising a client regarding communications the client is legally entitled to make), [5] (advising that a government lawyer in a criminal matter must comply with the Rule even if the ex parte communication does not violate the accused's constitutional rights), [6] (noting that it is appropriate to seek a court order permitting a desired communication), and [7] (confirming that the limits on ex parte communications with employees of a represented organization does not extend to former employees – a conclusion reached earlier by the CBA Ethics Committee in its Formal Opinion 69).

The Standing Committee recommends adoption of New Model Rule 4.2. The Committee also recommends adoption of the New Model Rule Comment, with two changes. *First*, the Committee recommends an addition to Paragraph [4] of

the Comment, to address a practical problem that has confronted Colorado attorneys under the Current Colorado Rule. Contracts frequently contain mandatory notice provisions that invariably require notice to be given to the parties to the contract. As a result, the issue often arises as to whether a lawyer giving notice on behalf of a client may send the notice directly to the opposing party, notwithstanding the strictures of Current Colorado Rule 4.2. The Standing Committee recommends that Paragraph [4] of the Comment be revised to include the following underscored language, to address this issue:

> [4] This Rule does not prohibit communications with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communications with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person, <u>such as a contractually-based right or obligation to give notice,</u> is permitted to do so.

Second, the Committee recommends retention of the language in the Current Colorado Rule Comment, concerning limitated representation under C.R.C.P. 11(b) or 311(b), in a new Paragraph [9A].

The Standing Committee recommends adoption of New Model Rule 4.2 and its Comment with an addition to Paragraph [4] of the Comment to permit the giving of notice in accordance with contractually-based notice provisions, and a new Paragraph [9A] to clarify that a pro se party receiving limited representation under C.R.C.P. 11(b) or 311(b) is considered to be unrepresented for purposes of this rule.

Rule 4.3 - Dealing with Unrepresented Persons

Current Colorado Rule 4.3 is different from Prior Model Rule 4.3 in two respects. *First*, the Current Colorado Rule requires the lawyer to state that the lawyer is representing a client. *Second*, it explicitly states that the lawyer shall not give legal advice to the unrepresented person except advice to secure counsel. The Comment to the Colorado Rule includes all of the commentary from the Prior Model Rule, but adds language to confirm that pro se parties to whom the lawyer has provided limited representation in accordance with C.R.C.P. 11(b) and 311(b) are considered unrepresented persons for purposes of Current Colorado Rule 4.3.

New Model Rule 4.3 introduces a new concept by permitting a lawyer to give legal advice to an unrepresented person so long as the lawyer does not know

(and has no reason to know) of a conflict between the interests of the lawyer's client and the unrepresented person. New Paragraph [2] of the Comment explains the reasons for this expansion of the lawyer's permissible communications with unrepresented persons:

> [2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel.

Several Standing Committee members noted that in multiple party cases or matters, some persons are often not represented by counsel. A transaction can often be facilitated, without substantial risk to either the represented or unrepresented person, if the lawyer for a represented person may communicate frankly with an unrepresented person. By contrast, if the lawyer in that situation must essentially stand mute, the represented client cannot receive full legal representation by the lawyer.

Other members observed that substantial consequences could arise from the giving of legal advice to an unrepresented person – which, depending upon the specific circumstances, could create an attorney-client relationship with the previously unrepresented person. In that event, the lawyer would have the full panoply of ethical obligations to the new client, including a duty of non-disclosure

under Rule 1.6. Such a scenario raises a host of obvious ethics and professional liability issues for the lawyer giving the advice. These considerations led the Ad Hoc Committee to reject this portion of New Model Rule 4.3. A minority of the Standing Committee has similar concerns and would exclude from the Proposed Colorado Rule the New Model Rule language that permits a lawyer, under limited circumstances, to give legal advice to an unrepresented person (beyond advice to secure counsel). However, the majority of the Standing Committee believes that the potential benefits of the New Model Rule language outweigh these potential problems. The Standing Committee recommends retention of the language in the Current Colorado Rule Comment, concerning limited representation under C.R.C.P. 11(b) or 311(b), in a new Paragraph [2A].

The Standing Committee recommends adoption of New Model Rule 4.3 and its Comment with the inclusion of new Paragraph [2A] in the Comment, to clarify that a pro se party receiving limited representation under C.R.C.P. 11(b) or 311(b) is considered to be unrepresented for purposes of this rule.

Rule 4.4 - Respect for Rights of Third Persons.

Current Colorado Rule 4.4 and its Comment are identical to the Prior Model Rule and Comment. New Model Rule 4.4(b) and associated new Paragraphs [2] and [3] of its Comment wade into one of the more vexing problems facing lawyers and the courts. Modern technologies, particularly email, facilitate both the

communication of information and the erroneous transmissions of confidential information to those who should not have access to that information. Inevitably, the question arises as to the lawyer's ethical and legal duties upon receipt of information that was transmitted by mistake to the lawyer.[7]

New Model Rule 4.4(b) addresses this issue by requiring prompt notice to the sender if a lawyer receives a document, which the lawyer knows or reasonably should know was inadvertently sent, relating to the representation of the lawyer's client. The Standing Committee supports imposition of this duty, which is relatively non-controversial. What *is* controversial is whether the lawyer-recipient has additional duties beyond notice. New Model Rule 4.4 imposes no further ethical duties. However, a majority of the Standing Committee believes that the ABA has not addressed this problem satisfactorily.

Many state bar ethics committees and courts have looked at this issue. The CBA Ethics Committee opined in its Formal Opinion 108 that when a lawyer actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents, including when the sender notifies the recipient of the erroneous transmission, Current Colorado Rule 4.4 requires the

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[7] In large-scale litigation matters, which increasingly have protective orders that establish procedures and remedies for the inadvertent production of confidential information, the provisions of those protective orders should control and govern the lawyers' duties with respect to the inadvertently-produced information.

lawyer to not examine the documents and to abide by the sending lawyer's instructions as to their disposition. Although CBA Ethics Committee opinions are not binding upon the Court, the Standing Committee believes that the Ethics Committee's resolution of this issue is correct and that the ethical obligation articulated in Formal Opinion 108 should be stated in Rule 4.4. Otherwise, the Rules will be incomplete at best or misleading at worst. Accordingly, the Standing Committee recommends the New Model Rule (including new section (b) setting forth the lawyer's duty of prompt notice upon receipt of an inadvertently sent document), and a new section (c) to read as follows:

> (c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender's instructions as to its disposition.

The Standing Committee also recommends revisions to Paragraphs [2] and [3] of the Comment to New Model Rule 4.4, to reflect the addition of section (c) to the Proposed Colorado Rule.

The Ad Hoc Committee recommended the adoption of New Model Rule 4.4 and its Comment with the exception of Paragraph [3] of the Comment. The Standing Committee disagrees with the deletion of Paragraph [3], which provides a safe-harbor of sorts to lawyers who erroneously receive confidential information.

The Comment provides that in circumstances where neither ethics rules (including proposed section (c)) nor other law compel the lawyer to return the information unread, the lawyer nevertheless has professional discretion to return the information and, by doing so, does not violate ethical obligations. The Standing Committee believes that the recognition of such professional discretion is salutary, regardless of whether the rule is modified as proposed and summarized above.

The Standing Committee recommends adoption of New Model Rule 4.4 and its Comment, with (1) the addition to the Rule of a new section (c) to the Rule, setting forth the lawyer's ethical duty when the lawyer, before reviewing the document, receives actual notice from the sender that the documents were inadvertently sent, (2) modification of Paragraph [2] of the Comment to conform it to the duties imposed by proposed section (c), and (3) retention of Paragraph [3] of the Comment (with minor changes to reflect the requirements of section (c)).

Rule 4.5 - Threatening Prosecution

Current Colorado Rule 4.5 is derived from the former Code and has no counterpart in the Prior or New Model Rules. The Standing Committee believes that this rule is necessary to prevent the misuse of the criminal, administrative, and disciplinary process in civil matters. In 1997, the Court revised the rule to create a safe harbor when a lawyer advises another lawyer that the other lawyer's conduct

may violate criminal, administrative or disciplinary rules or statutes, and that amendment appears to have worked well in practice.

The Ad Hoc Committee recommended replacement of the word "solely" with "principally" in the sentence that, reads in relevant part: ". . . [N]or shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter." The rationale for the Ad Hoc Committee's recommendation was that this provision of the Current Colorado Rule is, as a practical matter, unenforceable because it is very difficult to establish that a lawyer participated in filing criminal, etc. charges "solely" to obtain an advantage in a civil matter. The Standing Committee rejected the recommendation of the Ad Hoc Committee, after determining that the rule, as written, has appeared to work well and concluding that the Current Colorado Rule contains the appropriate, restrictive standard for the imposition of discipline.

The stylistic amendment is removal of the superfluous words "to present" after "shall not threaten."

The Standing Committee recommends retention of Current Colorado Rule 4.5 and its Comment, with the non-substantive revision to section (a) discussed above.

Rule 5.1 - Responsibilities of Partners, Managers, and Supervisory Lawyers

Current Colorado and Prior Model Rules 5.1 are identical. In New Model Rule 5.1, the ABA broadened the scope of the class of lawyers having responsibility to ensure that a law firm implements measures to ensure lawyers' compliance with the Rules. In addition to a "partner" (a defined term in New Model Rule 1.0), under New Model Rule 5.1, "a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm" also bears this responsibility and may be responsible for another lawyer's violation of the Rules. The ABA made sundry changes to the Comment to New Model Rule 5.1, partly to correspond to the changes in the New Model Rule regarding the categories of lawyers having responsibilities under the Rules, and also to clarify the types of policies that a lawyer with managerial authority must make reasonable efforts to adopt.

The Standing Committee recommends the adoption of New Model Rule 5.1 and its Comment in their entirety.

Rule 5.2 - Responsibilities of a Subordinate Lawyer

Current Colorado Rule 5.2 and its Comment are identical to the Prior Model Rule and Comment. There are no changes in either New Model Rule 5.2 or its Comment.

The Standing Committee recommends the adoption of New Model Rule 5.2 and its Comment in their entirety.

Rule 5.3 - Responsibilities Regarding Nonlawyer Assistants

Current Colorado Rule 5.3 and its Comment are identical to the Prior Model Rule and Comment. In New Model Rule 5.3, the ABA broadened the scope of the class of lawyers having responsibility to ensure that a law firm implements measures to ensure nonlawyer assistants' compliance with the Rules. As in New Model Rule 5.1, in addition to a "partner," under New Model Rule 5.3, "a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm" also bears this responsibility and may be responsible for a nonlawyer assistant's violation of the Rules. New Paragraph [2] of the Comment summarizes lawyers' responsibilities under the New Model Rule. The ABA also revised preexisting Paragraph [1] to clarify that "[a] lawyer must [not "should"] give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment . . . ."

The Standing Committee recommends the adoption of New Model Rule 5.3 and its Comment in their entirety.

Rule 5.4 - Professional Independence of a Lawyer

Current Colorado Rule 5.4 differs from the Prior Model Rule principally by (1) permitting a lawyer who completes unfinished legal business of a deceased

lawyer to pay to the deceased lawyer's estate that portion of the total compensation received that fairly represents the services rendered by the deceased lawyer, and (2) requiring compliance with C.R.C.P. 265 when a lawyer practices in the form of a professional corporation, professional association, or limited liability company. The Current Colorado Comment covers a number of subjects not addressed in the Prior Model Rule Comment.

New Model Rule 5.4 provides a new exception to the general prohibition against sharing fees with a nonlawyer: "[A] lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter." The ABA also added a new paragraph to the Comment to summarize the portion of the Rule that precludes a lawyer from allowing a third party to direct or regulate the lawyer's professional judgment in rendering services to another.

The Standing Committee recommends making only one change to Current Colorado Rule 5.4, by adopting the additional exception in New Model Rule 5.4 that would allow a lawyer to share court-awarded fees with a nonprofit organization, as quoted above. The Standing Committee recommends no changes to the Current Colorado Comment.

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

Current Colorado Rule 5.5 and its Comment are identical to the Prior Model Rule and Comment. The rule prohibits Colorado-admitted lawyers from engaging in the unauthorized practice of law in other jurisdictions and from assisting a person who is not a member of the Colorado bar from conduct that constitutes the unauthorized practice of law.

New Model Rule 5.5 includes extensive additions to the Prior Model Rule and its Comment, principally to address the subject of the multijurisdictional practice of law, specifically, to what extent a lawyer admitted only in one or more other United States jurisdictions may provide legal services in the adopting state. The Standing Committee recommends against adopting the ABA's extensive new provisions because C.R.C.P. 220 through 222 already address the scope of a non-Colorado-admitted lawyer's ability to practice in Colorado; instead, the Committee recommends the revision of New Model Rule 5.5(a)(1) to clarify that a lawyer may not practice law in Colorado "without a license to practice law issued by the supreme court of the state of Colorado unless specifically authorized by C.R.C.P. 220, C.R.C.P. 221, C.R.C.P. 221.1, C.R.C.P. 222 or federal or tribal law."

At the request of the Attorney Regulation Committee, while reviewing Rule 5.5, the Standing Committee considered whether and, if yes, to what extent a lawyer may employ and utilize the services of disbarred and suspended lawyers,

and lawyers on disability inactive status (collectively, "disbarred/suspended lawyers"). Although there is no Model Rule from which to draw guidance, the Standing Committee considered rules adopted by other states.

There was an ongoing difference in views as to whether clients need to be protected from contact with and actions by disbarred/suspended lawyers. The OARC is concerned that disbarred/suspended lawyers frequently continue to run their practices as if they had not been disciplined, even when they assume the technical title of legal assistant during their disbarment/suspension; precluding them from direct client contact, or requiring an admitted attorney to advise the client of the disbarred/suspended attorney's disciplinary status, would address this concern. Some Standing Committee members share this concern, while others believe that the OARC could address the problem through the terms of the discipline imposed in specific cases. Some members believe it is unfair to brand every disbarred/suspended attorney who continues to work in a legal setting with the "Scarlet D" of a discipline disclosure to every client with whom the lawyer has contact; others predicted that the proposed provisions would make lawyers less likely to hire disbarred/suspended attorneys as paralegals.

The OARC also questioned whether disbarred/suspended lawyers should be permitted to handle client funds, an administrative task that does not constitute the practice of law but nevertheless presents risks to clients; there was general

agreement that this is an appropriate restriction on the activities of disbarred/suspended attorneys.

After extensive debate, the Standing Committee recommends revision of section (a) of Current Colorado Rule 5.5 to require authorization to practice law under C.R.C.P. 220 through 222 or federal or tribal law, and to require a lawyer to remove from a firm name the name of a disbarred or suspended lawyer. The Committee also recommends the addition of new sections (b) through (d), which state the following restrictions on disbarred/suspended lawyers: (1) An employing lawyer may not permit or enable a disbarred/suspended lawyer to receive, disburse or otherwise handle client funds, render legal advice to clients, appear on behalf of a client in any hearing, proceeding, deposition or other discovery matter, negotiate or transact any matter for a client with third parties, or otherwise engage in the practice of law; (2) an employing lawyer may allow a disbarred/suspended lawyer to perform research, drafting, and clerical activities, including limited communications with clients and accompanying an admitted lawyer to a deposition or other discovery matter to provide assistance to the admitted lawyer; and (3) before a disbarred/suspended lawyer may have client contact, the employing lawyer must give the client written notice that the disbarred/suspended lawyer may not practice law, and the employing lawyer must keep that notice for two years following the completion of the work. The Committee recommends commentary

geared to the existing and new provisions of the Proposed Colorado Rule, rather than the vastly different Comment to the distinct New Model Rule.

The Standing Committee recommends against adoption of New Model Rule 5.5 or its Comment. Instead, the Committee recommends revision of the Current Colorado Rule and Comment as summarized above.

Rule 5.6 - Restrictions on Right to Practice

Current Colorado Rule 5.6 largely tracks the language of the Prior Model Rule, but clarifies in the Rule and Comment that a lawyer may agree to restrictions on the lawyer's right to practice consistent with Rule 1.17 (permitting the sale of a lawyer's practice). The ABA made only minor changes in the New Model Rule and Comment

The Standing Committee recommends adoption of the New Model Rule and Comment in their entirety.

Rule 5.7 - Responsibilities Regarding Law-Related Services

Model Rule 5.7 addresses when the Rules of Professional Conduct are applicable to lawyers who engage in law-related activities. It does not purport to validate or authorize any law-related services, but defines when the ethics rules apply to those activities. When the Court approved the Colorado Rules of Professional Conduct in 1992, there was no Model Rule 5.7 because the ABA had removed Rule 5.7 from the Model Rules before that date. After the Court adopted

the Colorado Rules, the ABA readopted a new version of Model Rule 5.7. New Model Rule reflects only minor changes from Prior Model Rule 5.7 and its Comment.

The Standing Committee discussed at length the substantial burdens the rule places on a lawyer to determine whether particular activities are law-related services and, if they are, to take steps to avoid the application of the ethics rules to those activities. Some members expressed particular concern about the impact of the rule on lawyers engaged in the provision of mediation services. Ultimately, a majority of the Standing Committee concluded that New Model Rule 5.7 would be protective of the public.

The Standing Committee recommends adoption of New Model Rule 5.7 and its Comment in their entirety.

Rule 6.1 - Voluntary Pro Bono Publico Service[8]

There are limited differences between Current Colorado Rule 6.1 and its Comment and the Prior Model Rule and Comment. New Model Rule 6.1 adds the following first sentence: "Every lawyer has a professional responsibility to provide legal services to those unable to pay." The New Model Rule Comment includes a new Paragraph [11] that urges law firms to encourage all lawyers in the firm to provide pro bono legal services.

The Standing Committee recommends retention of Current Colorado Rule 6.1, with two substantive changes: (1) Addition of the new sentence in the New Model Rule, quoted above ("Every lawyer has a professional responsibility . . ."); and (2) inclusion in the Proposed Colorado Rule of language in the Comment to Prior and New Model Rule 6.1, regarding the ability of government and public sector lawyers or judges to satisfy their pro bono responsibilities other than through the provision of legal services to persons of limited means, where

[8] On November 23, 2005, the Court amended the Comment to Current Colorado Rule 6.1 to add a "Recommended Model Pro Bono Policy for Colorado Attorneys and Law Firms" ("Pro Bono Policy"). The Standing Committee was not aware of the proposal to add the Pro Bono Policy to the Rule 6.1 Comment, and the Committee finally approved its Report and Recommendations before learning of the Court's action. Accordingly, the Standing Committee has not reviewed the substance of the amended Comment. However, based on the length and content of the Recommended Model Pro Bono Policy, if the Court readopts the recently-amended Comment to Rule 6.1 in connection with its adoption of other changes to the Current Colorado Rules, the Court should consider moving the Recommended Model Pro Bono Policy from the Comment to Rule 6.1 to an appendix to the Rules.

constitutional, statutory or regulatory restrictions prohibit those lawyers and judges from undertaking legal representation of clients. The Standing Committee does not recommend adoption of new Paragraph [11] of the Comment to New Model Rule 6.1, but it recommends a number of other, relatively minor, changes to the Comment, so as to leave largely intact the language of the current Colorado Comment, which underwent extensive revisions in 1999.

Rule 6.2 - Accepting Appointments

Current Colorado Rule 6.2 and its Comment are identical to the Prior Model Rule and Comment with the following exceptions: (1) To justify seeking to avoid a court appointment, the Current Colorado Rule requires that a representation result in both an "unreasonable and oppressive burden on the lawyer" whereas Prior Model Rule 6.2 required that the representation result in "an unreasonable financial burden"; (2) the Colorado comment, but not the Prior Model Rule Comment, includes language from the former Code addressing what are *not* compelling reasons for turning down an appointment; and (3) the Colorado Comment omits language in the Prior Model Rule Comment that states that an appointed lawyer's duties to the client are the same as those of retained counsel. The ABA made no changes in New Model Rule 6.2.

Building on Colorado's earlier departure from the exact language of the Model Rule, the Standing Committee recommends adoption of New Model Rule 6.2

with only one exception: Substitution of the phrase "unreasonable financial or otherwise oppressive burden" for the Model Rule's phrase ""unreasonable financial burden." The Standing Committee recommends adoption of the New Model Rule comment in full.

Rule 6.3 - Membership in Legal Services Organization

Current Colorado Rule 6.3 differs from Prior Model Rule 6.3 by including the words "a lawyer provided by" in the phrase that reads, in subparagraph (b) of the Colorado rule, "representation of a client of a lawyer provided by the organization." The current Colorado Comment and Prior Model Rule Comment are identical. New Model Rule 6.3 and its Comment are unchanged from the Prior Model Rule and its Comment.

The Standing Committee recommends two changes to New Model Rule 6.3 and its Comment: (1) Consistent with the Current Colorado Rule, including the words "a lawyer provided by" in the phrase that reads, in section (b) of the Colorado Rule, "representation of a client of a lawyer provided by the organization"; and (2) adding "a director" to the Comment's description of the categories of positions that a lawyer may hold in a legal services organization without having a client-lawyer relationship with persons served by the organization.

Rule 6.4 - Law Reform Activities Affecting Client Interests

The only difference between Current Colorado Rule 6.4 and the Prior Model Rule is that the Current Colorado Rule imposes disclosure duties when a lawyer "know or reasonably should know that the interests of a client may be materially benefited by a decision in which the lawyer participates," while the Prior Model Rule requires actual knowledge and does not include the "reasonably should know" language. The Comment to the Current Colorado and Prior Model Rules are the same. The ABA made no change to the New Model Rule or Comment. The Standing Committee sees no reason to continue to depart from the Model Rule by imposing disclosure duties when a lawyer "reasonably should know that the interests of a client may be materially benefited by a decision in which the lawyer participates"; if a lawyer is not in fact aware of the possibility of material benefit to a client, then that possibility cannot improperly influence the lawyer in formulating a position. However, the Standing Committee recommends several minor clarifying and grammatical changes in the New Model Rule and Comment.

The Standing Committee recommends the adoption of New Model Rule 6.4 and its Comment, with the exception of several non-substantive changes that clarify the intention of the Rule and correct the grammar in the Comment.

Rule 6.5 - Nonprofit and Court-Annexed Limited Legal Services Programs

Model Rule 6.5 is new. According to the Model Rules' Reporter's Explanation of Changes, the ABA Ethics 2000 Commission recommended the rule "in response to the Commission's concern that a strict application of the conflict-of-interest rules may be deterring lawyers from serving as volunteers in programs in which clients are provided short-term limited legal services under the auspices of a nonprofit organization or a court-annexed program," such as "the legal-advice hotline or pro se clinic, the purpose of which is to provide short-term limited legal assistance to persons of limited means who otherwise would go unrepresented." The legal services contemplated by this rule are distinct from the limited representation permitted under C.R.C.P. 11(b) and C.R.C.P. 311(b).

The Standing Committee recommends the adoption of New Model Rule 6.5 and its Comment in their entirety.

Rule 7.1 - Communications Concerning a Lawyer's Services

Colorado Rule 7.1, using identical language to that used in Prior Model Rule 7.1, prohibits a lawyer from making a false or misleading communication about the lawyer or the lawyer's services, and defines a communication as false or misleading if it (1) "contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading," (2) "is likely to create an unjustified expectation about results the

lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law," or (3) "compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated." The Colorado Rule – but not the Prior Model Rule – contains a number of additional provisions that the Court adopted in 1997, relating to disclosures required in communications by "non-advertising lawyers"; permitted and prohibited forms of mail delivery of unsolicited communications; in communications that state or imply that the client does not have to pay a fee if there is no recovery, disclosure of the client's responsibility for the payment of costs; lawyer responsibility for communications made by employees or agents on behalf of the lawyer; and the interplay of Rule 7.1 with the requirements of Rule 1.17. The Colorado Comment is entirely different from the Comment to the Prior Model Rule.

New Model Rule 7.1 eliminates definitions (2) and (3), quoted above, of false or misleading communications. The ABA added language to the Comment explaining when communications are false or misleading, including in the circumstances that were previously described in the Rule by definitions (2) and (3). It also added Comment language explaining that the rule prohibits truthful but misleading statements, and referring the reader to New Model Rule 8.4(e), which prohibits a lawyer from stating or implying an ability to influence improperly a

governmental agency or official or to achieve results by unlawful or unethical means.

In light of the unique provisions of Colorado Rule 7.1 and its Comment, there are compelling reasons to retain the Colorado Rule and Comment. However, the portion of Current Colorado Rule 7.1(a)(2) that prohibits a communication that "states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law," is now addressed in New Model Rule 8.4, which applies to all statements made by a lawyer – not merely those related to the marketing of the lawyer's services—and it is not necessary to repeat that prohibition in Proposed Colorado Rule 7.1. In addition, Current Colorado Rule 7.3(d)(2) prohibits communications that "resemble legal pleadings or other documents" when made by a lawyer engaged in targeted solicitation of work; the Standing Committee concludes that all marketing communications concerning a lawyer's services should be subject to the same proscription and, therefore, that the prohibition should be moved to Rule 7.1(c).

The Standing Committee recommends retention of Current Colorado Rule 7.1 and the distinct Comment to the Colorado Rule. However, the Committee recommends two changes to the Rule as summarized above.

Rule 7.2 - Advertising

Current Colorado Rule 7.2 and the Prior Model Rule are substantially similar, though not identical. The Comments to the Current Colorado and Prior Model Rule are identical except that the Colorado Comment omits Paragraph [2], which states specific categories of information that a lawyer may disseminate in an advertisement. New Model Rule 7.2 makes the following changes: (1) Deletion of the listing of the types of public media covered by the rule; (2) inclusion of "electronic communications" within its purview; (3) omission of the requirement that a lawyer maintain copies of advertising for a defined period of time; (4) revision of the description of legal service plans and qualified lawyer referral services to whom a lawyer may pay fees; and (5) addition of a provision permitting certain non-exclusive reciprocal referral arrangements. Consistent with these changes in the rule itself, the ABA extensively revised the Comment to New Model Rule 7.2.

The Standing Committee recommends the adoption of New Model Rule 7.2 and its Comment subject to several relatively minor changes to conform to the Current Colorado Rule.

Rule 7.3 - Direct Contact with Prospective Clients

Current Colorado Rule 7.3, like the Prior Model Rule, (1) prohibits direct solicitation from potential clients with whom the lawyer has no family or prior

professional relationship, (2) prohibits direct solicitation even where such a family or professional relationship exists, if the prospective client has made known to the lawyer a desire not to be solicited or if the solicitation involves coercion, duress or harassment, and (3) requires identification of covered communications as advertising materials. There are two primary differences between the rules. *First*, Current Colorado Rule 7.3(c), which the Court added in 1997, prohibits direct solicitations for personal injury or wrongful death work for thirty days after the date of the underlying accident, unless the lawyer has a family or prior professional relationship with the solicited party, and sets forth specific limitations on such communications even after expiration of the thirty-day "cooling off" period. *Second*, Prior Model Rule 7.3(d) stated an exception from the rule's general prohibition against live or telephone solicitations, to permit a lawyer to solicit memberships in prepaid legal services programs. The Comments to the Current Colorado and Prior Model Rules are virtually identical, except that the Colorado Comment omits Paragraph [8] of the Prior Model Rule Comment, which addresses Prior Model Rule 7.3(d) (which does not appear in the Current Colorado Rule).

New Model Rule 7.3 differs from the Prior Model Rule in three respects: (1) Addition of "real-time electronic contact" to "in-person" and "live telephone" contact in section (a); (2) addition of "electronic communications" to "written" and "recorded" communications in sections (b) and (c); and (3) expansion of the

categories of persons from whom a lawyer may solicit work in person or by telephone in section (a)(2) to include lawyers and persons who have "a family, close personal, or prior professional relationship with the lawyer."

The Standing Committee believes it is important to retain Current Colorado Rule 7.3(c)(1) and (2), regarding solicitation in personal injury and wrongful death matters. In addition, the Standing Committee believes that the Proposed Model Rule should make applicable to all solicitations the various requirements and prohibitions that appear in Current Colorado Rule 7.3(c)(4) and (5) and that currently apply only to solicitations in personal injury and wrongful death cases; specifically, no solicitation should reveal on the envelope the nature of the prospective client's legal problem, all solicitations should include the words "Advertising Material" on the outside envelope and at the beginning and ending of any recorded or electronic communication, and a copy of all solicitations should be kept for four years. However, it is not necessary to retain the prohibition (in Current Colorado Rule 7.3(c)(3)) on communications made to resemble legal pleadings or other legal documents, because the Standing Committee recommends including that prohibition in Rule 7.1, where it will apply to all communications regarding a lawyer's services – not merely to targeted solicitations.

The Standing Committee recommends adoption of New Model Rule 7.3 and its Comment, subject to the changes described above and several minor stylistic changes to avoid confusion.

Rule 7.4 - Communications of Fields of Practice and Specialization

Current Colorado Rule 7.4, like the Prior Model Rule, permits a lawyer to communicate the fact that the lawyer does or does not practice in particular fields of law, that the lawyer has been admitted to engage in patent practice, and that the lawyer engages in admiralty practice. The Current Colorado Rule does not track the Prior Model Rule language concerning certification as a specialist but instead requires, in any advertisement in which a lawyer affirmatively claims to be certified in any area of the law, a disclosure that "Colorado does not certify attorneys as specialists in any field." Current Colorado Rule 7.4 also includes provisions not present in Prior Model Rule 7.4 related to permissible communication of specialist status in legal journals advertising the lawyer's availability as a consultant, and permissible communications regarding specialization in connection with a lawyer's purchase of a practice under Rule 1.17. The Comment to the Current Colorado Rule departs substantially from the Comment to the Prior Model Rule.

New Model Rule 7.4 specifies the organizations that a lawyer may communicate as having certified the lawyer as a specialist, and requires the

communication to clearly identify the certifying organization. The ABA also substantially revised the Comment. In the view of the Standing Committee, Colorado should retain the language used in (1) Current Colorado Rule 7.4(a), which makes clear that a lawyer may communicate the fact that he or she is a specialist in a particular field of law if the communication complies with Rule 7.1, and (2) Current Colorado Rule 7.4(f), which requires the disclosure that Colorado does not certify attorneys as specialists, as quoted above.

The Standing Committee recommends adoption of New Model Rule 7.4 and its Comment, with the modifications to the Rule described above.

Rule 7.5 - Firm Names and Letterheads

Current Colorado Rule 7.5, like the Prior Model Rule, (1) prohibits the use of a firm name or letterhead that violates Rule 7.1, (2) permits a firm with offices in multiple jurisdictions to use the same name in each jurisdiction, but requires identification of those lawyers not licensed in a particular jurisdiction, (3) prohibits the use of the name of a lawyer holding a public office in the name of a law firm during any substantial period in which the lawyer is not actively and regularly practicing with the firm, and (4) permits lawyers to state or imply that they practice in a partnership or other entity only when that is a fact. However, in sharp contrast to the Prior Model Rule, Current Colorado Rule 7.5 prohibits the use of trade names, yet expressly permits a firm to use the names of deceased or retired

members of the firm or of a predecessor firm. The Current Colorado Rule Comment departs significantly from the Prior Model Rule Comment.

The ABA made only minor changes in New Model Rule 7.5 and its Comment. Both the Ad Hoc Committee and the Standing Committee concluded that the ban on the use of trade names is both unfair and unwarranted. The prohibition is unfair because established firms that use the names of deceased or retired lawyers effectively practice under trade names, yet other firms are not permitted to do so. The prohibition is unwarranted because other rules – in particular, Rule 7.1 – will protect the public from misleading trade names.

The Standing Committee recommends adoption of New Model Rule 7.5 and its Comment in their entirety.

Rule 7.6 – Political Contributions to Obtain Legal Engagements or Appointments by Judges.

Prior Model Rule 7.6 had not yet been adopted by the ABA in 1993, when Colorado adopted the Rules of Professional Conduct. As a result, the Court did not adopt the Rule, which addresses political contributions to obtain government legal engagements or appointments by judges (often referred to as "pay to play" provisions). The New Model Rule and Comment are unchanged. The Standing Committee views New Model Rule 7.6 as salutary.

The Standing Committee recommends the adoption of New Model Rule and its Comment in their entirety.

Rule 8.1 - Bar Admission and Disciplinary Matters

Current Colorado Rule 8.1, though very similar to the Prior Model Rule, applies beyond bar admission matters to bar reinstatement matters, and permits a lawyer to make a good faith challenge to a demand for information from a bar admission or disciplinary authority. The Current Colorado and Prior Model Rule Comments are identical. The New Model Rule is identical to the Prior Model Rule. The Comment was amended only minimally, primarily to clarify that bar applicants and respondents in disciplinary cases must correct any prior misstatements made in those proceedings.

The Standing Committee supports retention of the references to "readmission" and "reinstatement" in the first paragraph of the Current Colorado Rule. The Committee also suggests that the reference to a lawyer's right to make a good faith challenge to a demand for information from a bar admission or disciplinary authority be moved from Current Colorado Rule 8.1(b) to Paragraph [2] of the Comment.

The Standing Committee recommends adoption of New Model Rule 8.1 and its Comment, subject to the modifications described above.

Rule 8.2 - Judicial and Legal Officials

Current Colorado Rule 8.2 and its Comment are virtually identical to the Prior Model Rule and Comment. The only difference is the reference in the

Colorado Rule to "retention in judicial office," in addition to "election or appointment to" such an office. The ABA made no changes to the Prior Model Rule or Comment.

The Standing Committee recommends adoption of the New Model Rule and its Comment, subject to the revision of Proposed Rule 8.2(a) to read: ". . . or of a candidate for election, appointment to or retention in judicial office."

Rule 8.3 - Reporting Professional Misconduct

Current Colorado Rule 8.3 is almost identical to the Prior Model Rule. The Comments to the two rules are identical. The New Model Rule changes Prior Model Rule 8.3(c) by deleting the phrase "to the extent such information would be confidential if it were communicated subject to the attorney-client privilege." The ABA made corresponding revisions to Paragraph [5] of the Comment to the New Model Rule. The effect of these changes is to broaden the category of information gained by a lawyer or judge while participating in a lawyers assistance program that is exempt from a duty to report.

The Standing Committee recommends adoption of New Model Rule 8.3(a) and (b), and the Comment, but it recommends retention of current Colorado Rule 8.3(c), which governs a lawyer's disclosure obligations with respect to information otherwise protected by Rule 1.6 or information gained while serving as a member of a Court-approved lawyer's peer assistance program, to the extent that such

information would be confidential if it were communicated subject to the attorney-client privilege.

Rule 8.4 - Misconduct

Current Colorado Rule 8.4 contains prohibitions on two categories of conduct that were not found in Prior Model Rule: (1) "[C]onduct which violates accepted standards of legal ethics" (Current Colorado Rule 8.4(g)); and (2) "any other conduct that adversely reflects on the lawyer's fitness to practice law" (Current Colorado Rule 8.4(h)). The Comments to the two rules are the same except that the Prior Model Rule Comment addresses the impropriety of manifesting bias or prejudice when such actions are prejudicial to the administration of justice; because Current Colorado Rule 1.2(e) independently prohibits such conduct, the Comment to Current Colorado Rule 8.4 omits that language. However, as discussed *supra* at 15, the Standing Committee recommends moving the text of Current Colorado Rule 1.2(f) to Proposed Colorado Rule 8.4(g), and therefore, it makes sense to include the ABA paragraph on bias and prejudice in the Rule 8.4 Comment.

The ABA added to New Model Rule 8.4(e) a prohibition on statements or implications that a lawyer can achieve results by means that violate the Rules. This ban had appeared in Prior Model Rule 7.1, but the ABA moved it to New Model Rule 8.4 to clarify that the prohibition is not limited to statements related to

the marketing of legal services. The only change in the Comment to the New Model Rule is to clarify that Rule 8.4(a) "does not prohibit a lawyer from advising a client concerning action the client is lawfully entitled to take." The Standing Committee supports these changes.

The Standing Committee supports removal of the prohibition on conduct that "violates accepted standards of legal ethics," which appears in Current Colorado Rule 8.4(g) but not in the Prior or New Model Rules. The quoted language is either superfluous (because the Rules prescribe the "standards of legal ethics") or, worse yet, too vague to be fairly enforceable.

The Standing Committee is not in favor of discarding the other non-uniform provision in Current Colorado Rule 8.4 – the prohibition in section (h) of conduct that "adversely reflects on the lawyer's fitness to practice law." After considerable discussion, the Committee agrees with the Ad Hoc Committee that the concept embodied in section (h) should remain in the Rules, but concludes that the current language is overbroad and provides unbridled and, hence, inappropriate discretion to the OARC. The Rules Subcommittee examined the reported cases where the Court or the Presiding Disciplinary Judge imposed discipline under section (h), and discerned that the gravamen of the offense in each of those cases was that the lawyer had engaged in conduct that intentionally and wrongfully harmed another person, usually (but not always) in connection with the lawyer's practice of law.

Based on this precedent, which the Standing Committee believes makes sense, the Committee recommends that section (h) be revised to read as follows: "It is professional misconduct for a lawyer to . . . Engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law."

The Standing Committee recommends adoption of New Model Rule 8.4 and its Comment, but would add new sections (g) and (h) to the Rule, to prohibit, respectively, conduct in the representation of a client that exhibits or is intended to appeal to impermissible bias, and conduct that directly, intentionally and wrongfully harms others and adversely reflects on the lawyer's fitness to practice law.

Rule 8.5 - Disciplinary Authority; Choice of Law

Consistent with the text of Model Rule 8.5 in 1993 (when the Court adopted the Rules), Current Colorado Rule 8.5 states only that "[a] lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere." The Prior Model Rule, as later amended, also includes a choice of law provision.

New Model Rule 8.5 adds the statement that a lawyer not admitted in the jurisdiction is subject to the disciplinary authority of the jurisdiction if the lawyer provides or offers to provide legal services there, restates one of the choice of law

principles, and adds the following safe harbor for lawyers admitted in multiple jurisdictions: "A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyers conduct will occur." The ABA also made extensive revisions to the Comment.

The Standing Committee recommends the adoption of New Model Rule 8.5 (except for the deletion of two headings in the Rule), the entire Comment to the New Model Rule, and one additional comment paragraph confirming that a lawyer who is not admitted in Colorado and does not comply with C.R.C.P. 220 through 222 may be prosecuted for the unauthorized practice of law.

Rule 9 - Title; How Known and Cited

The Standing Committee recommends no changes to this rule, which is unique to Colorado.