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

AGENDA

December 9, 2005, 9:00 a.m.
Court of Appeals Conference Room (2d Floor)

NOTE CHANGE IN NORMAL LOCATION AND LOOK FOR VALERIE DEWEY TO SEND ELEVATOR TO 2D FLOOR

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1. Approval of minutes – To be distributed separately before meeting

2. Administrative matters

   a. Select next meeting date

   b. Welcome to new members

3. Ethics 2000 Subcommittee Report on Draft Report to Supreme Court – Michael Berger

   a. Draft Report – See Report and Appendices A-F, transmitted by email to Committee Members

   b. Outstanding "housekeeping" details (please bring relevant materials distributed for prior meetings):

      i. Rule 1.0(f) – Review subcommittee draft of *Rader* comment language

      ii. Rule 1.5, Comment [3A]—Review comment language re: compliance with Rule 1.8(a) when rate or basis of fee is changed

      iii. Rule 1.6, Comment [5A]—Consider proposed minor language revision to change "contemplating to move" to "contemplating a move"

      iv. Rule 1.7, Comments 11 and 36 – Review potential comment language re: "cohabiting relationships," and to state that new rule is not intended to substantively change current rule

      v. Rule 1.13(e). Consider changing "paragraphs" to "paragraph"

vi. Rule 4.2 – Consider adding to comment last paragraph of existing comment to address limited representation of pro se parties

vii. Rule 4.4(e), – Review subcommittee proposal regarding inadvertent disclosure rule language in text and Comment

viii. Rule 7.3(c)– Determine whether cooling-off period should be 15 or 30 days

ix. Rule 8.2(a) – Consider adding "retention in judicial office" to rule

4. New Business

5. Adjournment (by noon)

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FILE NOTE

The "submitted minutes" of the prior meeting that were provided to Committee members in advance of the current meeting have been omitted from this file.

See the files containing the *approved* minutes of the Supreme Court Standing Committee on the Rules of Professional Conduct, which are available on the Supreme Court's website.

Draft – November 28, 2005

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

December ___, 2005

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 this writing, eighteen American jurisdictions have adopted some version of the New Model Rules. *See* www.abanet.org/cpr/jclr/ethics_2000_status_chart.pdf. Another thirty-two jurisdictions (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*

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[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.

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 conduit to the Court for recommendations regarding the Colorado Rules of Professional Conduct (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.

Early on 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,

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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.

Court decisions, or Colorado Bar Association ("CBA") Ethics Committee opinions – justified a departure from the 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 the 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. 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, in appropriate cases, 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 New Model Rule and Comment (as well as the move of the Terminology section to 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 comment 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 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. **[WE WILL REVIEW THIS NEW COMMENT LANGUAGE AT THE 12/9/05 MEETING.]**

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 representations 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 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 large

majority of the Standing Committee agrees with the codification of this exception, but a substantial minority believes that the exception should be broadened to include legal advice regarding *any* of the lawyer's duties to a client, including duties that arise from common law standards of care.

The majority 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 majority, that practice would be inconsistent with a client's reasonable expectations of confidentiality. The majority 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.

However, the Standing Committee does propose an addition 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. 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 the Rules of Professional Conduct. <u>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.</u>

The Standing Committee minority contends that this additional comment language does not address its concerns, and recommends that New Model Rule 1.6(b)(4) be revised to permit a lawyer to disclose protected information "to secure legal advice about the lawyer's compliance with these Rules and other legal duties." In the view of the minority, 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 minority's 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. One Committee member in the minority put it this way: "It appears that only lawyers cannot have lawyers." Appendix F to this report is a November 7, 2005 letter from Standing Committee member David C. Little that expands upon the minority position.

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. 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 of the 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. **[WE WILL DISCUSS TWO POTENTIAL COMMENT CHANGES AT THE 12/9/05 MEETING: (1) ADDING "COHABITING RELATIONSHIP" TO PARAGRAPH 11; AND (2) ADDING A STATEMENT THAT NO SUBSTANTIVE CHANGE IS INTENDED FROM THE CURRENT CRPC. WE'RE NOT SURE WHETHER THE COMMITTEE VOTED TO MAKE THOSE CHANGES OR NOT).]**

The Committee recommends adoption of New Model Rule 1.7 and its Comment in their entirety. **[SUBJECT TO CHANGE]**

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 1.10, 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 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 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

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[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 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.

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 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 substantively 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 (with the addition of the word "material" in Rule 3.3(a)(1)) and its Comment..

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, and its Comment.

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 Rule, 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."

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

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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.

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 extent 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 and its Comment with one 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, such as a contractually-based right or obligation to give notice, is permitted to do so.

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. **[AT THE 12/9/05 MEETING, WE WILL CONSIDER WHETHER TO SUGGEST ADDING A COMMENT PARAGRAPH TO ADDRESS UNBUNDLED LEGAL SERVICES, AS IS IN THE CURRENT COLORADO RULE; THE AD HOC COMMITTEE AND RULES SUBCOMMITTEE APPARENTLY MISSED THIS COLORADO-UNIQUE COMMENT LANGUAGE.]**

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 adoption of New Model Rule 4.3 and its Comment in their entirety.

Rule 4.4 - Respect for Rights of Third Persons.

[AT ITS SEPTEMBER 27, 2005 MEETING THE COMMITTEE DIRECTED THE SUBCOMMITTEE TO DRAFT A NEW VERSION OF RULE 4.4 THAT INCORPORATES THE SUBSTANCE OF CBA ETHICS COMMITTEE FORMAL OPINION 108. WE WILL REVIEW THE PROPOSED LANGUAGE AT THE 12/9/05 MEETING. THE FOLLOWING TEXT ASSUMES THAT THE COMMITTEE WILL APPROVE THE SUBCOMMITTEE'S NEW VERSION OF RULE 4.4]

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 relating to the representation of the lawyer's client, which the lawyer knows or reasonably should know was inadvertently sent. 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 believe 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 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

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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.

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 of a new section (c) 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 category 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

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 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 the 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 from 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 in Proposed Colorado Rule 7.3 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.

[AT 12/9/05 MEETING WE WILL BE CONFIRMING WHETHER COOLING-OFF PERIOD SHOULD BE 15 OR 30 DAYS]

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." **[WE ACTUALLY VOTED TO RECOMMEND THE ABA RULE *WITHOUT* THE WORDS "RETENTION IN JUDICIAL OFFICE," BUT BELIEVE THAT WAS AN OVERSIGHT; WITHOUT THE COLORADO-SPECIFIC LANGUAGE, THE RULE WILL BE INAPPLICABLE TO THE MAJORITY OF EVENTS RELATED TO JUDICIAL QUALIFICATIONS IN COLORADO. TO BE CONFIRMED AT 12/9/05 MEETING.]**

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. 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]conduct 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.

Final 11282005

APPENDIX A

COLORADO RULES OF PROFESSIONAL CONDUCT
as proposed by the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct – December ___, 2005

PREAMBLE AND SCOPE

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

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

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and

the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law. Zealousness does not, under any circumstances, justify conduct that is unprofessional, discourteous and uncivil toward any person involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship,

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not. These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of

relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constructive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a

collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, in appropriate cases, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

As proposed by the Committee 5/20/05

RULE 1.0: TERMINOLOGY

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

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

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g, Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

[7A] In considering the prior Colorado Rules of Professional Conduct, the Colorado Supreme Court has stated that "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 the Matter of Egbune*, 971 P.2d 1065, 1069 (Colo.1999). *See also People v. Rader*, 822 P.2d 950 (Colo. 1992); *People v. Small,* 962 P.2d 258, 260 (Colo. 1998). For purposes of applying the ABA Standards for Imposition of Sanctions, and in determining whether conduct is fraudulent, the Court will continue to apply the *Egbune* line of cases. However, where a rule of professional conduct specifically requires the mental state of "knowledge," recklessness will not be sufficient to establish a violation of that rule and to that extent, the *Egbune* line of cases will not be followed.

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

As proposed by the Committee 10/10/04

RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

As proposed by the Committee 10/10/04

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b).

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

RULE 1.3: DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

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

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

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

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

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

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

Comment

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

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

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

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt

response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

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

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Explanation of Fees and Expenses

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

RULE 1.5: FEES

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a).

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is otherwise prohibited. A contingent fee agreement shall meet all of the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure, "Rules Governing Contingent Fees."

(d) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the basis upon which the division of fees shall be made, and the client's agreement is confirmed in writing; and

(3) the total fee is reasonable.

(e) Referral fees are prohibited.

(f) Fees are not earned until the lawyer confers a benefit on the client or performs a legal service for the client. Advances of unearned fees are the property of the client and shall be deposited in the lawyer's trust account pursuant to Rule 1.15(f)(1) until earned. If advances of unearned fees are in the form of property

other than funds, then the lawyer shall hold such property separate from the lawyer's own property pursuant to Rule 1.15(a).

(g) Nonrefundable fees and nonrefundable retainers are prohibited. Any agreement that purports to restrict a client's right to terminate the representation, or that unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees, is prohibited.

Comment

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, the basis or rate of the fee must be promptly communicated in writing to the client. When the lawyer has regularly represented a client, they ordinarily will have reached an understanding concerning the basis or rate of the fee; but, when there has been a change from their previous understanding, the basis or rate of the fee should be promptly communicated in writing. All contingent fee arrangements must be in writing, regardless of whether the client-lawyer relationship is new or established. See C.R.C.P., Ch. 23.3, Rule 1. A written communication must disclose the basis or rate of the lawyer's fees, but it need not take the form of a formal engagement letter or agreement, and it need not be signed by the client. Moreover, it is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, to identify the factors that may be take into account in finally fixing the fee, or to furnish the client with a simple memorandum or the lawyer's customary fee schedule. When developments occur during the representation that render an earlier disclosure substantially inaccurate, a revised written disclosure should be provided to the client.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

[3A] For purposes of Paragraph (b), a material change to the basis or rate of the fee is one that is reasonably likely to increase the amount payable by the client or which otherwise makes more burdensome the original financial obligations of the client. When a change in the basis or rate of the fee or expenses is reasonably likely to benefit the client, such as a reduction in the hourly rate or a cap on the

fees or expenses that did not previously exist, the change is not material for these purposes and compliance with Rule 1.8(a) is not required.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Advances of Unearned Fees and Engagement Retainer Fees

[10] The analysis of when a lawyer may treat advances of unearned fees as property of the lawyer must begin with the principle that the lawyer must hold in trust all fees paid by the client until there is a basis on which to conclude that the lawyer has earned the fee; otherwise the funds must remain in the lawyer's trust account because they are not the lawyer's property.

[11] To make a determination of when an advance fee is earned, the written statement of the basis or rate of the fee, when required by Rule 1.5(b), should include a description of the benefit or service that justifies the lawyer's earning the fee, the amount of the advance unearned fee, as well as a statement describing when the fee is earned. Whether a lawyer has conferred a sufficient benefit to earn a portion of the advance fee will depend on the circumstances of the particular case. The circumstances under which a fee is earned should be evaluated under an objective standard of reasonableness. Colo. RPC 1.5(a).

Rule 1.5(f) Does Not Prohibit Lump-sum Fees or Flat Fees

[12] Advances of unearned fees, including "lump-sum" fees and "flat fees," are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the written statement of the basis of the fee, if a written statement is required by Rule 1.5(b). See also Restatement (Third) of the Law Governing Lawyers §§ 34, 38 (1998). Rule 1.5(f) does not prevent a lawyer from entering into these types of arrangements.

[13] For example, the lawyer and client may agree that portions of the advance of unearned fees are deemed earned at the lawyer's hourly rate and become the lawyer's property as and when the lawyer provides legal services.

[14] Alternatively, the lawyer and client may agree to an advance lump-sum or flat fee that will be earned in whole or in part based upon the lawyer's completion of specific tasks or the occurrence of specific events, regardless of the precise amount of the lawyer's time involved. For instance, in a criminal defense matter, a lawyer and client may agree that the lawyer earns portions of the advance lump-sum or flat fee upon the lawyer's entry of appearance, initial advisement, review of discovery, preliminary hearing, pretrial conference, disposition hearing, motions hearing, trial, and sentencing. Similarly, in a trusts and estates matter, a lawyer and client may agree that the lawyer earns portions of the lump-sum or flat fee upon client consultation, legal research, completing the initial draft of testamentary documents, further client consultation, and completing the final documents.

[15] The portions of the advance lump-sum or flat fee earned as each such event occurs need not be in equal amounts. However, the fees attributed to each event should reflect a reasonable estimate of the proportionate value of the legal services the lawyer provides in completing each designated event to the anticipated legal services to be provided on the entire matter. See Colo. RPC 1.5(a); *Feiger, Collision & Killmer v. Jones*, 926 P.2d 1244, 1252-53 (Colo. 1996) (client's sophistication is relevant factor).

[16] "[A]n 'engagement retainer fee' is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required. An engagement retainer must be distinguished from a lump-sum fee constituting the entire payment for a lawyer's service in a matter and from an advance payment from which fees will be subtracted (see §§ 38, Comment g). A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed." Restatement (Third) of the Law Governing Lawyers §§ 34 cmt. e. An engagement retainer fee agreement must comply with Rule 1.5(a), (b), and (g), and should expressly include the amount of the engagement retainer fee,

described the service or benefit that justifies the lawyer's earning the engagement retainer fee, and state that the engagement retainer fee is earned upon receipt. As defined above, an engagement retainer fee will be earned upon receipt because the lawyer provides an immediate benefit to the client, such as forgoing other business opportunities by making the lawyer's services available for a given period of time to the exclusion of other clients or potential clients, or by giving priority to the client's work over other matters.

[17] Because an engagement retainer fee is earned at the time it is received, it must not be commingled with client property. However, it may be subject to refund to the client in the event of changed circumstances.

[18] It is unethical for a lawyer to fail to return unearned fees, to charge an excessive fee, or to characterize any lawyer's fee as nonrefundable. Lawyer's fees are always subject to refund if either excessive or unearned. If all or some portion of a lawyer's fee becomes subject to refund, then the amount to be refunded should be paid directly to the client if there is no further legal work to be performed or if the lawyer's employment is terminated. In the alternative, if there is an ongoing client-lawyer relationship and there is further work to be done, it may be deposited in the lawyer's trust account, to be withdrawn from the trust account as it is earned.

As proposed by the Committee 3/23/05

RULE 1.6 CONFIDENTIALITY OF INFORMATION

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

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

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

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

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

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

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

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

Comment to RULE 1.6 CONFIDENTIALITY OF INFORMATION

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[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

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[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. 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 the Rules of Professional Conduct. 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.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

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

[13A] Rule 4.1(b) requires a disclosure when necessary to avoid assisting a client's criminal or fraudulent act, if such disclosure will not violate this Rule 1.6.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[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).

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

As proposed by the Committee 12/03/04

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must

continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has

discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[NOTE TO COMMITTEE: THE COMMITTEE WILL CONSIDER INCLUDING COHABITING RELATIONSHIPS IN COMMENT [11] AT THE DECEMBER 9, 2005 MEETING. SEE COMMITTEE REPORT AT PAGE 25]

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage or when there is a cohabiting relationship between the lawyers, there may be a significant risk that client confidences will be revealed and that the lawyer's family or cohabiting relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse (or in a cohabiting relationship with another lawyer,) ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship or a cohabiting relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph, some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in

the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

[NOTE TO COMMITTEE: THE FOLLOWING COMMENT [36] WILL BE CONSIDERED AT THE DECEMBER 9, 2005 MEETING OF THE COMMITTEE]

[36] The text of this Rule 1.7 is quite different than the text of the prior version of Rule 1.7 of the Colorado Rules of Professional Conduct. Despite the textual differences, no changes in substance are intended.

As proposed by the Committee 5/20/05

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

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

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

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

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While 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.

* * * * * * * * * *

Comment to RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal

practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

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

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations

unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent

representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (b) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not solicit a substantial gift from a client of another member of the firm, even if the soliciting lawyer is not personally involved in the representation of the client, because the prohibition in paragraph (c) applies to all lawyers associated in the firm. The prohibitions set forth in paragraphs (a) and (j) are personal and are not applied to associated lawyers.

As proposed by the Committee 12/03/04

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

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Comment to RULE 1.9 DUTIES TO FORMER CLIENTS

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has

been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

As proposed by the Committee 3/23/05

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(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 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.

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Comment to RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST:

GENERAL RULE

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter

because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

As proposed by the Committee 3/23/05

RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) the personally disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior participation in the matter and the screening procedures to be employed), to the government agency to enable the government agency to ascertain compliance with the provisions of this Rule; and

(3) 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.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Comment to Rule 1.11 SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a

specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

As proposed by the Committee 3/23/05

RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD PARTY NEUTRAL

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) the personally disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior participation in the matter and the screening procedures to be employed), to the parties and any appropriate tribunal, to enable the parties and the tribunal to ascertain compliance with the provisions of this Rule; and

(3) 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.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment to Rule 1.12 FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (13). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent

agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

As proposed by the Committee 3/23/04

RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to the information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should

know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment to Rule 1.13 ORGANIZATION AS CLIENT

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (19) makes clear, however, that, when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed,

a lawyer may bring to the attention of an organization client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (3) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(3)(1) – (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(3)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a client arising out of an alleged violation of law. This is necessary in under to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (3) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government

officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognized that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

As proposed by the Client 3/23/05

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

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Comment to RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary

surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

As proposed by the Committee 07/19/05

RULE 1.15: SAFEKEEPING PROPERTY

General Duties of Lawyers Regarding Property of Clients and Third Parties

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate trust account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such funds and other property of clients or third parties shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall, promptly or otherwise as permitted by law or by agreement with the client or third person, deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, promptly upon request by the client or third person, render a full accounting regarding such property.

(c) When in connection with a representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Required Bank Accounts

(d) Every lawyer in private practice in this state shall maintain in a financial institution doing business in Colorado, in the lawyer's own name, or in the name of a partnership of lawyers, or in the name of an entity authorized pursuant to C.R.C.P. 265 of which the lawyer is a member, or in the name of the lawyer or entity by whom the lawyer is employed or with whom the lawyer is associated:

> (1) A trust account or accounts, separate from any business and personal accounts and from any fiduciary accounts that the lawyer may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which the lawyer shall deposit funds entrusted to the lawyer's care and any advance payment of fees that has not been earned or advance payment of expenses that have not been incurred. A lawyer shall not be required to maintain a trust account if the lawyer never receives such funds or payments; and,
>
> (2) A business account or accounts into which all funds received for professional services shall be deposited. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a "professional account" or an "office account".

(e) With respect to trust accounts established pursuant to this Rule:

(1) One or more of the trust accounts may be a Colorado Lawyer Trust Account Foundation ("COLTAF") account or accounts, as described in Rule 1.15(h)(2). All COLTAF accounts shall be designated "COLTAF Trust Account."

(2) All such trust accounts, whether general or specific, as well as all deposits slips and checks drawn thereon, shall be prominently designated as a "trust account." Nothing herein shall prohibit any additional descriptive designation for a specific trust account.

(3) Trust accounts shall be maintained only in financial institutions doing business in Colorado that are approved by the Regulation Counsel based upon policy guidelines adopted by the Board of Trustees of the Colorado Attorneys' Fund for Client Protection. Regulation Counsel shall annually publish a list of such approved institutions. A financial institution shall be approved if it shall file with the Regulation Counsel an agreement, in a form provided, to report to the Regulation Counsel in the event any properly payable trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored; any such agreement shall apply to all branches of the financial institution and shall not be canceled except on thirty-days notice in writing to the Regulation Counsel. The agreement shall further provide that all reports made by the financial institution shall be in the following format: (1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (2) in the case of an instrument that is presented against insufficient funds but which instrument is honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any; if an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds. In addition, each financial institution approved by the Regulation Counsel must cooperate with the COLTAF program and must offer a COLTAF account to any lawyer who wishes to open one. In addition to the reports specified above, approved financial institutions shall agree to cooperate fully with the Regulation Counsel and to produce any trust account or business account records on receipt of a subpoena therefore in connection with any proceeding pursuant to C.R.C.P. 251. Nothing herein shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule, but such charges shall not be a transaction cost to be charged against funds payable to the COLTAF program. Every lawyer or law firm maintaining a trust account in this state shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements by financial institutions mandated by this Rule and shall indemnify and hold harmless the financial institution for its compliance with such reporting and production requirement. A financial institution shall be immune from suit arising out of its actions or omissions in reporting overdrafts or insufficient funds or producing documents under this Rule. The agreement entered into by a financial institution with the Regulation Counsel shall not be deemed to create a duty to exercise a standard of care and shall not constitute a contract for the benefit of any third parties that may sustain a loss as a result of lawyers overdrawing lawyer trust accounts.

(4) The name of institutions in which such accounts are maintained and identification numbers of each account shall be recorded on a statement filed with the annual attorney registration payment pursuant to C.R.C.P. 227(2). Such information shall be available for use in accordance with paragraph (j) of this Rule. For each COLTAF account, the statement shall indicate the account number, the name the account is under, and the depository institution.

Trust Account Requirements and Management; COLTAF Accounts

(f) All trust accounts shall be maintained in interest-bearing, insured depository accounts; provided, that with the consent of the client or third person whose funds are in the account, an account in which interest is paid to the client or third person need not be an insured depository account. All COLTAF accounts shall be insured depository accounts. For the purpose of this Rule, "insured depository accounts" shall mean government insured accounts at a regulated financial institution, on which withdrawals or transfers can be made on demand, subject only to any notice period which the institution is required to reserve by law or regulation.

(g) A lawyer may deposit funds reasonably sufficient to pay anticipated service charges or other fees for maintenance or operation of such account into trust accounts. Such funds shall be clearly identified in the lawyer's records of the account.

(h) COLTAF Accounts

(1) Except as may be prescribed by subparagraph (2) below, interest earned on accounts in which the funds are deposited (less any deduction for service charges or fees of the depository institution) shall belong to the clients or third persons whose funds have been so deposited; and the lawyer or law firm shall have no right or claim to such interest.

(2) If the funds are not held in accounts with the interest paid to clients or third persons as provided in subsection (h)(1) of this Rule, a lawyer or law firm shall establish a COLTAF account, which is a pooled interest-bearing insured depository account for funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time in compliance with the following provisions:

(a) No interest from such an account shall be payable to a lawyer or law firm.

(b) The account shall include funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time with the intent that such funds not earn interest in excess of the reasonably estimated cost of establishing, maintaining and accounting for trust accounts for the benefit of such clients or third parties.

(c) A lawyer or law firm depositing funds in a COLTAF account shall direct the depository institution:

(i) To remit interest, net of service charges or fees, if any are charged, computed in accordance with the institution's standard accounting practice, at least quarterly, to COLTAF; and

(ii) To transmit with each remittance to COLTAF a statement showing the name of the lawyer or law firm on whose account the remittance is sent and the rate of interest applied.

The provisions of this subparagraph (h)(2) shall not apply in those instances where it is not feasible to establish a trust account for the benefit of COLTAF for reasons beyond the control of the lawyer or law firm, such as the unavailability of a financial institution in the community that offers such an account.

(3) If a lawyer or law firm discovers that funds of any client or third person have mistakenly been held in a trust account for the benefit of COLTAF in a sufficient amount or for a sufficiently long time so that interest on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining and accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person) the lawyer or law firm shall request COLTAF to calculate and remit trust account interest already received by it to the lawyer or law firm for the benefit of such client or third person in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.

(4) Information necessary to determine compliance or justifiable reasons for noncompliance with subparagraph (h)(2) shall be included in the annual attorney registration statement. COLTAF shall assist the Colorado Supreme Court in determining whether lawyers or law firms have complied in establishing the trust account required under subparagraph (h)(2). If it appears that a lawyer or law firm has not complied where it is feasible to do so, the matter may be referred to the Regulation Counsel for investigation and proceedings in accordance with C.R.C.P. 251 .

(i) Management of Trust Accounts.

(1) ATM or Debit Cards. A lawyer shall not use any debit card or automated teller machine card to withdraw funds from a trust account.

(2) All trust account withdrawals and transfers shall be made only by a lawyer admitted to practice law in this state or by a person supervised by such lawyer and may be made only by authorized bank or wire transfer or by check payable to a named payee.

(3) Cash withdrawals and checks made payable to "Cash" are prohibited.

(4) Cancelled Checks. A lawyer shall request that the lawyer's trust account bank return to the lawyer, photo static or electronic images of cancelled checks written on the trust account. If the bank provides electronic images, the lawyer shall either maintain paper copies of the electronic images or maintain the electronic images in readily obtainable format.

(5) Persons Authorized to Sign. Only a lawyer admitted to practice law in this state or a person supervised by such lawyer shall be an authorized signatory on a trust account;

(6) Reconciliation of Trust Accounts. No less than quarterly, a lawyer shall reconcile the trust account records both as to individual clients and in the aggregate with the lawyer's trust account bank statement(s).

Required Accounting Records; Retention of Records; Availability of Records

(j) A lawyer, whether practicing as a sole practioner, in a partnership, or through an entity authorized pursuant to C.R.C.P. 265 shall maintain in a current status and retain for a period of seven years after the event that they record:

(1) Appropriate receipt and disbursement records of all deposits in and withdrawals from all trust accounts and any other bank account that concerns the lawyer's practice of law, specifically identifying the date, payor and description of each item deposited as well as the date, payee, and

purpose of each disbursement. All trust account monies intended for deposit shall be deposited intact without deductions or "cash out" from the deposit and the duplicate deposit slip that evidences the deposit must be sufficiently detailed to identify each item deposited;

(2) An appropriate record-keeping system identifying each separate person or entity for whom the lawyer holds money or property in trust, for all trust accounts, showing the payor of all funds deposited in such accounts, the names and addresses of all persons for whom the funds are or were held, the amount of such funds, the description and amounts of charges or withdrawals from such accounts, and the names of all persons to whom any such funds were disbursed;

(3) Copies of all retainer and compensation agreements with clients (including written communications setting forth the basis or rate for the fees charged by the lawyer as required by Rule 1.5(b);

(4) Copies of all statements to clients showing the disbursement of funds to them or on their behalf;

(5) Copies of all bills issued to clients;

(6) Copies of all records showing payments to any persons, not in the lawyer's regular employ, for services rendered or performed;

(7) All bank statements and photo static copies or electronic copies of all canceled checks; and,

(8) Copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto.

(k) The financial books and other records required by this Rule shall be maintained in accordance with one or more of the following recognized accounting methods: the accrual method; the cash basis method; and the income tax method. All such accounting methods shall be consistently applied. Bookkeeping records may be maintained by computer provided they otherwise comply with this Rule and provided further that printed copies can be made on demand in accordance with this Rule. They shall be located at the principal Colorado office of each lawyer, partnership, professional corporation, or limited liability corporation.

(l) Dissolutions. Upon the dissolution of any partnership of lawyers or of any professional corporation or limited liability corporation, the former partners or shareholders shall make appropriate arrangements for the maintenance by one of them or by a successor firm of the records specified in subsection (j) of this Rule.

(m) Availability Of Records. Any of the records required to be kept by this Rule shall be produced in response to a subpoena duces tecum issued by the Regulation Counsel in connection with proceedings pursuant to C.R.C.P. 251. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege of the lawyer's client.

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Comment to RULE 1.15 SAFEKEEPING PROPERTY

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts.

[2] Trust accounts containing funds of clients or third persons held in connection with a representation must be interest-bearing for the benefit of the client or third person or for the benefit of the Colorado Lawyer Trust Account Foundation where the funds are nominal in amount or expected to be held for a short period of time. A lawyer should exercise good faith judgment in determining initially whether funds are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing account for the benefit of the client or third person. The lawyer should also consider such other factors as (i) the costs of establishing and maintaining the account, service charges, accounting fees, and tax report procedures; (ii) the nature of the transaction(s) involved; and (iii) the likelihood of delay in the relevant proceedings. A lawyer should review at reasonable intervals whether changed circumstances require further action respecting the deposit of such funds, including without limitation the action described in subparagraph 1.15(h)(3).

[3] Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[4] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[5] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[6] The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. See Rule 1.16(d) for standards applicable to retention of client papers.

[7] A "client's security fund" provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer should participate.

[8] It is to be noted that the duty to keep separate from the lawyer's own property any property in which any other person claims an interest exists whether or not there is a dispute as to ownership of the property. Likewise, although the second sentence of Rule 1.15(c) deals specifically with disputed ownership, the first sentence of that provision--requiring some form of accounting--applies even if there is no dispute as to ownership. For example, if the lawyer receives a settlement check made payable jointly to the lawyer and the lawyer's client, covering both the lawyer's fee and the client's recovery, the lawyer must provide an accounting to the client before taking the lawyer's fee from the joint funds. Typically the check will be

deposited in the lawyer's trust account and, following an accounting to the client with respect to the fee, the lawyer will "sever" the fee by withdrawing the amount of the fee from the trust account and depositing it in the lawyer's operating account.

As proposed by the Committee 3/23/05

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

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Comment to Rule 1.16 DECLINING OR TERMINATING REPRESENTATION

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Permissive Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

As proposed by the Committee 9/27/05

RULE 1.17: SALE OF LAW PRACTICE

A lawyer or a law firm may sell or purchase a law practice, or an area of practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law in Colorado, or in the area of practice in Colorado that has been sold;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within sixty (60) days of mailing of the notice to the client at the client's last known address.

(d) The fees charged clients shall not be increased by reason of the sale.

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Comment to RULE 1.17 SALE OF LAW PRACTICE

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an

unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state.

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

[6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser written notice must be mailed to the client at the client's last known address. The notice must include the identity of the purchaser, and the client must be told that the decision to consent or make other arrangements must be made within 60 days of the mailing of the notice. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] [No Colorado comment.]

[9] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[13] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

As proposed by the Committee 3/23/05

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to the prospective client, except as

provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

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Comment to RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

As proposed by the Committee 3/23/05

RULE 2.1: ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

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Comment to RULE 2.1 ADVISOR

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, 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. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

As proposed by the Committee 3/23/05

RULE 2.2 INTERMEDIARY

Rule 2.2 of the Colorado Rules of Professional Conduct is repealed.

As proposed by the Committee 5/20/05

RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Comment to RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

Definition

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer

permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

As proposed by the Committee 5/20/05

RULE 2.4 LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

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Comment to RULE 2.4 LAWYER SERVING AS THIRD-PARTY NEUTRAL

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the

American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

As proposed by the Committee 5/20/05

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

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Comment to RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in

support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

As proposed by the Committee 5/20/05

RULE 3.2 EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

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Comment to RULE 3.2 EXPEDITING LITIGATION

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

As proposed by the Committee 5/20/05

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

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

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

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

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

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

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Comment to RULE 3.3 CANDOR TOWARD THE TRIBUNAL

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client and the lawyer is not prohibited by other law from making such a request; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

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Comment to RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the

evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] 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.

[4] Paragraph (f) permits a lawyer to advise relatives and employees of a client to refrain from giving information to another party because the relatives or employees may identify their interests with those of the client. See also Rule 4.2. However, other law may preclude such a request. See Rule 16, Colorado Rules of Criminal Procedure.

As proposed by the Committee 5/20/05

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(4) the communication is intended to or is reasonably likely to demean, embarrass, or criticize the jurors or their verdicts; or

(d) engage in conduct intended to disrupt a tribunal.

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Comment to RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

As proposed by the Committee 5/20/05

RULE 3.6 TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

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Comment to RULE 3.6 TRIAL PUBLICITY

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

As proposed by the Committee 5/20/05

RULE 3.7 LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

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

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Comment to RULE 3.7 LAWYER AS WITNESS

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification

would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

As proposed by the Committee 5/20/05

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

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

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

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

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

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

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

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

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

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons

assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

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Comment to RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extra judicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law- enforcement personnel and other relevant individuals.

As proposed by the Committee 5/20/05

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity. Further, in such a representation, the lawyer:

(a) shall conform to the provisions of Rules 3.3(a)(1), 3.3(a)(3), 3.3(b), 3.3(c), and 3.4(a) and (b);

(b) shall not engage in conduct intended to disrupt such proceeding unless such conduct is protected by law; and

(c) may engage in ex parte communications, except as prohibited by law.

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Comment to RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it and on the candor of the lawyer. For this reason the lawyer must conform to Rules 3.3(a)(1), 3.3(a)(3), 3.3(b), 3.3(c), and 3.4(a) and (b) in such representation.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations in applicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

[4] This Rule recognizes that the lawyer's conduct and communications described in Rules 3.9(b) and (c) may be protected by constitutional or other legal principles.

As proposed by the Committee 7/19/05

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

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Comment to RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

False Statements

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A false statement can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Omissions or partially true but misleading statements can be the equivalent of affirmative false statements. For dishonest conduct generally see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

As proposed by the Committee 7/19/05

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

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

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Comment to RULE 4.2 COMMUNICATION WITH PERSON –PRESENTED BY COUNSEL

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication 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 nonlawyers representatives of the other regarding a separate matter. Nor does this Rule preclude communication 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, such as a contractually-based right or obligation to give notice, is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the

lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

[NOTE TO THE COMMITTEE: The last paragraph of the Comment to Current Colorado Rule 4.2 addresses the status of a lawyer who provides limited representation to pro se parties under C.R.C.P. 11(b) or 311(b). Neither the Colorado Ad Hoc Committee nor the Committee, in previously approving New Model Rule 4.2, addressed this Comment. Proposed Comment [9A] retains the existing Colorado comment on this subject]

[9A] A pro se party to whom limited representation has been provided in accordance with C.R.C.P. 11(b), or C.R.C.P. 311(b), and Colo. RPC 1.2 is considered to be unrepresented for purposes of this Rule unless the lawyer has knowledge to the contrary.

As proposed by the Committee 7/19/05

RULE 4.3 DEALING WITH UNREPRESENTED PERSON

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

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Comment to RULE 4.3 DEALING WITH UNREPRESENTED PERSON

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[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. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the

person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

As proposed by the Subcommittee 11/21/05

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

(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.

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Comment to RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Paragraph (c) imposes an additional obligation on lawyers under limited circumstances. If a lawyer receives a document and also receives notice from the sender prior to reviewing the document that the document was inadvertently sent, the receiving lawyer must refrain from examining the document and also must abide by the sender's instructions as to the disposition of the document, unless a court otherwise orders. Whether a lawyer is required to take additional steps beyond those required by Paragraphs (b) and (c) is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law or subparagraph (c) to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

RULE 4.5. THREATENING PROSECUTION

(a) A lawyer shall not threaten criminal, administrative or disciplinary charges to obtain an advantage in a civil matter nor shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter.

(b) It shall not be a violation of Rule 4.5 for a lawyer to notify another person in a civil matter that the lawyer reasonably believes that the other's conduct may violate criminal, administrative or disciplinary rules or statutes.

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Comment to RULE 4.5 THREATENING PROSECUTION

[1] The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal, disciplinary and some administrative processes are designed for the protection of society as a whole. For purposes of this rule, a civil matter is a controversy or potential controversy over rights and duties of two or more persons under the law whether or not an action has been commenced.

[2] Threatening to use, or using the criminal, administrative or disciplinary process to coerce adjustment of private civil matters is a subversion of that process; further, the person against whom the criminal, administrative or disciplinary process is so misused may be deterred from asserting valid legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal, administrative or disciplinary process tends to diminish public confidence in our legal system.

[3] The rule distinguishes between threats to bring criminal, administrative or disciplinary charges and the actual filing or presentation of such charges. Threats to file such charges are prohibited if a purpose is to obtain any advantage in a civil matter while the actual presentation of such charges is proscribed by this rule only if the sole purpose for presenting the charges is to obtain an advantage in a civil matter.

[4] This distinction is appropriate because the abuse of the judicial process is at its greatest when a threat of filing charges is used as a lever to obtain an advantage in a collateral, civil proceeding. This leverage is either eliminated or greatly reduced when the charge actually is presented.

[5] Moreover, this rule does not prohibit a lawyer from notifying another person involved in a civil matter that such person's conduct may violate criminal, administrative or disciplinary rules or statutes where the notifying lawyer reasonably believes that such a violation has taken place.

[6] While it may be difficult in certain circumstances to distinguish between a notification and a threat, public policy is served by allowing a lawyer to notify another person of a perceived violation without subjecting the notifying lawyer to discipline. Many minor violations can be eliminated, rectified or minimized if there is frank dialogue among participants to a dispute.

[7] Rule 4.5(b) provides a safe harbor for notifications of this type. Other factors that should be considered to differentiate threats from notifications in difficult cases include (a) an absence of any suggestion by the notifying lawyer that he or she could exert any improper influence over the criminal, administrative or disciplinary process, (b) consideration of whether any monetary recovery or other relief sought by the notifying lawyer is reasonably related to the harm suffered by the lawyer's clients. Where

no such reasonable relation exists, the communication likely constitute a proscribed threat. For example, a lawyer violates Rule 4.5 if the lawyer threatens to file a charge or complaint of tax fraud against another party where issues of tax fraud have nothing to do with the dispute. It is not a violation of Rule 4.5 for a lawyer to notify another party that the other person's writing of an insufficient funds check may have criminal as well as civil ramifications in a civil action for collection of the bad check.

As proposed by the Committee 7/19/05

RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

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

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

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

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

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

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Comment to RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers

can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

As proposed by the Committee 7/19/05

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

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

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

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Comment to RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a

frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

As proposed by the Committee 7/19/05

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

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

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

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

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

> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

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Comment to RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority, over the work of nonlawyers. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of nonlawyers that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

As proposed by the Committee 7/19/05

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

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

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

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

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

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

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

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

(d) A lawyer shall not practice with or in the form of a professional corporation, association, or limited liability company, authorized to practice law for a profit, except in accordance with C.R.C.P. 265 and any successor rule or action adopted by the Colorado Supreme Court.

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Comment to RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment on behalf of the lawyer's client. Moreover, since a lawyer should not aid or encourage a nonlawyer to practice law, the lawyer should not practice law or otherwise share legal fees with a nonlawyer. This does not mean, however, that the pecuniary

value of the interest of a deceased lawyer in the lawyer's firm or practice may not be paid to the lawyer's estate or specified persons such as the lawyer's spouse or heirs. In like manner, profit-sharing retirement plans of a lawyer or law firm which include nonlawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with nonlawyers are permissible since they do not aid or encourage nonlawyers to practice law. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c) such arrangements should not interfere with the lawyer's professional judgment on behalf of the lawyer's client. A lawyer should, however, make full disclosure of such arrangements to the client; and if the lawyer or client believes that the effectiveness of lawyer's representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of the client.

[2] To assist a lawyer in preserving independence, a number of courses are available, For example, a lawyer may practice law in the form of a professional legal corporation, if in doing so the lawyer complies with all applicable rules of the Colorado Supreme Court. Although a lawyer may be employed by a business corporation with nonlawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of the lawyer's professional judgment from any nonlawyer. Various types of legal aid offices are administered by boards of directors composed of lawyers and nonlawyers. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client the lawyer serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between the. lawyer and the organization and provides for the lawyer's independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain the lawyer's professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

[3] As part of the legal profession's commitment to the principle that high quality legal services should be available to all, lawyers are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services. Participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence, and devotion to the interests of individual clients. A lawyer so participating should make certain that a relationship .with a qualified legal assistance organization in no way interferes with the lawyer's independent professional representation of the interests of the individual client. A lawyer should avoid situations in which officials of the organization who are not lawyers attempt to direct lawyers concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy are given undue weight in determining the lawyers employed by an organization or the legal services to be performed for the member or beneficiary rather than competence and quality of service. A lawyer interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess those factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standards of effort and competence.

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not:

(1) Practice law in this jurisdiction without a license to practice law issued by the 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;

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

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

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

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

(1) Receive, disburse or otherwise handle client funds;

(2) Render legal consultation or advice to the client;

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

(4) Appear on behalf of a client at a deposition or other discovery matter;

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

(6) Otherwise engage in activities that constitute the practice of law.

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

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

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

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

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

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

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

(e) Once notice is given pursuant to C.R.C.P. 251.28 or this rule, then no additional notice is required.

Comment to RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(A) The definition of the practice of law is established by law and varies from one jurisdiction to another. In order to protect the public, persons not admitted to practice law in Colorado cannot hold themselves out as lawyers in Colorado or as authorized to practice law in Colorado. Rule 5.5(a)(1) recognizes that Rules 220, 221, 221.1, and 222 of the Colorado Rules of Civil Procedure permit lawyers to practice law in accordance with their terms in Colorado without a license from the Colorado Supreme Court. Lawyers may also be permitted to practice law within the physical boundaries of the State, without such a license, where they do so pursuant to Federal or tribal law. Such practice does not constitute a violation of the general proscription of Rule 5.5(a)(1).

(B) Paragraph (a)(3) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in governmental agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

(C) A lawyer may employ or contract with a disbarred, suspended lawyer or a lawyer on disability inactive status, to perform services that a law clerk, paralegal or other administrative staff may perform so long as the lawyer directly supervises the work. Lawyers who are suspended but the entire suspension being all stayed, may engage in the practice in of law and the portion of the rule limiting what suspended lawyers may do does not all apply.

(D) The name of a disbarred lawyer or a suspended lawyer who must petition for reinstatement must be removed from the firm name. A lawyer will be assisting in the unauthorized practice of law if the lawyer fails to remove such name.

(E) Disbarred, suspended lawyers or lawyers on disability inactive status, may have contact with clients of the licensed lawyer so long as such lawyer and the licensed lawyer provide written notice to the client that the lawyer may not practice law. Written notice to the client shall include an advisement that the person may not give advice or engage in any other conduct considered the practice of law. Proof of service shall be maintained in the licensed lawyer's file for a minimum of two years.

(F) Separate and apart from the disbarred, suspended or disabled lawyer's obligation not to practice law, the licensed lawyer who employs or hires such person has an obligation to directly supervise that individual.

As proposed by the Committee 7/19/05

RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

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

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

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Comment to RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

As proposed by the Committee 7/19/05

RULE 5.7 RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyers.

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Comment to RULE 5.7 RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be

made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services maybe so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyers employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients maybe served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

As proposed by the Committee 9/27/05

RULE 6.1 VOLUNTARY PRO BONO PUBLICO SERVICE

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least fifty hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the fifty hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional legal or public services through:

(1) delivery of legal services at no fee or a substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Where constitutional, statutory or regulatory restrictions prohibit government and public sector lawyers or judges from performing the pro bono services outlined in paragraphs (a)(1) and (2), those individuals should fulfill their pro bono publico responsibility by performing services or participating in activities outlined in paragraph (b).

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Comment to RULE 6.1 VOLUNTARY PRO BONO PUBLICO SERVICE

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay. Indeed, the oath that Colorado lawyers take upon admittance to the Bar requires that a lawyer will never "reject, from any consideration personal to myself, the cause of the defenseless or oppressed." In some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on the average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term

"governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono under paragraph (a) if an anticipated fee is uncollected, but the award of statutory 'lawyers' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remain unfulfilled, the lawyer may satisfy the remaining commitment in a variety of ways as set forth in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that maybe addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. However, in special circumstances, such as death penalty cases and class action cases, it is appropriate to allow collective satisfaction by a law firm of the pro bono responsibility. There may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the professions have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

As proposed by the Committee 9/27/05

RULE 6.2 ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial or otherwise oppressive burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

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Comment to RULE 6.2 ACCEPTING APPOINTMENTS

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

As proposed by the Committee 9/27/05

RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of a lawyer provided by the organization whose interests are adverse to a client of the lawyer.

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Comment to RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is a director, officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

As proposed by the Committee 9/27/05

RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact to the organization but need not identify the client.

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Comment to RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure to the organization when the lawyer knows a private client might be materially benefited.

RULE 6.5 NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

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Comment to RULE 6.5 NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services -- such as advice or the completion of legal forms -- that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the

program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

As proposed by the Committee 9/27/05

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is 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) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

(3) is likely to create an unjustified expectation about results the lawyer can achieve;

(b) No lawyer shall, directly or indirectly, pay all or a part of the cost of communications concerning a lawyer's services by a lawyer not in the same firm unless the communication discloses the name and address of the non-advertising lawyer, the relationship between the advertising lawyer and the non-advertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the non-advertising lawyer.

(c) Unsolicited communications concerning a lawyer's services mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery, and shall not resemble legal pleadings or other legal documents.

(d) Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs. This provision does not apply to communications that only state that contingent or percentage fee arrangements are available, or that only state the initial consultation is free.

(e) A lawyer shall not knowingly permit, encourage or assist in any way employees, agents or other persons to make communications on behalf of the lawyer or the law firm in violation of this Rule or Rules 7.2 through 7.4.

(f) In connection with the sale of a private law practice under Rule 1.17, an opinion of the purchasing lawyer's suitability and competence to represent existing clients shall not violate this rule if the lawyer complies with Rule 1.17(d).

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Comment to RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2 and solicitations governed by Rule 7.3.

[2] The touchstone of this Rule, as well as Rules 7.2 through 7.4, is that all communications regarding a lawyer's services must be truthful. Truthful communications regarding a lawyer's services provide a valuable public service and, in any event, are constitutionally protected. False and misleading statements regarding a lawyer's services do not serve any valid purpose and may be constitutionally proscribed.

[3] It is not possible to catalog all types and variations of communications that are false or misleading. Nevertheless, certain types of statements recur and deserve special attention.

[4] One of the basic covenants of a lawyer is that the lawyer is competent to handle those matters accepted by the lawyer. C.R.C.P. 1.1. It is therefore false and misleading for a lawyer to advertise for clients in a field of practice where the lawyer is not competent within the meaning of Rule 1.1.

[5] Characterizations of a lawyer's fees such as "cut-rate", "lowest" and "cheap" are likely to be misleading if those statements cannot be factually substantiated. Similarly, characterizations regarding a lawyer's abilities or skills have the potential to be misleading where those characterizations cannot be factually substantiated. Equally problematic are factually unsubstantiated characterizations of the results that a lawyer has in the past obtained. Such statements often imply that the lawyer will be able to obtain the same or similar results in the future. This type of statement, due to the inevitable factual and legal differences between different representations, is likely to mislead prospective clients.

[6] Statements that a law firm has a vast number of years of experience, by aggregating the experience of all members of the firm, provide little meaningful information to prospective clients and have the potential to be misleading.

[7] Statements such as "no recover, no fee" are misleading if they do not additionally mention that a client may be obligated to pay costs of the law suit. Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs.

[8] Finally, Rule 7.1(c) proscribes unsolicited communications sent by restricted means of delivery. It is misleading and an invasion of the recipient's privacy for a lawyer to send advertising information to a prospective client by registered mail or other forms of restricted delivery. Such modes falsely imply a degree of exigence or importance that is unjustified under the circumstances.

As proposed by the Committee 9/27/05

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization.

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

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Comment to RULE 7.2 ADVERTISING

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3 (a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

[NOTE to Committee Members: The Committee previously approved a "cooling off" period of 15 days. However, section 12-5-115.5, C.R.S. (2005) provides for a 30 day cooling off period. The Committee will address this issue at its 12/9/05 Meeting.]

(c) A lawyer shall not solicit professional employment from a prospective client believed to be in need of legal services which arise out of the personal injury or death of any person by written, recorded, or electronic communication. This Rule 7.3(c) shall not apply if the lawyer has a family or prior professional relationship with the prospective client or if the communication is issued more than 30 days after the occurrence of the event for which the legal representation is being solicited. Any such communication must comply with the following:

(1) No such communication may be made if the lawyer knows or reasonably should know that the person to whom the communication is directed is represented resented by a lawyer in the matter.

(2) If a lawyer other than the lawyer whose name or signature is contained in the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any such communication shall include a statement so advising the prospective client.

(d) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall:

(1) Include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2);

(2) Not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the nature of the prospective client's legal problem.

A copy of or recording of each such communication and a sample of the envelopes, if any, in which the communications are enclosed shall be kept for a period of four years from the date of dissemination of the communication.

(e) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

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Comment to RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal *services.* Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[Note to Committee Members: See preceding note to Rule 7.3(c).]

[6A] Section 12-5-115.5, Colorado Revised Statutes (2005) prohibits "solicitation for professional employment or for any release or covenant not to sue concerning personal injury or wrongful death from an individual with whom the person has no family or prior professional relationship unless the incident for which employment is sought occurred more than thirty days prior to the solicitation."

[7] The requirement in Rule 7.3(d)(1) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See Rule 8.4(a).

RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law or that the lawyer is a specialist in particular fields of law. Such communication shall be in accordance with Rule 7.1.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

(e) In any advertisement in which a lawyer affirmatively claims to be certified in any area of the law, such advertisement shall contain the following disclosure: "Colorado does not certify attorneys as specialists in any field." This disclaimer is not required where the information concerning the lawyer's services is contained in a law list, law directory or a publication intended primarily for use of the legal profession.

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Comment to RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty" or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's

recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

[4] A claim of certification contained in a lawyer's letterhead does not require the disclaimer in Rule 7.4(e) unless the letterhead is used in an advertisement.

As proposed by the Committee 9/27/05

RULE 7.5 FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

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Comment to RULE 7.5 FIRM NAMES AND LETTERHEADS

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

RULE 7.6 POLITICAL CONTRIBUTIONS TO OBTAIN LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

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Comment to RULE 7.6 POLITICAL CONTRIBUTIONS TO OBTAIN LEGAL ENGAGEMENTS OR APPOINTMENTS BY JUDGES

[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.

[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

As proposed by the Committee 9/27/05

RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission, readmission, or reinstatement to the bar, or a lawyer in connection with an application for admission, readmission, or reinstatement to the bar or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

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Comment to RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. Rule 8.1(b) does not prohibit a good faith challenge to the demand for such information. A person relying on such a provision or challenge in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

As proposed by the Committee 9/27/05

[Note to Committee Members: We actually voted to recommend the ABA Rule *without* the words "Retention in Judicial Office," but believe that was an oversight; without the Colorado-specific language, the Rule will be inapplicable to the majority of events related to judicial retentions in Colorado. To be confirmed at 12/9/05 meeting.]

RULE 8.2 JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer or of a candidate for election, appointment, or retention to judicial or legal office.

(b) A lawyer who is a candidate for retention in judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

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Comment to RULE 8.2 JUDICIAL AND LEGAL OFFICIALS

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

As proposed by the Committee 9/27/05

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

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

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of a lawyers' peer assistance program that has been approved by the Colorado Supreme Court initially or upon renewal, to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.

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Comment to RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers' assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

As proposed by the Committee 9/27/05

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

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

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process; or

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

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Comment to RULE 8.4 MISCONDUCT

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by word or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) and also may violate paragraph (d). Legitimate advocacy respecting the foregoing factors does not violate paragraphs (d) or (g). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. 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 lawyer's conduct will occur.

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Comment to RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

[1.A] The second sentence of Rule 8.5(a) does not preclude prosecution for the unauthorized practice of law of a lawyer who is not admitted in this jurisdiction, and who does not comply with C.R.C.P. 220, C.R.C.P. 221, C.R.C.P. 221.1, C.R.C.P. 222, but who provides or offers to provide any legal services in this jurisdiction.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

RULE 9 TITLE—HOW KNOWN AND CITED

These rules shall be known and cited as the Colorado Rules of Professional Conduct or Colo. RPC.