VOLUME 1

MATERIALS PROVIDED TO MEMBERS OF THE COLORADO SUPREME COURT STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

FOR THE FIRST AND SECOND MEETINGS

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

AGENDA

September 30, 2003, 9:00 a.m.
Supreme Court Conference Room (5th Floor)

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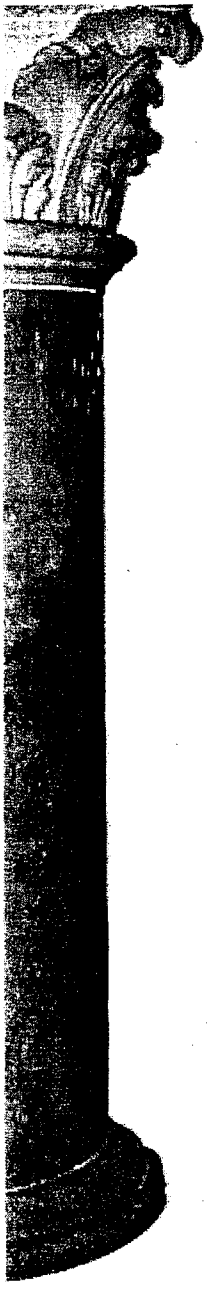
1. Chair's report
2. Administrative matters
   a. Introduction of members
   b. Introduction of Valerie Dewey
   c. Meeting information
   d. Committee web page [See attached pages 1 & 2]
   e. Corrections to membership roster [See attached pages 3 - 6]
3. Identification of groups that might be proposing changes to the Colorado Rules
4. Status report from Colorado Ethics 2000 Committee – John Gleason
5. Status report from CBA/DBA Task Force on Multidisciplinary Practice – Nancy Cohen [See attached pages 7 - 14]
6. Housekeeping amendments to rules [See attached page 15]
7. Brainstorming re: potential rule amendments
8. Adjournment (by 10:30 a.m.)

Chair
Marcy G. Glenn
Holland & Hart, LLP
P.O. Box 8749
Denver, Colorado 80201
(303) 295-8320
mglenn@hollandhart.com



Colorado Judicial Branch

Committee on the Colorado Rules of Professional Conduct

The Committee on the Colorado Rules of Professional Conduct is a Standing Committee established by the Colorado Supreme Court in 2003. The Committee is charged with the responsibility of periodic review, correcting, updating and improvement of the Colorado Rules of Professional Conduct. Before the formation of the Committee, a number of different Court-appointed and bar association committees and task forces, as well as other groups and individuals, made requests and recommendations directly to the Court concerning possible rule changes. The Court continues to welcome suggested changes to the Rules of Professional Conduct by any entity or person; however, the Court expects the Standing Committee to consider those recommendations in the first instance.

The Supreme Court Liaisons to the Committee are Justices Michael L. Bender and Nathan B. Coats. The Committee Chair is Marcy G. Glenn. The Committee is comprised of members of varying backgrounds, including federal and state trial-level judges, appellate judges, law school professors, disciplinary prosecutors, and attorneys in private practice in a broad range of practice areas.

The Committee as a whole will meet approximately four times per year in the Supreme Court Conference Room in the Colorado Judicial Building. A variety of subcommittees will meet at other times and locations to discuss changes to particular rules or around specific topics.

Members of the Committee

Marcy G. Glenn, Chair
Justice Michael L. Bender, Liaison
Justice Nathan B. Coats, Liaison
Michael H. Berger
James A. Casey
Richard T. Casson
Nancy L. Cohen
Cynthia F. Covell
John S. Gleason
David C. Little
William R. Lucero
Peggy E. Montaño
Cecil E. Morris, Jr.
Judge Edward W. Nottingham
Kenneth B. Pennywell
Scott R. Peppet
William D. Prakken
Henry R. Reeve

John M. Richilano
Alexander R. Rothrock
Boston H. Stanton, Jr.
David W. Stark
Bryan S. VanMeveren
Anthony van Westrum
Eli Wald
James E. Wallace
Lisa M. Wayne
Judge John R. Webb
Tuck Young

COLORADO RULES OF PROFESSIONAL CONDUCT

As Proposed by
The Colorado Bar Association / Denver Bar Association
Joint Task Force on Multidisciplinary Practice

TO ACCOMMODATE MULTIDISCIPLINARY PRACTICE

And as Considered by the
Colorado Bar Association Executive Council on January 22, 2003,
And by the
Denver Bar Association Board of Trustees on April 10, 2003,
And Approved by Those Bodies

FOR CIRCULATION FOR THE PURPOSE OF PUBLIC DISCUSSION

EXECUTIVE SUMMARY

PREFACE

The CBA/DBA Joint Task Force on Multi-Disciplinary Practice (the "Task Force") was established in the Fall of 1999 by then-CBA president, H. Barton Mendenhall, III, and then-DBA president, Hubert A. Farbes, Jr. The Task Force recommended to the CBA Board of Governors and the DBA Board of Trustees that the Colorado Rules of Professional Conduct (the "Colorado Rules") be amended to accommodate lawyers who want to practice law in a multi-disciplinary practice (MDP) so long as the public is protected and the core values of the legal profession, including competence, independence of professional judgment, protection of client confidential information, and loyalty to the client through the avoidance of conflicts of interest, are preserved. The CBA and DBA approved all of the recommendations made by the Task Force. The DBA added a recommendation relating to pro bono activities by lawyers in MDP entities.

A committee of the Task Force (the "Committee") was formed to study and then draft changes to the Colorado Rules in order to implement the Task Force's recommendations. The Committee's mission was to rewrite the Colorado Rules to permit MDP, consistent with the direction of the CBA and DBA; it was not to opine whether MDP is good or bad for the legal profession. In this respect, the Committee was balanced in its views concerning the appropriateness of MDP. Some members were in favor of MDP, others were opposed to the concept, and others were neutral.

Initially, the Committee consisted of thirteen (13) members. For the last year, the Committee has consisted of eight (8) active members: Jim Benjamin, Mark Boscoe, Nancy L. Cohen, Susan Smith Fisher, Marcy Glenn, John Lebsack, David Little and Tony van Westrum.

The Committee is comprised of members knowledgeable with the Colorado Rules and the development of professional responsibility standards governing the conduct of lawyers. Further, many members are knowledgeable about the attorney regulation system in Colorado.

As co-chairs of the Committee, we want to thank all of the members who actively participated in studying these issues and drafting amendments to the Colorado Rules in order to permit MDP while preserving the core values identified by the Task Force.

Nancy L. Cohen and John Lebsack
July 29, 2002

PROCESS OF THE COMMITTEE

The Committee reflects the viewpoints of large firm, small firm and individual practice, and attorney discipline. The Committee also reflects the viewpoints of different areas of practice, including litigation in a variety of substantive areas, and transactional work including real estate transactions and the formation of entities.

The Committee examined the Task Force recommendations to determine how the Colorado Rules should be amended to implement these recommendations. At the same time, the Committee obtained information from other states that were studying whether to amend their ethics rules to permit MDP, and if so, what amendments were proposed. Specifically, the Committee reviewed the Michigan State Bar Committee Report on Multi-Disciplinary Practice, the Utah State Bar Multi-Disciplinary Task Force Report, the Arizona State Bar Task Force on

Multi-Disciplinary Practice, and the District of Columbia ethical rules that permit the sharing of fees with nonlawyers. Additionally, the Committee reviewed the report prepared by the American Bar Association (ABA) Commission on Multi Disciplinary Practice (the "ABA Commission"), which recommended changes to the ABA Model Rules of Professional Conduct [so that lawyers can deliver legal services in a professional service firm that includes nonlawyers who provide nonlegal services and/or who have an ownership interest in the firm]. Although the ABA House of Delegates declined to adopt the ABA Commission's recommendations, its report provides guidance with respect to specific amendments to the ABA Model Rules to permit MDP and provides useful definitions relating to MDP. For example, the definition of "MDP entity" proposed by the Committee is similar to the definition proposed by the ABA Commission.

After extensive debate and study, the Committee decided that Recommendation 4 made by the Task Force should not be implemented in any proposed amendments to the Colorado Rules. Recommendation 4 requires that lawyers enter into a multi-disciplinary practice arrangement only with individuals in occupations that are subject to published ethical standards, and that are subject to some kind of regulatory oversight and enforcement mechanisms, whether governmental or through some appropriate trade or professional organization. The Committee can envision situations in which an attorney will want to practice with a nonlawyer who is not licensed or subject to published ethical standards because the relationship could benefit prospective clients. For example, a lawyer who practices employment law may wish to associate with a human resource specialist in an MDP entity even though that person may not be subject to any code of ethics. The Committee does not believe that the likelihood of a lawyer abiding by the Colorado Rules is enhanced merely because the lawyer would be associated in an MDP

entity with another licensed professional or someone subject to a voluntary code of ethics. Likewise, the Committee does not believe that a lawyer practicing in an MDP entity with an unlicensed individual automatically leads to the conclusion that the lawyer will fail to follow his or her ethical obligations. For these reasons, the Committee did not follow Recommendation 4.

The Committee recognizes that the Colorado Supreme Court can regulate only the practice of law and the unauthorized practice of law in Colorado. Accordingly, the proposed amendments to the Colorado Rules do not regulate the MDP entity or the nonlawyers in the MDP entity; rather the proposed amendments place the onus on lawyers desiring to practice in an MDP entity, to comply with the Colorado Rules. In certain circumstances, this may mean that the lawyer must cause the MDP entity itself to conform to the Colorado Rules or that the lawyer must forego or withdraw from MDP practice where participation would cause the lawyer to violate the Colorado Rules. For example, if the MDP entity wants to provide nonlegal services to a "customer" while the lawyer is representing a client who is adverse to that customer, the lawyer under Colo. RPC 5.4, either would have to prevail upon the MDP entity not to take on that customer or would have to withdraw from the MDP entity, in order to avoid a conflict of interest in violation of Colo. RPC 1.7 or 1.9.

Recommendation 5 called for broad written disclosure to a client of the differences that the client might find between representation by a lawyer at a firm and representation by a lawyer in an MDP entity. The Committee implemented Recommendation 5 by amending Colo. RPC 1.6 (confidentiality) only to require written disclosure to the client about the possibility that information provided to the MDP entity may not be confidential. Although there may be other

situations requiring written disclosure, the Committee believed that the broad language of Recommendation 5 did not provide enough guidance to the lawyer about what should be included in the disclosure. Furthermore, Recommendation 3 requires lawyers who want to practice in an MDP entity, to enter into an agreement with the nonlawyers in which the nonlawyers agree to respect the lawyer's independent judgment and ethical obligations. Recommendation 3 was implemented into the proposed amendments to Colo. RPC 5.4. If the amendments to Colo. RPC 1.6 and 5.4 are implemented, the Committee believes the public will be protected as to these concerns.

THE COLORADO RULES

Significant changes must be made to the Colorado Rules if MDP is to be permitted. The Committee began its task with the understanding that the Colorado Rules apply to all Colorado lawyers, regardless of whether they practice in a firm, are sole-practitioners, in-house counsel or work for a governmental agency. However, the Committee recognized that lawyers desiring to practice in an MDP entity would need more guidance for addressing certain ethical situations such as conflicts of interest, so that they are able to comply with the Colorado Rules. Significant changes are proposed to the following Colorado Rules: Colo. RPC 1.5, 1.6, 1.7, 1.8, 1.9, 1.10, 5.1, 5.4 and 7.5. A description of the changes is in the MDP Rules Committee comments.

Finally, the Committee proposed amendments to C.R.C.P. 265 in order to implement the Task Force's recommendations of permitting lawyers to practice law in an MDP entity. As amended, Rule 265 will allow lawyers to practice in an MDP entity.

The Committee recognized fairly early in its deliberative process that a change to one rule might change the meaning of another rule or necessitate a change to another rule. Although the Committee originally focused on a limited number of Colorado Rules that needed modification, ultimately, the Committee reviewed each rule to determine whether changes would be necessary in light of other proposed amendments. As a result, the Committee proposed modifications to numerous rules.

There were, however, a number of rules that required no change. The Committee believes that the principles set forth in each of those rules and their comments apply to all lawyers regardless of practice context and, therefore, that no additional guidance is necessary. The Committee decided, for example, not to modify Colorado Rule 6.1 pertaining to voluntary *pro bono* public service. The Committee determined that Colorado Rule 6.1 applies to all lawyers, regardless of the type of association in which the lawyer may practice. The Committee was concerned that if a specific reference to an MDP entity were incorporated into Colorado Rule 6.1, then it would be necessary to incorporate such language into every single rule to explain that lawyers who practice in an MDP entity have the same ethical obligations as any other lawyer. Otherwise, to express that fact in some rules, such as Colorado Rule 6.1, but not in all of the Colorado Rules, when other rules also apply to all Colorado lawyers, could create an ambiguity as to the application of other rules to lawyers in MDP entities.

Since it was not the Committee's mission to debate and then conclude whether multi-disciplinary practice is desirable, the Committee was able to agree on proposed amendments to

all of the Colorado Rules except one. The Committee was divided as to whether passive investment in an MDP entity or a law firm should be permitted. Accordingly, the Committee submits Alternatives A and B of proposed Colorado Rule 5.4. Alternative A permits passive investors. Alternative B prohibits passive investors. Alternative B follows the Task Force's recommendations. The substance of these differing positions is found in the Committee comment to Rule 5.4. Additionally, the Committee discussed whether disbarred and/or suspended lawyers should be precluded from holding equity positions in law firms or MDP entities, even if passive investment is generally permitted; it reached no conclusion on the matter and has not proposed any alternative language for that position.

CONCLUSION

The Committee spent hundreds of hours examining the Colorado Rules to determine what changes should be made so that lawyers may practice in an MDP entity. Although the Committee is certain that it has not addressed every issue that may arise and that further editing will be necessary, the Committee believes that the extensive study, debate and drafting reflected in the proposed amended rules have produced an ethical code that will provide guidance to Colorado practitioners desiring to practice in an MDP entity. We submit the proposed amended Colorado Rules for your use and further consideration.

MEMORANDUM

TO:	Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct	FROM:	Marcy G. Glenn
RE:	Housekeeping amendments to Colorado Rules	DATE:	August 22, 2003

The following are two errors in the published versions of the Colorado Rules of Professional Conduct, which should be corrected before the next publication of the rules. If you are aware of any other such errors, please be prepared to advise the full committee at the September 30 meeting. Thank you.

Rule	**Description of error**
Comment to Rule 1.7	Under the heading "Loyalty to a Client", the cite at the end of the second paragraph should be to "Rule 1.2", not "Rule 1.3".
Rule 6.3(b)	The rule as published has extra words that render subparagraph (b) nonsensical; need to delete "a lawyer provided by".

Marcy Glenn

From: Marcy Glenn

Sent: Friday, September 26, 2003 4:52 PM

To: Alexander Rothrock; Anthony van Westrum; Boston Stanton; Bryan VanMeveren; Cecil Morris; Cynthia Covell; David Little; David Stark; Eli Wald; Henry Reeve; Hon. John Webb; Hon. Michael Bender; Hon. Nathan Coats; James Casey; James Wallace; John Gleason; John Richilano; Kenneth Pennywell; Lisa Wayne; Nancy Cohen; Peggy Montano; Richard Casson; Scott Peppet; Tuck Young; Valerie Dewey; William Lucero; William Prakken

Subject: FW: Scan Results

Dear Committee members,

Attached are materials related to an additional agenda item for our September 30 meeting -- a proposed amendment to CRPC 5.5. I look forward to seeing you next week.

Very truly yours,

Marcy G. Glenn
Holland & Hart LLP
555 17th Street, Suite 3200
Denver, CO 80202
Phone (303) 295-8320
Fax (303) 295-8261
E-mail: mglenn@hollandhart.com

HOLLAND&HART
THE LAW OUT WEST

-----Original Message-----
From: Nina Stanberry
Sent: Friday, September 26, 2003 9:33 AM
To: Marcy Glenn
Subject: Scan Results

Please open the attached document.
This document was sent to you using an HP Digital Sender.

Sent by: N_STANBERRY <nstanberry@hollandhart.com>
Number of pages: 5
Document type: B/W Document
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COLORADO BAR ASSOCIATION
ESTABLISHED IN 1897

August 19, 2003

Chief Justice Mary Mullarkey
Colorado Supreme Court
2 E 14th Ave Ste 460
Denver, CO 80203

Dear Ms. Chief Justice:

RE: Proposed Amendments to RPC 5.5

The Executive Council of the Colorado Bar Association at its meeting on June 23, 2003 endorsed the revision to Colo. RPC 5.5 proposed by the Court in March 2002, with the minor suggested revision shown on the enclosed draft of that rule as amended.

The proposed revision was reviewed by the CBA Ethics Committee and that Committee's report to the Executive Council is enclosed. The Committee suggested the added language to account for the fact that in addition to the Colorado Supreme Court, the U.S. District Court and two tribal courts also authorize lawyers to practice law within the boundaries of the state.

Of course, if either you or the Court have questions regarding these matters, we are prepared to respond.

Thank you for your consideration.

Very Truly Yours

Charles C. Turner
Executive Director, Colorado Bar Association

Enclosures: Minutes of Executive Council Meeting
Ethics Committee Memo to Executive Council

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DENVER, COLORADO 80203-4336
303/860-1115 FAX 303/894-0821 WATS 800/332-6736
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MINUTES OF MEETING

COLORADO BAR ASSOCIATION

EXECUTIVE COUNCIL

June 23, 2003

The incoming 2003-04 Colorado Bar Association Executive Council met on June 23, 2003 with the following members in attendance: Bob Truhlar, Steve Briggs, D.A. Bertram, Joe Dischinger, Steve Ezell, John Holt, Mike Smith, Ray Torrez, Elizabeth Weishaupl, and by phone, Claire Sollars and Rich Krohn. Also in attendance were: 2002-03 Vice President Freddie Alvarez, and staff members Chuck Turner, Greg Martin, Dana Collier Smith, Dave Ells and Carolyn Ferber. Excused from the meeting were: Cyndy Ciancio, Cyndy Giauque, Julie Haines, Dick Hart, Bill Kane, David Masters, John Moye, Tony van Westrum and Dan Vigil.

Noting the Executive Council did not have actual authority to take action on behalf of the CBA until July 1, 2003, Mr. Truhlar indicated any such action at today's meeting would be ratified at the next Executive Council meeting.

Approval of Minutes

On a motion made and seconded, the minutes of the April 22, 2003 meeting were approved.

Ethics Committee – CRPC Rule 5.5

John Lebsack explained that the Colorado Supreme Court had asked the Ethics Committee to comment on the Court's proposed changes to CRPC Rule 5.5. The amendment would prohibit out-of-state lawyers from practicing law in Colorado without the benefit of Colorado licensure, unless authorized under specific CRPC rules. Through the Office of Attorney Regulation Counsel, a finding of violation of the Rules of Professional Conduct and a sanction on the offending lawyer would be sent to the attorney's home state. After reviewing the proposed rule changes, Mr. Lebsack stated the Ethics Committee had suggested adding language to include federal or tribal law as exceptions to the licensure requirement. After a brief discussion, a motion was made to approve the Ethics Committee's proposed amendment to Rule 5.5 for submission to the Colorado Supreme Court. The motion was seconded and passed.

There being no further business, the meeting was adjourned.

Respectfully submitted,

Dana J. Collier Smith
Assistant Executive Director

Ethics Committee
of the
Colorado Bar Association

May 20, 2003

To: The Executive Council of the Board of Governors
The Colorado Bar Association

The Board of Trustees
The Denver Bar Association

Re: Proposed Amendment To Colo. RPC 5.5

Ladies and Gentlemen:

The Ethics Committee of the Colorado Bar Association recommends to the Board of Governors of the CBA and to the Board of Trustees of the DBA (having been requested by that body to make a recommendation to it) that they endorse the revision to Colo. RPC 5.5 proposed by the Colorado Supreme Court in March 2002, with the addition noted below in bold type, and so inform the Court.

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

A lawyer shall not:

(a) 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, ~~or~~ C.R.C.P. 222, **or federal or tribal law;**

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

~~(b)~~ (c) assist a person who is not a member of the Colorado bar in the performance of activity that constitutes the unauthorized practice of law.

Background

On March 1, 2002, Justice Bender wrote on behalf of the Court asking that the CBA and DBA examine and comment on a change to Colo. RPC 5.5 proposed by the Court. That proposed change is as follows:

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW

A lawyer shall not:

(a) 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, or C.R.C.P. 222;

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

~~(b)~~ (c) assist a person who is not a member of the Colorado bar in the performance of activity that constitutes the unauthorized practice of law.

About May 2002, the Executive Council of the Board of Governors of the CBA and the Board of Trustees of the DBA voted to refer this proposed change to the CBA Ethics Committee for review, comment and recommendation back to those bodies so they could consider what comment to make to the Court. The Court was advised of this referral and requested to defer action on this proposed change pending such review. The Court granted that request.

The communications to the Ethics Committee at that time regarding this referral inadvertently were mislaid. The CBA and DBA still owe the Court a response to its proposed change to Rule 5.5.

At its meeting on May 17, 2003, the CBA Ethics Committee heard a report by Doug Foote on behalf of the Rules Committee of the Ethics Committee which had met to consider this proposed change.

The Rules Committee noted that:

- The changed rule principally sweeps in lawyers who do not fall under C.R.C.P. 220, that is, those who practice law in Colorado and who are not in active status in another state, or who have established a domicile here, or who have established a place for the regular practice of law in Colorado from which such attorney holds himself or herself out to the public as practicing Colorado law or solicits or accepts Colorado clients. Most other lawyers are covered by the deemed licensing provisions of C.R.C.P. 220 or C.R.C.P. 222 or the *pro hac vice* provisions of C.R.C.P. 221 or 221.1.
- The principal purpose of the Rule is to allow the Court, through the Office of Attorney Regulation Counsel, to enter a finding of violation of the Rules of Professional Conduct and a sanction on offending lawyers and then send that finding and sanction to the lawyer's home state. Office of Attorney Regulation Counsel has indicated that under formal or informal reciprocity, a finding of violation and sanction of a lawyer in a jurisdiction other than her or his home state almost always results in sanction in the lawyer's home state.

- Jurisdiction of the Court is founded on the lawyer's actions in practicing law in this state without a license and in violations of the rules of the Court governing the practice of law.
- Previous discussion by Doug Foote with Justice Bender indicated that the Court had not considered the implication of the change on federal court or related practice and did not specifically intend this rule to sweep in such practice.

After discussion, the Ethics Committee voted to forward this recommendation to the CBA Board of Governors and, having been requested to do so by the DBA Board of Trustees, to that body.

COLORADO SUPREME COURT
ATTORNEY REGULATION COUNSEL

Regulation Counsel
John S. Gleason

Chief Deputy Regulation Counsel
Nancy L. Cohen

Deputy Regulation Counsel
James C. Coyle

Attorneys' Fund for Client Protection
Unauthorized Practice of Law

Assistant
Regulation Counsel

Stephen R. Fatzinger
Luain T. Hensel
Kim E. Ikeler
Debora D. Jones
Fredrick J. Kraus
Charles E. Mortimer, Jr.
Matthew A. Samuelson
Gregory G. Sapakoff
Louise Culberson-Smith
James S. Sudler
Douglas S. Timmerman

September 26, 2003

Marcy G. Glenn
Chair, Standing Rules Committee
555 17th Street
Suite 3200
Denver, 80202

Dear Marcy:

Enclosed please find the information regarding the Advisory Committee's request that the Standing Rules Committee review the proposed ruling comment concerning disclosure of lack of malpractice insurance. Let me know if you want me to make the copies for the September 30, 2003 meeting. If you have any questions, please do not hesitate to call.

Very truly yours,

Nancy L. Cohen
Chief Deputy Regulation Counsel

NLC/jdw

MEMORANDUM

TO: Standing Rules Committee

FROM: Advisory Committee – Subcommittee on Malpractice Insurance

RE: Amendment to Colo. RPC 1.4

DATE: September 25, 2003

The Advisory Committee met on September 18, 2003, to discuss a potential amendment to Colo. RPC 1.4 regarding the disclosure of lack of malpractice insurance. The Advisory Committee requests that the Standing Rule Committee review the proposed rule and comment, and make recommendations to the Colorado Supreme Court regarding the disclosure rule. The Advisory Committee also requests that the Committee discuss an amendment to the registration statement regarding lack of malpractice insurance.

Attached to this memo is a report dated September 18, 2003, that was provided to the Advisory Committee.

The ABA Standing Committee on Client Protection drafted a proposed amendment to the ABA Model Rule 1.4. To date, however, the ABA Board of the Governors has not adopted it. Four states have adopted disclosure rules. Attached to this memorandum are the following rules: The ABA Standing

Committee on Client Protection proposed rule to Model Rule 1.4; Alaska's rule; New Hampshire's rule; Ohio's rule; and South Dakota's rule.

The proposed amendments to Colo. RPC 1.4 and the Comment are also attached.

Proposed Amendment to Colo. RPC 1.4

(c) a lawyer shall inform a client, in writing, at the time of the client's engagement of the lawyer that the lawyer does not have malpractice insurance of at least $100,000.00 per claim and $300,000.00 annual aggregate, and shall inform the client in writing at any time the lawyer's malpractice insurance drops below these amounts or the lawyer's malpractice insurance is terminated. The lawyer shall maintain a record of these disclosures for a period of seven years from the termination of the client's representation. This disclosure requirement does not apply to lawyers who are in-house counsel or government lawyers who do not represent clients outside their official capacity or in-house employment.

COMMENT

Disclosure of Lack of Malpractice Insurance

Lawyers are not required to maintain professional liability insurance, but if they choose not to, that fact shall be disclosed to a client. Lawyers' funds for client protection are designed to reimburse clients only in the event of their lawyer's dishonesty. *See* C.R.C.P. 252 *et seq.* The absence of professional liability insurance is a material fact that may bear upon a client's decision to hire a lawyer.

Lawyers who are either employed with a governmental entity on a part-time basis are not required to disclose whether they have malpractice insurance of $100,000.00 per claim/$300,000.00 in the aggregate. If, however, the attorney who provides services to a governmental agency is in the private practice of law, then that attorney must make the disclosure described in Colo. RPC 1.4(c). Attorneys representing clients separate from being in-house counsel or representing a governmental entity shall provide disclosure described in this rule.

American Bar Association
Standing Committee on Client Protection

Proposed amendment to Rule 1.4 of the ABA *Model Rules of Professional Conduct* to provide for the disclosure of lack of professional liability insurance

(Changes are bolded and underlined, as of June 5, 2002)

RULE 1.4: COMMUNICATION

(a) A lawyer shall:

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

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

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

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

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

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

(c) A lawyer shall inform new and existing clients, in writing, if the lawyer does not have malpractice insurance. A lawyer shall inform the client, in writing, any time the lawyer's malpractice insurance is terminated. A lawyer shall maintain a record of these disclosures for five years from the conclusion of the client's representation.

(d) The requirements in (c) do not apply to full-time members of the judiciary or full-time, in-house counsel or government lawyers when representing the entity by whom they are employed.

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.

Disclosure of Lack of Malpractice Insurance

[8] Lawyers are not required to maintain professional liability insurance, but if they choose not to, that fact shall be disclosed to a client. Lawyers' funds for client protection (clients' security funds) are designed to reimburse clients only in the event of their lawyer's dishonesty. See Rule 1.15, Comment [5]. The absence of professional liability insurance is a material fact that may bear upon a client's decision to hire a lawyer.

WEST'S ALASKA COURT RULES
ALASKA RULES OF Search Term Begin PROFESSIONAL Search Term End
CONDUCT

RULE 1.4 COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter undertaken on the client's behalf and promptly comply with reasonable requests for information.

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

(c) A lawyer shall inform an existing client in writing if the lawyer does not have malpractice insurance of at least $100,000 per claim and $300,000 annual aggregate and shall inform the client in writing at any time the lawyer's malpractice insurance drops below these amounts or the lawyer's malpractice insurance is terminated. A lawyer shall maintain a record of these disclosures for six years from the termination of the client's representation.

[Adopted effective July 15, 1993. Amended effective January 15, 1999; effective April 15, 2000.]

Alaska Comment

Subsection (c) does not apply to lawyers in government practice or lawyers employed as in-house counsel.

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

(1) no insurance: "Alaska Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have malpractice insurance of at least $100,000 per claim and $300,000 annual aggregate and if, at any time, a lawyer's malpractice insurance drops below these amounts or a lawyer's malpractice insurance coverage is terminated. You are therefore advised that (name of attorney or firm) does not have malpractice insurance coverage of at least $100,000 per claim and $300,000 annual aggregate."

(2) insurance below amounts: "Alaska Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have malpractice insurance of at least $100,000 per claim and $300,000 annual aggregate and if, at any time, a lawyer's malpractice insurance drops below these amounts or a lawyer's

malpractice insurance coverage is terminated. You are therefore advised that (name of attorney or firm)'s malpractice insurance has dropped below at least $100,000 per claim and $300,000 annual aggregate."
(3) insurance terminated: "Alaska Rule of Professional Search Term End Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have malpractice insurance of at least $100,000 per claim and $300,000 annual aggregate and if, at any time, a lawyer's malpractice insurance drops below these amounts or a lawyer's malpractice insurance coverage is terminated. You are therefore advised that (name of attorney or firm)'s malpractice insurance has been terminated."

Supreme Court of Ohio
News Releases

April 26, 2001

Court adopts rule requiring disclosure of lack of insurance

The Supreme Court of Ohio is requiring all lawyers without malpractice insurance to notify their clients using a standard form.

The court today adopted in a 5-to-2 vote an amendment to the Code of Professional Responsibility that is based on a recommendation from the Supreme Court Board of Commissioners on Grievances and Discipline. The new rule goes into effect July 1.

If an attorney without malpractice insurance fails to inform his or her client, the court can punish an attorney for violating the disciplinary rule.
"The new rule will provide the public with more information when selecting a lawyer," said Chief Justice Thomas J. Moyer. "A prospective client could consider the existence of malpractice insurance, together with information about an attorney's ability and experience, to make a more informed choice regarding legal counsel."

Mandating disclosure is a direct way of providing information to consumers and an indirect way to encourage more lawyers to get insured without requiring insurance.
Currently, Oregon is the only state to mandate malpractice insurance, providing a policy for lawyers -- an idea that has not been popular elsewhere because of cost and availability. At least three states have some version of a standard disclosure form while Virginia requires disclosure of whether an attorney has malpractice insurance on state attorney registration forms.

Most clients presume lawyers carry insurance, said Jonathan Marshall, secretary to the Board of Commissioners on Grievances and Discipline. "The board was concerned

because of the cases it's seen. There are a large number of lawyers who do not have malpractice insurance and clients who are left completely in the dark."

Both Justices Alice Robie Resnick and Evelyn Lundberg Stratton opposed the new rule. "In the absence of mandating malpractice insurance, the rule is of no practical value since its only requirement is disclosure, which places an unnecessary burden on the scores of attorneys who choose to be self-insured," Resnick said.

Justice Stratton said "If we are not willing to mandate malpractice insurance up front, I believe we should not try to force the issue in such a backdoor manner. This rule creates too many ambiguities that we do not fully address."

TEXT OF OHIO'S AMENDED DR 1-104

(A) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(B) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(C) The notice required by division (A) of this rule shall not apply to a lawyer who is engaged in either of the following:
(1) Rendering legal services to a governmental entity that employs the lawyer;
(2) Rendering legal services to an entity that employs the lawyer as in-house counsel."

WEST'S **SOUTH DAKOTA** CODE
TITLE 16. COURTS AND JUDICIARY
CHAPTER 16-18. POWERS AND DUTIES OF ATTORNEYS
APPENDIX TO CHAPTER 16-18

MODEL RULES OF PROFESSIONAL CONDUCT
CHAPTER 1--CLIENT -LAWYER RELATIONSHIP

Rule 1.4. Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) If a lawyer does not have professional liability insurance with limits of at least $100,000, or if during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly disclose to a client by including as a component of the lawyer's letterhead, using the following specific language, either that:
(1) "This lawyer is not covered by professional liability insurance;" or
(2) "This firm is not covered by professional liability insurance."
(d) The required disclosure in 1.4(c) shall be included in every written communication with a client.
(e) This disclosure requirement does not apply to lawyers who are members of the following classes: SDCL 16-18-20.2(1), (3), (4) and full-time, in-house counsel or government lawyers, who do not represent clients outside their official capacity or in-house employment.

Comment
The 1998 amendments establish that the absence of professional liability insurance is a material fact which must be disclosed to clients. The disclosure shall be made at the inception of the attorney-client relationship, or promptly thereafter. Further, if a lawyer has liability insurance and allows it to lapse or if the policy is terminated, there is an affirmative duty to make the disclosure to all clients with active files. The rule provides for uniform disclosure language and mandates that the written disclosure shall be a component of the lawyer's letterhead. Since the rule mandates disclosure only to the client, it necessarily means that lawyers without malpractice insurance will have to maintain two sets of letterhead - one for communications with the client and another for all other letters. Component of the letterhead means pre-printed. In other words, when a lawyer prepares his or her letterhead for printing, the disclosure must appear on the face of the letterhead using the precise language provided in 1.4(c)(1) or (2). It should be noted that Rule 7.5 relating to a lawyer's letterhead requires that this disclosure be printed in black ink and in a type size no smaller than used for printing of the lawyer's name on the letterhead.

Amended by Laws 1999, c. 271 (Sup.Ct. Rule 98-35), eff. Jan. 1, 1999.

WEST'S SOUTH DAKOTA CODE
TITLE 16. COURTS AND JUDICIARY
CHAPTER 16-18. POWERS AND DUTIES OF ATTORNEYS
APPENDIX TO CHAPTER 16-18
MODEL RULES OF PROFESSIONAL CONDUCT
CHAPTER 7--INFORMATION ABOUT LEGAL SERVICES

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 in each

jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those note 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.
(e) ***The disclosure required in Rule 1.4(c)(1) or (2) shall be in black ink with type no smaller than the type used for showing the individual lawyer's names.***

COMMENT:
Rule 7.5 (e) establishes the requirements for the letterhead component for all lawyers required to make the disclosure of the absence of professional liability insurance. While a lawyer may choose any color of ink for his or her letterhead, the disclosure component must be in black ink. The intent of this requirement is to avoid, for example, a lawyer selecting yellow bond paper for letterhead and printing the mandated disclosure in yellow ink. Further, recognizing the great variance of letterhead styles, rather than mandating a minimum type size, the rule requires that the disclosure be printed with type size no smaller than the type size used to print the lawyer's name. If a lawyer utilizes letterhead that omits the lawyer's name, then the disclosure shall be printed in type size reasonably necessary to comply with the disclosure requirement. Although not required, it is anticipated that most lawyers will prepare letterhead with the disclosure appearing centered and at the bottom of the letterhead.

Amended by Laws 1999, c. 273 (Sup.Ct. Rule 98-37), eff. Jan. 1, 1999.

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[Editor's Note: By order dated December 13, 2002, the New Hampshire Supreme Court adopted Professional Conduct Rule 1.17 as set forth below in Appendix B. This new rule shall be effective on March 1, 2003.]

APPENDIX B

Adopt a new Rule 1.17 to the Rules of Professional Conduct, which shall state as follows:

Rule 1.17. Disclosure of Information to the Client

(a) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement of the lawyer if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance ceases to be in effect. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(b) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(c) The notice required by paragraph (a) of this rule shall not apply to a lawyer who is engaged in either of the following:

(1) Rendering legal services to a governmental entity that employs the lawyer;

(2) Rendering legal services to an entity that employs the lawyer as in-house counsel.

(d) **Transitional period.** Within thirty days after March 1, 2003, which is the effective date of this rule, a lawyer who does not have professional liability insurance in the amounts set forth in paragraph (a) and who is not exempt from the notice requirements under paragraph (c) shall provide notice to each of the lawyer's clients. The notice shall be provided to each client on a separate form set forth following this rule and shall be

signed by the client.

NOTICE TO CLIENT

Pursuant to Rule 1.17 of the New Hampshire Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____

(Attorney's signature)

CLIENT ACKNOWLEDGEMENT

I acknowledge receipt of the notice required by Rule 1.17 of the New Hampshire Rules of Professional Conduct that *[insert attorney's name]* does not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____

(Client's signature)

Date: _____

MEMORANDUM

TO: Advisory Committee

FROM: Subcommittee on Malpractice Insurance

DATE: September 18, 2003

Introduction

The subcommittee studied whether the court should mandate disclosure about a lawyer's lack of malpractice insurance coverage to clients and/or the Supreme Court. In 2002, the subcommittee recommended that Colorado lawyers be surveyed to find out how many lawyers do or do not have malpractice insurance. The Supreme Court approved the survey to be included with the 2003 attorney registration form. One purpose of the survey was to obtain information so that the Advisory Committee could make recommendations whether disclosure about the lack of malpractice insurance should be mandated or whether other solutions, such as mandatory insurance, may be feasible.

The Survey Results

The Advisory Committee received responses from 7,720 lawyers. Approximately 60% who responded have malpractice insurance. After the survey results were tabulated and presented to the Advisory Committee, questions arose concerning the feasibility of mandating malpractice insurance and whether a disclosure rule may indirectly convince lawyers to obtain malpractice insurance. A question also arose whether the disclosure rule should include information about the deductible for the professional liability policy.

Based on the survey results, the subcommittee sought additional information about how many lawyers are insured. The Office of Attorney Regulation Counsel (OARC) contacted a number of private insurance companies listed on the Colorado Bar Association website who provide primary insurance coverage. At least one company refused to give any information; others have not responded. Six companies responded, five of which provided information about the number of attorneys each insures. The five companies that gave information, provide coverage to 2,541 lawyers. The subcommittee did not contact ALAS or Lloyds of London, both of which provide malpractice insurance to large local and national law firms.

The OARC also obtained information from Westport Insurance Corporation, the endorsed CBA provider of professional liability insurance. Westport insures 3,500 lawyers. A copy of Chris Buckman's letter is attached.

Mandated Insurance

At the present time, the only state that mandates insurance is Oregon. Oregon, an integrated bar state, adopted its program in the mid 1970's. A description of the Oregon State Bar Professional Liability Fund, its genesis and its success, were reviewed extensively in an article written by Kirk R. Hall, then Chief Executive Officer of the Oregon State Bar Professional Liability Fund. A copy of the article is attached for your information. A summary of cases challenging the Professional Liability Fund's existence and the results of those cases is also attached.

C.R.C.P. 265 addresses the issue of lawyers practicing in a professional corporation or other types of permitted forms of organization. One rule provision addresses the limitation of joint and several liability if the professional company has professional liability insurance of $100,000.00 per claim multiplied by the number of lawyers and $300,000.00 in the aggregate multiplied by the number of lawyers. Limitations on the total amount of required insurance per claim and in the aggregate also addressed information about deductibles or self-retained amounts. Lawyers who want to limit their own liability for misconduct of their partners must comply with C.R.C.P. 265.

Whether the Supreme Court should create a mandatory professional liability fund or mandate malpractice insurance coverage through private carriers are complex questions that need further study and more extensive and diverse participation. The subcommittee therefore recommends appointment of additional members including bar associations' leaders, insurance defense lawyers, underwriting claims representatives (if possible) and private practitioners who engage in various practices of law. Some of the issues to be studied include:

1) If insurance is mandated, should it be through a liability fund or should lawyers be required to obtain insurance through private carriers?

   a. The concern of mandatory insurance from a private carrier is that an insurance company will then determine who is eligible to practice law rather than the Supreme Court.

2) Does the court have the authority to create a fund, similar to the Client Protection Fund, or must legislation be enacted? For example, the state legislature enacted financial responsibility legislation for physicians, dentists and health care institution. *See* C.R.S. §13-64-202. There are exemptions to required professional liability insurance coverage as described in C.R.S. §13-64-301.

3) If a professional liability fund is proposed, who should oversee and operate the fund; what should the maximum claim amounts be, who should fund it, i.e. only private practitioners, and what should the contribution be per lawyer?

Disclosure Requirements

The American Bar Association (ABA) Standing Committee on Client Protection (the committee) has addressed the issue of professional liability insurance coverage. It drafted an amendment to Rule 1.4 of the Model Rules of Professional Conduct on communication to clients about lack of malpractice insurance coverage. The rule provides, in part, that lawyers who lack professional liability insurance or whose policy lapses, give written notice to clients. The committee decided not to submit the proposed rule to the ABA Board of Governors in 2003 because of lack of support. has been recently appointed. The committee, with a new chairperson, meets in mid-October to discuss the status of the proposed rule 1.4.

Based on OARC's participation in organizations at the national level, it is clear that states are currently evaluating disclosure and/or coverage requirements. Four states, Alaska, New Hampshire, Ohio and South Dakota, have malpractice disclosure rules requiring lawyers to inform a client in writing when the lawyer does not carry the mandated minimum level of malpractice.

Alaska's and Ohio's rules require lawyers in private practice to inform a client in writing if the lawyer does not have malpractice insurance of at least $100,000.00 per occurrence and $300,000.00 annual aggregate, or if the lawyer's professional liability insurance is terminated. New Hampshire's rule is similar to the rules adopted by Alaska and Ohio. Ohio and New Hampshire require the client to sign the notice.

South Dakota also amended its Rule 1.4 (communication) by requiring lawyers to disclose to clients in writing, if they lack malpractice insurance of at least $100,000.00 per claim. The information must be made at the beginning of the attorney-client relationship. Ongoing clients must be notified if a policy lapses or is terminated. This information must be included in the lawyer's letterhead using the specific language set forth in the rule. Lawyers who are in-house counsel or government lawyers who do not represent clients outside their official capacity, are not required to include such disclosures. South Dakota also amended its Rule 7.5 (firm names and letterheads) to address malpractice insurance disclosure. That rule provides, *inter alia*, that the disclosure required by Rule 1.4 shall be in black ink with type no smaller than the type used for showing the individual lawyer's names.

Each of the four jurisdictions were contacted to find out the answer to the following: why they chose the professional liability insurance amounts below which disclosure was required; was there any discussion about

deductibles; did the jurisdiction obtain information about an increase in insurance coverage; and was the issue of mandating insurance discussed? The information obtained is discussed below.

Alaska (unified bar state)

Steve Van Goor, Alaska's Bar Counsel, recalls a discussion about the amount listed in the rule. The committee believed the $100,000.00 per claim/$300,000.00 aggregate was a reasonable balance between protection of the client and cost to the lawyer. Mr. Van Goor does not recall any discussion about deductibles or self-insurance, although he didn't think it would make sense that a marginal lawyer has a policy with a high deductible just to avoid telling clients that the lawyer doesn't have coverage.

Alaska prepared a survey before its disclosure rule went into effect. According to Bob Reese of ALPS, an insurance carrier, insurance coverage increased by 10 to 12 percent after the disclosure rule went into effect.

The Alaska Bar considered mandatory malpractice insurance. At that time the cost would have been prohibitive and would have required some contribution by government and public lawyers. The board decided that the disclosure requirement was a reasonable alternative to a mandatory insurance rule.

There have been very few complaints about the mandatory disclosure requirement. The rule has now been in effect for over four years, and it is rare for the state bar to receive a complaint.

New Hampshire (unified bar state)

The New Hampshire Supreme Court created an advisory committee to review suggestions about the disciplinary system and its ethics rules. An attorney who was chair of the professional conduct committee, attended a conference and learned of the South Dakota rule regarding disclosure of lack of malpractice insurance. Acting as an individual, he wrote to the advisory committee and suggested adoption of the South Dakota rule. The rule proposes disclosure of lack of insurance if the amounts are less than $100,000.00 per claim/$300,000.00 aggregate. It is unclear why these amounts were proposed. After the court published the rule, the advisory committee received a comment about disclosing the amount of the deductible. The advisory committee decided it was unnecessary to amend the rule to include such information .

The N.H. advisory committee looked into the issue of mandatory insurance and received information from Oregon. An issue arose whether the court had the authority to issue a rule mandating malpractice insurance. The committee decided not to pursue this option.

New Hampshire's rule was enacted in 2003; no one knows how many lawyers do not carry malpractice insurance. The advisory committee is currently considering a recommendation that the supreme court require all active members of the bar to file an annual form indicating whether they carry such insurance.

Ohio

Ohio decided that lawyers should disclose a lack of insurance if the insurance fell below $100,000.00 per claim and $300,000.00 for aggregate claims. Ohio has a court rule that requires law firms to maintain professional liability insurance in the amount of $50,000.00 per claim and $100,000.00 for aggregate claims, for any liability for acts or omissions in rendering legal services so the committee believed mandating disclosure is appropriate. There was no discussion about deductibles.

The state bar expressed some opposition and offered alternative language that was rejected. A lay member of the Board of Commissioners originally made the proposal for the rule.

The Ohio Supreme Court enacted the rule absent a survey. No survey has been conducted since the rule was enacted. Ohio disciplinary counsel received information from insurance carriers indicating an increase in inquiries for insurance coverage after adoption of the rule.

Ohio considered mandating insurance; however, there was not enough support. Accordingly, the court enacted the disclosure rule.

South Dakota

The committee that studied the issue of malpractice insurance disclosure requirements for lawyers, decided that amounts of $100,000.00 per claim/$300,000.00 in the aggregate below which disclosure would have to be made, was basic coverage. The committee didn't want to substitute its judgment for that of the lawyer/firm and recognized that malpractice insurance is similar to car insurance – the primary expense is for basic coverage and relatively inexpensive to increase that coverage.

The committee believed that most reputable insurance companies would not sell a policy with a large deductible if the attorney could not cover the deductible.

Prior to enacting the rule, South Dakota unscientifically surveyed its lawyer population concerning the number of private practitioners who were insured. It determined that between 75 to 80 percent of private practitioners were insured. After the rule was enacted, South Dakota conducted two

additional surveys which revealed that 97% of the private practice practitioners were insured.

The State Bar of South Dakota also studied mandatory liability insurance. The Bar rejected mandatory insurance because it believed that an underwriting department of an insurance carrier should not decide who could or could not practice law. The committee believed that disclosure to the client was the next best alternative.

Although there was some opposition to the proposed rule, the proposal was approved overwhelmingly by the state bar membership. Thereafter, the court adopted the rule.

Virginia

Virginia requires lawyers to report the status of their insurance coverage to the state bar on an annual basis. That information is then made available to the public on a web site.

Pennsylvania

Pennsylvania also requires that lawyers provide information about their insurance coverage. This information is enclosed with the attorney registration statement. It does not appear that this information is public, and it is unclear why the information is currently being requested.

Recommendation

After compiling the information and studying the issues, the subcommittee recommends the following.

1. Until the court decides whether mandatory malpractice insurance is feasible, the court should adopt an amendment to Colo. RPC 1.4 (communication) by adding the following language.

> c) a lawyer shall inform a client, in writing, at the time of the client's engagement of the lawyer that the lawyer does not have malpractice insurance of at least $100,000.00 per claim and $300,000.00 annual aggregate, and shall inform the client in writing at any time the lawyer's malpractice insurance drops below these amounts or the lawyer's malpractice insurance is terminated. The lawyer shall maintain a record of these disclosures for a period of seven years from the termination of the client's representation. This disclosure requirement does not apply to lawyers who are in-house counsel or government lawyers who do not represent clients outside their official capacity or in-house employment.

This language is taken from the Alaska and South Dakota rules. The committee believes the records should be maintained for seven years because Colo. RPC 1.15 requires maintenance of financial records for seven years.

2. The Attorney Registration Statement be modified by adding a question about malpractice insurance coverage, i.e. does the attorney have malpractice coverage of at least $100,000.00 per claim/$300,000.00 in the aggregate. This information would then be published on the attorney registration web site.

3. The court continue to study the issue of mandatory insurance and expand the subcommittee to include bar associations leaders, insurance defense lawyers, claim adjusters (if possible) and other private attorneys engaged in different areas of law.

MARSH

Christopher M. Buckman
Assistant Vice President

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September 10, 2003

Nancy Cohen, Esq.
Office of Attorney Regulation
600 17th Street
Denver, CO 80202

Dear Nancy,

Pursuant to your request to Chuck Turner, Esq. for information regarding the Colorado Bar Association's endorsed Lawyer Professional Liability Program, below provides such date.

1. Number of Policyholders: 1,400

2. Number of Insured Attorneys: 3,500

   Note: Both National and Regional Firms (such as Fegne & Benson, LLP) purchase malpractice coverage for their entire firm on a single policy basis. The purchasing is handled at their headquarter offices (not the Colorado office). The large Denver based firms such as Holland & Hart, LLP; Home Roberts; and others purchase their malpractice from Attorneys Liability Insurance Society (ALAS), a policyholder owned captive. Therefore, both of these segments are not targets for the CBA LPL Plan.

3. The CBA's endorsed Lawyer Professional Liability Program offers limits to $10 million. Below provides a policy count profile by limits of liability.

Policy Count Profile by Policy Limits	
Limits	**% Insureds**
100/300	12
250/250	4
500/500	10
500/1M	6
1M/1M	15
1M/2M	24
2M/2M	10
2M/4M	3

Policy Count Profile by Policy Limits	
Limits	**% Insureds**
3M/3M	1
4M/4M	1
5M/5M	4
6M/6M	3
8M/8M	3
10M/10M	4

4. Typically a solo carries a deductible ranging from $1,000, $2,500, or $5,000. Their decision depends upon their practice, past claims history and financial ability to satisfy the deductible in the event of a claim situation.

   Firm deductibles range from $2,500 for small two and three attorney firms, to such options as $5,000, $10,000, $15,000, or $25,000. A firm of 35+ attorneys may have a large deductible such as $50,000. Underwriters use a general guideline of $1,000 per attorney as a base.

5. Fifty five percent of the policyholders purchase limits with defense costs inside the limit. Forty five percent of the policyholders purchase limits of liability with defense costs in addition to the limits of liability. Some of the variables attorneys weigh when making their decision are premium costs, _____ of limit protection adequacy, type of practice, number of attorneys with firm, and past policy limits.

6. The average premium for a solo ranges from $1,400 to $3,500 depending upon the limits purchased, solo'' areas of practice, law office controls/legal malpractice risk management program, past claims, and grievance history. Firm's premiums will vary greatly based upon the underwriting factors, however the average range is from $2,000 to $6,000 per attorney.

7.

CBA Endorsed Lawyers Professional Liability Program's Claims Frequency by Area of Law Practiced
▪ Personal Injury – Plaintiff

CBA Endorsed Lawyers Professional Liability Program's Claims Frequency by Area of Law Practiced
▪ Domestic Relations
▪ Real Estate
▪ Commercial Litigation – Plaintiff
▪ Estate/Probate/Trust
▪ Collection/Repossess
▪ Criminal
▪ Commercial Litigation – Defendant
▪ Workers' Compensation - Plaintiff

CBA Endorsed Lawyers Professional Liability Program's Claims Severity by Top Areas of Law Practiced
▪ Personal Injury – Plaintiff
▪ Estate Planning
▪ Commercial Litigation – Plaintiff
▪ Domestic Relations
▪ Estate/Probate/Trust
▪ Civil Rights
▪ Bankruptcy
▪ Corporate: Mergers/Acquisitions
▪ Real Estate
▪ Commercial Litigation - Defendant

8. The CBA's LPL plan's declination rate has been less than 1% of applicant, both renewal and now. Typically, when an attorney or firm are declined coverage, it is due to either claim/grievance history, poor law practice procedures and systems, or very large percent of their practice devoted to very high risk areas such as SEC work, Environmental, Class Action/Mass tort, and Intellectual Property. Some of these underwriting restrictions are driven by the reinsurers.

9. Westport Insurance Corporation, and its predecessors have been the CBA endorsed underwriter since 1994. The past eight years, the CBA sponsored LPL Plan has provided stability, consistency, a financially strong insurer, and excellent claims handling.

   The CBA's website provides a list of insurance companies underwriting lawyers professional liability in Colorado or of February 12, 2003. It is still accurate as of the date of this letter.

   The following companies have abandoned underwriting lawyers professional in Colorado, and in some cases nationally, in the past 3 years.

   - American National Lawyers Insurance Reciprocal (ANLIR) status liquidation
   - Scottsdale Insurance Company
   - Chicago Insurance, a division of Fireman's Fund
   - Clarendon
   - Legion Insurance Company
   - American International Group
   - SAFECO
   - Star Insurance Group
   - Kemper/Lumbermans
   - TIG Insurance Group

I hope this data provides the information you are seeking. Please call me with any questions.

Sincerely,

Christopher M. Buckman
Assistant Vice President

cc. Chuck Turner, Esq. – Colorado Bar Association

PROFESSIONAL LIABILITY FUND

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5335 S.W. MEADOWS ROAD
P. O. BOX 1600
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IRA R. ZAROV
CHIEF EXECUTIVE OFFICER

RECEIVED

AUG 11 2003

REGULATION COUNSEL

August 5, 2003

Ms. Nancy Cohen
Office of Attorney Regulation Counsel
600 17th Street
Suite 200 South
Denver, CO 80202

Dear Ms. Cohen:

Ira Zarov, our Chief Executive Officer, has asked me to send you the following documents:

1. Minimum Financial Responsibility for Lawyers (March 1, 2000); and
2. Reported Decisions Affecting the Oregon State Bar Professional Liability Fund (February 2002).

Please feel free to give me a call if you have any questions.

Sincerely,

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MINIMUM FINANCIAL RESPONSIBILITY FOR LAWYERS

A Description of the Oregon State Bar Professional Liability Fund
and Discussion of Alternatives for State Bar Insurance Programs

By Kirk R. Hall,
Chief Executive Officer

Revised March 1, 2000

I. Introduction

From time to time, lawyers, legislatures, and bar officials have considered whether practicing lawyers should be required to carry malpractice coverage or show other proof of minimum financial responsibility. In most states, between 30 and 50 percent of the lawyers in private practice go "bare," and do not carry malpractice coverage. This is especially true during hard insurance market cycles, when the cost of coverage goes up and availability decreases.

The minimum financial responsibility question has arisen again in many states, in part because of the activities of the American Bar Association (ABA). On February 4, 1992, the ABA House of Delegates adopted the Report of the Commission on Evaluation of Disciplinary Enforcement, known as the McKay Commission. That commission was created in February 1989 to conduct a nationwide evaluation of lawyer discipline enforcement and to provide a model for responsible regulation of the legal profession for the next century.

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While the chief focus of the McKay Commission was on discipline and enforcement, the Commission came up a number of related recommendations as well. One recommendation reads as follows:

Recommendation 18
Mandatory Malpractice Insurance Study

The American Bar Association should continue studies to determine whether a model program and model rule should be created to: (a) make appropriate levels of malpractice insurance coverage available at a reasonable price; and (b) make coverage mandatory for all lawyers who have clients.

Comments:

In the course of examining measures to protect the public, the Commission has considered recommending a court rule requiring all lawyers who have clients to carry malpractice liability insurance. The Commission took testimony from representatives of the Oregon State Bar Professional Liability Fund, the ABA Standing Committee on Lawyers' Professional Liability, and many individuals on the issue of malpractice insurance. The issue of mandatory coverage is complex. There are many different forms of coverage and many legal and economic issues to be considered. We recognize that further study is necessary. (Footnotes omitted.)- ABA Center For Professional Responsibility, *Lawyer Regulation For A New Century (Report Of The Commission On Evaluation Of Disciplinary Enforcement)* (1992).

The balance of this paper discusses whether there is a need for a minimum financial responsibility rule for lawyers, and if so, the alternatives available to implement such a rule.

II. Is There a Need for a Minimum Financial Responsibility Rule for Lawyers?

As a threshold question, lawyers and bar associations should determine whether there is a need for a minimum financial responsibility rule for lawyers in private practice.

This question was faced by the lawyers of Oregon in the mid-1970s, when the Oregon State Bar Professional Liability Fund (the "Fund") was created. Since that time, we have occasionally been asked what is the justification for requiring all lawyers in private practice to carry malpractice coverage. The question is sometimes asked whether we are aware of any malpractice claims in Oregon before 1978, or any malpractice claims in any other state, which went unpaid because a lawyer did not carry malpractice coverage. The answer is a resounding "yes". We know anecdotally of meritorious malpractice claims which either went unpaid or which were settled at a reduced amount because the erring attorney had no malpractice coverage and few assets. We also know of cases where attorneys defending themselves on meritorious claims created such difficulties for the claimants that the claims were abandoned. Finally, we know from the claims which we pay that in many cases our "insured" lawyer could not have paid the claim on his or her own.

This question can be considered in another fashion. In most states, as many as half the practicing attorneys carry no malpractice coverage at all. Is there any reason to believe that these attorneys do not make errors causing claims, while their fellow attorneys with malpractice coverage do? Assuming that each group (those with malpractice insurance and those without) generate roughly equal numbers of losses, is there any reason to believe the uninsured lawyers are able to pay and are, in fact, paying all such claims out of their own pockets? It is more likely that many claims against uninsured attorneys are simply dropped or significantly compromised if the uninsured attorneys either have few assets or indicate a willingness to litigate to the bitter end, even on a meritorious claim.

Many state bar associations have already addressed this matter in part by sponsoring and supporting lawyer-owned malpractice insurance companies. The 16 lawyer-owned companies now providing coverage in over 30 states are the best first step toward ensuring that lawyers can find malpractice coverage at a reasonable price, and that members of the public will be protected from lawyer negligence. Lawyer-owned companies are generally non-profit, and are focused exclusively on legal malpractice coverage; they exist for the sole purpose of providing coverage year after year to their lawyer-owners on an economical basis. In contrast, many commercial carriers charge whatever the traffic will bear, and pull out of markets precipitously whenever conditions change. However, support of lawyer-owned companies does not guarantee that all lawyers will buy or be eligible for the coverage.

We believe in Oregon that some form of malpractice coverage should be mandatory, just as auto drivers are required to carry coverage. We have always required lawyers to be responsible in their *ethical duties* through the Disciplinary Rules. A generation ago we required lawyers to be responsible in their *fiduciary duties* through the creation of a state bar client security fund. The third logical step, in our opinion, was to require lawyers to be responsible for the financial effects of their own *negligence*. This led to the creation of a mandatory bar malpractice fund.

In addition, lawyers themselves benefit greatly from carrying malpractice coverage. Roughly 58 percent of all claims are resolved without payment of any indemnity; without malpractice insurance, lawyers must handle these defensible claims themselves and bear all the costs of defense. As to malpractice claims resulting in indemnity payments, lawyers benefit by avoiding an unexpected (and possibly enormous) financial loss.

The question of the need for minimum financial responsibility rules is inextricably linked to the practicality of any proposed solution. Even if a need is found, the lawyers of each state must determine whether there is a solution which truly addresses the problem without creating needless difficulties or expense. Five possible solutions are discussed below.

In considering each possible solution, one must recognize that no system will guarantee every malpractice claim against a lawyer will be paid in full. All malpractice insurance policies contain standard exclusions which can be significant in certain cases (e.g., intentional wrongful acts). In addition, all policies contain maximum limits for each claim and in the aggregate, which means that some portion of some large claims may not be covered by insurance. However, these coverage limitations will apply to very few claims, and so malpractice insurance coverage provides the public with substantial protection in most instances.

III. Five Alternative Models for Minimum Financial Responsibility Rules

The balance of this paper presents five alternative proposals for minimum financial responsibility rules governing lawyers. The proposals are presented in order of increasing complexity and public protection.

A. Disclosure Requirements

As a "minimalist" approach, a bar association could require lawyers in private practice to disclose to their clients in writing (1) whether or not the lawyer carries malpractice coverage, (2) the applicable coverage limits, and (3) the name of the insurance company, policy number, and expiration date for the coverage. The lawyer could also be required to provide clients with an explanatory brochure concerning the difference between ethics and malpractice complaints, the nature of claims made malpractice coverage, and the telephone number of the state bar association for further questions. Finally, lawyers could also be required to notify all current clients in the event that the malpractice coverage is terminated or reduced in amount, or if the firm changes carriers. These requirements could be imposed through the bar ethics rules or by statute, and enforced through disciplinary proceedings in the event of violations.

California adopted a version of this approach by statute in the early 1990s. See California Business & Professions Code section 6147 (pertaining to contingency fee agreements) and section 6148 (pertaining to other fee agreements). Prior to 1994, California attorneys were obligated to include, in the fee agreement, a statement disclosing whether they maintained errors and omissions insurance coverage, and the policy limits of that coverage if less than $100,000 per occurrence/$300,000 aggregate.

In 1994, both provisions of the California Code were amended so as to only require the attorney to include, in the fee agreement, a statement that the attorney does not maintain malpractice insurance applicable to the services to be rendered, if such is the case, or that the attorney has not filed a written agreement with the California State Bar guaranteeing payment of claims for errors or omissions arising out of the services to be rendered, if that is the case.

However, both sections 6147 and 6148 were subject to "sunset" provisions expired on January 1, 2000. At that time, amended sections 6147 and 6148 took effect, which means California attorneys are no longer obligated to include in the fee agreement any disclosure regarding whether the attorney maintains malpractice insurance or has filed a guarantee agreement with the California State Bar. It is uncertain at this time whether or not the disclosure rules will be restored.

By rule of the Virginia Supreme Court, Virginia lawyers must annually certify whether they have professional liability coverage or if they have an outstanding judgment against them arising out of rendering legal services. This information is available to any member of the public. If an attorney falsely certifies, the attorney may be subject to bar discipline. According to the Virginia State Bar, roughly 90 percent of Virginia lawyers in private practice maintain some form of malpractice insurance coverage. If so, this is a high level of coverage; in other states, only 50 to 70 percent of lawyers carry any coverage.

The Alaska Supreme Court recently amended Rule 1.4 of the Alaska Rule of Professional Conduct to include the following requirements:

Rule 1.4 Communication.

***

(c) A lawyer shall inform an existing client in writing if the lawyer does not have malpractice insurance of at least $100,000 per claimant and $300,000 total and shall inform the client in writing at any time the lawyer's malpractice insurance drops below these amounts or the lawyer's malpractice insurance is terminated. A lawyer shall maintain a record of these disclosures for six years from the termination of the client's representation.

Alaska Comment

Subsection (c) does not apply to lawyers in government practice or lawyers employed as in-house counsel.

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

(1) no insurance: "Alaska Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have malpractice insurance of at least $100,000 per claimant and $300,000 total and if, at any time, a lawyer's malpractice insurance drops below these amounts or a lawyer's malpractice insurance coverage is terminated. You are therefore advised that (name of attorney or firm) does not have malpractice insurance coverage of at least $100,000 per claimant and $300,000 total."

(2) insurance below amounts: "Alaska Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have malpractice insurance of at least $100,000 per claimant and $300,000 total and if, at any time, a lawyer's malpractice insurance drops below these amounts or a lawyer's malpractice insurance coverage is terminated. You are therefore advised that (name of attorney or firm)'s malpractice insurance has dropped below at least $100,000 per claimant and $300,000 total."

(3) insurance terminated: "Alaska Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have malpractice insurance of at least $100,000 per claimant and $300,000 total and if, at any time, a lawyer's malpractice insurance drops below these amounts or a lawyer's malpractice insurance coverage is terminated. You are therefore advised that (name of attorney or firm)'s malpractice insurance has been terminated."

This Alaska rule took effect on January 15, 1999.

The one shortcoming of the new Alaska rule is that no disclosure or reporting to the Alaska State Bar itself is required. This means that the Bar will not be able to develop any statistics concerning the percentage of Alaska attorneys practicing without malpractice coverage, and will have no way of determining whether or not the rule is, in fact, causing more attorneys to purchase malpractice coverage. Instead, the Bar will only find out if an Alaska attorney has violated the disclosure rules if an ethics complaint is made by a former client. Alaska attorneys who have violated the disclosure rules may choose to settle quietly with the former client out-of-pocket in order to head off any ethics complaints with the Bar.

The State Bar of South Dakota may have the best disclosure rule of all. Since January 1, 1999, the South Dakota Rules of Conduct have included the following disclosure requirements.

First, as part of the membership renewal process each year, every lawyer must certify to the Bar Association whether or not the lawyer carries professional liability coverage, the name of the insurance carrier, the policy number, and the limits of coverage.

Second, Rule 1.4 of the South Dakota Rules of Conduct now provides:

Rule 1.4. Communication ***

> (c) If a lawyer does not have professional liability insurance with limits of at least $100,000, or if during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly disclose to a client by including as a component of the lawyer's letterhead, using the following specific language, either that:
>
> (1) "This lawyer is not covered by professional liability insurance;" or
>
> (2) "This firm is not covered by professional liability insurance"
>
> (d) The required disclosure in 1.4(c) shall be included in every written communication with the client.
>
> (e) This disclosure requirement does not apply to [house counsel and government lawyers who do not represent clients outside their employment].

The related Comments clarify that the disclosure must be made at the start of the attorney-client relationship, and that ongoing clients must be notified if a policy lapses or is terminated.

In addition, South Dakota's proposed new Rule 7.5(f) relating to Firm Names and Letterheads states:

> (f) The disclosure required in Rule 1.4(c)(1) or (2) shall be in black ink with type no smaller than the type used for showing the individual lawyer's names.

The Comments to Rule 1.4 state in part:

> Since the rule mandates disclosure only to the client, it necessarily means that lawyers without malpractice insurance will have to maintain two sets of letterhead—one for communications with the client and another for all other letters. Component of the letterhead means pre-printed. In other words, when a lawyer prepares his or her letterhead for printing, the disclosure must appear on the face of the letterhead using precise language provided in 1.4(c)(1) or (2).

Finally, South Dakota's Proposed Rule 7.2(1) on Advertising states as follows:

> (1) Mandatory Disclosure. Every lawyer shall, in any written or media advertisements, disclose the absence of professional liability insurance if the lawyer does not have professional liability insurance having limits of at least $100,000, using the specific language required in Rule 1.4(c)(1) or (2).

The Comments clarify that this disclosure requirement applies to all forms of advertising, but not to simple telephone directory listings.

South Dakota has an integrated Bar, and lawyers must renew their membership and disclose their coverage status annually on a calendar year basis. As of February 2000, the number of South Dakota attorneys practicing with and without malpractice coverage was as follows.

Category	Number of Attorneys	Percent Practicing With Malpractice Coverage	Percent Practicing Without Malpractice Coverage
Sole Practitioners	343	90.1 %	9.9 %
Partners in Firms of Two or More	510	99.6 %	0.4 %
Associates in Firms of Two or More	142	93.7 %	6.3 %
All Attorneys in Private Practice	995	95.5 %	4.5 %

(The third category, "Associates in Firms of Two or More" includes attorneys who are not viewed as members of firms, such as contract attorneys, research attorneys, etc. They may work simultaneously for more than one firm.)

Anecdotally, the malpractice insurance carriers who write in South Dakota have indicated there was a significant increase in the number of new applications just prior to the 1999 effective date of this new disclosure rule. In essence, some lawyers and firms who had previously been uninterested in maintaining malpractice insurance apparently decided to purchase the coverage in order to avoid the embarrassment and administrative hassles of disclosing their lack of coverage to

clients. The current "soft" market, in which malpractice coverage is easily available at low prices, undoubtedly helped these firms decide to obtain coverage as well.

The results of the new South Dakota rule are stunning. Through a simple step which requires minimal administrative effort by the bar association, the number of lawyers practicing without malpractice coverage in the state has been significantly decreased. Greater public protection has been achieved as a result.

There are both pros and cons to a simple disclosure approach. On the positive side, bar regulatory and record-keeping requirements are minimal. Virtually all lawyers will comply with the disclosure requirements, and clients will be able to decide for themselves whether or not to hire a lawyer without coverage. Over time, most lawyers would be likely to carry coverage, if for no other reason than marketing purposes. Lawyers will have an incentive to avoid malpractice claims, as this would jeopardize their insurability and, therefore, their future marketability to prospective clients.

On the negative side, some lawyers might falsely claim to carry coverage, gambling on the prospect that no claims will arise or that any claims which do arise can be settled out of pocket. Other lawyers may carry coverage in inadequate amounts or with undercapitalized or unregulated insurers in order to minimize premium costs.

There would also be no guarantee that a malpractice claim against an attorney who carried insurance coverage (and advertised that fact to clients) would actually be covered by any policy. Due to the complexities arising from claims-made professional liability coverage, a lawyer may effectively be without coverage for a claim even though the lawyer maintained some policy in force at all times. This could happen, for example, if a lawyer switches carriers without obtaining tail coverage from the old carrier or prior acts coverage from the new carrier. As another example, a lawyer may allow coverage to lapse (or coverage may be terminated) after completion of a legal matter for a client, but before the client knows of a potential claim; in that case, there will be no malpractice coverage for the claim when it is asserted. In other words, even if lawyers comply with the disclosure rule and are carrying coverage when representing a client, there is still no guarantee that coverage will be available to satisfy any particular claim.

Finally, some clients may be too unsophisticated (or too poor or desperate) to understand the implications of a disclosure indicating the lawyer carries no malpractice coverage. These could be people at the bottom of the socioeconomic scale, or people served by lawyers at the bottom ranks of their profession. These are often the very types of clients who need protection the most.

B. Certification of Coverage with Reliance on the Commercial Market

As a second alternative, lawyers in a state could be required to carry malpractice coverage in a certain minimum amount (and meeting certain minimum requirements as to scope of coverage, deductible, exclusions, etc.), or post an equivalent bond with the bar association. Coverage would have to be obtained from existing commercial and bar-related carriers, without any alternative mechanism to place coverage for lawyers unable to obtain it on the open market; presumably those uninsurable lawyers would have to post some equivalent form of bond. To ensure compliance,

lawyers each year would be required to certify to the bar association or state licensing authority that they carry the minimum required coverage, and to indicate the name of the insurance company, policy number, and policy expiration date. Lawyers would also be required to file an amended certificate mid-year if coverage is renewed or if coverage is shifted to a different carrier. Coverage information from the bar association would be available to clients and potential clients upon request. These requirements would be stated in ethics rules or by statute, and enforced through disciplinary proceedings.

In support of this approach, the ethics rules in a state could also be amended to require attorneys to pay clients for all judgments arising from malpractice claims or face disciplinary action; however, such a rule probably would not be enforceable if the attorney filed for bankruptcy.

This approach has already been adopted by many state lawyer referral services, which will not allow a lawyer to participate without showing proof of coverage. There are again pros and cons to this proposed solution. On the positive side, the requirement should ensure that all lawyers carry coverage, thereby eliminating a need for disclosure of coverage status and evaluation by individual clients. Bar association record-keeping requirements would not be significantly increased, and there would be a central location for coverage information where injured clients could determine the carrier for their former lawyer. In many states, injured clients have been frustrated by their inability to learn from their former lawyer who is providing the lawyer's malpractice coverage; state bar associations are presently unable to provide this information.

However, the major drawback to this approach is that it effectively delegates to the commercial insurance market the right to determine who may practice law in a given state. A lawyer who is turned down for coverage by all available carriers due to prior claims, practice area, prior disciplinary action, or for other reasons would have no recourse other than to post a substantial bond. In many cases, these lawyers would be unable to post a bond and so would be prohibited from private practice. It is doubtful that any bar association or state supreme court would be satisfied with such a result.

C. Certification of Coverage With Alternative Coverage Mechanism

As a third approach, lawyers could be required to maintain malpractice insurance in a certain minimum amount (or provide an equivalent bond), and provide evidence of coverage to the bar association or licensing authority on an annual basis. In contrast to the previous proposal, however, an alternative coverage mechanism would be established to deal with "uninsurable" lawyers.

Under this alternative, attorneys would be permitted in the first instance to obtain coverage from a list of approved commercial and bar-related carriers, allowing competitive market forces to work, and would also be required to make information concerning their malpractice coverage readily available to clients, either through disclosure in a written fee agreement or through public records maintained by the bar association.

As noted in Subsection B above, simply requiring attorneys to maintain malpractice coverage does not guarantee that all licensed attorneys in the state will be able to purchase such

coverage. Some attorneys may be declined for coverage by all available carriers, while others might be offered coverage on terms which are unaffordable or with special exclusions or conditions which effectively void most coverage. Unless steps are taken to make certain that basic coverage is available to all attorneys in the state, a bar association will effectively be delegating to commercial insurance companies the right to determine who may practice law in the state.

The most obvious solution to this problem is the creation of a joint underwriting association (JUA) or assigned risk pool to provide coverage for those attorneys who are unable to obtain it from the open market. Such a JUA could be modeled after similar associations created to provide "uninsurable" drivers with coverage. A JUA could provide coverage either by assigning each insurance carrier in the state a number of "uninsurable" lawyers for coverage (perhaps in proportion to the percentage of the market held by each carrier), or could provide coverage through some type of bar-or state-owned fund. The cost of such coverage could be determined through general actuarial principles, although those principles would be harder to apply to the rather unpredictable area of professional malpractice coverage than to other lines of insurance.

While this proposal, including a JUA, sounds relatively straightforward, in fact it contains significant complexities. First, the state (through the legislature, the courts, or the bar association) would have to determine what minimum level of coverage was adequate to protect the public. In this regard, the state would have to determine permissible deductibles, general terms of coverage (i.e., acceptable exclusions, scope of coverage grant, etc.), and other aspects of coverage. Finally, some state authority would have to examine and approve proposed policy forms from competing carriers, and also determine the financial viability of potential carriers before adding them to an approved list. Some offshore or out-of-state carriers might not be very cooperative in helping the state complete these inquiries.

As part of this determination, the state would also have to decide whether to impose minimum coverage requirements on an individual *attorney* basis, or on a *firm* basis. It will be easier to ensure compliance if the requirement is imposed on individual attorneys, rather than firms; however, as virtually all commercial malpractice insurance is sold on a firm-wide basis, there could be significant problems in ensuring coverage. In the alternative, the requirement of coverage could be imposed on a firm basis; this raises the question of whether coverage requirements and permissible deductible levels should be modified according to firm size. However, if the requirement is only imposed on a firm basis, individual lawyers who move from firm to firm may or may not have applicable coverage for particular claims. Disputes could arise in many cases as to which firm – and carrier – were responsible for a claim.

Another level of complexity arises because of the claims made nature of professional liability coverage. Under claims made policies, a claim against a professional is generally covered only by the insurance policy in effect at the time the claim is made (not the policy in effect at the time of the occurrence or error giving rise to the claim). When professionals begin coverage with the carrier, they receive a "retroactive date," which effectively cuts off coverage for any claim made during the policy period arising from an occurrence before the retroactive date. Many policies impose no retroactive date, and so effectively give full prior acts coverage to the firm; however, other policies do impose a retroactive date, particularly if the firm has had prior significant claims.

This can mean there is no coverage for a claim against a firm, even though the firm is currently maintaining malpractice coverage.

A related problem arises in connection with extended reporting coverage or "tail" coverage. All claims made policies give the insured the right to extend coverage beyond the end of the policy period for a limited period (e.g., 12 months or 24 months) for payment of a specified additional premium. The tail coverage will cover any claim made during the extended reporting period based on an error occurring before the end of the prior policy period (so long as the occurrence is after any applicable retroactive date). In many cases, a law firm will buy tail coverage if it is rejected for ongoing coverage by the insurer due to bad claims experience. However, if a firm does not buy tail coverage when switching to a new carrier, and if the new carrier does not offer the firm full prior acts coverage, the firm will have no coverage for a claim made after the new carrier's policy is in force based on an alleged error occurring while the firm was with the old carrier. In other words, in certain cases a firm with claims made coverage could have *no coverage* for a particular claim, even though the firm maintained professional liability insurance at all relevant times.

In order to deal with these unfortunate possibilities, a state which wishes to impose effective minimum financial requirements on lawyers through the commercial market will have to regulate the insurers concerning such coverage provisions as prior acts coverage (retroactive date), tail coverage (extended reporting coverage), and excluded activities and attorneys. Such regulation might require all carriers to provide unlimited extended reporting coverage to firms who are rejected for ongoing coverage, or might require all carriers to provide unlimited prior acts coverage (i.e., no retroactive date) for new firms accepted for coverage. Similarly, firms or lawyers who end up in the joint underwriting association because of rejection by commercial carriers would have to receive coverage which ensured that there would be no gaps because of the prior acts coverage/tail coverage problems described above.

Attorneys who are required to obtain coverage from the JUA might also be required to undertake various loss prevention measures, including remedial classes, limitation on types of practice, etc. This could have a beneficial effect of helping to reduce the frequency and severity of malpractice claims in the future.

Obviously, implementation of this alternative would require a massive cooperative effort among lawyers, insurers, the bar association, the insurance commissioner, and the legislature. Record keeping and regulatory requirements would be significant. Because of the existence of multiple carriers and law firms, significant disputes could arise concerning which carrier and law firm was responsible for a particular claim. Rate and policy form regulation would be increased.

On the positive side, members of the public would be assured that, in virtually all cases, their malpractice claims would be covered by insurance, and lawyers would be assured that some form of insurance coverage would be available.

The situation described above – the requirement that lawyers carry coverage, but reliance on competition in the commercial market with a joint underwriting authority as back-up – will actually be tried in England and Wales this year. For decades, the 55,000 active solicitors in England and Wales were required to purchase malpractice coverage from the Law Society's Solicitors Indemnity

Fund (SIF). Unfortunately, rates were high (recently averaging eight percent of a firm's gross billings), and SIF developed a deficit of roughly £450 million ($750 million) due to lack of actuarial studies and a surge in real estate conveyancing claims against solicitors in the early 1990s. As a result, 70 percent of solicitors voted to allow firms to seek coverage from the commercial market as of September 2000. SIF will go into runoff after that date (handling pending claims until their conclusion), and will be the claims manager for *new* claims for St. Paul, the Law Society's endorsed carrier. Other commercial carriers will be permitted to compete, but their policy form will have to meet certain minimum coverage requirements. The Law Society is also setting up an assigned risk pool in which all carriers must participate to deal with solicitors who cannot otherwise find coverage, claims not otherwise covered by a policy, etc. For the most current information on this program, see the following website:

http://www.lawsociety.org.uk/dcs/third_tier.asp?section_id=3139&ictop=5

The implementation of this new program for solicitors in England and Wales presents issues of staggering complexity, and will be a useful experiment to show whether or not a requirement of mandatory coverage can exist alongside competition in the commercial market.

D. Creation of a Back-up Lawyer Malpractice Fund

As a fourth alternative, a state can combine a disclosure requirement with a backup "Lawyer Malpractice Fund" paid for only by lawyers without coverage to deal with unsatisfied malpractice judgments. The details would be as follows.

A state can first require that all lawyers disclose whether or not they carry malpractice coverage as part of the annual license renewal. Lawyers would be required to specify the coverage limits, carrier name, policy number, and expiration date of the coverage. If a lawyer is engaging in private practice but is not carrying malpractice coverage (or has permitted a lapse in coverage of any sort, including switching carriers without obtaining prior acts coverage or tail coverage), the lawyer would be required to indicate this on the license renewal form.

The state would then use this annual malpractice insurance information to levy varying contributions to a "Lawyer Malpractice Fund" according to the following rules. Lawyers who have continuously maintained malpractice coverage in a prescribed minimum amount with acceptable carriers would pay no annual assessment to the Lawyer Malpractice Fund. Lawyers who maintain no malpractice insurance would pay the maximum annual contribution to the Fund. Finally, lawyers with gaps in coverage, inadequate limits, or coverage with a non-approved carrier would pay an intermediate annual assessment to the Fund.

The Lawyer Malpractice Fund would *not* provide malpractice coverage to the lawyers who contribute to it. Instead, the Fund would operate in the same manner as a typical client security fund, except that the Lawyer Malpractice Fund would pay clients for *lawyer negligence or malpractice,* not for theft or defalcation. The Fund would operate as follows.

In the event a client was injured by the malpractice of an attorney without applicable liability insurance, the client would be required to sue the lawyer and obtain a judgment for

malpractice (unless the claim was below a specified amount, e.g., $5,000, in which case the Lawyer Malpractice Fund could waive the requirement of a judgment). Next, the client would be required to attempt collection of the judgment directly from the negligent lawyer. Only if collection efforts were futile could the injured client present a claim to the Lawyer Malpractice Fund. Payments from the Fund would be totally discretionary, and subject to a specific dollar limit per claimant or group of claimants. The Fund would take an assignment of the client's judgment, and could later proceed against the lawyer. Failure to pay the judgment could perhaps be made a disciplinary offense or reason for license suspension, although this might not stand up under bankruptcy laws.

Because the Lawyer Malpractice Fund would *not* be insurance, the negligent lawyer would not receive a defense from the Fund and could not demand any payment or settlement from the Fund to protect the lawyer's interests. Similarly, the Fund would not be required to pay a claimant's claim if the Fund was dissatisfied for any reason (e.g., that the claimant's judgment was taken by default and the attorney's negligence was never determined, the claimant's judgment was collusive, the claimant's claim relates to business transactions with the lawyer and does not arise from the lawyer's private practice, etc.). Obviously the governing rules would be drafted so that a claimant's claim would qualify for coverage under either the state's client security fund or its Lawyer Malpractice Fund, but not under both.

Not only would the Lawyer Malpractice Fund pay for judgments against lawyers who never carried malpractice coverage, but it would also pay unsatisfied judgments against lawyers who had dropped their coverage after leaving practice, who had a gap in coverage, who purchased coverage from a failed insurer, etc. In other words, the Fund would cover all unsatisfied malpractice judgments, including those which ultimately were not paid by a malpractice insurer for some reason.

Finally, a statute or bar rule could also be enacted which required lawyers to disclose to their prospective clients whether or not they maintain malpractice coverage, the name of the carrier, etc., similar to existing rules in Virginia, Alaska, and South Dakota.

This alternative has several advantages. First, it would induce all lawyers in private practice to obtain commercial malpractice coverage in order to avoid admitting to clients that they carried no coverage and to avoid paying an assessment to a Lawyer Malpractice Fund which might be as costly as an insurance premium but which offered no coverage to the lawyer. Second, lawyers who were unable to obtain commercial malpractice insurance could nonetheless continue to practice in the state, as an alternative facility (the Lawyer Malpractice Fund) would exist to cover any unsatisfied judgments for negligence rendered against them. Third, administration of such a Fund would be easier than creation of a mandatory malpractice fund or lawyer-owned insurance company, as the Lawyer Malpractice Fund would not be required to hire defense counsel, follow insurance company rules, evaluate exposure and settle claims in litigation, etc.

On the other hand, some injured clients might be unable to find new counsel to sue a negligent lawyer, obtain a judgment, and attempt to satisfy the judgment. Other injured clients might be so wary of the civil litigation system that they would be unwilling to hire a new lawyer and commence a new round of litigation against their former lawyer. Some malpractice claims might be too small to be of interest to any lawyer for the purpose of obtaining a judgment against a

negligent lawyer, which would leave the injured client without recourse unless the requirement of obtaining a malpractice judgment was waived. Attorneys who pay into the Fund may complain that they are receiving no direct benefit (i.e., no defense or indemnity) in exchange for their contributions to the Fund. Finally, a Lawyer Malpractice Fund would require some staff to evaluate and process claims, especially smaller claims for which no judgment is required.

It is possible that such a Lawyer Malpractice Fund could successfully be maintained for a relatively modest annual assessment against attorneys who practice without malpractice coverage. The size of the assessment, as well as the maximum amount available to individual claimants from such a Fund, could be adjusted from year to year.

This alternative should be seriously considered by any state bar association which wants to ensure payment of all legitimate malpractice claims up to a certain amount but does not want to make coverage mandatory or create its own insurance fund or joint underwriting association among existing carriers.

E. Creation of a Mandatory Fund to Cover All Lawyers in a State

As a fifth alternative, a state can require that all lawyers carry malpractice coverage, and can require the lawyers to obtain that coverage from a single bar fund. This fund, in turn, would be required to provide coverage to all lawyers in the state so long as they were licensed to practice law.

This last proposal is, in essence, what has existed in Oregon for the past 22 years. The remaining discussion under this Subsection E will focus specifically on the experience of the Oregon State Bar Professional Liability Fund.

1. History of Fund

The Oregon State Bar is an integrated, mandatory bar association. The Professional Liability Fund was created in 1978 to achieve two objectives: (1) to create a stable market for malpractice coverage for Oregon lawyers, and (2) to protect the Oregon public by ensuring that all Oregon lawyers would carry malpractice coverage.

The first idea for a Fund arose in the mid-1970s, when lawyers, doctors, and other professionals experienced a "hard" market in the commercial insurance industry. The cost of malpractice coverage rose, terms and availability decreased, and in many cases carriers disappeared from the marketplace. These insurance industry problems had nothing to do with the history of claims against lawyers in Oregon, but instead were dictated by world reinsurance trends, changes in the business objectives or ownership of insurance companies, and general economic conditions. Roughly half the lawyers in Oregon were practicing "bare", without any malpractice coverage. The lawyers of the state became dissatisfied with the product provided by the commercial insurance industry, and decided to take action to form a locally-based fund for Oregon lawyers which would provide coverage through both hard and soft insurance cycles. The concept of a fund was similar in many respects to the Oregon Client Security Fund, which had been established a decade earlier.

Several other state bar associations reached similar conclusions at the same time. Those states opted to form mutual insurance, reciprocal, or stock companies under applicable state law, in effect simply competing against the commercial carriers. Lawyers in those states were not required to carry malpractice coverage, and the bar-related mutual insurance companies which were created likewise were not required to provide coverage to all lawyers of the state. As a result, lawyers in these states have enjoyed lower and more stable rates from the bar-related insurance companies, but the public is not assured that every lawyer practicing in the state carries malpractice coverage and individual lawyers are not assured that they can obtain coverage. Today, lawyer-owned insurance companies write coverage in more than 30 states.

In Oregon, the lawyers decided that creating an alternative coverage source solved only half the problem. We believed it was also important to make coverage mandatory for lawyers in private practice, just as auto insurance is mandatory for all drivers. After considerable study, we determined that the best approach was to pool all Oregon lawyers in a state bar malpractice fund as to the first layer of coverage (presently $300,000). Once the state bar imposed the requirement of mandatory coverage, the only alternative to a mandatory bar fund for all would have been to create a joint underwriting association or assigned risk pool for only those lawyers rejected by the commercial carriers, which has not proved successful in other lines of insurance. As described above, a joint underwriting association would also have created problems when lawyers shifted from one carrier to another or in and out of the pool, raising questions concerning prior acts coverage, tail coverage, disputes among carriers as to responsibility for a particular claim, etc.

To create the Fund, the Board of Governors of the Oregon State Bar obtained authorizing legislation from the 1975 and 1977 Oregon legislatures. A final proposal was approved by the Board of Governors and the membership at the November 1977 bar convention. The Fund commenced operations on July 1, 1978, and has been in operation ever since.

While the Oregon State Bar Professional Liability Fund is unique to the United States, there are similar mandatory bar programs in every province of Canada, Great Britain, and every state in Australia. All have performed well over the past two decades, resulting in considerable protection of the public and savings to the practicing lawyers.

2. Current Program

Under the current program, all lawyers in private practice in Oregon must obtain malpractice coverage from the Fund in the amount of $300,000 per claim/$300,000 aggregate per year, plus an additional $25,000 claims expense allowance. There is no deductible. Coverage is written on an individual basis, not firm basis, so the aggregate limits for a firm are equal to the number of lawyers with coverage at the firm (e. g., a ten-partner firm effectively has PLF limits of $300,000 per claim/$3 million aggregate). Lawyers who fail to pay the annual Fund assessment are suspended from bar membership and may no longer practice law in the state.

There are roughly 13,000 members of the Oregon State Bar, of which approximately 9,000 are active and reside in Oregon. Of these lawyers, approximately 6,600 are in private practice and participate in the Fund, while the remaining 2,400 lawyers claim exemption from the Fund. These are lawyers who work as in-house corporate or government counsel, law professors, patent lawyers,

employed legal aid attorneys, retired attorneys, etc. The Fund offers coverage on a claims-made basis, and the terms of coverage are as broad as commercial programs.

Only active members of the Oregon State Bar whose principal office is in Oregon are permitted and required to participate in the Fund. Oregon Bar members who are members of other bars and who spend a majority of their time at an out-of-state office are neither permitted nor required to participate. These lawyers may be representing Oregon clients in Oregon without carrying commercial malpractice coverage. It is likely that Oregon will some day require *all* attorneys representing *any* clients in Oregon (including Oregon Bar members whose principal office is outside Oregon and non-Oregon lawyers seeking admission to practice in Oregon courts *pro haec vice*) to demonstrate proof of malpractice coverage as a condition to practicing even part-time in the state.

3. Cost of Coverage

The cost for coverage in 2000 is $1,800 per attorney. This is generally cheaper that comparable coverage in neighboring states, especially considering that there is no deductible and a firm will get the benefit of more than $300,000 in aggregate coverage if there are multiple claims.

New attorneys are charged only half the regular assessment in their first year of practice. The cost of coverage is then "step-rated" up to the full assessment over the following four years.

4. Surcharges, Debits, and Credits

Unlike a commercial carrier, the Fund does not attempt to underwrite attorneys prospectively based upon their areas of practice. That is, we do not charge some lawyers more and other lawyers less for new coverage based upon an analysis of each lawyer's practice by subject area. Underwriting would not necessarily be accurate, and would involve a tremendous amount of paperwork. Because we are a mandatory Fund, we know that the lawyers we cover will be obtaining additional coverage from us in the future. Accordingly, we can effectively "underwrite" and surcharge lawyers for future coverage based on their actual prior claims experience, not just a guess as to future risk based on practice area.

Under our Special Underwriting Assessment (SUA) system, attorneys with prior claims are charged an additional amount for their coverage in future years. There is no surcharge for claims which are defended or settled for a total amount of $25,000 or less, which is the great majority of claims. For larger claims, the surcharge is equal to one percent of the total of defense and indemnity costs in excess of $25,000. The surcharge is paid each year for a total of five years if the attorney remains in private practice. Most attorneys have found this a fair way of making those attorneys causing claims bear a greater portion of the cost of the Fund, while keeping the mandatory malpractice coverage affordable.

5. Extended Reporting or "Tail" Coverage

Because the PLF is a claims-made plan, attorneys must obtain extended reporting or "tail" coverage when they leave the private practice of law. This tail coverage applies to claims first made against the attorney after retirement arising from actions occurring before retirement.

Most commercial companies offer tail coverage to retiring attorneys on a very unfavorable basis--e.g., at a price of 200 percent of the annual premium for only a one- or two-year extended reporting period. In contrast, our Fund provides tail coverage to retiring attorneys automatically at no additional cost. This applies also to attorneys who are leaving the private practice of law for other ventures, such as government or corporate work or business ventures.

6. Coverage of Individuals vs. Firms

It is a hard for lawyers and insurance professionals to conceive of malpractice coverage that is written on an individual basis, not on a firm basis. Our main reason for this choice is that participation in the Fund is tied to membership in the Oregon State Bar, not to membership in any particular firm. Collection of the annual assessment and suspension for nonpayment must necessarily relate to individuals and not firms. However, there are other additional benefits as well. Lawyers frequently change firm association mid-year, and firms themselves merge and split. It would be an additional bureaucratic burden to keep track of all these hirings, firings, mergers, and splits, and to have to reissue coverage each time. In contrast, because Fund participation is tied to bar membership, we provide coverage to individual lawyers wherever they may be practicing.

7. Multi-State Firms

Some Oregon firms have opened branch offices in other states. These firms typically buy excess coverage above our $300,000/$300,000 primary limits, and have had no difficulty in obtaining "drop-down" primary coverage for their out-of-state attorneys from the commercial excess carriers. The PLF also offers excess coverage to multi-state firms, as discussed in detail below.

8. Differences Among Segments of the Bar

As noted above, the Fund charges each lawyer in Oregon the same amount for coverage, with a surcharge for attorneys with prior claims. This is underwriting based on actual claims experience, not a hypothetical projection of claims based on such factors as firm size, area of practice, etc.

On occasion, we have been asked why we don't offer discounts to selected "low risk" firms or specialties and impose surcharges on selected "high risk" firms or specialties. Our answer is that we cannot see significant and long-term statistical differences between lawyers and between groups of lawyers in Oregon. For example, large firms of 100 lawyers or more tend to have fewer reported claims per lawyer, but the severity of large firm claims is significantly worse. On balance, we have paid out as much in defense and indemnity of claims against large firms in Oregon as the firms

have paid to us in annual assessments. Put another way, the large firms have not been "subsidizing" other segments of the bar through their regular annual assessments.

Similarly, while some practice areas appear to present lower risk than others, there is no guarantee that any particular lawyer will practice solely in a low risk area during a given year. Oregon does not certify lawyers for practice in specialty areas, and so each attorney is authorized to take on any type of practice matter. Some of our worst claims have been business or securities matters taken on by lawyers whose regular practice is concentrated on criminal defense, or financial matters taken on by insurance defense lawyers. Rather than attempt to analyze each year the practices of each of the 6,600 lawyers participating in the Fund in order to make small variations in the annual assessment, we treat all lawyers the same until they have shown themselves to be different by generating claims (at which point the lawyers are surcharged). This eliminates a tremendous amount of paperwork, and treats all Oregon lawyers as equals.

9. Reinsurance

Insurance companies often obtain reinsurance to protect them on the risks assumed and spread those risks to other financial entities, the reinsurers. Because Oregon has a mandatory program, and because the limits of coverage ($300,000 per claim) are relatively low, we are able to operate safely without reinsurance. This is a great strength, as we are able to charge Oregon lawyers for coverage based solely on the Oregon claims experience. When the national and international reinsurance markets tighten, the price of reinsurance skyrockets and availability shrinks (as occurred in the mid-1980s). This affects commercial companies writing lawyers' malpractice insurance in every state. However, because we are limited to Oregon lawyers, and because we are insulated from the reinsurance markets, we are able to ride out hard-market insurance cycles without any effect on price or availability in Oregon.

10. Claims Handling

When claims are made, they are handled primarily by staff attorneys with several years' experience in private practice. We employ independent lawyers from a select defense panel for cases in litigation, but staff attorneys always monitor cases closely even while in litigation. If a lawyer has made a mistake causing damages, we try to repair or pay the claim as quickly as possible; on the other hand, if the lawyer has not made a mistake or has not caused damages, our policy is to defend the claim all the way. We have made it widely known throughout the state that we will not pay "defense cost" or "nuisance value" settlements, as this would only increase our costs over the long run. As a result, only 22 percent of claims go into litigation, with the following result: 15 percent are settled during litigation, 6 percent end with a judgment for the defendant, and 1 percent end with a judgment for the plaintiff (most often with damages below our settlement offer). Roughly 58 percent of our claim files are closed without any payment of indemnity.

We believe our claims handling is far superior to that of most commercial carriers, which sometimes do a good job of marketing but a bad job of claims handling. An independent 1997 audit by a national claims department audit firm reached the following conclusion:

"You questioned how I rated the PLF with other insurance claims departments ***. My assessment of your department is that the PLF is superior to any insurance claims office I have been exposed to."

Oregon lawyers are happy with our handling of their malpractice claims. Upon the closing of a claim file we send a detailed evaluation form to each insured asking how well we did. Roughly two-thirds of the lawyers respond, and the results are extremely positive. In 1999, we received the following feedback on two chief questions:

1. How satisfied were you overall with the handling and disposition of your claim?

Very Satisfied	82%
Satisfied	16%
Not Satisfied	2%

2. How satisfied were you overall with the services provided by the PLF staff attorney?

Very Satisfied	85%
Satisfied	14%
Not Satisfied	1%

We have occasionally been asked whether the existence of a mandatory fund creates claims against lawyers. The answer is probably yes, but that is not necessarily a drawback. The existence of a mandatory fund may allow unrepresented claimants to present small claims with merit which would have otherwise gone uncompensated due to the cost of hiring another lawyer. Spurious or frivolous claims which are presented because of the existence of a mandatory fund are dealt with firmly as described above, which tends to inhibit the presentation of similar claims in the future. We doubt that the existence of mandatory coverage has a significant effect on the overall number of malpractice claims any more than the requirement of auto coverage does on auto claims.

On average, an Oregon lawyer has a one-in-nine chance of having a claim made in any given year; this is approximately the same as the national average for all claims made against attorneys (including those claims falling within any applicable deductible). Our cost of coverage is below the cost of comparable commercial coverage in neighboring states. For these reasons, we do not believe that the existence of a mandatory fund increases the cost of malpractice coverage for participating lawyers.

11. Loss Prevention

Loss prevention is one of our greatest achievements, and one which can only be implemented to the greatest extent through a mandatory bar program. On average, we spend $100 per lawyer per year on loss prevention activities. In contrast, the other bar-related mutual insurance companies spend only $5 to $10 per lawyer per year on loss prevention, and the commercial companies spend virtually nothing.

This discrepancy is for two reasons. First, some commercial companies may have little interest in loss prevention, as they are not particularly anxious to decrease the number and severity of claims, which in turn would decrease the total premium charged and the profit to the insurer. Second, both the commercial companies and the bar-related insurance companies have to worry that their current insureds will shift to another company in the next year; this would mean that any money spent on loss prevention for the insured firm would effectively be "wasted" and the benefits would be enjoyed by another insurer. The bar-related companies also operate in a competitive environment, and cannot pass on the cost of loss prevention through their premiums.

In contrast, because the Oregon State Bar Professional Liability Fund is a mandatory, ongoing program, we know that every dollar invested in loss prevention will result in a benefit of several dollars to us in future years through the reduction of malpractice claims. Our loss prevention activities focus on four areas: (1) education by way of written materials and workshops, (2) in-office assistance with law office systems, (3) alcohol and chemical dependency counseling and intervention, and (4) stress, burnout, and career change counseling and intervention.

Our education programs all qualify for mandatory CLE credit, and are provided free of charge several times a year. As a result, our programs are heavily attended. In addition, we make available audio cassette programs which qualify for CLE credit and which are mailed free to lawyers upon request.

We also print handbooks on malpractice avoidance in special areas of concern. These handbooks are mailed free to each member of the bar, and are presented to new bar members upon admission. Our current list of handbooks includes malpractice avoidance information relating to time deadlines and statutes of limitations, securities law, office systems (docket control, conflicts, etc.), and environmental and pollution liability law. We also publish a loss prevention newsletter six times a year and a newsletter concerning attorneys' personal problems four times a year.

In addition, we maintain six staff members who travel around the state working with lawyers on a confidential basis in such areas as law office systems, alcohol and chemical dependency problems, and stress, burnout, and career change problems. We also maintain separate and anonymous meeting facilities where support group meetings are held on a daily basis to deal with problems of substance abuse, codependency, and other matters which can impair a lawyer's performance. This assistance program operates independently of the bar, and does not report any information to the bar discipline staff. As a result, we receive dozens of referrals every month from lawyers and judges around the state concerning impaired lawyers who need help.

Over the past 18 years, we have assisted over perhaps a thousand lawyers and judges with alcohol or chemical dependency problems back into productive sobriety, and we have assisted literally hundreds of law offices, large and small, in straightening out their office systems relating to docket control, conflicts, mail handling procedures, and similar matters. This has all been accomplished on a 100 percent confidential basis. In 1999, the Oregon Legislature enacted new statutory provisions to make all program information confidential and not subject to discovery under most circumstances.

All these activities are funded from our assessment dollars as a valuable investment in prevention of future claims. This is an especially good reason for a mandatory bar malpractice fund, as there usually will be no other funding source available for such intensive loss prevention programs. We believe in loss prevention, as it helps not only the lawyers but also the image of the profession and the public at large.

12. Legal Challenges

Over our 22 years of operation, we have faced a number of legal challenges to our existence and our requirements. These have included claims relating to due process, equal protection, antitrust statutes, civil rights, etc. In each case we have prevailed. Both state and federal courts have found that the existence of a mandatory malpractice fund in an integrated state bar association is proper, just as the requirement of participation in a client security fund was upheld in many states a generation ago.

13. Excess Coverage

Of the 6,600 lawyers in private practice in Oregon, approximately half carry additional malpractice coverage above our $300,000/$300,000 limits. Until recently, lawyers obtained this excess coverage from the commercial market. Starting in 1991, the Oregon State Bar Professional Liability Fund began offering excess coverage to firms on an optional, underwritten basis. Standard rates in 2000 will be approximately $600 per attorney for excess coverage of $700,000 excess of the mandatory $300,000 coverage (or $1 million total coverage). This brings the total cost for coverage of $1 million/$1 million with no deductible to $2,400 per attorney. Firms which *renew* their excess coverage also receive continuity and investment earnings credits equal to 4 percent a year, up to 36 percent total in 2000 (bringing the cost of $700,000 in excess coverage as low as $385, for a total cost of $1 million in coverage of $2,185). Higher coverage limits to $5 million are also available at favorable rates.

The program is reinsured through top rated reinsurers, and is financially separate from the mandatory, primary fund. The lawyers of Oregon are pleased that they can now obtain all their malpractice coverage from a single source located in their home state at advantageous prices.

14. Disadvantages of a Mandatory Bar Fund

This Subsection E has concentrated on the many advantages of a mandatory bar malpractice fund. Needless to say, there are certain disadvantages which should be considered:

(a) The mandatory nature of the program can offend some lawyers who don't like to be told what to do;

(b) There is the possibility that, due to the mandatory nature of a bar fund, "bad" lawyers will cause the cost of coverage to go up for the majority of "good" lawyers; this has definitely not been the experience in Oregon;

(c) There is a potential problem for young lawyers and part-time lawyers who do not wish to carry any malpractice coverage because of cost (even though new lawyers pay a reduced amount in Oregon); however, for the protection of the public it may be important to require such lawyers to carry coverage;

(d) The practice of law has changed significantly since the mid-1970s. At that time, all lawyers and firms relied on the same sources for malpractice coverage, and all suffered equally from a hard-market cycle. Today, there is a segmentation of the bar based upon firm size, type of practice, and the existence of multi-state firms. Special insurance programs are offered for large firms, plaintiffs' firms, insurance defense firms, etc. which may appear preferable to a single bar program in the eyes of the targeted firms. In particular, large firms may wish to carry significant deductibles or self-insured retentions, (e.g., $500,000 per claim) rather than participate in a state bar fund. However, as noted above, we believe each segment of the bar benefits equally from a mandatory bar fund, and would not experience any long-term savings from a special commercial program. Firms allowed to "opt out" would not enjoy the benefits of expert claims handling and the Fund's comprehensive loss prevention services.

(e) Although the likelihood is exceedingly small, there is a possibility that a bar malpractice fund could face financial problems or even fail in the event of bad claims experience. However, not a single bar-related insurance company or bar fund has failed over the past 22 years, and there is virtually no risk of failure from a mandatory fund with proper administration.

(f) Creation of a mandatory fund eliminates competition with the commercial market at the primary coverage level. Competition is always beneficial as a spur against complacency. However, many of the benefits of a state bar program can only be achieved if the program is mandatory (for example, strong loss prevention programs). Complacency from non-competition is avoided because the bar program is locally based and run by the lawyers' own elected representatives. A mandatory fund also avoids the many coverage and regulatory problems described above for the other approaches to minimum financial responsibility requirements for lawyers.

While there are potential problems, we believe the Oregon program has shown that any possible drawbacks are greatly outweighed by the benefits:

(a) All lawyers in the state are covered continuously, and so the public is assured of protection in the event of malpractice;

(b) Oregon lawyers are rated and pay premiums based on actual claims experience in Oregon only, not the experience of other lawyers in other states;

(c) Because of the large base of lawyers and relatively moderate limits of the mandatory coverage, no reinsurance is required and so a bar fund is free from the fluctuations of world reinsurance markets;

(d) A mandatory bar fund can afford to set up a full-scale loss prevention program which is tied into existing bar CLE programs. These programs can deal effectively with alcohol- and drug-dependent lawyers, office system problems, etc.

(e) A mandatory bar fund can compile a full range of claims data for the state. This is information not available from any other source.

(f) A mandatory bar fund is subject to local control by the lawyers themselves.

(g) There will automatically be significant price savings from elimination of broker commissions, marketing costs, taxes, regulatory fees, and contributions to state guaranty funds. In many cases, these costs can account for 30% of the commercial insurance premium.

(h) Creation of a mandatory bar malpractice fund will improve the image of the bar among the public;

(i) A mandatory fund results in easy procedures for maintaining coverage. Lawyers are not required to fill out annual applications or be involved in other paperwork;

(j) Because of the mandatory and ongoing nature of a bar fund, there is no requirement of a start-up capital contribution from bar members. In contrast, creation of a bar-related mutual insurance company will typically require an initial capital contribution from each lawyer of between $1,000 and $2,000;

(k) Finally, a bar fund will result in superior claims handling from in-house staff and from a carefully selected defense panel of local attorneys.

Oregon lawyers continue to give strong support to the requirement of mandatory malpractice coverage, and to the existence of the Fund as the sole source of that coverage. In a 1995 survey, Oregon lawyers responded to the following two questions:

> Do you believe Oregon should require all attorneys in private practice to carry professional liability coverage (whether or not through the PLF)?

Yes	94%
No	6%

> Do you believe the Professional Liability Fund should continue to exist as the mandatory source of professional liability coverage for all Oregon lawyers?

Yes	86%
No	14%

We received similar results in a comprehensive survey in 1986. Clearly, mandatory coverage requirements can work and receive the broad support of the membership.

15. Challenges to Mandatory Funds in Other Countries

As noted above, mandatory funds have existed for many years in Canada, Great Britain, Australia, and elsewhere. From time to time, there have been challenges to the monopoly aspect of a few of these funds, and proposals for change. Until recently, the fund's monopoly has been reaffirmed in each case.

In Ontario, the law society's malpractice fund developed an unfunded liability of approximately C$150 million during the early 1990s as a result of claims arising from the economic recession and prior underfunding of reserves. This deficit represented approximately C$10,000 per practicing lawyer. In response, rates were increased dramatically and a task force was commissioned to study whether or not the fund should continue. After careful study, the task force decided that the law society's mandatory fund was preferable to other alternatives, but recommended various internal changes. Fortunately, the changes were implemented by new management, rates have decreased, deficit has largely been eliminated, and member support has returned.

As noted at page 12 above, the Solicitors Indemnity Fund (SIF) had a similar experience in the mid-1990s, discovering it had an unfunded reserves deficit of approximately £450 million (roughly $750 million). This represented a deficit of approximately $13,000 for each practicing solicitor. An outside task force was appointed, and consulted broadly with the membership. It recommended that the SIF be continued as the preferred alternative, again with certain changes to its procedures and its assessment rules. However, the governing council voted in mid-1999 to end SIF's monopoly on providing coverage, and to open the market to commercial carriers beginning in September 2000. SIF will continue to handle prior claims in the "run-off" period after that date, and will handle claims for St. Paul, which Law Society's endorsed carrier. As of this date, the rules for competition by commercial carriers are being formulated. Clearly, there will have to be standardization and minimum requirements as to terms of coverage, the provision of prior acts and extended reporting coverage, the handling of coverage disputes among insurers, and the establishment of an assigned risk pool for law firms which are rejected by all carriers.

The mandatory lawyer malpractice funds in the states of Australia have recently been subject to reexamination as a result of a new competition policy being implemented by the state and federal governments. In the state of New South Wales, for example, the law society's mandatory fund recently contracted with Australia's largest insurer to transfer all the program's risk for a three-year period; the mandatory fund will remain in place, however, and continue to handle all claims for the insurer. The annual assessment in New South Wales was high by Australian standards, in part because of a greater level of litigation against lawyers in the state and in part because of a recent economic downturn which resulted in failed business and real estate transactions and related claims against lawyers. The new insurance relationship had the advantage of lowering the New South Wales assessment by roughly one-third for 1999, and rates were guaranteed for a multi-year period. The mandatory fund will have the opportunity to take back the risk in a future year if the price charged by the insurer rises to an unacceptable level..

The state government in the Australian state of Victoria also endorsed a new competition policy, and enacted legislation requiring the existing law society mandatory fund to give up its

monopoly (i.e., permit commercial insurers to sell coverage to Victoria lawyers as an alternative to the law society fund) by year-end 1998. The Law Society in Victoria, however, was convinced that this combination of mandatory coverage requirements without a monopoly fund could not succeed, not lease because there would be no mechanism to provide coverage to lawyers rejected by competing carriers for prior claims or other reasons.

After two years of consultation and consideration, the Victoria state government agreed, reversed course, and restored the monopoly status to the existing mandatory fund in late 1998. At least part of the reason for restoration of the existing fund's monopoly position was the reluctance of the commercial insurers to agree to appropriate terms for dealing with rejected firms, including extended reporting or "tail" coverage for firms which were non-renewed, ongoing coverage for a limited period for rejected firms, and participation in a state-wide joint underwriting association. In addition, the existing monopoly program had been very efficient and kept prices down, and so was popular with the membership.

Finally, the law society in the Republic of Ireland established a lawyer-owned malpractice insurance mutual in 1989, but the mutual does not have a monopoly status and must compete with commercial carriers. The government has required since 1995 that Irish lawyers maintain coverage, but does not provide any mechanism to guarantee that coverage will be available. Instead, Irish law firms rejected by three insurers (one of which must be the mutual) are offered coverage by an assigned risk pool supported by all the carriers. The firm may stay in the pool only for two years, and may be charged a premium of up to 200 percent of the last year's premium plus an additional amount for "run-off" (i.e., prior acts coverage). After two years, the firm must rely solely on the market, and if no carrier offers coverage, the firm presumably must cease the practice of law.

Even though the requirement of mandatory coverage is relatively new in Ireland, there have already been one or two firms rejected by all existing carriers, including the law society's mutual, after two years in the assigned risk pool. Without malpractice coverage, the lawyers in those firms could not continue to practice. Rather than face the expected displeasure of the Supreme Court of Ireland, some of the insurers have agreed to insure the rejected firms on a joint, *ad hoc* basis, with very high premiums. It remains to be seen whether this informal arrangement for dealing with rejected firms will continue to work in the future.

The mandatory programs in other jurisdictions have not faced similar challenges, and enjoy widespread support. In many cases, they offer superior coverage and claims handling and prices below that of commercial carriers. Being non-profit, these programs pass on all financial benefits to the members. As an example, in Quebec the cost of C$1 million in mandatory coverage in 1999 was only C$1 per lawyer! The law society had developed a large surplus due to conservative reserving practices and superior investment returns, and decided to return some of that surplus to its members by lowering the annual assessment from C$500 to C$1. It is unlikely that a commercial insurer would be as generous toward its insureds with any excess surplus it developed.

16. Summary and Conclusions Regarding a Mandatory Fund

We believe the benefits from a mandatory bar malpractice program have been demonstrated many times over in Oregon since 1978, and by similar mandatory bar programs in Canada, Great

Britain, and Australia. We also believe that similar benefits can be realized in other states. However, a mandatory bar fund can succeed in a state only if it is widely supported by lawyers from all segments of the bar and all regions of the state. This, in turn, requires that lawyers and firms put aside their own personal interests to some degree and consider what is best for the bar as a whole and the public interest. If bar members believe that malpractice coverage should be mandatory for all attorneys in private practice, we believe that a single bar fund is the best, least expensive, and most efficient way to go.

IV. Alternative Models For Firms with Special Needs

The question of minimum financial responsibility requirements has become more difficult in recent years, as the demographics of the legal profession have become more varied. Today, large multi-state law firms may have little in common with smaller firms operating from a single office. Specialty "boutique" firms (e.g., patent firms, entertainment law firms, business firms with investment services, etc.) may have unusual coverage needs, and may not be acceptable under the general underwriting criteria of major carriers. Any new minimum financial responsibility requirement must take into account the needs and characteristics of these specialty firms.

The first, second, and fourth alternatives stated in Section III above would permit specialty firms to obtain coverage from specialty programs, and would not impose any greater burden on them than on other law firms generally. However, the third and fifth alternatives (requiring that coverage be uniform and mandatory with a joint underwriting association as back-up, or providing universal coverage through a mandatory bar fund) present greater difficulties. A central source of coverage may not have the underwriting ability or desire to "cut a deal" tailored to the needs of a specialty firm.

The problem is especially difficult for multi-state firms, where the attorneys in a branch office in a particular state are required to obtain coverage from a mandatory bar fund while other firm members in other states can go "bare" or buy from a commercial carrier. Every province in Canada requires attorneys to participate in its local mandatory fund, and problems concerning multi-province law firms are worked out through joint agreements among the various mandatory funds. However, it may be harder to achieve such working protocols among insurers and bar associations in the more diverse United States.

V. Premium Tax for Loss Prevention

Finally, some lawyers are attracted to a mandatory bar malpractice program, but discover the concept is not feasible in their state for political or other reasons. They then lament that a comprehensive loss prevention program similar to Oregon's is not possible, given the strictures on bar association fees and the unwillingness of commercial insurers to fund loss prevention.

As an alternative to a mandatory bar malpractice program as the funding source for loss prevention, lawyers and bar associations should consider lobbying the legislature and insurance commissioner for a special premium tax to apply only to lawyers professional liability insurance policies (of both admitted and non-admitted carriers), with the proceeds of the tax to be dedicated to intensive loss prevention programs sponsored by the bar association.

These programs would include malpractice avoidance seminars, publications, and handbooks, as well as confidential programs to deal with law office systems and problems of alcohol, chemical dependency, and stress. A special 2 to 3 percent premium tax could raise $60 to $90 per lawyer, and should result in a decrease in malpractice coverage rates over the following years which is greater than the tax as lawyers in the state improve their practices. The corresponding benefit to the public of decreased malpractice and disciplinary violations would be even more significant. The insurance companies should not oppose such a special premium tax because the tax would be the same for all carriers in the state. No carrier would be put at a competitive disadvantage, and the quality of practice of their insureds would steadily improve.

Bar associations could go one step further. Because loss prevention programs should be available to all, it is only fair to charge lawyers who do not carry malpractice coverage (and therefore do not pay the special premium tax) an additional amount as part of their annual bar dues. This additional amount would be added to the premium tax revenues dedicated to loss prevention. A bar dues surcharge for lawyers who go "bare" would be an added incentive for all lawyers in the state to carry malpractice coverage.

VI. General Conclusion

In conclusion, the decision to impose minimum financial responsibility requirements on attorneys is not a simple one. First, the lawyers in the state must determine that the need is great enough to justify the difficulties which will follow such a requirement. Second, the lawyers must then decide the best way to impose such minimum financial responsibility requirements. Each choice is fraught with difficulties.

A "minimalist" approach is simply to require full disclosure to clients concerning a lawyer's current malpractice coverage. At the opposite end of the spectrum, bar associations can successfully create their own mandatory bar fund, with many claims handling and loss prevention benefits; however, this diminishes freedom of choice for attorneys and creates some difficult issues, particularly for multi-state firms.

As a separate matter, lawyers and bar associations can consider a special premium tax on malpractice insurance policies, which would be dedicated to intensive loss prevention efforts.

With the McKay Commission Report and the growing interest by state legislators and regulators in the protection of the public from attorneys who go "bare," the question of minimum financial responsibility for lawyers is likely to be a continuing issue in this new decade.

REPORTED DECISIONS AFFECTING THE OREGON STATE BAR PROFESSIONAL LIABILITY FUND

By Kirk R. Hall/Ira Zarov
Chief Executive Officer
Professional Liability Fund

Bennett v. Oregon State Bar, 256 Or. 37, 470 P2d 945 (1970). Oregon attorney challenged the creation of the mandatory Client Security Fund under the "equality of privileges and immunities of citizens" clause of the Oregon Constitution and the Due Process and Equal Protection clauses of the U.S. Constitution. The court found no violation of any constitutional provisions.

In 1975, the Oregon Legislature enacted first provisions allowing creation of a Bar professional liability fund. A Bar study in 1976, adopted at the annual convention, recommended strengthened legislation in the next session.

Sadler v. Oregon State Bar, 275 Or. 279, 550 P2d 1218 (1976). The State Bar Act at ORS Chapter 9 setting procedures for admission, suspension, and discipline of attorneys by the Bar was challenged as usurping or interfering with the inherent power of the Oregon Supreme Court. The statutory provisions were upheld because they did not "unduly burden or substantially interfere with the judiciary" in its exercise of authority over the practicing bar.

In 1977, the Oregon Legislature granted the Bar stronger powers to create a fund. See ORS 9.080, 9.191, 9.200. The Oregon State Bar Professional Liability Fund is created later in the year.

38 Op. Atty. Gen. 1379 (1977). In response to questions from a legislator, Attorney General Jim Redden opines that (1) requiring all lawyers in private practice to pay a professional liability fund assessment does not violate the Due Process and Equal Protection clauses of the U.S. Constitution, and (2) it is constitutionally permissible to require each attorney to pay the same premium, even though there may be variations among attorneys in the extent of their exposure or their prior claims experience.

State ex rel Robeson v. Oregon State Bar, 291 Or. 505, 632 P2d 1255 (1981). The petitioner was suspended for failure to pay the annual Professional Liability Fund assessment, and sought mandamus against the Bar for reinstatement. Petitioner argued that the statutory suspension for nonpayment was a usurpation and improper delegation of the Oregon Supreme Court's authority over admission of attorneys. The Court rejected this argument on the basis of the *Sadler* case, and found no constitutional objections to suspension for non-payment. "We have no doubt that the due process clause does not foreclose making the practice of a profession contingent on making adequate arrangements for making good financial losses caused to clients, patients or others." 291 Or. at 513. Mandamus denied.

Balderree v. Oregon State Bar, 301 Or. 155, 719 P2d 1300 (1986). Petitioner worked as in-house counsel for a corporation. As such, plaintiff was not engaged in private practice of law, and so was entitled to exemption from annual Fund assessment. As a condition to exemption,

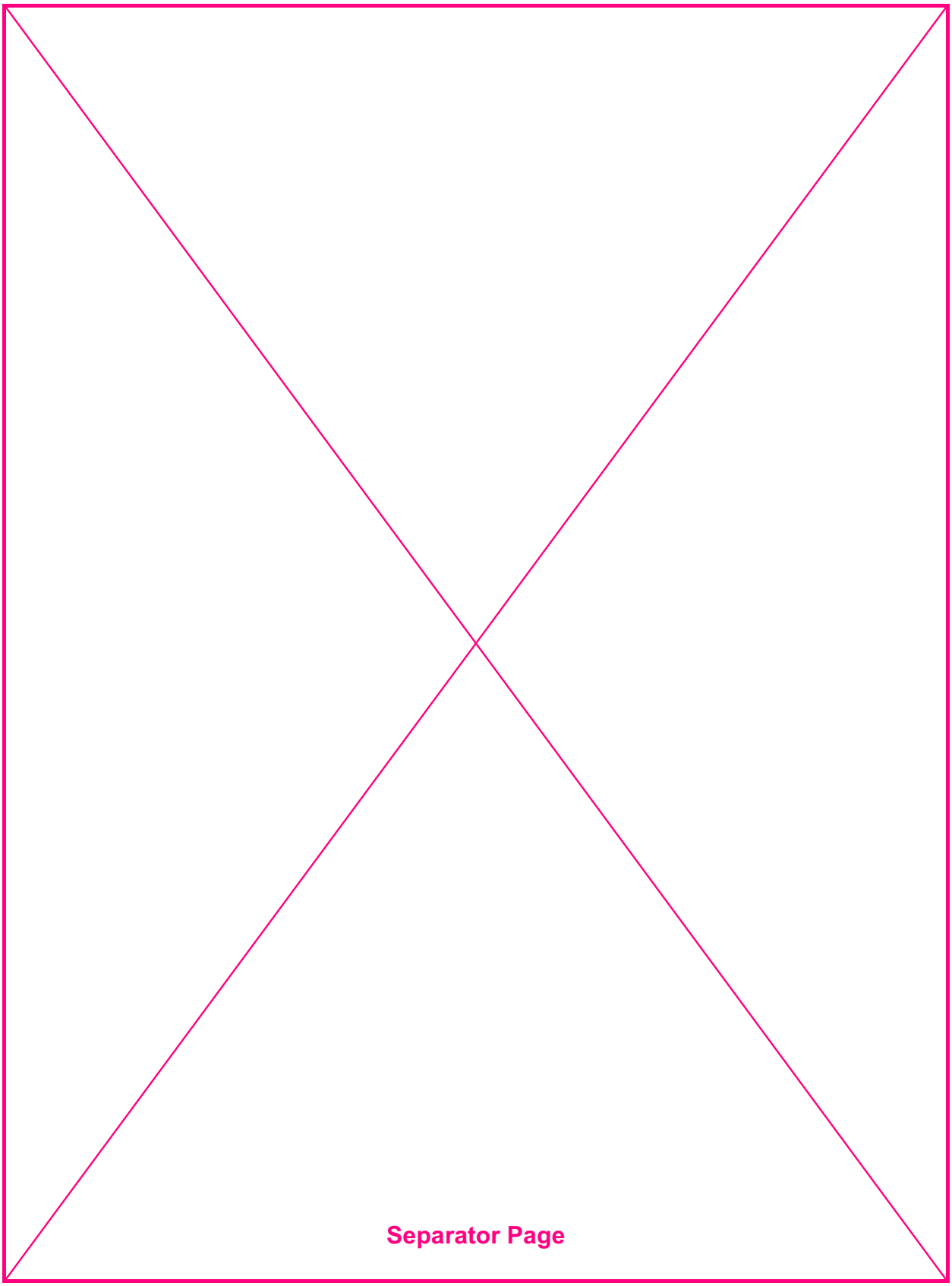
petitioner was required to sign agreement promising to indemnify Fund for any defense costs or damages the Fund was required to spend on petitioner's behalf. Petitioner refused to sign indemnity agreement and sued to avoid suspension. The Court upheld the Professional Liability Fund's right to require the indemnification agreement, noting that the Fund's enabling legislation at ORS 9.080(2) authorized the Bar to do whatever is "necessary and convenient" to implement a working liability fund. Even though an attorney had an exemption, the attorney might become involved in private practice and could be sued for damages. The Fund might face potential liability in such cases, and so requirement of the indemnification language was appropriate: "We conclude that the term 'necessary and convenient' *** means that which is reasonably necessary and useful in implementing the Board's authority." 301 Or. at 161-162.

Hass v. Oregon State Bar, Civil No. 87-196-JU, slip. op. (D. Or., June 12, 1987) aff'd 883 F2d 1453 (9th Cir. 1990), cert. den._____ US ___ (1990). Plaintiff sought declaration that requirement of Professional Liability Fund participation violated the Commerce Clause of the U.S. Constitution and the federal antitrust laws. The court rejected both claims, holding that the Fund was exempt from the antitrust laws under the state action doctrine, and that the Fund did not violate the Commerce Clause as it had equal effect on both interstate and local businesses and advanced a legitimate public interest. The decision was affirmed by the Ninth Circuit.

Ramirez v. Oregon State Bar, Civil No. 87-6625, slip. op. (D. Or., June 20, 1988), aff'd No. 88-3972 (9th Cir. 1990), cert. den._____ US ___ (1990). Plaintiff sued alleging that the existence of the Professional Liability Fund violated the First, Fifth, and Fourteenth Amendments of the U.S. Constitution and violated plaintiff's civil rights under 42 USC Section 1983. Plaintiff also alleged the Fund illegally restrained trade and commerce under the Sherman Act, 15 USC Sec. 1, and that collection of assessments by the Fund was in violation of RICO, 18 USC Sec. 1962. In summary judgment, the Federal Court found no violation of the plaintiff's civil rights and no violation of the Sherman Act or RICO statute. This decision was affirmed by the Ninth Circuit in an unpublished opinion.

Bobbitt v. Oregon State Bar, Civil No. 87-1140-PA (D. Or., Feb. 16, 1989). Plaintiff sued the Fund, alleging that its special underwriting assessment (SUA) which surcharges attorneys for prior claims experience violated the Due Process and Equal Protection clauses because of alleged defects in available procedures for appealing such a SUA surcharge. Plaintiff also alleged lack of standards and civil rights violations, interference with business relations, and fraud and outrageous conduct on the same basis. Following trial, Federal Court found no violation of the Constitution or any law, except held that PLF must allow plaintiff to reappeal SUA and under Due Process standards must give written explanation of PLF's decision whether or not to grant relief from surcharge. Otherwise, SUA program left intact. No appeal was taken.

Erwin v. Oregon State Bar, 149 Or. App. 98 (1997) Mr. Erwin brought declaratory judgment action against the OSB BOG challenging the assessment of contributions to the PLF. He claimed that the OSB suspension of attorneys for failure to pay the PLF assessment was unconstitutional because the requiring payment of the assessment was itself an unconstitutional taking. The circuit court dismissed. Erwin appealed. The appeal raised the issue of whether a declaratory judgment claim can be dismissed for failure to state a claim.



Separator Page

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

AGENDA

January 9, 2004, 1:30 p.m.
Supreme Court Conference Room (5th Floor)

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1. Approval of minutes [See attached pages 1-7]
2. Administrative matters
   a. Introduction of members who missed first meeting
   b. Scheduling of next meeting
3. Food for thought: Brief presentation regarding ethics issues in connection with alternative dispute resolution – Scott Peppet
4. Formation of Family Law Subcommittee [See attached pages 8-18]
5. Status report from Ad Hoc Ethics 2000 Committee – John Gleason, Nancy Cohen
6. Report from Rule 5.5 Subcommittee – Nancy Cohen [See (a) materials distributed by e-mail prior to the September 30, 2003 meeting, and (b) [See attached pages 19-48]
7. Initial report from Rule 1.4 Subcommittee – Eli Wald [See materials distributed by e-mail prior to the September 30, 2003 meeting]
8. Other business
9. Adjournment (by 3:30 p.m.)

Chair
Marcy G. Glenn
Holland & Hart, LLP
P.O. Box 8749
Denver, Colorado 80201
(303) 295-8320
mglenn@hollandhart.com

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.

"shall" version

Rule 1.2. SCOPE AND OBJECTIVES OF REPRESENTATION

(a) A lawyer shall abide by a client's decisions concerning the scope and objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of 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. **ADD: In cases involving the welfare of a child, an attorney representing a parent should consider the welfare of the child, and seek to minimize the adverse impact on the minor child.**

(b) A lawyers' 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 client consents after consultation. 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. **ADD: In Domestic Relation cases, An attorney should not condone, assist or encourage a client to transfer, hide, dissipate or move assets to defeat a spouse's claim.**

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

(f) In representing a client, a lawyer shall not engage in conduct 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.

ADD:
(g) In cases involving the welfare of a child, an attorney should not permit a parent to contest an issue of parental responsibility for either financial leverage or vindictiveness.

(h) *Option #1,* An attorney should refrain from assisting a parent in a case involving the welfare of a child from conduct which the attorney clearly knows is inconsistent with a child's best interest.

EXHIBIT
C

Option #2, **An attorney should not represent a client in a case involving the welfare of a child when the lawyer knows that the clients conduct will significantly harm the minor child either physically or emotionally.**

Option #3, **An attorney, in a case involving the welfare of a minor child, shall not recklessly disregard facts establishing that a clients conduct is clearly inconsistent with the interest of a minor child and shall refrain from assisting a parent with conduct which the attorney clearly knows is inconsistent with the child's best interests.**

(i) An attorney acting in a professional capacity should strive to lower the emotional level of a dispute and treat all participants with respect.

Rule 2.1. ADVISOR

In representing a client, a lawyer shall exercise independent professional judgement 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. **ADD: In a matter involving the welfare of a child, an attorney should advise the client of the emotional trauma and detrimental effects upon a child when matters of parental responsibility are contested and that resolution of the conflict is almost always in the best interest of a child.**

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 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. **ADD: A lawyer in a case involving the welfare of a minor child should not make or assist a client in making an allegation of child abuse unless there is a reasonable basis and evidence to believe it is true.**

ADD:
New Rule 4.6. COMMUNICATION WITH CHILDREN

(a) Option 1, In cases involving the welfare of a minor child, an attorney representing a party should not communicate with the minor child.

Option 2, **When issues in a representation affect the welfare of a minor child, an attorney should not initiate communication with the child, except in the presence of the child's lawyer, or special advocate of the child, with court permission, or as necessary to verify facts in motions and pleadings.**

(b) *Option #1* **In cases involving the welfare of a minor child, an attorney should not bring a child to court or call a child as a witness without a court order granting permission to do so.**

Option #2 **In cases involving the welfare of a minor child an attorney should not bring a**

child to court or call a child as a witness without full discussion with the client and a reasonable belief that it is in the best interest of the child.

I hope this is helpful. Let me know your thoughts.

Al Bonin

"shall" version

Rule 1.2. SCOPE AND OBJECTIVES OF REPRESENTATION

(a) A lawyer shall abide by a client's decisions concerning the scope and objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of 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. **ADD: In cases involving the welfare of a child, an attorney representing a parent should consider the welfare of the child, and seek to minimize the adverse impact on the minor child.**

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(c) A lawyer may limit the scope or objectives, or both, of the representation if the client consents after consultation. 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. **ADD: In Domestic Relation cases, an attorney should not condone, assist or encourage a client to transfer, hide, dissipate or move assets to defeat a spouse's claim.**

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

(f) In representing a client, a lawyer shall not engage in conduct 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.

ADD:
(g) In cases involving the welfare of a child, an attorney should not permit a parent to contest an issue of parental responsibility for either financial leverage or vindictiveness.

(h) ***Option #1,*** **An attorney shall refrain from assisting a parent in a case involving the welfare of a child from conduct which the attorney clearly knows is inconsistent with a child's best interest.**

EXHIBIT
D

Option #2, **An attorney shall not represent a client in a case involving the welfare of a child when the lawyer knows that the clients conduct will significantly harm the minor child either physically or emotionally.**

Option #3, **An attorney, in a case involving the welfare of a minor child, shall not recklessly disregard facts establishing that a clients conduct is clearly inconsistent with the interest of a minor child and shall refrain from assisting a parent with conduct which the attorney clearly knows is inconsistent with the child's best interests.**

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(b) ***Option #1*** **In cases involving the welfare of a minor child, an attorney shall advise the client not to bring a child to any court proceedings without prior authorization by the court.**

Option #2 **In cases involving the welfare of a minor child an attorney shall not bring a child to court or call a child as a witness without full discussion with the client and a reasonable belief that it is in the best interest of the child.**

MEMORANDUM

TO: Al Bonin
Chair, Colorado Supreme Court Committee on Ethical Issues in Family Law

FROM: Alec Rothrock Alec

CC: Dave Little, John Palmeri, Russel Murray

DATE: September 22, 2003

SUBJECT: Proposed Modifications to the Colorado Rules of Professional Conduct

On August 28, 2003, the Colorado Rules of Professional Conduct Subcommittee, consisting of David Little, John Palmeri, Russel Murray and myself, met for lunch to discuss the proposed modifications of the Colorado Rules of Professional Conduct that you circulated on July 31, 2003, together with Dave Johnson's August 14, 2003 comments. I have attached your July 31, 2003 draft and Dave's comments to this memorandum. The Subcommittee focused its discussion on proposed paragraphs 1.2(g) and (h), because they dealt with subjects that the Subcommittee felt were outside the scope of its current mandate.

(The July Meeting)

The Subcommittee began by discussing the events of the full Committee's July meeting. At that meeting, the Subcommittee suggested that any rule change requiring parties to act in the best interests of minor children be made to the Colorado Rules of Civil Procedure, and not the Colorado Rules of Professional Conduct. The Subcommittee believed that any such rule must apply to both attorneys and clients, as it is the client who decides the objectives of the representation, not the other way around. Colo. RPC 1.2(a).

One idea was to add a paragraph to Colorado Rule of Civil Procedure 11 that would apply to any pleading involving the allocation of parental responsibilities regarding a minor child. The attorney's signature would constitute a certification that, to the best of the lawyer's knowledge, information and belief formed after reasonable inquiry, the pleading is not interposed for any purpose inconsistent with the best interests of the child. If the pleading violated that rule, the Court could assess impose upon the attorney or the party, or both, an appropriate sanction which might include an order to pay the other party's attorneys' fees and costs incurred because of the offending pleading. Another idea was to require the attorney to certify, at the beginning of any pleading involving parenting time of a minor child, that the attorney had conferred with the client regarding the client's obligation not to seek relief inconsistent with the best interests of the child. In short, the Subcommittee favored a rule change that created adverse consequences for both attorney and client.

EXHIBIT
E

Someone else at the meeting suggested that any Rule 11-type rule change might be better suited for C.R.S. § 13-17-102, which provides similar remedies where parties and their attorneys bring or defend cases that lack substantial justification. Justice Bender then expressed a preference that the Committee consider changes to the Colorado Rules of Professional Conduct instead of the Colorado Rules of Civil Procedure. A subsequent motion to that effect passed.

(The Lunch Discussion)

The Subcommittee then reviewed and discussed your proposed modifications to the Colorado Rules of Professional Conduct and Dave Johnson's comments, which, most significantly, would make your proposed rule changes mandatory instead of simply encouraged.

As for the proposed changes that deal with the welfare of minor children, the Subcommittee recognized that, in some cases, it must be obvious to an attorney that a parent-client's objectives are contrary to the best interests of a minor child. Under the current ethics rules, the attorney should try to change the client's mind about his objectives but is not prohibited from assisting the client in seeking them. If the attorney fails to change the client's mind, the attorney would be justified in refusing to undertake the representation or in seeking the court's permission to withdraw from the representation. In all likelihood, the client would simply shop around for an attorney with no qualms about assisting a client in seeking repugnant objectives.

The Subcommittee then discussed the practical difficulty of ascertaining the best interests of a child--a subject about which the parties' mental health experts often sharply disagree, and judges agonize. In this gray area, the Subcommittee felt that there was a real and significant potential for conflict of interests if attorneys were required simultaneously to (a) pursue the lawful objectives of a client-parent and (b) refrain from assisting the client in seeking objectives contrary to the child's best interests. That conflict is recognized in Colorado law. *See McGee v. Hyatt Legal Services, Inc.*, 813 P.2d 754, 757 (Colo. App. 1990) (best interests of child may be contrary to wishes of parent-client; lawyer's duty to exert best ethical efforts on client's behalf is "inconsistent with any duty he might owe to the child"). Indeed, it is generally recognized. *See* L. Becker, "Ethics Responsibilities of a Lawyer for a Parent in Custody and Relocation Cases: Duties Respecting the Child and Other Conundrums," 15 *Journal of the American Academy of Matrimonial Lawyers* 33, 37 (1998) ("In the custody context[,] a duty of care to a child would arise only when the client's wishes and the child's interests seem to the lawyer to be at odds with each other. The imposition of a duty of care to the child in such circumstances would be inconsistent with the obligation the lawyer owes to the client."). A result of this conflict is that, in a close case, an attorney might be hesitant to seek the client's objectives for fear that the court or disciplinary authorities might, in hindsight, believe those objectives were contrary to the best interests of the child.

The Subcommittee was also concerned that the creation of such a duty in the Colorado Rules of Professional Conduct might lead to civil liability on the part of the lawyer in claims brought by affected children. *See Miami Int'l Realty Co. v. Paynter*, 841 F.2d 348, 352-53 (10th Cir. 1988) (in legal malpractice action, trial court did not err in admitting expert testimony regarding duties of lawyer under code of ethics to establish applicable standard of care); *see also* ABA Model

Rules of Professional Conduct, Preamble and Scope ("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") (2002). In other words, the affected child could argue that the attorney's violation of an ethical duty to the child should give rise to civil liability on the part of the attorney. Any such liability would erode the principle that an attorney "must act in his client's best interest and is not liable to a third party absent conduct that is fraudulent or malicious." *Glover v. Southard,* 894 P.2d 21, 23 (Colo. App. 1994).

> The rule that an attorney's liability to third parties is strictly limited rests upon three public policy bases: the protection of the attorney's duty of loyalty to and effective advocacy for his or her client; the nature of the potential for adversarial relationships between the attorney and third parties; and the attorney's potential for unlimited liability if his duty of care is extended to third parties.

Id. The limitations period for these types of claims would not begin to run until the child reached the age of majority. *Estate of Stevenson v. Hollywood Bar and Café, Inc.,* 832 P.2d 718, 721 n. 5 (Colo. 1992); C.R.S. § 13-81-103.

(The Proposed Rules)

As modified by Dave Johnson, proposed Colorado Rule of Professional Conduct 1.2(g) states, "In cases involving the welfare of a child, an attorney shall not permit a parent to contest an issue of parental responsibility for either financial leverage or vindictiveness." This proposed rule has two serious flaws. First, it would give the attorney the right, in these circumstances, to determine the objectives of the representation. This is the client's right, not the attorney's. Colo. RPC 1.2(a). Second, the proposed rule would require the attorney to ascertain the motives of the client, which are often unclear, mixed, and changing. To subject an attorney to discipline and potential liability because he misapprehended the client's motives would cast an intolerable pall on the attorney's willingness to pursue the client's objectives.

Colorado Rule of Professional Conduct 1.2(h) states as follows:

> h) *Option #1,* An attorney shall refrain from assisting a parent in a case involving the welfare of a child from conduct which the attorney clearly knows is inconsistent with a child's best interest.
>
> *Option #2,* An attorney shall not represent a client in a case involving the welfare of a child when the lawyer knows that the client's conduct will significantly harm the minor child either physically or emotionally.
>
> *Option #3,* An attorney, in a case involving the welfare of a minor child, shall not recklessly disregard facts establishing that a client's conduct is clearly inconsistent with the interest of a minor child and shall refrain from assisting a parent with conduct which the attorney clearly knows is inconsistent with the child's best interests.

Initially, it is unclear whether the "conduct" to which these Options refer consists of (a) the exercise by unfit parents of their right to pursue objectives in the legal system, typically obtaining more parenting time, or (b) abusive extra-judicial conduct by these same parents. The Subcommittee has assumed it is the former, because there does not seem to be a problem with attorneys who assist clients in acts of physical or emotional abuse on minor children. If the abusive conduct constitutes criminal conduct, Colorado Rule of Professional Conduct 1.2(d) already prohibits the attorney from assisting in it. Indeed, Colorado Rule of Professional Conduct 1.6(b) permits a lawyer to "reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime."

The former is problematic, for the very reason that it has the effect of restricting clients from exercising rights in the legal system. In contrast to conduct constituting a crime or fraud, seeking an order for parenting time or more of it is one step removed from the actual conduct that is contrary to the best interests of the child. In essence, the attorney becomes responsible for unforeseen conduct on the part of the client. If the effect of seeking an order for more parenting time is to assist the client in perpetrating a fraud on the court or a criminal act, Colorado Rule of Professional Conduct 3.3(a)(2) requires the attorney to affirmatively disclose to the court all material facts necessary to avoid the fraud or crime.

Proposed Colorado Rule of Professional Conduct 1.2(h) injects a knowledge requirement into the lawyer's actions, presumably as a safeguard against overbroad application of rule. The word "knows" is defined in the Colorado Rules of Professional Conduct as denoting "actual knowledge of the fact in question," which may be inferred from the circumstances. Colo. RPC Preamble, Scope and Terminology. For disciplinary purposes, a reckless state of mind is equivalent to actual knowledge in most circumstances. *People v. Small*, 962 P.2d 258, 259-60 (Colo. 1998). In this context, the adverb "clearly" tends to promote confusion, not clarity, and is inconsistent with the style of the Colorado Rules of Professional Conduct as a whole.

The Subcommittee believes that the inclusion of a knowledge requirement (scienter) does nothing to alleviate the inherent difficulty in many cases of determining whether seeking more parenting time is inconsistent with the child's best interests. In many cases, whether that objective is consistent with the best interests of a child is inherently subjective, intangible and amorphous in nature. If the objective will assist the client in engaging in criminal conduct such as physical or sexual abuse, Colorado Rule of Professional Conduct 1.2(d) prohibits the lawyer from assisting the client in attaining it, and Colorado Rule of Professional Conduct 3.3(a)(2) requires the attorney to affirmatively disclose to the court all material facts necessary to prevent it.

(Conclusion)

For these reasons, the Subcommittee concludes that it cannot support a change to the Colorado Rules of Professional Conduct that places a duty on the part of the attorney to refrain from assisting a parent-client in seeking objectives in the legal system that are contrary to the best interests of a nonclient minor child. These same reasons surely explain why, to the Subcommittee's knowledge, no jurisdiction in this country has imposed this kind of ethical

obligation on the lawyer. *See* L. Becker, "Ethics Responsibilities of a Lawyer for a Parent in Custody and Relocation Cases: Duties Respecting the Child and Other Conundrums," 15 *Journal of the American Academy of Matrimonial Lawyers* 33, 36 (1998) ("It seems clear that a lawyer who represents a parent in custody litigation does not have a general duty under applicable ethical codes to further the interest of a child, even where the lawyer believes that the client's wishes are inconsistent with the child's best interests."). The Subcommittee continues to believe that the better course is to consider changes to the Colorado Rules of Civil Procedure, which, although not free from some of the same infirmities as the proposed Colorado Rules of Professional Conduct, would at least reach the principal as well as the agent. In particular, the Subcommittee favors the idea of a certification by the attorney, at the beginning of any pleading involving parenting time of a minor child, that the attorney had conferred with the client regarding the client's obligation not to seek relief inconsistent with the best interests of the child.

MEMORANDUM

TO: Standing Rules Committee

FROM: Subcommittee on Rule 5.5.

DATE: December 16, 2003

The subcommittee reviewed the proposal sent by the Ethics Committee and the rule from the Ethics 2000 Committee concerning modifications to Rule 5.5. The subcommittee also received a memorandum from the Advisory Committee with research from the states limiting law related activities of a disbarred or suspended lawyer during the period of disbarment or suspension. Copies of the memorandum and research are attached to this memo.

The subcommittee essentially adopted the Ethics 2000 Committee's proposal and added limitations on the activities of disbarred and suspended lawyers. The proposal also places additional responsibilities on the supervising lawyer. A copy of the proposed rule and comments are attached to the memo. The Ethics 2000 proposal is similar to the Ethics Committee proposal.

Proposed rule 5.5 (a) recognizes that a lawyer cannot practice in Colorado without a Colorado license unless specifically authorized by Rule 220, 221 and 222 of the Colorado Rules of Civil Procedure or unless authorized by federal or tribal law. Both committees recommended language be included that it is not the unauthorized practice of law if a lawyer has received permission or is admitted to practice in the federal courts or is practicing tribal law.

The subcommittee had concerns about what contacts a disbarred or suspended lawyer should have with clients. A number of states prohibit a disbarred or suspended lawyer from working in a law firm. . After much discussion, the subcommittee decided that disbarred and suspended lawyers could work in law offices with certain restrictions. The subcommittee concluded that a disbarred lawyer can work in a law office but cannot have any contact with clients during the period of disbarment. A disbarred or suspended lawyer who has to petition for reinstatement, cannot work in the firm where the lawyer worked at the time of the disbarment or suspension.

With respect to a lawyer who is suspended or on disability inactive status, the subcommittee believes that contact with a client should be permitted so long as the supervising lawyer and the suspended or disabled lawyer give written notice to the client of the suspension or disability and of the fact that the lawyer cannot practice law. Proof of this notice must be kept for two years.

A number of jurisdictions specifically prohibit a disbarred or suspended lawyer from receiving, disbursing or otherwise handling client funds. The subcommittee believes this limitation is appropriate. It is similar to the California rule.

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(1) A lawyer shall not:

(a) 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;

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

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

(d) allow a disbarred lawyer to have any contact with clients of the lawyer or of the firm during the period of disbarment;

(e) allow a disbarred lawyer or a suspended lawyer who must petition for reinstatement to work in the firm where the lawyer was working before the disbarment or suspension, and allow the name of the disbarred or suspended lawyer to remain in the firm name; or

(f) allow a suspended lawyer or disabled lawyer to have any contact with clients of the lawyer or of the firm unless the suspended or disabled lawyer and the licensed lawyer give written notification to the client on whose specific matter such person will work, prior to or at the time of employment that the lawyer is suspended or disabled and cannot practice law. The lawyer shall retain proof of service and the written notification for two years.

(2) A suspended or disbarred lawyer shall not:

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

(b) give legal advice or engage in any other conduct that would be considered the practice of law.

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

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) 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).

Paragraph (c) 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.

A lawyer will be assisting a nonlawyer in the unauthorized practice of law if the lawyer allows a disbarred lawyer to have any client contact. A lawyer may employ or contract with a disbarred lawyer to perform services that a law clerk, paralegal or other administrative staff may perform so long as the lawyer supervises the work.

A disbarred lawyer or suspended lawyer (who must petition for reinstatement) may not continue to work in the firm where the lawyer practiced before disbarment. Furthermore, the name of the disbarred lawyer must be removed from the firm name . A lawyer will be assisting in the unauthorized practice of law if the lawyer fails to remove the disbarred lawyer's name or allows the lawyer to remain after the date of the disbarment.

Suspended or disabled lawyers may have contact with clients of the licensed lawyer so long as the suspended or disabled lawyer and the licensed lawyer provide written notice of the suspension. Written notice to the client shall include advisement of the suspension, including a provision that the suspended, and cannot give advice or engage in any other conduct associated with the practice of law. Proof of service shall be maintained in the licensed lawyer's file for a minimum of two years.

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

MEMORANDUM

October 13, 2003

TO: Rules of Professional Conduct Committee

FROM: Steve Jacobson, Attorney Regulation Committee

SUBJECT: Limits on Suspended and Disbarred Attorneys

The Advisory Committee discussed on several occasions the advisability of creating a rule limiting the relationship licensed lawyers would be allowed to have with suspended/ disbarred lawyers. The genesis of the discussion was the Attorney Regulation Committee's frustration in reviewing numerous complaints where:

a) Clients interacted with suspended/disbarred lawyers who were acting in a paralegal role in a law firm and the client asserted the suspended/disbarred lawyer gave advice and the client believed the person was a lawyer, and

b) Litigation continued to be controlled by suspended and disbarred lawyers who remained active in the operation of their firms.

The Office of Regulation Counsel prepared a summary of every state's regulations in this area for the Advisory Committee's review. A copy of the summary is attached.

The Committee discussion centered on the competing interests of client protection versus the rehabilitative benefits served by a suspended/disbarred lawyer continuing to do legal work. The Advisory Committee decided that some modification of the rule was necessary. Members of the Committee took different views along a continuum of possible rules that ranged from a total bar to any suspended/disbarred lawyer working for a lawyer to a rule that only required clarification of the suspended/disbarred lawyer's status.

The present rule in Colorado is as follows:

Colo. RPC 5.5(b)
Rule 5.5. Unauthorized Practice of Law.
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the Colorado bar in the performance of activity that constitutes the unauthorized practice of law.

The Advisory Committee believed that the matter should be referred to the Rules Committee to recommend an additional subsection (c) to the rule. The new subsection should draw from the following possible rule changes that express the continuum discussed by the Advisory Committee - most restrictive to least restrictive.

1. A rule that makes it a violation of the unauthorized practice rule to employ a suspended or disbarred attorney in a law office. The following language is similar to that used by Alabama. The rule has an all-encompassing definition of employment.

> A lawyer shall not:
> (c) employ a lawyer who is on disability inactive status or who have been suspended or disbarred.
> (d) For purposes of this rule, "employ" is defined as retaining, contracting with or hiring a suspended or disbarred lawyer to provide services, advice, or labor of the type customarily related to the provision of legal services. This specifically includes, but is not limited to, paralegal services, law-clerk services, research assistance, clerical assistance, secretarial services, office-management services, administrative-support services or any other services where the subject lawyer could have access to clients, clients' files, or client confidences.

2. A rule that makes it a violation of the unauthorized practice rule to allow a suspended/disbarred attorney to perform certain defined duties but prevents the suspended/disbarred lawyer from having "contact with clients or prospective clients of any attorney or law firm in person, by telephone, in writing, e-mail, or by any other form of communication," or having "contact with client funds or property."

3. A rule that allows suspended/disbarred lawyers to work for a lawyer, but not with the firm or lawyers the suspended/disbarred lawyer was working with at the time of suspension or disbarment and does not allow the lawyer or firm to represent any client's the suspended/disbarred lawyer or partners ever represented.

4. A rule that makes it a violation of the unauthorized practice rule to allow a suspended/disbarred attorney to perform certain defined duties which also allows limited forms of client contact. The following language is similar to that of Alaska.

> A lawyer shall not:
> (c) employ, associate professionally with, or aid a person the lawyer knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive attorney to perform the following on behalf of the member's client: render legal consultation or advice to the client; 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; appear as a representative of the client at a deposition or other discovery matter; negotiate or transact any matter for or on behalf of the client with third parties receive, disburse or otherwise handle the client's funds; or engage in activities which constitute the practice of law. A member may employ, associate professionally with, or aid a suspended, resigned, or involuntarily inactive attorney to perform research, drafting or clerical activities, including but not limited to: 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; direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or accompanying an active member who will appear as the representative of the client.

5. A rule that allows for suspended/disbarred lawyers to work in law offices in some fashion with client contact, but requires disclosure to the client of the status of the suspended/disbarred lawyer.

6. A rule that allows for suspended/disbarred lawyers to work in law offices in some fashion with client contact but requires that such a relationship be disclosed by the employing lawyer to Regulation Counsel with or without a provision for auditing the relationship.

STATE

RULE

TEXT

Alabama
Alabama Rules of Professional Conduct 5.5
ARDP Rule 26(h)
Rule 5.5. Unauthorized practice of law.
A lawyer shall not:
(a). Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b). Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Rule 26(h)
(h) Employment of lawyers on disability inactive status or lawyers who have been suspended or disbarred.
(1) A disbarred lawyer may not engage in the practice of law or in any employment in the legal profession.
(2) A lawyer on disability inactive status or a suspended lawyer may seek permission from the Disciplinary Commission to seek employment in the legal profession. Permission will be granted only if the lawyer has complied with all the conditions of suspension or disability inactive status and has demonstrated exemplary conduct indicative of reinstatement. In the event that permission is granted, the lawyer shall not have any contact with the clients of the office either in person, by telephone, or in writing.
(3) A law firm may not employ, retain, contract with, or hire a disbarred lawyer to provide services, advice, or labor of the type customarily related to the provision of legal services. This specifically includes, but is not limited to, paralegal services, law-clerk services, research assistance, clerical assistance, secretarial services, office-management services, administrative-support services or any other services where the subject lawyer could have access to clients, clients' files, or client confidences. If, however, permission has been granted to a suspended lawyer or a lawyer on disability inactive status as provided in paragraph (h)(2) of this rule, a law firm may employ the lawyer for purposes that do not conflict with paragraph (h)(2).
HISTORY: (Amended 10-9-91; Amended 5-3-00, eff. 8-1-00)

Alaska
Alaska Rule of Professional Conduct Rule 5.5
Alaska Bar Association Rule 15 (b), (c)
Rule 5.5. Unauthorized practice of law.
A lawyer shall not:
(a). Practice law in a jurisdiction where doing so violates the regulation of the legal

profession in that jurisdiction; or
(b). Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

15(b) Unauthorized Practice of Law
[listing activities that constitute practice of law]

15(c) Employment of Disbarred, Suspended or Resigned Attorney
...
(2) A member shall not employ, associate professionally with, or aid a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive attorney to perform the following on behalf of the member's client:
render legal consultation or advice to the client
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;
appear as a representative of the client at a deposition or other discovery matter;
negotiate or transact any matter for or on behalf of the client with third parties
receive, disburse or otherwise handle the client's funds; or
engage in activities which constitute the practice of law
(3) A member may employ, associate professionally with, or aid a suspended, resigned, or involuntarily inactive attorney to perform research, drafting or clerical activities, including but not limited to:
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;
direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; or
accompanying an active member who will appear as the representative of the client.
(4) [member must serve notice to Alaska Bar Association and client]
(5) A member may, without client or Bar Association notification, employ a disbarred, suspended, resigned, or involuntarily inactive attorney whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription or other similar support activities.

Arizona
ASCR 31(a)(3)
Rule 31 (a)(3):
"except as hereinafter provided in subsection 4 of this subsection (a), no person shall practice law in this state or hold himself out as one who may practice law in this stat unless he is an active member of the state bar, and no member shall practice law in this stat or hold himself out as one who may practice law in this state while suspended, disbarred, or on disability inactive status."

Arkansas
Ariz. St. RPC ER 5.5
Arizona Professional Conduct Procedure § 22
Rule 5.5. Unauthorized practice of law.
A lawyer shall not:
(a). Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b). Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

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Section 22: Restrictions on Former Attorneys
A. For the purposes of this Section, a "former attorney" is any attorney who is disbarred, has surrendered a law license, is on suspension, or is on inactive status.
B. (1) A former attorney providing services to an attorney or law firm under Subsection 22.C shall not occupy, share, or use office space in any location or building where the practice of law is conducted.
(2) A former attorney shall not engage in the practice of law, nor may a former attorney engage in any employment in or related to the practice of law, except as specifically permitted in this Section.
(3) For legal service provided to a client that was not completed prior to becoming a former attorney, a former attorney may receive compensation only on a quantum meruit basis.
(4) A former attorney shall promptly take such action as is necessary to cause the removal of any indicia of lawyer, counselor at law, attorney, legal assistant, law clerk, or similar title from any association with the name of the former attorney.
C. Consistent with the restrictions in Subsection 22.B, a former attorney may provide to attorneys and law firms, whether for or without compensation, services involving legal research, and drafting of briefs and research memorandum, provided the former attorney:
(1) Shall have no contact with clients or prospective clients of any attorney or law firm in person, by telephone, in writing, e-mail, or by any other form of communication;
(2) Shall have no contact with client funds or property;
(3) Any former attorney providing permitted services may be compensated only for the reasonable value of the services provided and shall not be compensated on a contingency basis or share in any way in any fees for legal services provided by an attorney; and
(4) Such services are not provided to any attorney or law firm with whom the former attorney had any employment affiliation as an attorney at the time of the activities which resulted in the attorney becoming a former attorney or at the time of the final action which resulted in the attorney becoming a former attorney.
D. Any attorney or law firm utilizing the services of a former attorney as permitted in this Section shall be responsible for the actions and work product of the former attorney in the rendering of such services and to ensure that the restrictions on a former attorney set out herein are observed.
E. An attorney shall not aid a former attorney in the unauthorized practice of law or in a violation of the restrictions set out herein on former attorneys. An attorney shall have an obligation, as under Model Rule 8.3, to report any violation of this Section by a former

attorney.
F. The maximum punishment for an attorney, or any former attorney on suspension or on inactive status, violating this Section may be disbarment. A former attorney previously disbarred or who has surrendered a law license and who violates this Section may be deemed to be in contempt of the Supreme Court and may be punished accordingly.
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California
Cal. Bar Rules, Prof Conduct Rule 1-300
Cal. Bar Rules Prof. Conduct Rule 1-311
Rule 1-300. Unauthorized Practice of Law
(A) A member shall not aid any person or entity in the unauthorized practice of law.
(B) A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

Rule 1-311. Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member
(B) A member shall not employ, associate professionally with, or aid a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member to perform the following on behalf of the member's client:
(1) Render legal consultation or advice to the client;
(2) Appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;
(3) Appear as a representative of the client at a deposition or other discovery matter;
(4) Negotiate or transact any matter for or on behalf of the client with third parties;
(5) Receive, disburse or otherwise handle the client's funds; or
(6) Engage in activities which constitute the practice of law.
(C) A member may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member 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; or
(3) Accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing clerical assistance to the active member who will appear as the representative of the client.
(D) Prior to or at the time of employing a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the member shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. The written notice shall also list the

activities prohibited in paragraph (B) and state that the disbarred, suspended, resigned, or involuntarily inactive member will not perform such activities. The member shall serve similar written notice upon each client on whose specific matter such person will work, prior to or at the time of employing such person to work on the client's specific matter. The member shall obtain proof of service of the client's written notice and shall retain such proof and a true and correct copy of the client's written notice for two years following termination of the member's employment with the client.
(E) A member may, without client or State Bar notification, employ a disbarred, suspended, resigned, or involuntarily inactive member whose sole function is to perform office physical plant or equipment maintenance, courier or delivery services, catering, reception, typing or transcription, or other similar support activities.
(F) Upon termination of the disbarred, suspended, resigned, or involuntarily inactive member, the member shall promptly serve upon the State Bar written notice of the termination.

Colorado
Colo. RPC 5.5(b)
Rule 5.5. Unauthorized Practice of Law.
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the Colorado bar in the performance of activity that constitutes the unauthorized practice of law.
Note: Rule 5.5(b) in essence makes an ethical violation of that which is judicial contempt. See CRS § 12-5-112.

Connecticut
Conn. Rules Prof. Conduct 5.5
Rule 5.5. Unauthorized Practice of Law
A lawyer shall not:
(1) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(2) Assist a person who is not a member of the bar, who has resigned from the bar or who has been suspended, disbarred, or placed on inactive status in the performance of activity that constitutes the unauthorized practice of law.

Delaware
Del. Prof. Conduct 5.5
Rule 5.5. Unauthorized practice of law
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that

constitutes the unauthorized practice of law.

District of Colombia
D.C. Bar Appx. A, Rule 5.5
D.C. Ct. App. Rule 49
Rule 5.5. Unauthorized practice of law
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Rule 49:
[Defines activities that constitute the practice of law]

Florida
Fla. Bar Reg. Rule
4-5.5
Fla. Bar Reg. Rule
3-6.1
RULE 4-5.5 UNLICENSED PRACTICE OF LAW
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unlicensed practice of law.

RULE 3-6.1 GENERALLY
An authorized business entity (as defined elsewhere in these rules) may employ individuals subject to this rule to perform such services only as may ethically be performed by other lay persons employed by authorized business entities:
(a) Individuals Subject to This Rule. Individuals subject to this rule are suspended attorneys and former attorneys who have been disbarred or whose disciplinary resignations have been allowed.
(b) Definition of Employment. An individual subject to this rule shall be considered as an employee of an authorized business entity if the individual is a salaried or hourly employee or volunteer worker for an authorized business entity, or an independent contractor providing services to an authorized business entity.
(c) Notice of Employment. [...]
(d) Client Contact. [...]
(e) Reports by Employee and Employer.[...]

Georgia
Ga. State Bar Rule 5.5
See also Official Code of Georgia:
O.C.G.A § 15-19-51
Ga. State Bar Rule 5.3
Rule 5.5 Unauthorized Practice of Law.
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Note: Under the Georgia code, UAL is per se unlawful, and constitutes contempt.

Rule 5.3
[...]
(d) a lawyer shall not allow any person who has been suspended or disbarred and who maintains a presence in an office where the practice of law is conducted by the lawyer, to:
(1) represent himself or herself as a lawyer or person with similar status;
(2) have any contact with the clients of the lawyer either in person, by telephone or in writing; or.
(3) have any contact with persons who have legal dealings with the office either in person, by telephone or in writing.

Hawaii
Hawaii Rules of Professional Conduct: Rule 5.5
Rule 5.5. Unauthorized Practice of Law.
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law; or
(c) allow any person who has been suspended or disbarred and who maintains a presence in an office where the practice of law is conducted by the lawyer to have any contact with the clients of the lawyer either in person, by telephone, or in writing or to have any contact with persons who have legal dealings with the office either in person, by telephone, or in writing.

Idaho
Idaho Code:
I.C. § 3-420
3-420. Unlawful practice of Law
-- Penalty. -- If any person shall, without having become duly admitted and licensed to

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practice law within this state or whose right or license to practice therein shall have terminated either by disbarment, suspension, failure to pay his license or otherwise, practice or assume to act or hold himself out to the public as a person qualified to practice or carry on the calling of a lawyer within this state, he shall be guilty of an offense under this act, and on conviction thereof be fined not to exceed five hundred dollars, or be imprisoned for a period of not to exceed six months, or both, and if he shall have been admitted to practice law he shall in addition be subject to suspension under the proceedings provided by this act.

Illinois
Illinois Rule of Professional Conduct: Rule 5.5
Supreme Court Rule 764 (b)
Rule 5.5. Unauthorized Practice of Law
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
Rule 764: Duties of a Disciplined Attorney and Attorneys Affiliated with Disciplined Attorney
...(b) Withdrawal from Law Office and Removal of Indicia as Lawyer.
Upon entry of the final order of discipline, the disciplined attorney shall not maintain a presence or occupy an office where the practice of law is conducted. The disciplined attorney shall take such action necessary to cause the removal of any indicia of the disciplined attorney as lawyer, counselor at law, legal assistant, legal clerk, or similar title.

Indiana
Burns Ind. R.P.C 5.5
Burns Indiana A.D. Rule 23, Section 26(b)
Rule 5.5. Unauthorized practice of law.
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
Rule 23 § 26(b).
[...]
(b) Duties of disbarred and suspended attorneys. Upon receiving notice of the order of suspension or disbarment, the respondent shall not undertake any new legal matters between service of the order and the effective date of the discipline. Upon the effective date of the order, the respondent shall not maintain a presence or occupy an office where the practice of law is conducted. A respondent suspended for more than six (6) months or disbarred shall take such action as is necessary to cause the removal of any indicia of

lawyer, counselor at law, legal assistant, law clerk or similar title.
(c) Duties of suspended attorneys. The suspended attorney shall, within twenty (20) days from the date of the notice of the suspension, file with the Court an affidavit showing that:

Iowa
Iowa Code Prof. Resp. DR 3-101
DR 3-101 Aiding Unauthorized Practice of Law.
(A) A lawyer shall not aid a nonlawyer in the unauthorized practice of law.
(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

Kansas
Kansas Sup. Ct. Rule 5.5
Rule 5.5. Unauthorized practice of law.
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Kentucky
KY Sup. Ct. Rule 5.5
Rule 5.5. Unauthorized practice of law.
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Louisiana
La St. Bar Article XVI: RULE 5.5
RULE: 5.5 UNAUTHORIZED PRACTICE OF LAW
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction;
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law;
(c) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a disbarred attorney, during the period of disbarment; or

(d) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a suspended attorney, during the period of suspension, unless first preceded by the submission of a fully executed employment registration statement to the Office of Disciplinary Counsel, on a registration form provided by the Louisiana Attorney Disciplinary Board, and approved by the Louisiana Supreme Court. The registration form provided for herein shall include:
(1) The identity and bar roll number of the suspended attorney sought to be hired;
(2) The identity and bar roll number of the attorney having direct supervisory responsibility over the suspended attorney throughout the duration of employment or association;
(3) A list of all duties and activities to be assigned to the suspended attorney during the period of employment or association;
(4) The terms of employment of the suspended attorney, including method of compensation;
(5) A statement by the employing attorney that includes a consent to random compliance audits, to be conducted by the Office of Disciplinary Counsel, at any time during the employment or association of the suspended attorney; and(6) A statement by the employing attorney certifying that the order giving rise to the suspension of the proposed employee has been provided for review and consideration in advance of employment by the suspended attorney. For purposes of this Rule, the practice of law shall include the following activities:
(i) Holding oneself out as an attorney or lawyer authorized to practice law;
(ii) Rendering legal consultation or advice to a client;
(iii) Appearing on behalf of a client in any hearing or proceeding, or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, hearing officer, or governmental body operating in an adjudicative capacity, including submission of pleadings, except as may otherwise be permitted by law;
(iv) Appearing as a representative of the client at a deposition or other discovery matter;
(v) Negotiating or transacting any matter for or on behalf of a client with third parties;
(vi) Otherwise engaging in activities defined by law or Supreme Court decision as constituting the practice of law.
In addition, a suspended lawyer shall not receive, disburse or otherwise handle client funds.
Upon termination of the suspended attorney, the employing attorney having direct supervisory authority shall promptly serve upon the Office of Disciplinary Counsel written notice of the termination.

Maine
ME Rules Bar 3.2
3.2 Admission, Disclosure and Misconduct
(a) Unauthorized Practice.
(1) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of law or court rule.
(2) A lawyer shall not aid any person, association, or corporation in the unauthorized

practice of law.

Maryland
Maryland Rule: 16-760
Md Rule 5.5

Rule 16-760: (11)(d)
[...]
Effect of order; prohibited acts. After the effective date of an order that disbars or suspends a respondent or places a respondent on inactive status, the respondent may not practice law, attempt to practice law, or offer to practice law in this State either directly or through an attorney, officer, director, partner, trustee, agent, or employee. Unless otherwise stated in an order of the Court of Appeals, the respondent shall not:
(1) occupy, share, or use office space in which an attorney practices law unless under circumstances clearly indicating to clients, prospective clients, and persons who may visit the office that the respondent is not a lawyer and is not permitted to practice law;.
(2) work as a paralegal for or as an employee of an attorney;.
(3) use any business card, sign, or advertisement suggesting that the respondent is entitled to practice law or maintain, either alone or with another, an office for the practice of law;.
(4) use any stationery, bank account, checks, or labels on which the respondent's name appears as an attorney or in connection with any office for the practice of law;.
(5) solicit or procure any legal business or retainer for an attorney, whether or not for personal gain; and.
(6) share in any fees for legal services performed by another attorney after the effective date of the order, but may be compensated for the reasonable value of services rendered prior to that date..

Rule 5.5. Unauthorized practice of law.
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Massachusetts
ALM Sup. Jud. Ct. Rule 4:01
ALM Sup. Jud. Ct. Rule 3:07, RPC 5.5

Section 17:
[...]
(7) Except as provided in section 18(5) of this rule, no lawyer who is disbarred or suspended, or who has resigned or been placed on disability inactive status under the provisions of this rule shall engage in paralegal work, and no lawyer or law firm shall knowingly employ or otherwise engage, directly or indirectly, in any capacity, a person

who is suspended or disbarred by any court or has resigned due to allegations of misconduct or who has been placed on disability inactive status.
(8) Any lawyer who is disbarred, suspended for an indefinite period, or who has resigned and who is found by the court to have violated the provisions of this rule by engaging in legal work prior to reinstatement under this rule may not be reinstated until after the expiration of at least ten years from the order of the court finding that the lawyer has violated the provisions of this rule. A lawyer who has been suspended for a specific period and who is found by the court so to have violated the provisions of this rule may not be reinstated until after the expiration of at least at least two times the term of the suspension, measured from the date of the order finding that the lawyer has violated the provisions of this rule. A lawyer on disability inactive status who knowingly violates the provisions of this rule by engaging in legal work shall be removed from disability inactive status and temporarily suspended pending the outcome of the disciplinary investigation and proceedings.
Section 18:
[...]
(3) Employment as Paralegal.
At any time after the expiration of the period of suspension specified in an order of suspension, or after the expiration of four years in a case in which an indefinite suspension has been ordered, or after the expiration of seven years in a case in which disbarment has been ordered or a resignation has been allowed under section 15 of this rule, a lawyer may move for leave to engage in employment as a paralegal. The court may allow such motion subject to whatever conditions it seems necessary to protect the public interest, the integrity and standing of the bar, and the administration of justice.
Rule 5.5. Unauthorized practice of law.
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Michigan
MCR Rule 9.119
MCL § 600.916.

Rule 9.119 Conduct of Disbarred, Suspended, or Inactive Attorneys.
(B) Conduct in Litigated Matters. In addition to the requirements of subsection (A) of this rule, the affected attorney must, by the effective date of the order of revocation, suspension, or transfer to inactive status, in every matter in which the attorney is representing a client in litigation, file with
the tribunal and all parties a notice of the attorney's disqualification from the practice of law.
[...]
(D) Conduct After Entry of Order Prior to Effective Date. A disbarred or suspended attorney, after entry of the order of revocation or suspension and prior to its effective

date, shall not accept any new retainer or engagement as attorney for another in any new case or legal matter of any nature, unless specifically authorized by the board chairperson upon a showing of good cause and a finding that it is not contrary to the interests of the public and profession. However, during the period between the entry of the order and its effective date, the suspended or disbarred attorney may complete, on behalf of any existing client, all matters that were pending on the entry date.

(E) Conduct After Effective Date of Order. An attorney who is disbarred or suspended, or who is transferred to inactive status pursuant to MCR 9.121 is, during the period of disbarment, suspension, or inactivity forbidden from:

(1) practicing law in any form;

(2) appearing as an attorney before any court, judge, justice, board, commission, or other public authority; and

(3) holding himself or herself out as an attorney by any means.

(F) Compensation of Disbarred, Suspended, or Inactive Attorney. An attorney whose license is revoked or suspended, or who is transferred to inactive status pursuant to MCR 9.121 may not share in any legal fees for legal services performed by another attorney during the period of disqualification from the practice of law. A disbarred, suspended, or inactive attorney may be compensated on a quantum meruit basis for legal services rendered and expenses paid by him or her prior to the effective date of the revocation, suspension, or transfer to inactive status.

§ 600.916. Unauthorized practice of law.

Sec. 916. (1) A person shall not practice law or engage in the law business, shall not in any manner whatsoever lead others to believe that he or she is authorized to practice law or to engage in the law business, and shall not in any manner whatsoever represent or designate himself or herself as an attorney and counselor, attorney at law, or lawyer, unless the person is regularly licensed and authorized to practice law in this state. A person who violates this section is guilty of contempt of the supreme court and of the circuit court of the county in which the violation occurred, and upon conviction is punishable as provided by law. This section does not apply to a person who is duly licensed and authorized to practice law in another state while temporarily in this state and engaged in a particular matter.

(2) A domestic violence victim advocate's assistance that is provided in accordance with section 2950c does not violate this section.

Minnesota

Minn. R. Prof. Conduct 5.5

Minn. R. Prof. Conduct 5.7

5.5 Unauthorized Practice of Law

A lawyer shall not:

(a) practice law in a jurisdiction where to do so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

5.7 Employment of Disbarred, Suspended, or Involuntarily Inactive Lawyers

(a) For purposes of this rule "employ" means to engage the services of another, including employees, agents, independent contractors and consultants, regardless of whether any compensation is paid.

(b) A lawyer shall not employ, associate professionally with, or aid a person the lawyer knows or reasonably should know has been disbarred, suspended, or placed on disability inactive status by order of the court to do any of the following on behalf of the lawyer's client:

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

(2) appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer unless the rules of the tribunal involved permit representation by non-lawyers and the client has been informed of the lawyer's suspension, disbarment, or disability inactive status;

(3) appear as a representative of the client at a deposition or other discovery matter;

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

(5) receive, disburse or otherwise handle the client's funds; or

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

(c) A lawyer may employ, associate professionally with, or aid a disbarred, suspended, or disability inactive lawyer to perform research, drafting, clerical, or similar activities, including but not limited to:

(1) legal work of a preparatory nature for the lawyer's review, such as legal research, the gathering of 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, information gathering, confirmation of receipt or sending of correspondence and messages; or

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

Mississippi
Miss. RPC 5.5
Rule 5.5. Unauthorized practice of law
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Missouri
S. Ct. Rule 4-5.5 R.S. Mo.

Rule 4-5.5. Unauthorized Practice of Law
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal

profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law; or
(c) practice law in Missouri if the lawyer is subject to Rule 15 and, because of failure to comply with Rule 15, The Missouri Bar has referred the lawyer's name to the chief disciplinary counsel or the Commission on Retirement, Removal and Discipline.

Montana
MT Prof. Conduct R. 5.5
RULE 5.5 UNAUTHORIZED PRACTICE OF LAW
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Nebraska
R.R.S. Neb. § 7-101
§ 7-101. Unauthorized practice of law; penalty
Except as provided in section 7-101.01, no person shall practice as an attorney or counselor at law, or commence, conduct or defend any action or proceeding to which he is not a party, either by using or subscribing his own name, or the name of any other person, or by drawing pleadings or other papers to be signed and filed by a party, in any court of record of this state, unless he has been previously admitted to the bar by order of the Supreme Court of this state. No such paper shall be received or filed in any action or proceeding unless the same bears the endorsement of some admitted attorney, or is drawn, signed, and presented by a party to the action or proceeding. It is hereby made the duty of the judges of such courts to enforce this prohibition. Any person who shall violate any of the provisions of this section shall be guilty of a Class III misdemeanor, but this section shall not apply to persons admitted to the bar under preexisting laws

Nevada
NRS § 7.285

Nev. S.C.R. 189
§ 7.285. Unlawful practice of law; criminal penalties; initiation of civil action by State Bar of Nevada
1. A person shall not practice law in this state if the person:
(a) Is not an active member of the State Bar of Nevada or otherwise authorized to practice law in this state pursuant to the rules of the supreme court; or
(b) Is suspended or has been disbarred from membership in the State Bar of Nevada pursuant to the rules of the supreme court.
2. A person who violates any provision of subsection 1 is guilty of:

(a) For a first offense within the immediately preceding 7 years, a misdemeanor.
(b) For a second offense within the immediately preceding 7 years, a gross misdemeanor.
(c) For a third and any subsequent offense within the immediately preceding 7 years, a category E felony and shall be punished as provided in NRS 193.130.
3. The State Bar of Nevada may bring a civil action to secure an injunction and any other appropriate relief against a person who violates this section.
RULE 189. Unauthorized practice of law
A lawyer shall not:
1. Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
2. Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

New Hampshire
NH Rules of Prof. Conduct 5.5
RULE 5.5. UNAUTHORIZED PRACTICE OF LAW
A lawyer shall not:
(a). practice law in a United States jurisdiction where doing so violates the regulation of the legal profession in that United States jurisdiction; or
(b). assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

New Jersey
N.J. Court Rules RPC 5.5
RPC 5.5 UNAUTHORIZED PRACTICE OF LAW.
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

New Mexico
N.M. R. Prof. Conduct 16-505
16-505 Unauthorized practice of law
A lawyer shall not:
A. practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction;
B. assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law;
C. employ or continue the employment of a disbarred or suspended lawyer as an attorney; or
D. employ or continue the employment of a disbarred or suspended lawyer as a law clerk, a paralegal or in any other position of a quasi-legal nature if the suspended or disbarred

lawyer has been specifically prohibited from accepting or continuing such employment by order of the Supreme Court or the disciplinary board.

New York
NY CLS Jud § 486
NY CLS Jud Appx Code Prof Resp DR 3-101 (2002)
§ 486. Practice of law by attorney who has been disbarred, suspended, or convicted of a felony
Any person whose admission to practice as an attorney and counselor-at-law has been revoked or who has been removed from office as attorney and counselor-at-law or, being an attorney and counselor-at-law, has been convicted of a felony or has been suspended from practice and has not been duly and regularly reinstated, who does any act forbidden by the provisions of this article to be done by any person not regularly admitted to practice law in the courts of record of this state, unless the judgment, decree or order suspending him shall permit such act, shall be guilty of a misdemeanor.
1200.16 [DR 3-101]. Aiding Unauthorized Practice of Law
(a) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.
(b) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

North Carolina
NC Prof. Cond. Rule 5.5
Rule 5.5. Unauthorized practice of law
(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.
(b) A lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
(c) A lawyer or law firm shall not employ a disbarred or suspended lawyer as a law clerk or legal assistant if that individual was associated with such lawyer or law firm at any time on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.
(d) A lawyer or law firm employing a disbarred or suspended lawyer as a law clerk or legal assistant shall not represent any client represented by the disbarred or suspended lawyer or by any lawyer with whom the disbarred or suspended lawyer practiced during the period on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

North Dakota
N.D.R. Prof. Cond. Rule 5.5
Rule 5.5. Unauthorized practice of law.
A lawyer shall not:
Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Ohio
Ohio Gov. Bar. R. V. Section 8 (G)

OH Code of Professional Responsibility Rule 3-101
(G)(1) Employment of a Suspended Attorney.
A suspended attorney may be employed by another attorney during the term of suspension, provided the employment of the suspended attorney does not involve the practice of law. The suspended attorney and employing attorney shall register the employment with the Disciplinary Counsel on a form prescribed by the Disciplinary Counsel that includes all of the following:
(a) A statement that the suspended attorney will not perform work in the course of his or her employment that constitutes the practice of law;
(b) A statement that the employing attorney will supervise and be responsible for the work of the suspended attorney to ensure that the suspended attorney does not engage in the practice of law;
(c) Any other information considered necessary by the Disciplinary Counsel.
DISCIPLINARY RULES
DR 3-101 AIDING UNAUTHORIZED PRACTICE OF LAW.
(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.
(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

Oklahoma
5 Okl. St. Chap. 1 Appx. 3-A Rule 5.5
Rule 5.5. Unauthorized Practice of Law
A lawyer shall not:
a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Oregon
Oregon Code of Professional Responsibility Rule 3-101
DR 3-101 Unlawful Practice of Law
(A) A lawyer shall not aid a nonlawyer in the unlawful practice of law.
(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

Pennsylvania
PA . ST. RPC Rule 5.5
Rule 5.5. Unauthorized Practice of Law
A lawyer shall not:
(a) aid a non-lawyer in the unauthorized practice of law; or
(b) practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

Rhode Island
RI Sup. Ct. Art. V Rule 5.5
Rule 5.5. Unauthorized practice of law.
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

South Carolina
S.C. Code Ann. § Title 407, Rule 5.5
S.C. Code Ann. § Title 413, Rule 34 (2001)

RULE 5.5. UNAUTHORIZED PRACTICE OF LAW
A lawyer shall not:
(a) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
RULE 34. EMPLOYMENT OF DISBARRED OR SUSPENDED LAWYERS
A lawyer who is disbarred, suspended or transferred to incapacity inactive status shall not be employed by a member of the South Carolina Bar as a paralegal, investigator or in any other capacity connected with the law. Any licensed attorney who, with knowledge that the person is disbarred, suspended or transferred to incapacity inactive status, employs such person in a manner prohibited by this rule shall be subject to discipline under these rules. A disbarred or suspended lawyer who violates this rule shall be deemed in contempt of the Supreme Court and may be punished accordingly.

South Dakota
SD Rules of Professional Conduct, Rule 5.5
Rule 5.5. Unauthorized Practice of Law.
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Tennessee
Tenn. Sup. Ct. Rule 8, Disciplinary Rule 3-101
DR 3-101. Aiding Unauthorized Practice of Law
(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.
(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.
[note: the Tennessee Bar Association will adopt, effective March, Rules of Professional Conduct.]

Texas
Texas Rule of Prof. Conduct 5.05
Rule 5.05. Unauthorized Practice of Law
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Utah
Utah Code Jud. Admin. R. 5.5
Rule 5.5. Unauthorized practice of law.
A lawyer shall not:
(a) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) Assist any person in the performance of activity that constitutes the unauthorized practice of law.

Vermont
Vt. Prof. Cond. Rule 5.5
Rule 5.5. Unauthorized Practice of Law.
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Virginia
VA Sup. Ct. R. 5.5
Rule 5.5. Unauthorized Practice of Law.
(a) A lawyer shall not:

(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
(b) A lawyer, law firm or professional corporation shall not employ in any capacity a lawyer whose license has been suspended or revoked for professional misconduct, during such period of suspension or revocation, if the disciplined lawyer was associated with such lawyer, law firm or professional corporation at any time on or after the date of the acts which resulted in suspension or revocation.
(c) A lawyer, law firm or professional corporation employing a lawyer as a consultant, law clerk or legal assistant when that lawyer's license is suspended or revoked for professional misconduct shall not represent any client represented by the disciplined lawyer or by any lawyer with whom the disciplined lawyer practiced on or after the date of the acts which resulted in suspension or revocation.

Washington
Wash. RPC 5.5
Washington General Rules, Rule 24
Rule 5.5 Unauthorized practice of law.
A lawyer shall not:
(a) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) Assist a person who is not a member of the Bar in the performance of activity that constitutes the unauthorized practice of law.

Wash. GR 24 (2002) Rule 24 Definition of the practice of law.
(a) General definition: The practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person(s) which require the knowledge and skill of a person trained in the law. This includes but is not limited to:
(1) Giving advice or counsel to others as to their legal rights or the legal rights or responsibilities of others for fees or other consideration.
(2) Selection, drafting, or completion of legal documents or agreements which affect the legal rights of an entity or person(s).
(3) Representation of another entity or person(s) in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in an administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review.
(4) Negotiation of legal rights or responsibilities on behalf of another entity or person(s).
(b) Exceptions and exclusions: Whether or not they constitute the practice of law, the following are permitted:
(1) Practicing law authorized by a limited license to practice pursuant to Admission to Practice Rules 8 (special admission for: a particular purpose or action; indigent representation; educational purposes; emeritus membership; house counsel), 9 (legal interns), 12 (limited practice for closing officers), or 14 (limited practice for foreign law

consultants).
(2) Serving as a courthouse facilitator pursuant to court rule.
(3) Acting as a lay representative authorized by administrative agencies or tribunals.
(4) Serving in a neutral capacity as a mediator, arbitrator, conciliator, or facilitator.
(5) Participation in labor negotiations, arbitrations or conciliations arising under collective bargaining rights or agreements.
(6) Providing assistance to another to complete a form provided by a court for protection under RCW chapters 10.14 (harassment) or 26.50 (domestic violence prevention) when no fee is charged to do so.
(7) Acting as a legislative lobbyist.
(8) Sale of legal forms in any format.
(9) Activities which are preempted by Federal law.
(10) Such other activities that the Supreme Court has determined by published opinion do not constitute the unlicensed or unauthorized practice of law or that have been permitted under a regulatory system established by the Supreme Court.
(c) Non-lawyer assistants: Nothing in this rule shall affect the ability of non-lawyer assistants to act under the supervision of a lawyer in compliance with Rule 5.3 of the Rules of Professional Conduct.
(d) General information: Nothing in this rule shall affect the ability of a person or entity to provide information of a general nature about the law and legal procedures to members of the public.
(e) Governmental agencies: Nothing in this rule shall affect the ability of a governmental agency to carry out responsibilities provided by law.
(f) Professional standards: Nothing in this rule shall be taken to define or affect standards for civil liability or professional responsibility.

West Virginia
W. Va. Prof. Cond. Rule 5.5

Rule 5.5. Unauthorized practice of law.
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
Rule 3.28. Duties of disbarred or suspended lawyers.
[...]
(c) The disbarred or suspended lawyer, after entry of the disbarment or suspension order, shall not accept any new retainer or engage as attorney for another in any new case or legal matter of any nature. During the period from the entry date of the order to its effective date, however, the lawyer may wind up and complete, on behalf of any client, all matters which were pending on the entry date. Within twenty days after the effective date of the disbarment or suspension order, the lawyer shall file under seal with the Supreme Court of Appeals an affidavit showing (1) the names of each client being represented in pending matters who were notified pursuant to subsections (a) and (b); (2)

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a copy of each letter of notification which was sent; (3) a list of fees and expenses paid by each client and whether escrowed funds have been or need to be reimbursed; and (4) an accounting of all trust money held by the lawyer on the date the disbarment or suspension order was issued. Such affidavit shall also set forth the residence or other address of the disbarred or suspended lawyer where communications may thereafter be directed and a list of all other courts and jurisdictions in which the disbarred or suspended lawyer is admitted to practice. A copy of this report shall also be filed with the Office of Disciplinary Counsel.

Wisconsin
Wis. Sup. Ct. Rule 20: 5.5
SCR 20:5.5 Unauthorized practice of law.
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Wyoming
Wyo. Prof. Conduct Rule 5.5
Rule 5.5. Unauthorized practice of law.
A lawyer shall not:
(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

Nina Stanberry

From: Nina Stanberry

Sent: Thursday, January 08, 2004 3:10 PM

To: Alexander Rothrock; Anthony van Westrum; Boston Stanton; Bryan VanMeveren; Cecil Morris; Cynthia Covell; David Little; David Stark; Eli Wald; Henry Reeve; Hon. Edward Nottingham; Hon. John Webb; Hon. Michael Bender; Hon. Nathan Coats; James Casey; James Wallace; John Gleason; John Richilano; Kenneth Pennywell; Lisa Wayne; Michael Berger; Nancy Cohen; Peggy Montano; Richard Casson; Scott Peppet; Tuck Young; Valerie Dewey; William Lucero; William Prakken

Cc: Marcy Glenn

Subject: Colorado Supreme Court Standing Committee on Rules of Professional Conduct

Ladies and Gentlemen:

Marcy Glenn asked me to transmit the attached interim Report of the Rule 1.4 Subcommittee, which will be discussed at the meeting tomorrow.

Nina Stanberry
Legal Secretary
Holland & Hart LLP
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HOLLAND&HART
THE LAW OUT WEST

Colorado Supreme Court Rule 1.4 Subcommittee
Interim Report
January 7, 2004

The Rule 1.4 subcommittee submits the following proposals and recommendations for consideration by the Supreme Court Standing Committee.

I. Outline of the subcommittee's evaluation of the proposed Rule.

1. The proposed Rule requires disclosure if an attorney does not carry malpractice liability insurance coverage at the time of the client's engagement of the attorney or if coverage is terminated during the attorney-client relationship. Information regarding lack of liability coverage is material to some clients' decision as to whether to retain or continue to work with an attorney, and the information may not be easily available from sources other than the attorney. At the same time, there is no hard evidence that some clients tend to make informed retention decisions based on the availability or absence of liability coverage.

2. The proposed amendment is consistent with the goals and justifications of Rule 1.4 to the extent it informs clients with regard to a material element of, and an important development in, the attorney-client relationship. The proposed amendment, however, may be inconsistent with Rule 1.4's underlying goal of fostering trust and loyalty in the attorney-client relationship by providing the client with information that may lead the client to distrust and doubt the attorney's competence.

3. Mandatory disclosure may correct clients' mistaken assumption that attorneys carry liability insurance. Mandatory disclosure, however, may replace one set of false expectations with another. Upon receiving disclosure that the attorney does not carry liability insurance clients may mistakenly assume that the attorney is incompetent or has been implicated in numerous malpractice claims. Furthermore, the proposed Rule may mislead an unsophisticated client by creating the impression that coverage will be available to the client at the time the client files a malpractice claim. The proposed Rule, however, only requires disclosure during the representation and does not require notice to clients post-termination of the attorney-client relationship. Moreover, the proposed Rule does not notify the client that the malpractice claim typically must be filed within the coverage period ("claims made").

4. Mandatory disclosure creates an indirect incentive for attorneys to carry liability insurance. While the likelihood of adopting a rule requiring mandatory coverage seems quite low at this point, if mandatory liability coverage is the ultimate goal perhaps it should be enforced directly rather than by indirect means. Two

concerns with regard to mandatory coverage apply to mandatory disclosure insofar as it creates an incentive to obtain insurance coverage. First, it introduces insurance companies as market-based regulators of attorney conduct and gate-keepers with regard to who may practice law. Second, the proposed Rule may disfavor attorneys who cannot afford or obtain liability coverage for financial or other reasons.

5. There is no hard evidence that a significant number of clients with viable malpractice claims cannot collect against uninsured, judgment-proof attorneys. Such evidence may not be easily obtainable because clients of uninsured attorneys are less likely to file a malpractice claim (the "selection of cases for litigation" problem).

6. Anecdotal evidence suggests that the indirect incentive created by the proposed Rule may lead to increased coverage costs to all attorneys. There is no hard evidence as to what types of attorneys fail to carry liability insurance and their reasons for not obtaining coverage. Best available estimates suggest that 18-20% of the Colorado private bar is uninsured.

7. The proposed Rule does not impose a post-termination duty to inform former clients that an attorney no longer has coverage. However, given that most malpractice disputes arise after the attorney-client relationship is terminated, should the rule impose such a post-termination duty? Should the proposed Rule contemplate or be adopted in conjunction with additional liability disclosures in the attorney's registration process?

II. Proposed Rule changes.

Amend the proposed Rule to clarify that the disclosure requirement only applies during the attorney-client representation. The proposed Rule does not impose a post-termination duty on lawyers to inform former clients in the event the lawyers' coverage drops below the specified amounts or the lawyers' coverage terminates. See sections I.1 and 3.

> (c) a lawyer shall inform a client, in writing, at the time of the client's engagement of the lawyer ~~that~~if the lawyer does not have malpractice insurance of at least $100,000.00 per claim and $300,000.00 annual aggregate, and shall inform the client in writing if at any time during the representation the lawyer's malpractice insurance drops below these amounts or the lawyer's malpractice insurance is terminated. The lawyer shall maintain a record of these disclosures for a period of seven years from the termination of the client's representation. This disclosure requirement does not apply to lawyers who are in-house counsel or government lawyers who do not represent clients outside their official capacity or in-house employment.

III. Proposed study of registration statement disclosures.

Authorize this subcommittee, the Standing Committee or the Supreme Court Advisory Committee to further explore requiring lawyers to disclose in the annual registration statement whether they maintain malpractice insurance, and that such disclosure be made public. This proposal facilitates the collection of currently unavailable evidence with regard to the number of uninsured attorneys (see sections I.5 and 6) and remedies a possible misapprehension on the part of clients assuming that current attorney liability coverage means that coverage will be available at the time a malpractice claim is filed. See sections I.3 and 7.

IV. Proposed study of additional liability disclosures.

Authorize this subcommittee, the Standing Committee or the Supreme Court Advisory Committee to further explore requiring disclosure of the type and nature of the attorney's insurance liability coverage. Such disclosure as to whether the coverage applies only to "claims made" or covers "prior acts," may be included in a private attorney-client disclosure statement or may be included in a public disclosure along with attorney's registration statement liability disclosures. See sections I.3, 7 and III.