

VOLUME 5

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

FOR THE TENTH AND ELEVENTH MEETINGS

Meeting	File Page
Tenth Meeting, July 19, 2005.	2
Eleventh Meeting, September 27, 2005.	72

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

AGENDA

July 19, 2005, 9:00 a.m.
Supreme Court Conference Room (5th Floor)

1. Approval of minutes – To be distributed via separate e-mail during week of July 18, or at the meeting
2. Administrative matters
 - a. Select next meeting date
 - b. Committee membership
3. Potential amendments to Preamble and Comment to Rule 1.3, to address current references to “zealous” representation – Steve C. Briggs – **See pages 99-106 from October 1, 2004 meeting materials**
4. Ethics 2000 Subcommittee Report on Rules 1.15, 1.17, 4.1, 4.2, 4.3, 4.5, 5.1, 5.2, 5.3, 5.4, 5.6, 5.7 – Michael Berger
 - a. Interim Report No. 4 of Subcommittee – **See pages 4-5, 23-45, and 55-65 from March 23, 2005 meeting materials**
 - b. Interim Report No. 5 of Subcommittee – **See pages 1, 8-16 from May 20, 2005 meeting materials**
 - c. Interim Report No. 6 of Subcommittee – See attached pages 1 - 49
5. Adjournment (by noon)

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FILE NOTE

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

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

COLORADO SUPREME COURT
COMMITTEE ON RULES OF PROFESSIONAL CONDUCT
ETHICS 2000 SUBCOMMITTEE

INTERIM REPORT NO. 6

July 13, 2005

The Subcommittee has now completed its work through the end of the 5.x series of rules, with the exception of Rules 4.4 and 5.5, which will be addressed in the Subcommittee's next (and hopefully final) report. The following are the recommendations of the Subcommittee.

Rule 1.15. Safekeeping Property, etc.

This rule was addressed in Interim Report No. 5, but because of comments received shortly prior to the last Committee meeting, consideration of the rule was tabled until this meeting.

The comments received from a Subcommittee member led to a substantial rewrite of Rule 1.15 by the Subcommittee. The substance of the Rule was not changed in any material respects, but the Rule had become unwieldy over the years, was difficult to read, and the organization of the rule made it difficult to locate particular provisions. The Subcommittee believes that the new version of the proposed rule is a major format improvement over existing Rule 1.15.

Because of substantial differences between existing Colorado PC 1.15 and Ethics 2000 Rule 1.15, and the customization of Colo. PC 1.15 by the Colorado Supreme Court over the years, the Ad Hoc Committee recommended the retention of the substance of existing Colo. RPC 1.15, instead of the adoption of Ethics 2000 Rule 1.15. The Subcommittee agrees with this recommendation. There are a number of provisions in Colo. RPC 1.15 that are unique to Colorado, based upon the Colorado Supreme Court's decisional law which should, as a matter of policy, be retained in the rule.

While Rule 1.15 was being considered by the Subcommittee, two additional sets of changes were proposed. Even though these proposed changes were unrelated to the ABA Ethics 2000 proposals, the Subcommittee determined that it made sense to consider these changes as well. The first set of proposed changes was from the COLTAF Board of Directors. COLTAF recommended several changes to Rule 1.15 to insure that Rule 1.15 complies with certain decisions of the United States Supreme Court regarding the constitutional validity of certain states' programs similar to COLTAF. The Subcommittee has reviewed these proposed rules and unanimously voted to recommend their adoption.

The second set of proposed rules was from the Office of Attorney Regulation Counsel ("OARC"). Certain banking practices have changed with the adoption of what is commonly known as the "Check 21" federal legislation and implementing regulations. The Subcommittee made several changes to the proposals by OARC, and with those changes, as well as the organizational changes made by the Subcommittee to the Rule, the Subcommittee recommends the adoption of proposed Rule 1.15.

In summary, the Subcommittee recommends the adoption of existing Rule 1.15, with the COLTAF and Check 21 changes and the formatting changes made by the Subcommittee.

Rule 1.17. Sale of Law Practice. At the last meeting of the full Committee, the Committee voted to select the "in the jurisdiction" option set forth in the ABA Model Rule. The Committee returned proposed Rule 1.17 to the Subcommittee to deal with the issue that arises when a lawyer is unable to establish that the client has actually received the notice prescribed by proposed rule 1.17(c)(3). ABA Ethics 2000 Rule 1.17 prescribes a cumbersome, judicial procedure for dealing with this situation. At the last Committee meeting, Justice Bender observed that to place this burden upon the judiciary in view of present budgetary problems was not a wise allocation of limited resources. Upon further consideration, the Subcommittee now proposes that the sixty day period for objections by the client to the transfer of the client file run from the date of mailing of the notice to the client at the client's last known address. The Subcommittee believes that this procedure is justifiable for two reasons. First, clients have an obligation to keep their lawyers informed of their whereabouts. Second, even if the client file is transferred against the (unexpressed) wishes of the client, it is very difficult to perceive how the client will be harmed. The successor lawyer has the same duties of confidentiality and loyalty to the client that were owed by the selling lawyer. The client can always discharge the successor lawyer for any or no reason. As a result, the Subcommittee recommends that Rule 1.17(c)(3) read as follows:

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

Consistent with this proposed change, the second paragraph contained in ABA Ethics 2000 Rule 1.7(c) (3) should be deleted.

With these changes, the Subcommittee recommends the adoption of Rule 1.17.

Rule 4.1. Truthfulness in Statements To Others. There was substantial debate regarding whether there should be a "materiality" requirement in Rule 4.1. The Ad Hoc Committee recommended the deletion of the materiality requirement contained in ABA Ethics 2000 Rule 4.1(a). The discussion in the Subcommittee tracked the similar discussion in both the Subcommittee and the full Committee regarding the materiality requirement in Rule 3.3. At its last meeting, the full Committee voted to approve ABA Ethics 2000 Rule 3.3, which contains a materiality requirement. The Subcommittee believes that consistent treatment on this issue is required with respect to Rule 4.1. Therefore, the Subcommittee disagrees with the recommendation of the Ad Hoc Committee to delete the materiality requirement contained in ABA Ethics 2000 Rule 4.1 and recommends that the full Committee propose the adoption of ABA Ethics 2000 Rule 4.1, which contains the materiality requirement.

This position is also supported by the interests of uniformity. In multi-state litigations and transactions, uniformity of rules governing the actions of lawyers is of obvious importance and, as stated previously, unless the public policy of Colorado demands a different rule than proposed by the ABA, there is a strong preference towards adoption of the ABA rule. No strong public policy of Colorado requires departure from ABA Model Rule 4.1.

The Ad Hoc Committee also recommended that the words "or misleading" be inserted into ABA Ethics 2000 Rule 4.1(a) to address statements that are not outright false but which are materially misleading. Present Colo. RPC 4.1 contains the "or misleading" language. The Subcommittee considered this recommendation by the Ad Hoc Committee, but rejects it. The Comments to ABA Ethics 2000 Rule 4.1 make clear that a misleading statement may, in appropriate circumstances, constitute a "false statement" and that is sufficient to place a lawyer on notice that a misleading statement may fall within the proscriptions of Rule 4.1. The Subcommittee also considered creating a definition of "false statement" in the definition section of the Rules (Rule 1.0) but determined that the Comments to Rule 4.1 are sufficient in that regard.

The Subcommittee does recommend minor changes to Comment [1]. While the text of Rule 4.1(a) speaks of "false statements of material fact or law", the heading of Comment [1] is titled "Misrepresentations." Similarly, the text of Comment [1] speaks of "misrepresentations" rather than "false statements". The Subcommittee believes that it makes more sense for the Comments to use the same terms used in the text of the Rule. These proposed changes do not change the substance of the Rule or the Comment.

Rule 4.2. Communications With Persons Represented by Counsel. The Ad Hoc Committee recommended the adoption of ABA Ethics 2000 Rule 4.2 and the Comments. The Subcommittee agrees with that recommendation, but proposes an addition to Comment [4]. The issue addressed by the proposed Comment addition is whether a lawyer ethically may communicate with a party represented by counsel where a contractual notice provision requires notice to be given in a particular manner (oftentimes directly to the party to the contract, and sometimes with a copy to the lawyer for the party to the contract). If the notice is not given in accordance with the contractual provision, an issue may arise as to whether the notice is effective or sufficient under the terms of the contract, with substantial consequences to the client. The Subcommittee believes that neither lawyers nor their clients should be subjected to such uncertainties and therefore proposes that Comment [4] to Rule 4.2 be supplemented by the addition of the following language:

"such as a contractually based right or obligation to give notice."

Rule 4.3 Dealing With Unrepresented Persons

The Ad Hoc Committee recommended the adoption of ABA Ethics 2000 Rule 4.3 but did not agree with the last sentence of the Rule and recommended that the last sentence be stricken. That disputed sentence relaxes the prior ABA Model Rule (and current Colorado) prohibition on the giving of legal advice to an unrepresented person. Under the prior ABA rule and under current Colo. RPC 4.3, a lawyer is prohibited from giving any legal advice to an unrepresented

person, other than advice to obtain legal counsel. However, it is not unusual, in multiple party cases or matters, that some of the parties are represented by counsel and others are not. The transaction can be facilitated, without substantial risk to either the lawyer's client or the unrepresented party, if the lawyer may communicate frankly with the non-represented party. If the lawyer in such a situation must essentially stand mute, the client retaining the lawyer is not able to receive what the client bargained for— full legal representation by the lawyer. However, the prohibition remains, under the proposed rule, where the lawyer knows or reasonably should know that the interests of the unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client.

The Subcommittee debated the wisdom of permitting a lawyer, under any circumstances, to give legal advice to an unrepresented person and also discussed the nuances of when a non-client becomes a client when legal advice is proffered by the lawyer. The Subcommittee concluded that the proposed ABA Ethics 2000 rule strikes the proper balance and therefore recommends the adoption of ABA Ethics 2000 Rule 4.3 and the Comments in their entirety.

Rule 4.4. Respect for the Rights of Third Persons.

The Subcommittee has not completed its work on Rule 4.4. The Subcommittee will report on Rule 4.4 at the next meeting of the Committee.

Rule 4.5 Threatening Prosecution

Colo. RPC 4.5 has no counterpart in the former ABA Rules of Professional Conduct or the ABA Ethics 2000 Rules. It is derived from the former Code of Professional Responsibility. The Ad Hoc Committee recommended the retention of existing Colorado Rule 4.5, with minor revisions, and the Subcommittee agrees with that recommendation. The Subcommittee believes that this rule is necessary to prevent the misuse of the criminal process in civil matters. Recent revisions to the rule by the Colorado Supreme Court (which created a safe harbor for a lawyer to advise others that the other's conduct may violate criminal, administrative or disciplinary rules or statutes, without making threats) appear to have worked well in practice

Rule 5.1. Responsibilities of a Partner or Supervisory Lawyer.

ABA Ethics 2000 Rule 5.1 is identical to the prior Model Rule and current Colorado Rule 5.1, except that its coverage is broadened to include lawyers who have managerial authority comparable to partners or members of the firm. The Ad Hoc Committee recommended the adoption of the proposed rule and comments, and the Subcommittee agrees with that recommendation.

Rule 5.2. Responsibilities of a Subordinate Lawyer.

There is no change from the current rule. The Ad Hoc Committee recommended the adoption of the proposed rule and the comments. The Subcommittee concurs.

Rule 5.3. Responsibilities Regarding Nonlawyer Assistants.

The only change made in ABA Ethics 2000 Rule 5.3 from the prior Model Rule (and existing Colorado Rule 5.3) is to broaden the coverage to lawyers who have comparable supervisory authority to partners and members of the firm. This is the same change made in Rule 5.1. Both the Ad Hoc Committee and the Subcommittee recommend the adoption of proposed Rule 5.3 and its comments in their entirety.

Rule 5.4. Professional Independence of a Lawyer

The form of Rule 5.4 that is was recommended by the Ad Hoc Committee and is now being recommended by the Subcommittee is an amalgamation of existing Colo. RPC 5.4 and the ABA Ethics 2000 Rule 5.4. There are no substantive changes from the ABA Ethics 2000 Rule, but the rule has been conformed to refer to C.R.C.P. 265, which governs the practice of law in limited liability entities.

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

The Subcommittee has not completed its review of this rule. Previously, the Committee referred to this Subcommittee the recommendations of the Rule 5.5 Subcommittee (dealing with restrictions upon the activities of disbarred and suspended lawyers). The Subcommittee will report to the full Committee on this Rule at the next meeting of the Committee.

Rule 5.6. Restrictions on Right to Practice.

ABA Ethics 2000 Rule 5.6 makes minor, non-substantive revisions to the prior Model Rule (and Colorado RPC 5.6.) The Ad Hoc Committee recommends the adoption of the Rule and the Comments and the Subcommittee agrees.

Rule 5.7. Responsibilities Regarding Law-Related Services

ABA Ethics 2000 Rule 5.7 is new. It has no counterpart in the former ABA Model Rules and Colorado has no comparable rule. It provides valuable guidance as to when the Rules of Professional Conduct are applicable to lawyers who engage in law-related activities. The Rule does not purport to validate or authorize any particular law-related services, but provides rules to enable a lawyer to ascertain when the Rules of Professional Conduct are applicable to those activities.

The Ad Hoc recommended the adoption of this new Rule and the Comments and the Subcommittee agrees with that recommendation.

RULE 1.15: SAFEKEEPING PROPERTY

General Duties of Lawyers Regarding Property of Clients and Third Parties

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

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

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

Required Bank Accounts

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

(1) A trust account or accounts, separate from any business and personal accounts and from any fiduciary accounts that the lawyer may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which the lawyer shall deposit trust account or accounts funds entrusted to the lawyer's care and any advance payment of fees that has not been earned or advance payment of expenses that have not been incurred shall be deposited. ~~(except that such a trust account A lawyer shall not be required to maintain a trust account if the lawyer does not ever receive such funds or payments); and,~~

(2) A business account or accounts into which all funds received for professional services shall be deposited. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a "professional account" or an "office account".

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

As proposed by Ethics 2000 Subcommittee 7/11/05
Changes from Colorado Ad Hoc Committee Proposal are marked
Substantially different than ABA Ethics 2000 Rule 1.15

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

~~(A42) Other than fiduciary accounts maintained by a lawyer as executor, guardian, trustee, or receiver, or in any other similar fiduciary capacity, all such trust accounts, whether general or specific, as well as all deposits slips and checks drawn thereon, shall be prominently designated as a "trust account". Nothing herein shall prohibit any additional descriptive designation for a specific trust account. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a "professional account" or an "office account". The COLTAF account or accounts shall each be designated "COLTAF Trust Account."~~

~~(B63) A~~ Trust accounts shall be maintained only in financial institutions doing business in Colorado ~~which that~~ are approved by the Regulation Counsel based upon policy guidelines adopted by the Board of Trustees of the Colorado Attorneys' Fund for Client Protection, ~~which Regulation Counsel~~ shall annually publish a list of such approved institutions. A financial institution shall be approved if it shall file with the Regulation Counsel an agreement, in a form provided, to report to the Regulation Counsel in the event any properly payable trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored; any such agreement shall apply to all branches of the financial institution and shall not be canceled except on thirty-days notice in writing to the Regulation Counsel. The agreement shall further provide that all reports made by the financial institution shall be in the following format: (1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (2) in the case of ~~an~~ instruments that ~~are~~is presented against insufficient funds but which instruments ~~are~~is honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any; if an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds. In addition, each financial institution approved by the Regulation Counsel must cooperate with the COLTAF program and must offer a COLTAF account to any lawyer who wishes to open one. In addition to the reports specified above, approved financial institutions shall agree to cooperate fully with the Regulation Counsel and to produce any trust account or business account records on receipt of a subpoena therefore in connection with any proceeding pursuant to C.R.C.P. 251. Nothing herein shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule, but such charges shall not be a transaction cost to be charged against funds payable to the COLTAF program. Every lawyer or law firm maintaining a trust account in this state shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements by financial institutions mandated by this Rule and shall indemnify and hold harmless the financial institution for its compliance with such reporting and production requirement. A financial institution shall be immune from suit arising out of its actions or omissions in reporting overdrafts or insufficient funds or producing documents under this Rule. The agreement entered into by a financial institution with the Regulation Counsel shall not be deemed to create a duty to exercise a standard of care and shall not constitute a contract for the benefit of any third parties that may sustain a loss as a result of lawyers overdrawing lawyer trust accounts.

~~(C3) One or more of the trust accounts may be the account or accounts described in Rule 1.15(f)(2), known as COLTAF (Colorado Lawyer Trust Account Foundation) accounts. All COLTAF accounts shall be designated "COLTAF Trust Account."~~

As proposed by Ethics 2000 Subcommittee 7/11/05
Changes from Colorado Ad Hoc Committee Proposal are marked
Substantially different than ABA Ethics 2000 Rule 1.15

~~(2) A business account or accounts into which all funds received for professional services shall be deposited. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a "professional account" or an "office account".~~

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

Trust Account Requirements and Management: COLTAF Accounts

~~(d) "Accounts" as used in paragraph (a) above shall mean one or more identifiable. All trust accounts shall be maintained in interest-bearing, insured depository accounts; provided, that with the consent of the client or third person whose funds are in the account, an account maintained under in which subparagraph (e)(1) below (interest is paid to the client or third person) need not be an insured depository account, but a All COLTAF accounts maintained under subparagraph (e)(2) below (interest is paid to the Colorado Lawyer Trust Account Foundation) shall be insured depository accounts. For the purpose of this Rule, "insured depository accounts" shall mean government insured accounts at a regulated financial institution, on which withdrawals or transfers can be made on demand, subject only to any notice period which the institution is required to reserve by law or regulation.~~

~~(g) A lawyer may deposit funds reasonably sufficient to pay anticipated service charges or other fees for maintenance or operation of such account into Trust accounts. an account maintained under paragraph (f)(1), (f)(3), or (f)(4). Such funds shall be clearly identified in the lawyer's records of the account.~~

(e)(h) COLTAF Accounts.

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

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

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

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

As proposed by Ethics 2000 Subcommittee 7/11/05
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Substantially different than ABA Ethics 2000 Rule 1.15

~~_____~~(c) ~~A Lawyers~~ or law firms depositing funds in a COLTAF ~~an interest-bearing insured depository account under this subparagraph (e)(2)~~ shall direct the depository institution:

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

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

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

~~(43)~~ If a lawyer or law firm discovers that funds of any client or third person have mistakenly been held in a trust account for the benefit of the ~~Colorado Lawyer Trust Account Foundation~~ COLTAF in a sufficient amount or for a sufficiently long time so that interest on the funds being held in such account exceeds the reasonably estimated cost of establishing, maintaining and accounting for a trust account for the benefit of such client or third person (including without limitation administrative costs of the lawyer or law firm, bank service charges, and costs of preparing tax reports of such income to the client or third person) the lawyer or law firm shall request the ~~Colorado Lawyer Trust Account Foundation~~ COLTAF to calculate and remit trust account interest already received by it to the lawyer or law firm for the benefit of such client or third person in accordance with written procedures ~~which that~~ the ~~Colorado Lawyer Trust Account Foundation~~ COLTAF shall publish and make available through its website and shall provide to any lawyer or law firm upon request.

~~(43)~~ Information necessary to determine compliance or justifiable reasons for noncompliance with subparagraph ~~(he)~~(2) shall be included in the annual attorney registration statement. ~~The Colorado Lawyer Trust Account Foundation~~ COLTAF shall assist the Colorado Supreme eCourt in determining whether lawyers or law firms have complied in establishing the trust account required under subparagraph ~~(he)~~(2). If it appears that a lawyer or law firm has not complied where it is feasible to do so, the matter may be referred to the ~~attorney-r~~Regulation eCounsel for investigation and proceedings in accordance with C.R.C.P. 251 241.

(i) Management of Trust Accounts.

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

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

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

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

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

As proposed by Ethics 2000 Subcommittee 7/11/05
Changes from Colorado Ad Hoc Committee Proposal are marked
Substantially different than ABA Ethics 2000 Rule 1.15

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

Required Accounting Records: Retention of Records; Availability of Records

~~(jg) Required Accounting Records. A lawyers, whether practicing as a sole practitioners, in a partnership,s or through an entities authorized pursuant to C.R.C.P. 265 partnerships of lawyers, and professional companies in private practice in this state shall maintain in a current status and retain for a period of seven years after the event which that they record:~~

(1) ~~Appropriate receipt and disbursement records of all deposits in and withdrawals from accounts specified in subsection (a) of this rule all Trust accounts and any other bank account which that concerns their lawyer's practice of law, specifically identifying the date, source payor and description of each item deposited as well as the date, payee, and purpose of each disbursement. All trust account receipts monies intended for deposit shall be deposited intact without deductions or "cash out" from the deposit and the duplicate deposit slip that evidences the deposit must should be sufficiently detailed to identify each item deposited. All trust account withdrawals shall be made only by authorized bank or wire transfer or by check payable to a named payee and not to cash. Only a lawyer admitted to practice law in this state or a person supervised by such shall be an authorized signatory on a trust account; and,~~

(2) ~~An appropriate record-keeping system identifying each separate trust person or entity for whom the lawyer holds money or property in trust, for all trust accounts, showing the source payor of all funds deposited in such accounts, the names and addresses of all persons for whom the funds are or were held, the amount of such funds, the description and amounts of charges or withdrawals from such accounts, and the names of all persons to whom any such funds were disbursed; A regular trial balance of the individual client ledgers shall be maintained and reconciled at least quarterly with the applicable bank statements.~~

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

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

(5) ~~Copies of all bills issued to clients; and,~~

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

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

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

~~(kh) Type and Availability of Accounting Records. The financial books and other records required by subsections (f) and (g) of this Rule shall be maintained in accordance with one or more of~~

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Changes from Colorado Ad Hoc Committee Proposal are marked
Substantially different than ABA Ethics 2000 Rule 1.15

the following recognized accounting methods: ~~generally accepted accounting principles, such as the accrual method, the cash basis method, and the income tax method.~~ All such accounting methods shall be consistently applied. Bookkeeping records may be maintained by computer provided they otherwise comply with this Rule and provided further that printed copies can be made on demand in accordance with this ~~Rule subsection or subsection (g).~~ They shall be located at the principal Colorado office of each lawyer, partnership, professional corporation, or limited liability corporation.

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

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

Comment to RULE 1.15 SAFEKEEPING PROPERTY

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

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

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

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

As proposed by Ethics 2000 Subcommittee 7/11/05
Changes from Colorado Ad Hoc Committee Proposal are marked
Substantially different than ABA Ethics 2000 Rule 1.15

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

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

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

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

RULE 1.17: SALE OF LAW PRACTICE

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

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;

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

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

(1) the proposed sale;

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

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

~~If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.~~

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

Comment to RULE 1.17 SALE OF LAW PRACTICE

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

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice

As proposed by Ethics 2000 Subcommittee 5/13/05
No changes from Colorado Ad Hoc Committee Proposal
Only change from ABA Ethics 2000 Model Rule
is time period in (b)(3)

upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

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

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state. Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so situated, states may permit the sale of the practice when the lawyer leaves the geographic area rather than the jurisdiction. The alternative desired should be indicated by selecting one of the two provided for in Rule 1.17(a).

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

Sale of Entire Practice or Entire Area of Practice

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

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

As proposed by Ethics 2000 Subcommittee 5/13/05
No changes from Colorado Ad Hoc Committee Proposal
Only change from ABA Ethics 2000 Model Rule
is time period in (b)(3)

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist).

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

Fee Arrangements Between Client and Purchaser

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

Other Applicable Ethical Standards

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

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

Applicability of the Rule

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

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

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

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

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

- (a) make a false or misleading statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

* * * * *

Comment to RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

~~Misrepresentation~~ False Statements

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. ~~A misrepresentation can occur. A false statement can occur~~ if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. ~~Misrepresentations can also occur by Omissions or partially true but misleading statements or omissions that are~~ can be the equivalent of affirmative false statements. For dishonest conduct generally that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

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

Crime or Fraud by Client

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

RULE 4.1 — TRUTHFULNESS IN STATEMENTS TO OTHERS

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

- (a) make a false or misleading statement of fact or law to a third person; or**
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.**

Comment

Misrepresentation

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Statements of Fact

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiations, certain types of statements ordinarily are not taken as statements of fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client

Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

Committee Comment

The deletions the Committee made in subparagraph (a) are those adopted by Minnesota to not limit the prohibition to material statements, and to eliminate the argument over whether or not a statement concerned a "material" fact. This provision is substantially the same as DR 7-102(A)(3) and (5) of the Code.

Rule 4.1

Truthfulness in Statements to Others

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

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

COMMENT

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

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

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme

cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

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

Comment to RULE 4.2 COMMUNICATION WITH PERSON ~PRESENTED BY COUNSEL

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

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

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

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

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

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

As proposed by Ethics 2000 Subcommittee 7/11/05
Marked to show changes from Colorado Ad Hoc Committee Proposal
Subcommittee recommends ABA Ethics 2000 Rule with addition to Comment [4]

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

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

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

RULE 4.2 — COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

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

Source: Comment amended and adopted June 17, 1999, effective July 1, 1999.

Comment

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for the purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).

This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question. A pro se party to whom limited representation has been provided in accordance with C.R.C.P. 11(b), or C.R.C.P. 311(b), and Colo.RPC 1.2 is considered to be unrepresented for purposes of this Rule unless the lawyer has knowledge to the contrary.

Committee Comment

This Rule is proposed as adopted by the ABA, and is essentially the same as DR 7-104(A) of the Code.

As proposed by Ethics 2000 Subcommittee 7/11/05

No changes made to ABA Ethics 2000 rule.

Ad Hoc Committee deleted last phrase in last sentence of text of rule.

RULE 4.3 DEALING WITH UNREPRESENTED PERSON

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

Comment to RULE 4.3 DEALING WITH UNREPRESENTED PERSON

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

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

RULE 4.3 — DEALING WITH UNREPRESENTED PERSON

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

Source: Comment amended and adopted June 17, 1999, effective July 1, 1999.

Comment

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel. The lawyer must comply with the requirements of this Rule for pro se parties to whom limited representation has been provided, in accordance with C.R.C.P. 11(b), C.R.C.P. 311(b), Colo.RPC 1.2, and Colo.RPC 4.2. Such parties are considered to be unrepresented for purposes of this Rule.

Committee Comment

The Committee has added to the ABA provision the language requiring the lawyer to "state that the lawyer is representing a client." The Committee has also added the requirement that "the lawyer shall not give advice to the unrepresented person other than to secure counsel," to parallel DR 7-104(A)(2) of the Code.

RULE 4.5. THREATENING PROSECUTION

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

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

Comment to RULE 4.5 THREATENING PROSECUTION

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

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

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

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

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

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

Rule 4.5(b) provides a safe harbor for notifications of this type. Other factors that should be considered to differentiate threats from notifications in difficult cases include (a) an absence of any

As proposed by Ethics 2000 Subcommittee 7/11/05
Marked changes are from existing Colo.R.P.C. 4.5
No change from Ad Hoc Committee proposal
No counterpart in ABA Ethics 2000 Rules of Professional Conduct

suggestion by the notifying lawyer that he or she could exert any improper influence over the criminal, administrative or disciplinary process, (b) consideration of whether any monetary recovery or other relief sought by the notifying lawyer is reasonably related to the harm suffered by the lawyer's clients. Where no such reasonable relation exists, the communication likely constitute a proscribed threat. For example, a lawyer violates Rule 4.5 if the lawyer threatens to file a charge or complaint of tax fraud against another party where issues of tax fraud have nothing to do with the dispute. It is not a violation of Rule 4.5 for a lawyer to notify another party that the other person's writing of an insufficient funds check may have criminal as well as civil ramifications in a civil action for collection of the bad check.

[BARNHILL COMMITTEE COMMENT TO RULE 4.5
(For the Committee's information purposes only)]

The Model Rules contain no counterpart to Disciplinary Rule 7-105(A). The Committee believes that the prohibition of DR 7-105(A) against threatening criminal prosecution in order to obtain an advantage in civil proceeding should be maintained. Proposed Rule 4.5 is adapted from California Rule of Professional Conduct 7-104. It broadly applies to threats of bringing and actually bringing administrative and disciplinary charges, as well as bringing criminal charges. Note that while a threat to bring criminal, administrative or disciplinary charges to obtain any advantage in a civil proceeding is a violation of Rule 4.5, the actual bringing of such charges is subject to discipline only if it is done solely to obtain an advantage in a civil matter.

The phrase "nor shall a lawyer present or participate in presenting...disciplinary charges solely to obtain an advantage in a civil matter" (emphasis added), arguably is inconsistent with the immunity accorded lawyers and others who file requests for investigation with the Colorado Supreme Court Grievance Committee. See C.R.Civ.P. 241.25(e): "All requests for investigation submitted to the Supreme Court, the Committee, the Committee Counsel, or the Disciplinary Counsel, and all complaints filed with the Committee, shall be absolutely privileged and no law suit maybe predicated thereon." Nevertheless, the Committee determined that (1) immunity under C.R.Civ.P. 241.25(e) does not protect a lawyer from disciplinary proceedings for filing false complaints with the Grievance Committee; (2) similarly, violations of proposed Rule 4.5 based on improper grievance filings would not be immune from discipline under Rule 241.25(e); and (3) even if the immunity provisions could be construed so broadly, it is Rule 241.25(e) not proposed Rule 4.5 that should be changed.

The proposed Official Comment to Rule 4.5 is adapted from Ethical Consideration 7-21 of the current Colorado Code of Professional Responsibility.]

RULE 4.5 — THREATENING PROSECUTION

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

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

Source: Entire Rule and comment amended and adopted June 19, 1997, effective July 1, 1997.

Comment

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

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

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

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

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

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

Rule 4.5(b) provides a safe harbor for notifications of this type. Other factors that should be considered to differentiate threats from notifications in difficult cases include (a) an absence of any suggestion by the notifying lawyer that he or she could exert any improper influence over the criminal, administrative or disciplinary process, (b) consideration of whether any monetary recovery or other relief sought by the notifying lawyer is reasonably related to the harm suffered by the lawyer's clients. Where no such reasonable relation exists, the communication likely will constitute a proscribed threat. For example, a lawyer violates Rule 4.5 if the lawyer threatens to file a charge or complaint of tax fraud against another party where issues of tax fraud have nothing to do with the dispute. It is not a violation of Rule 4.5 for a lawyer to notify another party that the other person's writing of an insufficient funds check may have criminal as well as civil ramifications in a civil action for collection of the bad check.

Committee Comment

The Model Rules contain no counterpart to Disciplinary Rule 7-105(A). The Committee believes that the prohibition of DR 7-105(A) against threatening criminal prosecution in order to obtain an advantage in civil proceeding should be maintained. Proposed Rule 4.5 is adapted from California Rule of Professional Conduct 7-104. It broadly applies to threats of bringing and actually bringing administrative and disciplinary charges, as well as bringing criminal charges. Note that while a threat to bring criminal, administrative or disciplinary charges to obtain any advantage in a civil

proceeding is a violation of Rule 4.5, the actual bringing of such charges is subject to discipline only if it is done solely to obtain an advantage in a civil matter.

The phrase "nor shall a lawyer present or participate in presenting . . . disciplinary charges solely to obtain an advantage in a civil matter" (emphasis added), arguably is inconsistent with the immunity accorded lawyers and others who file requests for investigation with the Colorado Supreme Court Grievance Committee. See C.R.Civ.P. 241.25(e) "All requests for investigation submitted to the Supreme Court, the Committee, the Committee Counsel, or the Disciplinary Counsel, and all complaints filed with the Committee, shall be absolutely privileged and no lawsuit may be predicated thereon." Nevertheless, the Committee determined that (1) immunity under C.R.Civ.P. 241.25(e) does not protect a lawyer from disciplinary proceedings for filing false complaints with the Grievance Committee; (2) similarly, violations of proposed Rule 4.5 based on improper grievance filings would not be immune from discipline under Rule 241.25(e); and (3) even if the immunity provisions could be construed so broadly, it is Rule 241.25(e) not proposed Rule 4.5 that should be changed.

The proposed Official Comment to Rule 4.5 is adapted from Ethical Consideration 7-21 of the current Colorado Code of Professional Responsibility.

RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

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

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

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

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

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

Comment to **RULE 5.1 RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER**

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

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

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its

As proposed by Ethics 2000 Subcommittee 7/11/05
No change from Ad Hoc Committee Proposal
Ad Hoc Committee recommends adoption of ABA Ethics 2000 Rule

members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

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

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

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

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

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

RULE 5.1 — RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

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

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

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

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

Comment

Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.

The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

Paragraph (c) (1) expresses a general principle of responsibility for acts of another. See also Rule 8.4 (a).

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

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

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

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

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

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

Comment to RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

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

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

Comment

Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

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

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

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

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

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

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

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

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

Comment to **RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS**

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

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

**RULE 5.3 — RESPONSIBILITIES REGARDING
NONLAWYER ASSISTANTS**

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

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

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

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

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

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

Comment

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

Committee Comment

The Committee concluded that public policy dictates that lawyers must be responsible for the acts of those they supervise. The lawyer's status as partner, associate, or otherwise has little or nothing to do with his or her professional responsibilities.

RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

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

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

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

~~(2)(3)~~ a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

~~(3)(4)~~ a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

~~(4)(5)~~ a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommend employment of the lawyer in the matter.

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

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

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

~~(1) a nonlawyers owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;~~

~~(2) a nonlawyers is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or~~

~~(3) a nonlawyers has the right to direct or control the professional judgment of a lawyer.~~

Comment to RULE 5.4 PROFESSIONAL INDEPENDENCE OF A LAWYER

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

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

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

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

RULE 5.4 — PROFESSIONAL INDEPENDENCE OF A LAWYER

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

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

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

(3) a lawyer who purchases the practice of a lawyer pursuant to the provisions of Rule 1.17 may, in the case of a deceased lawyer or one for which a legal guardian or representative has been appointed, pay such estate or representative the purchase price;

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

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

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

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

Source: Entire rule amended and adopted June 12, 1997, effective July 1, 1997.

Comment

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

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

As part of the legal profession's commitment to the principle that high quality legal services should be available to all, lawyers are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services. Participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence, and devotion to the interests of individual clients. A lawyer so participating should make certain that a relationship with a qualified legal assistance organization in no way interferes with the lawyer's independent, professional repre-

sentation of the interests of the individual client. A lawyer should avoid situations in which officials of the organization who are not lawyers attempt to direct lawyers concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy are given undue weight in determining the lawyers employed by an organization or the legal services to be performed for the member or beneficiary rather than competence and quality of service. A lawyer interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess those factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standards of effort and competence.

Committee Comment

Subsections (a), (b), and (c) are virtually identical to DR 3-102(A), DR 3-103(A), and DR 5-107(B), respectively. Subsection (d) has been modified so that it now corresponds to DR 5-107(C).

Rule 5.4

Professional Independence of a Lawyer

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

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

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

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

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

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

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

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

COMMENT

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

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

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

Comment to RULE 5.6 RESTRICTIONS ON RIGHT TO PRACTICE

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

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

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

RULE 5.6 — RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement or as permitted in Rule 1.17; or

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

Source: (a) and Comment amended and adopted June 12, 1997, effective July 1, 1997.

Comment

An agreement restricting the right of a lawyer to practice after leaving a firm not only limits the lawyer's professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm or restrictions included in the terms of a sale pursuant to Rule 1.17.

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

RULE 5.7 RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

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

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

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

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

* * * * *

Comment to RULE 5.7 RESPONSIBILITIES REGARDING LAW-RELATED SERVICES

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

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

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

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

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

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

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

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

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

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects

As proposed by Ethics 2000 Subcommittee 7/11/05
No changes from Ad Hoc Committee proposal
No changes from ABA Ethics 2000 rule

comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

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

JAG

July 19, 2004

RECEIVED

JUL 20 2004

Holland & Hart
Marcy G. Glenn

Marcy G. Glenn, Esq.
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Re: Proposed Additional Change To Ad Hoc Ethics 2000 Committee's Recommended
Changes To Colorado Rules Of Professional Conduct

Dear Marcy:

Thanks for taking the time to speak with me last week about the good work of the Ad Hoc Ethics 2000 Committee and of your committee. Pursuant to our conversation, I am sending this letter to summarize my request for an additional change to our Colorado Rules of Professional Conduct.

The additional change is to remove any reference to "zeal" and "zealous" in describing our professional obligations. This would require a change in Paragraphs 2, 8, and 9 of the Preamble, "A Lawyer's Responsibilities," and to the Commentary to Rule 1.3. The change is not substantial.¹ The need for the change is.

A. The Lack Of Need For "Zealous Advocates"

In discussing why the word "zealous" should be eliminated, let's begin with what the Code provides without it. Under Rule 1.1, a lawyer must provide competent representation. Rule 1.3 requires that a lawyer act with reasonable diligence and promptness, and not neglect a legal matter. Under Rule 1.6, a lawyer shall not reveal confidential information relating to representation of a client. Rule 1.7 proscribes conflicts of interests.

Aside from the duties to the client, Rule 3.1 provides that a lawyer shall not bring or defend a proceeding, or assert or controvert an issue unless there is a basis for doing so that is not frivolous. Rule 3.3 addresses a lawyer's duty of candor toward a tribunal. Rule 3.4 states that a lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal evidence, or knowingly disobey an obligation under the rules of a tribunal. That includes the rules of discovery. A lawyer also shall not allude to evidence that the lawyer does not reasonably believe is relevant or is otherwise inadmissible.

Rule 4.1 provides that a lawyer shall not make a false or misleading statement of fact or law to a third party. Rule 8.4 defines unprofessional misconduct to include engaging in conduct that is prejudicial to the administration of justice.

Diligence, competence, confidentiality, with no conflicts of interest: elegant simplicity. The rules are comprehensive, describing a lawyer's duties not only to clients, but also to others. In short, the word "zealous" is not a word needed to describe a lawyer's ethical duties.

Now let's consider where the word "zealous" actually appears in our rules of ethics. We can begin with our prior Code of Professional Responsibility. There were only two references. One was in the title to Rule 7, "Zealously Representing Clients within the Bounds of the Law." Read the actual rule and the word never appears. The second was in the title to DR 7-101, "Representing a Client Zealously." Again, the word is never used in the rule.

The word is of no more importance in our current Rules of Professional Conduct or in the Rules with proposed changes. The Preamble includes the following in Paragraph 2: "As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." The Preamble at Paragraph 8 further states: "A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done." Finally, the Preamble at Paragraph 9 states: "These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system." These statements do nothing to explain what the supposed duty of "zealous advocacy" encompasses beyond the duties expressed in the other rules.

The commentary to Rule 1.3, the rule on diligence, states in part: "A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." Again, no mention in the rule itself, and no definition in the commentary.

Some might argue that "zealous advocacy" is part of what distinguishes our profession from a business. The distinction between a profession and a business is certainly important. Many occupations have appropriated the term "profession," but only the clergy, doctors, and lawyers actually occupy that special position in society. The distinction, however, does not rest in any part on being a "zealous advocate." Rather, lawyers, doctors, and the clergy are entitled to be called professions because their members work within a confidential relationship to provide services based on a special trust with deeply personal matters, the services rendered only after highly specialized training.

Others might argue that "zealous advocacy" is part of the ideals of our profession. However, removing any reference to acting as a "zealous advocate" does not impact the ideals of being "fearless" in representing an unpopular cause, or of being "conscientious" or

“tireless” in the efforts expended for a client. As already noted in the Comment to Rule 1.3 Diligence: “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer A lawyer should act with commitment and dedication to the interest of the client.” In short, Atticus Finch need not back down.ⁱⁱ

The extent of the supposed duty of “zealous advocacy” has been the subject of careful scrutiny. The American Law Institute has nicely summarized the scope of that duty as follows: “The Preamble to the ABA Model Rules of Professional Conduct (1983) . . . and EC 7-1 of the ABA Model Code of Professional Responsibility refer to a lawyer’s duty to act ‘zealously’ for a client. The term sets forth a traditional aspiration, but it should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling. For legal purposes, the term encompasses the duties of competence and diligence.”ⁱⁱⁱ (emphasis added)

If that’s all there is to it, what is the genesis of the supposed duty to be a zealous advocate? W. Bradley Wendel, in his article, “Public Values And Professional Responsibility,” traces the history of the phrase back to a comment in a speech in the English parliament in 1820 by Lord Brougham. Mr. Wendel concludes:

“The Restatement view [that the term merely encompasses the duties of competence and diligence] is in line with a more nuanced understanding of the Lord Brougham defense, which was never intended as a maxim of legal ethics. Brougham made his statement in the context of a parliamentary debate, not a judicial proceeding, and the speech was intended as a veiled political threat to King George IV. In any event, . . . it can hardly be argued that the Brougham speech describes the prevailing norms of the English Bar in 1820. It certainly has no general applicability.”^{iv} (emphasis added)

So that’s it for the role of the zealous advocate: the duties of competence and diligence. And those duties are adequately described in our Code of Professional Conduct. The phrase “zealous advocacy” is full of sound and fury, signifying nothing.

B. Impact Of The Supposed Duty Of “Zealous Advocacy”

The duty of “zealous advocacy” may be empty of meaning. However, this does not mean that references to it are without import. Put simply, the duty to be a “zealous advocate” is the single most common justification used by trial lawyers for conduct ranging from incivility to dishonesty, from abuses of discovery, to abuses of opposing counsel, even to abuses of the presiding tribunal.

In short, the illusory duty is treated as synonymous with a duty to be ruthless. It creates the impression, or can at least be used as an excuse to claim, that the duty to the

client is paramount, and that a lawyer is therefore justified in minimizing or even ignoring the other duties expressly stated in our Rules of Profession Conduct.

Here are just a few conclusions by others who have studied the matter:

"We believe the adversary system and the duty of zealous representation often serve to justify . . . objectionable behaviors and help to create and reinforce the very cynicism, selfishness, and social mistrust that legal culture instead should attempt to overcome."^v

"It is those normative commitments themselves – zealous representation of clients and business rationality working in combination to reinforce economic self-interest – that need to be made the subject of critical scrutiny."^{vi}

"The civil litigation system has fostered an adversarial culture in which legal professionals practice delay and deception, and rationalize such conduct based on an ideal of zealous representation."^{vii}

"Justifying one's ethical deliberation through reliance on the role prescribed by the zealous-advocate model raises the potential for ethical problems from the very moment the attorney-client relationship is formed."^{viii}

"Several commentators believe that lawyers have resolved the conflicts by simply adopting an amoral professional role. . . [T]he attorney simply functions as a technician whose role is to advance the client's interests zealously without regard to the lawyer's personal morals or value, society's needs or morals. The lawyer's actions are constrained only by the 'bounds of the law' and ethics codes. . . . The amoral professional role has been blamed for fostering unprofessional tactics and actions by lawyers in the name of zealous advocacy."^{ix}

"What often parades as zealous advocacy for a client is merely unrestrained competitiveness driven by an obsessive desire to win and a compulsive fear of losing."^x

"I believe the root cause of this professional pathology is the increasingly combative and aggressive nature of the legal profession. I suggest that too often we treat ruthlessness, paranoia and insensitivity as professional virtues, cloaking these traits in the amiable guise of zealous advocacy"^{xi}

Here in Colorado, Cathlin Donnell chaired the Legal System Dynamics Subcommittee of the Professionalism Committee. The Subcommittee reported in 1993 as follows:

“The underlying perspective of most of the subcommittees is that unprofessional conduct is a problem created by certain individual lawyers within the profession who are unaware of appropriate professional standards, or who are not convinced that they need comply, and who may well gain advantage and success by not complying. This Subcommittee has been exploring a contrary perspective, namely that our legal system itself, not the misbehavior of particular individuals, is the principal cause of growing unprofessionalism. [The reasons include our] ethical rules and the ‘lawyer culture’ which require zealousness . . .”^{xii}

To recognize the pernicious impact of the perceived duty of “zealous” representation is not to indict the adversary system of justice. While inherently flawed, such a system, properly used, can aid in the search for truth and justice. The problem is that too many lawyers rely on their duty to be a “zealous advocate” to subvert our adversary system into a mechanism for distorting truth, subverting justice, and treating others with incivility.

The Preamble to the Rules of Professional Conduct contains an important statement commonly overlooked: “Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience. . . .”^{xiii}

As Professor Rhode stated in her article, *The Professionalism Problem*: “A . . . guiding principle calls for lawyers to accept personal moral responsibility for the consequences of their professional acts. . . . The rationale for professional actions cannot depend on retreats into roles that deny the need for reflection at precisely the moment when reflection is more needed.”^{xiv}

This is not about refusing to represent clients who may have different life goals and morals. This is a pluralistic society. Legal ethics must be understood as a discipline that accepts conflicting values. Thus, while a client may need the advocate to espouse a legal position inconsistent with the lawyer’s personal values, it is not necessarily contrary to personal values to represent such a client. A lawyer understands the importance of having all voices in society properly represented. Nevertheless, this is about representing the client within the bounds of our adversary system, our current Rules of Professional Conduct – and our own personal conscience.

When a lawyer ignores personal conscience and abuses the system or acts with incivility, the impact is not suffered just by opposing counsel. The impact is also on the lawyer who thinks that he or she has to ignore personal conscience in order to fulfill the duty

of being a "zealous advocate." Such a lawyer is confronted, not only with office battle fatigue, but also what I call "moral incongruity."^{xv} In short, when lawyers feel forced to behave as lawyers in ways they would not behave in their private lives, the internal conflict contributes to their "rust out" as human beings.

The authors of Moral Vision and Professional Decisions put it like this:

"It is small wonder that lawyers, who are trained in the ethics of the jugular attack [and] all-out battles, find it difficult to sustain stable, convivial and compatible work groups, not to mention families. . . . You can't work there sixty hours a week and then shed its influence as you return to the more civilized suburbs. . . . In a very real sense people merge with the roles they play. What begins as a role becomes part of a person's identity. . . . Because they are so comprehensive and time-demanding, professional roles tend to be particularly dominant and threatening to personal identity."^{xvi}

In his article on professionalism, Daniel R. Coquillette vehemently argues that lawyers are deluding themselves if they believe that they can resolve the internal conflict by divorcing their personal lives from the professional lives.^{xvii} Citing Aristotle, he stresses that "one's person or professional actions and identity cannot be independent from one's personal morality. . . [O]ne's behavior determines one's character."^{xviii}

As Rabbi Harold L. Kudan has put it: "That which dominates our imagination and our daily thoughts will determine our life and character. Therefore it behooves us to be careful what we are worshipping, for what we are worshipping we are becoming."^{xix} Or, as Aristotle himself put it, "You are what you repeatedly do."

C. Conclusion

Our Rules of Professional Conduct provide for every duty a lawyer owes a client. These include the duties of competence and diligence. There is no additional duty to be a "zealous advocate." Yet the perception of that duty either creates the perceived need for, or is used as an excuse to justify, incivility and abuse of our adversary system. It is also the source of internal conflict, the "moral incongruity," that so greatly contributes to our "rust out" as human, and humane, beings.

Let me stress that I am writing this to expressly my personal request. The Colorado Bar Association has not been asked to take a position on the matter. However, I would point out that the subject was addressed during the work of the CBA's Professionalism Reform Task Force. As reported in the Colorado Lawyer two years ago this month^{xx}, the Lawyer To Lawyer Working Group listed as its first two recommendations:

* Remove all references to "zealous advocacy" from the preamble and comments to the Rules of Professional Conduct."

- * Use the occasion of the removal of zealousness from the Rules for seminars and other presentations by well-respected members of the bar on the reasons for its removal and the pernicious effects of dishonesty on a lawyers' reputation, on the well being of clients, on the public, and on the profession as a whole.

You mentioned that this might be appropriate for discussion at your meeting on the morning of October 1. Unfortunately, I will be in Alamosa that day hosting a CBA Regional Bar Visit. However, because the program will not start before noon, I could be available to take part through a telephone conference. I will await word from you on how to proceed. In the meantime, my thanks to you and your committee for your consideration of my proposal and for the time you are volunteering to a good cause.

Sincerely,



Steve C. Briggs

ⁱ Some have advocated that we should immediately go further than my modest proposal. For example, it has been suggested that new rules of professional responsibility and civil procedure could be fashioned for the investigative and discovery stages of civil litigation. During these stages, counsel would be required to view themselves primarily as officers of the court rather than partisan advocates. Brazil, Wayne D., "The Adversary Character of Civil Discovery: A Critique And Proposals For Change," 31 Vanderbilt L. Rev. 1295 (November 1978); see also Rhode, Deborah L., "The Professionalism Problem," 39 Wm. & Mary L. Rev. 283 (January 1998).

ⁱⁱ The fearless and tireless lawyer in the book, *To Kill A Mockingbird*, by Harper Lee.

ⁱⁱⁱ Restatement of the Law Third, The Law Governing Lawyers, §16, p. 148 (The American Law Institute 1998).

^{iv} Wendel, W Bradley, "Public Values and Professional Responsibility," 75 Notre Dame L. Rev. 1, fn. 205 (1999).

^v Symposium, "Rediscovering the Role of Religion in the Lives of Lawyers and Those They Represent," Panel Discussion Responses to the Keynote Address, 26 Fordham Urb. L.J. 841, fn 54 (1999) (Moderator Rabbi Gerald Wolpe, Respondents Eugene W. Harper, Jr., Nanette H. Schorr, and Mohammed Fadel).

^{vi} Gordon, Robert, "The Ethical Worlds of Large-Firm Litigators: Preliminary Observations," 67 Fordham L. Rev. 709, 737 (1998)

^{vii} Nelson, Robert L., "The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation," 67 Fordham L. Rev. 773, p. 805.

^{viii} Higgins, Shannan E., "Ethical Rules of Lawyering: An Analysis Of Role-Based Reasoning From Zealous Advocacy to Purposivism," 12 Geo. J. Legal Ethics 639, p. 650.

^{ix} Daicoff, Susan, "Asking Leopards To Change Their Spots," 11 Geo. J. Legal Ethics 547 (Spring 1998).

^x Josephson, Mickael, "Ethics Beyond The Code," Talk at the Colorado Bar Association Annual Meeting (September 1994).

^{xi} Shuman, David, "Beyond The Waste Land," Oregon State Bar Bulletin, p. 10. (May 1991).

^{xii} Donnell, Cathlin, "Legal System Dynamics: Has the System Cracked?" 20 Colorado Lawyer, June 1135, 1136 (June 1991).

^{xiii} One scholar has argued that it is not sufficient merely to use personal morality to temper any supposed duty to act as a zealous advocate for a client. Rather, a lawyer's duty should be to act as a zealous advocate for justice, not the client. Simon, William, *The Practice of Justice: A Theory of Lawyer's Ethics* (1998). That approach has been criticized as not sufficiently protecting the interest of the client and, ultimately, society. Monopoli, Paula A., "Teaching Lawyers To Be More Than Zealous Advocates", 2001 Wis. L. Rev. 1159.

^{xiv} Rhodes, *supra*, note 1.

^{xv} Susan Daicoff stated it this way: "A conflict arises between a lawyer's own personal values and morals and the behavior she believes is necessary to fulfill her professional role to advocate zealously for the client." Daicoff, Susan, *supra*, note 9, p. 561.

^{xvi} Rand, Jack and Rand, Dana Crowley. Moral Vision and Professional Decisions (Cambridge University Press)

^{xvii} Coquillette, Daniel R. "Professionalism: The Deep Theory." 72 N.C.L. Rev. 1271 (1994).

^{xviii} Daicoff, Susan, *supra*, note 9, p. 574.

^{xix} Schuman, David, *supra*, note 11.

^{xx} "Colorado Bar Association PRI Task Force Interim Report to the Board of Governors, May 2002," 31 Colo. Law. 53 (July 2002)

MONTANA RULES OF PROFESSIONAL CONDUCT

[The Montana Supreme Court's language departures from the Model Rules are in *italics*. Numbering is accurate for Montana, but is not identical to the ABA Model Rules. The ABA's amendments to their Model Rules are underlined, as is new language to Montana. Language in **bold** and *italics* is that proposed by the State Bar, but rejected by the Montana Supreme Court.]

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] *A lawyer shall always pursue the truth.*

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

[3] As a representative of clients, a lawyer performs various functions. *In performance of any functions a lawyer shall behave consistently with the requirements of honest dealings with others.* As advisor, a lawyer *endeavors to* provide a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer *zealously* asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements *under these Rules* of honest dealings with others. ~~As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client.~~ *As an evaluator,* a lawyer acts as evaluator by examining a client's legal affairs and reporting about them *to the client or others.*

[4] *In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.3. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.*

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

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

[7] As a public citizen, a lawyer should seek improvement of the law, *access to the legal system,* the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients; employ that knowledge in reform of the law and work to strengthen legal education. *In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.* A lawyer should be mindful of deficiencies in the administration of justice and of

the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, ~~and. Therefore, all lawyers should therefore devote professional time and resources and use civic influence in their behalf to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.~~ A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[8] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[9] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are *usually* harmonious. *Thus, when an opposing party is well-represented, a lawyer can be a zealous dedicated advocate on behalf of a client, even an unpopular one, but in doing so must comply with these Rules of Professional Conduct. and at the same time assume that justice is being done.* So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[10] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest, ~~in remaining an ethical person while earning a satisfactory living.~~ The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

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

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

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

[14] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. All lawyers understand that, as Officers of the Court, they have a duty to be truthful, which engenders trust in both the profession and the rule of law. The Rules of Professional Conduct, when properly applied, serve to define that relationship. Trust in the integrity of the system and those who operate it is a basic necessity of the rule of law; accordingly truthfulness must be the hallmark of the legal profession, and the stock-in trade of all lawyers.

SCOPE

[15] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has ~~professional discretion to exercise professional judgment~~. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

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

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

[18] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that ~~may~~ attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.20. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

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

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

[21] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for

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Arizona Rules of Professional Conduct

PREAMBLE, SCOPE, AND TERMINOLOGY

A LAWYER'S RESPONSIBILITIES

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Whether or not engaging in the practice of law, lawyers should conduct themselves honorably.

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

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

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

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal

affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

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

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

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

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while acting honorably

and maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

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

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

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

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SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. The context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and

procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

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

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

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

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

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not

necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

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

Rule 3.3 and 4.1 Comparison

Current Colorado Rule

Former ABA Model Rule

ABA Ethics 2000 Rule

Version approved by full Committee

Rule 3.3

(a) A lawyer shall not knowingly
(1) make a false statement of **material** fact or law to a tribunal;
(2) fail to disclose a **material** fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client

Same as current Colorado rule

(a) a lawyer shall not knowingly
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of **material** fact or law previously made to the tribunal by the lawyer

(a) A lawyer shall not knowingly
(1) make a false statement of **material** fact or law to a tribunal or fail to correct a false statement of **material** fact or law previously made to the tribunal by the lawyer

Rule 4.1

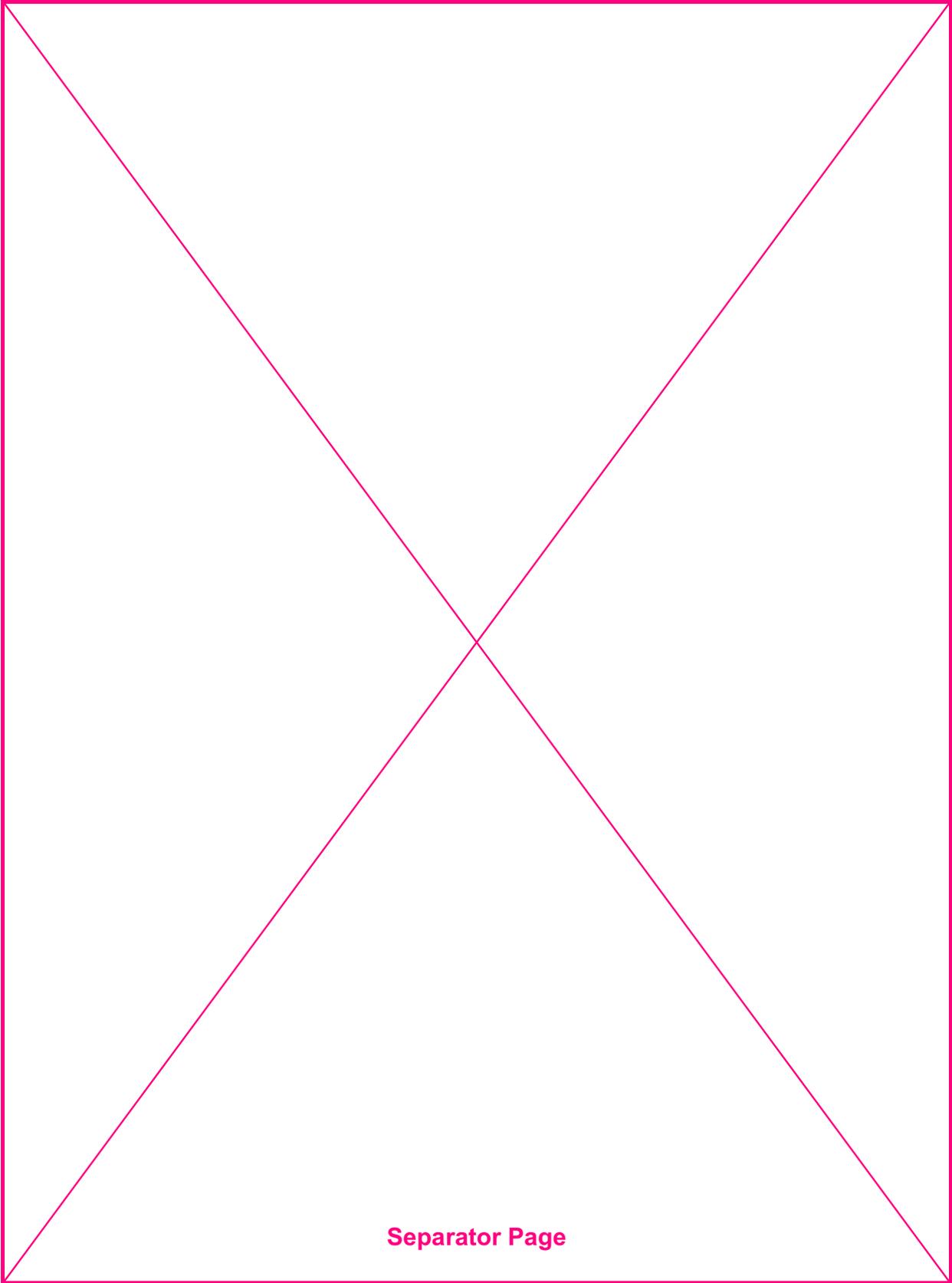
In the course of representing a client a lawyer shall not knowingly (a) make a false or **misleading** statement of fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6

In the course of representing a client a lawyer shall not knowingly (a) make a false statement of **material** fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6

In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6

Subcommittee Proposal

Identical to ABA Ethics 2000 Rule (column to left) –deletes words “or misleading”, added by Ad Hoc Committee



Separator Page

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

AGENDA

September 27, 2005, 1:30 p.m.
Supreme Court Conference Room (5th Floor)

1. Approval of minutes – See attached pages 1-19
2. Administrative matters
 - a. Select next meeting date
 - b. Committee membership
3. Ethics 2000 Subcommittee Report on Preamble and Rules 1.17, 4.4, 5.5, 6.1, 6.2, 6.3, 6.4, 6.5, 7.1, 7.2, 7.3, 7.4, 7.5, 7.6, 8.1, 8.2, 8.3, 8.4 and 8.5 – Michael Berger
 - a. Final Report of Subcommittee – See attached pages 20-25
 - b. “Zealousness” materials provided by Steve C. Briggs – **See pages 99-106 from October 1, 2004 meeting materials**
 - c. Materials regarding Rule 1.17
 - 1) Interim Report No. 4 of the Subcommittee – **See pages 5, 55-77 from March 23, 2005 meeting materials**
 - 2) Interim Report No. 5 of the Subcommittee – **See pages 1, 14-16 from May 20, 2005 meeting materials**
 - 3) Interim Report No. 6 of the Subcommittee – **See pages 2, 13-15 from July 19, 2005 meeting materials**
 - d. Materials regarding Rule 5.5
 - 1) **Materials distributed by e-mail before September 30, 2003 meeting**
 - 2) **Pages 19-48 from January 9, 2004 meeting materials**
 - 3) **Pages 14-16 from June 11, 2004 meeting materials**

4. Adjournment (by 4:30)

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FILE NOTE

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

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

COLORADO SUPREME COURT
COMMITTEE ON RULES OF PROFESSIONAL CONDUCT
ETHICS 2000 SUBCOMMITTEE

FINAL REPORT

September 15, 2005

At long last, the Subcommittee has completed its review of the ABA Ethics 2000 Model Rules of Professional Conduct. This is the Final Report of the Subcommittee.

Preamble. Zealousness and Zealots.

At the last Committee meeting, the Committee directed the Subcommittee to make revisions to the Preamble to make clear what “zealously” means and doesn’t mean in the representation of a client by a lawyer. In carrying out this direction of the Committee, the Subcommittee focused upon the last sentence of Comment [9] to the Preamble and Scope of the ABA Ethics 2000 Model Rules. That sentence reads as follows:

“These principles include the lawyer’s obligation zealously to protect and pursue a client’s legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.”

A minority of the Subcommittee is of the view that this sentence is sufficient to disabuse any reasonable reader of the notion that the concept of zealous representation requires or authorizes “Rambo” tactics and other unprofessional actions. A majority of the Subcommittee believes, on the other hand, that the quoted sentence, while certainly on point, needs to be strengthened. Accordingly, a divided Subcommittee recommends that the last sentence of ABA Ethics 2000 Comment [9] be revised and expanded into the following two sentences:

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

Rule 1.17. Based upon prior directions of the full Committee, minor, non-substantive changes were made to the prior Subcommittee proposal. In addition, the Comments were revised to conform with the prior decision of the Committee to delete the ABA Ethics 2000 requirement for a court order where notice of the sale is not actually received by the client.

Rule 4.4. ABA Ethics 2000 Rule 4.4(b) and the associated comments wade into one of the more vexing problems facing lawyers and the courts. Modern technologies, particularly email, facilitate the communication of information but also facilitate erroneous transmissions of confidential information. The ease of sending or forwarding email communications invites the transmission of confidential information to those who should not have access to the information. In litigation matters, the tremendous cost and burden of scouring hundreds, even thousands of emails for confidential information that should be redacted or not produced at all, virtually guarantees that errors will be made no matter how careful lawyers and their staff may be.

Inevitably, the question arises as to the lawyer's ethical and legal duties upon receipt of information that was transmitted by mistake to the lawyer.

ABA Ethics 2000 Rule 4.4(b) addresses part of this issue. It provides that a lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender. The sender may then apply for a court order with respect to use of the information. The imposition of this duty is non-controversial. What is controversial is what, if any, additional duties, as a matter of law and legal ethics, are imposed upon the lawyer-recipient.

Many state bar ethics committees and courts have addressed this issue. The Colorado Bar Association Ethics Committee, in its Formal Opinion 108, has opined that when a lawyer actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents, the lawyer must, as a matter of legal ethics, not examine the documents and must abide by the sending lawyer's instructions as to their disposition. The opinions of the CBA Ethics Committee are not, of course, binding upon the Colorado Supreme Court, or anyone else.

One of the proposals considered by the Subcommittee was essentially the CBA Ethics Committee formulation. Those members in support of such a formulation believe that the Court should define lawyers' obligations in the rules, thus providing definitive guidance in this difficult area. Despite the reasoning of the CBA Ethics Committee, a majority of the Subcommittee rejected this proposal, citing uniformity concerns. Accordingly, a majority of the Subcommittee recommends the adoption of the text of ABA Ethics 2000 Rule 4.4, without any changes.

The Ad Hoc Committee also recommended the adoption of ABA Ethics 2000 Rule 4.4 but recommended the deletion of Comment [3]. The Subcommittee disagrees with the deletion of Comment [3]. Comment [3] provides a safe-harbor of sorts to lawyers who erroneously receive confidential information. The Comment provides that in those circumstances where the lawyer is not compelled either by ethics rules or other law to return the information unread, the lawyer has professional discretion to return the information and by doing so, does not violate the duty of loyalty imposed by the Rules of Professional Conduct. The Subcommittee believes that the recognition of such professional discretion is salutary, regardless of whether the rule is modified as proposed by the minority who would adopt the CBA Ethics Committee formulation. Some members noted, however, that Comment [3] may be inconsistent with the duties opined in CBA Ethics Committee Formal Opinion 108 because, if a lawyer has an ethical duty not to read

the mistakenly sent communication, then there is no professional discretion involved in such a circumstance.

In summary, the Subcommittee recommends the adoption of ABA Ethics 2000 Rule 4.4 together with the Model comments, without any changes.

Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law. The principal issue debated by the Subcommittee was whether notice to clients should be required whenever a disbarred or suspended lawyer (hired by a lawyer or law firm as a paralegal or in another non-lawyer capacity) has “professional contact” with a client of the law firm. A majority (by one vote) of the Subcommittee is of the opinion that such notice is essential to avoid misleading clients of the firm as to the licensure status of the disbarred or suspended lawyer. The Subcommittee members in the minority believe that it is the supervisory lawyer’s responsibility to ensure that the disbarred or suspended lawyer does not perform tasks that could not be legally performed by a non-lawyer and that the written notice requirement was unfair and overbroad.

Rules 6.1 through 6.5. Each of these rules, recommended for adoption by the Colorado Ad Hoc Committee, were not controversial and the Subcommittee recommends the adoption of each of these rules with the minor changes recommended by the Colorado Ad Hoc Committee.

Rule 7.1. The Colorado Ad Hoc Committee recommended the retention of existing Colo. RPC 7.1, instead of the ABA Ethics 2000 rule. The Subcommittee unanimously agrees with that recommendation. Over the past years, the Colorado Supreme Court has made a number of changes to the former ABA Model Rule 7.1. These changes provide more substance and guidance than both former ABA Model Rule 7.1 and ABA Ethic 2000 Rule 7.1. The Colorado Rule appears to work fairly well in practice.

However, the Ad Hoc Committee recommended the deletion of existing Colo. RPC 7.1(a)(2) because ABA Ethics 2000 Rule 8.4(e) now contains some (but not all) of what is now contained in Colo. RPC 7.1(a)(2). The Subcommittee agrees only in part with the Colorado Ad Hoc Committee on this point. We agree with the deletion of the second clause of existing 7.1(a)(2) because that clause is now contained in Rule 8.4(e) and because that prohibition transcends the reach of the seven series of the rules. The first clause of existing Colo. RPC 7.1(a)(2), however, is particularly applicable to advertising by lawyers and thus belongs in Rule 7.1. Accordingly, the Subcommittee unanimously recommends that existing Colo. RPC 7.1 be retained as a new subsection 7.1(a)(3) to read as follows:

“is likely to create an unjustified expectation about results the lawyer can achieve.”

In addition, in the course of reviewing existing Colorado Rule 7.3, the Subcommittee determined that one of its provisions should be moved from Rule 7.3 to have more universal

application in Rule 7.1. Colo. RPC 7.3 (d)(2) prohibits communications that “. . . resemble legal pleadings or other legal documents.” The Subcommittee believes that **all** marketing communications involving a lawyer’s services, not just targeted communications governed by Rule 7.3, should be subject to the same proscription. Colo. RPC 7.1(c) already prohibits the sending of advertising or advertising or solicitation material by restricted forms of delivery, such as certified or registered mail because such forms of delivery are misleading in that they imply that the content is of greater import than it actually is. Lawyer advertising as well as solicitations that resembles legal process or papers are similarly misleading and should be prohibited.

In summary, the Subcommittee recommends the retention of existing Colo. RPC 7.1 with two changes: (1) the inclusion of the first phrase of existing Rule 7.1(a)(2) into a new subsection 7.1(a)(3) and (2) the insertion of the substance of existing Rule 7.3 (d)(2) into existing Rule 7.1(c).

Rule 7.2 Advertising.

The Subcommittee recommends the adoption of ABA Ethics 2000 Rule 7.2, with the changes recommended by the Colorado Ad Hoc Committee. There is a typographical error in the Colorado Ad Hoc Committee’s proposal. Subsection (a) should read as follows:

“Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.”

Rule 7.3. Direct Contact with Prospective Clients.

The Colorado Ad Hoc Committee recommended the adoption of ABA Ethics 2000 Rule 7.3, with several changes to reflect the existing content of Colo. RPC 7.3. The Subcommittee agrees with the Ad Hoc Committee’s recommendation with a few minor changes. First, the Subcommittee recommends the deletion of the references to Rules 7.1, 7.2 7.3(a) and 7.3(b) in subsection (c) of Rule 7.3. Aside from the awkwardness of these cross references, the Subcommittee is concerned that the inclusion of these cross references could result in an unintended construction that where rules do not specifically mention other rules that are applicable, that the other rules are not applicable. That is inconsistent with the concept that the rules form a code. Many rules may be applicable to any particular conduct and it is impossible and unwise to attempt to catalog every rule that may be applicable to particular conduct.

Second, for the same reason, the Subcommittee recommends the deletion of the words “governed by this Rule 7.3” from subsection (d). This reference is unnecessary and potentially misleading.

Finally, as noted above with reference to Rule 7.1, the Subcommittee recommends moving the substance of Rule 7.3(d)(2) to Rule 7.1, necessitating the renumbering of subsection (d)(3).

Rule 7.4 Communication of Fields of Practice

The Colorado Ad Hoc Committee recommended the adoption of ABA Ethics 2000 Rule 7.4, with two exceptions: (1) the retention of Colo. RPC 7.4(f) (now Rule 7.4(e)), which requires lawyers to qualify any claim of certification, except when contained on a lawyer's letterhead and (2) the retention of Colo. RPC 7.4(a) in its current form. The Subcommittee agrees with these recommendations and recommends the adoption of ABA Ethics 2000 Rule 7.4 with the changes suggested by the Colorado Ad Hoc Committee.

Rule 7.5. Firm Names and Letterheads. The Ad Hoc Committee recommends the adoption of ABA Ethics 2000 Rule 7.5. The Subcommittee agrees, but notes that this constitutes a major change from the current Colorado rule. Under the current Colorado rule, trade names are prohibited; this prohibition is reversed by the new Model Rule. Proponents of the reversal of the prohibition point out that, in reality, trade names of law firms have been permitted for many years. Many law firms contain the names of long-deceased partners or members and are thus "trade names" in any meaningful sense. Most American jurisdictions have eliminated the ban upon trade names.

Rule 7.6. Political Contributions to Obtain Legal Engagements or Appointments by Judges. The Ad Hoc Committee recommended the adoption of ABA Ethics 2000 Rule 7.6 without change. There was no change from the earlier Model Rule 7.6. However, Colorado has not previously adopted Rule 7.6, so this would be a new rule for Colorado. The Subcommittee agrees with the Colorado Ad Hoc Committee that this rule, which explicitly prohibits "pay to play" practices, is salutary and recommends its adoption without any changes.

Rule 8.1. Bar Admissions and Disciplinary Matters. The Colorado Ad Hoc Committee recommended the adoption of the text of ABA Ethics 2000 Model Rule 8.1, with minor changes to clarify that bar applicants and respondents in disciplinary proceedings must correct any misstatements in such proceedings. The Colorado Ad Hoc Committee also recommended the retention of the good faith challenge concept that currently appears in the comment to Colo. RPC 8.1. The Subcommittee agrees with both of these recommendations.

Rule 8.2. Judicial and Legal Officials. ABA Ethics 2000 Rule 8.2 is identical to the prior Model Rule and existing Colo.RPC 8.2. Both the Colorado Ad Hoc Committee and the Subcommittee recommend the adoption of this rule.

Rule 8.3. Reporting Professional Misconduct. The Colorado Ad Hoc Committee recommended the adoption of ABA Ethics 2000 Rule 8.3 subject to the modification of subsection (c) to reflect the Colorado Supreme Court's recent change to that rule. The Subcommittee agrees with the Ad Hoc Committee's recommendation.

Rule 8.4. Misconduct. Current Colo. RPC 8.4 contains two provisions that are not found in either the former or present Model Rule. The first non-uniform provision, found in Colo.RPC 8.4(g), prohibits Colorado lawyers from "engag[ing] in conduct which violates accepted standards of legal ethics." The Colorado Ad Hoc Committee recommended the deletion of this non-uniform subsection on the basis that the Rules of Professional Conduct prescribe the

“standards of legal ethics” and that the subsection is either superfluous, or worse, establishing some undefined and unknown additional standards. The Subcommittee agrees that Colo.RPC 8.4(g) should be deleted for the same reasons relied upon by the Ad Hoc Committee.

As to the second non-uniform provision, the Ad Hoc Committee recommended the retention of existing Colo. RPC 8.4(h) which prohibits lawyers from “engag[ing] in any other conduct that adversely reflects on the lawyer’s fitness to practice law.” By one vote, the Subcommittee defeated a proposal to eliminate Colo. RPC 8.4 (h) entirely. The Subcommittee then addressed, and a majority of the Subcommittee concluded, that while the concept embodied by existing Colo. RPC 8.4(h) should remain in the rules, Colo. RPC 8.4(h) as written is overbroad and provides inappropriate and unbridled discretion to the prosecuting authority. The Subcommittee performed a review of those disciplinary cases where discipline was imposed by the Colorado Supreme Court (or the PDJ) based upon a violation of Colo. RPC 8.4(h). It appears that the gravamen of the offense in each of these cases is that the lawyer engaged in conduct that intentionally and wrongfully harmed another person, usually, but not always, in connection to the lawyer’s practice of law. In the Subcommittee’s view, such conduct, when it reflects adversely on a lawyer’s fitness to practice law, should be subject to discipline. Therefore, the Subcommittee recommends that Rule 8.4(h) read as follows:

“Engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer’s fitness to practice law.”

The Subcommittee also debated more generally the concept of whether a lawyer should be subject to discipline for private conduct, i.e, conduct that does not arise in connection with the lawyer’s practice of law. Both current Colo.RPC 8.4(c) and ABA Ethics 2000 Rule 8.4(c) permit discipline without regard to whether the conduct arises in connection with the practice of law. A large majority of the Subcommittee voted to retain this concept, which also is consistent with the Colorado Supreme Court’s decisions.

Rule 8.5. Disciplinary Authority; Choice of Law. ABA Ethics 2000 Rule 8.5(b) adds a needed choice of law provision to the rules of professional conduct. It follows generally accepted principles of conflicts of law. The Ad Hoc Committee recommended the adoption of ABA Ethics 2000 Model Rule 8.5 with the addition of a non-uniform comment to make it clear that a lawyer who practices law in Colorado pursuant to CRCP 220 through 222, is subject to the disciplinary jurisdiction of this state. The Subcommittee agrees with the Colorado Ad Hoc Committee’s recommendations.

PREAMBLE AND SCOPE

PREAMBLE: A LAWYER'S RESPONSIBILITIES

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

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

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

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

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

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

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Colorado Ad Hoc Committee proposal is identical to ABA Ethics 2000 Preamble

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

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

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

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

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

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

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

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constructive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

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

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

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

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

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the

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situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

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

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

RULE 1.17: SALE OF LAW PRACTICE

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

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, ~~[in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in Colorado~~ in which the practice has been conducted;

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

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

(1) the proposed sale;

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

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

~~If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.~~

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

* * * * *

Comment to RULE 1.17 SALE OF LAW PRACTICE

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

Termination of Practice by the Seller

[2] The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice

upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

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

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state. ~~Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so situated, states may permit the sale of the practice when the lawyer leaves the geographic area rather than the jurisdiction. The alternative desired should be indicated by selecting one of the two provided for in Rule 1.17(a).~~

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

Sale of Entire Practice or Entire Area of Practice

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

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser written notice must be mailed to the client at the client's last known address. The notice ~~the client must be given actual written notice of the contemplated sale, must include including~~ the identity of the purchaser, and the client must be told that the decision to consent or make other arrangements must be made within 90-60 days of the mailing of the notice. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] ~~[No Colorado comment.] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist).~~

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

Fee Arrangements Between Client and Purchaser

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

Other Applicable Ethical Standards

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

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

Applicability of the Rule

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

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

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

Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990).

RULE 1.17 — SALE OF LAW PRACTICE

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

- (a) The entire practice is sold to one or more lawyers or law firms.**
- (b) The fees charged clients shall not be increased by reason of the sale, and a purchaser shall not pass on the cost of good will to a client. The purchaser may, however, refuse to undertake the representation unless the client consents to pay fees regularly charged by the purchaser for rendering substantially similar services to other clients prior to the initiation of the purchase negotiations, except that any written fee agreements between seller and clients must be honored.**
- (c) Written notice of the pending sale shall be given at least sixty days prior to the date of transfer of responsibility for the client's file. Incident to the sale the seller shall provide to such client, via certified mail, return receipt requested, directed to the client's last known address, written notice, which shall include:**

- (1) notice of the fact of the proposed sale;
 - (2) the identity of the purchaser;
 - (3) the terms of any proposed change in the fee agreement permitted under paragraph (c);
 - (4) notice of the client's right to retain other counsel or to take possession of the file; and
 - (5) notice that the client's consent to the transfer of the client's file to the purchaser will be presumed if the client does not retain other counsel or otherwise object within 60 days of receipt of the notice. If the purchaser has identified a conflict of interest that the client cannot waive and that prohibits the purchaser from undertaking the client's matter, the notice shall advise that the client should retain substitute counsel to assume the representation and arrange to have the substitute counsel contact the seller.
- (d) The notice may describe the purchaser's qualifications, including the seller's opinion of the purchaser's suitability and competence to assume representation of the client, but only if the seller has made a reasonable effort to arrive at an informed opinion.
- (e) If certified mail is not effective to give the client notice, the seller, or the purchaser in the event the selling lawyer is deceased or disabled, shall take such steps as may be reasonable under the circumstances to give the client actual notice of the proposed sale and the other information required in paragraph (c). If no response to the notice is received within 60 days of the mailing of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client.
- (f) The sale of the goodwill of a law practice may be conditioned upon the seller ceasing to engage in the private practice of law for a reasonable period of time within the geographical area in which the practice had been conducted.
- (g) If substitution of the purchasing lawyer or law firm in a pending matter is required by the tribunal, the purchasing lawyer or law firm shall provide for same promptly.
- (h) Admission to or withdrawal from a partnership or professional company, retirement plans, and similar arrangements, or a sale limited to tangible assets of a law practice is not a purchase or sale for purposes of this rule.
- (i) Notwithstanding Rule 1.5(d), the purchase price for the practice may be based upon a portion of the fees collected from the clients of the law practice, even if the division of such fees is not in proportion to the services performed or the responsibilities assumed by the seller and purchaser.

Source: Entire Rule added June 12, 1997, effective July 1, 1997; (i) added and adopted and comment amended and adopted April 18, 2001, effective July 1, 2001.

Comment

This Rule permits a selling lawyer, law firm, or the representatives of a deceased, disabled or disappeared lawyer to obtain compensation for the reasonable value of a private law practice in the same manner as withdrawing partners or shareholders of law firms. See Rules 5.4 and 5.6. This Rule does not apply to the transfer of responsibility for legal representation from one lawyer or firm to another when such transfers are unrelated to the sale of a practice. For transfer of individual files in other circumstances, see Rules 1.15(b) and 1.16(d).

A lawyer participating in the sale of a law practice is subject to the ethical standards that apply when involving another lawyer in the representation of a client. These include, for example, the seller's obligation to act competently in identifying a purchaser qualified to assume the representation of the client and the purchaser's obligation to undertake the representation competently, Rule 1.1; the obligation to avoid disqualifying conflicts and to secure client consent after consultation for those conflicts that can be waived, Rule 1.7; and the obligation to protect information relating to the representation, Rules 1.6 and 1.9.

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

Selling Entire Practice

When a lawyer is closing a private practice, the lawyer may negotiate with a purchaser for the reasonable value of the practice that has been developed by the seller. A seller may agree to transfer matters in one legal field to one purchaser, while transferring matters in another legal field to a separate purchaser. However, a lawyer may not sell individual files piecemeal.

The seller remains responsible for handling all clients' matters until the files are transferred under this rule.

Termination of Practice by the Seller

The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to one or more purchasers. The fact that a number of the seller's clients decide not to be represented by the purchaser but take their matters elsewhere, therefore, does not result in a violation. Neither does a return to private practice as a result of an unanticipated change in circumstances result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes practice upon being defeated in a retention election for the office.

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

The rule permits a sale attendant upon retirement from the private practice of law within the state of Colorado. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state.

Conflicts

The practice may be sold to one or more lawyers or firms so long as the seller presents all clients with the opportunity to obtain competent representation.

Since the number of client matters and their nature directly bear on the valuation of good will and therefore directly relate to selling the law practice, conflicts that cannot be waived by the client and that prevent the prospective purchaser from undertaking the client's matter should be determined promptly. If the purchaser identifies a conflict that the client cannot waive, information should be provided to the client to assist in locating substitute counsel. If the conflict can be waived by the client, the purchaser should explain the implications and determine whether the client consents to the purchaser undertaking the representation. Initial screening with regard to conflicts, for the purpose of determining the good will of the practice, need be no more intrusive than conflict screening of a walk-in prospective client at the purchaser's firm.

Client Confidences, Consent and Notice

Negotiations between the seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client can be conducted in a manner that does not violate the confidentiality provisions of Rule 1.6 just as preliminary discussions are permissible concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the fact of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 60 days. If nothing is heard from the client within that time, consent to the transfer of the client's file to the identified purchaser is presumed.

A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. The purchaser may represent those clients who cannot be given actual notice of the proposed purchase or are not available to consent to the purchase or direct any other disposition of their files until otherwise notified by the client. The purchaser shall preserve the confidences of the client.

Fee Arrangements Between Client and Purchaser

Paragraph (c) is intended to prohibit a purchaser from charging the former clients of the seller a higher fee than the purchaser is charging the purchaser's existing clients. The sale may not be financed by increases in fees charged the clients of the practice that is purchased. Existing agreements between seller and the client as to fees and the scope of the work must be honored by the purchaser, unless the client consents after consultation.

Adjustments for differences in the fee schedules of the seller and the purchaser should be made between the seller and purchaser in valuing good will, and not between the client and the purchaser. If a written fee agreement exists between the seller and a client, the purchaser may not refuse to undertake the representation unless the client consents to pay the higher fees the purchaser usually charges. To prevent client financing of the sale, the higher fee the purchaser may charge must not exceed the fees charged by the purchaser for substantially similar service rendered prior to the initiation of the purchase negotiations.

Deceased, Disabled or Disappeared Lawyer

Even though a nonlawyer seller representing the estate of a deceased, disabled or disappeared lawyer is not subject to the Colorado Rules of Professional Conduct, a lawyer who participates in a sale of a law practice must conform to this rule. Therefore, the purchasing lawyer must see that its requirements are met.

ABA ETHICS 2000 VERSION

CLIENT-LAWYER RELATIONSHIP

Rule 1.17

Sale of Law Practice

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

- (a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, [in the geographic area] [in the jurisdiction] (a jurisdiction may elect either version) in which the practice has been conducted;
- (b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;
- (c) The seller gives written notice to each of the seller's clients regarding:
 - (1) the proposed sale;
 - (2) the client's right to retain other counsel or to take possession of the file; and
 - (3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.
- (d) The fees charged clients shall not be increased by reason of the sale.

COMMENT

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

Termination of Practice by the Seller

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

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

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

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice on the occasion of moving to another state. Some states are so large that a move from one locale therein to another is tantamount to leaving the jurisdiction in which the lawyer has engaged in the practice of law. To also accommodate lawyers so situated, states may permit the sale of the practice when the lawyer leaves the geographical area rather than the jurisdiction. The alternative desired should be indicated by selecting one of the two provided for in Rule 1.17(a).

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

Sale of Entire Practice or Entire Area of Practice

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

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with

respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist.)

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

Fee Arrangements Between Client and Purchaser

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

Other Applicable Ethical Standards

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

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

Applicability of the Rule

[13] This Rule applies to the sale of a law practice of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law

practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

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

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

WD

RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

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

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

Comment to RULE 4.4 RESPECT FOR RIGHTS OF THIRD PERSONS

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

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to make additional steps, such as returning the original document, is matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put it into readable form.

RULE 4.4 — RESPECT FOR RIGHTS OF THIRD PERSONS

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

Comment

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

Committee Comment

This rule is unchanged from that adopted by the ABA. It provides, in different language, the provisions contained in DR's 7-102(A)(1) and 7-106(C)(2) of the Code.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.4

Respect for Rights of Third Persons

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

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

COMMENT

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

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

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

As proposed by Subcommittee 09-14-2005
Subsections (2) – (5) are new; they are not contained in either
existing Colorado rule or ABA Ethics 2000 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 any activity that constitutes the unauthorized practice of law; or

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

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

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

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

(c) 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;

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

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

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

(3) Subject to the limitation set forth below in paragraph (4), a lawyer may employ, associate professionally with, allow or aid a disbarred, suspended (whose suspension is partially or fully served), or on disability inactive status to perform research, drafting or clerical activities, including but not limited to:

(a) 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;

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

As proposed by Subcommittee 09-14-2005
Subsections (2) – (5) are new; they are not contained in either
existing Colorado rule or ABA Ethics 2000 rule

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

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

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

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

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

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

(A) The definition of the practice of law is established by law and varies from one jurisdiction to another. In order to protect the public, persons not admitted to practice law in Colorado cannot hold themselves out as lawyers in Colorado or as authorized to practice law in Colorado. Rule 5.5(1)(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(1)(a).

(B) Paragraph (1)(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.

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

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

As proposed by Subcommittee 09-14-2005
Subsections (2) – (5) are new; they are not contained in either
existing Colorado rule or ABA Ethics 2000 rule

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

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

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.**

Comment

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) 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 non-lawyers 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.

Committee Comment

The two subparts in this Rule are nearly identical to DR 3-101(B) and DR 3-101(A), respectively. Rule 5.3(b) replaces “nonlawyer” found in DR 3-101(A) with “person who is not a member of the Colorado bar.” The latter phrase is better, especially since it should eliminate some of the confusion that now arises when lawyers who are licensed elsewhere relocate to Colorado and begin work, perhaps in a law firm as an associate, before gaining admission to the Colorado bar.

LAW FIRMS AND ASSOCIATIONS

Rule 5.5

Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

COMMENT

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule 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.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the

lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not

licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

RULE 6.1 VOLUNTARY PRO BONO PUBLICO SERVICE

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

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

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

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

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

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

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

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Comment to RULE 6.1 VOLUNTARY PRO BONO PUBLICO SERVICE

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

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

advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means.

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

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

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

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

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

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

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

As proposed by Subcommittee 09-14-2005.
No changes from Ad Hoc Committee Proposal

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

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

RULE 6.1 — VOLUNTARY PRO BONO PUBLIC SERVICE

A lawyer should aspire to render at least fifty (50) hours of pro bono public legal services per year. In fulfilling this responsibility, the lawyer should:

(a) Provide a substantial majority of the fifty (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means, or

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

(b) Provide any additional legal or public service through:

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

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

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

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

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

Source: Entire Rule [and Comment] repealed and readopted November 2, 1999, effective January 1, 2000.

Comment

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

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

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

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

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

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

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

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

Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. However, in special circumstances, such as death penalty cases and class action cases, it is appropriate to allow collective satisfaction by a law firm of the pro bono responsibility.

There may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

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

Model Code Comparison

There was no counterpart of this Rule in the Disciplinary Rules of the Model Code. EC 2-25 stated that the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer Every lawyer, regardless of professional prominence or professional work load, should find time to participate in serving the disadvantaged." EC 8-9 stated that "[t]he advancement of our legal system is of vital importance in maintaining the rule of law . . . [and] lawyers should encourage, and should aid in making, needed changes and improvements." EC 8-3 stated that "[t]hose persons unable to pay for legal services should be provided needed services."

PUBLIC SERVICE

Rule 6.1

Voluntary Pro Bono Publico Service

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

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

(b) provide any additional services through:

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

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

COMMENT

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set

forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.]

not in Colo. version (old or proposed)

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

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

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).]

move to proposed Colo Rule

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

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a mod-

est fee for furnishing legal services to persons of limited means. Participation in judicial care programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

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

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

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

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

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

Not in Colo rule
(old or new)

11

62

RULE 6.2 ACCEPTING APPOINTMENTS

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

- (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
- (b) representing the client is likely to result in an unreasonable financial or otherwise oppressive burden on the lawyer; or
- (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Comment to RULE 6.2 ACCEPTING APPOINTMENTS

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

Appointed Counsel

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

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

CURRENT CRPC VERSION

RULE 6.2 — ACCEPTING APPOINTMENTS

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

- (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;**
- (b) representing the client is likely to result in an unreasonable and oppressive burden on the lawyer; or**

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

Comment

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

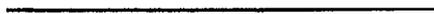
Appointed Counsel

For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the lawyer-client relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust. On the other hand, good cause does not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, or the belief of the lawyer that the defendant in a criminal proceeding is guilty.

} not in old or new ABA version

Committee Comment

Rule 6.2 is an outgrowth of the sentiment expressed in Ethical Consideration 2-29. To clarify a portion of the Comment under the heading "Appointed Counsel," the Committee added some of the language now contained in EC 2-29.



And don't's old + new ABA comment 3

ABA ETHICS 2000 VERSION

PUBLIC SERVICE

Rule 6.2

Accepting Appointments

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

- (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
- (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

COMMENT

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

Appointed Counsel

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

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

RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of a lawyer provided by the organization whose interests are adverse to a client of the lawyer.

Comment to RULE 6.3 MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is a director, officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

CURRENT CRPC VERSION

RULE 6.3 — MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that lawyers provided by the organization serve persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of a lawyer provided by the organization whose interests are adverse to a client of the lawyer.

Comment

Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict

disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

It may be necessary in appropriate cases to reassure a client of a lawyer provided by the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

Committee Comment

Rule 6.3 is a clearer expression of some of the principles currently contained in Ethical Consideration 2-33 (now incorporated into the Comment under Rule 5.4) and DR 5-101(A). The language — “a lawyer provided by” — has been added to the ABA Model simply to make clear what otherwise has to be presumed, i.e., that it is the staff attorneys of the organization who provide the legal services to the clients who have come to the organization for assistance.

PUBLIC SERVICE

Rule 6.3

Membership in Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

- (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or
- (b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

COMMENT

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact to the organization but need not identify the client.

* * * * *

Comment to RULE 6.4 LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure to the organization when the lawyer knows a private client might be materially benefitted.

CURRENT CRPC VERSION

RULE 6.4 — LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows or reasonably should know that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact to the organization but need not identify the client.

Comment

Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows or reasonably should know that a private client might be materially benefitted.

Committee Comment

In addition to the principles contained in Ethical Consideration 2-33 and DR 5-101(A), this Rule draws on the principles contained in DR 8-101.

ABA ETHICS 2000 VERSION

PUBLIC SERVICE

Rule 6.4

Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

COMMENT

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.

RULE 6.5 NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

* * * * *

Comment to RULE 6.5 NONPROFIT AND COURT-ANNEXED LIMITED LEGAL SERVICES PROGRAMS

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services -- such as advice or the completion of legal forms -- that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph

(b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

PUBLIC SERVICE

Rule 6.5

Nonprofit and Court-Annexed Limited Legal Services Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

COMMENT

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services—such as advice or the completion of legal forms—that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; ~~or~~

(2) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

(3) is likely to create an unjustified expectation about results the lawyer can achieve;

(b) No lawyer shall, directly or indirectly, pay all or a part of the cost of communications concerning a lawyer's services by a lawyer not in the same firm unless the communication discloses the name and address of the non-advertising lawyer, the relationship between the advertising lawyer and the non-advertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the non-advertising lawyer.

(c) Unsolicited communications concerning a lawyer's services mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery and shall not resemble legal pleadings or other legal documents.

(d) Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs. This provision does not apply to communications that only state that contingent or percentage fee arrangements are available, or that only state the initial consultation is free.

(e) A lawyer shall not knowingly permit, encourage or assist in any way employees, agents or other persons to make communications on behalf of the lawyer or the law firm in violation of this Rule or Rules 7.2 through 7.4.

(f) In connection with the sale of a private law practice under Rule 1.17, an opinion of the purchasing lawyer's suitability and competence to represent existing clients shall not violate this rule if the lawyer complies with Rule 1.17(d).

Comment to RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2 and solicitations governed by Rule 7.3.

The touchstone of this Rule, as well as Rules 7.2 through 7.4, is that all communications regarding a lawyer's services must be truthful. Truthful communications regarding a lawyer's services provide a valuable public service and, in any event, are constitutionally protected. False and misleading statements regarding a lawyer's services do not serve any valid purpose and may be constitutionally proscribed.

As proposed by Subcommittee 09-14-2005.
Marked to show changes from Colorado Ad Hoc Committee Proposal

It is not possible to catalog all types and variations of communications that are false or misleading. Nevertheless, certain types of statements recur and deserve special attention.

One of the basic covenants of a lawyer is that the lawyer is competent to handle those matters accepted by the lawyer. C.R.C.P. 1.1. It is therefore false and misleading for a lawyer to advertise for clients in a field of practice where the lawyer is not competent within the meaning of Rule 1.1.

Characterizations of a lawyer's fees such as "cut-rate", "lowest" and "cheap" are likely be misleading if those statements cannot be factually substantiated. Similarly, characterizations regarding a lawyer's abilities or skills have the potential to be misleading where those characterizations cannot be factually substantiated. Equally problematic are factually unsubstantiated characterizations of the results that a lawyer has in the past obtained. Such statements often imply that the lawyer will be able to obtain the same or similar results in the future. This type of statement, due to the inevitable factual and legal differences between different representations, is likely to mislead prospective clients.

Statements that a law firm has a vast number of years of experience, by aggregating the experience of all members of the firm, provide little meaningful information to prospective clients and have the potential to be misleading.

Statements such as "no recover, no fee" are misleading if they do not additionally mention that a client may be obligated to pay costs of the law suit. Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs.

Finally, Rule 7.1(c) proscribes unsolicited communications sent by restricted means of delivery. It is misleading and an invasion of the recipient's privacy for a lawyer to send advertising information to a prospective client by registered mail or other forms of restricted delivery. Such modes falsely imply a degree of exigence or importance that is unjustified under the circumstances.

INFORMATION ABOUT LEGAL SERVICES**RULE 7.1 — COMMUNICATIONS CONCERNING A
LAWYER'S SERVICES**

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated;

(b) No lawyer shall, directly or indirectly, pay all or a part of the cost of communications concerning a lawyer's services by a lawyer not in the same firm unless the communication discloses the name and address of the non-advertising lawyer, the relationship between the advertising lawyer and the non-advertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the non-advertising lawyer.

(c) Unsolicited communications concerning a lawyer's services mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery.

(d) Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs. This provision does not apply to communications that only state that contingent or percentage fee arrangements are available, or that only state the initial consultation is free.

(e) A lawyer shall not knowingly permit, encourage or assist in any way employees, agents or other persons to make communications on behalf of the lawyer or the law firm in violation of this Rule or Rules 7.2 through 7.4.

(f) In connection with the sale of a private law practice under Rule 1.17, an opinion of the purchasing lawyer's suitability and competence to represent existing clients shall not violate this Rule if the lawyer complies with Rule 1.17(d).

Source: (f) added and adopted June 12, 1997, effective July 1, 1997; entire Rule and Comment amended and adopted June 12, 1997, effective January 1, 1998.

Comment

This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2 and solicitations governed by Rule 7.3.

The touchstone of this Rule, as well as Rules 7.2 through 7.4, is that all communications regarding a lawyer's services must be truthful. Truthful communications regarding a lawyer's services provide a valuable public service and, in any event, are constitutionally protected. False and misleading statements regarding a lawyer's services do not serve any valid purpose and may be constitutionally proscribed.

It is not possible to catalog all types and variations of communications that are false or misleading. Nevertheless, certain types of statements recur and deserve special attention.

One of the basic covenants of a lawyer is that the lawyer is competent to handle those matters accepted by the lawyer. C.R.P.C. 1.1. It is therefore false and misleading for a lawyer to advertise for clients in a field of practice where the lawyer is not competent within the meaning of Rule 1.1.

Characterizations of a lawyer's fees such as "cut-rate", "lowest" and "cheap" are likely to be misleading if those statements cannot be factually substantiated. Similarly, characterizations regarding a lawyer's abilities or skills have the potential to be misleading where those characterizations cannot be factually substantiated. Equally problematic are factually unsubstantiated characterizations of the results that a lawyer has in the past obtained. Such statements often imply that the lawyer will be able to obtain the same or similar results in the future. This type of statement, due to the inevitable factual and legal differences between different representations, is likely to mislead prospective clients.

Statements that a law firm has a vast number of years of experience, by aggregating the experience of all members of the firm, provide little meaningful information to prospective clients and have the potential to be misleading.

Statements such as "no recovery, no fee" are misleading if they do not additionally mention that a client may be obligated to pay costs of the lawsuit. Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs.

Finally, Rule 7.1(c) proscribes unsolicited communications sent by restricted means of delivery. It is misleading and an invasion of the recipient's privacy for a lawyer to send advertising information to a prospective client by registered mail or other forms of restricted delivery. Such modes falsely imply a degree of exigence or importance that is unjustified under the circumstances.

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1

Communications concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

COMMENT

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

RULE 7.2 ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization.

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Comment to RULE 7.2 ADVERTISING

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow

of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3 (a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

RULE 7.2 — ADVERTISING

(a) A lawyer may advertise a lawyer's services or fees through any public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, electronic media or through written or recorded communication including those governed by Rule 7.3, to prospective clients, consumers or the public at large. Such communications shall be referred to as "advertisements."

(b) A copy or recording of an advertisement shall be kept by the lawyer for four years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may:

(1) Pay the reasonable costs of advertisements permitted by this rule;

(2) Pay the usual charges of a not-for-profit lawyer referral service or legal service organization; and

(3) Pay for a law practice in accordance with Rule 1.17.

(d) Any advertisement made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

(e) All advertisements governed by this rule shall also comply with the requirements of Rules 7.1 and 7.4.

Source: (c)(1), (2), and (3) amended and adopted June 12, 1997, effective July 1, 1997; entire rule and comment amended and adopted June 12, 1997, effective January 1, 1998.

Comment

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer

A lawyer is allowed to pay for advertising permitted by the Rule, and for the purchase of a law practice in accordance with the provisions of Rule 1.17, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

INFORMATION ABOUT LEGAL SERVICES

Rule 7.2

Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

COMMENT

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone number; the kinds of services the lawyer

will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange that is not initiated by the prospective client.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Paying Others to Recommend a Lawyer

[5] Lawyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers. See Rule 5.3 for the duties of lawyers and law firms with respect to the conduct of nonlawyers who prepare marketing materials for them.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations

that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of prospective clients; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not refer prospective clients to lawyers who own, operate or are employed by the referral service.)

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with prospective clients, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead prospective clients to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

- (1) is a lawyer; or
- (2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

- (1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress or harassment.

(c) A lawyer shall not solicit professional employment from a prospective client believed to be in need of legal services which arise out of the personal injury or death of any person by written, recorded, or electronic communication. This Rule 7.3(c) shall not apply if the lawyer has a family or prior professional relationship with the prospective client or if the communication is issued more than 15 days after the occurrence of the event for which the legal representation is being solicited. Any such communication must comply with ~~Rule 7.1, Rule 7.2, Rule 7.3(a), Rule 7.3(b) and~~ the following:

(1) No such communication may be made if the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter.

(2) If a lawyer other than the lawyer whose name or signature is contained in the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any such communication shall include a statement so advising the prospective client.

(d) Every written, recorded or electronic communication ~~governed by this Rule 7.3~~ from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall

(1) Include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2);

~~(2) Not be made to resemble legal pleadings or other legal documents;~~

~~(3)~~(2) Not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the nature of the prospective client's legal problem.

A copy of or recording of each such communication and a sample of the envelopes, if any, in which the communications are enclosed shall be kept for a period of four years from the date of dissemination of the communication.

(e) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a

prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

* * * * *

Comment to RULE 7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the

meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] The requirement in Rule ~~7.3(d)(1)~~7.3(e) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Paragraph (e) ~~(d)~~ of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) ~~(d)~~ would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See Rule 8.4(a).

RULE 7.3 — DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not either in-person or by live telephone contact, solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship where a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) A lawyer shall not solicit professional employment from a prospective client believed to be in need of legal services which arise out of the personal injury or death of any person by written, recorded, or electronic communication. This provision shall not apply if the lawyer has a family or prior professional relationship with the prospective client, or if the communication is issued more than 30 days after the occurrence of the event for which the legal representation is being solicited. Any such communication must comply with Rule 7.1, Rule 7.2 and the following:

(1) No such communication may be made if the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter.

(2) If a lawyer other than the lawyer whose name or signature is contained in the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any such communication shall include a statement so advising the prospective client.

(3) No such communication shall be made to resemble legal pleadings or other legal documents.

(4) Any such written or recorded communication shall not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the nature of the prospective client's legal problem.

(5) A copy of or recording of such communication and a sample of the envelopes in which the communications are enclosed shall be kept for a period of four years from the date of dissemination of the communication.

(d) Every written, recorded or electronic communication governed by this Rule 7.3 shall include the words "This Is An Advertisement" in a form that is clear and conspicuous on the outside of the envelope, if any, and at the beginning and end of any written, recorded or electronic communication.

Comment

There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

This potential for abuse inherent in direct in-person or live telephone solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or auto dialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person or telephone persuasion that may overwhelm the client's judgment.

The use of general advertising and written and recorded communications to transmit information from lawyer to prospective client, rather than direct in-person or live telephone contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person or live telephone conversations between a lawyer to a prospective client can be disputed and are not subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal or professional relationship or where the lawyer is

motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations.

But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insured, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

The requirement that certain communications be marked "This Is An Advertisement" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

Source: Entire Rule and Comment amended and adopted and committee comment deleted by amendment June 12, 1997, effective January 1, 1998.

INFORMATION ABOUT LEGAL SERVICES

Rule 7.3

Direct Contact with Prospective Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

COMMENT

[1] There is a potential for abuse inherent in direct in-person, live telephone or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the

face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[2] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or autodialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person, telephone or real-time electronic persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

[6] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid

legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[7] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[8] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law or that the lawyer is a specialist in particular fields of law. Such communication shall be in accordance with Rule 7.1.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

(e) In any advertisement in which a lawyer affirmatively claims to be certified in any area of the law, such advertisement shall contain the following disclosure: "Colorado does not certify attorneys as specialists in any field." This disclaimer is not required where the information concerning the lawyer's services is contained in a law list, law directory or a publication intended primarily for use of the legal profession.

Comment to RULE 7.4 COMMUNICATION OF FIELDS OF PRACTICE

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty" or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an

As proposed by Subcommittee 09-14-2005.
No changes from Colorado Ad Hoc Committee Proposal

advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

A claim of certification contained in a lawyer's letterhead does not require the disclaimer in Rule 7.4(e) unless the letterhead is used in an advertisement.

CURRENT CRPC VERSION

RULE 7.4 — COMMUNICATION OF FIELD OF PRACTICE

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may state or imply that the lawyer is a specialist in accordance with Rule 7.1.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation “Patent Attorney” or a substantially similar designation.

(c) A lawyer engaged in admiralty practice may use the designation “Admiralty”, “Proctor in Admiralty” or a substantially similar designation.

(d) A lawyer may permit his or her name to be listed by a lawyer referral service in specific fields of law in which the lawyer will accept referrals.

(e) A lawyer available to act as a consultant to or as an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers and publish in legal journals an announcement of such availability. The announcement may state that the lawyer is a specialist, in accordance with Rule 7.1.

(f) In any advertisement in which a lawyer affirmatively claims to be certified in any area of the law, such advertisement shall contain the following disclosure: "Colorado does not certify attorneys as specialists in any field." This disclaimer is not required where the information concerning the lawyer's services is contained in a law list, law directory or a publication intended primarily for use of the legal profession.

(g) A lawyer purchasing a private law practice under Rule 1.17 may allow the lawyer's qualifications to be described by the lawyer selling the private law practice.

Source: (g) added and adopted June 12, 1997, effective July 1, 1997; entire Rule [balance of] and Comment amended and adopted and Committee Comment deleted June 12, 1997, effective January 1, 1998.

Comment

This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services, for example, in a telephone directory or other advertising. If the lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted to so indicate.

Recognition and specialization in patent matters is a matter of long established policy of the Patent and Trademark Office. Designation of admiralty practice has a long historical tradition associated with maritime commerce and federal courts.

In some instances, a lawyer confines his or her practice to a particular field of law. A lawyer may indicate in permitted advertising, if it is factual, a limitation of the practice in one or more particular areas or fields of law in which the lawyer practices.

The legal profession has developed referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of the lawyer referral system enables a lay person to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved.

Rule 7.4 requires disclosures when attorneys claim to be certified in a particular area of law. This rule recognizes the fact that Colorado does not certify lawyers in any field of practice and seeks to protect the public from the impression that a lawyer's claimed expertise signifies the lawyer has proven such claimed expertise through any type of Colorado certification process. It should additionally be noted that the rule requires compliance with Rule 7.1, and thereby Rule 1.1, in reference to a lawyer's claim of expertise or limitation of practice to particular fields of law. Therefore, a lawyer is prohibited from claiming expertise or emphasis in a field of law unless the lawyer has or develops the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation of clients in that field of law.

A claim of certification contained in a lawyer's letterhead does not require the disclaimer in Rule 7.4(f) unless the letterhead is used in an advertisement.

INFORMATION ABOUT LEGAL SERVICES

Rule 7.4

Communication of Fields of Practice and Specialization

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

COMMENT

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience,

knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

RULE 7.5 FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when *that* is the fact.

Comment to RULE 7.5 FIRM NAMES AND LETTERHEADS

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

RULE 7.5 — FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use or participate in the use of a firm name, letterhead, professional card, office sign, telephone directory listing, law list, legal directory listing, or other professional designation that violates Rule 7.1.

(b) A lawyer in private practice shall not practice under a tradename, a name that is misleading as to the identity of the lawyer or lawyers practicing under such a name, or firm name containing names other than those of one or more of the lawyers in the firm; provided, the name of a professional corporation or professional association may contain "P.C.", "L.L.C.", "L.L.P.", "P.A." or similar symbols indicating the nature of the organization, and a legal clinic which meets all of the criteria of a legal clinic as defined by these Rules may use "legal clinic" in its name.

(c) 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 of those not licensed to practice in the jurisdiction where the office is located.

(d) A firm may use, or continue to include in its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.

(e) 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.

(f) Lawyers may state or imply that they practice in a partnership or other organization only when that is a fact.

Source: (b) amended October 17, 1996, effective January 1, 1997.

Comment

The firm may be designated by the names of all or some of its members or by the names of deceased members where there has been a continuing succession in the firm's identity. It may be observed that any name including the name of a deceased partner is, strictly speaking, a tradename. The use of such names to designate law firms is proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

With regard to paragraph (f), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith & Jones", for that title suggests partnership in the practice of law.

A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his or her name to remain in the name of the firm if the lawyer actively continues to practice law as member thereof. Otherwise, the name should be removed from the firm name, and the lawyer should not be identified as a past or present member of the firm. In addition, the lawyer should not hold himself or herself out as a practicing lawyer.

In order to avoid the possibility of misleading persons with whom the lawyer deals, a lawyer should be scrupulous in the representation of his or her professional status. The lawyer should not hold himself or herself out as being a partner or associate of a law firm if the lawyer is not one in fact, and thus should not hold himself or herself out as a partner or associate if the lawyer only shares office space with another lawyer.

Committee Comment

The Committee decided not to adopt the provision in ABA proposed Model Rule 7.5 which permits lawyers to practice under a tradename. The Committee determined that it would be misleading to the public if any attorney practiced under a tradename. Firms develop "a persona" which becomes known to the public, which might not be known if lawyers practiced under a tradename. The Committee incorporated portions of DR 2-102(B) into Model Rule 7.5, paragraph (b) and (c). The Committee also believes that incorporating EC2-12 and EC2-13 into the Comments is helpful in providing guidance to practicing lawyers.

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 or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

COMMENT

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a non-lawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

RULE 7.6 POLITICAL CONTRIBUTIONS TO OBTAIN LEGAL ENGAGEMENTS OR
APPOINTMENTS BY JUDGES

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

Comment to RULE 7.6 POLITICAL CONTRIBUTIONS TO OBTAIN LEGAL ENGAGEMENTS OR
APPOINTMENTS BY JUDGES

[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.

[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or

As proposed by Subcommittee 09-14-2005.
No changes from Colorado Ad Hoc Committee Proposal
Ad Hoc Committee proposal is identical to ABA Ethics 2000 Rule 7.6

professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

INFORMATION ABOUT LEGAL SERVICES

Rule 7.6

Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

COMMENT

[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this Rule, the term "political contribution" does not include uncompensated services.

[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term "lawyer or law firm" includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an exam-

ination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission, readmission, or reinstatement to the bar, or a lawyer in connection with an application for admission, readmission, or reinstatement to the bar or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

Comment to RULE 8.1 BAR ADMISSION AND DISCIPLINARY MATTERS

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. Rule 8.1(b) does not prohibit a good faith challenge to the demand for such information. A person relying on such a provision or challenge in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

RULE 8.1 — BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission or reinstatement to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary or reinstatement matter, shall not:

- (a) knowingly make a false statement of material fact; or**
- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond reasonably to a lawful demand for information from an admission or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6 or prohibit a good faith challenge to the demand for such information.**

Comment

The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision

in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

Committee Comment

The Committee added reinstatement to the scope of proceedings to which this Rule is applicable. The Committee also added language clarifying that the provisions of subparagraph (b) are not intended to prohibit a good faith challenge to requests for information.

**MAINTAINING THE INTEGRITY
OF THE PROFESSION**

Rule 8.1

Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact; or
- (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

COMMENT

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

RULE 8.2 JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

* * * * *

Comment to RULE 8.2 JUDICIAL AND LEGAL OFFICIALS

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

RULE 8.2 — JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election, appointment to or retention in judicial or legal office.

(b) A lawyer who is a candidate for retention in judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Comment

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Committee Comment

The Committee notes that applicable provisions of the Colorado Code of Judicial Conduct also apply to the process for selecting and retaining judges.

**MAINTAINING THE INTEGRITY
OF THE PROFESSION**

Rule 8.2

Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

COMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

As proposed by Subcommittee 09-14-2005.
No changes from Colorado Ad Hoc Committee Proposal
Same as ABA Ethics 2000 Rule 8.3 except for language in
(c) which recently was added by Colorado Supreme Court

RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of a lawyers' peer assistance program that has been approved by the Colorado Supreme Court initially or upon renewal, to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.

* * * * *

Comment to RULE 8.3 REPORTING PROFESSIONAL MISCONDUCT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and

As proposed by Subcommittee 09-14-2005.
No changes from Colorado Ad Hoc Committee Proposal
Same as ABA Ethics 2000 Rule 8.3 except for language in
(c) which recently was added by Colorado Supreme Court

the public. These Rules do not otherwise address the confidentiality of information received by a lawyer
or judge participating in an approved lawyers' assistance program; such an obligation, however, may be
imposed by the rules of the program or other law.

RULE 8.3 — REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of a lawyers' peer assistance program that has been approved by the Colorado Supreme Court initially or upon renewal, to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.

Source: Entire Rule amended [(c) added] and adopted June 19, 2003, effective July 1, 2003.

Comment

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers' or judges' assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek treatment through such programs. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. The Rule therefore exempts the lawyer from the reporting requirements of paragraphs (a) and (b) with respect to information that would be privileged if the relationship between the impaired lawyer or judge and the recipient of the information were that of a client and a lawyer. On the other hand, a lawyer who receives such information would nevertheless be required to comply with the Rule 8.3 reporting provisions to report misconduct if the impaired lawyer or judge indicates an intent to engage in illegal activity, for example, the conversion of client funds to his or her use.

Committee Comment

In recommending this Rule, the Committee adopted the definition of knowledge contained in *Restatement of Restitution*, 10, Comment (d) (1937), similarly adopted in Colorado Bar Association Ethics Committee Opinion 64 (April 23, 1983): "Knowledge means no substantial doubt."

**MAINTAINING THE INTEGRITY
OF THE PROFESSION**

Rule 8.3

Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

COMMENT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received

by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

As proposed by Subcommittee 09-14-2005.
Marked to show changes from Colorado Ad Hoc Committee Proposal
Rule 8.4(g) moved from Rule 1.2(e).
Rule 8.4(h) is a non-uniform addition to ABA Ethics 2000 Rule 8.4

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process; ~~or engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.~~

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

* * * * *

Comment to RULE 8.4 MISCONDUCT

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor

As proposed by Subcommittee 09-14-2005.
Marked to show changes from Colorado Ad Hoc Committee Proposal
Rule 8.4(g) moved from Rule 1.2(e).
Rule 8.4(h) is a non-uniform addition to ABA Ethics 2000 Rule 8.4

significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by word or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) and also may violate paragraph (d). Legitimate advocacy respecting the foregoing factors does not violate paragraphs (d) or (g). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.~~A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.~~

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

RULE 8.4 — MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the act of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a judge, judicial officer, government agency or official;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;
- (g) engage in conduct which violates accepted standards of legal ethics; or
- (h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Source: Committee Comment amended October 17, 1996, effective January 1, 1997.

Comment

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Committee Comment

The Committee added the proscriptions contained in C.R.Civ.P. 241.6 and DR 1-102(a)(6) of the Code.

Sexual relationships between a lawyer and a client raise many issues regarding a lawyer's professional conduct. For example, in *People v. Good*, 893 P.2d 101 (Colo. 1995), the Colorado Supreme Court held that because of the risks inherent in a sexual relationship between a lawyer and a

client, such a relationship or even suggestions of such a relationship will almost always violate Rule 8.4(h). *See also People v. Bergner*, 873 P.2d 726 (Colo. 1994).

**MAINTAINING THE INTEGRITY
OF THE PROFESSION**

Rule 8.4

Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMENT:

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, dis-

ability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

(a) A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Comment to RULE 8.5 DISCIPLINARY AUTHORITY; CHOICE OF LAW

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

[1.A] The second sentence of Rule 8.5(a) does not preclude prosecution for the unauthorized practice of law of a lawyer who is not admitted in this jurisdiction, and who does not comply with C.R.C.P. 220, C.R.C.P. 221, C.R.C.P. 221.1, C.R.C.P. 222, but who provides or offers to provide any legal services in this jurisdiction.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

RULE 8.5 — JURISDICTION

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

Comment

In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5.

If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

ABA ETHICS 2000 VERSION

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OF THE PROFESSION**

Rule 8.5

***Disciplinary Authority;
Choice of Law***

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(b) **Choice of Law.** In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

COMMENT

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

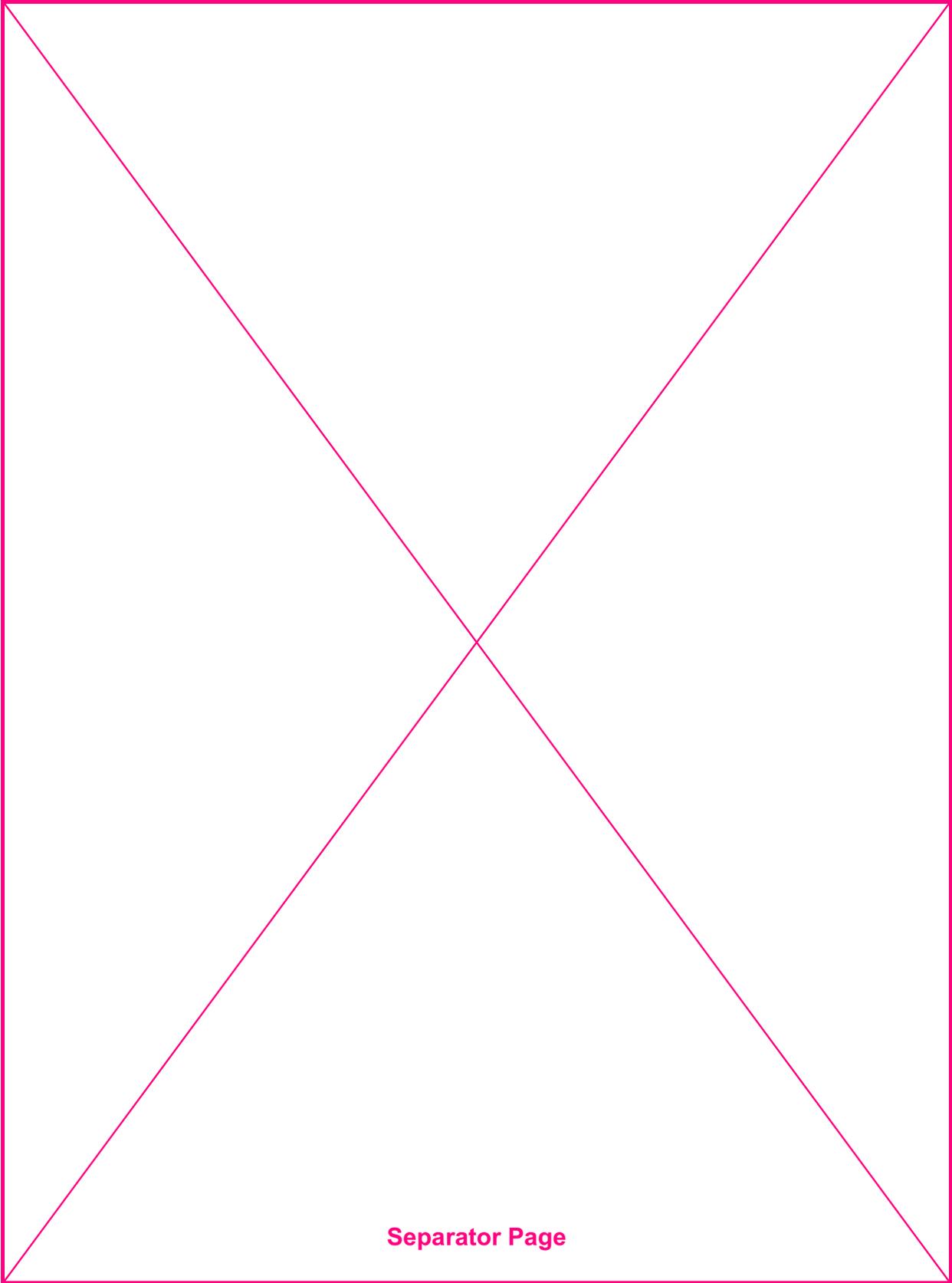
[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

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