VOLUME 7

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

FOR THE THIRTEENTH, FOURTEENTH, AND FIFTEENTH MEETINGS

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

AGENDA

March 3, 2006, 9:00 a.m.
Supreme Court Conference Room

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1. Approval of minutes [See attached pages 1-13]
2. Administrative matters - Select next meeting date
3. New Comment to Rule 6.1, adopted November 23, 2005 – Michael Berger [See attached pages 14-22]
4. Request from Civil Rules Committee for participation in consideration of proposed amendments to CRCP 265 – David Little [See attached pages 23-29]
5. Report from Technology Subcommittee – Dick Reeve
6. Report from Subcommittee on Financial Assistance to Clients – Alec Rothrock [See attached pages 30-48]
7. Report from Rule 1.4 Subcommittee (Disclosure of Insurance Coverage) – Eli Wald
8. New Business
9. Adjournment (by noon)

Chair
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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 RULES OF CIVIL PROCEDURE

APPENDIX TO CHAPTERS 18 TO 20
COLORADO RULES OF PROFESSIONAL CONDUCT
Rule 6.1. Voluntary Pro Bono Public Service
This Comment Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms is to be Added to the Existing Comment in Rule 6.1. Voluntary Pro Bono Public Service

The Recommended Additional comment is Adopted by the Court November 23, 2005, effective immediately.
Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms

Preface. Providing pro bono legal services to indigent persons and organizations serving indigent persons is a core value of Colorado licensed attorneys enunciated in Colorado Rule of Professional Conduct 6.1. Adoption of a law firm pro bono policy will commit the firm to this professional value and assure attorneys of the firm that their pro bono work is valued in their advancement within the firm.

The Colorado Supreme Court has adopted the following recommended Model Pro Bono Policy that can be modified to meet the needs of individual law firms. References are made to provisions that may not apply in a small firm setting. Adoption of such a policy is entirely voluntary.

At the least, a pro bono policy would:

(1.) Clearly set forth an aspirational goal for attorneys, as well as the number of hours for which billable credit will be awarded for firms that operate on a billable hour system (the attached model policy uses the figure of at least 50 hours per attorney per year, which mirrors the aspirational goal set out in Rule 6.1 of the Colorado Rules of Professional Conduct);

(2.) Demonstrate that pro bono service will be positively considered in evaluation and compensation decisions; and

(3.) Include a description of the processes that will be used to match attorneys with projects and monitor pro bono service, including tracking pro bono hours spent by lawyers and others in the firm.

The Colorado Supreme Court will recognize those firms that make a strong commitment to pro bono work by adopting a policy that includes:

(1.) An annual goal of performing 50 hours of pro bono legal service by each Colorado licensed attorney in the firm, pro-rated for part-time attorneys, primarily for indigent persons and/or organizations serving indigent persons consistent

with the definition of pro bono services as set forth in the Colorado Supreme Court's Model Pro Bono Policy, and

(2.) A statement that the firm will value at least 50 hours of such pro bono service per year by each Colorado licensed attorney in the firm, for all purposes of attorney evaluation, advancement, and compensation in the firm as the firm values compensated client representation.

The Colorado Supreme Court will also recognize on an annual basis those Colorado law firms that voluntarily advise the Court by February 15 that their attorneys, on average, during the previous calendar year, performed 50 hours of pro bono legal service, primarily for indigent persons or organizations serving indigent persons consistent with the definition of pro bono services as set forth in the Colorado Supreme Court's Model Pro Bono Policy.

Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms

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B. How to Obtain CLE Credit

References

A. Preamble to the Colorado Rules of Professional Conduct
B. Colorado Rule of Professional Conduct 6.1
C. Chief Justice Directive 98-01, Costs for Indigent Persons Civil Matters
D. Colorado Rule of Civil Procedure 260.8
E. Colorado Rule of Civil Procedure 260.8, Form 8

I. Introduction

The firm recognizes that the legal community has a unique responsibility to ensure that all citizens have access to a fair and just legal system. In recognizing this responsibility, the firm encourages each of its attorneys to actively participate in some form of pro bono legal representation.

This commitment mirrors the core principles enunciated in the Colorado Rules of Professional Conduct:

> 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 devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest . . . 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. (Preamble, Colorado Rules of Professional Conduct).

The firm understands there are various ways to provide pro bono legal services in our community. In selecting among the various pro bono opportunities, the firm encourages and expects that attorneys (both partners and associates or other designation) will devote a minimum of fifty (50) hours each year to pro bono legal services, or a proportional amount of pro bono hours by attorneys on alternative work schedules. In fulfilling this responsibility, firm attorneys should provide a substantial majority of the fifty (50) hours of pro bono legal services 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. (Colorado Rule of Professional Conduct 6.1). The firm strongly believes that this level of participation lets our attorneys make a meaningful contribution to our legal community, and provides important opportunities to further their professional development.

II. Firm Pro Bono Committee/Coordinator (see suggested change for small firms below)

The firm has established a Pro Bono Committee responsible for implementing and administering the firm's pro bono policies and procedures. The Pro Bono Committee consists of a representative group of attorneys of the firm. In addition, the firm has designated a Pro Bono Coordinator. The Pro Bono Committee/Pro Bono Coordinator has the following principal responsibilities:

1. Encouraging and supporting pro bono legal endeavors;
2. Reviewing, accepting and/or rejecting pro bono legal projects;
3. Coordinating and monitoring pro bono legal projects, ensuring, among other things, that appropriate assistance, supervision and resources are available;
4. Providing periodic reports on the firm's pro bono activities; and
5. Creating and maintaining a pro bono matter tracking system.

Attorneys are encouraged to seek out pro bono matters that are of interest to them.

****[Small firms may wish to designate only a Pro Bono Coordinator and can introduce the above paragraph as follows:** "The firm has designated a Pro Bono Coordinator responsible for implementing and administering the firm's pro bono policies and procedures" and then delete the next two sentences.]

III. Pro Bono Services Defined

The foremost objective of the firm pro bono policy is to provide legal services to indigent or near-indigent members of the community and the nonprofit organizations that assist them, in accordance with Rule 6.1 of the Colorado Rules of Professional Conduct. The firm recognizes there are a variety of ways in which the firm's attorneys and paralegals can provide pro bono legal services in the community. The following, while not intended to be an exhaustive list, reflects the types of pro bono legal services the firm credits in adopting this policy:

A. **Representation of Low Income Persons.** Representation of individuals who cannot afford legal services in civil or criminal matters of importance to a client;
B. **Civil Rights and Public Rights Law.** Representation or advocacy on behalf of individuals or organizations

seeking to vindicate rights with broad societal implications (class action suits or suits involving constitutional or civil rights) where it is inappropriate to charge legal fees; and

C. **Representation of Charitable Organizations.** Representation or counseling to charitable, religious, civic, governmental, educational, or similar organizations in matters where the payment of standard legal fees would significantly diminish the resources of the organization, with an emphasis on service to organizations designed primarily to meet the needs of persons of limited income or improve the administration of justice.

D. **Community Economic Development.** Representation of or counseling to micro-entrepreneurs and businesses for community economic development purposes, recognizing that business development plays a critical role in low income community development and provides a vehicle to help low income individuals to escape poverty;

E. **Administration of Justice in the Court System.** Judicial assignments, whether as pro bono counsel, or a neutral arbiter, or other such assignment, which attorneys receive from courts on a mandatory basis by virtue of their membership in a trial bar;

F. **Law-related Education.** Legal education activities designed to assist individuals who are low-income, at risk, or vulnerable to particular legal concerns or designed to prevent social or civil injustice.

G. **Mentoring of Law Students and Lawyers on Pro Bono Matters.** Colorado Supreme Court Rule 260.8 provides that an attorney who acts as a mentor may earn two (2) units of general credit per completed matter in which he/she mentors a law student. An attorney who acts as a mentor may earn one (1) unit of general credit per completed matter in which he/she mentors another lawyer. However, mentors shall not be members of the same firm or in association with the lawyer providing representation to the indigent client.

Because the following activities, while meritorious, do not involve direct provision of legal services to the poor, the firm will not count them toward fulfillment of any attorney's, or the firm's, goal to provide pro bono legal services to indigent persons or to nonprofits that serve such persons' needs: participation in a non-legal capacity in a community or volunteer organization; services to non-profit organizations with sufficient funds to pay for legal services as part of their

normal expenses; client development work; non-legal service on the board of directors of a community or volunteer organization; bar association activities; and non-billable legal work for family members, friends, or members or staff of the firm who are not eligible to be pro bono clients under the above criteria.

IV. Firm Recognition of Pro Bono Service (see suggested change for small firms below).

A. Performance Review and Evaluation. The firm recognizes that the commitment to pro bono involves a personal expenditure of time. In acknowledgment of this commitment and to support firm goals, an attorney's efforts to meet this expectation will be considered by the firm in measuring various aspects of the attorney's performance, such as yearly evaluations and bonuses where applicable. An attorney's pro bono legal work will be subject to the same criteria of performance review and evaluation as those applied to client-billable work. As with all client work, there should be an emphasis on effective results for the client and the efficient and cost-effective use of firm resources.

B. Credit for Pro Bono Legal Work. The firm will give full credit for at least fifty (50) hours of pro bono legal services, and additional hours as approved by the Pro Bono Committee and/or Coordinator, in considering annual billable hour goals, bonuses and other evaluative criteria based on billable hours.

****[Small firms may wish to only include the following paragraph in lieu of the above provisions:** The firm recognizes that the commitment to pro bono involves a personal expenditure of time. In acknowledgment of this commitment and to support firm goals, your pro bono service will be considered a positive factor in performance evaluations and compensation decisions and will be subject to the same criteria of performance review and evaluation as those applied to client-billable work. As with all client work, there should be an emphasis on effective results for the client and the efficient and cost-effective use of firm resources.]

V. Administration of Pro Bono Service (see suggested change for small firms below).

A. Approval of Pro Bono Matters. The Pro Bono Committee/Coordinator will review all proposed pro bono legal matters to ensure that:

1. There is no client or issue conflict or concern;
2. The legal issue raised is not frivolous or untenable;

3. The client does not have adequate funds to retain an attorney and
4. The matter is otherwise appropriate for pro bono representation.

All persons seeking approval of a pro bono project must: (1) submit a request identifying the client and other entity involved; (2) describe the nature of the work to be done; and (3) identify who will be working on the matter. Once the firm undertakes a pro bono matter, the matter is treated in the same manner as the firm's regular paying work.

B. Opening a Pro Bono Matter. It is the responsibility of the attorney seeking to provide pro bono legal services to complete the conflicts check and open a new matter in accordance with regular firm procedures.

C. Pro Bono Engagement Letter. After a matter has received initial firm approval, the principal attorney on a pro bono legal matter must send an engagement letter to the pro bono client. Typically, the engagement letter should be sent after the initial client meeting during which the nature and terms of the engagement are discussed.

D. Staffing of Pro Bono Matters. Pro bono legal matters are initially staffed on a voluntary basis. It may become necessary to assign additional attorneys to the matter if the initial staffing arrangements prove to be inadequate, and the firm reserves the right to make such assignments.

E. Supervision of Pro Bono Matters. As appropriate, a partner shall supervise any associate working on a pro bono legal matter and the supervising partner shall remain informed of the status of the matter to ensure its proper handling. In addition, it may be appropriate to use assistance or resources from outside the firm. The firm will assist attorneys in finding a supervisor if necessary.

F. Professional Liability Insurance. Attorneys may provide legal assistance through those pro bono organizations that provide professional liability insurance for their volunteers. The firm also carries professional liability insurance for its attorneys in instances where no coverage is available on a pro bono matter through a qualified legal aid organization. Before undertaking any pro bono legal commitments, the professional liability implications should be reviewed with the Pro Bono Committee or the Pro Bono Coordinator.

G. Paralegal Pro Bono Opportunities. Approved pro bono legal work for paralegals includes: (1) work taken on in conjunction with and under the supervision of an attorney working on a specific pro bono legal matter, or (2) work handled independently for an organization that provides pro

bono legal opportunities, provided, however, that such participation does not create an attorney-client relationship and/or involve the paralegal's provision of legal advice.

H. Disbursements in Pro Bono Matters. The firm can and should bill and collect disbursements in pro bono legal matters where it is appropriate to do so based on the client's resources. The firm encourages attorneys to pursue petitions for the waiver of filing fees in civil matters (Chief Justice Directive 98-01) when applicable, and to use pro bono experts, court reporters, investigators and other vendors when available to minimize expenses in pro bono legal matters. The firm may advance or guarantee payment of incidental litigation expenses, provided the client agrees to be ultimately responsible for them. However, the firm may later forego repayment of such expenses if such repayment would cause the client substantial financial hardship. (Colo. Rule of Professional Conduct 1.8(e)). The Pro Bono Committee/Pro Bono Coordinator must approve in advance any expense of a non-routine, significant nature, such as expert fees or translation costs. The supervising partner in a pro bono legal matter should participate in decisions with respect to disbursements.

I. Attorney Fees in Pro Bono Matters. The firm encourages its attorneys to seek and obtain attorney fees in pro bono legal matters where possible. In the event of a recovery of attorney fees, the firm encourages the donation of these fees to an organized non-profit entity whose purpose is or includes the provision of pro bono representation to indigent or near-indigent persons.

J. Departing Attorneys. When an attorney handling a pro bono case leaves the firm, he or she should work with the Pro Bono Committee/Coordinator to (1) locate another attorney in the firm to take over the representation of the pro bono client, or (2) see if the referring organization can facilitate another placement.

****[Small firms may wish to title this section "Pro Bono Procedures" and include only the following paragraph in lieu of the above provisions:** All pro bono legal matters will be opened in accordance with regular firm procedures, including utilization of a conflicts check and a client engagement letter. Pro bono matters should be supervised by a partner, as appropriate. The firm encourages its attorneys to seek and obtain attorney fees in pro bono legal matters whenever possible.]

VI. CLE Credit for Pro Bono Work

Colorado Rule of Civil Procedure 260.8 provides that attorneys may be awarded up to nine (9) hours of CLE credit per three-year reporting period for: (1) performing uncompensated pro bono legal representation on behalf of indigent or near indigent clients in a civil legal matter, or (2) mentoring another lawyer or law student providing such representation.

A. Amount of CLE Credit. Attorneys may earn one (1) CLE credit hour for every five (5) billable-equivalent hours of pro bono representation provided to the indigent client. An attorney who acts as a mentor may earn one (1) unit of general credit per completed matter in which he/she mentors another lawyer. Mentors shall not be members of the same firm or in association with the lawyer providing representation to the indigent client. An attorney who acts as a mentor may earn two (2) units of general credit per completed matter in which he/she mentors a law student.

B. How to Obtain CLE Credit. An attorney who seeks CLE credit under CRCP 260.8 for work on an eligible matter must submit the completed Form 8 to the assigning court, program or law school. The assigning entity must then report to the Colorado Board of Continuing Legal and Judicial Education its recommendation as to the number of general CLE credits the reporting pro bono attorney should receive.

Amended and adopted by the Court, En Banc November 23, 2005, effective immediately. Justice Coats would not adopt the additional comment to RPC 6.1.

BY THE COURT:

Gregory J. Hobbs, Jr.
Justice of the Colorado Supreme Court

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OF COUNSEL:
J. BAYARD YOUNG
THOMAS C. DELINE

January 30, 2006

Richard W. Laugesen, Esq.
1830 South Monroe Street
Denver, CO 80210

Re: Colorado Supreme Court Civil Rules Committee
Rule 265 Consideration

Dear Mr. Laugesen:

After the conversation you and I had about Rule 265, I received a number of other communications from parties who are interested in the function and application of the rule. I am enclosing a photocopy of an email I received that seems to describe what might develop in the event the Supreme Court decides to accept a recommendation for modification of the Rules of Professional Conduct known as the Ethics 2000 Modifications. The Supreme Court's Standing Committee on the Rules of Professional Conduct has recommended certain modifications to the rules, including the creation of a new Rule 5.7.

The enclosed email graphically describes the potential conflict that might exist between Rule 265 as it is now proposed before the Civil Rules Committee and the anticipated concepts described in C.R.P.C. 5.7.

With these concerns in mind, I would suggest that it might be prudent to have further deliberations concerning Rule 265 referred to the Supreme Court Standing Committee on the Rules of Professional Conduct for consideration of any modifications which might be appropriate, both with respect to the present considerations before our Rules Committee and the interaction of the rule with the proposed C.R.P.C. 5.7. It appears to me that although Rule 265 is included as a rule of procedure, it is much more a rule of conduct and internal function of the law firm. As such, it might be better addressed by the members of the Conduct Rules Committee rather than by the Civil Rules Committee.

I have discussed this suggestion with Judge Webb, Chuck Kall and Mike Berger, the members of the Rules Subcommittee that formulated the current proposal before our Rules Committee, and they are all in favor of doing so. I have discussed it with Marcy Glenn, the Chair of the Supreme Court Standing Committee on the Rules of Professional Conduct, and she is in accord with the idea that Rule 265 might be more appropriately the subject of her committee's attention in view of the recommendations to the Supreme Court for the adoption of C.R.P.C. 5.7. If you feel like this is a good idea, I would recommend that you suggest to the Court that the further consideration of Rule 265 be transferred from the Civil Rules Committee to the Committee on the Rules of Conduct with a further recommendation that perhaps the members of the Civil Rules Subcommittee be included in the deliberations to consider further modifications to the rule itself.

I am not sure what the protocol might be for making this adjustment and if you feel this is a good idea and you need any further help in making the adjustment, please let me know.

Thanks for looking into this.

Yours truly,

David C. Little

DCL/sgr
Enclosure
cc: The Honorable John R. Webb
Charles J. Kall
Michael H. Berger
Robert R. Keatinge
Marcy G. Glenn

MEMORANDUM

To: Civil Rules Committee of the Supreme Court

From: **[Ethics Committee]**

Date: DRAFT of January 24, 2006

Re: Proposed Changes to C.R.C.P. 265

Members of the Colorado Bar have raised serious concerns over Rule 265 of the Colorado Rules of Civil Procedure. This rule applies to lawyers practicing in professional corporations, limited liability companies, limited liability partnerships, registered limited liability partnerships, or joint stock companies, collectively referred to as "professional service companies." *C.R.C.P. 265.* We understand that the historical purpose of Rule 265 was to address various issues of individual liability and insurance that arose as a result of law firms reorganizing as limited liability partnerships. In its current form, Rule 265 imposes three principal requirements on professional service companies: (i) that they be established solely for the purpose of the practice of law; (ii) that partners, shareholders or other members of the professional company agree to be jointly and severally liable for the professional acts or omissions of any other partner, shareholder or other member, unless certain insurance requirements are met; and (iii) that each attorney practicing law in a professional service company comply with the Colorado Rules of Professional Conduct.

This Rule raises several issues for practitioners in Colorado. First, it creates an arbitrary distinction between lawyers in sole proprietorships or general partnerships and lawyers in limited liability partnerships. Second, it limits the ability of professional service companies to manage their business so as to compete effectively with national law firms and regional law firms organized as general partnerships. Third, Rule 265 in its current form is inconsistent with the Rules of Professional Conduct in general, and specifically with Model Rule 5.7, the adoption of which has been recommended in Colorado as part of Ethics 2000. These issues are discussed in more detail below.

As stated above, Rule 265 restricts services offered only by professional service companies and not general partnerships or sole proprietorships. Section A2 of the Rule states, "The professional company shall be established solely for the purpose of conducting the practice of law..." *C.R.P.R. 265.* No such restriction applies to general partnerships or sole proprietorships. Moreover, the Colorado Rules of Professional Conduct do not prohibit a lawyer from providing law-related or non-legal services, provided such services does not constitute a feeder operation for improper solicitation. *See C.B.A. Ethics Opinion 98 (Dec. 14, 1996).* Indeed, the Colorado Bar Association has issued advisory guidance on how to conduct a dual practice within the framework of the Rules of Professional Conduct. *Id.* The effect of Rule 265 then is to bar only professional service companies from offering services and engaging in ancillary businesses in which sole practitioners and general partnerships are free to participate.

This draws an arbitrary distinction based on the form of the law firm entity which has no logical basis.

Another issue arises out of the arbitration, mediation, other alternative dispute resolution services (collectively "ADR"), and jury selection consulting services commonly provided by lawyers and law firms. Under Rule 265, professional service companies must be established "solely for the purpose of conducting the practice of law." *C.R.P.R. 265.* Defining what constitutes the practice of law in Colorado is within the sole purview of the Colorado judiciary. *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n., 135 Colo. 398, 406, 312 P.2d 998, 1002 (1957).* Rather than formulating and applying an all-inclusive definition, the Supreme Court of Colorado has held generally that "one who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counseling, advising and assisting him in connection with these rights and duties is engaged in the practice of law." *Denver Bar Ass'n. v. P.U.C., 154 Colo. 273, 279, 391 P.2d 467, 471 (1964).* Arguably, under this definition, ADR services are not "the practice of law" because the lawyer is not acting in a representative capacity with respect to another. If that is the case, the many lawyers currently providing alternative dispute resolution services within professional service companies are in violation of Rule 265. This is an undesirable result. Two potential resolutions exist: (i) revise the definition of the "practice of law" or (ii) eliminate the requirement in Rule 265 that professional service companies be organized "solely" for the purpose of the practice of law.

The first option is untenable – the definition of the practice of law is within the exclusive jurisdiction of the courts, *id.*, and any attempt to create an all-inclusive definition would undoubtedly become outdated immediately. Thus, the second option is proposed by this Committee – amending Rule 265 to eliminate the requirement that professional service companies be organized solely for the practice of law.

By not requiring professional service companies to be organized solely for the practice of law, Colorado law firms may continue to provide ADR services without violating the Rule. In addition, this change would allow Colorado law firms to compete more effectively with national law firms. According to a 2005 Hildebrandt International report, more than 85 law firms in the United States have announced affiliations with law-related businesses. (*Conference Report, 29th National Conference on Professional Responsibility.*) This number does not include the multitude of other national firms providing ancillary services in-house to meet client demand. Some created independent consulting subsidiaries, such as ML Strategies LLC (a consulting affiliate of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC) or registered their trust departments to manage client assets, such as Nutter Investment Advisors LP (a subsidiary of Nutter, McClennen & Fish LLP) and Choate Investment Advisors (a subsidiary of Choate, Hall & Stewart). Ropes & Gray LLP hired non-lawyers (actuaries, insurance and benefits consultants) to provide value added services through their employee benefits consulting group, as did Seyfarth Shaw through their training group. Prior to the merger with Wilmer Cutler Pickering, Boston's Hale & Dorr LLP created a subsidiary, HR Department LLC, to provide Human Resources outsourcing services to its clients and others. Bingham Dana (now Bingham McCutchen LLP), brought in two former state governors to offer governmental relations services to national companies, and Palmer & Dodge (now Edwards Angell Palmer & Dodge) created a

literary agency. Colorado law firms, whether organized as general partnerships or LLPs, will remain at a competitive disadvantage if they are not allowed to offer those services to their clients.

Finally, if Model Rule 5.7 is adopted in Colorado as part of Ethics 2000, there is potential for ambiguity and confusion when read in conjunction with Rule 265. Model Rule 5.7 contemplates the provision of "law-related services" by a lawyer.[1] Law-related services are defined as "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 performed by a non-lawyer." *Model Rule 5.7.* Examples of law-related services include tax return preparation, financial planning, accounting, trust services, legislative lobbying, economic analysis, and consulting. *Id., Comment 9.* Once Rule 5.7 is adopted, Colorado lawyers relying on the Rules of Professional Conduct may reach the conclusion that Rule 5.7 permits them to engage in ancillary businesses and services. However, as stated above, law firms organized as professional service companies are barred from providing such services under Section A2 of Rule 265. This is an incongruous result, where one set of rules permits lawyers to engage in conduct which another rule prohibits.

For these reasons, we believe a better approach would be to retain those sections of Rule 265 which address the issues the Rule was originally intended to address – liability and insurance – and permit the Rules of Professional Conduct to be the sole set of rules to governs what lawyers and law firms may do in their law practice, regardless of the form of the entity. To that end, please find enclosed a proposal for the revision of Rule 265.

[1] Model Rule 5.7 provides, in part: "(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) by a separate 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 of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist."

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February 2, 2006

David C. Little, Esq.
5445 DTC Parkway, Suite 800
Greenwood Village, Colorado 80111

RE Rule 265 and its interaction with proposed C.R.P.C. 5.7

Dear Mr. Little:

Thank you for your letter of January 30, 2006 with its "Ethics Committee Memorandum" attachment.

I appreciate being informed of the Committee on Rules of Professional Conduct also considering the subject matter of Rule 265 and proposed new C.R.P.C. 5.7.

I agree with your recommendation that further deliberations concerning Rule 265 be coordinated with the Professional Conduct Rules Committee so that any modification of Rule 265 will be consistent with proposed C.R.P.C. 5.7. I also agree that if the Professional Conduct Rules Committee will allow it, members of your Subcommittee work on the project with that sister Committee.

I have spoken to Marcy Glenn, Chair of the Professional Conduct Rules Committee, and agreed that the Subcommittees of the two Committees work together in formulating recommendations concerning Rule 265.

I would ask that once proposed revisions to Rule 265 are finalized, the Civil Rules Committee have the opportunity to review them before their final submission to the Supreme Court.

Thank you again for your and your Subcommittee's fine efforts.

Sincerely,

Richard W. Laugesen
Chair, Supreme Court
Civil Rules Committee

c: Marcy G. Glenn, Esq.
Chair, Supreme Court Rules of
Professional Conduct Committee
P.O. Box 8749
Denver, Colorado 80201

RWL:pld

Burns Figa & Will P.C.

MEMORANDUM

TO: **Alec Rothrock**

FROM: Lindsey Rothrock

DATE: February 23, 2006

CLIENT:

SUBJECT: Rule 1.8(e) – Financial Assistance to Clients

This memorandum provides the language of both the current and proposed Rule 1.8(e) of the Colorado Rules of Professional Conduct. It also provides a summary and language of various other state rules pertaining to the issue of financial assistance to clients.

I. Colorado - Colo.R.P.C. 1.8(e)

A. Current Rule

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the lawyer's client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses. A lawyer may forego reimbursement of some or all of the expenses of litigation if it is or becomes apparent that the client is unable to pay such expenses without suffering substantial financial hardship. Colo.R.P.C. 1.8(e).

B. Proposed Rule – As proposed by the Committee 5/20/05

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

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

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

C. Comment to Proposed Rule

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

II. Other State Rules

A. Alabama

1. Summary of Rule

Rule 1.8(e) of the Alabama Rules of Professional Conduct is identical to Colorado's proposed rule in that lawyers may advance court costs and litigation expenses (the repayment of which may be contingent on the outcome of the matter) and may pay court costs and litigation expenses on behalf of an indigent client. However, Alabama's rule also provides that, so long as a lawyer makes no promises of financial assistance before the lawyer's employment, the lawyer may advance or guarantee emergency financial assistance to a client, the repayment of which may not be contingent on the outcome of the case. The rule further states that in actions in which an attorney's fee is expressed and payable as a percentage of the recovery in the action, a lawyer may pay, for his own account, court costs and expenses of litigation.

2. Ala. R. Prof. Conduct 1.8(e)

Rule 1.8(e) of the Alabama Rules of Professional Conduct states:

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

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

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

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer; and

(4) in an action in which an attorney's fee is expressed and payable, in whole or in part, as a percentage of the recovery in the action, a lawyer may pay, for his own account, court costs and expenses of litigation. The fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred. Ala. R. Prof. Conduct 1.8(e).

B. California

1. Summary of Rule

Rule 4-210(A) of the Rules of Professional Conduct of the State Bar of California prohibits a lawyer from paying or guaranteeing or representing that he or she will pay the personal or business expenses of a prospective or existing client. However, a lawyer may, with the client's consent, pay or agree to pay such expenses to third persons from funds collected for the client as a result of the representation. Additionally, a lawyer may lend money to the client after the lawyer's employment, so long as the client promises in writing to repay the loan. A lawyer also may advance the costs of prosecuting or defending a claim or action, or otherwise protecting or promoting the client's interest. Such advancements are limited to all reasonable litigation expenses or reasonable expenses in preparation for litigation or in providing any legal services to the client.

2. Cal. R. Prof. Conduct 4-210(A)

Rule 4-210(A) of the Rules of Professional Conduct of the State Bar of California provides:

(A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member's law firm will pay the personal or business expenses of a prospective or existing client, except that this rule shall not prohibit a member:

(1) With the consent of the client, from paying or agreeing to pay such expenses to third persons from funds collected or to be collected for the client as a result of the representation; or

(2) After employment, from lending money to the client upon the client's promise in writing to repay such loan; or

(3) From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client. Cal. R. Prof. Conduct 4-210(A).

C. Louisiana

1. Summary of Rule

The Louisiana Supreme Court recently has adopted amendments made to Rule 1.8(e) of the Louisiana Rules of Professional Conduct. The new rule change will become effective on April 1, 2006.

Under the new rule, a lawyer may advance court costs and litigation expenses (the repayment of which may be contingent on the outcome of the matter), provided the expenses are reasonably incurred. Court costs and litigation expenses include, but are not limited to, filing fees; deposition costs; expert witness fees; transcript costs; witness fees; copy costs; photographic, electronic, or digital evidence production; investigation fees; related travel expenses; litigation related medical expenses; and any other case specific expenses directly related to the representation undertaken. A lawyer may also pay court costs and litigation expenses on behalf of an indigent client, and a lawyer may provide financial assistance to a client who is in necessitous circumstances.

Overhead costs of a lawyer's practice, which the rule defines, shall not be passed on to a client. However, with the client's consent, a lawyer may charge as recoverable costs such items as computer legal research charges; long distance telephone expenses; postage charges; copying charges; mileage and outside courier service charges, incurred solely for the purposes of the representation. Also, with the client's consent and where the lawyer's fee is based upon an hourly rate, a lawyer may charge a reasonable charge for paralegal services. In all other instances, however, paralegal services shall be considered an overhead cost of the lawyer.

The allowance of financial assistance under the new rule is subject to specific restrictions:

- Prior to providing financial assistance, attorneys are to inform their clients in writing of the terms and conditions under which such financial assistance is made.

- Where a lawyer uses a line of credit or loans obtained from financial institutions to

provide financial assistance to a client, the lawyer shall not pass on to the client interest charges, including any fees or other charges attendant to such loans, in an amount exceeding the actual charge by the third-party lender, or ten percentage points above the bank prime loan rate of interest, whichever is less.

• A lawyer who provides a guarantee or security on a loan made in favor of a client may do so only to the extent that the interest charges do not exceed ten percentage points above the bank prime loan rate of interest.

• Lawyers are to make reasonable good faith efforts to procure a favorable interest rate for their clients.

• Lawyers are to procure the client's written consent to the terms and conditions under which any such financial assistance is made.

• A listing of court costs and expenses of litigation which may be advanced on the client's behalf, and a definition of "overhead costs" which may not be passed on to clients, have been included in the rule changes.

2. State Bar Articles of Incorporation, Art. 16, Rules of Prof. Conduct, Rule 1.8(e)

The new Rule 1.8(e) of the Louisiana Rules of Professional Conduct provides:

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

(1) A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter, provided that the expenses were reasonably incurred. Court costs and expenses of litigation include, but are not necessarily limited to, filing fees; deposition costs; expert witness fees; transcript costs; witness fees; copy costs; photographic, electronic, or digital evidence production; investigation fees; related travel expenses; litigation related medical expenses; and any other case specific expenses directly related to the representation undertaken, including those set out in Rule 1.8(e)(3).

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

(3) Overhead costs of a lawyer's practice which are those not incurred by the lawyer solely for the purposes of a particular representation, shall not be passed on to a client. Overhead costs include, but are not necessarily limited to, office rent, utility costs, charges for local telephone service, office supplies, fixed asset expenses, and ordinary secretarial and staff services. With the informed consent of the client, the lawyer may charge as recoverable costs such items as computer legal research

charges, long distance telephone expenses, postage charges, copying charges, mileage and outside courier service charges, incurred solely for the purposes of the representation undertaken for that client, provided they are charged at the lawyer's actual, invoiced costs for these expenses. With client consent and where the lawyer's fee is based upon an hourly rate, a reasonable charge for paralegal services may be chargeable to the client. In all other instances, paralegal services shall be considered an overhead cost of the lawyer.

(4) In addition to costs of court and expenses of litigation, a lawyer may provide financial assistance to a client who is in necessitous circumstances, subject however to the following restrictions.

(i) Upon reasonable inquiry, the lawyer must determine that the client's necessitous circumstances, without minimal financial assistance, would adversely affect the client's ability to initiate and/or maintain the cause for which the lawyer's services were engaged.

(ii) The advance or loan guarantee, or the offer thereof, shall not be used as an inducement by the lawyer, or anyone acting on the lawyer's behalf, to secure employment.

(iii) Neither the lawyer nor anyone acting on the lawyer's behalf may offer to make advances or loan guarantees prior to being hired by a client, and the lawyer shall not publicize nor advertise a willingness to make advances or loan guarantees to clients.

(iv) Financial assistance under this rule may provide but shall not exceed that minimum sum necessary to meet the client's, the client's spouse's, and/or dependents' documented obligations for food, shelter, utilities, insurance, non-litigation related medical care and treatment, transportation expenses, education, or other documented expenses necessary for subsistence.

(5) Any financial assistance provided by a lawyer to a client, whether for court costs, expenses of litigation, or for necessitous circumstances, shall be subject to the following additional restrictions.

(i) Any financial assistance provided directly from the funds of the lawyer to a client shall not bear interest, fees or charges of any nature.

(ii) Financial assistance provided by a lawyer to a client may be made using a lawyer's line of credit or loans obtained from financial institutions in which the lawyer has no ownership, control and/or security interest; provided, however, that this prohibition shall not apply to publicly traded financial institutions where the lawyer's ownership, control and/or security interest is

less than 15%. Where the lawyer uses such loans to provide financial assistance to a client, the lawyer should make reasonable, good faith efforts to procure a favorable interest rate for the client.

(iii) Where the lawyer uses a line of credit or loans obtained from financial institutions to provide financial assistance to a client, the lawyer shall not pass on to the client interest charges, including any fees or other charges attendant to such loans, in an amount exceeding the actual charge by the third party lender, or ten percentage points above the bank prime loan rate of interest as reported by the Federal Reserve Board on January 15th of each year in which the loan is outstanding, whichever is less.

(iv) A lawyer providing a guarantee or security on a loan made in favor of a client may do so only to the extent that the interest charges, including any fees or other charges attendant to such a loan, do not exceed ten percentage points (10%) above the bank prime loan rate of interest as reported by the Federal Reserve Board on January 15th of each year in which the loan is outstanding. Interest together with other charges attendant to such loans which exceeds this maximum may not be the subject of the lawyer's guarantee or security.

(v) The lawyer shall procure the client's written consent to the terms and conditions under which such financial assistance is made. Nothing in this rule shall require client consent in those matters in which a court has certified a class under applicable state or federal law; provided, however, that the court must have accepted and exercised responsibility for making the determination that interest and fees are owed, and that the amount of interest and fees chargeable to the client is fair and reasonable considering the facts and circumstances presented.

(vi) In every instance where the client has been provided financial assistance by the lawyer, the full text of this rule shall be provided to the client at the time of execution of any settlement documents, approval of any disbursement sheet as provided for in Rule 1.5, or upon submission of a bill for the lawyer's services.

(vii) For purposes of Rule 1.8(e), the term "financial institution" shall include a federally insured financial institution and any of its affiliates, bank, savings and loan, credit union, savings bank, loan or finance company, thrift, and any other business or person that, for a commercial purpose, loans or advances money to attorneys and/or the clients of attorneys for court costs, litigation expenses, or for necessitous circumstances.

D. Minnesota

1. Summary of Rule

Rule 1.8(e) of the Minnesota Rules of Professional Conduct also is identical to Colorado's proposed rule in that lawyers may advance court costs and litigation expenses (the repayment of which may be contingent on the outcome of the matter) and may pay court costs and litigation expenses on behalf of an indigent client. However, Minnesota's rule also provides that a lawyer may guarantee a loan to enable the client to withstand ongoing litigation and to prevent substantial pressure on the client to settle a case because of financial hardship rather than on the merits. To guarantee a loan, the client must remain ultimately liable to repay it without regard to the outcome of the litigation, and the lawyer must not promise such financial assistance to the client before the lawyer's employment.

2. 52 Minn. Stat., R. of Prof. Conduct 1.8(e)

Rule 1.8(e) of the Minnesota Rules of Professional Conduct provides:

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

> (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
>
> (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and
>
> (3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by that client. 52 Minn. Stat., R. of Prof. Conduct 1.8(e).

E. Mississippi

1. Summary of Rule

Rule 1.8(e) of the Mississippi Rules of Professional Conduct permits a lawyer to advance costs and litigation expenses, including but not limited to, reasonable medical expenses that are necessary to the litigation preparation for hearing or trial. The repayment of such costs and expenses may be contingent on the outcome of the litigation.

Further, a lawyer may advance reasonable and necessary medical expenses associated with treatment for the injury that gave rise to the litigation or administrative proceeding, and a lawyer may advance reasonable and necessary living expenses incurred. Both of those types of advances must be paid by the client upon a successful conclusion of the matter, and they are subject to several conditions and restrictions. For example, the advancements can only be made to clients under dire and necessitous circumstances, and they must be limited to minimal living expenses of minor sums, such as those necessary to prevent foreclosure or repossession or for necessary medical treatment. The attorney cannot pay any medical or living expenses for 60 days from the time that the client has signed a contract of employment with him or her. Additionally, payments to any one party by any lawyer must not exceed $1,500 during the litigation unless, upon ex parte application, such further payment has been approved by the Standing Committee on Ethics of the Mississippi Bar. Further details of the rule are stated below.

2. Miss. Ct. R., R. of Prof. Conduct 1.8(e)

Rule 1.8(e) of the Mississippi Rules of Professional Conduct provides:

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

> 1. A lawyer may advance court costs and expenses of litigation, including but not limited to reasonable medical expenses necessary to the preparation of the litigation for hearing or trial, the repayment of which may be contingent on the outcome of the matter; and
>
> 2. A lawyer representing a client may, in addition to the above, advance the following costs and expenses on behalf of the client, which shall be repaid upon successful conclusion of the matter.
>
> > a. Reasonable and necessary medical expenses associated with treatment for the injury giving rise to the litigation or administrative proceeding for which the client seeks legal representation; and
> >
> > b. Reasonable and necessary living expenses incurred.

The expenses enumerated in paragraph 2 above can only be advanced to a client under dire and necessitous circumstances, and shall be limited to minimal living expenses of minor sums such as those necessary to prevent foreclosure or repossession or for necessary medical treatment. There can be no payment of expenses under paragraph 2 until the expiration of 60 days after the client has signed a contract of employment with counsel. Such payments under paragraph 2 cannot include a promise of future payments, and counsel cannot promise any such payments in any type of communication to the public, and such funds may only be

advanced after due diligence and inquiry into the circumstances of the client.

Payments under paragraph 2 shall be limited to $1,500 to any one party by any lawyer or group or succession of lawyers during the continuation of any litigation unless, upon ex parte application, such further payment has been approved by the Standing Committee on Ethics of the Mississippi Bar. An attorney contemplating such payment must exercise due diligence to determine whether such party has received any such payments from another attorney during the continuation of the same litigation, and, if so, the total of such payments, without approval of the Standing Committee on Ethics shall not in the aggregate exceed $1,500. Upon denial of such application, the decision thereon shall be subject to review by the Mississippi Supreme Court on petition of the attorney seeking leave to make further payments. Payments under paragraph 2 aggregating $1,500 or less shall be reported by the lawyer making the payment to the Standing Committee on Ethics within seven (7) days following the making of each such payment. Applications for approval by the Standing Committee on Ethics as required hereunder and notices to the Standing Committee on Ethics of payments aggregating $1,500 or less, shall be confidential. Miss. Ct. R., R. of Prof. Conduct 1.8(e).

F. Montana

1. Summary of Rule

Rule 1.8(e) of the Montana Rules of Professional Conduct also is the same as Colorado's proposed rule, as lawyers may advance court costs and litigation expenses (the repayment of which may be contingent on the outcome of the matter) and may pay court costs and litigation expenses on behalf of an indigent client. The rule also states that a lawyer may, for the sole purpose of providing basic living expenses, guarantee a loan from a regulated financial institution whose usual business involves making loans. However, the client must reasonably need such loan to enable the client to withstand ongoing litigation and to prevent substantial pressure on the client to settle a case because of financial hardship rather than on the merits. The client must remain ultimately liable for repayment of the loan without regard to the outcome of the litigation, and the lawyer may not offer, promise or advertise such financial assistance before the client retains him or her.

2. Mont. Ct. R., R. of Prof. Conduct 1.8(e)

Rule 1.8(e) of the Montana Rules of Professional Conduct provides:

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

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

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

(3) a lawyer may, for the sole purpose of providing basic living expenses, guarantee a loan from a regulated financial institution whose usual business involves making loans if such loan is reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided that neither the lawyer nor anyone on his/her behalf offers, promises or advertises such financial assistance before being retained by the client. Mont. Ct. R., R. of Prof. Conduct 1.8(e).

G. North Dakota

1. Summary of Rule

Similar to Colorado's proposed rule, under Rule 1.8(e) of the North Dakota Rules of Professional Conduct lawyers may advance court costs and litigation expenses (the repayment of which may be contingent on the outcome of the matter) and may pay court costs and litigation expenses on behalf of an indigent client. North Dakota's rule also provides that a lawyer may guarantee a loan to enable the client to withstand ongoing litigation and to prevent substantial pressure on the client to settle a case because of financial hardship rather than on the merits. To guarantee a loan, the client must remain ultimately liable to repay it without regard to the outcome of the litigation, and the lawyer must not promise such financial assistance to the client before the lawyer's employment.

2. N.D. Ct. R., R. of Prof. Conduct 1.8(e)

Rule 1.8(e) of the North Dakota Rules of Professional Conduct provides:

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

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

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

(3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without

regard to the outcome of the litigation and, further provided, that no promise of financial assistance was made to the client by the lawyer or by another in the lawyer's behalf, prior to the employment of that lawyer by the client. N.D. Ct. R., R. of Prof. Conduct 1.8(e).

H. Texas

1. Summary of Rule

Rule 1.08(d) of the Texas Disciplinary Rules of Professional Conduct permits a lawyer to advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter. The rule also allows a lawyer to pay court costs and litigation expenses on behalf of an indigent client.

2. Texas Gov't Code Ann., Title 2, Subtit. G, App. A, Art. 10, Sec. 9, Rule 1.08(d)

Rule 1.08(d) of the Texas Disciplinary Rules of Professional Conduct provides:

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

(1) a lawyer may advance or guarantee court costs, expenses of litigation or administrative proceedings, and reasonably necessary medical and living expenses, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client. Texas Gov't Code Ann., Title 2, Subtit. G, App. A, Art. 10, Sec. 9, Rule 1.08(d).

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February 3, 2005

Marcy Glenn, Esq.
Chair, Committee on the Rules
of Professional Conduct
555 17th Street, Suite 3200
Denver, Colorado 80202

Re: Colo.R.P.C. 1.8(e)

Dear Marcy:

In my capacity as a member of the Colorado Bar Association Ethics Calling Committee, and due to my involvement with the Colorado Trial Lawyers Association, I have had in the neighborhood of five to ten inquiries in the last six years regarding an attorney, under very extreme circumstances, being able to advance other than litigation expenses, or to guarantee a loan in order that the client can afford living expenses or medical treatment. Situations such as foreclosure on the client's home or being sued for medical bills, and matters of this nature, have often prompted the inquiry.

Recently I got a call from counsel who was representing a mother and child in a "bad baby" case where there was clear malpractice and the issue was the amount of damages. The mother had run out of funds and was going to be forced to move back to South Dakota and move in with her family to support herself and the child. The problem was that her child was receiving special education services here in Denver, which the child could not receive in South Dakota, and thus the client was at an extreme disadvantage. I dutifully advised counsel that this was impermissible under Colo.R.P.C. 1.8(e). Later, I received a call from plaintiff's counsel asking if it would be permissible to let the mother and child live in her basement so that the mother could afford to stay in Colorado. I told the caller that although Rule 1.8(e) talked in terms of financial assistance, it would be my opinion that affording living accommodations would be in lieu of financial assistance and therefore might be considered a violation of Rule 1.8(e). Plaintiff's counsel then asked me if it would be permissible if the client performed household services for her, picked up her children at school and did things of this sort to earn her keep. I reluctantly gave her the advice that as long as the services performed were actual services and approximated the value of the living accommodations, I believe

there would be a good faith attempt to comply with Rule 1.8(e) and it was arguable that there would be no violation.

The problem in this area is that insurance companies and others who defend these lawsuits know the plight the plaintiffs are in, and will force them to settle for a percentage on the dollar knowing that the plaintiff cannot afford to wait two years or more until the case comes to trial to receive financial assistance.

In 1996 or thereabouts, realizing the plight that severely injured plaintiffs were in, a company was formed entitled Litigation Financial Group. This company would advance living expenses to the client in exchange for an agreed upon percentage of any recovery. Obviously, the company screened the cases in which they elected to participate to ensure that a recovery would be forthcoming. The Ethics Committee, upon an inquiry by a member of the plaintiff's bar, issued a letter opinion which, in effect, approved an attorney's participation in allowing his client to enter into such an arrangement, with certain provisos such as the exercise of the attorney's professional independence must not be compromised and the like. However, this company is no longer in business, so that this avenue is not available any longer.

As I understand it, the main reason for Rule 1.8(e) is that it prevents champerty and maintenance and, without it, clients could be encouraged to pursue lawsuits. It is based on the common law doctrine against maintenance, champerty and barratary. [However, the scope of the Rule is not limited to such conduct. *People v. Mason*, 938 P.2d 133, 136 (Colo. 1997).] The Colorado Supreme Court and the Presiding Disciplinary Judge have disciplined several attorneys in recent years for violating Rule 1.8(e), with little or no comment regarding the good intentions of the attorneys providing the financial assistance to help their clients. See *People v. Kocel*, 61 P.3d 56 (Colo. O.P.D.J. 2003); *People v. Blundell*, 01 PDJ 038 (Colo. O.P.D.J. 3-14-02); *People v. Lusero*, 00 PDJ 070 (Colo. O.P.D.J. 5-3-01); and *In re Gibson*, 991 P.2d 277 (Colo. 1999). On the other hand, see *Charles W. Wolfram, Modern Legal Ethics*, Section 8.13 at 489/92 (1986) (old and unjust approach of discounting all assistance to others who attempt to assert their rights through litigation no longer followed, cited in the ABA Annotated Model Rules of Professional Conduct, Legal Background to Rule 1.8(e).

The Rule is not universally followed and in fact several courts have found proper an attorney's guarantee of loans for client's living expenses or direct advances of living expenses to enable a client to pursue a personal injury claim. See for instance *Louisiana State Bar Association v. Edwins*, 329 So.2d 437 (1976); and *In re Ratner*, 194 Kan. 362, 399 P.2d 865 (Kan. 1965). In *Chittenden v. State Farm*, 788 So.2d 1140 (La. 2001), the Louisiana Supreme Court held that "court costs and expenses of litigation", expressly

allowed to be paid under the rule, included both medical and living expenses, citing the policy of *Edwins*. [The Louisiana version of Rule 1.8(e), identical to the Model Rules, does not, as does Colorado's version, cite specific expenses which may be advanced, i.e., court costs, investigation, medical examination, and obtaining and presenting evidence.]. [See *In re Mountain*, 721 P.2d 264 (Kan. 1986), holding that respondent attorney violated DR 5-103(B) by advancing pre-natal medicine expenses to his client, the birth mother, in adoption proceedings.] Kansas has since adopted Model Rule 1.8(e) (*In re Farmer*, 950 P.2d 713 (Kan. 1997).] This may overrule *In re Ratner, supra.*

A number of other states have established a version of Rule 1.8(e) which expressly allows an attorney to advance necessary living expenses and/or medical assistance. See Ala. R. of Prof. Conduct 1.8(e) (1995); Cal. R. Prof. Conduct 4-210(A)(2) (1989); 52 Minn. Stat., Rules of Prof. Conduct 1.8(e) (Supp. 1999); Miss. Ct. R., Rules of Professional Conduct 1.8(e) [Mississippi specifically amended its Rule 1.8(e) recognizing the need to relax traditional prohibitions on advances to clients in order to prevent the loss of the client's cause of action due to economic disadvantage. In re: G.M., 797 So.2d 931 (Miss. 2001)]; Mont. Ct. R., Rules of Professional Conduct, Rule 1.8(e); N.D. Ct. R., Rules of Professional Conduct 1.8(e); and Texas Gov.'t Code Ann., Title 2, Subtit. G, App. A, Art. 10, Sec. 9, Rule 1.08(d) (West 1998).

In proposing the amendment to Rule 1.8(e) of the Montana Rules of Professional Conduct, that state's Supreme Court recognized that without financial assistance for basic living expenses, some clients could not withstand the delay in litigation and thus be induced to settle or dismiss the case because of financial hardship rather than on the merits. That court felt compelled to temporarily suspend the then existing version of Rule 1.8(e) which did not allow for such financial assistance, in favor of allowing it on a case by case basis on order of the court until Rule 1.8(e) could be appropriately amended. 21 Mont.Lawy.5 (Jan. 1996), pgs. 5-6, attached.

Additionally, the Ohio Supreme Court perceived the need to reexamine the rule prohibiting the advancement of medical assistance and living expenses. In *Toledo Bar Assoc. v. McGill*, 597 N.E.2d 1104 (Ohio 1992), the court acknowledged the respondent attorney violated the rule by advancing funds for these purposes but it rejected the stronger disciplinary action recommended by the hearing board in favor of minimal discipline because of the Court's perceived need to reexamine the rule. [However, it appears the rule was not changed in Ohio. See *Cleveland Bar Assn. v. Mineff*, 652 N.E.2d 968 (Ohio 1995) (minimal discipline imposed on attorney for advancing living expenses to client, "consistent with the sanction imposed in *McGill*.")]

The purpose of setting forth this analysis is to show that other states, admittedly a minority, have had occasion to reexamine the rationale for Rule 1.8(e) in modern times.

One of the objections to allowing an attorney to advance living expenses is that it will permit the attorney to hold out incentives to a prospective client and will be used to induce clients to retain the attorney. The Louisiana Court in *Edwins* found that despite the language of then DR-5-103(b), no violation occurred where the attorney advanced expenses of necessary medical treatment for his client who received a small welfare benefit "insufficient even for the minimum subsistence level of the poorest people in our economy".

> In our opinion, ...the advancement of living expenses did not constitute a violation of professional responsibility, so long as: (a) the advances were not promised as an inducement to obtain professional employment, nor made until after the employment relationship was commenced; (b) the advances were reasonably necessary under the facts; (c) the client remained liable for repayment of all funds, whatever the outcome of the litigation; and (d) the attorney did not encourage public knowledge of this practice as an inducement to secure representation of others. *Id.* at 449.

I am not proposing that Rule 1.8(e) be rescinded. What I am proposing is that Rule 1.8(e) be retained, but it provide that either an independent committee be set up, or that the Attorney Regulation Committee or even Attorney Regulation Counsel be authorized to review requests by plaintiff's counsel and be given the authority to authorize the payment of living expenses, medical bills for necessary medical treatment, and the like, upon a proper showing, the details of which may be as stringent as the Supreme Court, upon recommendation of your Committee, would dictate, so that the situation must really be compelling before a deviation from Rule 1.8(e) would be permitted. The problem would also have to arise subsequent to the commencement of the representation, without any understanding on behalf of the attorney and the client that the attorney would advance such expenses, so that there would be no inducement for the client to prefer attorney A over attorney B. In my opinion, this would serve the needs of the public far better than a blanket prohibition against all such advances or loan guarantees, in that it will enable injured people to retain their homes, get the medical assistance which is so necessary, and in fact allow them to get a fair resolution of the litigation, rather than having to settle cheaply in order to exist.

I understand this was brought up briefly before the Committee at the end of the last meeting and the initial reaction may have been one of disfavor. Can this Committee

really say that there is no circumstance so compelling that it would permit an attorney to assist his or her client? If your Committee can say that, then I will withdraw my proposal. On the other hand, if this Committee believes that there may be circumstances where the equities weigh so heavily in favor of the client, and the need is so great, that such advances should be allowed under prescribed guidelines, then I would request you consider my proposal or some ramification thereof.

Sincerely,

Ben Aisenberg

Bennett S. Aisenberg

Enclosure

Rules amendment would allow loans to clients

Court sets March 19 deadline for comments

The Montana Supreme Court has proposed an amendment to the Rules of Professional Conduct that would sometimes allow attorneys to loan money to injured clients suffering extreme financial distress.

In its Nov. 21 order suspending Rule 1.8(e) pending a decision on whether to amend the rule, the Court provided the following background:

Within the last eight months, this Court has had occasion to consider and to act upon two applications for extraordinary relief under Rule 17, M.R.App.P., filed by an attorney for the purpose of allowing the attorney for an injured plaintiff to co-sign a bank loan made to the client for the payment of basic living expenses during the pendency of the case under circumstances where the attorney demonstrated that the client was suffering extreme financial distress attributable to the client's injuries.

In each case the attorney sought an opinion of the State Bar Ethics Committee that by co-signing a bank loan to the client under the circumstances, the attorney would not be in violation of Rule 1.8(e) of the Rules of Professional Conduct. That Rule, in pertinent part, provides:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

The Ethics Committee took the position that it was not appropriate to render an opinion on the attorney's request beyond the Committee's interpretation of the Rule provided in Ethics Opinion 860723. In that opinion, the Committee answered in the negative the following question: "May an attorney borrow money in their firm name and then advance the loan proceeds to their clients during the pendency of the client's lawsuit or guarantee a loan which is made to the client during the pendency of a claim or litigation?" The Committee also subsequently indicated in correspondence with the attorney that it had "wrestled with the issue of financial assistance to clients and recognizes that its current rule requires additional discussion. . .[and that the Committee]... would like the opportunity to review Montana's Rule 1.8, in conjunction with the Montana Supreme Court and Montana's bar, to consider the need, if any, for revision."

In connection with one of Rule 17

MORE LOANS, PAGE 6

LOANS, FROM PAGE 5

applications considered by this Court, (Cause No. 95-423), Professor David J. Patterson filed a brief *amicus curiae*, suggesting that Rule 1.8(e) should be revised in the manner hereinafter set forth. Patterson is a member of and special counsel for the Montana Bar Ethics Committee (having recused himself from any participation at the Committee in the particular case then at issue); he serves as liaison to the Commission on Practice; he teaches professional ethics to students at the University of Montana Law School; and he presents professional ethics seminars to attorneys. In that same case, the Ethics Committee took the position that the relief requested by the attorney in his Rule 17 application, if granted, would violate Rule 1.8.

In light of the facts and circumstances of the two Rule 17 applications filed in this Court; on the basis of the authority, reasoning and argument set forth in Professor Patterson's brief *amicus curiae*; and on the basis of the Ethics Committee's Opinion #860723 and its willingness to revisit Rule 1.8, we, likewise, conclude that it is appropriate to consider revisions to Rule 1.8(e) and to adopt a process that will enable this Court, the Ethics Committee, the Bar and other interested persons to adequately gauge and to intelligently comment upon the extent of the need for and the propriety and desirability of allowing attorneys to provide limited financial assistance to their clients during litigation under certain defined circumstances.

We believe that proposing an amended version of Rule 1.8(e) for comment by the Ethics Committee, the Bar and other interested persons in conjunction with a relatively short trial period during which this Court will entertain applications on a case-by-case basis under Rule 17, using the criteria set forth in a proposed amended Rule, will best and most expeditiously accomplish those objectives while at the same time, and in the context of an actual set of criteria, provide this Court, the Ethics Committee, the Bar and interested persons with experience and data as to the propriety and desirability of and the extent of the need for revisions to Rule 1.8(e).

Accordingly, pursuant to the authority granted this Court by Article II, Section 2(3), of the Montana Constitution, IT IS ORDERED:

1. That Rule 1.8(e) of the Rules of Professional Conduct is temporarily suspended, pending further order of this Court, provided, however, that during the period of such suspension, a lawyer may not provide financial assistance to a client or make or guarantee a loan to a client in connection with pending or contemplated litigation that the lawyer is conducting for the client except as follows:

a) Without further order of this Court, the lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter and the lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

b) On a case-by-case basis, on good cause shown by application under Rule 17 M.R.App.P., and only on further order of this Court, the lawyer may make or guarantee a loan to the client on fair terms, the repayment of which to the lawyer may be contingent on the outcome of the matter, provided that the lawyer's application to this Court demonstrates that: (i) the loan is needed to enable the client to withstand delay in litigation that otherwise might unjustly induce the client to settle or dismiss a case because of financial hardship rather than on the merits; (ii) the loan is used only for basic living expenses; (iii) the client faces demonstrable financial hardship that relates to, and arises out of, the injuries and claims for which the lawyer is representing the client; and (iv) the lawyer has not promised, offered, or advertised the loan before being retained by the client;

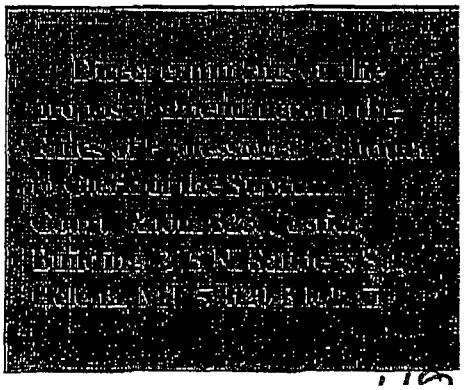
2. That after the expiration of the comment period referred to herein a upon further order of this Court, Ru 1.8(e) be amended as follows:

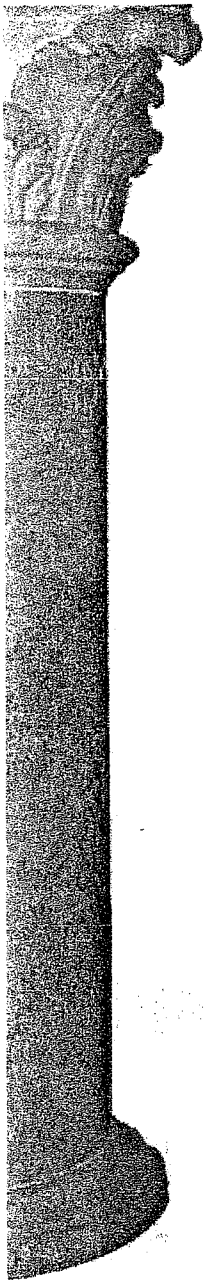
A lawyer may not make or guara tee a loan to a client in connection wi pending or contemplated litigation th the lawyer is conducting for the clie except that the lawyer may:

(1) make or guarantee a loan cove ing court costs and expenses of litig tion, the repayment of which to t lawyer may be contingent on the ou come of the matter; and

(2) make or guarantee a loan on fa terms, the repayment of which to t lawyer may be contingent on the ou come of the matter, if: (i) the loan needed to enable the client to withstar delay in litigation that otherwise mig unjustly induce the client to settle dismiss a case because of financial har ship rather than on the merits; (ii) t loan is used only for basic living e penses; (iii) the client faces demo strable financial hardship that relates t and arises out of, the injuries and clai for which the lawyer is representing t client; and (iv) the lawyer does n promise, offer, or advertise the loa before being retained by the client; an

4. That the Court is accepting wri ten comments, suggestions and crit cisms regarding the proposed amende rule through March 19, including com ment on whether 37-61-408, MCA may be implicated by the propose amendments to the Rule. The Cou specifically invited comments from th Ethics Committee, and reserved th possibility of ordering oral argume after the comment period has expired.





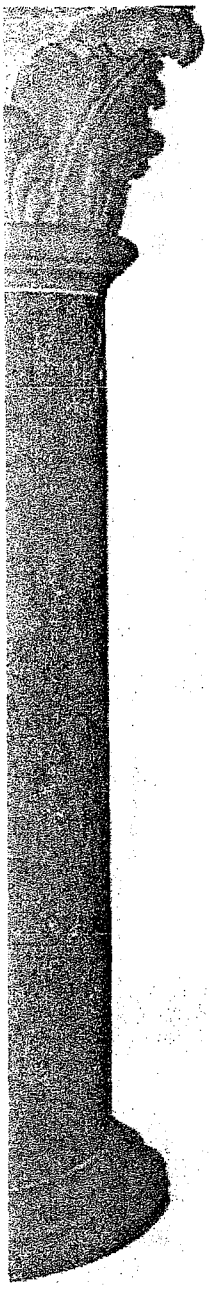
Proposed Rule Changes

2006 Recommended Changes to Colorado Rules of Professional Conduct
Submitted by the Colorado Supreme Court Committee on the Rules of Professional Conduct
Hearing to be held June 15, 2006 @ 1:30 pm.

Proposed Rule Change to C.R.C.P. for Rule 43
(strikethrough version) (clean version)
VIII. Supplementary and Special Proceedings, Rule 43. Presence of the defendant.
Hearing to be held May 4, 2006 at 3:30 p.m.
Written comments due no later than 5 p.m., Wednesday, April 21, 2006.

Proposed Rule Change to C.R.C.P. for Rule 4, 304 and 504
(strikethrough version) (clean version)
Chapter 1, Rule 4. Process
Chapter 25, Rule 304. Service of Process
Chapter 26, Rule 504. Service of the Notice, Claim and Summons to Appear for Trial
Written comments due no later than 5 p.m., Wednesday, February 1, 2006.

Proposed Rule Change to C.R.C.P.
Chapter 4 Disclosure and Discovery, Rule 26 General Provisions Governing Discovery; Duty o Disclosure
Chapter 5 Trials, Rule 43 Evidence
Chapter 17(A) Practice Standards and Local Rules
This change will go into effect January 1, 2006.



2006 Recommended Changes to Colorado Rules of Professional Conduct

Submitted by Colorado Supreme Court Committee

The committee's 2006 recommendations concerning amendments to the Colorado Rules of Professional Conduct are listed below. The Court will hear comments from interested parties on June 15, 2006 @ 1:30 pm in the Supreme Court courtroom and would appreciate written comments.

Summary of the proposed changes to Colorado Rules of Professional Conduct
(pages 1-15 introductory material, pages 16-118 summary of analysis)

Proposed changes marked to show changes from existing rules

Clean version of proposed changes

Comparison with the ABA Model Rules of Professional Conduct

CHAPTER 22. PROFESSIONAL SERVICE COMPANIES

Adopted Effective December 1, 1995

Including Amendments Received Through December 15, 2005

Research Note

Annotations for Colorado court rules are available in the Court Rules volumes in West's Colorado Revised Statutes Annotated, *and in the CO-RULES database on* Westlaw®. Westlaw *may also be used to search for specific terms in court rules or to update court rules. See also CO-RULES and CO-ORDERS Scope Screens for further information.*

Amendments to these rules are published, as received, in the P.2D *and* Colorado Reporter *advance sheets.*

Table of rules

RULE 265. PROFESSIONAL SERVICE COMPANIES

I.

A. Attorneys who are licensed to practice law in Colorado may do so in the form of professional corporations, limited liability companies, limited liability partnerships, registered limited liability partnerships, or joint stock companies, herein collectively referred to as "professional companies," permitted by the laws of Colorado to conduct the practice of law, provided that such professional companies are established and operated in accordance with the provisions of this Rule and the Colorado Rules of Professional Conduct. The provisions of this Rule shall apply to all professional companies having as shareholders, officers, directors, partners, employees, members, or managers one or more attorneys who engage in the practice of law in Colorado, whether such professional companies are formed under Colorado law or under laws of another state or jurisdiction. All professional companies conducting the practice of law in Colorado shall comply with the following requirements:

1. The name of the professional company shall contain the words "professional company," "professional corporation," "limited liability company," "limited liability partnership," or "registered limited liability partnership" or abbreviations thereof such as "Prof. Co.," "Prof. Corp.," "P.C.," "L.L.C.," "L.L.P.," or "R.L.L.P." that are authorized by the laws of the State of Colorado or the laws of the state or jurisdiction of organization. In addition, the name of the professional company shall always meet the ethical standards established by the Colorado Rules of Professional Conduct for the names of law firms.

2. The professional company shall be established solely for the purpose of conducting the practice of law, and the practice of law in Colorado shall be conducted only by persons qualified and licensed to practice law in the State of Colorado.

3. The professional company may exercise all of the powers and privileges conferred upon such types of entities by the laws of the State of Colorado or other state or jurisdiction of organization but only for the purpose of conducting the practice of law pursuant to this rule and the Colorado Rules of Professional Conduct.

4. The articles of incorporation, partnership agreement, operating agreement, or other governing document or agreement of the professional company shall provide, and each of the shareholders, partners, or members shall agree, that each of them who is a shareholder, partner, or member of the professional company at the time of the commission of any professional act, error, or omission by any of the shareholders, officers, directors, partners, members, managers, or employees of the professional company shall be

jointly and severally liable to the extent provided by this Rule for the damages caused by such act, error, or omission; provided, however, that the governing document or agreement may provide that any such shareholder, partner, or member who has not directly and actively participated in the act, error, or omission for which liability is claimed shall not be liable, except as provided in clause (e) of this subparagraph I.A.4, for any of the damages caused thereby if at the time the act, error, or omission occurs the professional company has professional liability insurance which meets the following minimum standards:

(a) The insurance shall insure the professional company against liability imposed upon it arising out of the practice of law by attorneys employed by the professional company in their capacities as attorneys.

(b) Such insurance shall insure the professional company against liability imposed upon it by law for damages arising out of the professional acts, errors, and omissions of all nonprofessional employees.

(c) The policy may contain reasonable provisions with respect to policy periods, territory, claims, conditions, and other matters.

(d) The insurance shall be in an amount for each claim of at least $100,000 multiplied by the number of attorneys employed by the professional company, and, if the policy provides for an aggregate top limit of liability per year for all claims, the limit shall not be less than $300,000 multiplied by the number of attorneys employed by the professional company; provided, however, that no professional company shall be required to carry total limits of insurance in excess of $500,000 for each claim or be required to carry an aggregate top limit of liability for all claims per year of more than $2,000,000.

(e) The policy may provide for a deductible or self-insured retained amount and may provide for the payment of defense or other costs out of the stated limits of the policy. In either or both such events, the liability assumed by the shareholders, partners, or members of the professional company shall include the amount of such deductible or retained self-insurance and shall include the amount, if any, by which the payment of defense costs may reduce the insurance remaining available for the payment of claims below the minimum limit of insurance required by this Rule if the ultimate liability for the claim exceeds the amount of insurance remaining to pay for it.

(f) A professional act, error, or omission is considered to be covered by professional liability insurance for the purpose of this subparagraph I.A.4 if the policy includes such act, error, or omission as a covered activity, regardless of whether claims previously made against the policy have exhausted the aggregate top limit for the applicable time period or whether the individual claimed amount or ultimate liability exceeds either the per claim or aggregate top limit.

5. The liability assumed by the shareholders, partners, or members of the professional company pursuant to subparagraph I.A.4 is limited to liability for professional acts, errors, or omissions which constitute the practice of law and shall not extend to actions or undertakings that do not constitute the practice of law. The liability assumed by the shareholders, partners, or members of the professional company pursuant to subparagraph I.A.4 may be pursued only by a citation brought under C.R.C.P. 106(a)(5) after entry of a judgment against the professional company. Liability, if any, for any and all actions or undertakings, other than professional acts, errors, or omissions, shall be as generally provided by law and shall not be changed, affected, limited, or extended by this Rule.

B. Each attorney practicing law in Colorado as a shareholder, director, officer, member, manager, partner, or employee of a professional company, whether formed under the laws of the State of Colorado or under the laws of any other state or jurisdiction, shall comply with the following standards of professional conduct:

1. No such attorney shall act or fail to act in a way which would violate any of the Colorado Rules of Professional Conduct adopted by this Court. The professional company shall also comply at all times with all standards of professional conduct established by this Court and with the provisions of this Rule. Any violation of or failure to comply with any of the provisions of this Rule by the professional company may be grounds for this Court to terminate or suspend the right of any attorney who is a shareholder, director, officer, member, manager, or partner of such professional company to practice law in Colorado in the form of a professional company.

2. Nothing in this Rule shall be deemed to diminish or change the obligation of each attorney employed by the professional company to conduct that attorney's practice in accordance with the Colorado Rules of Professional Conduct promulgated by this Court. Any attorney who by act or omission causes the professional company to act or fail to act in a way which violates such standards of professional conduct or any provision of this Rule shall be deemed personally responsible for such act or omission and shall be subject to discipline therefor.

II.

Any professional company established for the purpose of conducting the practice of law must comply with all of the following additional requirements:

A. Except as provided in paragraph II.B and II.C, all officers, directors, shareholders, partners, members, or managers of the professional company shall be individuals who are duly licensed by either the Supreme Court of the State of Colorado or some other state or jurisdiction to practice law either in the State of Colorado or in such other state or jurisdiction and who at all times own shares or other equity interests in the professional company in their own right. In addition, all other employees or representatives of the professional company who practice law shall be duly licensed by either the Supreme Court of the State of Colorado or some other state or jurisdiction to practice law in the State of Colorado or in such other state or jurisdiction.

B. A professional company may have one or more shareholders, partners, or members which are professional companies so long as each such shareholder, partner, or member is established and operated in accordance with the provisions of this Rule and the Colorado Rules of Professional Conduct.

C. A professional company may have directors, officers, or managers who do not have the qualifications described in paragraph II.A, but no director, officer, manager, or employee of a professional company who is not licensed to practice law either in the State of Colorado or elsewhere shall exercise any authority whatsoever over any of the professional company's activities relating to the practice of law.

D. Provisions shall be made requiring any shareholder, partner, or other member who withdraws from or otherwise ceases to be eligible to be a shareholder, partner, or member of the professional company to dispose of all shares or other equity interests therein as soon as practicable either to the professional company or to any person having the qualifications described in paragraph II.A. Provisions may be made for the redemption or disposition of shares or other equity interests over a reasonable period of time so long as the withdrawing shareholder, partner, or member does not exercise any management or professional function during such period of time.

E. A professional company may adopt retirement, pension, profit-sharing (whether cash or deferred), health and accident insurance, or welfare plans for all or some of its employees, including lay employees, provided that such plans do not require or result in the sharing of specific or identifiable fees with lay employees and provided that any payments made to lay employees or into any such plan on behalf of lay employees are based upon their compensation or length of service or both rather than upon the amount of fees or income received.

Amended eff. June 1, 1987; Nov. 1, 1991; Jan. 1, 1993. Repealed and adopted eff. Dec. 1, 1995. Amended eff. Dec. 6, 1995; Dec. 20, 1995.

*

I resign as chair of
the subcommittee.

I recommend you appoint
Tuck Young as chair

Lien Kenpennywell Materials

bridge funds

PURCHASE AGREEMENT
(General)

This Purchase Agreement ("Agreement") is executed and delivered by [redacted] ("Seller") on January 20, 2006 (the "Offer Date") and accepted by BridgeFunds Limited, a Nevada corporation ("Purchaser") on the date set forth on the signature page hereof (the "Contract Date").

Background

1. Seller is the plaintiff in a personal injury liability claim (as further defined below, the "Action").

2. In order to ensure the receipt of some proceeds in connection with the Action without regard to its outcome, Seller desires to sell an interest in the Proceeds (as defined below) of the Action to Purchaser.

3. Purchaser desires to purchase an interest in the Proceeds of the Action from Seller and is willing to assume the risk of resolution of the Action.

NOW THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties therefore agree as follows:

SECTION 1. DEFINITIONS.

1.1 "Action" means (a) the case styled [redacted] vs. Wilshire Insurance Co arising from an automobile accident occurring on February 14, 2004; (b) all applicable proceedings, proceedings on appeal or remand, enforcement, ancillary, parallel, or alternative dispute resolution proceedings and processes arising out of or relating to such case; (c) any other proceedings founded on the underlying facts giving rise to such case in which Seller is a party; and (d) any arrangements made with Seller by or among any other party to such case which resolves any of the Seller's claims against any such other party.

1.2 "Applicable Amount" means a portion of the Proceeds equal to the Purchase Price plus fee amount of $3,379 plus the Documentation Fee for a total of $21,051 if payment is received by Purchaser less than 180 days after the Purchase Date; if payment is received by Purchaser 180 days or more after the Purchase Date, the amount of $20,851 shall increase by an additional 2.99 percent for every additional 30 day period, or portion thereof thereafter, such amount to be compounded monthly.

1.3 "Applicable Privileges and Protections" means the attorney-client privilege, the work product doctrine and any other evidentiary privilege or protection that may be accorded documents or other information created in connection with the Action.

1.4 "Documentation Fee" means a $200 fee payable by Seller in consideration for the administration and documentation of transactions under this Agreement.

[redacted] 1/20/2006

Personal Injury Funding
750 McLean Avenue
Yonkers, NY 10704
914-237-2721
914-237-9168 (fax)

February 9, 2004

VIA FACSIMILE

Franklin D. Azar & Associates P.C. .
Attorneys at Law
14426 East Evans Ave
Aurora, CO 80014-1474
303-757-3300
303-759-5203 (fax)

Attn: Kenneth Pennywell

- Re: Your Client: [redacted]
  and/or ANY RELATED ACTIONS / ACCIDENT DATE 11/26/2001.

Dear Kenneth Pennywell:

Please find the funding agreement for your client, [redacted], and an acknowledgment of lien in the amount of 1,900.00 plus 4.99% monthly compounded associated usage fees in accordance with the contract with Personal Injury Funding. Kindly sign the acknowledgment of lien and fax back to this office so that we can issue a check to your client.

Thank you for your assistance in the matter and should you have any questions, please feel free to call me.

Very truly yours,

Marc Waldman

MW/am

1 800 790 8992
MONEY FOR LAWSUITS .com

MONEY FOR LAWSUITS, dba QUICKCASH INC.
304 HUDSON STREET, 7TH FLOOR
NEW YORK, NY 10013

TELEPHONE 212.608.7372
FACSIMILE 212.608.6964

August 11, 2005

VIA FACSIMILE

Law Office of Franklin D. Azar & Associates
Attorneys at Law
14426 East Evans Avenue
Aurora, CO 80014
303-757-3300
303-759-5203 (fax)

Attn: Kenneth Pennywell

- Re: [redacted] ACCIDENT DATE 11/26/01 AND/OR ANY RELATED ACTION.

Dear Mr. Pennywell:

Per your request, the pay off of our advance to [redacted] is $4,776.99 **on or before September 01, 2005.** If it is paid after such date, please refer to the attached payment schedule. Please feel free to contact the undersigned if you have any further questions.

Sincerely,

Marc Waldman

PS: Please make the check payable to:

QuickCash, Inc.
304 Hudson Street, 7th FL
New York, NY 10013
ATTN: Kristina Melendez

SCHEDULE A

DISCLOSURE STATEMENT

Investment In Contingent Proceeds for [redacted]:	
Funding Date	2/11/2004
Growth Factor (Monthly Rate of Return)	4.99%
Annualized Rate of Return	79.38%
Minimum Number of Months	3.00
Advance	1,900.00
Less Processing Fee	250.00
Less Origination Fee	150.00
Net Advance to [redacted]	1,500.00

Amount to be paid by Seller to release Purchaser's Ownership Interest in the Proceeds on the following dates:

On or Before:	3/1/2004	Stub Period	2,275.10
On or Before:	4/1/2004	Month 1	2,275.10
On or Before:	5/1/2004	Month 2	2,275.10
On or Before:	6/1/2004	Month 3	2,275.10
On or Before:	7/1/2004	Month 4	2,388.63
On or Before:	8/1/2004	Month 5	2,511.90
On or Before:	9/1/2004	Month 6	2,641.52
On or Before:	10/1/2004	Month 7	2,773.34
On or Before:	11/1/2004	Month 8	2,916.46
On or Before:	12/1/2004	Month 9	3,061.99
On or Before:	1/1/2005	Month 10	3,220.00
On or Before:	2/1/2005	Month 11	3,386.17
On or Before:	3/1/2005	Month 12	3,543.62
On or Before:	4/1/2005	Month 13	3,726.49
On or Before:	5/1/2005	Month 14	3,912.44
On or Before:	6/1/2005	Month 15	4,114.35
On or Before:	7/1/2005	Month 16	4,319.65
On or Before:	8/1/2005	Month 17	4,542.57
On or Before:	9/1/2005	Month 18	4,776.29
On or Before:	10/1/2005	Month 19	5,015.36
On or Before:	11/1/2005	Month 20	5,274.18
On or Before:	12/1/2005	Month 21	5,537.37
On or Before:	1/1/2006	Month 22	5,823.13
On or Before:	2/1/2006	Month 23	6,123.63
On or Before:	3/1/2006	Month 24	6,408.36
On or Before:	4/1/2006	Month 25	6,739.07
On or Before:	5/1/2006	Month 26	7,075.35
On or Before:	6/1/2006	Month 27	7,440.48
On or Before:	7/1/2006	Month 28	7,811.76
On or Before:	8/1/2006	Month 29	8,214.89
On or Before:	9/1/2006	Month 30	8,638.82
On or Before:	10/1/2006	Month 31	9,069.90
On or Before:	11/1/2006	Month 32	9,537.95
On or Before:	12/1/2006	Month 33	10,013.90
On or Before:	1/1/2007	Month 34	10,530.67
On or Before:	2/1/2007	Month 35	11,074.11
On or Before:	3/1/2007	Month 36	11,589.03

After the period shown, please call for a Pay Off Amount, which continues to increase by the Growth Factor, compounded monthly

MONEY FOR LAWSUITS, dba QUICKCASH INC.
304 HUDSON STREET, 7TH FLOOR
NEW YORK, NY 10013
TELEPHONE 212.608.7372
FACSIMILE 212.608.6964

AJC

August 12, 2005

VIA FACSIMILE

Law Office of Franklin D. Azar & Associates
Attorneys at Law
14426 East Evans Avenue
Aurora, CO 80014
303-757-3300
303-759-5203 (fax)

Attn: Kenneth Pennywell

- Re: [redacted] ACCIDENT DATE 11/26/01 AND/OR ANY RELATED ACTION.

Dear Mr. Pennywell:

Per your request, the ***reduced*** pay off of our advance to [redacted] is **$4,000.00 on or before September 01, 2005.** If it is paid after such date, please refer to the attached payment schedule. Please feel free to contact the undersigned if you have any further questions.

Sincerely,

Marc Waldman

PS: Please make the check payable to:

QuickCash, Inc.
304 Hudson Street, 7th FL
New York, NY 10013
ATTN: Kristina Melendez

FM (Initials)

PERSONAL INJURY FUNDING
FUNDING AGREEMENT

My name is [redacted] and I reside at [redacted] Greeley CO 80631.

- I am accepting the sum of 1,500.00 from PERSONAL INJURY FUNDING (PIF), which I will use for immediate economic necessities.

- In consideration thereof, I am assigning an interest equal to the advanced amount, (as defined below) together with an accrued use fee and other fees or costs, from the proceeds of my lawsuit to PIF. The term "proceeds" shall include any money paid as a consequence of the lawsuit whether by settlement, judgment or otherwise. The monthly use fee shall be a charge in the amount of 4.99% per month of the total advanced amount, compounded monthly. This advanced amount includes a processing fee of 400.00. (Together, this makes my total advanced amount 1,900.00.) The fees are charged from this date until payments of proceeds are made to PIF. These amounts will be deducted from the proceeds of my lawsuit. If I recover money from my lawsuit, which is insufficient to pay the full amount due to PIF, then the recovery will be limited to the proceeds of the lawsuit.

- If I do not recover any money from my lawsuit then I owe Personal Injury Funding nothing.

- I hereby grant Personal Injury Funding a Security Interest and Lien in the amount of 1,900.00 plus usage fees increased by 4.99% per month from the date of this contract, compounded monthly.

- The "lawsuit" shall be the case of [redacted] and/or ANY RELATED ACTIONS / ACCIDENT DATE 11/26/2001.

- I hereby agree that I will not knowingly create additional liens against the proceeds without the prior written consent of Personal Injury Funding except those as may be necessary to the prosecution of the case and any medical expenses, treatment and related equipment that I may require. I specifically promise not to create any liens against the proceeds of the case as a result of any funding or advances that I might receive after the date of this agreement.

- Judiciary Law §489 prohibits "Champerty". Basically, champerty makes it illegal for an individual or company to acquire someone else's right to sue. In entering into this agreement, the parties acknowledge that Personal Injury Funding is in no way acquiring your right to sue; that you have already started the lawsuit that Personal Injury Funding in funding; that the lawsuit absolutely belongs to you and no one else; and that Personal Injury Funding will in no way be involved in the decisions that you and your attorneys(s) make in connection with the lawsuit.

- I have instructed my attorney to cooperate with you and to give you periodic updates of the status of my case as you request. If I change attorneys, I will notify you within

FM (Initials)

48 hours of the change, and provide you with the name, address and phone number of my new attorney.

- I again acknowledge that I hereby grant you a Lien and Security Interest in the proceeds of the lawsuit. The amount due you shall be withheld from any money collected as a result of this lawsuit and paid immediately upon collection to Personal Injury Funding. The amount due shall be paid immediately after my attorney fees (including the expenses charged by my attorney for costs) and after payment to any lien holders that might exist on the record as of this date, or which may have priority by law. I will not receive any money from the proceeds of the lawsuit until you have been paid in full. This shall also apply to any structured settlement of my lawsuit.

- I irrevocably direct my attorney, and any future attorney representing me in the lawsuit, to honor this lien. If Personal Injury Funding must engage the services of any attorney to collect the sum due, then I will be responsible for reasonable attorneys' fees and costs for such. I agree that a fee equal to one-third of the money due Personal Injury Funding is a reasonable fee for such purpose.

- I hereby waive any defense to payment of the sums due and promise not to seek to avoid payment of any money due to Personal Injury Funding under this Agreement.

- I will receive any notices required at the address I have first listed above. If I move, I will notify you within 72 hours of my new address.

- If any provision of this Agreement shall be deemed invalid or unenforceable, it shall not affect the validity or enforceability of any other provision hereof. This written agreement represents the entire agreement between the parties. If may only be modified in writing. This agreement takes precedence over any prior understandings, representations or agreements.

- I agree that any disputes that may arise out of this Agreement shall be adjudicated in either the Supreme Court, or the Civil Court in the County of Westchester. This agreement will be construed in accordance with the laws of the State of New York.

- This Agreement may be executed in separate counterparts. A Signature transmitted by fax shall be effective with the same force and effect as the original signature.

- This Agreement has been fully explained to me, and all questions that I might have about this transaction have been explained to me fully. This has been done in English, the language I speak best.

- I hereby accept Personal Injury Funding's funding as per the terms of this agreement, grant Personal Injury Funding a Security Interest and Lien as per the terms hereof, and assign the proceeds of my lawsuit to the extent specified in this agreement on this February 9, 2004.

FM (Initials)

- You have advised me to seek legal counsel of my own choosing prior to signing this Agreement. I have either received such counsel or expressly waive it.

- I may rescind this Agreement within 72 hours of this date, provided, however, that I return all money given to me by Personal Injury Funding simultaneously with my recission. I may do this by making personal delivery to Personal Injury Funding offices of: (a) the undeposited (or cashed) check that Personal Injury Funding gave to me; (b) a Certified bank check in the exact amount that Personal Injury Funding gave me; or (c) a Money Order in the exact amount that Personal Injury Funding gave me.

Dated: February 9, 2004

[redacted]

Client Name:(print) [redacted]

Client Name:(signature) [redacted]

Personal Injury Funding

By: Marc Waldman

NOTARY: [redacted]

[redacted]
NOTARY PUBLIC
STATE OF COLORADO
My Commission Expires May 22, 2004

LawCash
1-800-LAWCASH
(1-800-529-2274)
www.lawcash.net

LawCash Launches a New Program:
One Hour Funding

ONE HOUR FUNDING FOR LAWYERS AND THEIR CLIENTS

LawCash will advance a portion of any settlement at a small discount to the full value. This is equal to a monthly charge of $20.00 for each $1,000.00 advanced.

This program is available to both you and your client. The process is fast and convenient. With the holidays coming up, you can now have at your fingertips the cash you or your clients need within **one hour** after we verify the information listed below and receive the executed Funding Documents.

HOW MUCH WILL WE FUND?

1) Up to 50% of client's net settlement proceeds.

2) Up to 60% of attorney's fees on settled cases.

WHAT DO WE NEED TO GET STARTED?

1) A copy of the executed general release and your cover letter to the insurance company.

2) A letter on your stationery indicating the net amount due to you and/or your client after all attorney's fees, disbursements and liens are paid.

3) The amount requested by you or your client.

4) Fax the above to our 24 hour fax line (718) 875-0608.

APPLICATION FEES

There is a $125 application fee that will be due at time of distribution of settlement check.

Please contact us at 1-800-LawCash (1-800 529-2274) or fax us the required information to (718) 875-0608 so that we can fulfill your requirements.

LAWCASH FACTS

- Consumer Advisory Board consisting of twelve national and state trial lawyer ...sidents who oversee ...Cash's policies and ...cedures, chaired by Gary B. Pillersdorf (Past President, New York State Trial Lawyers Association)
- Offices Nationwide
- Ethical/Confidential
- One of the largest non-recourse funding companies in the U.S.
- Approved by ACORN, the largest membership organization of low and moderate-income families in the country.
- Preferred financial services vendor for Consumer Attorneys Association of Los Angeles (CAALA).
- A Founding Member and ...ld Member of the ...nership for Justice Fund ...th the NY State Trial Lawyers Association

1-800-LAWCASH
(1-800-529-2274)
www.lawcash.net

LawCash

LAWCASH ADVANCES MONEY AGAINST PENDING LAWSUITS.

LawCash understands your needs:

Funds all types of personal injury / negligence cases

Helps your client without affecting the outcome of your case

Gives your client the ability to level the playing field with defendant's insurance companies who are more financially secure and have the time/money to delay a proper settlement

Enables you as an attorney to proceed without time constraint in order to maximize settlement amount

LawCash understands your client's needs:

LawCash will advance up to 10% of the estimated value of the case

Minimum: $500 Maximum: $100,000

Non-recourse funding—If your client loses their case they will not owe LawCash anything

Significantly lower rates than similar companies (3%–4% per month)

Completely confidential / No credit check

Fast service—Because we understand the urgency and importance of your client's needs

LAWCASH FACTS

Approved by ACORN

Featured in; Crain's Business Weekly, The New York Times, The New York Amsterdam News, New York Daily News, LA Daily News and on New York Yankee Radio

A Founding Member of the Partnership for Justice Fund with the NY State Trial Lawyers Association

Offices Nationwide

Ethical / Confidential

One of the largest non-recourse plaintiff funding companies in the U.S.

Consumer Advisory Board consisting of nine national and state trial lawyer presidents who oversee LawCash's policy and procedures

GETTING STARTED

If you have clients that would like to apply for LawCash services, have them:

Call our local LawCash representative or 1.800.LAWCASH

Complete a brief application online at www.lawcash.net

LawCash will then fax a request to your office for specific materials necessary to evaluate the case

Upon receipt of those materials, LawCash will notify your office within 24-48 hours if your client is eligible for our services

Offices Nationwide:
1-800-LAWCASH
(1-800-529-2274)
www.lawcash.net

BridgeFunds

Funding to give good people the strength to stand up to deep-pocketed defendants.

bridge funds

13911 Ridgedale Drive, Suite 110
Minnetonka, MN 55305

bridge funds

Funding for Claimants.

Buy more time so you can settle on your terms.
Not theirs.

It's true: Time is money. So if you can present a smart way for your clients to fight for what's right, chances are you may win a larger recovery for your client. And that's where we can help.

Introducing BridgeFunds.

At BridgeFunds, we provide clients involved in civil disputes needed funds to cover living expenses, credit card payments, medical bills and any other expenses to give you the extra time you may need to negotiate the best possible settlement.

BridgeFunds relieves the pressure on your clients to settle early and helps reduce the anxiety and financial strain that comes from lost or reduced wages or tapping into cash reserves. And because the funds are non-recourse and repayment is secured through the settlement, an advance from BridgeFunds does not affect your client's credit history.

Why settle for less?
BridgeFunds lets you level the playing field. Our advance gives your client staying power to help make sure they receive the settlement they're entitled to. Funds from $2,000 to $100,000 can be advanced in a lump sum or in periodic payments over the course of the claim process. We offer quick turnaround – usually 48 hours from receipt of a complete file – and there's no application fee. The entire process is completely confidential. We're professional, easy to work with and typically require less than 15 minutes of your time.

BridgeFunds is not involved in any aspect of the case. When you win, we win.
At BridgeFunds, we can advance funds on just about any civil action to give your client more time to settle for a bigger award against high-powered defendants.

Civil cases include:
- Personal Injury
- Product Liability
- Maritime / Railroad
- Workers' Compensation
- Wrongful Death
- Medical Malpractice
- Commercial
- Wrongful Terminations
- Construction Negligence
- Sexual Harassment
- Employment Discrimination

Why us? Why not?
"BridgeFunds is quick, efficient and professional. Many of my clients need a financial alternative and BridgeFunds can fill that void. It gives me the time to get my client's case settled for the largest amount possible. I definitely recommend BridgeFunds."

Ronald F. Meuser, Jr.
Attorney

"I called my attorney daily looking to settle so that I could have something to live on; he asked me to hang on and presented BridgeFunds as an option. It turned out to be the right thing."

Karen Hendrickson
Client

"I was completely ground down by the process. My settlement was taking much longer than we thought; it wasn't my attorney's fault. BridgeFunds gave me a way to hang on for a better settlement."

Linda Miller
Client

It's easy for your clients to apply.
1) Call **952-417-8000** or toll-free **1-866-417-8001**
2) E-mail us at **info@bridge-funds.com**
3) Visit us online at **www.bridge-funds.com**

Once all the documentation is received, we can respond with an answer within 48 hours and funds can be made available immediately.

The advance is repaid out of the settlement proceeds and the net result can be a significant increase in your client's financial settlement.

We're not a bank. Our funds are non-recourse so our fees vary depending upon the risk of a particular claim. As a result, we evaluate each case individually and will tailor fees based upon the particular circumstances of the case. We offer flexible terms to maximize the size of the settlement for your client and there are no up-front fees or monthly payments to worry about. The bottom line: You and your client both win by buying more time to pursue a larger settlement.

ABOUT US

The Whitehaven Group is a leader in pre-settlement funding for personal injury and other types of pending cases. Since 1999, the principals of Whitehaven have invested millions of dollars in pending litigation. We have a knowledgeable staff of highly trained attorneys. We provide multiple funding options to meet your clients' needs and can approve your client's request the same day the supporting documentation is provided to us. Our staff of attorneys and other personnel makes the process simple and easy for both you and your clients.

- IMMEDIATE CASH FOR NEEDY CLIENTS
- COMPETITIVE RATES
- SAME DAY APPROVAL
- A KNOWLEDGEABLE/ PROFESSIONAL STAFF
- WE ACCEPT ALL CASES, LARGE OR SMALL

TWG THE WHITEHAVEN GROUP

EMPIRE STATE BUILDING
350 FIFTH AVENUE, SUITE 7415
NEW YORK, NY 10118

*****AUTO**MIXED AADC 100
Kenneth Pennypill
Franklin Azar Attorney at Law
144-26 East Evan Avenue
Aurora, CO 80014-1480

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U.S. POSTAGE
PAID
NEW YORK, NY
PERMIT NO. 4666

THE WHITEHAVEN GROUP

A leader in litigation funding.

Case No. 578

Ms. X, a single mother of a college student, was involved in an accident and could not return to work. She used her savings and could no longer afford to assist her daughter with her college tuition. Her daughter was about to be forced to leave school. Her mother knew that once she left school, she most likely would not return and was greatly disturbed by this. She contacted us and we contacted her attorney. The day after her attorney provided us with the documents to review her claim, she was approved for the necessary advance funding and received her check so that her daughter could cont[illegible]er education.

TWG THE WHITEHAVEN GROUP

EMPIRE STATE BUILDING
350 FIFTH AVENUE, SUITE 7415
NEW YORK, NY 10118

WE ADVANCE FUNDS AGAINST ALL TYPES OF PENDING CASES INCLUDING:

- MOTOR VEHICLE ACCIDENTS
- SLIP/TRIP AND FALL ACCIDENTS
- PREMISES LIABILITY
- DEFECTIVE SIDEWALK AND STAIRWAY CASES
- ELEVATOR MALFUNCTIONS
- CONSTRUCTION ACCIDENTS
- MEDICAL MALPRACTICE
- PRODUCTS LIABILITY
- COMMERCIAL LITIGATION
- CLASS ACTION LITIGATION

Has your personal injury client ever asked y for a loan or an advance against a pending case?

Have you ever found yourself in the uncomfortable position of having to reject your client's request for emergency funding due to your state's ethical rules?

Has your clients' difficult financial situation ever caused them to pressure you to accept a lower settlement when you know you could have obtained a much better settlement had they been able to wait out the litigation process?

THE WHITEHAVEN GROUP HAS THE SOLUTIONS FOR THESE PROBLEMS

The Whitehaven Group provides immediate money to personal injury victims with pending lawsuits or claims. In exchange for the advance provided, we generally will receive an agreed-upon sum of money at the conclusion of the case, but only if the case is ultimately successful. If the case is lost, your client is not obligated to repay any money. We require your client to sign an agreement acknowledging all of the terms of the transaction as well as a Lien. We will also request you to sign an acknowledgement of the Lien, which is basically in the same form and serves the same function as doctor liens.

Our decision whether to fund your client's case will be made within hours of receipt of the appropriate information and documentation from you.

TWG THE WHITEHAVEN GROUP

Call: 800-951-0025

WE RESPECT YOUR VALUABLE TIME.

We have an expedited funding process for attorneys. You simply call us directly and provide a simple oral presentation of the facts. On many occasions, we will be able to approve the funding based upon your presentation and a minimum of documentation. This will permit quick funding decisions and reduce unnecessary delays for all parties involved.

For more substantial cases, we have programs which provide monthly financial assistance to help your clients meet necessary living expenses until their cases are resolved.

If your client has emergency funding needs during the pendency of a lawsuit and has no place else to turn for money, The Whitehaven Group is available to immediately meet your client's needs.

QUESTION: May an attorney ethically refer a client to our company?

ANSWER: Yes. In almost every state it is permissible for an attorney to refer or recommend clients to a company which provides immediate funding against a pending claim.

QUESTION: Do we have any right to participate in the case?

ANSWER: No. We have no right to participate in or have any input whatsoever in the processing of the case, settlement negotiations, the amount or timing of settlement, approval of settlement or any strategy related to the case. Only you and your client will have any say regarding these matters.

CASE EXAMPLES

Case No. 704

Mr. P was injured in an automobile accident and sustained serious back injuries. His financial situation became so bad that he was unable to pay his bills and maintain his household. His family was in danger of eviction. When Mr. P and his attorney learned about our services, they immediately called to see if we could help. His attorney gave us the facts of the case and supportive documentation and Mr. P was immediately approved for emergency funding. Mr. P picked up his check that same day. We also arranged to provide financial assistance to Mr. P monthly for over two (2) years to help him provide for his family.

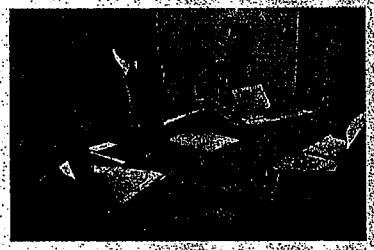
Case No. 344

Ms. P had a case pending against the City of New York. The City made a $75,000 offer approximately six months prior to trial. The attorney knew the case was worth much more but the client needed $5,000 immediately and wanted her attorney to take this low ball offer.The attorney called us, explained the facts, and asked if we could help the client with a $5,000 advance so she could hold out until he could get her a fair offer and make her more money. We provided the $5,000 cash advance to the client within days. Six months later her case settled for $175,000.

LawCapital Enterprises, LLC

Our firm helps to provide non- recourse venture capital type financing to accident victims and attorneys nationwide. Call us after you have exhausted all other avenues such as credit cards, banks and family. There are no monthly payments to make and bad credit is no problem. If you don't win your case, you owe NOTHING and get to keep the advance.

Please contact us or have your attorney call us today and we will be happy to explain our program in more detail.



Get money when you need it most– NOW!

LawCapital Enterprises, LLC
110 Columbia Street
Vancouver, WA 98660

LAWCAPITAL
ENTERPRISES, LLC

Injured? In a Lawsuit? Need Money Now? We Can Help!

Low Rates and Fast Processing

Funding Solutions for Accident Victims and Attorneys.

Plaintiff Advances
Expert Witness Expenses
Medical Procedure Funding
Attorney Funding

Tel: (800) 568-8321
Fax: (800) 630-2473
www.lawcapital.net

LAWCAPITAL
ENTERPRISES, LLC

Please call toll-free
1-800-568-8321

If you are a personal injury victim with a pending lawsuit, you already know that the legal process can be a long one. Unfortunately, that often hinders one's ability to obtain the justice the legal system is designed to provide. Burdened by pressing personal financial needs, many plaintiffs are forced to accept unfairly small settlement offers. But not anymore! Law-Capital Enterprises, LLC (LCE) is committed to helping you stay in the case by assisting you with a cash advance that will allow you to meet your financial needs and give your attorney the time to negotiate a fair and equitable settlement of your case, free of external financial pressures. LCE can also provide assistance with the litigation costs of your case such as retaining expert witnesses, which allows your attorney to prepare the case in a manner that will ensure the best possible settlement. Additionally, LCE can also secure financing for your surgical procedures allowing you to choose the surgeon of your choice.

Types of Cases Considered:

If you have a strong claim in any of the following areas, LawCapital Enterprises, LLC can get you the funds necessary to help you stay in the case* :

Personal Injury (Auto, Slip & Fall, etc.)
Commercial Litigation
Negligence, including Medical Malpractice
Wrongful Death
Product Liability
Premise Liability
Class Action (Fen Phen, Asbestos, etc.)
Maritime Cases (Jones Act)
Workers Compensation (Third Party Claims)
Railroad Cases (FELA)

Our Procedure

The process is simple. There are no lengthy applications, credit checks or employment verifications. If you have a pending lawsuit and are represented by legal counsel, simply complete the application form and fax/mail it back to us. We'll do the rest. Once we receive the necessary information from your attorney, a determination will be made on whether your case satisfies underwriting criteria. The average funding time is within 48 hours after we receive your case information. (*Service not available in Ohio)

Capital to balance the scales of justice.

Client Application

(Please Print) All information is strictly confidential
*Please complete and fax to: **(800) 630-2473***

1. Your Full Name: _____
2. Address: _____
City: _____ State: _____ Zip: _____
3. Tel: #: _____
4. Date of Birth: ____/____/____
5. Social Security #: _____
(For identification purposes only. No credit check is required.)
6. Type of Case: _____
7. Please Describe Your Injuries: _____
_____
_____
8. Amount of Money Requested: _____
9. Your Attorney Information:
Name: _____
Firm Name: _____
Address: _____
City: _____ State: _____ Zip: _____
Tel: #: _____ Fax: _____

Records & Information Release

I hereby authorize and direct my attorney of record _____ in my case, to cooperate and release all necessary and requested information and documents to LawCapital Enterprises, LLC its representatives, agents and affiliates. I understand that the requestor reserves the right to broker, fund or co-fund through other sources, however, all information will be treated as privileged and confidential and will only be used in the limited capacity of underwriting my claim or lawsuit in consideration for a financial advance and will not be further used or disclosed unless so instructed by myself, my counsel or a lawful court order.

Signature: _____
Date: _____

What can I his money for?

Anything you need. WestCoast Associates does not limit your use of these funds in any way. Former clients have used their advances for.

- CONTINUED LITIGATION EXPENSES
- MEDICAL BILLS
- SURGERY COSTS
- PROPERTY DAMAGE COST
- LOST WAGES SUPPLEMENT
- CAR RENTAL
- NEW CAR PURCHASE
- GENERAL NEEDS

We are an advance funding company servicing Colorado. Our specialty is advancing funds to individuals who have suffered as a result of someone else's negligence. We provide funds to be used by individuals to pay their bills, cover their lost wages and to make their litigation time as easy as possible. We strive to provide prompt and hassle free service to all our clients.

720-275-6196

17

- HASSLE FREE ADVANCE
- NO PAYMENT DUE UNTIL CASE SETTLES
- NO LONG APPLICATION
- NO JOB CHECK
- NO CREDIT CHECK

Not All Applicants May Qualify

WestCoast Associates
P.O. BOX 110306 Aurora, CO 80042-0306

Settlement Pen[illegible]ng?

GET CA$H NOW!

WestCoast Associates

720-275-6196

www.wefundnow.net

We Understand

WestCoast Associates understands:

We help our clients with their financial needs without affecting the outcome of the case.

We provide our clients with financial assistance so they are able to take the appropriate amount of time to obtain a fair settlement.

We give our clients' attorney the freedom to work with their clients to maximize their settlements without the worries of financial restraints.

We finance all types of personal injury cases.

We understand the urgency and importance of our client's needs; we strive to have a turn around rate of 24 to 48 hours, whenever possible.

720-275-6196

www.wefundnow.net

WestCoast Associates

P.O. BOX 110306 Aurora, CO 80042-0306

To Get an Advance

1. The individual requesting funds can complete an over the phone application with a live representative from our company, or submit an online application.

2. With our clients permission, one of our management staff will contact the attorney representing the client. We may request certain information, if the client was not able to provide that information.

3. Upon careful review, WestCoast Associates will determine the eligibility of the client and the amount of the advance, if qualified.

4. We will contact the client and his/her attorney to notify them of our decision.

5. If both parties agree to the terms and conditions, we will deliver the contract to both our client and their attorney.

6. Upon the receipt of a signed contract of both parties we will promptly deliver the funds.

7. During the litigation process we do request that any up to date information be reported to us by either our client or their attorney.

FAQ'S

Is this a loan?

No, we advance money on the future value of your personal injury case. Unlike a loan we do not require any collateral, credit checks or current employment.

Do I owe any up front fees or hidden costs?

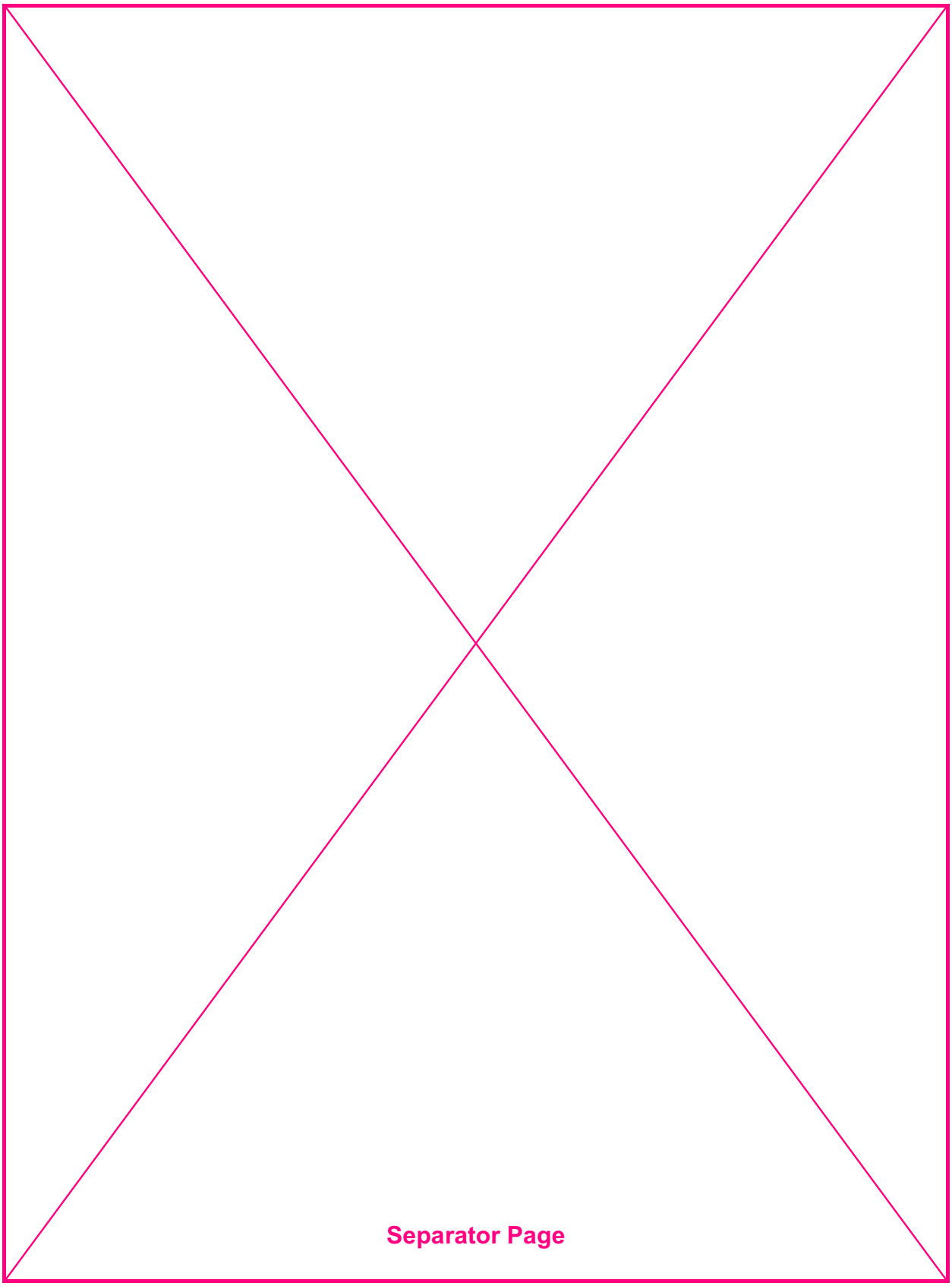
No, we do not charge application fees and all payments due to WestCoast Associate are paid when the case is settled and the proceeds are distributed by your attorney as stated in your contract.

How much can I qualify for?

The minimal advance amount is $500, but depending on your case you may qualify for up to $100,000. All requests are reviewed on a case by case basis. There is no guarantee of advance.

Is this service expensive?

Yes, we encourage you to find other means of financing your immediate economic situation. Yes, we take extremely high risk in providing funding based on the future value of your pending personal injury case. As a result, our fees are high.
Our fee is charged quarterly, but **ONLY** on the initial amount advanced. Payment to be made once the case is settled.



Separator Page

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

AGENDA

April 27, 2006, 2:00 p.m.
Supreme Court Conference Room

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1. Approval of minutes [To be distributed separately]
2. Administrative matters
   a. Resignation of John Richilano [See page 1]
   b. Select next meeting date
3. New Comment to Rule 6.1 – Michael Berger [See pages 14-22 from March 3, 2006 meeting materials; attached pages 2-15]
4. Discussion of CLE programs related to proposed amendments
5. Formation of new subcommittee to work with Civil Rules Committee on proposed amendments to CRCP 265 [See pages 23-29 from March 3, 2006 meeting materials; attached page 16]
6. Report from Technology Subcommittee – Dick Reeve
7. Report from Subcommittee on Financial Assistance to Clients – Alec Rothrock [See pages 30-48 from March 3, 2006 meeting materials; attached pages 17-28]
8. Report from Rule 1.4 Subcommittee (Disclosure of Insurance Coverage) – Eli Wald
9. New Business
10. Adjournment (by 4:00 p.m.)

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

FILE NOTE

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

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

RICHILANO & GILLIGAN, P.C.
ATTORNEYS AT LAW

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jmr@rglawoffice.net

Marci A. Gilligan
mgilligan@rglawoffice.net

655 17th Street, Ste. 1700
Denver, CO 80202

Phone (303) 893-8000
Fax (303) 893-8055

March 6, 2006

Marcy G. Glenn, Esq.
Holland & Hart LLP
P.O. Box 8749
Denver, CO 80201

Re: Standing Committee on the Colorado Rules of Professional Conduct

Dear Marcy:

With regret, I am tendering my resignation from the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct. The work of the Standing Committee is much too important to suffer my spotty attendance, which has been a professional embarrassment to me -- especially in light of the tireless efforts of members such as Mike Berger. However, my case commitments have reached a point where I simply cannot devote the time necessary to support your leadership of this committee. It would be unfair to the committee and the Court (specifically Justice Bender, who recommended my appointment), for me to continue.

I look forward to the next time I can work with you and the others in a similar endeavor, at which time I hope I can be of greater service.

Very truly yours,

John M. Richilano

cc: Hon. Michael L. Bender

DRAFT DATED APRIL 11, 2006

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

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

April ___, 2006

The Standing Committee on the Colorado Rules of Professional Conduct ("Standing Committee") submitted its Report and Recommendations ("Report") to the Court on December 30, 2005. On November 23, 2005, the Court entered an Order adding a "Recommended Model Pro Bono Policy for Colorado Attorneys and Law Firms" ("Pro Bono Policy") to the Comment to Colo.RPC 6.1. The Court had not requested the Standing Committee's views or comments on the Pro Bono Policy, and the Standing Committee was unaware of the Pro Bono Policy when it completed its deliberations on the ABA Ethics 2000 Model Rules of Professional Conduct. See Report and Recommendations at 101, n. 8.

Following the submission to the Court of its Report, the Standing Committee decided to perform a limited review of the Pro Bono Policy. Many members of the Standing Committee voiced concerns regarding the philosophy underlying and substance of the Pro Bono Policy, as well as about the procedures followed in adopting the Pro Bono Policy—specifically, the Court's decision not to seek the

views of the Standing Committee before adopting the Pro Bono Policy. However, the Standing Committee determined not to address the wisdom of the Pro Bono Policy, but to review only the form and format of the Pro Bono Policy, primarily with a view toward resolving any inconsistencies with the recommendations previously made by the Standing Committee in its Report.

The Standing Committee recommends that the Preface and text of the Pro Bono Policy (with the changes shown on Appendix A to this Supplemental Report) be placed in an appendix to the Rules of Professional Conduct, rather than in the Comment to Rule 6.1.[1] The Standing Committee further proposes that a brief reference to the Pro Bono Policy be placed in a new Comment [12] to Rule 6.1.[2] These proposed changes accomplish two salutary goals. First, the format of the Model Rules and Comments is thereby preserved. Second, the new Comment directs the reader to the Pro Bono Policy without including a very lengthy policy statement in the Comment itself.

The Pro Bono Policy defines the recipients of the pro bono services in several different, and conflicting, ways. The Preface speaks of "indigent persons". The Pro Bono Policy itself describes the recipients alternately as "persons of limited means," "indigent members of the community," "near-indigent members of the community," and "low income persons". None of these terms is defined. The text of Rule 6.1, as promulgated by the ABA, and as recommended to the Court by

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[1] Appendix A to this Supplemental Report is marked to show the changes recommended by the Standing Committee to the present form of the Pro Bono Policy, as it now appears in the Comment to Colo.RPC 6.1.

[2] Appendix B to this Supplemental Report contains the text of Rule 6.1 and its Comment, as previously proposed by the Standing Committee, with the addition of the new proposed Comment [12].

the Standing Committee, speaks of "persons of limited means." The Standing Committee believes that the terms "indigent" and "near indigent" are underinclusive of the universe of persons that may need pro bono legal services. Accordingly, the Standing Committee recommends that the term "persons of limited means" be used uniformly throughout the Comment to Rule 6.1 and the Pro Bono Policy.

The Introduction portion of the Pro Bono Policy incorrectly quotes the current version of the Preamble to the Rules of Professional Conduct. On the assumption that the Court will adopt the revised Preamble previously recommended by the Standing Committee, the Introduction has been rewritten to correctly quote the proposed Preamble.

The Standing Committee also recommends that Section V. H. of the Pro Bono Policy be revised to reflect the changes recommended in Proposed Rule 1.8(e). Under Current Rule 1.8(e) a lawyer may not relieve the client of the responsibility to pay the costs of litigation unless "it is or becomes apparent that the client is unable to pay such expenses without suffering substantial financial hardship." Proposed Rule 1.8(e) relaxes this restriction and permits a lawyer to agree in advance to forego reimbursement of the expenses of the litigation regardless of the client's financial situation. On the assumption that the Court will adopt Proposed Rule 1.8(e), Section V.H. has been redrafted.

Finally, the Standing Committee notes that the categories of pro bono services defined in Section III of the Pro Bono Policy are inconsistent with the definition of pro bono activities contained in both Current and Proposed Rule 6.1. The Standing Committee suggests that the Court expand the categories listed in the

Pro Bono Policy to include all of those listed in the Rule. This proposed change has not been made in Appendix A to this Supplemental Report.

APPENDIX A TO SUPPLEMENTAL REPORT

Marked to Show Changes from the Pro Bono Policy as it Presently Exists

~~COLORADO RULES OF CIVIL PROCEDURE~~

~~APPENDIX TO CHAPTERS 18 TO 20~~
~~COLORADO RULES OF PROFESSIONAL CONDUCT~~
~~Rule 6.1. Voluntary Pro Bono Public Service~~
~~This Comment Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms is to be Added to the Existing Comment in Rule 6.1. Voluntary Pro Bono Public Service~~

~~The Recommended Additional comment is Adopted by the Court November 23, 2005, effective immediately.~~

Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms

Preface. Providing pro bono legal services to ~~indigentpersons~~persons of limited means and organizations serving ~~indigent~~ persons of limited means is a core value of Colorado licensed attorneys enunciated in Colorado Rule of Professional Conduct 6.1. Adoption of a law firm pro bono policy will commit the firm to this professional value and assure attorneys of the firm that their pro bono work is valued in their advancement within the firm.

The Colorado Supreme Court has adopted the following recommended Model Pro Bono Policy that can be modified to meet the needs of individual law firms. References are made to provisions that may not apply in a small firm setting. Adoption of such a policy is entirely voluntary.

At the least, a pro bono policy would:

(1.) Clearly set forth an aspirational goal for attorneys, as well as the number of hours for which billable credit will be awarded for firms that operate on a billable hour system (the attached model policy uses the figure of at least 50 hours per attorney per year, which mirrors the aspirational goal set out in Rule 6.1 of the Colorado Rules of Professional Conduct);

(2.) Demonstrate that pro bono service will be positively considered in evaluation and compensation decisions; and

(3.) Include a description of the processes that will be used to match attorneys with projects and monitor pro bono service, including tracking pro bono hours spent by lawyers and others in the firm.

The Colorado Supreme Court will recognize those firms that make a strong commitment to pro bono work by adopting a policy that includes:

(1.) An annual goal of performing 50 hours of pro bono legal service by each Colorado

licensed attorney in the firm, pro-rated for part-time attorneys, primarily for ~~indigent~~ persons of limited means and/or organizations serving ~~indigent~~ persons of limited means consistent with the definition of pro bono services as set forth in this ~~the Colorado Supreme Court's~~ Model Pro Bono Policy, and

(2.) A statement that the firm will value at least 50 hours of such pro bono service per year by each Colorado licensed attorney in the firm, for all purposes of attorney evaluation, advancement, and compensation in the firm as the firm values compensated client representation.

The Colorado Supreme Court will also recognize on an annual basis those Colorado law firms that voluntarily advise the Court by February 15 that their attorneys, on average, during the previous calendar year, performed 50 hours of pro bono legal service, primarily for ~~indigent~~ persons of limited means or organizations serving ~~indigent~~ persons of limited means consistent with the definition of pro bono services as set forth in this ~~the Colorado Supreme Court's~~ Model Pro Bono Policy.

Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms

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I. Introduction

The firm recognizes that the legal community has a unique responsibility to ensure that all citizens have access to a fair and just legal system. In recognizing this responsibility, the firm encourages each of its attorneys to actively participate in some form of pro bono legal representation.

This commitment mirrors the core principles enunciated in the Colorado Rules of Professional Conduct:

~~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 devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest. . . . 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.(Preamble, Colorado Rules of Professional Conduct).~~

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. . . . 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. (Preamble, Colorado Rules of Professional Conduct).

The firm understands there are various ways to provide pro bono legal services in our community. In selecting among the various pro bono opportunities, the firm encourages and expects that attorneys (both partners and associates or other designation) will devote a minimum of fifty (50) hours each year to pro bono legal services, or a proportional amount of pro bono hours by attorneys on alternative work schedules. In fulfilling this responsibility, firm attorneys should provide a substantial majority of the fifty (50) hours of pro bono legal services 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. (Colorado Rule of Professional Conduct). The firm strongly believes that this level of participation lets our attorneys make a meaningful contribution to our legal community, and provides important opportunities to further their professional development.

II. Firm Pro Bono Committee/Coordinator (see suggested change for small firms below)

The firm has established a Pro Bono Committee responsible for implementing and administering the firm's pro bono policies and procedures. The Pro Bono Committee consists of a representative group of attorneys of the firm. In addition, the firm has designated a Pro Bono Coordinator. The Pro Bono Committee/Pro Bono Coordinator has the following principal responsibilities:

1 Encouraging and supporting pro bono legal endeavors;
2 Reviewing, accepting and/or rejecting pro bono legal projects;
3 Coordinating and monitoring pro bono legal projects, ensuring, among other things, that appropriate assistance, supervision and resources are available;
4 Providing periodic reports on the firm's pro bono activities; and
5 Creating and maintaining a pro bono matter tracking system.

Attorneys are encouraged to seek out pro bono matters that are of interest to them.

[Small firms may wish to designate only a Pro Bono Coordinator and can introduce the above paragraph as follows: "The firm has designated a Pro Bono Coordinator responsible for implementing and administering the firm's pro bono policies and procedures" and then delete the next two sentences.]

III. Pro Bono Services Defined

The foremost objective of the firm pro bono policy is to provide legal services to ~~indigent or near-indigent members of the community~~ persons of limited means and the nonprofit organizations that assist them, in accordance with Rule 6.1 of the Colorado Rules of Professional Conduct. The firm recognizes there are a variety of ways in which the firm's attorneys and paralegals can provide pro bono legal services in the community. The following, while not intended to be an exhaustive list, reflects the types of pro bono legal services the firm credits in adopting this policy:

A. **Representation of Low Income Persons.** Representation of individuals who cannot afford legal services in civil or criminal matters of importance to a client;

B. **Civil Rights and Public Rights Law.** Representation or advocacy on behalf of individuals or organizations seeking to vindicate rights with broad societal implications (class action suits or suits involving constitutional or civil rights) where it is inappropriate to charge legal fees; and

C. **Representation of Charitable Organizations.** Representation or counseling to charitable, religious, civic, governmental, educational, or similar organizations in matters where the payment of standard legal fees would significantly diminish the resources of the organization, with an emphasis on service to organizations designed primarily to meet the needs of persons of limited income or improve the administration of justice.

D. **Community Economic Development.** Representation of or counseling to micro-entrepreneurs and businesses for community economic development purposes, recognizing that business development plays a critical role in low income community development and provides a vehicle to help low income individuals to escape poverty;

E. **Administration of Justice in the Court System.** Judicial assignments, whether as pro bono counsel, or a neutral arbiter, or other such assignment, which attorneys receive from courts on a mandatory basis by virtue of their membership in a trial bar;

F. **Law-related Education.** Legal education activities designed to assist individuals who are low-income, at risk, or vulnerable to particular legal concerns or designed to prevent social or civil injustice.

G. **Mentoring of Law Students and Lawyers on Pro Bono Matters.** Colorado Supreme Court Rule 260.8 provides that an attorney who acts as a mentor may earn two (2) units of general credit per completed matter in which he/she mentors a law student. An attorney who acts as a mentor may earn one (1) unit of general credit per completed matter in which he/she mentors another lawyer. However, mentors shall not be members of the same firm or in association with the lawyer providing representation to the ~~indigent~~ client of limited means.

Because the following activities, while meritorious, do not involve direct provision of legal services to the poor, the firm will not count them toward fulfillment of any attorney's, or the firm's, goal to provide pro bono legal services to ~~indigent~~ persons or limited means or to nonprofits that serve such persons' needs: participation in a non-legal capacity in a community or volunteer organization; services to non-profit organizations with sufficient funds to pay for legal services as part of their normal expenses; client development work; non-legal service on the board of directors of a community or volunteer organization; bar association activities; and non-billable legal work for family members, friends, or members or staff of the firm who are not eligible to be pro bono clients under the above criteria.

IV. Firm Recognition of Pro Bono Service (see suggested change for small firms below).

A. Performance Review and Evaluation. The firm recognizes that the commitment to pro bono involves a personal expenditure of time. In acknowledgment of this commitment and to support firm goals, an attorney's efforts to meet this expectation will be considered by the firm in measuring various aspects of the attorney's performance, such as yearly evaluations and bonuses where applicable. An attorney's pro bono legal work will be subject to the same criteria of performance review and evaluation as those applied to client-billable work. As with all client work, there should be an emphasis on effective results for the client and the efficient and cost-effective use of firm resources.

B. Credit for Pro Bono Legal Work. The firm will give full credit for at least fifty (50) hours of pro bono legal services, and additional hours as approved by the Pro Bono Committee and/or Coordinator, in considering annual billable hour goals, bonuses and other evaluative criteria based on billable hours.

[Small firms may wish to only include the following paragraph in lieu of the above provisions: The firm recognizes that the commitment to pro bono involves a personal expenditure of time. In acknowledgment of this commitment and to support firm goals, your pro bono service will be considered a positive factor in performance evaluations and compensation decisions and will be subject to the same criteria of performance review and evaluation as those applied to client-billable work. As with all client work, there should be an emphasis on effective results for the client and the efficient and cost-effective use of firm resources.]

V. Administration of Pro Bono Service (see suggested change for small firms below).

A. Approval of Pro Bono Matters. The Pro Bono Committee/Coordinator will review all proposed pro bono legal matters to ensure that:

1 There is no client or issue conflict or concern;
2 The legal issue raised is not frivolous or untenable;
3 The client does not have adequate funds to retain an attorney and
4 The matter is otherwise appropriate for pro bono representation.

All persons seeking approval of a pro bono project must: (1) submit a request identifying the client and other entity involved; (2) describe the nature of the work to be done; and (3) identify who will be working on the matter. Once the firm undertakes a pro bono matter, the matter is treated in the same manner as the firm's regular paying work.

B. Opening a Pro Bono Matter. It is the responsibility of the attorney seeking to provide pro bono legal services to complete the conflicts check and open a new matter in accordance with regular firm procedures.

C. Pro Bono Engagement Letter. After a matter has received initial firm approval, the principal attorney on a pro bono legal matter must send an engagement letter to the pro bono client. Typically, the engagement letter should be sent after the initial client meeting during which the nature and terms of the engagement are discussed.

D. Staffing of Pro Bono Matters. Pro bono legal matters are initially staffed on a voluntary basis. It may become necessary to assign additional attorneys to the matter if the initial staffing arrangements prove to be inadequate, and the firm reserves the right to make such assignments.

E. Supervision of Pro Bono Matters. As appropriate, partner shall supervise any associate working on a pro bono legal matter and the supervising partner shall remain informed of the status of the matter to ensure its proper handling. In addition, it may be appropriate to use assistance or resources from outside the firm. The firm will assist attorneys in finding a supervisor if necessary.

F. Professional Liability Insurance. Attorneys may provide legal assistance through those pro bono organizations that provide professional liability insurance for their volunteers. The firm also carries professional liability insurance for its attorneys in instances where no coverage is available on a pro bono matter through a qualified legal aid organization. Before undertaking any pro bono legal commitments, the professional liability implications should be reviewed with the Pro Bono Committee or the Pro Bono Coordinator.

G. Paralegal Pro Bono Opportunities. Approved pro bono legal work for paralegals includes: (1) work taken on in conjunction with and under the supervision of an attorney working on a specific pro bono legal matter, or (2) work handled independently for an organization that provides pro bono legal opportunities, provided, however, that such participation does not create an attorney-client relationship and/or involve the paralegal's provision of legal advice.

H. Disbursements in Pro Bono Matters. The firm can and should bill and collect disbursements in pro bono legal matters where it is appropriate to do so based on the client's resources. The firm encourages attorneys to pursue petitions for the waiver of filing fees in civil matters (Chief Justice Directive 98-01) when applicable, and to use pro bono experts, court reporters, investigators and other vendors when available to minimize expenses in pro bono legal matters. The firm may advance or guarantee payment of incidental litigation expenses, and may agree that the repayment of such expenses may be contingent upon the outcome of the matter in accordance with Colo.RPC 1.8(e), ~~provided the client agrees to be ultimately responsible for them. However, the firm may later forego repayment of such expenses if such repayment would cause the client substantial financial hardship. (Colo. Rule of Professional Conduct 1.8(e)).~~ The Pro Bono Committee/Pro Bono Coordinator must approve in advance any expense of a non-routine, significant nature, such as expert fees or translation costs. The supervising partner in a pro bono legal

matter should participate in decisions with respect to disbursements.

I. Attorney Fees in Pro Bono Matters. The firm encourages its attorneys to seek and obtain attorney fees in pro bono legal matters where possible. In the event of a recovery of attorney fees, the firm encourages the donation of these fees to an organized non-profit entity whose purpose is or includes the provision of pro bono representation to ~~indigent or near-indigent~~ persons of limited means.

J. Departing Attorneys. When an attorney handling a pro bono case leaves the firm, he or she should work with the Pro Bono Committee/Coordinator to (1) locate another attorney in the firm to take over the representation of the pro bono client, or (2) see if the referring organization can facilitate another placement.

****[Small firms may wish to title this section "Pro Bono Procedures" and include only the following paragraph in lieu of the above provisions:** All pro bono legal matters will be opened in accordance with regular firm procedures, including utilization of a conflicts check and a client engagement letter. Pro bono matters should be supervised by a partner, as appropriate. The firm encourages its attorneys to seek and obtain attorney fees in pro bono legal matters whenever possible.]

VI. CLE Credit for Pro Bono Work

Colorado Rule of Civil Procedure 260.8 provides that attorneys may be awarded up to nine (9) hours of CLE credit per three-year reporting period for: (1) performing uncompensated pro bono legal representation on behalf of ~~indigent or near-indigent~~ clients of limited means in a civil legal matter, or (2) mentoring another lawyer or law student providing such representation.

A. Amount of CLE Credit. Attorneys may earn one (1) CLE credit hour for every five (5) billable-equivalent hours of pro bono representation provided to the ~~indigent~~ client of limited means. An attorney who acts as a mentor may earn one (1) unit of general credit per completed matter in which he/she mentors another lawyer. Mentors shall not be members of the same firm or in association with the lawyer providing representation to the ~~indigent~~ client of limited means. An attorney who acts as a mentor may earn two (2) units of general credit per completed matter in which he/she mentors a law student.

B. How to Obtain CLE Credit. An attorney who seeks CLE credit under CRCP 260.8 for work on an eligible matter must submit the completed Form 8 to the assigning court, program or law school. The assigning entity must then report to the Colorado Board of Continuing Legal and Judicial Education its recommendation as to the number of general CLE credits the reporting pro bono attorney should receive.

~~Amended and adopted by the Court, En Banc November 23, 2005, effective immediately. Justice Coats would not adopt the additional comment to RPC 6.1.~~

~~BY THE COURT:~~

~~Gregory J. Hobbs, Jr.~~
~~Justice of the Colorado Supreme Court~~

APPENDIX B TO SUPPLEMENTAL REPORT

Rule 6.1 as Proposed by the Colorado Supreme Court Committee on the Rules of Professional Conduct. Marked to Show Changes from Prior Standing Committee Recommendations to Court.

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).

* * * * * * * * * *

Comment to RULE 6.1 VOLUNTARY PRO BONO PUBLICO SERVICE

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

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

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

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

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

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

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

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

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. However, in special circumstances, such as death penalty cases and class action cases, it is appropriate to allow collective satisfaction by a law firm of the pro bono responsibility. There may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations

providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided.

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

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

[12] Appendix A to these Rules contains a Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms that can be modified to meet the needs of individual law firms. Adoption of such a policy is entirely voluntary.

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April 15, 2004

The Honorable Michael Bender
The Honorable Nathan Coats
Colorado Supreme Court
2 East 14th Ave
Denver CO 80203

Re: Rule 265

Dear Justices Bender and Coats:

I have recently come across a serious flaw in Rule 265 regarding lawyer firms practicing as Professional Corporations and LLCs. The clear intent of the rule is to prevent lawyers operating as a group from avoiding personal liability from the acts of their fellow lawyers and employees unless there is adequate professional liability in place. The flaw relates to when the rule says that the insurance must be in effect. It provides that, if insurance is in place AT THE TIME OF THE ACT OR OCCURRENCE, there is no personal liability for the acts of others. Because all professional liability insurance has been CLAIMS BASED for as long as I can remember, and no one to my knowledge even writes OCCURRENCE BASED professional liability insurance, there are two scenarios which would create unintended outcomes under the rule:

1. A law firm has insurance in place at the time of the occurrence but lets it lapse before suit is filed on the claim. There would be no insurance to cover the loss but the individual attorneys would not be liable for the acts of the others.

2. A law firm does not have insurance at the time of the occurrence but subsequently obtains insurance, which is in effect at the time of the claim. There would be insurance to cover the loss but the individual attorneys would have personal liability, regardless.

I believe that the rule is in need of modification to deal with this issue, as I do not believe that subsection (f) adequately addresses this issue. My recommendation is that the rule provide language similar to what is required to be disclosed regarding insurance under CRCP 16 and 26, namely, whether there is insurance in place which covers the claim.

I would also like to point out a potential "loophole" in the rule. There are some law firms which are PCs or LLCs, whose shareholders or members are either PCs or LLCs themselves, there being no individual attorney shareholders or members. The argument can therefore be made that professional malpractice committed by the "parent" firm only imposes personal liability on the sub-PCs or sub-LLCs, thereby circumventing the intent of the rule.

I would be happy to provide proposed language or participate in a committee to look into this problem. I know that there were amendments to the rule in 1995 to address the creation of LLCs in Colorado but I do not know who worked on those changes.

Very truly yours,

Andrew Rosen

the PROFESSIONAL LAWYER

American Bar Association Center for Professional Responsibility Standing Committee on Professionalism

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Helping Clients with Living Expenses: "No Good Deed Goes Unpunished"

John Sahl

There is a strong tradition in the United States that a citizen can turn to his or her lawyer for help when dealing with a legal, business, or personal problem. Sometimes the client requests financial help. Even without a request, lawyers may offer clients financial assistance out of a sense of compassion. The decision to provide financial assistance to a client may expose the lawyer to professional discipline if he or she violates ethical rules in the process. Simply stated, a lawyer's generosity or compassion may be dangerous to the lawyer's professional well-being.

The financial relationship between lawyers and clients has attracted substantial attention in recent literature covering such topics as lawyers' billing practices, retention contracts, referral fees, and contingency fee agreements.[1] By comparison, the questions of when and how lawyers may advance financial assistance to cover client expenses have generally received less attention.[2] The specific question of whether lawyers should be permitted to advance non-litigation expenses or living expenses to clients is often relegated to a footnote when examining the economic relationship between the lawyer and the client.[3] Non-litigation expenses, otherwise known as and referred to in this article as living expenses, may include the cost of medical care, housing, food, clothing, utilities, and transportation.

First, this article briefly reviews the origins of and reasons for the ban on lawyers advancing living expenses to clients when litigation is pending or occurring.[4] Second, it describes the current regulatory regimes governing the matter and the majority rule that prohibits lawyers from advancing living expenses to clients involved in litigation. Third, the article examines some of the key reasons for the majority rule and concludes that they do not justify the current ban. Fourth, it assesses how some states deal with lawyers who violate the majority rule against providing non-litigation expenses to clients, an assessment that suggests these states may have second thoughts about the rule and therefore impose minimal punishment for violations. Fifth, the article discusses the approach of a minority of states that permit lawyers to advance living expenses. The article concludes by recommending that the American Bar Association (ABA) and all states adopt a rule that permits attorneys to advance living expenses to clients when litigation is pending or occurring.

I. HISTORICAL BACKGROUND: ADVANCING CLIENT EXPENSES

Under Roman and early English law, advocates arguing before courts could not be compensated for their services but could receive donations.[5] Later at common law when lawyers were entitled to compensation, champerty laws in England prohibited them and any non-party from financially supporting a suit in return for a share of the party's recovery.[6] The laws of maintenance and barratry also prohibited lawyers from financially supporting a party's suit.[7] The reasons for the prohibitions were to prevent wealthy non-parties from oppressing the poor and, by speculation and meddling, obstructing the administration of justice.[8]

For the same reasons advanced in England, many states in America enacted statutes, while others relied on the common law, to prohibit champerty, maintenance and barratry.[9] Although the laws were initially created to protect the poor in litigation, they later became an impediment to the poor who often needed financial assistance to pursue claims against powerful manufacturers and transportation companies.[10] Contingent fees and the advancement of expenses became increasingly necessary so that impecunious citizens might have their day in court.[11]

Continued on page 4

Living Expenses, continued from page 1

Recognizing the need to provide the poor with access to the courts, some American judges permitted lawyers to advance money to clients for their living, medical, and other expenses on two conditions.[12] First, the lawyer could not promise such assistance before the client-lawyer relationship was formed;[13] and second, the client had to remain liable for repaying the advance.[14] Some of these judges commended lawyers for providing financial assistance during litigation, describing the practice as "common" and "honorable."[15] The assistance did not violate laws against champerty because the client remained responsible for repayment of the expense.[16] These judges still found lawyers guilty of champerty when they assumed sole and full responsibility for litigation expenses or tied their repayment to the outcome of the case.[17]

II. Early ABA Consideration of Living Expense Advances

In 1928, the ABA adopted Canon 42, which tacitly recognized that lawyers were providing financial assistance to clients.[18] Canon 42 provided: "A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement."[19] Canon 42 did not directly answer the question of whether lawyers could advance living expenses to clients, and the question continued to be controversial.[20] Some states construed Canon 42 to prohibit lawyers from lending money to clients for living expenses while others permitted the practice.[21]

Before 1955, the cases seemed to produce "a reasonably clear and consistent rule" that lawyers could advance living and medical expenses if the lawyer did not thereby induce the client to employ him, and the client remained liable for the expenses.[22] In 1955 the ABA issued Formal Opinion 288, which in effect rejected the reasoning of the earlier cases that had upheld loans for living expenses.[23] Formal Opinion 288 narrowly interpreted the term "expenses" in Canon 42 to permit lawyers to pay only litigation expenses. The opinion implicitly established a clear official policy for prohibiting lawyers from advancing their clients' living expenses.[24]

III. CURRENT ABA REGULATION OF LIVING EXPENSE ADVANCES

a. Majority Rule: Living Expense Advances Prohibited

In 1969, the ABA adopted the Model Code of Professional Responsibility (the Code). Reflecting longstanding concerns about champerty and lawyer independence, DR 5-101(A) prohibited lawyers from acquiring a proprietary interest in a cause of action or the subject matter of litigation except that a lawyer could obtain a lien for his fees and expenses or accept a reasonable contingent fee in a civil case.[25] DR5-103(B) also continued the ABA's implicit prohibition on lawyers advancing living expenses to their clients involved in litigation.[26] DR 5-103(B) permitted lawyers to advance litigation expenses, "including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses."[27] All but a handful of states adopted the rules.[28]

In 1983, the ABA replaced the Code with the Model Rules of Professional Conduct (hereinafter Rules). The Rules continued the proscription on lawyers acquiring a proprietary interest in a cause of action or the subject matter of litigation with certain exceptions.[29] In addition, Rule 1.8(e) of the Rules reflected the majority rule in language that implicitly prohibited lawyers from paying a client's living expenses. A lawyer's "financial assistance to a client in connection with pending or contemplated litigation" was limited to "advanc[ing] court costs and the expenses of litigation . . . ." Unlike DR 5-103(B), however, Rule 1.8(e) provided that the client's repayment of litigation expenses could be contingent on winning the case.[30] Rule 1.8(e)(2) introduced another change from the Code. It permitted a lawyer to pay court costs and litigation expenses for indigent clients without any expectation of ever recovering them—essentially making a gift of the expenses.

The Ethics 2000 proposal to ban such assistance is significant.

In 1997 the ABA decided to review the Rules and created the Commission on the Evaluation of the Rules of Professional Conduct, known as the Ethics 2000 Commission.[31] Among other reasons for the review, there was a concern that the Rules were not reflective of recent developments in the profession and society and that there was a need for greater uniformity among the states.[32] The Ethics 2000 Commission has proposed to continue the ban on lawyers advancing living expenses to their clients.[33] The Ethics 2000 position is consistent with the American Law Institute's position prohibiting loans from lawyers to clients for proposes other than financing litigation.[34]

The Ethics 2000 proposal to ban such assistance is significant. It apparently rejects the recent decision of some states to permit lawyers to advance living expenses in certain situations.[35] It is doubtful that these states lightly embarked on a policy contrary to the ABA's clear position. It is also questionable whether these states will change their position and follow the Ethics 2000 proposal, since it mirrors the current ABA policy that the states have recently rejected. The risk that some of these states will ignore the Ethics 2000 recommendation threatens one of the commission's key goals—promoting greater national uniformity of ethical rules.

IV. JUSTIFICATIONS FOR THE MAJORITY RULE

a. Conflicting Role of Lawyer as Client's Creditor

A principal justification for prohibiting a lawyer from advancing living expenses to clients is the concern that the lawyer is placed in the "conflicting role of a creditor and [that this] could induce the lawyer to conduct the litigation so as to

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protect the lawyer's interests rather than the client's."[36] The ABA and all states currently permit lawyers to advance the cost of their time or labor and the cost of litigation to provide clients with access to the courts. Whenever a lawyer agrees to a contingent fee or advances litigation expenses, the lawyer acquires an interest in the client's litigation and assumes the conflicting role as the client's creditor.[37] This conflict may be especially acute in the contingency fee situation where a lawyer is confronted with the dilemma of advising a client about a settlement offer or seeking a larger award with a trial. The settlement provides the lawyer with a certain and reasonable return on his investment of time and expenses in the case, while losing the case at trial means no compensation for the lawyer. In addition to losing his fee, the lawyer might also forfeit the litigation expenses he advanced to the client because clients commonly refuse to reimburse their lawyers for such expenses upon losing a case.[38]

This "creditor conflict role" justification for the majority rule is flawed on several grounds. First, it arbitrarily distinguishes living expenses from contingency fees and litigation expenses in defining the permissible financial interests that a lawyer may acquire in his or her client's litigation. Second, depending on the case, the expense of the lawyer's time—and not the expense of paying the client's living expenses—may pose the greater threat to the lawyer's exercise of independent judgment on behalf of a client. In other cases, the lawyer's advance of litigation expenses to the client, and not the lawyer's payment of living expenses, may pose the greater threat to the lawyer's ability to act in the client's best interests.[39] It is unfair to assume that the advancement of living expenses generally presents a qualitatively different risk to lawyer independence than the risks posed by lawyers advancing litigation expenses or accepting contingency fees.[40] Third, the unfairness is especially troublesome because lending clients money for living expenses serves the same salutary goal that contingency fees and litigation expense loans seek to promote – opening the doors of courthouses to impecunious clients and ensuring equal access to justice.[41]

Fourth, this "creditor conflict role" justification also ignores the fact that lawyers are ethically obligated to represent their clients with undivided loyalty.[42] The ABA and state bars should focus their efforts on investigating and enforcing this fundamental principle rather than establishing an expansive rule that prohibits all lawyers from advancing living expenses.[43] The current ABA rule unfairly sweeps within its prohibition lawyer conduct that may not involve any dilution of lawyer loyalty to the client.[44]

Fifth and finally, to the extent that the advancement of living expenses—like contingency fees and litigation expenses—places the lawyer in the conflicting role of a creditor, both the Rules and the Code permit the lawyer to continue representing the client when the lawyer reasonably believes the representation will not be adversely affected and the client consents after full disclosure.[45] A simple rule requiring lawyers to obtain the client's consent after fully disclosing any potential conflicts of interests stemming from the lawyer's advance of living expenses would adequately protect the client's interests.[46] The current rule that permits clients to waive potential conflicts in some circumstances, but not when the circumstances concern a lawyer advancing living expenses, appears arbitrary and paternalistic. The rule also conveniently limits the potential up front investment by the lawyer to litigation expenses and the lawyer's time. Recent commentators have criticized the ban on lawyer advances as anticompetitive devices designed to maximize the lawyer's return on a case.[47]

b. Lawyer Fear of Competitive Disadvantage

Some practitioners fear a competitive disadvantage in the marketplace for legal services if the profession permits lawyers to advance living expenses because only more established or affluent lawyers will offer such assistance.[48] This fear may be unwarranted for several reasons. First, some lawyers in a position to advance living expenses may avoid the practice to minimize the law firm's capital investment in cases and to limit their financial involvement with clients. These lawyers may prefer instead to help clients obtain third-party lenders to provide the cost of living expenses, a practice that has attracted recent attention.[49] Other lawyers may simply reject the policy as unseemly and instead help clients obtain public assistance, disability payments, unemployment coverage, or new employment.[50]

It is possible that lawyers who offer to advance living expenses may increase their share of the client market.

It is possible that lawyers who offer to advance living expenses may increase their share of the client market. A loss of market share for some lawyers, however, is insufficient reason for the profession to abandon its policy of making legal services available to all, including the poor.[51] Lawyers and clients should be free to structure their economic relationship to meet both of their interests, provided they do not violate fundamental principles of the client-lawyer relationship, such as loyalty and confidentiality. Living expense advances are not necessarily inconsistent with these principles—indeed, they pose no greater risk to them than do advancements for contingency fees and litigation expenses.

Lawyers unable or unwilling to advance living expenses to clients may choose to associate with other firms who provide such assistance, for example, by agreeing to co-counsel cases.[52] It is increasingly common for lawyers to enter into these strategic associations or alliances to fund and to provide representation. Assuming that more established firms are in a better position to advance living expenses, newer or smaller firms may provide better representation because of the more established firms' experience, as well as its financial resources. The more established or experienced firm has a strong financial incentive to act as a mentor and to ensure that the client receives effective represen-

tation. The firm wants to increase its share in the client's potential recovery, and to minimize its liability for the other lawyer's representation. Thus, the need for some lawyers to associate with more established firms for the purpose of advancing living expenses may produce an indirect benefit for both lawyers and clients.

The current majority rule also incorrectly assumes that clients who need living expense advances will not reimburse lawyers for such expenses unless the client receives a recovery.[53] Although this may often be the result, lawyers can insist that clients remain liable for such advances irrespective of the outcome of the litigation. Furthermore, the client's need for living expenses may be temporary and the client *may* be able to repay living expense advances before the case is resolved—when the client receives deferred compensation, for example, or resumes work.[54]

c. Solicitation & Other Related Concerns

The majority rule's restriction on lawyers advancing living expenses is also concerned with lawyers using financial assistance to solicit clients.[55] There is a fear that a lawyer's offer to pay living expenses will unfairly induce a client to select a lawyer for financial reasons rather than competency and experience.[56] This concern is overstated.

The majority rule's approach is paternalistic and denies consumers access to a valuable financial benefit.

The ABA and many states currently permit lawyers to advertise that they will accept a contingent fee or advance litigation expenses.[57] The bar has solicitation rules to prevent unfair inducements concerning contingency fees and the advances of litigation expenses—contexts that are very similar to lawyers who advance living expenses. Current ABA solicitation rules prohibit lawyer communications that are false or misleading and direct mail solicitation that does not contain the words "Advertising Material" on the outside of the envelope.[58] These solicitation rules are also adequate to protect clients from unfair inducements in the context of advances for living expenses.

As with contingency fees and litigation expense advances, the lawyer's offer to pay living expenses furnishes important commercial information to a client, especially a poor client. A poor client who was injured by another's tortious conduct may have lost his or her employment and be unable to pay his or her living expenses. Once aware of an opponent's financial difficulties, a defendant may prolong litigation to force the unaided opponent to accept a premature and unfair settlement.[59] Permitting lawyers to advance living expenses would help to level the playing field between poor and wealthy litigants. The majority rule's approach is paternalistic and denies consumers access to a valuable financial benefit.

Additional support for the majority rule is the concern that lawyers who advance living expenses will stir up litigation. This fear stems from the profession's historical concern about lawyers or other non-parties funding a suit that would permit a wealthy person to oppress an impecunious adversary in the courts or permit an intermeddler to obstruct justice.[60] Living expense advances by lawyers today do not oppress poor clients but instead empower them to prosecute their rights in court.[61] In addition, a rule that bans lawyer advances for living expenses to prevent intermeddling and the obstruction of justice is unnecessary in light of other remedies for such abuses. Judicial doctrines concerning standing and ripeness, ethical rules, like Rule 3.1's admonition against harassing or malicious claims, and procedural rules, like Rule 11 of the Federal Rules of Civil Procedure are better designed to prevent or to punish intermeddling and the obstruction of justice.[62]

A final justification for the majority rule is the concern that lawyers who provide living expenses to clients will demean the profession—that it is unseemly for lawyers to both fund and profit from their clients' litigation. This appearance-based concern is equally applicable to lawyers who accept contingency fees, advance litigation expenses, and solicit and advertise. The profession has determined that this concern is outweighed by the longstanding ethical goal of making legal services available to all.[63] Lawyers who advance living expenses promote that ethical goal, as do lawyers who accept contingency fees or advance litigation expenses. Helping poor clients to litigate legitimate claims by covering their living expenses may represent acts of charity or compassion and enhance the public's perception of the profession.

V. JUDICIAL MITIGATION (OR SECOND THOUGHTS) REGARDING THE MAJORITY RULE

a. Recent Cases

Lawyers who violate the majority rule's ban on advancing living expenses face the risk of discipline, including suspension or disbarment. Nevertheless, some lawyers are not deterred by the rule and continue to advance living expenses.[64] In part, this may be because some courts have imposed minimal punishment for violations and have expressed some doubts about the ban.[65]

For example, the Ohio Supreme Court has customarily imposed public reprimands—its least onerous sanction—for lawyers who only violate the ban against advancing living expenses.[66] In a recent case, *Cleveland Bar Association v. Nusbaum*, a lawyer advanced approximately $26,000 in living expenses to a client who was severely injured in a motorcycle accident.[67] In publicly reprimanding the lawyer, Nusbaum, the Ohio Supreme Court cited several mitigating factors.[68] They included the absence of any previous disciplinary actions filed against him in his 29 years of practice, the fact that his client was helped and not harmed by the loans, and the fact that Nusbaum's ex-wife filed the grievance. The court also acknowledged its receipt of several letters attesting to Nusbaum's good character, including one from his client.[69] The client reported that he had had twenty operations since the accident, that he was unable to work, and that he could not have survived without Nusbaums's advances for life's basic necessities. He considered Nusbaum to be his friend and

thought that without the help he would have been forced to settle the case for less money.[70]

In *Attorney Grievance Commission of Maryland v. Kandel*, the lawyer advanced living expenses generally in increments of $100 on nine different occasions for the same client who was involved in two separate automobile accidents.[71] The advances funded medical treatment, transportation for medical care, and also car repairs.[72] Kandel, a sole practitioner, had represented numerous clients in variety of cases over a thirty-five year period and had never been disciplined. The Maryland Court of Appeals noted that he was not motivated by personal gain to make the advances, that his client needed the money "due to his financial position and because of the necessity of continuing medical treatment," and that the client was not harmed by the living expense advances.[73] Although the court reaffirmed its policy against advancing living expenses, it rejected bar counsel's recommendation of a ninety-day suspension and instead ordered a public reprimand.

Courts have occasionally suggested that their bar associations ought to reexamine the rule banning living expense advances.[74] *Oklahoma Bar Association v. Smolen* involved a lawyer who violated the state's ban on advancing living expenses to clients during pending litigation by lending $79,304 to 161 different clients during an 18-month period.[75] The non-interest-bearing loans were to destitute clients without the means and resources to obtain "sustenance."[76] Recognizing that Smolen might be deserving of total exoneration based on the dissent's criticisms of the rule, the court nevertheless publicly censured him.[77] The court urged the "Bench, the practicing Bar [and] . . . the academic legal community to consider changing the rule."[78] Although it is unclear whether such an examination was undertaken, the Oklahoma Supreme Court recently rejected a humanitarian exception for living expenses in another case involving Smolen.[79]

The court believed that a humanitarian exception to the state's ban . . . promoted access to the courts . . . .

In 1995, the Mississippi Supreme Court urged the state bar to review its rule prohibiting advances for living expenses in *The Mississippi Bar v. Attorney HH*.[80] In response to that request, the bar established an ad hoc committee to consider possible changes to the rule. The bar ultimately adopted the committee's recommendation to permit lawyers to advance living expenses and reasonable and necessary medical expenses under certain conditions. Today, Mississippi is one of the few states that allow lawyers to advance clients' living expenses.

VI. MINORITY APPROACH:

Two state supreme courts permit living expense advances on humanitarian grounds notwithstanding ethical rules to the contrary. At least eight states have ethical rules that expressly permit lawyers to either advance or guarantee loans for living expenses to clients.[81] Most of these states impose significant limitations on the advances. For example, lawyers may not promise to pay living expenses to obtain or maintain employment, and clients must remain liable for repayment of an advance.[82]

a. Judicial Decisions

In 1976 in *Louisiana State Bar Association v. Edwins*, the state supreme court held that lawyers were permitted to advance "minimal living expenses" to clients under four conditions, even though a state ethical rule prohibited the practice.[83] These conditions are: (1) lawyers must not promise advances to induce employment and they must not make advances until after being retained; (2) the advances must be reasonable based on the facts, (3) clients must remain ultimately liable for repayment of advances; and (4) lawyers must not promote public knowledge of such advances for purposes of securing future employment.[84] The court viewed the living expenses advanced in *Edwins* as akin to litigation expenses that, along with contingency fees, were ethically sanctioned methods of facilitating access to the courts. The court believed that a humanitarian exception to the state's ban on advancements of living expenses promoted access to the courts and prevented impecunious clients from being forced to accept inadequate settlements in protracted litigation.[85]

In a case of first impression, the Florida Supreme Court followed Louisiana's example in *Florida Bar v. Taylor*.[86] The court determined that the prohibition against advances for living expenses was designed to prevent lawyers from obtaining or maintaining employment by promising clients living expenses. The lawyer in the case had issued a single check for $200 to an indigent client and her child for basic necessities.[87] He had also provided used clothing for the child. The Florida Supreme Court held that the lawyer's conduct was not improper because it was not intended to maintain employment but rather was "essentially an act of humanitarianism" with no expectation of repayment.[88]

b. Professional Conduct Rules

Unlike Louisiana and Florida, Alabama and seven other states have adopted professional conduct rules that permit lawyers to advance living expenses. Alabama expressly permits lawyers to advance or guarantee "emergency" financial assistance to clients provided the clients remain ultimately liable for repayment of the advances irrespective of the outcome of the case.[89] A lawyer must not promise emergency financial assistance prior to employment.

Minnesota's and North Dakota's rules permit lawyers to guarantee loans for living expenses to clients to enable them to withstand prolonged litigation and resist pressure to accept an inadequate settlement.[90] Clients remain liable for the repayment of the loans regardless of the outcome of the case.[91] Both Minnesota and North Dakota forbid lawyers to promise to guarantee loans for living expenses prior to the lawyer's employment. Montana also permits lawyers to guarantee loans from regulated financial institutions for basic living expenses when the loans are "reasonably needed" to enable clients to settle cases on the merits rather than

for reasons of financial hardship.[92] Again, clients must repay the loans and lawyers can only promise the assistance after clients have retained them.[93]

Mississippi has the most detailed rule for lawyers "advancing reasonable and necessary" medical and living expenses to clients.[94] Advances may occur only 60 days after the client has signed a retention agreement and the lawyer may not promise such payments in any type of communication to the public. Advances are limited to $1,500 and the lawyer must diligently investigate the client's need for the assistance and ensure that the client has not received assistance from other lawyers in the matter that in the aggregate exceeds the $1,500 limit. The lawyer may ask the Mississippi Bar's Standing Committee on Ethics for permission to exceed the $1,500. If the committee denies permission, the lawyer may petition the supreme court for permission to pay more than $1,500.

The Mississippi approach raises several concerns. First, it arbitrarily limits advances in the first instance to $1,500 and imposes transaction costs on lawyers by requiring due diligence on their part to ensure that the client has not received advances from other lawyers. After the due diligence, lawyers must report each payment to the bar, raising the specter of additional scrutiny by the bar and possible peer disapproval. Second, the rule essentially acknowledges the significance of such advances and then, like the rules of several other states, prohibits lawyers from informing the public that the advances may be available.[95] Although the point is beyond the scope of this article, these prohibitions may violate the First Amendment's commercial speech doctrine.[96] Third, the rule's restrictions may chill the humanitarian instinct of Mississippi lawyers.

A couple of states impose few or no limitations. California permits lawyers to advance clients money, including living expenses, upon the client's written promise of repayment.[97] Lawyers in Texas may advance "reasonably necessary medical and living expenses" and make repayment contingent on the outcome of the case.[98] In the District of Columbia, lawyers may lend, or even provide clients with, funds for living expenses without any promise of repayment, provided the financial assistance is "reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding."[99]

The District of Columbia's approach is especially noteworthy because it offers advantages not present in some of the other minority jurisdictions. Lawyers are free to advance funds, and not just guarantee a loan, for any amount of living expenses reasonably necessary to help clients withstand protracted litigation without requiring them to repay the advance. Lawyers are also free to communicate this important commercial information to the public. The approach recognizes that lawyers are capable of determining how much financial assistance is reasonably necessary to help a client, and the District has refrained from imposing burdensome reporting requirements on the good Samaritan lawyer. The bar retains the authority to review a lawyer's judgment about what is reasonably necessary in any case and to ensure that he or she complies with the bar's solicitation rules.

The District of Columbia bar association is one of the nation's largest, with approximately 76,000 members.[100] It is worth noting that the District's permissive approach concerning lawyer advances for living expenses has existed for a "long time and has not produced any official complaints."[101] Nor has the approach caused the bar any "reason to be concerned."[102] On the other hand, the approach offers several benefits. Individual clients gain financial assistance and more meaningful access to the courts, lawyers can engage in humanitarian acts, and the public learns that the legal profession seeks to assist all citizens in obtaining justice. The District's approach provides the ABA and other states with a practical and worthy model for establishing a policy that permits lawyers to advance living expenses.

CONCLUSION

The ABA should reject the majority rule that proves the adage that no good deed goes unpunished.

It is important for the bar to establish rules that reflect both aspirations and the real challenges that lawyers face. Those challenges are inevitably shaped by problems confronting society, including the inability of *many* persons to afford legal services. Changing the majority rule that prohibits lawyers from advancing living expenses would not produce a major shift in the way the bar renders legal services.[103] This is evidenced by the fact that some lawyers ignore the current ban and assume the risk of advancing living expenses to their clients.[104] Some lawyers ignore the ethical rule, in part, because it ignores the poverty in society and prevents them from taking moral action—advancing necessary living expenses.[105] Broad ethical rules that ignore important social realities or lack moral credence diminish the legitimacy of the entire code of professional ethics.

The ABA should reject the majority rule that proves the adage that no go deed goes unpunished. It should adopt a more generous approach by permitting lawyers to do more to help poor clients litigate their claims. Lawyers should not be compelled, of course, to provide living expenses, but nor should they run the risk of professional discipline for humanitarian acts.

ENDNOTES

Acknowledgment: I am grateful for the comments of Professor William C. Becker, Professor Susan Martyn and Professor Alexander Meiklejohn and for the research assistance of Cybil Dotson, Todd Snitchler and Melissa Zelnar.

1. *See e.g.*, Gerald F. Phillips, *Reviewing a Law Firm's Billing Practices*, 13 ABA PROF. LAW 1 at 2 (Fall 2001) (examining abusive billing practices by lawyers); Richard W. Painter, *Litigation on a Contingency: A Monopoly of Champions or a Market For Champerty?*, 71 CHI.-KENT. L. REV. 625 (1995) (discussing the economic and ethical concerns of lawyers

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sharing the risks of litigation with their clients and suggesting some contingent fee regulation).

2. Lawyer financial assistance to clients is sometimes treated as a necessary but less significant component of these more popular topics - Painter, *supra* note 1, at 645 n.103 & 688 n. 286; *see also* Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 U.C.L.A. L. REV. 29, 107 n.317 (Oct. 1989)(contending that there would be a reduction in contingency fee rates if lawyers were permitted to bid against each other for clients by providing financial assistance contingent on the outcome of the case). *But see* Rudy Santore & Alan D. Viard, *Legal Fee Restrictions, Moral Hazard, and Attorney Rents*, 44 J.L. & ECON. 549, 555 (OCT. 2001) (providing an excellent economic analysis of the profession's bans on financial assistance to clients and contending the bans are anticompetitive because they suppresses price competition among lawyers); Kelly Thrasher & Joseph W. Blackburn, *Deduction of Litigation Expenses: Trial Lawyers v. I.R.S.*, 28 N. KY. L. REV. 1 (Winter 2001) (discussing the history of contingent fee arrangements and the deduction of litigation expense advances); Janet Findlater, *The Proposed Revision of DR 5-103(B): Champerty and Class Actions*, 36 BUS. LAW. 1667 (July 1981) (in the class action context, discussing DR 5-103(B)'s failure to make client reimbursement of litigation expenses contingent on the outcome of the suit).

3. *See e.g.*, Rhonda Wasserman, *Equity Transformed: Preliminary Injunctions To Require The Payment of Money*, 70 B.U.L.REV. 623, 629, n.29 (1990). *See also* Findlater, *supra* note 2 (excluding any discussion of lawyers advancing non-litigation expenses). There are some notable exceptions where the question of living expenses was the central focus of discussion *See* Note, *Living Expenses, Litigation Expenses, and Lending Money to Clients*, 7 GEO. J. LEGAL ETHICS 1117 (1994) (authored by Michael R. Koval) [hereinafter *Lending Money*]; John J. Vassen, *The Case For Allowing Lawyers to Advance Client Living Expenses*, 80 ILL. B.J. 16 (1992); Comment, *Lending a Helping Hand" Professional Responsibility and Attorney-Client Financing Prohibitions*, 16 DAYTON L. REV. 221 (1990) (authored by Dawn S. Garrett) [hereinafter *Helping Hand*]; Note, *Guaranteeing Loans to Clients Under Minnesota's Code of Professional Responsibility*, 66 MINN. L. REV. 1091 (1982) [hereinafter *Guaranteeing Loans*]; Note, *Loans to Client For Living Expenses*, 55 CALIF. L. REV. 1419 (1967) (authored by William Roger Strelow) [hereinafter *Loans*]. *See* Gerson H. Smoger, *Funding Contingent Fee Cases: Ethical Considerations*, 2 ATLA Annual Convention Reference Materials 2849 (July 2001) (discussing lawyers' expenditures, including living expense advances, in national pharmaceutical and toxic tort cases and urging lawyers to know the ethical rules in each state in which clients reside to avoid any ethical problems).

4. This article only discusses lawyers who advance living expenses to clients in civil cases. Similar advances in criminal cases involve other issues that are beyond the scope of this article. For example, the government assumes some of the non-litigation expenses for clients, for example, medical costs for incarcerated clients awaiting trial. *See* Note, *Lending Money*, *supra* note 3, at 1119 n.12. In addition, criminal cases do not produce a monetary judgment that enables lawyers to recoup any advances for non-litigation expenses. *Id.*

5. Brickman, *supra* note 2, at 35. It is unclear whether this also meant that lawyers could not be reimbursed for advancing litigation expenses to clients.

6. Champerty consists of "'investing'" in another's cause of action "by buying a certain percentage of the hoped-for recovery – in effect discounting it." GEOFFREY C. HAZARD, JR. & W. WILLAM HODES, THE LAW OF LAWYERING 12-28 (3rd ed. 2001) [hereinafter HAZARD & HODES]. *See* CHARLES WOLFRAM, MODERN LEGAL ETHICS 490 (1986).

7. Barratry, maintenance, and champerty were common law crimes prohibiting the stirring up of litigation. *See* WOLFRAM, *supra* note 6, at 489; *see also* Max Radin, *Maintenance by Chanperty*. 24 CAL. L.. REV. 48, 67 (1936) (noting that the suppression of these crimes promoted the pubic welfare). Barratry is the "[v]exatious incitement to litigation, esp[ecially] by soliciting potential clients . . ." BLACK'S LAW DICTIONARY 144 (7th ed. 1999). *See* Radin *supra*, at 64-65. Maintenance is an offense where one invests in another's cause of action by "providing living or other expenses to a client so litigation can be . . . " pursued. HAZARD & HODES, *supra* note 6, 12-28. *See* Radin *supra*, at 63-67 (providing an historical discussion of maintenance) .

8. Comment, *Helping Hand*, *supra* note 3, at 228 & n. 27.

9. *Id.* A complainant had to prove some wrongful intent on the part of the non-party committing one of the offenses. *Id.* at n.30.

10. *See* Radin, *supra* note 7, at 71 (discussing the growth of contingent fees that coincided with the increase in negligence claims against transportation companies).

11. *See id.* at 70; Painter, *supra* note 1, at 628; Brickman *supra* note 2, at 37.

12. Note, *Lending Money*, *supra* note 3, at 1120; Comment, *Helping Hand*, *supra* note 3, at 225; Note, *Loans*, *supra* note 3, at 1421.

13. Hildebrand v. State Bar, 117 P.2d 860, 863-64 (Cal. 1941); People *ex rel.* Chicago Bar Ass'n v. McCallum, 173 N.E. 827, 831-32 (Ill. 1930) (lending money to poor client for living and medical costs during case does not offend public policy); *In re* Sizer, 267 S.W. 922 (Mo. 1924).

14. McCallum, 173 N.E. at 831 (lending money to poor client for living and medical costs during case does not offend public policy); Johnson v. Great Northern Ry., 151 N.W. 125, 127 (Minn 1915) (advancing medical and living expenses to a poor client during litigation comports with public policy); *In re* Sizer, 267 S. W. 922, 928 (Mo. 1924) (dismissing disciplinary charges against lawyers who, in part, had loaned $100 to a client because of his family's "destitute condition" and noting that the loan was not "consideration for the employment."). *See* James E. Moliterno, *Why Formalism?*, 49 KANSAS L. REV. 135, 140-41 (November 2000) (discussing, in part, the court's attention to the "context" – the facts of *In re Sizer* - in dismissing the disciplinary charges against the two).

15. Johnson v. Great Northern Ry., 151 N.W. 125, 127 (Minn 1915); Reece v. Kyle, 31 N.E. 747, 750 (Ohio 1892). *See* Note, *Lending Money*, *supra* note 3, at 1122. *Cf.* Mahoning Bar Ass'n v. Ruffalo, 199 N.E. 2d 396, 398-99 (Ohio 1964) (holding that several Ohio decisions permitting living expenses, including Reece v. Kyle, 31 N.E. 747 (Ohio 1982) are inapplicable because of Ohio's adoption of the ABA Canons of Professional Ethics, especially Canon 42 and citing ABA Formal Opinion No. 228). *See infra* notes 18-24 & accompanying text discussing ABA Canon 42 and ABA Formal Opinion No 228.

16. Note, *Lending Money*, *supra* note 3, at 1119 (1994) (citing Johnson v. Great Northern Ry., 151 N.W. 125 (Minn 1915) (advancing medical and living expenses to a poor client during litigation comports with public policy); McCallum, 173 N.E. 827 (lending money to poor client for living and medical costs does not offend public policy)) *see* Radin, *supra* note 7, at 48.

17. Comment, *Helping Hand*, *supra* note 3, at 229 (citing e.g., Sun Life Assur. Co. v. Casanova, 260 F. 449 453-54 (1st Cir. Puerto Rico 1919). Model Rule 1.8(c) permits the repayment of litigation expenses to be contingent on the outcome of the

case or for lawyers to pay indigent clients' litigation expenses without *any* promise of repayment. *See infra* notes 29-31 and accompanying text.

18. This Canon was added to the original Canons adopted in 1908. Note, *Loans supra* note 3, at 1423.
19. 1908 Canons, Canon 42.
20. Note, *Loans, supra* note 3, at 1422-23 (noting that while courts were validating loans for living expenses, the New York City Bar Association condemned them in Advisory Opinions)(citing N. Y. City Opinions 20 (1925)).
21. Note, *Lending Money, supra* note 3, at 1122.
22. *Id.* at 1423; *see also* Ratner, *Advancing Money to Clients – Whether Unethical*, 15 NACCA L.J. 410, 413 (1955)(criticizing ABA Formal Opinion 288).
23. Note, *Loans, supra* note 3, at 1420.
24. Note, *Lending Money, supra* note 3, at 1123.
25. ABA/BNA Lawyers' Manual on Professional Conduct 51:801(1995) [hereinafter ABA/BNA Lawyers' Manual]; Rule 1.8(j) Comment 7 ("This general rule, which has its basis in common law champerty and maintenance . . . .").
26. In effect, DR 5-103(B) reaffirmed the 1955 position of the ABA as set forth in Formal Opinion 288. It narrowly interpreted the term, "expenses," in Canon 42 to exclude living expenses.
27. DR 5-103(B) provides: "While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses." *See* WOLFRAM, *supra* note 6, at 508 (reporting that some states permitted lawyers to pay litigation expenses without the client's promise of repayment when a client was clearly unable to pay such expenses) (citing Baker v. American Broadcasting Co., 585 F. Supp. 291, 294-95 (E.D.N.Y. 1984)). Some states added language to DR 5 –103(B) to mitigate the hardship on lawyers and clients who could not pay their client's litigation costs. For example. New York's DR 5 –103(B)(2) provides: "Unless prohibited by law or rule of court, a lawyer representing an indigent client on a pro bono basis may pay court costs and reasonable expenses of litigation on behalf of the client." 22 NYCRR 1200:22 Avoiding Acquisition of Interest in Litigation [DR 5-103] (contained in THOMAS D. MORGAN & RONALD D. ROTUNDA, 2001 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 542 (2001)).
28. ABA/BNA Lawyers' Manual, *supra* note 25, Sect. 51:801, at 11; *see* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS Sect. 36 (c) at 269 (reporting that "[t]he great majority of jurisdictions bar lawyers from making any loan for nonlitigation expenses, such as living expenses.") (1998) [hereinafter RESTATEMENT (THIRD)]; *see* N. Y. St. Bar Ass. Comm. Prof. Eth. Opinion No. 744 (May 29, 2001) (titled "TOPIC LITIGATION COSTS") 2001 WL 901077 (reaffirming New York's general rule, DR 5-103(B), that permits lawyer to advance or guarantee the expenses of litigation provided the client remains ultimately liable for repayment); *see also* WOLFRAM, *supra* note 6, at 509 (writing that "several jurisdictions have balked at the strictness of the Code and the economic straits in which it may leave some clients and have provided some measures of limited relief.").
29. Rule 1.8(j). "A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses; and (2) contract with a client for a reasonable contingent fee in a civil action."
30. Rule 1.8(e)(1) (stating "the repayment [of litigation expenses] . . . may be contingent on the outcome of the matter. . . ."). Rule 1.8(e)'s change from DR 5-103(B), making the repayment of expenses contingent on the outcome of the case, recognized what had become a reality of practice for many lawyers, that clients would not reimburse them for expenses in unsuccessful litigation. *See* Thrasher & Blackburn, *supra* note 2, at 22 (reporting that the District of Columbia Bar wanted DR5-103(B)'s client "ultimate liability clause" eliminated because, in part, it was "'widely ignored'"). Anecdotal information suggests that lawyers continue to advance non-litigation expenses to clients – ignoring existing ethical prohibitions. Like Rule 1.8(e)'s change to permit repayment to be contingent on the outcome of the case, a rule change permitting non-litigation expenses would similarly reflect what is already the reality of practice for some lawyers.
31. David W. Rack, *The Ethics 2000 Commission's Proposed Revision of the Model Rules, Substantive Change of Just a Makeover?*, 27 Ohio N.U.L.REV. 233 (2001).
32. *Id.* 233-34.
33. *Id.* at 249.
34. RESTATEMENT (THIRD), *supra* note 28, at Sect. 36. It is worth noting that the proposed section 48 of the Restatement (which is now section 36) contained a more liberal position on lawyers advancing living expenses to clients. It allowed a loan for living expenses if necessary "to enable the client to withstand delay in litigation that otherwise might unjustly induce the client to settle or dismiss a case because of financial hardship rather than on the merits." Monroe H. Freedman, *Caveat Lector: Conflicts Of Interest Of ALI Members In Drafting The Restatements*, 26 HOFSTRA L. REV. 641, 648 (Spring 1998) (citing Restatement (Third) of the Law Governing Lawyers Sect. 48(2)(b)(i) (Proposed Final Draft No. 1 1996) (providing, *in part*, an excellent and critical summary of the debate and the defeat of the proposed Section 48 *id.* 646-51); *See also* Note, *Lending Money, supra* note 3, at 1137 (discussing a tentative draft of Section 48) (citing RESTATEMENT OF THE LAW GOVERNING LAWYERS sect. 48 (Am. Inst. Tent. Draft. No. 4, 1991)).
35. *See* note 81.
36. RESTATEMENT (THIRD), *supra* note 28, Sect. 36, at 267.
37. *See* Attorney Grievance Commission of Maryland v. Eisenstein, 635 A.2d 1327. 1337-38 (Md. Ct. App. 1994) (criticizing lawyer advances for non-litigation expenses because they "'smack[] of purchasing an interest in the subject matter of the litigation' in which the lawyer is involved . . .'" (citing 2 ABA/BNA Lawyers' Manual, *supra* note 25, at 51:803); *see also* Santore &Viard, *supra* note 2, at 549 (noting that the lawyer "buys the rights to the client's legal claim" in a contingency fee arrangement).
38. Clients will not reimburse lawyers sometimes for loans for litigation expenses, even when the client has clearly agreed to reimbursement. *See* Santore & Viard, *supra* note 2, at 553; *see also* Note, *Loans, supra* note 3, at 1441 (stating that "the inability of unsuccessful clients to repay advances, has never been thought to make such advances champertous. No reason appears for treating loans for living expenses differently.").
39. The Mississippi Bar v. Attorney HH, 671 So.2d 294, 298 (Miss. 1995).
40. *See* Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 723 (1994) (noting that "[t]he risks of conflicts or baseless litigation" when lawyers provide living and litigation expenses "are precisely the same as those arising from contingent fees.")
41. *See* Note, *Lending Money, supra* note 3, at 1121; *see also* Shapley v. Bellows, 4 N.H. 345, 355 (1928) (writing that

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lawyers who advance expenses permit indigent clients "to obtain justice where without such aid [they] would be unable to enforce a just claim.").

42. MR 1.7(b) (constituting part of the Conflict of Interest: The General Rule). A lawyer who may be "materially limited" in representing a client can nevertheless represent the client if "(1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation . . . . " *Id.* A lawyer advancing litigation expenses to a client should discuss the potential for a conflict of interest if the amount advanced might impair the lawyer's ability to recommend a course of action that is in the client's best interests. *Id.* at Comment 4. *See* EC 5-7, 5-8, DR5-105 (A) (requiring a lawyer to decline employment if the lawyer's own interests may reasonably affect his ability to exercise independent judgment for the client, except when the client consents after full disclosure), *see also* RESTATEMENT (THIRD), *supra* note 27, Sect. 121, at 244-45 (noting that the conflict of interest rule is designed to "assure clients that their lawyers will represent them with undivided loyalty.").

43. *See* Rhode, *supra* note 40, at 723 (suggesting that the "best response" to conflict of interest and other concerns "is greater regulatory oversight, not categorical prohibitions.").

44. *See id.* (indicating that "most experts believe that current restrictions" on lawyers financing litigation "sweep too broadly.").

45. Model Rule 1.7(b) (1) & (2); DR 5-105 (A). Although not yet official ABA policy, the Ethics 2000 Report has recommended that conflict of interest waivers be signed by each affected client and confirmed in writing. *See* American Bar Association, Commission on the Evaluation of the Rules of Professional Conduct, Report, Recommendation Rule 1.7 (b)(4). The written waiver requirement should help lawyers and clients to be more circumspect about conflict of interest risks, including those associated with lawyers advancing living expenses.

46. Comment, *Helping Hand, supra* note 3, at 238 (1990) (proposing a full disclosure and consent requirement for lawyers advancing living expenses).

47. *See* Santore & Viard, *supra* note 2, at 555 (providing an excellent economic analysis of the profession's bans on financial assistance to clients and contending that the bans are anticompetitive because they suppresses price competition among lawyers).). *See also* Freedman, *supra* note 34, at 646-51 (noting lawyers' comments that reflected anticompetitive reasons for the ban on living expense advances by lawyers to needy clients and suggesting that the ban "is an instance in which lawyer self-interests appears to have prevailed over clients' rights - here, the rights of the most vulnerable of clients." *Id.* at 646-47).

48. Attorney Grievance Commission of Maryland v. Kandel, 563 A 2d 387 (Md. Ct. App. 1989). In *Kandel*, the lawyer advanced living expenses on at least eight occasions to the same client who was involved in two separate automobile accidents. For example, Kandel advanced the client $100 for transportation and car repairs. In approving a public reprimand of the lawyer, the court held that DR5-103(B) serves the important public interest of "avoid[ing] unfair competition among lawyers on the basis of their expenditures to their clients. Clients should not be influenced to seek representation based on the ease with which monies can be obtained, in the form of an advancements, from certain law firms or attorneys." *Id.* at 390. *See infra*, notes 71-73 and accompanying text for a discussion of *Kandel*.

49. *Referral of Personal Injury Client to Third-Party Factor Which Will Purchase an Interest in the Case*, N.J. Adv. Comm. Prof. Eth. Opinion No. 691 (1/15/2001) 2001 WL 169754. "It is well settled that an attorney is prohibited from advancing funds to a client for living expenses." *Id.* at 1 (citing RPC 1.8(e)). "However, RPC 1.8(e) does not expressly or impliedly prohibit a lawyer from helping a client to obtain financial assistance from another, as long as the lawyer has no financial interest in the individual or entity which secures or provides the funding." *Id.*at 2; Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2001-03 (approving a law firm's loan from a third-party financial institution and using the loan to advance litigation expenses in personal injury matter accepted on a contingency fee basis and then deducting the costs and interest fees of the loan from the client's settlement as a litigation expense); *see* Marilyn Lindgren Cohen, *Financial Assistance to Clients The Do's And Don'ts*, 54 Sep. OR. ST. B. BULL. 39, 40 (1994) (reporting that the Alabama State Bar Disciplinary Comm'n Op. 89-75 (1989) permits a lawyer to obtain financing from a lending organization if the client is fully informed, agrees in advance to the loan, and the interest rate is not usurious). Oregon permits a lawyer unaffiliated with the client's lawyer to loan the client money and for the client to repay the loan from his or her recovery. OSB Informal Ethics Opinion 92-1 (cited in Cohen, *supra* at 49).

50. Cohen, *supra* note 49, at 43.

51. Moderate income and other clients might also seek to defer or shift some of the economic costs associated with their case, for example medical care, to lawyers who are probably in a better position to shoulder the burden of living expenses.

52. Vassen, *supra* note 3, at 37 (suggesting that some lawyers with inadequate financial resources might "do a disservice to a client by taking a case" and that these lawyers might "joint venture" the case with more established firms).

53. Comment, *Helping Hand, supra* note 3, at 238.

54. *Id.*

55. The Florida Bar v. Taylor, 648 So. 2d 1190, 1192 (Fla. 1994) (dissent); Toledo Bar Ass'n v. McGill, 597 N.E.2d 1104, 1106-07 (Ohio 1992) (dissent); In re Carroll, 602 P.2d 461, 467 (Ariz. 1979). *See* WOLFRAM, *supra* note 6, at 507.

56. Cohen, *supra* note 49, at 40.

57. They can also advertise that the repayment of litigation expenses can be contingent on the outcome of the case in some jurisdictions. *See* Rule 1.8(e)(1).

58. Rule 7.1 & 7.3(c).

59. *See* WOLFRAM, *supra* note 6, at 509; Freedman, *supra* note 34, at 647.

60. Cohen, *supra* note 49, at 39; Rhode, *supra* note 40 at 723; Comment, *Helping Hand, supra* note 3, at 246.

61. *See* Oklahoma Bar Ass'n v. Smolen, 837 P.2d 894, 897 (Okla. 1992) (dissent).

62. Rule 3.1, Comment 2. *See* Findlater, *supra* note 2, at 1675-76 (noting that there are "other measures . . . reasonably directed to deterring the nuisance suit – for example, summary procedures or imposition of defendants' counsel fee upon plaintiffs who press unmeritorious causes. . . . ").

63. Rule 6.1 ("Every lawyer . . . has a responsibility to provide legal services to those unable to pay. . . . "); EC2-1 ("Hence, important functions of the legal profession are . . . to facilitate the intelligent selection of lawyers, and to assist in making legal services fully available."). *See* Louisiana State Bar Ass'n v. Edwins, 329 So. 2d 437, 445-47 (La. 1976).

64. *See* Edwins, 329 So.2d at 448 (recognizing that it is a common practice in maritime litigation for seamen to request and to receive larger advances to support their life style pending a final disposition of high-award litigation; noting that if Louisiana lawyers do not provide such advances, the clients will find lawyers elsewhere who will).

65. In Attorney AAA v. The Mississippi Bar, 735 So.2d 294 (Miss. 1999), the Mississippi Supreme Court rejected a

request to suspend a lawyer for one year and instead privately reprimanded the lawyer who violated an ethical rule by advancing living expenses and also committed other violations. *Id.* at 306. The state still had a rule that banned living expense advances when the lawyer made such advances. The Mississippi court questioned the efficacy of the state rule and noted that at its urging the bar had recently modified the rule to permit advances for living and medical expenses under certain conditions. *Id.* at 298-301; *see also infra* notes 66-88 & accompanying text (discussing courts questioning or rejecting the majority rule).

66. *See* Cleveland Bar Ass'n v. Mineff, 652 N.E.2d 968 (Ohio 1995); Toledo Bar Ass'n v. McGill, 597 N.E.2d 1104 (Ohio 1992).

67. Cleveland Bar Ass'n v. Nusbaum, 753 N.E. 2d 183 (Ohio 2001).

68. *Id.* at 184. *See* Mineff, 652 N.E.2d at 970 (holding that mitigating factors included no financial harm to the client, the lawyer's violation was unintentional, and it did not interfere with his independent judgment in a case in which he loaned the client $5300 to avoid eviction and the loss of weight due to one meal per day).

69. Nusbaum, 753 N.E. 2d at 184.

70. One justice in a separate and "reluctant[]" concurrence suggested that a possible justification for DR 5- 103(B)'s ban on lawyers advancing living expenses was to preclude litigants from "hold[ing] out for a larger settlement . . . ." *Id.* at 184. Additional support for this justification has not been found. A handful of states have expressly rejected this justification in permitting lawyers to advance living expenses. *See* notes 81-99 & accompanying text for a discussion of the minority approach permitting living expense advances.

71. Attorney Grievance Commission of Maryland v. Kandel, 563 A 2d 387, 389-90 (Md. Ct. App. 1989). Unlike the earlier advances of $100, the ninth advance was for $200 and occurred after the case was settled. The ninth advance was not a violation of 1.8(e) because litigation was no longer pending. *Id.* at 390. *Cf.* Attorney Grievance Commission of Maryland v. Eisenstein, 635 A.2d 1327 (Md. Ct. App. 1994) (suspending a lawyer for two years, in part, for making personal loans to a "longstanding friend" and client in a pending case *id.* at 1337; noting that Maryland Rule 1.8(e)'s ban on lawyers advancing non-litigation expenses reflects the majority view and prevents lawyers from buying an interest in the subject matter of the client's litigation *id.* at 486).

72. Kandel, 563 A.2d at 389-90.

73. *Id.* at 391-92.

74. *See e.g.*, McGill, 597 N.E.2d at 1106. In *McGill*, the Ohio Supreme Court wrote: "we find some merit in respondent's assertion that DR 5 –103 (B) should perhaps be re-examined." *Id.* (citing Minnesota's version of DR 5 –103(B) that permits lawyers to guarantee living expense loans). Thus, the Court rejected the board's recommendation that the two respondents receive six-month suspensions stayed on the condition that they not violate DR 5-103(B) in the future. *Id. Accord* Mineff, 652 N.E.2d 968; *cf.* Nusbaum, 753 N.E. 2d 183.

75. Oklahoma Bar Ass'n v. Smolen, 837 P.2d 894, 902 (Okla. 1992).

76. *Id.* at 895.

77. *Id.* at 906.

78. *Id.*

79. 16 ABA/BNA Lawyers' Manual, *supra* note 25, at 698 (12/20/00) (reporting that the Oklahoma Supreme Court in Oklahoma Bar Ass'n v. Smolen, NO. SCBD-4522, (12/5/00) reaffirmed the rule against lawyers advancing living expenses & ordered a 60-day suspension for a lawyer, Smolen, who was publicly reprimanded in a prior case for advancing such expenses).

80. The Mississippi Bar v. Attorney HH, 671 So.2d 294, 298 (Miss. 1995).

81. *See* RESTATEMENT (THIRD), *supra* note 28, Sect. 36 (c) at 269-70; 16 ABA/BNA Lawyers' Manual, *supra* note 25, at 698 (12/20/00). States that allow lawyers to guarantee loans for living expenses are: Minnesota, North Dakota and Montana. Lawyers in the following states may advance living expenses directly to clients: California, District of Columbia, Florida, Louisiana, and Mississippi. The ethical rules in Alabama, the District of Columbia and Texas permit lawyers to guarantee loans and to pay their clients' living expenses.

82. *See* notes 83-97 & accompanying text (discussing these and other restrictions); Note, *Helping Hand*, *supra* note 3, at 235.

83. Edwins, 329 So. 2d at 445. The court determined that DR 5-103(B) was designed to implement Canon 5's policy of ensuring that lawyers exercise independent judgment on behalf of clients. It interpreted DR 5-103(B) in light of two ethical considerations, EC 5-7 and EC 5-8, which permitted lawyers to enter contingent fee arrangements or to advance litigation costs to provide clients with access to the courts. The court noted that living expense advances by lawyers may be "the only effective means" for impoverished clients " to enforce [their] cause of action." *Id.* at 446.

84. *Id.* at 446. *See* Dupuis v. Faulk, 609 So.2d 1190, 1193 (3d Cir. La. Ct. App. 1992)(holding that dire circumstances warranted the lawyer's advance of medical and living expenses to the client, *id.* at 1193).

85. *See* Edwins, 329 So. 2d 437, 446 (La. 1976). The Louisiana Supreme Court recently reaffirmed the humanitarian exception in Edwins, even though the state bar had not yet changed its ethical rules to permit living expense advances. Chittenden v. State Farm Mutual Automobile Insurance Company, 788 So.2d 1140 (2001) *writ granted*, 763 So.2d 610 (La. June 16, 2000), *and remanded* 788 So.2d 1140 (La. May 15, 2001). As a result, the *Chittenden* court called for the formation of a committee to study the revision of Rule 1.8(e). *Id.* at 1146 n.10. Apparently a similar circumstance existed in Illinois until recently. *See* Vassen, *supra* note 3, at 16-17. Based on *People ex rel Chicago Bar Ass'n v. McCallum*, 173 N.E. 827 (1930), Illinois courts permitted loans for living expenses even though the state bar's rule, DR 5-103(B), prohibited them. *Id.* (citing *In re* Teichner, 387 N.E.2d 265 (Ill. 1979)). However, recent Illinois decisions, that first interpreted DR 5-103(B) and then the state's current rule, Rule 1.8(d), have held that it is improper to advance living expenses. *Id.* (citing Topps v. Pratt & Callis, P.C., 564 N.E.2d 196 (4th Dist. 1991)) *appeal denied* 567 N.E.2d 343, *and appeal granted* 571 N.E.2d 156, *appeal improvidently granted* 579 N.E.2d 890).

86. Florida Bar v. Taylor, 648 So. 2d 1190, 1192 (Fla. 1995) (citing Louisiana State Bar Ass'n v. Edwins, 329 So. 2d 437 (La. 1976)). The *Taylor* court also found helpful information for its ruling in the case of *The Florida Bar v. Dawson*, 111 So.2d 427 (Fla. 1959). *See* Timothy P. Chinaris, *Survey of Florida Law: Professional Responsibility Law In Florida: The Year in Review, 1995*, 20 NOVA L. REV. 223, 230 (1995) (criticizing the *Taylor* decision as being based on "unrealistic assumptions and presents a strained application of the ethics rules.").

87. Taylor, 648 So. 2d 1190 (involving a medical malpractice claim).

88. *Id.* at 1192.

89. Ala. Rules of Prof. Conduct, Rule 1.8 (e)(3) (2001) (stating "a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise of assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer . . . . "). *See* ABA/BNA Lawyers' Manual, *supra* note 25, 51:801, at 11; RESTATEMENT (THIRD),

supra note 28, Sect. 36 (c), at 269-70.

90. Minn. Rules of Prof. Conduct Rule 1.8 (e) (1)-(3) (1999) (providing "a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains liable for repayment of the loan without regard to the outcome of the case and . . . that no promise of such financial assistance was made to the client . . . prior to the employment of that lawyer by the client."); N. Dakota Rules of Prof. Conduct, Rule 1.8(e)(3) (2001) (states "[a] lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains liable . . . for repayment . . . without regard to the outcome of the litigation and, . . . that no promise of financial assistance was made to the client . . . prior to the [client's] employment of that lawyer. . . ."). *See* ABA/BNA Lawyers' Manual, *supra* note 25, Sect. 51:801, at 11.

91. *Id.*

92. Montana Rules of Prof. Conduct, Rule 1.8(e)(3) (1996) (providing "a lawyer may for the sole purpose of providing basic living expenses, guarantee a loan form a regulated financial institution whose usual business involves making loans if such loan is reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle the case because of financial hardship rather than on the merits, provided the client remains . . . liable for repayment . . . without regard to the outcome of the litigation and . . . neither the lawyer nor anyone on his/her behalf offers, promises or advertises such financial assistance before being retained by the client.").

93. *Id.*; *see* ABA/BNA Lawyers' Manual, *supra* note 25, Sect. 51:801, at 12. Proponents of a rule that only permits lawyers to guarantee loans from a third-party lender contend that the approach makes a client feel less psychologically indebted to the lawyer and therefore less inhibited about "exercis[ing his or her] right of control over the cause of action." *Guaranteeing Loans*, *supra* note 3, at 1110-11. The concern about the client's sense of indebtedness may be overstated. For example, a client's sense of indebtedness may be greater in the contexts of a contingency fee arrangement or where the lawyer is advancing litigation expenses. It is unfair to arbitrarily force clients to turn to third-party lenders for living expenses but not for litigation-related expenses. Moreover, the lawyer's full disclosure of any risks concerning a direct advance of living expenses should adequately protect the client's interests, including the client's sense of control over his or her cause of action. Ideally, the disclosure should be in writing and signed by the client.

94. Mississippi Rules of Prof. Conduct, Rule 1.8(e)2a & b (1999) (providing that a lawyer may advance "[r]easonable and necessary medical expenses associated with treatment for the injury giving rise to the litigation or administrative proceeding for which the client seeks legal representation: and [r]easonable and necessary living expenses incurred."). Lawyers can advance minor sums "under dire and necessitous circumstances," including to prevent foreclosure or repossession or for necessary medical treatment. *Id.* at 2b. Payments aggregating $1500 or less must be reported to the Mississippi Bar's Standing Committee on Ethics within 7 days following each payment. *Id. See* Elizabeth J. Cohen, *Affairs of the Heart*, 87 A.B.A. J 66 (2001) (reporting that lawyers in Mississippi are not "categorically prohibit[ed] from advancing medical insurance premiums to needy clients") (citing *In re ex parte Application of* G.M., No. 2000-M-00165-SCT (Miss. 4/19/01)).

95. The rules of Alabama, California, Minnesota, North Dakota, and Montana appear to preclude any communication of living advances to the public by preventing lawyers from promising living expenses prior to employment. The judicial exceptions for lawyers advancing living expenses in Louisiana and Florida also require that a lawyer be retained before offering to pay or guarantee the client's living expenses. *See* Chittenden, 788 So.2d at 1145; Taylor, 648 So. 2d at 1191-92 (noting the referee's finding that the lawyer's financial assistance was not for establishing or maintaining employment, the court impliedly requires the lawyer's employment before promising living expenses).

96. *See* Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988).

97. Rules of Prof. Conduct of the State Bar of California, Rule 4-210(A)(2). Payment of Personal or Business Expenses Incurred by or for a Client (1989) (Rule 4-210(A) (2) provides that a lawyer is not prohibited " [a]fter employment, from lending money to the client upon the client's promise in writing to repay such a loan: . . . . "). Lawyers' loans under this rule, including living expenses, have not apparently produced significant disciplinary problems. *See* Telephone Interview with Jeff Dal Cerro, Assistant Chief Trial Counsel, Office of Chief Trial Counsel, State Bar of California (San Francisco) (1/2/02) ("as a stand alone violation, it has not created any significant problems but it could implicate conflict rules"). California also has a rule that does not prohibit lawyers from advancing all reasonable costs of litigation "or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. It does not seem to cover lawyers advancing living expenses. *See* ABA/BNA Lawyers' Manual, *supra* note 25, Sect. 51:801, at 12.

98. Texas Disciplinary Rules of Prof. Conduct, Rule 1.08. Conflict of Interest: Prohibited Transactions (d)(1)(1991) (Rule 1.08 (d)(1) provides " a lawyer may advance or guarantee court costs, . . and reasonably necessary medical and livening expenses, the repayment of which may be contingent on the outcome of the matter, . . . "). *See* ABA/BNA Lawyers' Manual, *supra* note 25, Sect. 51:801, at 12; Note, *Helping Hand supra* note 3, at 236, n. 71 (citing State Bar of Texas, Comm. on Prof. Ethics, Formal Op. 2230 (1959)).

99. D.C. Rules of Prof. Conduct Rule 1.8(d)(2) (1996) (providing that "A lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may pay or provide: (2) other financial assistance which is reasonably necessary to permit the client to institute or maintain the litigation or administrative proceeding." *Id.* Rule 1.8(d) & (d)(2)).

100. *See* Telephone Interview with Wallace Shipp, Deputy Bar Counsel for the District of Columbia (1/4/02).

101. *See Id.* Attorney Shipp has been bar counsel for 21 years and reported: "I can not remember docketing a complaint involving a lawyer overreaching in the context of this rule [- permitting lawyers to advance expenses, including living expenses]."

102. *See Id.* One justification for the majority rule's ban on living expense advances is that it restricts improper solicitation by lawyers. *See supra* notes 55-59 & accompanying text. Attorney Shipp has not seen lawyers advertising advancements of living expenses to solicit clients. *See supra* note 100.

103. *See* Interview with Edward Cleary, Dir., Minnesota Office for Lawyer Prof. Responsibility (1/2/02) (reporting that the issue of lawyers advancing living expenses to clients is not "a significant problem area" and noting that a number of lawyers have been privately admonished over the past several years for paying clients' living expenses instead of guaranteeing loans for the expenses).

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such motions also inevitably delays the resolution of pending matters. The cost and burden of dealing with such motions may well be the reason that the Seventh Circuit and other courts have suggested lateral screening as a sensible solution for the wasteful practice of tactical disqualification motions.

CONCLUSION

The three myths involved in the defeat of the Ethics 2000 Commission's lateral screening proposal in the House of Delegates do not survive real-world scrutiny. Regrettably, the inordinate concern for keeping up appearances has caused real harm to innocent clients, needlessly impaired the professional mobility of countless lawyers, and burdened the courts with pointless posturing. The House of Delegates may have spoken on lateral screening, but the individual states will have the final word as they review the recommendations of the Ethics 2000 Commission. If the states are guided by reality rather than myth, they will conclude that the Commission got it right on lateral screening.

ENDNOTES

* Robert A. Creamer is a Vice President and Loss Prevention Counsel of Attorneys' Liability Assurance Society, Inc., A Risk Retention Group (ALAS). The views expressed in this paper are the author's and not necessarily those of ALAS. The author is indebted to Joseph R. Lundy of ALAS for his comments on this paper.

1. The vote was 176 to 130 in favor of an amendment deleting the proposed screening provision. The membership of the House of Delegates is approximately 530.
2. The seven states that have recognized lateral screening by rule are: Illinois [Rule 1.10(e)]; Kentucky [Rule 1.10(d)]; Maryland [Rule 1.10(b)]; Michigan [Rule 1.10(b)]; Oregon [DR 5-105(I)]; Pennsylvania [Rule 1.10(b)]; and Washington [Rule 1.10(b)].
3. Brian J. Redding, *Screening for Lateral Entrants and Limiting Future Malpractice Liability*, 10 THE PROFESSIONAL LAWYER 8 (Summer 1999).
4. *See, e.g.*, Peter R. Jarvis, *Sixteen Years on Screen: Oregon's Lateral Hire Screening Rules*, 10 THE PROFESSIONAL LAWYER 2 (Summer 1999).
5. M. Peter Moser, *Screening of Personally Disqualified Lawyers to Avoid Law Firm Disqualification Should Be More Widely Employed*, 1999 SYMPOSIUM ISSUE OF THE PROFESSIONAL LAWYER 159/164 (1999). Mr. Moser is a member, and former chair, of the ABA Standing Committee on Ethics and Professional Responsibility.

Living Expenses, continued from page 13

104. *In the Matter of* Philip S. Arensberg, 553 N.Y.S.2d 859, 860 (1990) (censuring lawyers for advancing living expenses and refusing to excuse their conduct because other lawyers make such advances). *See* Bruce Green, *Lawyer Discipline: Conscientious Noncompliance, Conscious Avoidance, and Prosecutorial Discretion*, 66 FORD. L. REV. 1307, 1308 n.6 (March 1998) ("suspect[ing] that noncompliance with this particular disciplinary rule, privately and as a matter of conscience, is common."). *See generally* Chinaris, *supra* note 86, at 231 (suggesting that the Florida Supreme Court's refusal in *Taylor* to apply "the plain language of the rule" banning lawyers' advances for living expenses will "breed disrespect for this and other rules.").

105. *See* Green, *supra* note 104, at 1308 & n.6. Professor Green described two instances that indicate why lawyers ignore the current ban. The first involved a poverty lawyer who arranged for a friend to loan living expenses to the lawyer's impoverished client. The lawyer subsequently reimbursed the friend to avoid violating the ethical ban against such advances. In this way, the poverty lawyer was able to accomplish what he believed was morally correct. *Id.* at 1308 n.6. The second situation involved a speech by a disciplinary prosecutor. Afterwards, a lawyer in the audience described a situation where the lawyer felt compelled to loan money to a distressed client. "The disciplinary counsel's response was, in substance, 'Give him the money. Just don't tell us about it.'" *Id.* at 1308.

Billing, continued from page 19

got to bring them up. You're making us look bad."

There were no questions regarding how Sarah's firm could do the same amount of work so much more efficiently. Instead there was just the conscience dulling suggestion to bill more hours so the lead firm wouldn't have to reduce theirs.

This little tale seems to define one of the central ethical dilemmas of the modern practice of law. When professionalism comes up against profit, it is profit that wins more often than not.

Let us not put our young associates and ourselves in the ethical position of Watergate defendant, Jeb Magruder, himself a relatively young lawyer, when he said, "I know what I have done, and Your Honor knows what I have done. Somewhere between my ambition and my ideals, I lost my ethical compass."

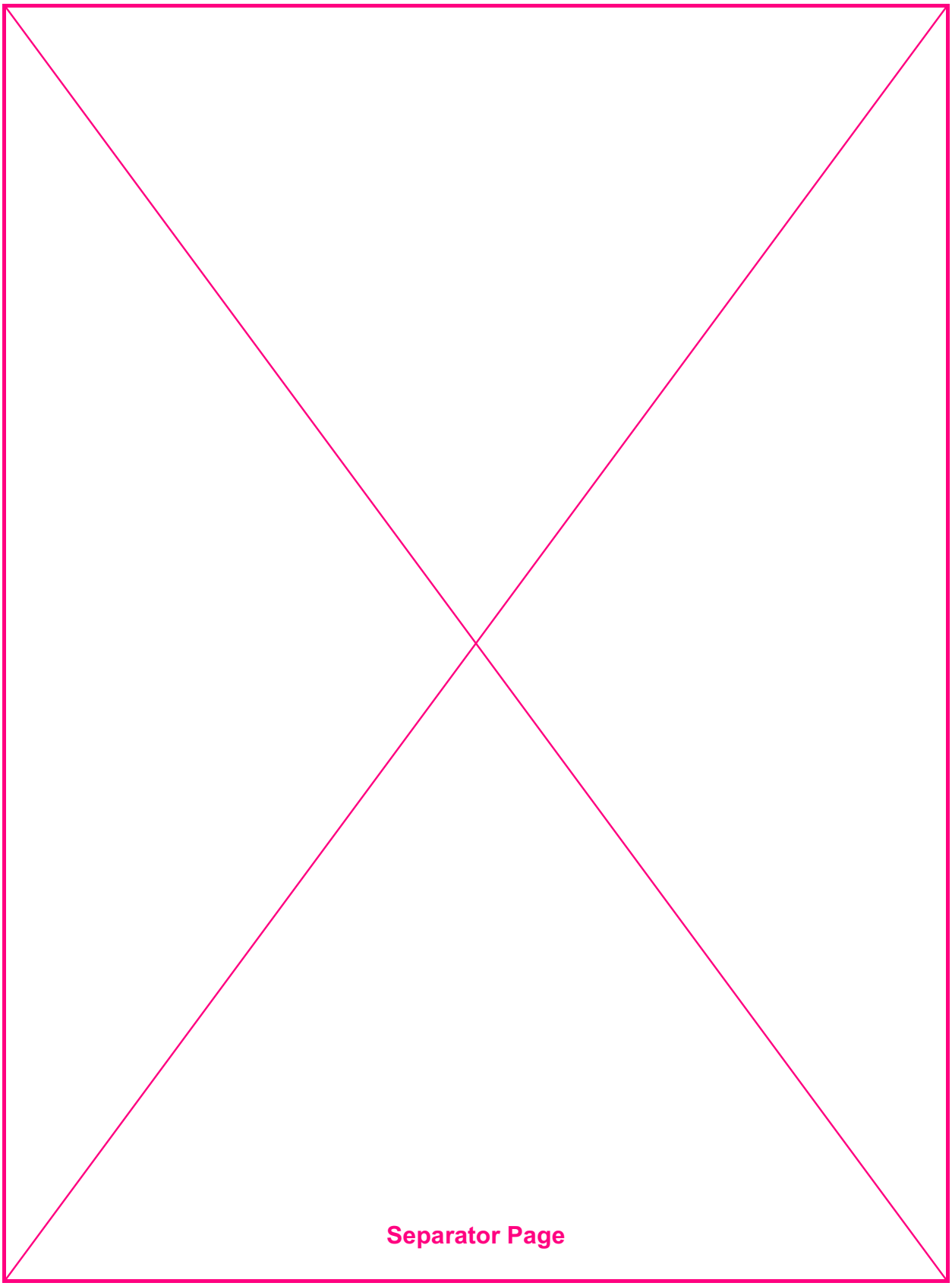
Instead we should heed the thoughts of Mark Twain. "Morals (and ethics) are an acquirement like music, like a foreign language, like piety, poker or paralysis. No one is born with them."

So let's try harder to teach our young lawyers positive lessons. Our need for wealth should not be their first priority. Instead of teaching them how to predetermine billing outcomes to the financial detriment of our clients, let's focus both them and ourselves on doing each task as efficiently as possible. Let the total amount of the time consumed be judged by that standard.

Let's also forsake the practice of setting associate bonuses based on the amount of gross time they have charged our clients. Instead, we should predicate them on how much they have accomplished as lawyers without respect to the billable hours involved.

There is an old saying that each of us has to live with ourselves so we should see to it that we always have good company. Let's try to keep our own consciences sharp and alive. In doing so, keep in mind that it is far easier to prevent bad habits than to break those already acquired. Let's not force our young lawyers into the same bad habits we older lawyers struggle against.

And don't forget the words of Oscar Wilde, "No man (or woman) is rich enough to buy back their past."



Separator Page

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

AGENDA

September 22, 2006, 9:00 a.m.
Supreme Court Conference Room

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1. Approval of minutes [See attached pages 1-9]
2. Administrative matters
   a. Committee membership
   b. Select next meeting date
3. Additional comments on proposed CRPC amendments:
   a. William R. Gray letter [See attached pages 10-13];
   b. Morrison Heth e-mail [See attached pages 14-16]
   c. Michael L. O'Donnell, Cathy S. Krendl, Robert R. Keatinge, and Carolyn J. Fairless letter [See attached pages 17-21]
4. Report on proposed CRPC amendments – Justices Bender and Coats
5. Report from Subcommittee on CLE Programs Concerning Amended Rules – Ruthanne Polidori
6. Report from Rule 1.4 Subcommittee (Disclosure of Insurance Coverage) – Nancy Cohen [See attached pages 22-30]
7. Report from CRCP 265 Subcommittee – David Stark
8. Report from Alternative Attorney Roles Subcommittee – Tony van Westrum
9. Report on status of referral of possible discrepancy between Rule 6.1 comment and CRCP 260.8, to Board of Continuing Legal Education – David Little [See attached pages 31-42]

10. New Business

11. Adjournment (by noon)

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

FILE NOTE

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

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

PURVIS, GRAY & MURPHY, LLP
ATTORNEYS AT LAW

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TELEPHONE (303) 442-3366
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e-mail: info@purvisgray.net

PLEASE REPLY TO BOULDER OFFICE

August 16, 2006

Susan J. Festag
Clerk of the Colorado Supreme Court
2 East 14th Avenue, 4th Floor
Denver, CO 80203

Re: Concerning proposed changes to the Rules of Professional Conduct

Dear Chief Justice Mullarkey, Justice Bender, and Members of the Court:

It has only today come to my attention that the court is considering revisions to the Colorado Rules of Professional Conduct. Although the comment period has technically closed, I have one area of these proposed Rules changes that concern me, namely, the under-regulation of lawyer advertising.

An article appeared in Lawyers USA on August 14, 2006 that summarizes recent supreme court actions in several jurisdictions across the country, all of which are efforts to reclaim lost ground in appropriately regulating lawyer advertising. This article and the Rules revisions it reports merit your thoughtful consideration. I am enclosing a copy of that article for your ease of reference.

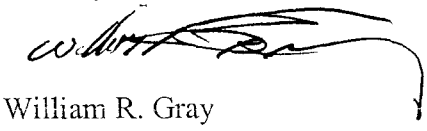
Succinctly, I am strongly in favor of placing a requirement in Rule 7.2 similar to that imposed by the Missouri Supreme Court in September, 2005 that lawyer television advertising contain a required disclaimer stating, "The choice of a lawyer is an important decision and should not be based solely on advertisements."

I agree with the quoted observation of the immediate past president of the New York State Bar Association, A. Vincent Buzard, who is reported in this article to have stated that "Inappropriate (note, I would substitute "inappropriately under-regulated") lawyer advertising causes the public and the legal system problems because it reinforces the myth that there's a litigation explosion." Buzard also is quoted in this article as having observed that, "It convinces people that the legal system is some kind of lottery–the idea of 'come to us and you'll be wealthy.'"

I appreciate the limitations that *Bates v. Arizona, 433 U.S. 350 (1977)* and its progeny create, but I believe that, since *Bates*, lawyers and supreme courts across the country have largely abdicated

our responsibility to take necessary steps to appropriately regulate lawyer advertising, and that in our zeal to be in compliance with *Bates* we have conceded ground in this regulatory swamp that ultimately has proven to be a disservice to the public and even fosters lawyer advertising that is demeaning to our noble profession. The requirement imposed by the Missouri Supreme Court would be an important retrenchment. I commend it to your thoughtful consideration.

Sincerely,



William R. Gray

WRG/kl

cc: Marcy G. Glenn, Esq.
John S. Gleason, Esq.

Ohio: Decision illustrates nationwide backlash. Continued on page 22

purpose of economic development, had remained in her home, defiant.

Kelo: Dozens of bills have been introduced. Continued on page 23

...awyers see work slump

don't see any slowdown." M. Horowitz, president of ...ice ...ege of Real Estate s national real es- ket ... ...ixed," with some areas – notably New York and Washington – showing staying power, and

Slump: Commercial real estate is thriving. Continued on page 28

New York weighs tough new lawyer advertising rules

By Dick Dahl
Staff writer

Standing before images of fiery explosions or computer-animation car crashes, the wild-eyed Shapiro would jab his hands into the air and assure viewers that he would scorch the earth in his pursuit of wrongdoers.

"I cannot rip the hearts out of those who hurt you; I cannot hand you their severed heads," he said in one commercial. "But I can hunt them down and settle the score."

He ended his commercials with a further promise: "You call. I hammer."

Shapiro's commercials are no more – he was hit with a $1.9 million malpractice judgment by a jury that determined he never actually tried cases, but left all the work to paralegals. But they're an example of the kind of advertising that prompted four presiding justices of New York's appellate courts to propose new disciplinary rules designed to discourage any future Jim Shapiros.


Jeffrey Freedman

Attorneys are sharply divided over the proposed changes. Some

Ads: Changes may hit small law firms hardest. Continued on page 24

...rdicts & ...ettlements

Leaky pain patch yields $772,000 verdict

In what is believed to be the first verdict involving a defective pain patch, a Houston jury awarded $772,000 to the daughter of a Texas woman who died after using a leaky patch. .....Page 8

Book Review

The 'Anonymous Lawyer'

Jeremy Blachman, the Harvard Law graduate behind the popular blog "The Anonymous Lawyer," has turned his satiric site into a new book - "Anonymous Lawyer: A Novel." .....Page 12

See Index on page 5

The Profession

Prejudice galvanizes Muslim lawyers

The Sept. 11 terrorist attacks are spurring Muslims to enter the legal profession in increasing numbers. .....Page 14

Proposed new advertising rules divide lawyers

Continued from page 1

believe that the rules, which are scheduled to go into effect Nov. 1, will return decorum to the profession, while others contend that many of them are unconstitutional.

Lawyers have a chance to comment until Sept. 15, but unless the rules change significantly New York will have one of the strictest regimes for lawyer advertising. (See accompanying story for a detailed description of the changes.)

Although other states generally have less restrictive rules, a "get tough" approach to lawyer advertising is appearing in someother parts of the country as well.

For example, in September 2005 the Missouri Supreme Court adopted amendments to the state Rules of Professional Conduct that place greater restrictions on lawyer advertising, including a required disclaimer that states, "The choice of a lawyer is an important decision and should not be based solely on advertisements," and prohibitions on ads that suggest guaranteed good results.

In Florida, the state supreme court held last November that a law firm's use of images of pit bulls in spiked collars – and its toll-free phone number 1-800-PIT-BULL – was improper. *(The Florida Bar v. Pape*, 918 So.2d 240 (Fla. 2005).)

And on July 19, the New Jersey Supreme Court prohibited attorneys from mentioning "Super Lawyer" or "Best Lawyers in America" rankings in their advertisements.

Conflicting views

Back in 1977, the U.S. Supreme Court ruled that it was unconstitutional for states to prohibit lawyers from advertising. (*Bates v. State Bar of Arizona*, 433 US 350 (1977).

Since then, two distinct opposing factions have emerged. On one end are the old guard, who believe that any advertising demeans the profession. On the other are those who say that relatively unfettered lawyer advertising provides consumers with the information they need to make good choices.

The New York rules represent a victory for the old guard's position.

Michael S. Ross, a New York City lawyer who served on the bar association task force that drew up the first draft of the rules, said the effort was fueled in part by public pressure.

"There's been a lot of distaste for the way lawyers solicited clients after disasters, like the Staten Island Ferry disaster," which killed 11 people and injured 71 in October 2003, he said.

In addition, an increasing number of lawyers have been advertising on television. And some, like Shapiro, employ devices that traditionalists find troubling.

For example, the Albany, N.Y. personal-injury firm of Martin, Harding and Mazzotti has been running TV ads since 1995 calling themselves "The Heavy Hitters."

But if the rules are adopted, the firm would have to stop using the term "heavy hitters," because monikers would be banned.

Taglines could also be at risk. Buffalo, N.Y. attorney Jeffrey M. Freedman states in his ads, "We Get Results." But the rules say advertisements or statements can't contain "statements that are reasonably likely to create an expectation about results the lawyer can achieve."

"It's not going to put me out of business," said Freedman. "But I'm not happy about it."

Some lawyers are also unhappy with the new required disclosures for TV ads, which will add about 10 seconds to each commercial. According to Paul Harding of the Martin, Harding and Mazzotti firm, this makes his 15-second spots worthless.

Hitting small firms hardest?

A. Vincent Buzard, a partner at Harris Beach in Rochester, N.Y. and the immediate past president of the New York State Bar Association, believes that too many ads undermine the dignity of the profession and the legal system. When he took office, he set out to do something about it, and created the task force that wrote most of the rules.

"Inappropriate lawyer advertising causes the public and the legal system problems because it reinforces the myth that there's a litigation explosion," he said. "It convinces people to believe that the legal system is some kind of lottery – the idea of 'come to us and you'll be wealthy.'"

But David J. Abeshouse, a Uniondale, N.Y. business litigator, believes the new rules will primarily "hurt small, high-end practices, because it ties our hands in terms of being able to tell prospective clients who we are."

"Solos and small firms are the ones who benefit most from advertising," agreed Syracuse, N.Y. lawyer Nicole Black. "Big firms have the ability to get clients in traditional ways, like sponsoring or underwriting events."

The most onerous change for smaller firms, Abeshouse said, are new notification requirements which state that a copy of each advertisement or solicitation must be filed with the appropriate attorney disciplinary committee "at the time of its initial dissemination."

And because the rules' labeling and notification requirements apply to "all computer-accessed information," Abeshouse believes that websites, blogs, podcasts and possibly even e-mail could in some circumstances be considered ads.

"What if I'm sending an e-mail to someone who's not a client?" he asked. "What if something I said can be interpreted to be self-promotional?"

Port Jefferson Station, N.Y. attorney Alison Shields has her own blog, Legal Ease Blog, and she's also concerned about the filing requirements.

"Some people blog three times a day. What kind of administrative nightmare would that be?" she complained.

Freedman predicted that if the rules go into effect as planned, "there definitely will be litigation. I believe this will ultimately be settled by the U.S. Supreme Court."

Roslyn, N.Y. plaintiffs' attorney Philip L. Franckel agrees.

"I think they may be unconstitutional. Why should I have to tell [anyone] which TV stations my ads will be on and the frequency of their appearance? I've tried to come up with a legitimate reason to know that, but I can't come up with anything," he said.

But Roy D. Simon, Jr., a professor of legal ethics at Hofstra University School of Law, thinks the rules may survive a challenge.

The changes, he said, "are at the border of what the First Amendment allows by way of restrictions on lawyer advertising and may cross that border. But the border may be moving, and by the time these are challenged all the way up to the U.S. Supreme Court, which I believe they will be if they remain in their present form, the Court may decide this is acceptable."

Get a copy

The rules can be viewed at: www.nycourts.gov/rules/proposedamendments.shtml

Comments should be sent by Sept. 15 to: Michael Colodner, Esq., Counsel, Office of Court Administration, 25 Beaver Street, New York, N.Y. 10004. You can access a copy of the New Jersey Super Lawyer decision (Opinion 39, Committee on Lawyer Advertising) at: http://www.judiciary.state.nj.us/notices/ethics/CAA_Opinion%2039.pdf

Questions or comments can be directed to the writer at: dick.dahl@lawyersusaonline.com

What the rules say

The key changes in the proposed New York lawyer advertising rules include:

- A 30-day moratorium on solicitations in wrongful-death or personal-injury cases. A limited exception is provided for claims that must be filed in less than 30 days.
- A ban on using actors to portray clients, judges or lawyers, and on inaccurate re-enactments. Depictions of a courtroom or courthouse would also be prohibited.
- A ban on paid endorsements, testimonials by current clients or nicknames (e.g., "The Hammer") in ads. Unrealistic claims or promises would also be prohibited.
- A prohibition on "pop-up" ads and chat-room solicitations.
- Two requirements for TV ads: a disclosure that the commercial is "an advertisement for legal services" and a disclaimer that "prior results cannot and do not guarantee or predict a similar outcome with respect to any future matter, including yours, in which a lawyer or law firm may be retained."

The rules will require lawyers to file all ads for legal services, including radio and television ads, with the relevant disciplinary committee for review, and to translate all foreign-language ads into English. The submissions must be accompanied by information on where and how frequently the ads will appear.

The changes cover all manners of online advertising and solicitation, including websites and e-mail, and apply to out-of-state lawyers who solicit clients in New York.

Attorneys are sharply divided over the issue.

"The time has come to do something about this," said Robert E. Lahm, president of the New York Academy of Trial Lawyers, a two-year-old organization whose stated purpose is to improve lawyers' public image and credibility.

"I believe in the First Amendment, but I think too many [solicitations] go over the top," said Lahm, a Syracuse, N.Y. trial lawyer. "This kind of misleading advertising has to be reined in."

But critics contend the rules are overkill.

"The people who make grandiose statements should be controlled," said David J. Abeshouse, a Uniondale, N.Y. business litigator and ADR provider who also lectures on legal ethics. "But to make rules that affect everyone is using too broad a brush."

– Dick Dahl

Marcy Glenn

From: Marcy Glenn
Sent: Monday, September 11, 2006 7:26 PM
To: 'Chuck Turner'
Cc: 'nathan.coats@judicial.state.co.us'; 'bender michael'; 'moheth@frii.com'
Subject: RE: Rule 1.8 Suggestion

Hi, Chuck, thanks for passing this along. And thank you, Mr.. Heth, for your thoughtful suggestions. I believe that the case you are recalling might be *People v. Berge*, 620 P.2d 23 (Colo. 1980). Since our committee has submitted its report already and I know that the Supreme Court is currently considering what rule amendments to adopt, I am forwarding the e-mail exchange below directly to Justices Bender and Coats, who are the liaisons to the Standing Committee, for the Court's consideration.

I note that our committee recommended adopting the ABA version of Rule 1.8(c), consistent with the committee's presumption of recommending the ABA rule unless there was a strong reason to depart from the Model Rule. It is possible that the Court will view Mr.. Heth's suggested changes as warranting such a departure.

Sincerely,

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

HOLLAND&HART

From: Chuck Turner [mailto:cturner@cobar.org]
Sent: Thursday, September 07, 2006 10:48 AM
To: Marcy Glenn
Subject: FW: Rule 1.8 Suggestion

Marcy, for your Committee's perusal and/or disposition as you see fit. I would appreciate some feedback as I'd like to be responsive to this fellow. Thanks Marcy; hope all is well with you and family, cct

---

From: Nancy L. Cohen [mailto:nancy.cohen@arc.state.co.us]
Sent: Tuesday, August 29, 2006 3:34 PM
To: Chuck Turner
Subject: RE: Rule 1.8

Sorry Chuck for the delay. I think this should go to the Standing Rules Committee so to Marcy. Nancy

-----Original Message-----
From: Chuck Turner [mailto:cturner@cobar.org]
Sent: Tuesday, August 29, 2006 1:59 PM
To: Nancy L. Cohen
Subject: FW: Rule 1.8

Can I assume that someone will look at this? Should I send it to our Ethics Committee or Marcy or somebody? Thanks Nancy, cct

---

From: Chuck Turner
Sent: Monday, August 21, 2006 1:52 PM
To: 'Morrison Heth'
Cc: Nancy L. Cohen
Subject: RE: Rule 1.8

Good thoughts; I do recall the case, it involved a fairly prominent estate attorney. cct

---

From: Morrison Heth [mailto:moheth@frii.com]
Sent: Monday, August 21, 2006 10:05 AM
To: Chuck Turner
Subject: Re: Rule 1.8

Mr. Turner,

Thanks for your reply. For what it may be worth my suggested revision in red of the rule follows. The suggested revision also includes other lawyers in the lawyer's firm to avoid the disciplinary problem that came up in a case whose name I cannot remember. A client wanted to make a bequest to his Denver lawyer, who said he could not prepare such a provision, so the lawyer had another lawyer "down the hall" prepare the will, and the court said that was still a prohibited conflict of interest. The case was a few years ago.

c) A lawyer shall not prepare an instrument giving the lawyer, another lawyer or employee of the lawyer's firm, or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the other lawyer, employee or donee.

Thanks again,

Mo Heth

> ----- Original Message -----
> **From:** Chuck Turner
> **To:** Morrison Heth
> **Sent:** 08/21/2006 8:50 AM
> **Subject:** RE: Rule 1.8
>
> Thanks for thought; I will run this by those who make these calls and see if that has been discussed. cct
>
> ---
>
> **From:** Morrison Heth [mailto:moheth@frii.com]
> **Sent:** Friday, August 18, 2006 5:19 PM
> **To:** Chuck Turner
> **Subject:** Rule 1.8
>
> Dear Mr. Turner,

Rule 1.8(c) of the professional rules of conduct provides as follows:

c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

To avoid situations that have come up more than once, it would be helpful to include employees of the lawyer as an additional class of persons that the lawyer is prohibited from preparing instruments giving a substantial gift. Just a thought for future consideration.

Thank you.

Morrison L. Heth
Attorney at Law
200 East 7th Street, Suite 406
Loveland, CO 80537
970-663-7238 Office
970-663-7296 Fax
Email: moheth@frii.com

September 14, 2006

Via Hand Delivery

Colorado Supreme Court
2 E. 14th Ave.
Denver, Colorado 80203

Re: Proposed Rule Changes

Dear Justices of the Colorado Supreme Court:

We are writing to express our concern about the proposed changes to the Scope of the Rules of Professional Conduct. In particular, we are concerned about the impact that the changes are likely to have on legal malpractice and breach of fiduciary duty claims against lawyers, and transactional lawyers in particular.

The proposed changes would delete the sentence, "Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty," and replace it with the sentence "Nevertheless, since the Rules do establish standards of conduct by lawyers, in appropriate cases, a lawyer's violation of a Rule may be evidence of a breach of the applicable standard of conduct." Such a revision would raise a host of potential problems, including the following:

1. It is our understanding from speaking with some members of the Standing Committee that the Rule changes are not intended to create new bases for malpractice claims against lawyers. However, by deleting the current last sentence, the implication is that that sentence is no longer intended to be part of the Scope, i.e., that the Rules in fact should now be viewed as augmenting a lawyer's substantive legal duty. Such an implication would lead to undesirable and unintended results. As the proposed changes are not intended to create new standards for civil liability against lawyers, then the existing language should remain in the Scope, even if additional language is added.

2. The additional language sought to be added to the Scope is also problematic, for several reasons. First, the proposed language uses the term "in appropriate cases," without defining what cases are in fact appropriate. This ambiguity can have harsh and unintended consequences for transactional lawyers. For example, a civil case where the lawyer is alleged to have improperly represented opposing sides in litigation may be an "appropriate case" for use of Rule 1.7 as evidence of a breach of a standard of conduct. However, should that same rule be applied to a lawyer who represents a husband and wife in estate planning, or to a lawyer who assists the founders of a small company? For business lawyers, "in appropriate cases" is not the limitation the committee believes it to be, and may be no limitation at all.

3. More fundamentally, although proponents of the proposed new last sentence argue that it is consistent with the case law, it would, in fact, represent a change to existing

Colorado law. The current commentary limits the application of the Rules to disciplinary matters, and the Colorado courts have tended to observe this position. *See* Code of Professional Responsibility, Preliminary Statement; Colorado Rules of Professional Conduct, Preamble, Scope and Terminology ("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."). *See also Bryant v. Hand*, 158 Colo. 56, 404 P.2d 521 (Colo. 1965). Notably, Delaware, the home of Chief Justice Veasey (the chair of the ABA Ethics 2000 Committee) adopted Ethics 2000, yet chose not to include the proposed addition to the Preamble.[1] To remain consistent with existing Colorado law, Colorado should follow Delaware's lead.

4. At a minimum, the proposed new last sentence will cause confusion, because it cannot be reconciled with the remainder of the Preamble. The Preamble states that "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." It is difficult to see how the new language can be harmonized with this existing language.

5. As a practical matter, the more burdens that are placed on transactional lawyers, the more inclined those lawyers will be to avoid as a prophylactic measure, representations that could raise conflict issues, even if such avoidance would be contrary to the client's and society's best interests. For example, transactional lawyers will increasingly refuse to represent more than one party, thereby making it very difficult for small businesses to obtain competent and affordable legal representation. In a business setting, there is often more than one equity owner, and these owners want to minimize, and may have no financial choice but to minimize, legal fees when they are beginning their businesses. If a violation of the conflict rules can give rise to civil liability, transactional lawyers may be reluctant to take on the representation in the first place. Alternatively, lawyers may advise the owners that each of them will require separate counsel, with all of the concomitant expense that would be entailed. This result may generate more fees for lawyers, but is not the best interest of business clients.

6. Similarly, estate planning lawyers will be loath to represent multiple family members, and will advise a husband and wife, for example, that they each need to obtain

---

[1] Delaware also chose not to include the language "Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty." However, as noted in Paragraph 1 above, as that language has previously been adopted in Colorado, deleting the language would prove problematic.

separate counsel to represent their interests in drafting a will. This would be unduly expensive for the client, and could also damage the marital relationship by fostering an unnecessarily adversarial relationship between the husband and wife. Again, such a result would not serve the clients' interests, and could also lead to undesirable social consequences.

7. The proposed change would also cause lawyers to send clients more letters explaining potential conflicts, and purportedly obtaining consent to those conflicts, in an attempt by the lawyer to avoid civil liability. Such a result, while perhaps helping to insulate the lawyer from liability under the proposed Scope changes, would help only the lawyer – not the client. For example, a sophisticated business client will not obtain any useful information from such a letter. Instead, the client will question why the lawyer is writing a letter whose sole purpose is to protect the lawyer. This is not conducive to a relationship of trust between the lawyer and client, and will only serve to further erode the public's image of the legal profession.

8. As the above examples are intended to show, it is often unclear in the business context what is a standard of conduct and what is a standard of care. The revision to the rule confuses the two concepts even more.

9. A review of the Committee's minutes demonstrates that the Committee did not consider the unique issues arising in representing transactional clients. These issues should be given serious consideration before any changes are made.

10. The proposed new last sentence is also troublesome in that it only speaks to violation of a Rule as evidence of a breach of the applicable standard of conduct. If such evidence is in fact to be allowed, then why is evidence of compliance with a Rule not also admissible as evidence that no breach occurred? It is inherently unfair to subject lawyers to civil liability for failing to comply with a Rule, while not simultaneously providing them with a safe harbor when they have complied with the Rules.

11. Finally, it appears that the proposed changes go to the admissibility of certain evidence at trial. The Preamble is not an appropriate place in which to make these admissibility determinations. Rather, such a change should be made – if it is to be made at all – in the Rules of Evidence, and should be subject to the same review and approval process as for any other change to the evidentiary rules.

In conclusion, the Rules are designed for disciplinary purposes only, and should not be expanded to provide bases for civil liability. We therefore urge the Court not to adopt the proposed changes to the Scope. Although we view any of the proposed Scope changes as undesirable, to the extent that the Court wishes to adopt revisions, we recommend the following: (1) the change should be made subject to the review and approval process for Rules of Evidence; (2) the existing last sentence should remain in the Scope even if the proposed new last sentence

is added; (3) the proposed new last sentence, if added, should be modified to read as follows: "Nevertheless, since the Rules do establish standards of conduct by lawyers, in appropriate cases, a lawyer's violation of a Rule may be evidence of a breach of the applicable standard of conduct, or a lawyer's compliance with a Rule may be evidence that the lawyer did not breach the applicable standard of conduct."; and (4) the phrase "in appropriate cases" should be more accurately defined. Should the Court wish to define "in appropriate cases" we would be happy to work with you in developing a definition.

We appreciate your time and consideration. Please feel free to contact us if you would like to discuss these issues further.

Respectfully,

Michael L. O'Donnell
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MEMORANDUM

TO: Colorado Supreme Court Standing Rules Committee

FROM: Subcommittee on Insurance Disclosure

DATE: September 22, 2006

INTRODUCTION

The Standing Rules Subcommittee on Insurance Disclosure ("subcommittee") met to discuss whether Colo. RPC 1.4 should be modified by requiring lawyers to disclose to clients when they do not have insurance coverage. This issue had been discussed by the Standing Committee in the fall of 2004. At that time, the Standing Committee voted against modifying Colo. RPC 1.4 concerning insurance disclosure. The Standing Rules Committee also recommended that the issue be reviewed in a couple of years.

BACKGROUND

On August 9, 2004, the American Bar Association (ABA) House of Delegates adopted the ABA Model Court Rule on Insurance Disclosure. The Model Court Rule requires lawyers to disclose on their annual registration statement whether the lawyer maintains professional liability insurance. Prior to the adoption, the ABA had considered whether to amend Model Rule 1.4. There was not, however, sufficient support and the request for amendment to the Model Rule was withdrawn.

In 2004, four jurisdictions, Alaska, New Hampshire, Ohio and South Dakota, required lawyers to make disclosures about insurance as part of their Rules of Professional Conduct. Oregon required malpractice insurance for admission to the bar. The report submitted in conjunction with the Model Court Rule to the ABA House of Delegates, suggested that the bar or lawyer regulatory agency educate the public about the nature and type of legal malpractice insurance coverage and the fact that such insurance does not provide coverage for dishonest or intentional acts.

DISCUSSION

On July 18, 2006, the Subcommittee met to discuss what action, if any, should be taken concerning insurance disclosure. The Subcommittee again agreed that Colo. RPC 1.4 should not be amended so that lawyers would be required to reveal they did not have malpractice insurance. The Subcommittee recognizes that if the Supreme Court is interested in following the ABA Model Court Rule on Insurance Disclosure, it should not be part of the Colorado Rules of Professional Conduct.

The Subcommittee expressed several concerns about having such a malpractice insurance disclosure requirement as part of the Colorado Rules of Professional Conduct.

Some members believe it is not an ethical matter. Some also believe that consumers may be more confused since the insurance policies available are "claims made" and although there may be insurance when the lawyer is retained, that insurance policy may not be in force when a claim actually occurs. Furthermore, malpractice insurance may not be available to all lawyers, e.g. insurance coverage may not be available for small firms whose specialty is intellectual property.

The Subcommittee believes that if the Court is interested in adopting the ABA Model Rule on Insurance Disclosure, the Supreme Court Advisory committee, rather than the Standing Rules Committee, should consider it. Furthermore, a brief explanation on the court's website is needed, as follows: a description of the types of malpractice insurance coverage that are available; what a "claims made" policy is; and that the insurance coverage may not be available when a claim is actually made. The Subcommittee also believes that information should be provided explaining that some types of practices may not be able to get insurance coverage.

Attached to this memo is State Implementation of the ABA Model Court Rule on Insurance Disclosure as of August 11, 2006.

As of August 11, 2006

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON CLIENT PROTECTION

STATE IMPLEMENTATION OF ABA *MODEL COURT RULE ON INSURANCE DISCLOSURE*

	Requires Disclosure Directly to Client (5) (AK, NH, OH, PA and SD)	**Requires Disclosure On Annual Registration Statement**[1] (14) (AZ, DE, ID, IL, KS, MA,MI, MN, NE, NV, NM, NC, VA and WV)	**Considering Adoption** (5) (CA, KY, NY, UT and WA)	**Information Made Available to Public**	**Other Info** (*See also*, Oregon)
AK	Alaska Rules of Professional Conduct, Rule 1.4			N/A	
AZ		Supreme Court Rule 32(c), effective January 1, 2007. http://www.supreme.state.az.us/rules/ramd_pdf/R-04-0025.pdf		Yes. State Bar of Arizona website.	
AR					On January 21, 2006 the House of Delegates of the Arkansas Bar Association voted not to adopt a disclosure rule.
CA			California's proposed new insurance disclosure rules are available on the State Bar of California's public comment page at http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=79567 The page has instructions for submitting comments, and includes links to the Insurance Disclosure Task Force - Report and Recommendations and the proposed new rules. The comment deadline is		

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	Requires Disclosure Directly to Client (5) (AK, NH, OH, PA and SD)	Requires Disclosure On Annual Registration Statement[1] (14) (AZ, DE, ID, IL, KS, MA,MI, MN, NE, NV, NM, NC, VA and WV)	Considering Adoption (5) (CA, KY, NY, UT and WA)	Information Made Available to Public	Other Info (*See also*, Oregon)
			September 15, 2006.		
DE		Registration Form		No	
ID		Idaho Rules of Professional Conduct, Rule 302(7), effective October 1, 2006			
IL		Amended Illinois Supreme Court Rule 756		Yes http://www.iardc.org/malpracticeinfo.html	
KS		Supreme Court Rule 208A		Yes, by means designated by the Court.	
KY			The Kentucky Bar has sent a proposed Rule to the Kentucky Supreme Court for adoption. http://www.kycourts.net/Supreme/Rules/2005ProposedAmendments.pdf		
MA	Rule 4:02 Effective Sept. 1, 2006. http://www.mass.gov/courts/courtsandjudges/courts/supremejudicialcourt/rule402amend.pdf			Yes.	

As of August 11, 2006

	Requires Disclosure Directly to Client (5) (AK, NH, OH, PA and SD)	Requires Disclosure On Annual Registration Statement[1] (14) (AZ, DE, ID, IL, KS, MA,MI, MN, NE, NV, NM, NC, VA and WV)	Considering Adoption (5) (CA, KY, NY, UT and WA)	Information Made Available to Public	Other Info (*See also*, Oregon)
MI		Administrative Order No. 2003-5, dated August 6, 2003		No. For statistical purposes only. 12,782 lawyers - Malpractice Insurance Not Needed 17,170 lawyers - Malpractice Insurance is Maintained (79%) 4,623 lawyers - Malpractice Insurance not maintained (21%)	
MN		RULE 6. Annual Reporting of Professional Liability Insurance Coverage (Effective October 1, 2006)		Yes. Rule 7. Access to Lawyer Registration Records	
NE		Rules Creating, Controlling, and Regulating Nebraska State Bar Association, Article III, Membership, paragraph (f).		Shall be made available to the public.	
NV		Amended Supreme Court Rule 79 (Adopted September 13, 2005 and effective November 13, 2005)		Yes. It will be part of the lawyer's public record available by phone or email inquiry.	
NH	New Hampshire Rules of Professional Conduct, Rule 1.17. (Disclosure of Information to the Client)			N/A	

As of August 11, 2006

	Requires Disclosure Directly to Client (5) (AK, NH, OH, PA and SD)	Requires Disclosure On Annual Registration Statement[1] (14) (AZ, DE, ID, IL, KS, MA,MI, MN, NE, NV, NM, NC, VA and WV)	Considering Adoption (5) (CA, KY, NY, UT and WA)	Information Made Available to Public	Other Info (*See also*, Oregon)
NM		Amended Rule 17-202(A) of the NMRA of the Rules Governing Discipline		No: for internal use by the NM Bar and Supreme Court only.	
NY			Under consideration.		
NC		North Carolina-Rules and Regulations, Subchapter A, Organization of the North Carolina State Bar, Section .0204, Certificate of Insurance Coverage		On the Bar's website: http://www.ncbar.com/home/member_directory.asp and http://www.ncbar.com/InsuranceDisclosure.asp	
OH	Ohio Code of Professional Responsibility, Amended DR 1-104 (Disclosure of Information to the Client)			N/A	Lawyers who hire themselves out to do research and writing for other lawyers need not comply. (Ohio Supreme Court Bd. of Commissioners on Grievances and Discipline, Op. 2005-1, 2/4/05).
OR					All lawyers required to maintain professional liability insurance.
PA	Pennsylvania adopted RPC 1.4(c), effective 7/1/2006. http://www.aopc.org/OpPosting/Supreme/out/50drd.1attach.pdf			N/A	
SD	South Dakota Model Rules of			N/A	SD has 7 years of certification to the Supreme Court - 97%

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	Requires Disclosure Directly to Client (5) (AK, NH, OH, PA and SD)	Requires Disclosure On Annual Registration Statement[1] (14) (AZ, DE, ID, IL, KS, MA,MI, MN, NE, NV, NM, NC, VA and WV)	Considering Adoption (5) (CA, KY, NY, UT and WA)	Information Made Available to Public	Other Info (*See also*, Oregon)
	Professional Conduct, Rule 1.4 (Communication)				have at least $100,000 in coverage, together with name and policy number of the policy. Over the past 7 years, the percentage has never dropped below 96% nor been higher than 97.5% in any given year.
UT			Rule 1.4 Proposed Amendment - Disclosure of Malpractice Insurance Rule 1.4. Communication. http://www.utahbar.org/news/archives/2005/07/index.html		
VA		Rules of the Virginia Supreme Court, Part 6 § 4 Paragraph 18. Financial Responsibility		Yes, on Bar's website: (See, www.vsb.org, under the headings Public Information, Attorney Records Search, Attorneys without Malpractice Insurance). Total Members Answering PL Questions: 25,921 - FY2005 Private Practice – No Insurance: 1,892 (11%) Private Practice – With Insurance: 14,703 (89%)	The Virginia State Bar Council, at its meeting on February 18, 2005, is expected to consider for approval, disapproval, or modification, proposed amendments to Part Six: Section IV, Paragraph 18 of the Rules of the Supreme Court of Virginia, issued by the Lawyer Malpractice Insurance Committee. The proposed amendments were approved by the Lawyer Malpractice Insurance Committee on October 27, 2004. The changes would add to the existing requirement that active members of the bar report each year on their dues statement whether or not they have malpractice insurance, a further requirement that

	Requires Disclosure Directly to Client (5) (AK, NH, OH, PA and SD)	Requires Disclosure On Annual Registration Statement[1] (14) (AZ, DE, ID, IL, KS, MA,MI, MN, NE, NV, NM, NC, VA and WV)	Considering Adoption (5) (CA, KY, NY, UT and WA)	Information Made Available to Public	Other Info (*See also*, Oregon)
					they notify the bar within 30 days in event their liability insurance coverage lapses or terminates, unless it is simply a situation in which a change in carriers occurs with no lapse in coverage. The reason for the change is the provide something closer to real time information to members of the public about bar members who do not have malpractice insurance, rather than having this information updated only once a year at the time the annual dues statement is returned.
WA			On July 30, 2005 the Washington State Bar Association Board of Governors approved an insurance disclosure rule and forwarded it to the Supreme Court. If the Supreme Court adopts it, it will take effect 9/1/06.		
WV		State Bar By-Laws – Article III (A) - Financial Responsibility Disclosure http://www.state.wv.us/wvsca/rules/ArticleIII.htm		Yes. . . . shall be made available to the public by such means as may be designated by the West Virginia State Bar.	

As of August 11, 2006

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May 12, 2006

The Honorable Nathan B. Coats
Associate Justice
Colorado Supreme Court
Colorado State Judicial Building
2 East 14th Avenue
Denver, CO 80203

Re: C.R.C.P. 260.8/C.R.P.C. 6.1 Comment

Dear Justice Coats:

During and after the most recent meeting of the Supreme Court's Standing Committee on the Rules of Professional Conduct, we discussed what appears may be a conflict between the Continuing Legal Education Rule C.R.C.P. 260.8 and the recently issued Comment to C.R.P.C. 6.1. Both of these pronouncements address opportunities for lawyers who perform pro bono legal services for certain qualified clients to earn limited amounts of CLE credit that can partially satisfy the three year CLE requirements established generally by C.R.C.P. 260. The concern for the conflict between Rule 260.8 and the Comment to C.R.P.C. 6.1 focuses, first of all, on the mechanics by which CLE credits can be obtained and, secondly, the type of activity and client qualifications that merits awarding credits.

C.R.C.P. 260.8 has several qualifying requirements that are not addressed or described in the 6.1 Comment. Rule 260.8 (2) unequivocally requires that the work that would be eligible for CLE credit "must have been assigned to the lawyer by: a court; a bar association or Access to Justice Committee-sponsored program; an organized non-profit entity, such as Colorado Legal Services and Metro Volunteer Lawyers, whose purpose is or includes the provisions of pro bono representation to indigent or near-indigent persons in civil legal matters; or a law school". The Comment to C.R.C.P. 6.1 does not contemplate any assigning authority at all. Under the 6.1 Comment the work is by and large generated by

the lawyer and is more or less administered by a pro bono committee or coordinator in a law firm or by the lawyer him or herself. (See Proposal for Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms, Part V, Administration of Pro Bono Service A. Approval of Pro Bono Matters, Comment to C.R.P.C. 6.1). There appears to be an immediate conflict between the two pronouncements. One requires assignment to the lawyer by an independent third party agency and the other allowing the lawyer to self-generate the pro bono activity.

The second problem deals with confusion over the methodology of obtaining the CLE credit. If credit is to be awarded under C.R.C.P. 260.8 a form denominated Form 8 must be completed by the assigning agency and submitted to the CLE Board. The 6.1 pronouncement is not at all clear about this. It refers to an "assigning court, program or law school", but there is no such assigning agency involved.

The CLE Board is guided by the dictates of C.R.C.P. 260 and will only award credit upon submission of Form 8 by the assigning agency. This means that the lawyer who performs pro bono work, other than upon assignment from a third party agency, may have an expectation of CLE credit but no means by which to obtain it. Literally, without the assigning agency and the completion of the form by the agency, the CLE Board's hands are tied.

Finally the original pronouncement of the comment to C.R.C.P. 6.1 made consistent reference to "indigent or near indigent clients". This language tracks Rule 260.8 (1) that requires the pro bono work to be performed for an indigent or near indigent client. Now, a proposal has been submitted by the Standing Committee to change the designation of the qualified client from indigency or near indigency to "of limited means". There is no corresponding phraseology in Rule 260 and consequently if the Court accepts the proposal by the Standing Committee there could be a significant difference in the qualifying characteristic of the client for whom the pro bono work is done. There does not seem to be any explanation why the phrase "indigent or near indigent" was changed to of limited means or why the denomination "limited means" has any special significant or greater definition.

I believe one or the other of these pronouncements ought to be changed. Either Rule 260.8 should be amended by the Court to conform to the rather loose arrangement in the 6.1 Comment, or the 6.1 Comment ought to be adjusted to be more compatible with C.R.C.P. 260. We need to give more precise guidance both to the practicing bar and the CLE Board

administration. In the first place, the language should be made more compatible and, in the second place, there should be some compatibility between the requirements of C.R.C.P. 260.8 so that lawyers could know when and how the self-generated pro bono activity might qualify for award of CLE credits.

I have attached a copy of both the 6.1 Comment and Rule 260.8 for your reference. Please let me know if you would like to have any other information or comment and if you would care to discuss the matter, please feel free to call upon at any time.

Yours truly,

David C. Little

lkf
Enclosure

cc Marcy Glenn
Alan Ogden

Rule 260.8.

State Court Rules

RULES OF CIVIL PROCEDURE

CHAPTER 20 COLORADO RULES OF PROCEDURE REGARDING ATTORNEY DISCIPLINE AND DISABILITY PROCEEDINGS, COLORADO ATTORNEYS' FUND FOR CLIENT PROTECTION, AND MANDATORY CONTINUING LEGAL EDUCATION AND JUDICIAL EDUCATION

Rule 260.8. Direct Representation and Mentoring in Pro Bono Civil Legal Matters

Rule 260.8. Direct Representation and Mentoring in Pro Bono Civil Legal Matters

(1) A lawyer may be awarded a maximum of nine (9) units of general credit during each three-year compliance period for providing uncompensated pro bono legal representation to an indigent or near-indigent client or clients in a civil legal matter, or mentoring another lawyer or a law student providing such representation.

(2) To be eligible for units of general credit, the civil pro bono legal matter in which a lawyer provides representation must have been assigned to the lawyer by: a court; a bar association or Access to Justice Committee-sponsored program; an organized non-profit entity, such as Colorado Legal Services and Metro Volunteer Lawyers, whose purpose is or includes the provision of pro bono representation to indigent or near-indigent persons in civil legal matters; or a law school. Prior to assigning the matter, the assigning court, program, entity, or law school shall determine that the client is financially eligible for pro bono legal representation because (a) the client qualifies for participation in programs funded by the Legal Services Corporation, or (b) the client's income and financial resources are slightly above the guidelines utilized by such programs, but the client nevertheless cannot afford counsel.

(3) Subject to the reporting and review requirements specified herein, (a) a lawyer providing uncompensated, pro bono legal representation shall receive one (1) unit of general credit for every five (5) billable-equivalent hours of representation provided to the indigent client; (b) a lawyer who acts as a mentor to another lawyer as specified in this Rule shall be awarded one (1) unit of general credit per completed matter; and (c) a lawyer who acts as a mentor to a law student shall be awarded two (2) units of general credit per completed matter. A lawyer will not be eligible to receive more than nine (9) units of general credit during any three-year compliance period via any combination of pro bono representation and mentoring.

(4) A lawyer wishing to receive general credit units under this Rule shall submit to the assigning court, program, or law school a completed Form 8. As to mentoring, the lawyer shall submit Form 8 only once, when the matter is fully completed. As to pro bono representation, if the representation will be concluded during a single three-year compliance period, then the lawyer shall complete and submit Form 8 only once, when the representation is fully completed. If the representation will continue into another three-year compliance period, then the applying lawyer may submit an interim Form 8 seeking such credit as the lawyer may be eligible to receive during the three-year compliance period that is coming to an end. Upon receipt of an interim or final Form 8, the assigning court, program, entity, or law school shall in turn report to the Board the number of general CLE units that it recommends be awarded to the reporting lawyer under the provisions of this Rule. It shall recommend an award of the full number of units for which the lawyer is eligible under the provisions of this Rule, unless it determines after review that such an award is not appropriate due to the lawyer's lack of diligence or competence, in which case it shall recommend awarding less than the full number of units or no units. An outcome in the matter adverse to the client's objectives or interests shall not result in any presumption that the lawyer's representation or mentoring was not diligent or competent. The Board shall have final authority to issue or decline to issue units of credit to the lawyer providing representation or mentoring, subject to the other provisions of these Rules and Regulations, including without limitation the hearing provisions of Regulation 108.

(5) A lawyer who acts as a mentor to another lawyer providing representation shall be available to the lawyer providing representation for information and advice on all aspects of the legal matter, but will not be required to file or otherwise enter an appearance on behalf of the indigent client in any court. Mentors shall not be members of the same firm or in association with the lawyer providing representation to the indigent client.

(6) A lawyer who acts as a mentor to a law student who is eligible to practice law under CRS §§ 12-1-116 to -116.5 shall be assigned to the law student at the time of the assignment of the legal matter with the consent of the mentor, the law student, and the law school. The matter shall be assigned to the law student by a court, a program or entity as described in Rule 260.8(2), or an organized student law office program administered by his or her law school, after such court, program, entity, or student law office determines that the client is eligible for pro bono representation in accordance Rule 260.8(2). The mentor shall be available to the law student for information and advice on all aspects of the matter, and shall directly and actively supervise the law student while allowing the law student to provide representation to the client. The mentor shall file or enter an appearance along with the law student in any legal matter pursued or defended for the client in any court. Mentors may be acting as full-time or adjunct professors at the law student's law school at the same time they serve as mentors, so long as it is not a primary, paid responsibility of that professor to administer the student law office and supervise its law-student participants.

Source: Added November 10, 2004, effective January 1, 2005.

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APPENDIX A TO SUPPLEMENTAL REPORT

Marked to Show Changes from the Pro Bono Policy as it Presently Exists

~~COLORADO RULES OF CIVIL PROCEDURE~~

~~APPENDIX TO CHAPTERS 18 TO 20~~
~~COLORADO RULES OF PROFESSIONAL CONDUCT~~
~~Rule 6.1. Voluntary Pro Bono Public Service~~
~~This Comment Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms is to be Added to the Existing Comment in Rule 6.1. Voluntary Pro Bono Public Service~~

~~The Recommended Additional comment is Adopted by the Court November 23, 2005, effective immediately.~~

Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms

Preface. Providing pro bono legal services to ~~indigent~~persons of limited means and organizations serving ~~indigent~~ persons of limited means is a core value of Colorado licensed attorneys enunciated in Colorado Rule of Professional Conduct 6.1. Adoption of a law firm pro bono policy will commit the firm to this professional value and assure attorneys of the firm that their pro bono work is valued in their advancement within the firm.

The Colorado Supreme Court has adopted the following recommended Model Pro Bono Policy that can be modified to meet the needs of individual law firms. References are made to provisions that may not apply in a small firm setting. Adoption of such a policy is entirely voluntary.

At the least, a pro bono policy would:

(1.) Clearly set forth an aspirational goal for attorneys, as well as the number of hours for which billable credit will be awarded for firms that operate on a billable hour system (the attached model policy uses the figure of at least 50 hours per attorney per year, which mirrors the aspirational goal set out in Rule 6.1 of the Colorado Rules of Professional Conduct);

(2.) Demonstrate that pro bono service will be positively considered in evaluation and compensation decisions; and

(3.) Include a description of the processes that will be used to match attorneys with projects and monitor pro bono service, including tracking pro bono hours spent by lawyers and others in the firm.

The Colorado Supreme Court will recognize those firms that make a strong commitment to pro bono work by adopting a policy that includes:

(1.) An annual goal of performing 50 hours of pro bono legal service by each Colorado

licensed attorney in the firm, pro-rated for part-time attorneys, primarily for ~~indigent~~ persons of limited means and/or organizations serving ~~indigent~~ persons of limited means consistent with the definition of pro bono services as set forth in this ~~the Colorado Supreme Court's~~ Model Pro Bono Policy, and

(2.) A statement that the firm will value at least 50 hours of such pro bono service per year by each Colorado licensed attorney in the firm, for all purposes of attorney evaluation, advancement, and compensation in the firm as the firm values compensated client representation.

The Colorado Supreme Court will also recognize on an annual basis those Colorado law firms that voluntarily advise the Court by February 15 that their attorneys, on average, during the previous calendar year, performed 50 hours of pro bono legal service, primarily for ~~indigent~~ persons of limited means or organizations serving ~~indigent~~ persons of limited means consistent with the definition of pro bono services as set forth in this ~~the Colorado Supreme Court's~~ Model Pro Bono Policy.

Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms

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D. Colorado Rule of Civil Procedure 260.8
E. Colorado Rule of Civil Procedure 260.8, Form 8

I. Introduction

The firm recognizes that the legal community has a unique responsibility to ensure that all citizens have access to a fair and just legal system. In recognizing this responsibility, the firm encourages each of its attorneys to actively participate in some form of pro bono legal representation.

This commitment mirrors the core principles enunciated in the Colorado Rules of Professional Conduct:

~~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 devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest. . . . 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.(Preamble, Colorado Rules of Professional Conduct).~~

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. . . . 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. (Preamble, Colorado Rules of Professional Conduct).

The firm understands there are various ways to provide pro bono legal services in our community. In selecting among the various pro bono opportunities, the firm encourages and expects that attorneys (both partners and associates or other designation) will devote a minimum of fifty (50) hours each year to pro bono legal services, or a proportional amount of pro bono hours by attorneys on alternative work schedules. In fulfilling this responsibility, firm attorneys should provide a substantial majority of the fifty (50) hours of pro bono legal services 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. (Colorado Rule of Professional Conduct). The firm strongly believes that this level of participation lets our attorneys make a meaningful contribution to our legal community, and provides important opportunities to further their professional development.

II. Firm Pro Bono Committee/Coordinator (see suggested change for small firms below)

The firm has established a Pro Bono Committee responsible for implementing and administering the firm's pro bono policies and procedures. The Pro Bono Committee consists of a representative group of attorneys of the firm. In addition, the firm has designated a Pro Bono Coordinator. The Pro Bono Committee/Pro Bono Coordinator has the following principal responsibilities:

1 Encouraging and supporting pro bono legal endeavors;
2 Reviewing, accepting and/or rejecting pro bono legal projects;
3 Coordinating and monitoring pro bono legal projects, ensuring, among other things, that appropriate assistance, supervision and resources are available;
4 Providing periodic reports on the firm's pro bono activities; and
5 Creating and maintaining a pro bono matter tracking system.

Attorneys are encouraged to seek out pro bono matters that are of interest to them.

****|Small firms may wish to designate only a Pro Bono Coordinator and can introduce the above paragraph as follows:** "The firm has designated a Pro Bono Coordinator responsible for implementing and administering the firm's pro bono policies and procedures" and then delete the next two sentences.]

III. Pro Bono Services Defined

The foremost objective of the firm pro bono policy is to provide legal services to ~~indigent or near-indigent members of the community~~ persons of limited means and the nonprofit organizations that assist them, in accordance with Rule 6.1 of the Colorado Rules of Professional Conduct. The firm recognizes there are a variety of ways in which the firm's attorneys and paralegals can provide pro bono legal services in the community. The following, while not intended to be an exhaustive list, reflects the types of pro bono legal services the firm credits in adopting this policy:

A. **Representation of Low Income Persons**. Representation of individuals who cannot afford legal services in civil or criminal matters of importance to a client;

B. **Civil Rights and Public Rights Law.** Representation or advocacy on behalf of individuals or organizations seeking to vindicate rights with broad societal implications (class action suits or suits involving constitutional or civil rights) where it is inappropriate to charge legal fees; and

C. **Representation of Charitable Organizations.** Representation or counseling to charitable, religious, civic, governmental, educational, or similar organizations in matters where the payment of standard legal fees would significantly diminish the resources of the organization, with an emphasis on service to organizations designed primarily to meet the needs of persons of limited income or improve the administration of justice.

D. **Community Economic Development.** Representation of or counseling to micro-entrepreneurs and businesses for community economic development purposes, recognizing that business development plays a critical role in low income community development and provides a vehicle to help low income individuals to escape poverty;

E. **Administration of Justice in the Court System.** Judicial assignments, whether as pro bono counsel, or a neutral arbiter, or other such assignment, which attorneys receive from courts on a mandatory basis by virtue of their membership in a trial bar;

F. **Law-related Education.** Legal education activities designed to assist individuals who are low-income, at risk, or vulnerable to particular legal concerns or designed to prevent social or civil injustice.

G. **Mentoring of Law Students and Lawyers on Pro Bono Matters.** Colorado Supreme Court Rule 260.8 provides that an attorney who acts as a mentor may earn two (2) units of general credit per completed matter in which he/she mentors a law student. An attorney who acts as a mentor may earn one (1) unit of general credit per completed matter in which he/she mentors another lawyer. However, mentors shall not be members of the same firm or in association with the lawyer providing representation to the ~~indigent~~ client of limited means.

Because the following activities, while meritorious, do not involve direct provision of legal services to the poor, the firm will not count them toward fulfillment of any attorney's, or the firm's, goal to provide pro bono legal services to ~~indigent~~ persons or limited means or to nonprofits that serve such persons' needs: participation in a non-legal capacity in a community or volunteer organization; services to non-profit organizations with sufficient funds to pay for legal services as part of their normal expenses; client development work; non-legal service on the board of directors of a community or volunteer organization; bar association activities; and non-billable legal work for family members, friends, or members or staff of the firm who are not eligible to be pro bono clients under the above criteria.

IV. Firm Recognition of Pro Bono Service (see suggested change for small firms below).

A. Performance Review and Evaluation. The firm recognizes that the commitment to pro bono involves a personal expenditure of time. In acknowledgment of this commitment and to support firm goals, an attorney's efforts to meet this expectation will be considered by the firm in measuring various aspects of the attorney's performance, such as yearly evaluations and bonuses where applicable. An attorney's pro bono legal work will be subject to the same criteria of performance review and evaluation as those applied to client-billable work. As with all client work, there should be an emphasis on effective results for the client and the efficient and cost-effective use of firm resources.

B. Credit for Pro Bono Legal Work. The firm will give full credit for at least fifty (50) hours of pro bono legal services, and additional hours as approved by the Pro Bono Committee and/or Coordinator, in considering annual billable hour goals, bonuses and other evaluative criteria based on billable hours.

[Small firms may wish to only include the following paragraph in lieu of the above provisions: The firm recognizes that the commitment to pro bono involves a personal expenditure of time. In acknowledgment of this commitment and to support firm goals, your pro bono service will be considered a positive factor in performance evaluations and compensation decisions and will be subject to the same criteria of performance review and evaluation as those applied to client-billable work. As with all client work, there should be an emphasis on effective results for the client and the efficient and cost-effective use of firm resources.]

V. Administration of Pro Bono Service (see suggested change for small firms below).

A. Approval of Pro Bono Matters. The Pro Bono Committee/Coordinator will review all proposed pro bono legal matters to ensure that:

1 There is no client or issue conflict or concern;
2 The legal issue raised is not frivolous or untenable;
3 The client does not have adequate funds to retain an attorney and
4 The matter is otherwise appropriate for pro bono representation.

All persons seeking approval of a pro bono project must: (1) submit a request identifying the client and other entity involved; (2) describe the nature of the work to be done; and (3) identify who will be working on the matter. Once the firm undertakes a pro bono matter, the matter is treated in the same manner as the firm's regular paying work.

B. Opening a Pro Bono Matter. It is the responsibility of the attorney seeking to provide pro bono legal services to complete the conflicts check and open a new matter in accordance with regular firm procedures.

C. Pro Bono Engagement Letter. After a matter has received initial firm approval, the principal attorney on a pro bono legal matter must send an engagement letter to the pro bono client. Typically, the engagement letter should be sent after the initial client meeting during which the nature and terms of the engagement are discussed.

D. Staffing of Pro Bono Matters. Pro bono legal matters are initially staffed on a voluntary basis. It may become necessary to assign additional attorneys to the matter if the initial staffing arrangements prove to be inadequate, and the firm reserves the right to make such assignments.

E. Supervision of Pro Bono Matters. As appropriate, partner shall supervise any associate working on a pro bono legal matter and the supervising partner shall remain informed of the status of the matter to ensure its proper handling. In addition, it may be appropriate to use assistance or resources from outside the firm. The firm will assist attorneys in finding a supervisor if necessary.

F. Professional Liability Insurance. Attorneys may provide legal assistance through those pro bono organizations that provide professional liability insurance for their volunteers. The firm also carries professional liability insurance for its attorneys in instances where no coverage is available on a pro bono matter through a qualified legal aid organization. Before undertaking any pro bono legal commitments, the professional liability implications should be reviewed with the Pro Bono Committee or the Pro Bono Coordinator.

G. Paralegal Pro Bono Opportunities. Approved pro bono legal work for paralegals includes: (1) work taken on in conjunction with and under the supervision of an attorney working on a specific pro bono legal matter, or (2) work handled independently for an organization that provides pro bono legal opportunities, provided, however, that such participation does not create an attorney-client relationship and/or involve the paralegal's provision of legal advice.

H. Disbursements in Pro Bono Matters. The firm can and should bill and collect disbursements in pro bono legal matters where it is appropriate to do so based on the client's resources. The firm encourages attorneys to pursue petitions for the waiver of filing fees in civil matters (Chief Justice Directive 98-01) when applicable, and to use pro bono experts, court reporters, investigators and other vendors when available to minimize expenses in pro bono legal matters. The firm may advance or guarantee payment of incidental litigation expenses, and may agree that the repayment of such expenses may be contingent upon the outcome of the matter in accordance with Colo.RPC 1.8(e), ~~provided the client agrees to be ultimately responsible for them. However, the firm may later forego repayment of such expenses if such repayment would cause the client substantial financial hardship. (Colo. Rule of Professional Conduct 1.8(e)).~~ The Pro Bono Committee/Pro Bono Coordinator must approve in advance any expense of a non-routine, significant nature, such as expert fees or translation costs. The supervising partner in a pro bono legal

matter should participate in decisions with respect to disbursements.

I. Attorney Fees in Pro Bono Matters. The firm encourages its attorneys to seek and obtain attorney fees in pro bono legal matters where possible. In the event of a recovery of attorney fees, the firm encourages the donation of these fees to an organized non-profit entity whose purpose is or includes the provision of pro bono representation to ~~indigent or near-indigent~~ persons of limited means.

J. Departing Attorneys. When an attorney handling a pro bono case leaves the firm, he or she should work with the Pro Bono Committee/Coordinator to (1) locate another attorney in the firm to take over the representation of the pro bono client, or (2) see if the referring organization can facilitate another placement.

****[Small firms may wish to title this section "Pro Bono Procedures" and include only the following paragraph in lieu of the above provisions:** All pro bono legal matters will be opened in accordance with regular firm procedures, including utilization of a conflicts check and a client engagement letter. Pro bono matters should be supervised by a partner, as appropriate. The firm encourages its attorneys to seek and obtain attorney fees in pro bono legal matters whenever possible.]

VI. CLE Credit for Pro Bono Work

Colorado Rule of Civil Procedure 260.8 provides that attorneys may be awarded up to nine (9) hours of CLE credit per three-year reporting period for: (1) performing uncompensated pro bono legal representation on behalf of ~~indigent or near-indigent~~ clients of limited means in a civil legal matter, or (2) mentoring another lawyer or law student providing such representation.

A. Amount of CLE Credit. Attorneys may earn one (1) CLE credit hour for every five (5) billable-equivalent hours of pro bono representation provided to the ~~indigent~~ client of limited means. An attorney who acts as a mentor may earn one (1) unit of general credit per completed matter in which he/she mentors another lawyer. Mentors shall not be members of the same firm or in association with the lawyer providing representation to the ~~indigent~~ client of limited means. An attorney who acts as a mentor may earn two (2) units of general credit per completed matter in which he/she mentors a law student.

B. How to Obtain CLE Credit. An attorney who seeks CLE credit under CRCP 260.8 for work on an eligible matter must submit the completed Form 8 to the assigning court, program or law school. The assigning entity must then report to the Colorado Board of Continuing Legal and Judicial Education its recommendation as to the number of general CLE credits the reporting pro bono attorney should receive.

~~Amended and adopted by the Court, En Banc, November 23, 2005, effective immediately. Justice Coats would not adopt the additional comment to RPC 6.1.~~

~~BY THE COURT:~~

~~Gregory J. Hobbs, Jr.~~
~~Justice of the Colorado Supreme Court~~