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

AGENDA

January 10, 2020, 9:00 a.m.
2 East 14th Ave., 4th Floor, Supreme Court Conference Room
Call-in number: 720-625-5050 or (toll free) 1-888-604-0017
Access Code: 36332449#
WiFi Access Code: To be provided at the meeting

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1. Approval of minutes for October 4, 2019 meeting [pp. 1-7]
2. Report re: Supreme Court's amendment to Rule 8.4(c) [Marcy Glenn, pp. 8-36]
3. Report from Diversity Subcommittee [Judge Espinosa]
4. Report from ABA Advertising Amendments Subcommittee [Eli Wald, pp. 37-58]
5. Report from Contingent Fee Subcommittee [Alec Rothrock, pp. 59-79]
6. New business:
   a. Abandoned Estate Planning Documents Statute [Tim Bounds and Herb Tucker, pp. 80-111]
7. Administrative matters:
   a. Select next meeting date
8. Adjournment (before noon)

Marcy G. Glenn, Chair
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These minutes have not been approved by the Committee.

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On October 4, 2019
(Fifty-Fourth Meeting of the Full Committee

The fifty-fourth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 AM on Friday, October 4, 2019, by Chair Marcy G. Glenn. The meeting was held in the Court of Appeals Conference Room on the third floor of the Ralph L. Carr Colorado State Judicial Building.

Present in person at the meeting, in addition to Marcy G. Glenn and Justice William W. Hood, III, were Judge Michael H. Berger, Nancy L. Cohen, Thomas E. Downey, Jr., Judge Adam J. Espinosa, Judge Lino S. Lipinsky de Orlov, Cecil V. Morris, Jr., Noah C. Patterson, Judge Ruthanne N. Polidori, Henry Richard Reeve, Alexander R. Rothrock, Marcus L. Squarrell, Jamie S. Sudler, III, Eli Wald, Frederick R. Yarger, and Jessica E. Yates. Persons attending the meeting by telephone were Margaret Funk, John M. Haried, Boston H. Stanton, Jr., Lisa M. Wayne, Judge John R. Webb and Tuck Young. Excused from attendance were Gary B. Blum, Cynthia F. Covell, Justice Monica M. Marquez, and David W. Stark. Katherine Michaels attended the meeting on behalf of excused Supreme Court staff attorney and Committee liaison Jennifer J. Wallace.

1. Meeting Materials: Minutes of January 11, 2019 Meeting

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the fifty-third meeting of the Committee, held on January 11, 2019. The minutes of the fifty-third meeting of the full Committee, held January 11, 2019, were approved.

2. Report Re: Supreme Court's Adoption of New Rule 8.4(i)

Member Yates and Justice Hood provided a brief report on the Colorado Supreme Court's public hearing on September 18, 2019 regarding the adoption of Rule 8.4(i) and comment 5A to the Rule. The reporting members advised there were 3 public speakers at the hearing on September 18 and that the matter was quickly considered and approved by the Court. The formal Order was issued by the Court, *en banc*, on September 19, 2019 and made effective immediately.

3. Report from the Rule 8.4(c) Subcommittee (Chair, Tom Downey)

Tom Downey, who chaired the Subcommittee, directed the members to the Subcommittee's written report, which had originally been presented at the meeting of the Committee on January 11, 2019, and which was included in the materials for the October 4 meeting at pages 15 – 17. Mr. Downey also directed the members' attention to the Colorado Bar Association (CBA) Ethics Committee Opinion No. 137 entitled "Advising, Directing and Supervising Others in Lawful Investigative Activities That Involve Dishonesty, Fraud, Deceit, or Misrepresentation," contained at pages 18 – 37 of the meeting materials.

Mr. Downey reviewed the Subcommittee's report, noting it had recommended that no comment was needed but had alternatively prepared a comment in the event the Committee determined that a comment was more appropriate. Mr. Downey briefly summarized CBA Opinion 137, noting that it specifically discussed the issues addressed in the alternative comment prepared by the Subcommittee. Mr. Downey reported the Subcommittee had reviewed the Subcommittee's initial recommendations as outlined in the written report following the issuance of CBA Opinion 137, and had again concluded that no comment was required and, alternatively, that if the Committee desired to have a comment, that it should be brief and contain the language outlined in the Subcommittee's report.

Judge Berger informed the full Committee that Assistant Attorney General Joe Michaels had published an article on Rule 8.4(c) in *The Colorado Lawyer* and recommended it to the members of the Committee.

A motion was made and seconded to adopt the Subcommittee's recommendation that no comment be adopted to address the meaning of the words "lawful investigative activities" as it appears in Rule 8.4(c). A vote of the full Committee was taken and all members except one voted to adopt the Subcommittee's recommendation to not adopt a comment.

Judge Webb suggested that the Committee reconsider its vote and either adopt the comment proposed by the Subcommittee or adopt a comment simply referring to CBA Opinion 137. After discussion, the Committee affirmed its previous vote against recommending the adoption of a comment to Rule 8.4(c).

The Chair advised that some members of the CBA Ethics Committee who worked on Ethics Opinion No. 137 had voiced strong objections to the adoption of Rule 8.4(c) and were considering recommending that the Supreme Court reconsider the language of Rule 8.4(c) as adopted by the Court in September 2017.

A discussion was held as to how to advise the Court that the Committee had voted to not recommend a comment to Rule 8.4(c). After some discussion, it was agreed that the Chair would send a letter to the Court advising that the Committee had considered whether to recommend the adoption of a comment to Rule 8.4(c) and that after study by a Subcommittee and consideration by the Committee it was the Committee's recommendation that the Court not adopt a comment to address the meaning of the words "lawful investigative activities" as it appears in Rule 8.4(c).

4. Report from the Contingent Fee Subcommittee (Chair, Alec Rothrock)

The report of the Contingent Fee Subcommittee was presented at pages 38-39 of the meeting materials and through the report of its Chair, Alec Rothrock. Mr. Rothrock reported that the Subcommittee had met several times and had made considerable progress in drafting a new rule to present to the Committee along with associated forms. Mr. Rothrock reported that most of the work on the language of the rule itself had been completed but the Subcommittee still needed to draft an associated form of a contingent fee agreement.

The key features of the Subcommittee's work to date were summarized in the eight points set forth at pages 38-39 of the meeting materials. Mr. Rothrock reviewed each of those points He noted that, as discussed in item 5 of the Subcommittee's written report, the proposed rule would protect clients through language prohibiting contingent fee agreement provisions that require clients to reimburse the lawyer for all sanctions awarded against the lawyer and by requiring lawyers to inform clients that they may disapprove the hiring of associated counsel and discharge associated counsel hired without their approval.

One member commented that if the rules relating to contingent fee agreements were incorporated into the Rules of Professional Conduct, it might generate more disciplinary complaints by attorneys against other attorneys. The member also commented that if the rules relating to contingent fee agreements were incorporated into Rule 1.5, they should be set forth in a separate section of that rule. The member also commented that the contingent fee provisions relating to payment of sanctions awarded against the attorney may need additional revision as it might not be appropriate for the rule to require that the lawyer is always responsible for paying any sanctions awarded against the lawyer. Mr. Rothrock noted that the Subcommittee's intent was not to assign the responsibility for sanctions awards either to the client or to the lawyer, but to eliminate the ability of the lawyer to unilaterally shift to the client the burden of paying all awarded sanctions.

Mr. Rothrock concluded his report by noting that the Subcommittee would now turn its focus to drafting forms of contingent fee agreements to accompany the language of the new rule.

5. Report from the ABA Advertising Amendments Subcommittee (Chair, Eli Wald)

Professor Eli Wald, chair of the ABA Advertising Amendments Subcommittee, presented the Subcommittee's report, which appeared in the meeting materials at pages 40-178.

Professor Wald began by noting that in August 2018 the American Bar Association (ABA) House of Delegates revised Chapter 7, Rules 7.1-7.5, of the ABA Model Rules of Professional Conduct regulating advertisement and solicitation. In 2019, the Committee formed a Subcommittee to review and report on the ABA amendments. Committee members Nancy Cohen, Cynthia Covell, Tom Downey, Judge Adam Espinosa, Margaret Funk, Cecil Morris, Noah Patterson, Marcus Squarrell, David Stark and Jamie Sudler, as well as non-members Casey Canonsburg and Saul Sarney served on the Subcommittee. The Subcommittee had also reached out and invited representatives from the Colorado Attorney General's office, Colorado Trial

Lawyers Association, CBA Young Lawyers Division, and the Office of Attorney Regulation Counsel.

At the outset of his report, Professor Wald reviewed the three trends viewed by the ABA as warranting updating of the rules: (1) a lack of uniformity among state rules in an era of increased competition in the market for legal services coupled with the nationalization of law practice required a uniform approach to eliminate the "dizzying number of state variations"; (2) the technological advancements of the internet and social media had changed the landscape relating to advertising and solicitation and the increased speed of the flow of information required review and updating of the old rules; and (3) the ABA believed that in order to continue to ensure client access to accurate information about lawyers and legal services, while respecting First Amendment and antitrust law provisions, changes to the existing rules were required.

The Subcommittee recommended that the Committee revise Colorado Rules 7.1-7.5 to conform to the Model Rules in all respects with six exceptions, where the Subcommittee recommends that existing Colorado language be retained.

The written materials at pages 41 through 48 contain a brief summary of the recommended changes and the six instances where the Subcommittee recommends that existing Colorado provisions be retained. The written materials also contain a redlined version of the advertising rules (pages 49-65), the Association of Professional Responsibility Lawyers (APRL) 2015 Report of the Regulation of Lawyer Advertising Committee, dated June 22, 2015 (pages 66-121), the Supplemental APRL Report, dated April 26, 2016 (pages 122-143), and the Report of the ABA House of Delegates, dated August, 2018 (pages 144-178).

A member questioned why any change is necessary and pointed out that some states, like Florida, had taken separate action not consistent with the proposed Model Rules. Another member noted that although there are a few disciplinary complaints made relating to advertising and solicitation, the paucity of such complaints does not necessarily indicate compliance with the existing rules. Professor Wald responded by reiterating the idea that the existing rules need updating in order to recognize the technological changes relating to the free flow of information in the marketplace, but also noting that to date there has been limited state adoption of the new Model Rules. With respect to the issue of whether there is a need for change, a member noted that the APRL reports as well as the report of the House of Delegates demonstrate the need to revise the rules. Another member noted that the multijurisdictional practice of many lawyers today necessitates uniform standards.

A member, while expressing agreement with the overall concept of adopting the revisions, pointed out a perceived conflict between proposed Rule 7.2(b) and existing Rule 1.5(e), which prohibits referral fees. The member suggested that perhaps Rule 1.5(e) should be eliminated. The member also questioned the Subcommittee's recommendation to retain existing Rule 7.3(c) and 7.3(d) and suggested that proposed Rule 7.5(b) needs some additional work. Professor Wald indicated that he does not believe the proposed provisions of Rule 7.2(b) would conflict with existing Rule 1.5(e).

In a straw vote, members indicated their general agreement to recommend approval of some version of the new Model Rules.

Another member agreed with Professor Wald that the provisions of proposed Rule 7.2(b) are not necessarily inconsistent with existing Rule 1.5(e).

Following a short break, the Committee engaged in a discussion of proposed Rules 7.1-7.3 and their proposed comments:

Proposed Rule 7.1. Committee members expressed an overall consensus on the language of the proposed rule itself with the discussion focusing on certain of the proposed comments. Comment 3A is one of the aforementioned instances where the Subcommittee recommends that the language of the existing Colorado comment be retained. Proposed Comment 3A states:

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

The Committee Chair suggested that the language "only state" be changed to read "state only". A member suggested that the first sentence of the comment be amended to provide "... that the client may be liable for costs of the adverse party's attorneys' fees if so ordered by the court." There was a general discussion of the use of the word "shall" in the comment with certain members expressing that the mandatory language implied by the use of that word was improper and that the word "shall" be changed to read either "must" or "should".

The discussion over use of the word "shall" also carried over into a discussion of proposed Comment 6 to proposed Rule 7.1. Comment 6, which also deviates from Comment 6 to the Model Rule in that it retains existing Colorado language, provides as follows:

> A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

A member suggested that replacing the word "shall" with the word "should" would water down the provisions of the comment and that it would be more instructive to practicing lawyers that the comment make an affirmative statement that something either is or is not misleading. Another member again cautioned against adopting language other than the Model Rule language in order to promote uniformity.

Proposed Rule 7.2. Professor Wald highlighted the provisions of Rule 7.2(d)(5), which allows an attorney to "... give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer services." He also reviewed the language of proposed Rule 7.2(c) dealing with the issues of lawyer certification and

specialization. The discussion turned to proposed comment 11A to this rule, which retains existing Colorado language. A member suggested that the language "... claims to be certified" be amended to read "claims to specialize". Other members disagreed with the suggestion of substituting "specialize" for "certified" by noting that existing Rule 7.2(c)(1) uses the word "certified" and by noting that the language of the comment should track the language of the rule. There was a brief comment regarding Comment 1, which, as proposed, permits dissemination of information concerning a lawyer's or law firm's name, address, email address, website, and telephone number among other informational material.

Proposed Rule 7.3. Professor Wald again reiterated the need to balance the free flow of information for marketing of legal services while restricting overreaching by lawyers with vulnerable clients. He pointed out that the rationale behind proposed Rule 7.3(b)(2) and (3) was that the clients described in those sections were not considered vulnerable. The proposed rule retains the language of existing Rule 7.3(c) in proposed Rule 7.3(d). A member suggested that perhaps language of proposed Rule 7.3(d)(2) should be moved to a comment while another member strongly disagreed and favored keeping the language in the rule. There was some discussion about the origins of the language contained in proposed Rule 7.3(d) (which retains the language of existing Rule 7.3(c)) with one member noting that the restrictions of the rule parallel statutory restrictions contained in C.R.S. §13-93-111, regarding contacting accident victims within a period of time following an accident. There was some discussion regarding the relationship between proposed Rule 7.3(d)(1) and current Rule 4.2 and whether both provisions are necessary. A member expressed his view that both sections are necessary because they deal with separate policy issues. During the discussion on this issue, the Committee Chair reminded members of CBA Ethics Opinion 111 and suggested that it be reviewed in connection with proposed Rule 7.3(b) and 7.3(d). Professor Wald indicated he would do some additional research with respect to the origins of the language of proposed Rule 7.3(d).A member suggested that proposed Rule 7.3(d) goes beyond the requirements of existing Colorado statutes.

Professor Wald noted that the language of proposed Rule 7.3(f) derives from long-standing Colorado-adopted language on advertising. The members discussed the need to protect potential vulnerable clients and whether the average person distinguishes between the terms "advertising material and "solicitation materials". There was some discussion about the proposed rule's four-year retention requirement. A member suggested that it be increased to five years to track an applicable statute of limitations. It was also suggested that the record-keeping requirement be eliminated for those persons described in proposed Rule 7.3(b)(1), (2), and (3), and that consideration be given to using some of the language of proposed Rule 7.3(b)(1) at the beginning of proposed Rule 7.3(f).

The discussion concluded with the Committee Chair praising the work of the Subcommittee and requesting the Subcommittee to address the issues raised at the meeting and provide the Committee with redlined and clean versions of the proposed rules and comments at the Committee's next meeting.

6. Administrative matters

a. Diversity Subcommittee. Judge Espinosa, as chair of the Diversity Subcommittee, reported that the Subcommittee had an initial telephone conference meeting to discuss ideas for developing and attracting qualified, diverse members for service on the Committee. A Subcommittee member discussed her efforts to develop candidates for another committee and offered to share her ideas and materials to assist the Subcommittee. The Committee Chair requested that members volunteer for service on this Subcommittee and encouraged the Subcommittee to continue its efforts and report back at the next meeting.

b. The next meeting date of the full Committee was scheduled for January 10, 2020.

c. The meeting was adjourned at 12:03 PM.

Respectfully submitted

Thomas E. Downey, Jr., Secretary

(These minutes have not been approved by the Committee.)

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HOLLAND&HART LLP

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October 31, 2019

VIA U.S. MAIL AND EMAIL

The Honorable William W. Hood, III
Colorado Supreme Court
2 E. 14th Avenue
Denver, CO 80203

The Honorable Monica Márquez
Colorado Supreme Court
2 E. 14th Avenue
Denver, CO 80203

Re: Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct – Decision Not to Recommend Comment to Rule 8.4(c)

Dear Justices Hood and Márquez:

I write on behalf of the Court's Standing Committee on the Colorado Rules of Professional Conduct (the Standing Committee).

In September 2017, the Court adopted an amendment to Rule 8.4(c) of the Colorado Rules of Professional Conduct (the Colorado Rules), to permit a lawyer to "advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities" that involve dishonest, fraud, deceit or misrepresentation. At its October 27, 2017 meeting, the Standing Committee formed a subcommittee to consider whether the Standing Committee should propose a comment on the meaning of the phrase "lawful investigative activities" as used in the Rule 8.4(c) exception. Standing Committee member Tom Downey, who had chaired the "Pretexting Subcommittee" that had considered an exception to Rule 8.4(c) many years ago, also chaired the subcommittee formed in October 2017. The following Standing Committee members served on the subcommittee: Judge Michael Berger, Margaret Funk, John Haried, Judge Ruthanne Polidori, Dick Reeve, Marcus Squarrell, David Stark, Jamie Sudler, Judge John Webb, and Fred Yarger. Non-members Andrea Anderson, Matthew Kirsch, John Posthumus, Adam Scoville, and Jan Zavislan also served on the subcommittee.

In a report that was presented to the Standing Committee at its January 11, 2019 and October 4, 2019 meetings, the subcommittee recommended against the adoption of a comment. *See* Attachment A. The subcommittee provided six reasons, which appear at page 2 of its report, for its recommendation. One reason was that, when the report issued, the CBA Ethics Committee was working on an ethics opinion to provide guidance on the meaning and application of the Rule 8.4(c) exception. The CBA opinion has now been adopted as Formal Opinion 137. *See* Attachment B.

Although the subcommittee recommended against adoption of a comment, it included a draft comment at page 3 of its report, as a starting point for discussion in the event that the Standing Committee nevertheless wished to recommend a comment.

The subcommittee also recommended a minor amendment to Rule 8.4(c) itself: changing the word "or" to "and" as indicated here: "(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, ~~or~~and investigators, who participate in lawful investigative activities".

At its January 26, 2018 meeting, the Standing Committee voted in favor of recommending that the Court amend Rule 8.4(c) to replace the word "or" with "and", as set forth in the redlined text above. Through this letter, I am forwarding that recommendation to the Court.

At its October 4, 2019 meeting, all but one member of the Standing Committee in attendance voted against recommending adoption of a comment to accompany Rule 8.4(c). Therefore, the Standing Committee did not consider the draft comment language provided in the subcommittee's report. The Standing Committee also voted in favor of providing the subcommittee's work product to the Court.

Sincerely,

Marcy G. Glenn
of Holland & Hart LLP

MGG:ko
Encls.
cc: Members of the Standing Committee (w/encl.)

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Report of R.P.C. 8.4(c) Comment Subcommittee

The Rule 8.4(c) Comment Subcommittee respectfully submits the following report.

I. SUMMARY

This subcommittee was formed at the October 27, 2017 meeting of the full Committee and tasked to consider whether a comment on the phrase "lawful investigative activities" was necessary, and to consider changing the wording of Rule 8.4(c) to eliminate the word "or", which appears before the word "investigators," and replace it with the word "and".

The following individuals served as members of the subcommittee: Andrea Anderson, David Stark, Dick Reeve, Fred Yarger, Jamie Sudler, Jan Zavislan, John Haried, John Posthumus, the Hon. John Webb, Marcus Squarrell, Margaret Funk, Matthew Kirsch, the Hon. Michael Berger, the Hon. Ruthanne Polidori, Adam Scoville and Tom Downey

The subcommittee recommended replacing the word "or" with the word "and" as it appears before the word "investigators," in the text of Rule 8.4(c). This recommended change was adopted by the full Committee at its meeting on January 26, 2018.

The subcommittee does not recommend the adoption of a comment to address the meaning of the words "lawful investigative activities" as it appears in the rule.

Should the full Committee disagree with the subcommittee's recommendation not to add a comment, the subcommittee has prepared language for a proposed comment to Rule 8.4(c).

II. BACKGROUND

In September, 2017, the Colorado Supreme Court conducted a public hearing on proposed amendments to the language of Rule 8.4(c) and subsequently adopted the proposed amendments to that rule which now reads as follows:

It is professional misconduct for a lawyer to:

...

(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities;

ATTACHMENT A

III. NO COMMENT NEEDED

At each meeting of the subcommittee, a preliminary vote was taken on whether the subcommittee felt a comment was needed. The majority of the subcommittee voted for no comment each time such a vote was taken. Some of the reasons articulated for the belief that no comment is needed are as follows:

1. The Supreme Court's original notification of proposed amendments to Rule 8.4(c) listed only proposed language changes to the Rule itself and did not propose any comment to the Rule.

2. After its announcement of proposed amendments to Rule 8.4(c) and prior to the public hearing on the proposed amendments, the Supreme Court did not propose any comments to accompany the proposed rule changes or request any assistance of the Standing Committee to consider any proposed comments.

3. The recorded proceedings from the September, 2017 public hearing on the proposed amendments to the Rule do not indicate any concern by the Supreme Court of the need for a comment to accompany the proposed language changes to Rule 8.4(c).

4. The amended language of Rule 8.4(c) is relatively new. Many on the subcommittee suggested that adoption of comment language be delayed until issues with the amended language of the Rule have arisen and dictate the need for a comment.

5. Subcommittee members noted that the Final Report Of Pretexing Subcommittee dated December 19, 2011 did contain some proposed comment language.

6. Subcommittee members also noted that the Ethics Committee of the Colorado Bar Association is working on a proposed opinion addressing the amended language of Rule 8.4 (c).

IV. PROPOSED COMMENT

Notwithstanding the subcommittee's opinion that a comment is not needed, the subcommittee nevertheless continued its work and developed a proposed comment for the full Committee's consideration. The subcommittee's guide in drafting a proposed comment was that the comment should be brief and reiterate that the exception in Rule 8.4(c) does not allow a lawyer to directly participate in lawful investigative activities that involve dishonesty, fraud, deceit, or misrepresentation.

The subcommittee ultimately agreed on the following language:

PROPOSED COMMENT TO RPC 8.4(c)

> The exception in Rule 8.4(c) allowing advice, direction or supervision does not allow a lawyer to directly participate in lawful investigative activities that involve dishonesty, fraud, deceit, or misrepresentation. Conduct that is "lawful" could, if engaged in by a lawyer directly, also violate other rules, such as Rule 4.1 (Truthfulness in Statements to Others). What is "lawful" is determined on a case-by-case basis by reference to other law, including constitutional principles, legislation, and the common law.

V. CONCLUSION

The Rule 8.4(c) Comment subcommittee does not recommend the adoption of a comment to the rule addressing the phrase "lawful investigative activities". Should the Committee disagree with the subcommittee's recommendation and wish to adopt a comment, the subcommittee recommends that any such comment be brief and reiterate that the exception to Rule 8.4(c) does not allow a lawyer to directly participate in lawful investigative activities that involve dishonesty, fraud, deceit or misrepresentation.

Respectfully Submitted,

Thomas E. Downey, Jr.

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Advising, Directing, and Supervising Others in Lawful Investigative Activities That Involve Dishonesty, Fraud, Deceit, or Misrepresentation

Adopted May 2019

I. Introduction and Scope

In September 2017, the Colorado Supreme Court amended Rule 8.4(c) of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) adding this exception:

> It is professional misconduct for a lawyer to:
>
> . . .
>
> > (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities.

(Emphasis added.) No comment accompanied this change.

This opinion discusses the implications of this exception, the permissible limits of a lawyer's involvement in investigative activities, the exception's effect on other Rules, and some commonly recurring situations in which the exception may apply.

II. Syllabus

Revised Rule 8.4(c) permits a lawyer to "advise, direct, or supervise others," including clients, law enforcement officers, and investigators, who participate in lawful investigative activities involving dishonesty, fraud, deceit, or misrepresentation. Left unchanged is the ethical

prohibition against a lawyer personally participating in activities involving dishonesty, fraud, deceit, or misrepresentation, regardless of the lawfulness of those activities.

Whether an investigative activity is "lawful" is a mixed question of fact and law. While this opinion provides some guidance regarding this question, a lawyer asked to advise, direct, or supervise an investigative activity should conduct independent research based on the facts and circumstances of a particular case.

In general, criminal investigations are likely to be considered "lawful investigative activities" even if they involve dishonesty, fraud, deceit, and misrepresentation, provided those activities are not designed to mislead courts or other tribunals. In civil matters, investigative activities are likely to be considered lawful if they are designed to ferret out violations of constitutional, statutory, or common law. This is especially true if the conduct involves posing as customers or other members of the public and does not involve attempts to induce or coerce a subject into making statements or taking action that the subject would not otherwise have taken.

III. Discussion and Analysis

A. Policy Underpinnings of Rule 8.4(c)

Rule 8.4(c) protects against conduct that "jeopardizes the public's interest in the integrity and trustworthiness of lawyers." *In re Conduct of Carpenter*, 95 P.3d 203, 208 (Or. 2004). Colorado's Office of the Presiding Disciplinary Judge has endorsed this view, stating that "dishonesty . . . encompasses fraudulent, deceitful, or misrepresentative conduct evincing 'a lack of honesty or integrity in principle; a lack of fairness and straightforwardness.'" *People v. Katz*, 58 P.3d 1176, 1189 (Colo. OPDJ 2002) (quoting *In re Shorter*, 570 A.2d 760, 767 (D.C. 1990)); *People v. Schmeiser*, 35 P.3d 560, 562, 564 (Colo. OPDJ 2001) (concluding that a violation of Colo. RPC 8.4(c) requires that the statement must be untrue and relate to a material fact). The focus of the Rule is on dishonesty "which encompasses fraudulent, deceitful, or

misrepresentative behavior." *Shorter*, 570 A.2d at 767 (construing prior DR 1-102(A)(4)); *see also Conduct of Carpenter*, 95 P.3d at 208–09 ("[C]onduct involving 'dishonesty' is conduct that indicates a disposition to lie, cheat, or defraud; untrustworthiness; or a lack of integrity" (internal quotations omitted)).

The United States Supreme Court has long recognized the propriety of using undercover agents, pretext, and deception in lawful investigations. *See Lewis v. U.S.*, 385 U.S. 206, 209 (1966) ("the Government is entitled to use decoys and to conceal the identity of its agents"). The Colorado Supreme Court has similarly approved deception in criminal investigations, observing that many crimes simply "could not otherwise be detected unless the government is permitted to engage in covert activity." *People in the Interest of M.N.*, 761 P.2d 1124, 1135 (Colo. 1988); *see also People v. Bailey*, 630 P.2d 1062, 1068 (Colo. 1981) (rejecting entrapment and constitutional challenges to deceptive undercover activities); *People v. Nelson*, 296 P.3d 177, 184 (Colo. App. 2012) (policeman's ruse of falsely identifying himself as "maintenance" causing defendant to open apartment door held not to render subsequent entry unlawful); *People v. Roth*, 85 P.3d 571, 574 (Colo. App. 2003) (police use of fictitious drug checkpoint was lawful and did not require suppression of evidence); *People v. Zamora*, 940 P.2d 939, 943 (Colo. App. 1996) (police pretext in asking to inspect apartment for fictitious crime did not render consent to warrantless search involuntary; whether conduct is lawful turns on whether defendant's consent is voluntary).

The Committee also has recognized that a lawyer's involvement in lawful criminal or civil regulatory investigations can ensure that the investigation complies with constitutional parameters, "as well as high professional and ethical standards." CBA Formal Op. 96, "Ex Parte

Communications with Represented Persons During Criminal and Civil Regulatory/Investigations and Proceedings" (rev. 2012) (CBA Op. 96).

The American Bar Association (ABA) instructs prosecutors to "provide legal advice to law enforcement agents regarding the use of investigative techniques that law enforcement agents are authorized to use," and that ethical rules "should not be read to forbid prosecutors from participating in or supervising undercover investigations, which by definition involve 'deceit.'" *See* ABA Standards for Criminal Justice: Prosecutorial Investigations, Standard 1.3(g) & Commentary to Standard 1.3(g); *see also* H. Morley Swingle & Lane P. Thomasson, Feature: *Big Lies and Prosecutorial Ethics*, 69 J. Mo. B. 84, 85 (Mar.-Apr. 2013) ("A prosecutor would not be doing his job effectively if he or she refused … to help [an] officer prepare to conduct a lawful covert operation[.]").

B. Lawyers May Not Personally Participate in Dishonesty, Fraud, Deceit, or Misrepresentation

While recognizing the value of deception as a tool for law enforcement and of lawyer oversight of such investigations, courts have drawn a clear line between a lawyer advising and supervising covert activities and personally participating in them.

Prior to the revision of Rule 8.4(c), the Colorado Supreme Court refused to recognize any exception that would allow a lawyer to personally engage in deceptive activities, even under the most extenuating of circumstances. In *In re Pautler*, 47 P.3d 1175 (Colo. 2002), a prosecutor was disciplined for impersonating a public defender in an attempt to achieve the peaceful surrender of a barricaded axe murderer who had demanded to speak to a public defender as a condition of his surrender. *Id.* at 1176–77. The Colorado Supreme Court held that then-existing Rule 8.4(c) made no exception for investigatory activities. *Id.* at 1179. Instead, the court repeatedly emphasized that lawyers must not personally engage in behavior "that involves deceit

or misrepresentation" even during investigative activities. *Id.* at 1180; *see also In re Gatti*, 8 P.3d 966 (Or. 2000) (reaching a similar result under an older version of Oregon's counterpart to Rule 8.4(c)).

Revised Rule 8.4(c) does not alter the result in *Pautler*, but makes clear that a lawyer may "advise, direct, or supervise others," including clients, law enforcement officers, and investigators, who participate in "lawful investigative activities" involving dishonesty, fraud, deceit, or misrepresentation.

C. Lawful Investigative Activities

Revised Rule 8.4(c) applies to all Colorado lawyers. Whether the exception created by revised Rule 8.4(c) applies in a particular circumstance turns on a legal question: "What constitutes a lawful investigative activity?" In cases determining whether deception was used in pursuit of "lawful investigative activities," there is a "discernable continuum" of conduct ranging "from clearly impermissible to clearly permissible" actions. *Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876, 880 (N.D. Ill. 2002).

Existing case law on what constitutes "lawful investigative activities" may be distilled into several guiding principles. Caution must be exercised in applying existing law, however, as material differences exist between revised Rule 8.4(c) and the Rules in other jurisdictions.

First, hiring investigators to pose as customers or consumers is a proper, lawful investigative technique. Such a ruse is designed to ferret out ongoing wrongdoing, such as discrimination or inappropriate use of a product or trademark infringement that would be otherwise difficult, if not impossible, to discover without the deception. Courts traditionally have allowed pretextual or undercover investigations in civil rights cases and, somewhat less consistently, in intellectual property investigations. Lawyers "can employ persons to play the

role of customers seeking services on the same basis as the general public." *Hill*, 209 F. Supp. 2d at 880.

Second, investigators must take care not to induce or coerce the target of an investigation into making statements he or she otherwise would not have made to a member of the public. Investigators "cannot trick employees into doing things or saying things they otherwise would not do or say." *Id.* A proper investigation should merely "note or reproduce" a witness's usual behavior. An operation designed to induce someone into doing or saying something he or she would otherwise not do or say, would likely not qualify as a lawful investigation. *In re Curry*, 880 N.E.2d 388, 405 (Mass. 2008).

Third, any deception should not *impede* a lawful investigation. *See In re Malone*, 105 A.D.2d 455, 457–58 (N.Y. App. Div. 1984) (censuring a prosecutor who instructed an officer to lie to an investigative panel); *accord In re Friedman*, 392 N.E.2d 1333, 1339–40 (Ill. 1979) (finding an ethics violation where a prosecutor instructed police officers to testify falsely to catch lawyers involved in a bribery scheme).

Fourth, lawyers may not affirmatively mislead a court or other tribunal. *See People v. Reichman*, 819 P.2d 1035, 1036 (Colo. 1991) (holding that a lawyer may not knowingly deceive the judicial system by filing false criminal charges to bolster an undercover investigator's credibility); *see also* Colo. RPC 3.3(a).

Fifth, relevant considerations in a civil investigation include whether the investigation was a "straightforward effort to gather evidence"; whether the investigation is "designed to reproduce the subject's usual behavior" or was designed to "trick" the subject into doing something atypical; whether the investigation is gathering information "readily available to the public"; the degree of intrusiveness of the investigation (with less intrusive investigations less

likely to run afoul of constraints on permissible lawful investigative activities or ethical rules); whether those targeted by the investigation are "suspected wrongdoers"; whether there are other ways to collect evidence of the wrongdoing; and whether a supervisory lawyer has reviewed and approved the investigation. *See* Judy Z. Kalman & Mariya Treisman, *Pretextual Investigative Techniques and the Rules of Professional Conduct*, NAGTRI J., Vol. 3, Issue 1 (Feb. 2018) (collecting cases).

Finally, a number of states have defined the scope and contours of "covert activity" for purposes of lawful investigations. For example, Oregon has specifically stated that "lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights" is acceptable, "provided the lawyer's conduct is otherwise in compliance" with the Rules. Or. RPC 8.4(b). Further, Oregon permits covert activity to be commenced "only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place[,] or will take place in the foreseeable future." *Id.*; *accord* Iowa RPC 32:8.4, cmt. [6] (same).

Revised Colorado. RPC 8.4(c) is not so explicit and was adopted without any comment providing guidance to lawyers, government or private. In drawing guidance from Oregon, Iowa, and other states that have adopted variants of ABA Model Rule 8.4(c), it is important to keep in mind that the express language of such variants and their comments circumscribe the ethical boundaries of a lawyer's involvement in investigative activities in those jurisdictions. Lawyers practicing in Colorado who are consulted regarding investigative activities must analyze each situation on a case-by-case basis, and exercise their own sound professional judgment, informed by legal research.

D. Relationship to Other Rules

While revised Rule 8.4(c) may seem to be a significant departure from previous standards, it is better viewed as a narrow governing exception. This section considers other Rules potentially affected by revised Rule 8.4(c), starting with those that, at least on their face, are most likely to be affected. After analysis, however, the Committee concludes that many of these Rules are unaffected, or largely unaffected, by revised Rule 8.4(c).

1. Rule 8.4(a) (Misconduct)

Rule 8.4(a) provides: "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Revised Rule 8.4(c) provides a narrow exception to this anti-circumvention rule. It is a settled rule of statutory construction that "a specific statutory provision prevails over a general provision." *Colo. Permanente Med. Group, P.C. v. Evans*, 926 P.2d 1218, 1236 (Colo. 1996). The Committee believes that revised Rule 8.4(c)'s express authorization for a lawyer to "advise, direct, or supervise others" "in conduct involving dishonesty, fraud, deceit or misrepresentation" controls over application of the general anti-circumvention rule, so long as the advice, direction, or supervision occurs in furtherance of a "lawful investigative activit[y],".

Further, it is the opinion of the Committee that, even before the enactment of revised Rule 8.4(c), subsection (a) did not prohibit a lawyer from advising a client concerning action the client is legally entitled to take, even if such action involves conduct involving dishonesty, fraud, deceit, or misrepresentation. For example, in Colorado and other states that have adopted a "unilateral consent" rule, it is generally lawful for a nonlawyer to surreptitiously record a conversation to which he or she is a party, though a lawyer may not. *See People v. Selby*, 606 P.2d 45, 47 (1979) (holding a lawyer may not secretly record a conversation with another lawyer or person); CBA Formal Op. 112, "Surreptitious Recording of Conversations or Statements"

(2003). Even before the adoption of revised Rule 8.4(c), a lawyer could have advised a nonlawyer client of his or her legal right to engage in such a surreptitious recording.

2. Rule 4.1 (Truthfulness in Statements to Others)

Rule 4.1 provides:

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

Because revised Rule 8.4(c) does not permit a lawyer to personally engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, Rule 4.1 and the result in *Pautler* are unaffected. *See* Colo. RPC 4.1, cmt. [1].

3. Rule 4.2 (Communication with Person Represented by Counsel)

Rule 4.2 states:

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

Although revised Rule 8.4(c) permits a lawyer to "advise, direct, or supervise" a nonlawyer where the investigative activity in question is a "lawful investigative activity," the Committee believes that revised Rule 8.4(c) does not otherwise alter Rule 4.2's requirements. Investigation is prohibited once the lawyer knows a party is represented by counsel in a matter unless one of Rule 4.2's exceptions applies. Rule 4.2's "authorized by law" exception, however, may include "lawful investigative activity" as referenced in revised Rule 8.4(c). *See generally* CBA Op. 96.

4. Rule 4.3 (Dealing with Unrepresented Person)

Rule 4.3 provides:

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

Because Rule 4.3 applies to personal contact by a lawyer with an unrepresented party, it is unaffected by revised Rule 8.4(c), which does not authorize a lawyer to personally engage in deceitful conduct.

5. Rule 4.4(a) (Respect for Rights of Third Persons)

Rule 4.4(a) states, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

The Committee believes that conduct in accordance with revised Rule 8.4(c) would not violate the "substantial purpose" clause of Rule 4.4(a). The Committee further believes that, so long as the requirements of revised Rule 8.4(c) are observed, advising, directing, or supervising others in the use of covert or deceitful methods in the course of "lawful investigative activities" cannot be construed to be a violation of another's "legal rights."

6. Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)

Rule 5.3 provides:

> With respect to nonlawyers employed or retained by or associated with a lawyer:
>
> . . .
>
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

> (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct *if engaged in by a lawyer* if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(Emphasis added.)

Private investigators hired by a lawyer, whether on a full-time or project basis, as well as government investigators and staff employed by the lawyer, are "nonlawyers employed or retained by or associated with a lawyer."[1] Rule 5.3 requires a lawyer to make "reasonable efforts to ensure that [such] person's conduct is compatible with the professional obligations of the lawyer."

The Committee believes that Rule 5.3's requirement that a lawyer make "reasonable efforts to ensure . . . conduct is compatible with the professional obligations of the lawyer" includes the determination of whether the conduct the lawyer is recommending, directing, or advising is in furtherance of a lawful investigative activity. Such reasonable efforts may include reviewing the substantive law bearing on whether an investigative activity is lawful, consulting with others on this issue when appropriate, and providing guidance to those the lawyer is advising regarding how to lawfully conduct the activity. For the reasons described in Section III.D.1, revised Rule 8.4(c) provides a narrow exception to Rule 5.3(c) and allows a lawyer to "advise, direct, or supervise" a nonlawyer engaged in "conduct involving dishonesty, fraud,

[1] Process servers, skip tracers, and others hired by a lawyer also fall within the ambit of Rule 5.3, and may fall within the purview of revised Rule 8.4(c) if their tasks include "dishonesty, fraud, deceit or misrepresentation."

deceit or misrepresentation" so long as that conduct is in furtherance of "lawful investigative activities."

7. Rule 1.2(d) (Scope of Representation and Allocation of Authority Between Client and Lawyer)

Rule 1.2(d) provides:

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

As discussed above, revised Rule 8.4(c) permits lawyers to advise, direct, and supervise clients in lawful investigative activities that involve "fraud." To that extent, the revised Rule controls over Rule 1.2(d)'s prohibition on counseling a client to engage in *fraudulent* conduct, but it does not alter the prohibitions on counseling a client to engage or assisting a client to engage in *criminal* conduct.

8. Rule 3.3 (Candor Toward the Tribunal)

As noted above in Section III, revised Rule 8.4(c) does not modify a lawyer's duty of candor to the tribunal under Rule 3.3.

IV. Illustrations

Certain issues regarding investigative activities may arise frequently in a lawyer's practice, even on a daily basis, such as the supervision of undercover law enforcement investigations.

A. Private and Government Investigators – Pretextual Investigations

As noted above, undercover investigations and deceptive investigative techniques are an accepted practice in the detection and prevention of crime. *M.N.*, 761 P.2d 1124, 1135; *People v. Morley*, 725 P.2d 510, 514–15 (Colo. 1986); *Bailey*, 630 P.2d at 1068. A lawyer's involvement

in an investigation can ensure that the investigation complies with constitutional standards. CBA Formal Op. 96. Revised Rule 8.4(c) clarifies that a lawyer may advise, direct, or supervise others in lawful criminal investigations, even if those investigations are covert or use deceptive investigative techniques. *See also* ABA Standards for Criminal Justice: Prosecutorial Investigations, Standard 1.3(g) & Commentary to Subdivision 1.3(g).

Revised Rule 8.4(c) also applies in contexts other than criminal investigations. For example, an investigator may pretend to be a homebuyer or renter in order to detect discrimination in housing, pose as a job-seeker to gather evidence of employment discrimination, or purport to be a consumer of certain goods in order to gather evidence of consumer fraud or evidence of trademark or copyright infringement. Pursuant to revised Rule 8.4(c), a lawyer may ethically advise, direct, or supervise such a lawful, albeit deceptive, investigation by an investigator retained by the lawyer or by the lawyer's client. However, the investigation must be "lawful," and the lawyer may not personally participate in conduct involving dishonesty, fraud, deceit, or misrepresentation.

B. Surreptitious Recordings

The Committee is aware that in certain situations a lawyer's client or other persons (such as investigators) might wish to record a conversation surreptitiously. For example, a client may want to gather evidence to support a claim for employment discrimination or sexual harassment by recording statements that are being made to the employee in the work place. A party in a dissolution of marriage action may wish to record statements made by the other party that indicate the other party is hiding assets or presents a risk to the safety of the children of the marriage. Or a client may want to record threats of physical harm so that the client can seek a restraining order, support criminal prosecution, or establish evidence to support a civil claim for

intentional infliction of emotional distress. In these situations, it seems unlikely that the person to be recorded would continue to make the statements if they knew they were being recorded.

As previously noted in Section III.D.1., in Colorado it is generally lawful for a nonlawyer client to record a conversation to which he or she is a party without the other party's knowledge, even though a lawyer may not do so. A lawyer, however, should advise a client that any recording should not violate state or federal computer crime, wiretap, or eavesdropping statutes. *See*, e.g., 18 U.S.C. §2511; C.R.S. § 18-5.5-102; C.R.S. § 18-9-303; C.R.S. § 18-9-304.

Although a lawyer may not communicate with a party who is represented in a matter by another lawyer (unless the other lawyer consents), "[p]arties to a matter may communicate directly with each other." Colo. RPC 4.2, cmt. [4]. Revised Rule 8.4(c) specifically includes "clients . . . who engage in lawful investigative activities" among those persons that the lawyer may advise, direct, or supervise. Therefore, as long as the recording is lawful, revised Rule 8.4(c) permits a lawyer to advise, direct, or supervise other persons with respect to such recordings, even if made surreptitiously.[2]

C. Public Records and Social Media

Our society increasingly stores data electronically and uses the Internet to gather information. In addition, social media have become so commonplace it is easy to compile a large amount of information about someone from that person's and the person's friends' and colleagues' postings on social media. In short, public records and social media provide fertile ground for investigating a person or organization.

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[2] The Committee recognizes this conclusion is contrary to the holding in *McClelland v. Blazin' Wings, Inc.*, 675 F. Supp. 2d 1074, 1079-80 (D. Colo. 2009). However, that opinion, issued several years ago, was based on Colo. RPC 8.4(c) before its amendment in 2017. The court in *McClelland* relied in part on CBA Formal Op. 112, "Surreptitious Recording of Conversations or Statements" (2003), which also was based on the pre-amendment Rule. *See also* ABA Comm. on Ethics and Prof. Resp., Formal Op. 11-461, "Advising Clients Regarding Direct Contacts with Represented Persons" (2011).

Important information often can be obtained by investigating through public records and social media without deception. For example, no dishonesty, fraud, deceit, or misrepresentation is required to view and record public postings made by a potential criminal defendant about a crime he or she has committed, or by a personal injury plaintiff showing photos of his or her weekend activities which refute claims of pain and physical disability. These examples involve information that has been made public and is available for anyone to see. Therefore, an investigator or a lawyer may gather such information. *See* CBA Formal Op. 127, "Use of Social Media for Investigative Purposes" (2015).

However, in some instances, information cannot readily be obtained without some form of deception or misrepresentation. One example is law enforcement officers pretending to be someone they are not in order to catch sexual predators using the Internet to lure their victims, or to detect human trafficking, drug smuggling, or other illegal activities. In such instances, information may be obtained only by gaining access to a restricted portion of a social media site by misrepresenting one's identity or the reason for wanting such access, for example, when an investigator asks to "friend" someone on Facebook without revealing the investigation. Revised Rule 8.4(c) clarifies that a lawyer may advise, supervise, or direct law enforcement in such investigations that involve deception or misrepresentation, but may not personally engage in them.

With regard to situations not involving law enforcement, such as investigating witnesses or gathering information about a party to a case, the Committee believes that revised Rule 8.4(c) now permits a lawyer to ethically advise, supervise, or direct others, including investigators or clients, with respect to use of deceptive means to gather information from a restricted portion of a social media profile or website, as long as it is in the course of a lawful investigative activity,

and as long as the lawyer does not personally engage in such conduct. *See* CBA Formal Op. 127, *supra*.

Addendum: Useful References

Case Law

Havens Realty Corp. v. Coleman, 455 U.S. 363, 374 (1982) (tester has standing to bring Fair Housing Act claim even though "the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home").

Lewis v. United States, 385 U.S. 206, 209 (1966) (the "government is entitled to use decoys and to conceal the identity of its agents").

Hoffa v. United States, 385 U.S. 293, 300 (1966) (discussing witness's failure to disclose his role as a government informer in context of illegal search and seizure under the Fourth Amendment).

United States v. Szycher, 585 F.2d 443, 447 (10th Cir. 1978) (prohibiting pretextual investigation activities "where the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking the judicial processes to obtain a conviction").

McClelland v. Blazin' Wings, Inc., 675 F. Supp. 2d 1074, 1080 (D. Colo. 2009) (private investigator's conduct in surreptitiously recording defendant's employee was improper).

In re Pautler, 47 P.3d 1175, 1179 (Colo. 2002) (pre-amendment Colo. RPC 8.4(c) applied to prosecutor's conduct in impersonating a public defender).

People v. Reichman, 819 P.2d 1035, 1038-39 (Colo. 1991) (pre-amendment Colo. RPC 8.4(c) prohibition against deception applied to criminal prosecutors).

People v. Smith, 778 P.2d 685, 686 (Colo. 1989) ("the undisclosed use of a recording device necessarily involves elements of deception and trickery which do not comport with the high standards of candor and fairness to which all attorneys are bound").

People in the Interest of M.N., 761 P.2d 1124, 1130 (Colo. 1988) ("Unlawful activities performed by a government agent in the course of undercover law enforcement do not necessarily subject the officer to prosecution.").

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People v. Nelson, 296 P.3d 177, 184 (Colo. App. 2012) (policeman's ruse of falsely identifying himself as "maintenance," causing defendant to open apartment door, did not render subsequent entry unlawful).

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People v. Zamora, 940 P.2d 939, 943 (Colo. App. 1996) (police pretext for asking to inspect apartment did not render consent to warrantless search involuntary).

People v. Schmeiser, 35 P.3d 560, 562, 564 (Colo. OPDJ 2001) (concluding that a violation of pre-amendment Colo. RPC 8.4(c) requires that the statement must be untrue and relate to a material fact).

Other Jurisdictions

Midwest Motor Sports v. Arctic Cat Sales, Inc., 347 F.3d 693, 695 (8th Cir. 2003) (where information "could have been obtained properly through the use of formal discovery techniques," doing so using undercover, pretextual investigation was unlawful).

Hill v. Shell Oil Co., 209 F. Supp. 2d 876, 879–80 (N.D. Ill. 2002) (rejecting challenge to evidence obtained by undercover investigators investigating racial discrimination in gasoline sales).

Holdren v. General Motors Corp., 13 F. Supp. 2d 1192 (D. Kan. 1998) (recognizing a fine line between advising and suggesting that a client engage in direct contact with a represented party, but concluding the attorney had violated Rule 4.2 via the anti-circumvention prohibition of Rule 8.4(a)).

In re Friedman, 392 N.E.2d 1333, 1339–40 (Ill. 1979) (finding ethics violation where a prosecutor instructed police officers to testify falsely to catch lawyers involved in a bribery scheme).

In re Curry, 880 N.E.2d 388, 408 (Mass. 2008) (lawyer sanctioned for his and his investigator's dishonest conduct in attempting to coerce a judge's law clerk to implicate the judge in a corruption scandal).

Apple Corps Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 475 (D. N.J. 1998) ("a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations").

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In re Conduct of Carpenter, 95 P.3d 203, 208-09 (Or. 2004) ("[C]onduct involving 'dishonesty' is conduct that indicates a disposition to lie, cheat, or defraud; untrustworthiness; or a lack of integrity.").

In re Gatti, 8 P.3d 966, 973 (Or. 2000) (lawyer's conduct in misrepresenting he was a chiropractor seeking employment to medical record company warranted public reprimand and constituted conduct involving dishonesty, fraud, deceit, or misrepresentation).

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RULE CHANGE 2019(17)
COLORADO RULES OF PROFESSIONAL CONDUCT

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) – (b) [NO CHANGE]

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, ~~or~~ and investigators, who participate in lawful investigative activities;

(d) – (i) [NO CHANGE]

COMMENT [NO CHANGE]

Rule 8.4. Misconduct

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(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, and investigators, who participate in lawful investigative activities;

(d) – (i) [NO CHANGE]

COMMENT [NO CHANGE]

Amended and Adopted by the Court, En Banc, December 6, 2019, effective immediately.

By the Court:

Monica M. Márquez
Justice, Colorado Supreme Court

Colorado Supreme Court Standing Committee for the Colorado Rules of Professional Conduct

ABA Rules 7.1–7.5 Subcommittee Revised Report

I. Introduction: lawyer advertising and solicitation rules for the 21st century

In August 2018 the American Bar Association ("ABA") House of Delegates revised Chapter 7, Rules 7.1-7.5 of the ABA Model Rules of Professional Conduct ("Rules"), regulating advertisement and solicitation. The ABA amendments were adopted following two years of intensive study, after receiving a proposal from the Association of Professional Responsibility Lawyers (APRL) in 2016.

In Spring 2019 the Colorado Supreme Court Standing Committee for the Colorado Rules of Professional Conduct ("Committee") appointed the ABA Rules 7.1–7.5 Subcommittee ("Subcommittee") to review the ABA amendments and report back to the Committee. Professor Eli Wald chaired the Subcommittee; also serving on Subcommittee were Nancy Cohen, Cynthia Covell, Thomas E. Downey, Jr., the Honorable Adam Espinosa, Margaret Funk, Casey Kannenberg, Cecil Morris, Noah Patterson, Saul Sarney, Marcus Squarrell, David Stark and Jamie Sudler.

The Subcommittee's work included the formation of a broad-based working group, holding numerous meetings and reaching broad consensus. Throughout, the Subcommittee's process has been transparent, open, and welcoming, including inviting representatives from the Colorado Attorney General's Office, Colorado Trial Lawyers Association, Colorado Bar Association Young Lawyers Division and the Office of Attorney Regulation Counsel. The Subcommittee presented its report to the Committee on October 4, 2019, received comments and incorporated them in this revised report. These edits have been made using track changes.

Because the Subcommittee generally recommends adoption of the ABA changes, it incorporates by reference the ABA's description of its process and timetable, see, ABA Report, pp. 7-13. In particular, the Subcommittee notes the ABA's compelling summary of APRL's proposal (pp. 7-8),[1] and agrees with the ABA's background analysis (pp. 10-13) which demonstrates why the ABA changes are timely and necessary.

The cornerstone of Chapter 7 of the Rules and of the Colorado Rules of Professional Conduct ("Colo. RPC") has long been ensuring client access to accurate information about lawyers and legal services. The ABA revisions uphold this guiding principle yet note three trends warranting updating the Rules. First, increased competition in the market for legal services and the nationalization of law practice render uniformity and consistency across states' rules of professional conduct imperative for the effective representation of clients, yet lawyer advertising and solicitation rules feature a "dizzying number of state variations."[2] Thus, the first

[1] APRL proposal included two reports, authored in 2015 and 2016, attached as Exhibits A and B.
[2] ABA Standing Committee on Ethics and Professional Responsibility Report ("ABA Report"), August 2018, at 1, attached as Exhibit C.

objective of the ABA's changes is to increase uniformity across states' advertising and solicitation rules by offering a model suited for the 21st century.[3]

Second, the widespread use of social media and the internet has changed the landscape of lawyer advertising and solicitation allowing greater and faster flow of information about lawyers and legal services in the market for legal services, making some of the current rules antiquated.[4] The second objective of the ABA's changes is to update the Rules, closing the gap between technological advancements and lawyer regulation.

Finally, developments in First Amendment and antitrust law suggest that burdensome and unnecessary restrictions on the dissemination of accurate information about lawyers and legal services may be unlawful, violating lawyers' right of commercial free speech and ability to freely compete in the market for legal services. The third aim of the ABA changes is to continue to ensure client access to accurate information about lawyers and legal services while respecting First Amendment and antitrust law.[5]

Having carefully reviewed the ABA changes to Chapter 7, the Subcommittee generally finds them compelling for the above stated reasons and recommends revising the Colo. RPC rules 7.1-7.5 to conform to the Rules. In five instances, however, the Subcommittee believes that ensuring client access to accurate information about lawyers and legal services calls for retaining current provisions of the Colo. RPC or Comments. These five instances are highlighted in the attached redlined version of the recommended rule changes and in this summary. The balance of the redlining in the attached Colo. RPC reflects the ABA amendments that the Subcommittee also recommends.

II. Brief Summary of the Recommended Changes

Following the ABA changes, the Subcommittee recommends amendments to the Colo. RPC, Rules 7.1 through 7.5 and their related Comments.

These amendments:[6]

- Streamline and simplify the rules while adhering to constitutional limitations on restricting commercial speech, protecting the public, and permitting lawyers to use new technologies to inform consumers accurately and efficiently about the availability of legal services.

- Combine the provisions on false and misleading communications into Rule 7.1 and its Comments. The black letter of Rule 7.1 is greatly reduced, resulting in a

[3] *Id.*
[4] *Id.*
[5] *Id.* at 1-2.
[6] This brief summary tracks the ABA's. *See*, ABA Report, p. 15.

short and concise general principle prohibiting false and misleading communications. Provisions of Rule 7.5, which largely relate to misleading communications, are moved into Comments to Rule 7.1.

• Consolidate specific rules for advertising into Rule 7.2, change "office address" to "contact information" (to accommodate technological advances) and delete unrelated or superfluous provisions. Provisions of Rule 7.4 regarding certification are moved to Rule 7.2(c) and its Comments. Lawyer referral services remain limited to qualified entities approved by an appropriate regulatory authority.

• Add a new subparagraph to Rule 7.2(b) as an exception to the general provision against paying for recommendations. The new provision would permit only nominal "thank you" gifts and contains other restrictions.

• Define solicitation as "a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter." With some exceptions, live person-to-person solicitation continues to be prohibited. This includes in-person, face-to-face, telephone, and real-time visual or auditory person-to-person communication.

• Broaden slightly the exceptions in Rule 7.3(b)(2) and (3) to permit live person-to-person solicitation of routine "users of the type of legal services involved for business matters," and of "persons with whom a lawyer has a business relationship." Additional Comments offers guidance on the new terms.

III. Discussion of the Proposed Amendments

A. Rule 7.1: Communications Concerning a Lawyer's Services

Rule 7.1 continues to prohibit false or misleading communications about lawyers and legal services, upholding the guiding principle of providing clients access to accurate information. Reflecting the trend of increased flow of information as well as increased client familiarity with information about law and lawyers, and respecting lawyers' First Amendment rights, however, the revised rule deletes unnecessary restrictions and moves others to the Comments.

Following the ABA changes, the Subcommittee recommends renumbering current rule 7.1(a)(1), stating the basic prohibition against false or misleading communications, as Rule 7.1.

Current subsections 7.1(a)(2) and 7.1(a)(3), offering examples of the basic principle are deleted because they have become unnecessary and are replaced with revised Comments [2] and [3].

Current subsection 7.1(b) is deleted and replaced with revised rule 7.2(b).

Current subsection 7.1(c) (and corresponding current Comment [9]), mandating the use of regular U.S. mail for certain communications, is deleted because it is antiquated given recent technological advancements.

Current subsections 7.1(e) and 7.1(f) are deleted as unnecessary and redundant, given the general principle stated in revised rule 7.1, as well as current Rules 1.17 (sale of law practice), 5.1 (responsibilities of a supervising lawyer), 5.3 (responsibilities regarding nonlawyer assistants), and 8.4(c) (conduct involving dishonesty). All of these changes are consistent with the ABA changes and will ensure greater uniformity in advertising and solicitation rules.

The Subcommittee recommends retention of the substance of current subsection 7.1(d), regarding accuracy of information about contingency fees, because the provision is consistent with the guiding principle of ensuring client access to accurate non-misleading information. Consistent with the new structure of Chapter 7, designed to offer concise overall guidance about accuracy of communications in Rule 7.1 and relegating details to the Comments and to Rules 7.2 and 7.3, the Subcommittee recommends moving current subsection 7.1(d) to the Comment, renaming it Comment [3A].

Consistent with the ABA changes, current Comments [2]-[6] are deleted because they are unnecessary, redundant, and may infringe on lawyers' First Amendment commercial free speech rights.

Following the ABA changes, additional guidance is inserted in revised Comment [2] to explain that truthful information may be misleading if consumers are led to believe that they must act when, in fact, no action is required.[7]

In revised Comment [3], the Subcommittee recommends replacing "advertising" with "communication" to make the Comment consistent with the title and scope of the rule. Comment [4] offers additional guidance, explaining that an "unsubstantiated claim" may also be misleading. Comment [5] recommends that lawyers review Rule 8.4(c) for additional guidance regarding acting honestly.[8]

Revised Comments [5] through [8] have been added by incorporating the black letter concepts from current Rule 7.5. Current Rule 7.5(a) restates and incorporates Rule 7.1, and then provides examples of misleading statements. The ABA has concluded and the Subcommittee agrees that Rule 7.1, with the guidance of new Comments [5] through [8], better addresses the issues.[9]

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[7] ABA Report, at 3.
[8] *Id.*
[9] *Id.*

B. Rule 7.2: Communications Concerning a Lawyer's Services: Specific Rules[10]

Specific Advertising Rules: Specific rules for advertising are consolidated in Rule 7.2, similar to the current structure of Rule 1.8, which provides for specific conflict situations.

Following the ABA changes, the Subcommittee recommends amendments to Rule 7.2(a) parallel to its recommendations for changes to Comments to Rule 7.1, specifically replacing the term "advertising" with "communication" and replacing the identification of specific methods of communication with a general statement that any media may be used.[11]

Gifts for Recommendations: Rule 7.2(b) continues the existing prohibition against giving "anything of value" to someone for recommending a lawyer. Following the ABA changes, new subparagraph (b)(5), however, contains an exception to the general prohibition. This subparagraph permits lawyers to give a nominal gift to thank the person who recommended the lawyer to the client. The new provision states that such a nominal gift is permissible only where it is not expected or received as payment for the recommendation. The new words "compensate" and "promise" emphasize these limitations: the thank you gift cannot be promised in advance and must be no more than a token item, i.e. not "compensation."[12] The ABA notes and the Subcommittee agrees that this is not a change but rather a clarification of existing rules. As to employees, the ABA has concluded that lawyers ought to be permitted to give nominal gifts to non-lawyers, e.g. paralegals who may refer friends or family members to a firm, marketing personnel and others. Rule 5.4 continues to protect against any improper fee sharing. Rule 7.3 protects against solicitation by, for example, so-called "runners," which are also prohibited by other rules, e.g. Rule 8.4(a).[13]

Specialization: Provisions of Rule 7.4 regarding certification are moved to a new subsection 7.2(c) and Comments. Amendments also clarify which entities qualify to certify or accredit lawyers. The remaining provisions of Rule 7.4 are moved to Comments [9] through [11] of Rule 7.2. Finally, Comment [9] adds guidance on the circumstances under which a lawyer might properly claim specialization by adding the phrase "based on the lawyer's experience, specialized training or education."[14]

Contact Information: In provision 7.2(d) [formerly subdivision (c)] the term "office address" is changed to "contact information" to address technological advances on how a lawyer may be contacted and how advertising information may be presented. Examples of contact information are added in new Comment [12]. All "communications" about a lawyer's services must include the firm name (or lawyer's name) and some contact information (street address, telephone number, email, or website address).

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[10] The Subcommittee recommends following the ABA changes to Rule 7.2 and closely follows the ABA Report's summary of the proposed changes.
[11] ABA Report, at 3.
[12] *Id.* at 4.
[13] *Id.*
[14] *Id.*

Changes to the Comments: Statements in Comments [1] and [3] justifying lawyer advertising are deleted. Advertising is constitutionally protected speech and needs no additional justification. These Comments provide no additional guidance to lawyers.[15]

New Comment [2] explains that the term "recommendations" does not include directories or other group advertising in which lawyers are listed by practice area.

New language in Comment [3] clarifies that lawyers who advertise on television and radio may compensate "station employees or spokespersons" as reasonable costs for advertising. These costs are well in line with other ordinary costs associated with advertising that are listed in the Comment, i.e. "employees, agents and vendors who are engaged to provide marketing or client development services."

New Comment [4] explains what is considered nominal, including ordinary social hospitality. It also clarifies that a gift may not be given based on an agreement to receive recommendations or to make future recommendations. These small and token gifts are not likely to result in the harms addressed by the rule: that recommendation sources might interfere with the independent professional judgment of the lawyer, interject themselves into the lawyer-client relationship, or engage in prohibited solicitation to gain more recommendations for which they might be paid.

Comment [6] continues to address lawyer referral services, which remain limited to qualified entities approved by an appropriate regulatory authority. Description of the ABA Model Supreme Court Rules Governing Lawyer Referral Services is omitted from Comment [6] as superfluous.

The last sentence in Comment [7] is deleted because it is identical to the second sentence in Comment [7] ("Legal services plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules.") (emphasis added).[16]

C. Rule 7.3: Solicitation of Clients[17]

The black letter of the current Rules and Colo. RPC does not define "solicitation;" the definition is contained in Comment [1]. For clarity, a definition is added as new paragraph (a). The definition of solicitation is adapted from Virginia's definition. A solicitation is:

> a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs

[15] *Id.*
[16] *Id.* at 4-5.
[17] The Subcommittee recommends following most of the ABA changes to Rule 7.3 and generally follows the ABA Report's summary of the proposed changes.

> legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.[18]

Paragraph (b) continues to prohibit direct, in-person solicitation for pecuniary gain, but clarifies that the prohibition applies solely to live person-to-person contact. Comment [2] provides examples of prohibited solicitation including in-person, face-to-face, telephone, and real-time visual or auditory person-to-person communication. Language added to Comment [2] clarifies that a prohibited solicitation does not include chat rooms, text messages, or any other written communications to which recipients would not feel undue pressure to respond.[19]

The Rule no longer prohibits real-time electronic solicitation because real-time electronic communication includes texts and Tweets. These forms of communication are more like a written communication, which allows the reader to pause before responding and creates less pressure to immediately respond or to respond at all, unlike a direct interpersonal encounter.[20]

Exceptions to live person-to-person solicitation are slightly broadened in Rule 7.3(b)(2). Persons with whom a lawyer has a business relationship—in addition to or separate from a professional relationship—may be solicited because the potential for overreaching by the lawyer is reduced.[21] This new exception respects the principle of providing clients with accurate information and preserving lawyers' free speech rights, allowing solicitation of persons who are not vulnerable to overreaching.

Exceptions to prohibited live person-to-person solicitation are slightly broadened in Rule 7.3(b)(3) to include a "person who routinely uses for business purposes the type of legal services offered by the lawyer." Similarly, Comment [5] to Rule 7.3 is amended to explain that the potential for overreaching, which justifies the prohibition against in-person solicitation, is unlikely when the solicitation is directed toward experienced users of the legal services in a business matter.[22]

The amendments retain Rule 7.3(c)(1) and (2), which prohibit solicitation of any kind when a target has made known his or her desire not to be solicited, or the solicitation involves coercion, duress, or harassment. These restrictions apply to both live in-person and written solicitations. Comment [6] identifies examples of persons who may be most vulnerable to coercion or duress, such as the elderly, those whose first language is not English, or the disabled.[23]

After much discussion, the Subcommittee recommends retaining current subsection 7.3(c), to be renumbered 7.3(d), consistent with CO Rev. Stat. § 13-93-111 (2019). The Subcommittee notes that the current Colorado subsection is consistent with First Amendment law, and strikes

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[18] *Id.* at 5.
[19] *Id.* at 5-6.
[20] *Id.* at 6.
[21] *Id.*
[22] *Id.*
[23] *Id.*

an appropriate balance between providing clients access to information about lawyers and legal services while protecting vulnerable persons from undue pressure and overreaching by lawyers.

The statement that the Rules do not prohibit communications about legal services authorized by law or by court order is moved from Comment [4] of Rule 7.2 to new paragraph (e) of Rule 7.3.[24]

After much discussion, the Subcommittee recommends retaining current subsection 7.3(d), to be renumbered 7.3(f). The Subcommittee notes that the ABA deleted the requirement that targeted written solicitations be marked as "advertising material," concluding that the requirement is no longer necessary to protect the public. The Subcommittee respectfully disagrees. Even if consumers have become accustomed to receiving advertising materials from nonlawyers, receipt of such materials from lawyers presents a higher risk of misleading consumers. Moreover, current subsection 7.3(d) strikes an appropriate balance between respecting lawyers' First Amendment commercial speech rights and protecting vulnerable persons from undue pressure by allowing targeted solicitation, subject only to the truthful and accurate labeling of such solicitation as "advertising material."

Amendments were made to Rule 7.3(g) to make the prohibition language consistent with the solicitation prohibition and to reflect the reality that prepaid and group legal service plans enroll members and sell subscriptions to a wide range of groups. They do not engage in solicitation as defined by the Rules.[25]

New Comment [8] to Rule 7.3 adds class action notices as an example of a communication that is authorized by law or court order.[26]

D. Rule 7.4: Communication of Fields of Practice

Consistent with the ABA Changes, current rule 7.4 is deleted, with the bulk of its substance moved to Rule 7.2, Comments [9]-[11].

Given that Colorado does not certify lawyers as specialists, the Subcommittee recommends retaining the substance of current subsection 7.4(e), alerting Colorado clients to that effect. The Subcommittee recommends moving current subsection 7.4(e) to rule 7.2, Comment [11A]. Current Comment [4] to rule 7.4 is deleted as redundant.

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[24] *Id.* at 7.
[25] *Id.*
[26] *Id.*

E. Rule 7.5: Firm Names and Letterheads

Consistent with the ABA Changes, current Rule 7.5 is deleted, with the bulk of its substance moved to Rule 7.1, Comments [5]-[8].

In particular, the first sentence of current subsection 7.5(b) has been moved and renumbered as Comment [6] to Rule 7.1. The Subcommittee recommends retaining the second sentence of current subsection 7.5(b), and moving it to Rule 7.1, to become the second sentence of Comment [6] to Rule 7.1.

Respectfully submitted,

Eli Wald

Chair, Colorado Supreme Court Standing Committee for the Colorado Rules of Professional Conduct, ABA Rules 7.1–7.5 Subcommittee

~~September~~January, ~~2019~~2020

Proposed Changes to Colo. RPC, Chapter 7, Rules 7.1-7.5

This redline version compares the current Colo. RPC and the proposed ABA changes recommended by the Subcommittee, using track changes. The five instances in which the Subcommittee recommends retention of current subsections of the Colo. RPC or their comments contrary to the ABA changes are highlighted in yellow.

Rule 7.1: Communications Concerning a Lawyer's Services

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

Comment

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

[2] Misleading truthful statements are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees withthose of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[3A] Any communication that states or implies the client does not have to pay a fee if there is no recovery ~~shall~~ must also disclose that the client may be liable for costs or the adverse party's attorney fees if ordered by a court. This provision does not apply to communications that ~~only~~ state only that contingent or percentage fee arrangements are available, or that ~~only~~ state only that the initial consultation is free.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm ~~shall~~ must indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

Rule 7.2: Communications Concerning a Lawyer's Services: Specific Rules

(a) A lawyer may communicate information regarding the lawyer's services through any media.

(b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;

(3) pay for a law practice in accordance with Rule 1.17 ;

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; and

(ii) the client is informed of the existence and nature of the agreement; and

(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

Comment

[1] This Rule permits public dissemination of information concerning a lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client- development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4 (a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Qualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one

that is approved by an appropriate regulatory authority as affording adequate protections for the public . See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer "concentrates in" or is a "specialist," practices a "specialty," or "specializes in" particular fields based on the lawyer's experience, specialized training or education, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

[11A] In any advertisement in which a lawyer affirmatively claims to be certified as a specialist in any area of the law, such advertisement shall contain the following disclosure: "Colorado does not certify lawyers as specialists in any field." This disclaimer is not required where the information concerning the lawyer's services is contained in a law list, law directory or a publication intended primarily for use of the legal profession.

Required Contact Information

[12] This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

Rule 7.3 Solicitation of Clients

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(d) A lawyer shall not engage in solicitation by any media for professional employment, concerning personal injury or wrongful deathwhich arise out of the personal injury or death of any person by any media. See, CO Rev Stat § 13-93-111 (2019). This Rule 7.3(d) shall not apply if the lawyer has a family or prior business or professional relationship with the person or if the communication is issued more than 30 days after the occurrence of the event for which the legal representation is being solicited. Any such communication must comply with the following:

(1) no such communication may be made if the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter; and

(2) if a lawyer other than the lawyer whose name or signature is contained in the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any such communication shall include a statement so advising the prospective client.

(e) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(f) Every communication from a lawyer soliciting professional employment shall:

(1) include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (b)(1), (b)(2) or (b)(3);

(2) not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the nature of the person's legal problem.

(3) A copy of or recording of each such communication and a sample of the envelopes, if any, in which the communications are enclosed shall be kept for a period of ~~four~~ five years from the date of dissemination of the communication.

(g) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to

be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3 (c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(c).

Rule 7.4. Reserved

Rule 7.5. Reserved

13-93-111. Solicitation of accident victims - waiting period - definition.

(1) Except as permitted by section 13-21-301 (3) or 10-3-1104 (1)(h), no person shall engage in solicitation for professional employment or for any release or covenant not to sue concerning personal injury or wrongful death from an individual with whom the person has no family or prior professional relationship unless the incident for which employment is sought occurred more than thirty days prior to the solicitation.

(2) No person shall accept a referral for professional employment concerning personal injury or wrongful death from any person who engaged in solicitation of an individual with whom the person had no family or prior professional relationship unless the incident for which employment is sought occurred more than thirty days prior to the solicitation.

(3) As used in this section, "solicitation" means an initial contact initiated in person, through any form of written communication, or by telephone, telegraph, or facsimile, any of which is directed to a specific individual, unless requested by the individual, a member of the Colorado Revised Statutes 2018 Page 542 of 552 Uncertified Printout individual's family, or the authorized representative of the individual. "Solicitation" shall not include radio, television, newspaper, or yellow pages advertisements.

(4) Any agreement made in violation of this section is voidable at the option of the individual suffering the personal injury or death or the individual's personal or other authorized representative.

Source: L. 2017: Entire article added with relocations, (SB 17-227), ch. 192, p. 700, § 1, effective August 9.

Editor's note: This section is similar to former § 12-5-115.5 as it existed prior to 2017.

BFW ATTORNEYS BURNS FIGA & WILL

Memorandum

TO: Marcy Glenn, Chair, Colorado Supreme Court Standing Committee on the Rules of Professional Conduct

FROM: Alec Rothrock, Chair, Contingent Fee Subcommittee

DATE: January 6, 2020

SUBJECT: Report and Proposal of Contingent Fee Subcommittee

At its January 26, 2018 meeting, this Committee created a subcommittee to consider modifications to Colo. RPC 1.5(c) and the Rules Governing Contingent Fees, C.R.C.P. 23.3, with a view toward modernizing and improving the latter, which are now over forty years old. The subcommittee included lawyers with substantial experience in contingent fee representation, some of whom are not members of the Committee. The subcommittee consisted of the author, Bennett Aisenberg, Thomas Downey Jr., Marcy Glenn, Patricia Jarzobski, Eric Jonsen, Peter Koclanes, Cecil Morris, Ross Pulkrabek, Jamie Sudler, Professor Eli Wald and Judge John Webb.

The subcommittee met on numerous occasions. It reached consensus on the proposed Rule, Comments and Forms that immediately follow this memorandum. An annotated version of the same documents follows the "clean" version. The footnoted annotations are intended to reflect the origins and philosophy of the specific language and not to be included in any official version of the Rule, Comments and Forms.

The subcommittee is aware that its proposed revisions would add substantial volume to Colo. RPC 1.5. With the addition of the flat fee rule a year ago, Colo. RPC 1.5 is already lengthy. The subcommittee did not treat the reorganization of Colo. RPC 1.5 as within its purview, but it observes that in 2014, the Colorado Supreme Court repealed an unwieldy Colo. RPC 1.15 and adopted five shorter rules in its place, Colo. RPC 1.15A-1.15E. As it considers the subcommittee's proposal, the Committee should also consider whether to recommend the reorganization of Colo. RPC 1.5, and, if so, how to go about it.

The salient substantive points of the subcommittee's proposal are to:

1. Eliminate the Rules Governing Contingent Fees and move all contingent fee-related rules, comments and forms to the Colorado Rules of Professional Conduct.

2. Eliminate the currently required Disclosure Statement and move required disclosures to the portion of Colo. RPC 1.5(c) that lists the mandatory contents of contingent fee agreements.

3. Leave undisturbed the substantial compliance standard for enforceability of contingent fee agreements and the disclosures necessary to preserve the lawyer's eligibility to recover attorney fees on a quantum meruit basis if the attorney-client relationship ends before the event triggering a right to a fee.

4. Eliminate formalistic requirements such (a) the attestation by witnesses of the parties' signatures on contingent fee agreements, (b) the creation of duplicate fully-executed contingent fee agreements, and (c) the transmission by mail of one fully-executed contingent fee agreement to the client at her postal address within ten days of execution.

5. Protect clients by, for example, (a) alerting lawyers to the potential impropriety of provisions requiring clients to reimburse the lawyer for all sanctions awarded against the lawyer, and (b) requiring lawyers to inform clients that they may disapprove the hiring of associated counsel and discharge associated counsel if one is hired.

6. Borrow language from ABA Model Rule 1.5(c) and its Comments to expand the body of legal authority available to interpret common provisions.

7. Encourage lawyers to consider language clarifying the lawyer's rights and obligations, such as (a) whether the defense of counterclaims and the handling of appeals fall within the scope of representation; (b) who receives money awarded by the court as sanctions against an opposing party; and (c) the possibility that the lawyer will be ethically required to decline a client's request to receive funds in which a third party claims an interest.

8. Clarify that contingent fee agreements may be used when the contingency does not involve the recovery of money, such as reverse contingent fees on the amount of money the lawyer saves the client as compared to the client's potential liability.

Colo. RPC 1.5

. . .

(c) A "contingent fee" is a fee for legal services under which compensation is to be contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the representation.

(1) The terms of a contingent fee agreement shall be communicated in writing before or within a reasonable time after commencing the representation and shall include the following information:

A. The names of the lawyer and the client;

B. A statement of the nature of the claim, controversy or other matters with reference to which the services are to be performed, including each event triggering the lawyer's right to compensation;

C. The method by which the fee is to be determined, including the percentage or amounts that will accrue to the lawyer in the event of settlement, trial or appeal, or other final disposition, and whether the contingent fee will be determined before or after the deduction of (i) costs and expenses advanced by the lawyer or otherwise incurred by the client, and (ii) other amounts owed by the client and payable from amounts recovered;

D. A statement of the circumstances under which the lawyer may be entitled to compensation if the lawyer's representation concludes, by discharge, withdrawal or otherwise, before the occurrence of an event that triggers the lawyer's right to a contingent fee;

E. A statement regarding expenses, including (i) whether the lawyer is authorized to advance funds for litigation-related expenses to be reimbursed to the lawyer from the recovery, (ii) an estimate of the expenses to be incurred and the amount of expenses the lawyer may advance without further approval, and (iii) the client's obligation, if any, to pay expenses if there is no recovery;

F. A statement regarding the possibility that a court will award costs or attorneys' fees against the client;

G. A statement regarding the possibility that a court will award costs or attorneys' fees in favor of the client, and, if so, how any such costs or attorney fees will be accounted for and handled;

H. A statement informing the client that if the lawyer wishes to hire a lawyer in another firm to assist in the handling of a matter ("associated counsel"), the lawyer will promptly inform the client in writing of the identity of the associated counsel and of the effect, if any, of the hiring of associated counsel

on the amount of the contingent fee. The statement shall also provide that the client has the right to disapprove the hiring of associated counsel and, if hired, to terminate the employment of associated counsel; and

I. A statement that other persons or entities may have a right to be paid from amounts recovered on the client's behalf, for example when an insurer or a federal or state agency has paid money or benefits on behalf of a client in connection with the subject of the representation.

(2) A contingent fee agreement must be signed by the client and the lawyer.

(3) The lawyer shall retain a copy of the contingent fee agreement for seven years after the final resolution of the case, or the termination of the lawyer's services, whichever first occurs.

(4) No contingent fee agreement may be made (a) for representing a defendant in a criminal case, (b) in a domestic relations matter, where payment is contingent on the securing of a divorce or upon the amount of maintenance or child support, or property settlement in lieu of such amounts, or (c) in connection with any case or proceeding where a contingency method of a determination of attorneys' fees is otherwise prohibited by law.

(5) Upon conclusion of a contingent fee matter, the lawyer shall provide the client a written disbursement statement showing the amount or amounts received; an itemization of costs and expenses incurred in handling of the matter; sums to be disbursed to third parties, including lawyers in other law firms; and computation of the contingency fee.

(6) No contingent fee agreement shall be enforceable unless the lawyer has substantially complied with all of the provisions of this Rule.

(7) The form Contingent Fee Agreement provided in Appendix _ may be used for contingent fee agreements and shall be sufficient. The authorization of this form shall not prevent the use of other forms consistent with this Rule. Nothing in this Rule prevents a lawyer from entering into an agreement that provides for a contingent fee combined with one or more other types of fees, such as hourly or flat fees, provided that the agreement complies with this Rule insofar as the contingent fee is concerned.

Comment

. . .

[6] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. *E.g.*, 28 U.S.C. § 2678 (limiting percentage of fees in Federal Tort Claims Act cases); C.R.S. § 8-43-403 (limiting percentage of contingent fee in certain worker's compensation cases). The prohibition on contingent fees in certain domestic relations matters does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, maintenance or other financial orders because such contracts do not implicate the same policy concerns.

. . .

[7] The scope of representation in a contingent fee agreement should reflect whether the representation includes the handling of counterclaims, third-party claims to amounts recovered, and appeals.

[8] A lawyer may include a provision in a contingent fee agreement setting forth the lawyer's agreement to reimburse the client for any attorneys' fees and costs awarded against the client. A provision in a contingent agreement in which the client must reimburse the lawyer for any attorneys' fees or costs awarded against the lawyer may be improper.

[9] Nothing in this Rule prohibits a lawyer from arranging, in the Contingent Fee Agreement or otherwise, for a third party to guarantee some or all of the financial obligations of the Client in the Contingent Fee Agreement.

[10] Third parties often hold claims to amounts recovered by the lawyer on behalf of the client. The lawyer may be required, as a matter of professional ethics, to pay these amounts from the proceeds of a recovery and not to disburse them to the client.

[11] A tribunal may award attorneys' fees to the client under a fee-shifting provision of a contract or statute or as a sanction for discovery violations or other litigation misconduct. The fee agreement may provide for a different allocation of such an award of fees as between the client and the lawyer depending on the circumstances giving rise to the award, such as whether the fees are awarded as a sanction for improper conduct that necessitated additional effort by the lawyer, or whether the fees are awarded under a contractual or statutory fee-shifting provision. This rule does not limit the ways in which clients and lawyers may contract to allocate awards of attorneys' fees; however, the lawyer must comply with the reasonableness standard of paragraph (a) of this Rule.

[12] A conversion clause that requires payment of the alternate fee immediately upon termination, and regardless of the occurrence of the contingency, would discourage most clients from discharging their lawyer. Few clients have the financial means to pay a contingent fee from their own resources, with no guarantee of replenishment by a recovery from a third party. Such a conversion clause is appropriate only if the client is relatively sophisticated in legal matters, has the demonstrated means to pay the contingent fee regardless of the occurrence of the contingency, and has specifically negotiated the conversion clause.

Appendix

Form 1

CONTINGENT FEE AGREEMENT

Dated _____, 20___

_____ (Client), retains _____ (Lawyer) to perform the legal services described in paragraph (1) below. The Lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are: _____. The representation (will) (will not) [indicate which] include the handling of counterclaims, third-party claims to amounts recovered, and appeals.

(2) The contingency upon which compensation is to be paid is the Client's recovery of funds by settlement or judgment.

(3) The Client will pay the Lawyer __ percent of the (gross amount collected) (net amount collected) [indicate which]. ("Gross amount collected" means the amount collected before any subtraction of expenses and disbursements) ("Net amount collected" means the amount of the collection remaining after subtraction of expenses and disbursements [including] [not including] costs or attorneys' fees awarded to an opposing party and against the Client.) [indicate which]. "The amount collected" (includes) (does not include) [indicate which] specially awarded attorneys' fees and costs awarded to the client and against an opposing party.

(4) The Client is not to be liable to pay compensation otherwise than from amounts collected for the Client by the Lawyer, except as follows: In the event the Client terminates this contingent fee agreement without wrongful conduct by the Lawyer which would cause the Lawyer to forfeit any fee, or if the Lawyer justifiably withdraws from the representation of the Client, the Lawyer may ask the court or other tribunal to order that the Lawyer be paid a fee based upon the reasonable value of the services provided by the Lawyer. If the Lawyer and the Client cannot agree how the Lawyer is to be compensated in this circumstance, the Lawyer will request the court or other tribunal to determine: (1) whether the Client has been unfairly or unjustly enriched if the Client does not pay a fee to the Lawyer; and, if so (2) the amount of the fee owed, taking into account the nature and complexity of the Client's case, the time and skill devoted to the Client's case by the Lawyer, and the benefit obtained by the Client as a result of the Lawyer's efforts. Any such fee shall be payable only out of the gross recovery obtained by or on behalf of the Client and the amount of such fee shall not be greater than the fee that would have been earned by the Lawyer if the contingency described in this contingent fee agreement had occurred.

(5) A court or other tribunal may award costs or attorney fees to an opposing party and against the client.

(6) The Client will be liable to the lawyer for reasonable expenses and disbursements. Such expenses and disbursements are estimated to be $ _____. The Client authorizes the Lawyer to incur expenses and make disbursements up to a maximum of $ _____. The Lawyer will not exceed this limitation without the client's further written authority. The Client will reimburse the Lawyer for such expenditures (upon receipt of a billing), (in specified installments), (upon final resolution), (etc.) [indicate which].

(7) If the Lawyer wishes to hire a lawyer in another firm to assist in the handling of a matter (called an "associated counsel"), the Lawyer will promptly inform the Client in writing of the identity of the associated counsel and of the effect, if any, of the hiring of associated counsel on the amount of the contingent fee. The Client has a right to disapprove the hiring of associated counsel and to terminate the employment of associated counsel for any reason.

(8) Other persons or entities may have a right to be paid from amounts recovered on the Client's behalf. The Client (authorizes) (does not authorize) [indicate which] the Lawyer to pay from the amount collected the following: (e.g., all physicians, hospitals, subrogation claims and liens, etc.). The Lawyer may be legally required to pay the claims of third parties out of any monies collected for the Client, and not to disburse them to the Client so the Client may handle these claims. However, if the Client disputes the amount or validity of the third-party claim, the Lawyer may deposit the funds into the registry of an appropriate court for determination. Any amounts paid to third parties (will) (will not) [indicate which] be subtracted from the amount collected before computing the amount of the contingent fee under this agreement.

WE HAVE EACH REACH THE ABOVE AGREEMENT BEFORE SIGNING IT.

(Signature of Client)

(Signature of Lawyer)

Form 2

FINAL DISBURSEMENT STATEMENT

GROSS RECOVERY $_____

Itemization of expenses incurred in handling of case:

_____$_____
_____$_____
_____$_____
_____$_____
Total Expenses $_____

Amount of Expenses Advanced by Lawyer $_____
Amount of Expenses Paid by Client $_____
NET RECOVERY $_____

Computation of Contingent Fee

Recovery = _____% of (Net) (Gross) $_____

Total Fee (and expenses advanced by lawyer) $_____

DISBURSEMENT TO CLIENT _____ $_____

* (If fee is on "Net Recovery" and Lawyer has advanced expenses which are being reimbursed from the "gross recovery.")

_____
(Signature of Lawyer)

_____
(Signature of Client)

By signature client acknowledges receipt of a copy of this disbursement statement.

Colo. RPC 1.5

. . .

(c) A "contingent fee" is a fee for legal services under which compensation is to be contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the representation.[1]

(1) The terms of a contingent fee agreement shall be communicated in writing before or within a reasonable time after commencing the representation and shall include the following information[2]:

A. The names[3] of the lawyer and the client;

B. A statement of the nature of the claim, controversy or other matters with reference to which the services are to be performed,[4] including each event triggering the lawyer's right to compensation[5];

C. The method by which the fee is to be determined, including the percentage or amounts[6] that will accrue to the lawyer in the event of settlement, trial or appeal,[7] or other final disposition, and whether the contingent fee will be determined before or after the deduction of (i) costs and expenses advanced by the lawyer or otherwise incurred by the client, and (ii) other amounts owed by the client and payable from amounts recovered;

D. A statement of the circumstances under which the lawyer may be entitled to compensation if the lawyer's representation concludes, by discharge,

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[1] This is an adaptation of Rule 1, Chap. 23.3, C.R.C.P.

[2] This language tracks Colo. RPC 1.5(h)(1) of the new flat fee rule, including use of the word "shall" instead of "must." Rule 4(b), Chap. 23.3, C.R.C.P., requires lawyers to create two fully executed copies and to "mail or deliver" one such copy to each client "within ten days after the making of the agreement." In the age of electronic communication, the duplicate original requirement seems antiquated. ABA Model Rule 1.5(c) has no delivery requirement.

[3] Rule 5(a), Chap. 23.3, C.R.C.P. requires contingent fee agreements to provide the "mail address" of the lawyer and the client. I left out addresses as unnecessary and antiquated.

[4] This is the phrase used in Rule 5(c), Chap. 23.3, C.R.C.P. By comparison, Colo. RPC 1.5(h)(1)(i) requires the lawyer to set forth a "description of the services the lawyer agrees to perform."

[5] I added this phrase. The event triggering a right of compensation will almost invariably be the recovery of money.

[6] In the January 2019 draft, this phrase was "percentage or percentages," to reflect the fact that contingent fee agreements often have different percentage recoveries depending on the stage of the case upon resolution.

[7] The first part up to the word "appeal" is from ABA Model Rule 1.5(c). The remaining part is an attempt to codify paragraphs (4) and (7) of the form contingent fee agreement.

withdrawal or otherwise, before the occurrence of an event that triggers the lawyer's right to a contingent fee[8];

E. A statement regarding expenses, including (i) whether the lawyer is authorized to advance funds for litigation-related expenses to be reimbursed to the lawyer from the recovery, (ii) an estimate of the expenses to be incurred and the amount of expenses the lawyer may advance without further approval, and (iii) the client's obligation, if any, to pay expenses if there is no recovery[9];

F. A statement regarding the possibility that a court will award costs or attorneys' fees against the client[10];

G. A statement regarding the possibility that a court will award costs or attorneys' fees in favor of the client, and, if so, how any such costs or attorney fees will be accounted for and handled[11];

---

[8] This is a modest revision of Rule 5(d), Chap. 23.3, C.R.C.P., which requires a "statement of the contingency upon which the client is to be liable to pay compensation otherwise than from amounts collected for him by the attorney." It is presumptuous for a lawyer to purport to state what a client is "liable to pay." Also, sums collected "otherwise than from amounts collected for [the client] by the attorney" is opaque.

[9] This is an attempt to clarify and streamline Rule 5(f), Chap. 23.3, C.R.C.P. The phrase "if any" in clause (iii) leaves open the possibility that a lawyer can enter into a contingency-fee agreement in which all fees, expenses and costs of litigation are unconditionally assumed by the lawyer—even if there <u>is</u> a recovery from which to pay them. As discussed in a Utah ethics opinion, this arrangement would have been prohibited under the pre-Ethics 2000 version of Rule 1.8(e), but it is not prohibited under the Ethics 2000 version that Colorado adopted in 2008. UT Eth. Op. 02-09 (Utah St.Bar.), 2002 WL 31160051.

[10] This sentence comes from the form Disclosure Statement. Disclosing the possibility of an award of costs or attorney fees to the opposing party is appropriate. However, the form Disclosure Statement goes on to state that "should that happen in my case, I will be responsible to pay such award," and that the contingent fee agreement should "provide whether an award against me will be paid out of the proceeds of any amount collected on my behalf. I also understand that the agreement should provide whether the fee I am obligated to pay my attorney will be based on the amount of recovery <u>before</u> or <u>after</u> payment of the awarded costs and attorney fees to an opposing party." Paragraph (5) of the form Contingent Fee Agreement states, "Costs and attorneys' fees awarded to an opposing party against the client before completion of the case will be paid (by the client) (by the attorney) [indicate which] when ordered. Any award of costs or attorneys' fees, regardless of when awarded, (will) (will not) [indicate which] be subtracted from the amount collected before computing the amount of the contingent fee under this agreement." Allowing the lawyer to shift to the client the burden of paying a sanctions award, regardless of fault, has been called "offensive." See the second sentence of Comment [8] below.

[11] This provision is a combination of language from the form Disclosure Statement and the form Contingent Fee Agreement. The form Disclosure Statement requires a lawyer to disclose that a "court or an arbitrator may sometimes award attorney fees in addition to [the] amount of recovery being claimed. I understand that the fee agreement I enter into with my attorney should contain a provision as to how any specially awarded attorney fees will be accounted for and handled." Paragraph (4) of the form Contingent Fee Agreement states, "'The amount collected' (includes) (does not include) [indicate which] specially awarded attorneys' fees and costs awarded to the client." This kind of provision was analyzed and approved in Oklahoma Op. 324, which in turn relied on *Heldreth v. Rahimian,* 638 S.E.2d 359, 369 n. 16

H. A statement informing the client that if the lawyer wishes to hire a lawyer in another firm to assist in the handling of a matter ("associated counsel"), the lawyer will promptly inform the client in writing of the identity of the associated counsel and of the effect, if any, of the hiring of associated counsel on the amount of the contingent fee.[12] The statement shall also provide that the client has the right to disapprove the hiring of associated counsel and, if hired, to terminate the employment of associated counsel[13]; and

I. A statement that other persons or entities may have a right to be paid from amounts recovered on the client's behalf, for example when an insurer or a federal or state agency has paid money or benefits on behalf of a client in connection with the subject of the representation.[14]

(2) A contingent fee agreement must be signed by the client and the lawyer.

(3) The lawyer shall retain a copy of the contingent fee agreement for seven years after the final resolution of the case, or the termination of the lawyer's services, whichever first occurs.[15]

(W. Va. 2006), and *Cambridge Trust Co. v. Hanify & King Prof'l Corp.*, 721 N.E.2d 1, 6 (Mass. 1999); Restatement of the Law (Third), The Law Governing Lawyers § 38, cmt. f (2000).

[12] I was tempted to add something to the effect that the retention of associated counsel cannot result in an increase in the fee, but extraordinary circumstances may justify it, and the overall fee has to be reasonable regardless. Also, I have the impression that the retention of associated counsel rarely increases the overall fee. If it does happen, the lawyer would be required to comply with the relatively lax requirements on "midstream modifications." See Cmt. [2], Colo. RPC 1.5 ("when there has been a change from their previous understanding, the basis or rate of the fee should be promptly communicated in writing"). Also, I thought about a reference to the lawyer's obligation in Colo. RPC 1.5(d)(2) to make sure the client agrees to any co-counsel arrangement, "including the basis upon which the division of fees shall be made," and to confirm the client's agreement in writing. I decided against it because at the outset of the representation, the client cares only about whether the retention of co-counsel will increase the overall fee, not how the lawyer may divide the contingent fee with a hypothetical associated counsel.

[13] Clause (4) of the form contingent fee agreement gives the impression that it is entirely up the lawyer whether to hire associated counsel, provided the lawyer explains the compensation arrangement. I doubt there have been many problems with the hiring of associated counsel (compensation of associated counsel is another matter), but it should be clear that the client can veto this arrangement and has the final say on how many law firms are involved in the representation. I would not extend this type of disclosure obligation to the lawyer's staffing of contingent fee cases within the law firm.

[14] The first part of this provision is an attempt to clarify the "subrogation" provision in the form Disclosure Statement.

[15] This sentence largely tracks Rule 4(b), Chap. 23.3, C.R.C.P. I note that Colo. RPC 1.15D(a)(3) requires lawyers to maintain for *seven* years "[c]opies of all written communications setting forth the basis or rate for the fees charged by the lawyer as required by Rule 1.5(b), *and copies of all writings, if any, stating other terms of engagement for legal services*." The italicized language appears to cover contingent fee agreements. As such, the six-year retention requirement in current Rule 4(b) is inconsistent with the seven-year retention requirement in Colo. RPC 1.15D(a)(3). Also, the rule as I have drafted it does not require the lawyer to maintain an "original" of the contingent fee agreement.

(4) No contingent fee agreement may be made (a) for representing a defendant in a criminal case, (b) in a domestic relations matter, where payment is contingent on the securing of a divorce or upon the amount of maintenance or child support, or property settlement in lieu of such amounts,[16] or (c) in connection with any case or proceeding where a contingency method of a determination of attorneys' fees is otherwise prohibited by law.[17]

(5) Upon conclusion of a contingent fee matter, the lawyer shall provide the client a written disbursement statement showing the amount or amounts received; an itemization of costs and expenses incurred in handling of the matter; sums to be disbursed to third parties, including lawyers in other law firms; and computation of the contingency fee.[18]

(6) No contingent fee agreement shall be enforceable unless the lawyer has substantially complied with all of the provisions of this Rule.[19]

(7) The form Contingent Fee Agreement provided in Appendix _ may be used for contingent fee agreements and shall be sufficient. The authorization of this form shall not prevent the use of other forms consistent with this Rule.[20] Nothing in this Rule prevents a lawyer from entering into an agreement that provides for a contingent fee combined with one or more other types of fees, such as hourly or

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[16] Subsection (b) is from ABA Model Rule 1.5(d). Using it here promotes uniformity among state rules.

[17] Subsection (c) is from Rule 3, Chap. 23.3, C.R.C.P., except it omits from the end of the sentence the following words "the Colorado Rules of Professional Conduct, or governmental agency rule." I think this language is subsumed within "the law." Also omitted from the paragraph is the last prohibition in Rule 3, Chap. 23.3, C.R.C.P., for contingent fee agreements that are "unconscionable, unreasonable, and unfair." The word "reasonable" is duplicative of Colo. RPC 1.5(a). Unconscionableness and unfairness are too vague, and these words are not necessary in light of the reasonableness requirement. To my knowledge, no Colorado case strikes down a contingent fee agreement on the basis of either of these concepts by themselves.

[18] This clause is an attempt to clarify what is already required by Rule 3, Chap. 23.3, C.R.C.P., and the form Disbursement Statement in Rule 7, Chap. 23.3, C.R.C.P.

[19] This is essentially the same as Rule 6, Chap. 23.3, C.R.C.P., which states, "No contingent fee agreement shall be enforceable by the involved attorney unless there has been substantial compliance with all of the provisions of this Chapter 23.3." This provision is arguably inconsistent with Colo. RPC Scope ¶ [20], which states that "violation of a Rule does not necessarily warrant any other nondisciplinary remedy. . . ." On the other hand, current Colo. RPC 1.5(c) does essentially the same thing indirectly, by stating that a "contingent fee agreement shall meet all of the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure, 'Rules Governing Contingent Fees.'" Of course, this sentence incorporates by reference Rule 6, Chap. 23.3, C.R.C.P. In other words, current Colo. RPC 1.5(c) already offends Colo. RPC Scope ¶ [20] indirectly, so we should not take offense to a Rule of Professional Conduct that does so directly.

[20] This language tracks Colo. RPC 1.5(h)(3) of the flat fee rule. Rule 7, Chap. 23.3, C.R.C.P., states, "The following forms may be used and shall be sufficient. The authorization of these forms shall not prevent use of other forms consistent with this Chapter 23.3." We could also refer in this provision to the form Disbursement Statement.

flat fees, provided that the agreement complies with this Rule insofar as the contingent fee is concerned.[21]

[21] The second sentence was suggested in concept at the January 2019 meeting of the subcommittee.

Comment

. . .

[6] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. *E.g.*, 28 U.S.C. § 2678 (limiting percentage of fees in Federal Tort Claims Act cases); C.R.S. § 8-43-403 (limiting percentage of contingent fee in certain worker's compensation cases). The prohibition on contingent fees in certain domestic relations matters does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, maintenance or other financial orders because such contracts do not implicate the same policy concerns.[22]

. . .

[7] The scope of representation in a contingent fee agreement should reflect whether the representation includes the handling of counterclaims, third-party claims to amounts recovered, and appeals.[23]

[8] A lawyer may include a provision in a contingent fee agreement setting forth the lawyer's agreement to reimburse the client for any attorneys' fees and costs awarded against the

[22] Except for the last sentence and the reference to the statutes, this is existing Comment [3], which is verbatim from the ABA Model Rules. The last sentence is an adaptation of a sentence from ABA Comment [6] to Rule 1.5 that corresponds to the clause I borrowed from ABA Model Rule 1.5(d), except that I replaced "alimony" in ABA Comment [3] for "maintenance," which is the term used in Colorado. This sentence replaces a sentence from current Colorado and ABA Comment [3] stating, "Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters." I am puzzled why the ABA included this sentence when it added Comment [3] in the Ethics 2000 changes. The ABA Reporter's Explanation of Changes says that then-new ABA Comment [3] "also refers to applicable law that may govern situations other than a contingent fee." I found no legal authority applying or explaining this sentence, and it seems entirely unnecessary, at least within Comment [3].

[23] "The ordinary rule of construction of contingent fee contracts is that, in the absence of an express provision which addresses possible appeal, services rendered by an attorney in upholding a judgment on appeal are within the undertaking under the contingent fee contract." *Attorney Grievance Comm'n v. Korotki*, 569 A.2d 1224, 1232 (Md. App. 1990).

client.[24] A provision in a contingent agreement in which the client must reimburse the lawyer for any attorneys' fees or costs awarded against the lawyer may be improper.[25]

[9] Nothing in this Rule prohibits a lawyer from arranging, in the Contingent Fee Agreement or otherwise, for a third party to guarantee some or all of the financial obligations of the Client in the Contingent Fee Agreement.

[10] Third parties often hold claims to amounts recovered by the lawyer on behalf of the client. The lawyer may be required, as a matter of professional ethics, to pay these amounts from the proceeds of a recovery and not to disburse them to the client.

[11] A tribunal may award attorneys' fees to the client under a fee-shifting provision of a contract or statute or as a sanction for discovery violations or other litigation misconduct. The fee agreement may provide for a different allocation of such an award of fees as between the client and the lawyer depending on the circumstances giving rise to the award, such as whether the fees are awarded as a sanction for improper conduct that necessitated additional effort by the lawyer, or whether the fees are awarded under a contractual or statutory fee-shifting provision. This rule does not limit the ways in which clients and lawyers may contract to allocate awards of

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[24] This is probably permissible as an "expense of litigation" under Colo. RPC 1.8(e)(1), as liberally construed in *Mercantile Adjustment Bureau LLC v. Flood*, 278 P.3d 348 (Colo. 2012). *See* AK Eth. Op. 2004-02 (Alaska Bar.Assn.Eth.Comm.), 2004 WL 1853007. *Contra* OK Adv. Op. 323 (Okl.Bar.Assn.Leg.Eth.Comm.), 2009 WL 806564.

[25] *See Harb v. Gallagher*, 131 F.R.D. 381, 390 (S.D.N.Y. 1990) ("That an attorney would attempt to avoid the strictures of Rule 11 and our professional Code of Ethics by . . . extracting a promise from a client . . . to absorb the consequences of an improper filing, . . when, as here, the attorney knows or should have reason to know that such filing violates Rule 11 or is otherwise improper, offends deeply and should not be countenanced'); *Eastway Construction Corp. v. City of New York*, 637 F. Supp. 558, 570 (S.D.N.Y. 1986) ("sanctions are imposed against the attorney also for disciplinary purposes, as a punishment for dereliction of duty by an officer of the court who should know better. Allowing the client to reimburse the attorney would interfere with the court's attempt to maintain discipline. Therefore, reimbursement by the client should be prohibited"); NYCLA Eth. Op. 683, Topic: Reimbursement by Client of Monetary Sanctions Imposed by a Court, 1990 WL 677025 * 3 ("We believe it is inappropriate for a lawyer to agree with the client in the retainer agreement that the client will be liable for any costs and sanctions imposed. This situation is analogous to agreements prospectively limiting the lawyer's liability to the client for malpractice. Cf. DR 6-102(A) [Colo. RPC 1.8(h)(1)]. Before a particular set of facts implicating possible sanctions arises, we believe it would be impossible for a client to give knowing consent to a shifting of sanctions."). J. Ward, "Rule 11 and Factually Frivolous Claims—The Goal of Cost Minimization and the Client's Duty to Investigate," 44 *Vand. L. Rev.* 1165, 1190 (Oct. 1991) ("While sound policy may prohibit an agreement that requires the client to indemnify the attorney for Rule 11 sanctions, no similar justification exists for preventing attorneys from indemnifying their clients. In tort law parties minimize costs and spread risk by insuring against liability."). *See also* C.R.S. § 13-17-102(3) ("When a court determines that reasonable attorney fees should be assessed, it shall allocate the payment thereof among the offending attorneys and parties, jointly or severally, as it deems most just, and may charge such amount, or portion thereof, to any offending attorney or party."); *Bilawsky v. Faseehudin*, 916 P.2d 586, 591 (Colo. App. 1995) (remanding for allocation of sanctions, if any, between client and her attorneys according to their relative degrees of responsibility under Rule 11 and C.R.S. § 13-17-101 et seq.).

attorneys' fees; however, the lawyer must comply with the reasonableness standard of paragraph (a) of this Rule.

[12] A conversion clause that requires payment of the alternate fee immediately upon termination, and regardless of the occurrence of the contingency, would discourage most clients from discharging their lawyer. Few clients have the financial means to pay a contingent fee from their own resources, with no guarantee of replenishment by a recovery from a third party. Such a conversion clause is appropriate only if the client is relatively sophisticated in legal matters, has the demonstrated means to pay the contingent fee regardless of the occurrence of the contingency, and has specifically negotiated the conversion clause.[26]

[26] The principle stated in this Comment comes from CBA Op. 100.

Appendix

Form 1[27]

CONTINGENT FEE AGREEMENT

Dated _____, 20___

_____ (Client),[28] retains _____ (Lawyer) to perform the legal services described in paragraph (1) below. The Lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are: _____. The representation (will) (will not) [indicate which] include the handling of counterclaims, third-party claims to amounts recovered, and appeals.[29]

(2) The contingency upon which compensation is to be paid is the Client's recovery of funds by settlement or judgment.[30]

(3) The Client will pay the Lawyer __[31] percent of the (gross amount collected) (net amount collected) [indicate which]. ("Gross amount collected" means the amount collected before any subtraction of expenses and disbursements) ("Net amount collected" means the amount of the collection remaining after subtraction of expenses and disbursements [including] [not including] costs or attorneys' fees awarded to an opposing party and against the Client.)

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[27] The contingent fee agreement would become the first form in the Appendix because there would no longer be a disclosure statement. All the disclosures would be in the contingent fee agreement itself.

[28] I omitted language in clause (1) of the form contingent fee agreement calling for the lawyer to include not just the name of the client but the client's street address. I added definitions of Client and Lawyer. I used "lawyer" instead of "attorney" in keeping with the modern trend. I did not include language in the form a reference to other persons who may have obligations under the contingent fee agreement and should be made a party to it for that reason. The lawyer will have to modify the agreement in that event.

[29] This is a modification of clause (1) in the form contingent fee agreement. It adds a reference to "counterclaims, third-party claims to amounts recovered, and appeals."

[30] Clause (2) of the form contingent fee agreement states, "The contingency upon which compensation is to be paid is: _____." I thought that instead of leaving the blank, we should fill it in with "the Client's recovery of funds by settlement or judgment." In 99% of contingent fee cases, this language will suit the purpose. In some cases, the triggering event will be the recovery of property other than "funds." For example, *Alioto v. Hoiles*, 2010 WL 3777129 (D. Colo. 2010), was a dispute over whether certain events triggered the contingency in the fee agreement. I would be interested to hear from lawyers who regularly handle contingent fee cases whether they think we should fill in the blank and, if so, what it should say.

[31] There is an asterisk here in the form contingent fee agreement. The annotation states, "[Here insert the percentages to be charged in the event of collection. These may be on a flat basis or on a descending scale in relation to amount collected.]." I omitted the asterisk and annotation because they seem unnecessary.

[indicate which]. "The amount collected" (includes) (does not include) [indicate which] specially awarded attorneys' fees and costs awarded to the client and against an opposing party.[32]

(4) The Client is not to be liable to pay compensation otherwise than from amounts collected for the Client by the Lawyer, except as follows: In the event the Client terminates this contingent fee agreement without wrongful conduct by the Lawyer which would cause the Lawyer to forfeit any fee, or if the Lawyer justifiably withdraws from the representation of the Client, the Lawyer may ask the court or other tribunal to order that the Lawyer be paid a fee based upon the reasonable value of the services provided by the Lawyer. If the Lawyer and the Client cannot agree how the Lawyer is to be compensated in this circumstance, the Lawyer will request the court or other tribunal to determine: (1) whether the Client has been unfairly or unjustly enriched if the Client does not pay a fee to the Lawyer; and, if so (2) the amount of the fee owed, taking into account the nature and complexity of the Client's case, the time and skill devoted to the Client's case by the Lawyer, and the benefit obtained by the Client as a result of the Lawyer's efforts. Any such fee shall be payable only out of the gross recovery obtained by or on behalf of the Client and the amount of such fee shall not be greater than the fee that would have been earned by the Lawyer if the contingency described in this contingent fee agreement had occurred.[33]

(5) A court or other tribunal may award costs or attorney fees to an opposing party and against the client.[34]

(6) The Client will be liable to the lawyer for reasonable expenses and disbursements. Such expenses and disbursements are estimated to be $ _____. The Client authorizes the Lawyer to incur expenses and make disbursements up to a maximum of $ _____. The Lawyer will not exceed this limitation without the client's further written authority. The Client will reimburse the Lawyer for such expenditures (upon receipt of a billing), (in specified installments), (upon final resolution), (etc.) [indicate which].[35]

(7) If the Lawyer wishes to hire a lawyer in another firm to assist in the handling of a matter (called an "associated counsel"), the Lawyer will promptly inform the Client in writing of the identity of the associated counsel and of the effect, if any, of the hiring of associated counsel

[32] This provision is unchanged from the form contingent fee agreement except for the use of the defined terms "Client" and "Lawyer."

[33] The form Contingent Fee Agreement should include a conversion clause (that's what this is) even though this provision is purely civil in nature. This conversion clause is unchanged from the form contingent fee agreement except for the use of the defined terms "Client" and "Lawyer."

[34] For the reasons stated earlier, I omitted here the following language from the form contingent fee agreement: "Costs and attorneys' fees awarded to an opposing party against the Client before completion of the case will be paid (by the Client) (by the Lawyer) [indicate which] when ordered. Any award of costs or attorneys' fees, regardless of when awarded, (will) (will not) [indicate which] be subtracted from the amount collected before computing the amount of the contingent fee under this agreement." I also omitted "or arbitrator" before "court."

[35] This provision is unchanged from the form contingent fee agreement except for the use of the defined terms "Client" and "Lawyer" and the use of the active tense instead of the passive tense.

on the amount of the contingent fee. The Client has a right to disapprove the hiring of associated counsel and to terminate the employment of associated counsel for any reason.[36]

(8) Other persons or entities may have a right to be paid from amounts recovered on the Client's behalf. The Client (authorizes) (does not authorize) [indicate which] the Lawyer to pay from the amount collected the following: (e.g., all physicians, hospitals, subrogation claims and liens, etc.). The Lawyer may be legally required to pay the claims of third parties out of any monies collected for the Client, and not to disburse them to the Client so the Client may handle these claims. However, if the Client disputes the amount or validity of the third-party claim, the Lawyer may deposit the funds into the registry of an appropriate court for determination. Any amounts paid to third parties (will) (will not) [indicate which] be subtracted from the amount collected before computing the amount of the contingent fee under this agreement.[37]

WE HAVE EACH READ THE ABOVE AGREEMENT BEFORE SIGNING IT.[38]

_____
(Signature of Client)

_____
(Signature of Lawyer)

Form 2[39]

FINAL DISBURSEMENT STATEMENT

[36] This is a new clause. The only reference to associated counsel in the form contingent fee agreement is in clause (4), which contains a fleeting reference to the percentage fee to be paid to the "attorney (including any associated counsel)." The form disclosure statement includes a provision stating, "I have been informed and understand that my attorney may sometimes hire another attorney to assist in the handling of a case. That other attorney is called an 'associated counsel.' I understand that the attorney fee agreement should tell me how the fees of associated counsel will be handled." See also Colo. RPC 1.5(c)(1)(G).

[37] This provision is a modification of clause (7) of the form contingent fee agreement, except for the use of the defined terms "Client" and "Lawyer" and some stylistic modification.

[38] This sentence comes verbatim from the form contingent fee agreement. In the form contingent fee agreement, there are lines for witness signatures following the signature lines for attorney and client. I see no need for witness signatures. No other fee agreements require witness signatures and Chapter 23.3 does not require them.

[39] I did not change the form Disbursement Statement except to change "attorney" to "Lawyer."

GROSS RECOVERY $_____

Itemization of expenses incurred in handling of case:

_____$_____
_____$_____
_____$_____
_____$_____

Total Expenses $_____

Amount of Expenses Advanced by Lawyer $_____

Amount of Expenses Paid by Client $_____

NET RECOVERY $_____

Computation of Contingent Fee

Recovery = _____% of (Net) (Gross)
$_____

Total Fee (and expenses advanced by Lawyer) $_____

DISBURSEMENT TO CLIENT _____ $_____

* (If fee is on "Net Recovery" and Lawyer has advanced expenses which are being reimbursed from the "gross recovery.")

_____
(Signature of Lawyer)

_____
(Signature of Client)

By signature client acknowledges receipt of a copy of this disbursement statement.

Attorneys at Law
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December 6, 2019

Sent via electronic mail to: mglenn@hollandhart.com

Marcy G. Glenn, Chair
Supreme Court Rules of Professional
Conduct Standing Committee

RE: Colorado Electronic Preservation of Abandoned Estate Planning Documents Act

Dear Ms. Glenn:

We were referred to you by Michael Kirtland, member of the CBA Ethics Committee, and the Hon. Richard L. Gabriel, regarding revisions to the Ethical Rules necessary to implement Colorado's new Electronic Preservation of Abandoned Estate Planning Documents Act ("CEPAEPDA"/the "Act"). By way of background, we are Co-Chairs of the CBA Trust & Estate Section subcommittee that drafted this Act.

The Colorado Legislature passed the Act as House Bill 19-1229 and it was signed by the Governor on May 22, 2019. The Act has been codified as C.R.S. § 15-23-101, et seq., with conforming amendments to the Colorado Probate Code at C.R.S. §§ 15-12-304 and 15-12-402. (See signed Act attached as Exhibit "A")

The Act creates a procedure to determine whether an original will or codicil is abandoned and, if so, a process to store it with the State Court Administrator's Office in an electronic format. It is anticipated that the State Court Administrator will create the platform necessary for electronic storage. At this time, the Act is limited to original wills and codicils. Because of a fiscal note requiring state revenue for implementation of the Act, the proposed effective date is January 1, 2021. (See Final Fiscal Note attached as Exhibit "B").

We have also attached a Hypothetical which explains exactly how the statute requires a lawyer, as a custodian of original client documents, to make a diligent attempt to locate the former client prior to making a digital copy of the client's original document for electronic storage with the State Court Administrator and destruction of the paper originals by the lawyer. The Hypothetical also addresses the protocol for retrieval of those electronically stored documents for formal probate. (See Hypothetical attached as Exhibit "C".)

Current Ethical Rules provide that wills and codicils are client property and, therefore, lawyers have ethical duties to maintain and preserve these original documents. Before lawyers

may use the Act, Ethical Rules would need to be amended to create a safe harbor for lawyers to electronically store original wills and codicils with the State Court Administrator before destroying the original documents. Attached is a list of conforming amendments to the Rules of Professional Conduct which our subcommittee believes would need to be approved by the Colorado Supreme Court prior to the effective date of the new Act. (See proposed list conforming amendments to the Ethical Rules attached as Exhibit "D".)

We understand that the next meeting of the Standing Committee is January 10, 2020 at 9:00 a.m. We would respectfully request that you add our proposal for conforming amendments to the Colorado Rules of Professional Conduct to your agenda. Assuming we can get on the agenda, our subcommittee will send representative of our subcommittee to the January meeting to answer any questions the Standing Committee members may have regarding this new Act and our proposed conforming amendments to the Ethical Rules.

Please do not hesitate to contact us if you have any questions.

Sincerely,

Pete Bullard

Tim Bounds

HOUSE BILL 19-1229

BY REPRESENTATIVE(S) Roberts and Snyder, Arndt, Bird, Buckner, Duran, Kennedy;
also SENATOR(S) Gardner and Lee, Priola, Tate.

CONCERNING THE "COLORADO ELECTRONIC PRESERVATION OF ABANDONED ESTATE PLANNING DOCUMENTS ACT".

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, **add** article 23 to title 15 as follows:

ARTICLE 23
Colorado Electronic Preservation of Abandoned Estate Planning Documents Act

15-23-101. Short title. THE SHORT TITLE OF THIS ARTICLE 23 IS THE "COLORADO ELECTRONIC PRESERVATION OF ABANDONED ESTATE PLANNING DOCUMENTS ACT".

15-23-102. Legislative declaration. (1) THE GENERAL ASSEMBLY FINDS AND DECLARES THAT:

Capital letters or bold & italic numbers indicate new material added to existing law; dashes through words or numbers indicate deletions from existing law and such material is not part of the act.

EXHIBIT A

STANDING COMMITTEE 082

(a) ABANDONED ORIGINAL ESTATE PLANNING DOCUMENTS ARE IN THE CUSTODY OF PROFESSIONALS WHO ARE UNABLE TO LOCATE THE CREATORS OF THE DOCUMENTS;

(b) CREATING A CENTRAL REPOSITORY FOR THESE DOCUMENTS WOULD BE IN THE BEST INTERESTS OF THE CUSTODIANS AND CREATORS OF THESE DOCUMENTS AND THE CREATORS' REPRESENTATIVES WHO MAY LATER BE IN NEED OF THE DOCUMENTS;

(c) THE JUDICIAL DEPARTMENT IS AN APPROPRIATE REPOSITORY FOR THE DOCUMENTS;

(d) ECONOMICS DICTATE AND TECHNOLOGY PERMITS CONVERSION OF ORIGINAL ESTATE PLANNING DOCUMENTS INTO ELECTRONIC VERSIONS OF THE ORIGINALS AS RELIABLE SUBSTITUTES FOR THE ORIGINALS; AND

(e) CUSTODIANS ARE IN THE BEST POSITION TO CERTIFY THE AUTHENTICITY OF ORIGINAL ESTATE PLANNING DOCUMENTS BEFORE THEIR CONVERSION TO ELECTRONIC FORMAT AND FILING WITH THE JUDICIAL DEPARTMENT.

(2) THEREFORE, THE GENERAL ASSEMBLY DECLARES THAT:

(a) PUBLIC POLICY OF THIS STATE SHOULD ENCOURAGE A CUSTODIAN OF AN ABANDONED ORIGINAL ESTATE PLANNING DOCUMENT TO CERTIFY THE DOCUMENT AS SUCH AND, AFTER MAKING A GOOD-FAITH EFFORT TO LOCATE THE CREATOR OF THE DOCUMENT, CONVERT IT TO AN ELECTRONIC FORMAT AND FILE THE ELECTRONIC RECORD OF THE DOCUMENT WITH THE JUDICIAL DEPARTMENT;

(b) THE JUDICIAL DEPARTMENT SHOULD MAINTAIN THE ELECTRONIC RECORD OF EACH DOCUMENT FILED WITH IT UNDER THIS ARTICLE 23 AND FURNISH A CERTIFIED COPY THEREOF TO INDIVIDUALS AND ENTITIES REASONABLY ENTITLED THERETO UPON PROOF OF IDENTITY AND ENTITLEMENT;

(c) A CERTIFIED COPY OF AN ELECTRONIC RECORD MAINTAINED IN THE JUDICIAL DEPARTMENT SHOULD BE ACCORDED THE SAME STATUS AS THE ABANDONED ORIGINAL ESTATE PLANNING DOCUMENT; AND

(d) IT IS THE INTENT OF THE GENERAL ASSEMBLY THAT THIS ARTICLE 23 BE LIBERALLY CONSTRUED TO GIVE EFFECT TO THE PURPOSES STATED IN THIS ARTICLE 23.

15-23-103. Definitions. AS USED IN THIS ARTICLE 23, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) "AGENT" MEANS AN ATTORNEY-IN-FACT GRANTED AUTHORITY UNDER A DURABLE OR NONDURABLE POWER OF ATTORNEY.

(2) "CERTIFIED BY THE STATE COURT ADMINISTRATOR" MEANS A RECORD CERTIFIED BY THE STATE COURT ADMINISTRATOR AS BEING A TRUE COPY OF AN ELECTRONIC RECORD MAINTAINED BY THE STATE COURT ADMINISTRATOR.

(3) "COMPUTER FOLDER" MEANS A DIRECTORY IDENTIFIED UNDER THE NAME OF A CREATOR CONTAINING THE CREATOR'S ELECTRONIC DOCUMENTS AND RELATED ELECTRONIC RECORDS THAT IS ESTABLISHED AND MAINTAINED BY THE STATE COURT ADMINISTRATOR PURSUANT TO SECTION 15-23-114 (3)(c).

(4) "CREATOR" MEANS AN INDIVIDUAL WHO, EITHER ALONE, WITH ONE OR MORE OTHER INDIVIDUALS, OR THROUGH A FIDUCIARY, HAS EXECUTED AN ORIGINAL ESTATE PLANNING DOCUMENT, AS DEFINED IN SUBSECTION (13) OF THIS SECTION, PURSUANT TO THE LAW OF ANY JURISDICTION.

(5) "CUSTODIAN" MEANS ANY OF THE FOLLOWING THAT HAS SOLE POSSESSION AND CONTROL OF AN ORIGINAL ESTATE PLANNING DOCUMENT OF AN INDIVIDUAL:

(a) AN ATTORNEY LICENSED OR FORMERLY LICENSED TO PRACTICE IN COLORADO, THE ATTORNEY'S FIDUCIARY, OR AN AFFIANT OF AN AFFIDAVIT OF THE DECEASED ATTORNEY'S ESTATE PURSUANT TO PART 12 OF ARTICLE 12 OF THIS TITLE 15;

(b) AN ENTITY PROVIDING LEGAL SERVICES PURSUANT TO RULE 265 OF THE COLORADO RULES OF CIVIL PROCEDURE;

(c) A PROFESSIONAL FIDUCIARY APPOINTED UNDER AN ORIGINAL

ESTATE PLANNING DOCUMENT, THE SUCCESSOR TO THE PROFESSIONAL FIDUCIARY, THE PROFESSIONAL FIDUCIARY'S OR SUCCESSOR'S FIDUCIARY, OR AN AFFIANT OF AN AFFIDAVIT OF THE PROFESSIONAL FIDUCIARY'S OR SUCCESSOR'S ESTATE PURSUANT TO PART 12 OF ARTICLE 12 OF THIS TITLE 15;

(d) A FINANCIAL INSTITUTION PROVIDING FIDUCIARY SERVICES;

(e) A FINANCIAL INSTITUTION OR ITS SUBSIDIARY PROVIDING SAFE DEPOSIT BOX SERVICES; OR

(f) AN ATTORNEY APPOINTED BY THE CHIEF JUDGE OF A JUDICIAL DISTRICT TO INVENTORY FILES OF AN ATTORNEY PURSUANT TO RULE 251.32 (h) OF THE COLORADO RULES OF CIVIL PROCEDURE.

(6) "DILIGENT SEARCH" MEANS AN ATTEMPT TO LOCATE AND CONTACT A CREATOR BY TWO OR MORE OF THE FOLLOWING MEANS:

(a) SEARCHING A TELEPHONE DIRECTORY COVERING AT LEAST THE GEOGRAPHIC AREA OF THE LAST PHYSICAL ADDRESS OF THE CREATOR KNOWN TO THE CUSTODIAN;

(b) CALLING THE CREATOR AT THE LAST PHONE NUMBER OF THE CREATOR KNOWN TO THE CUSTODIAN;

(c) SENDING AN E-MAIL TO THE LAST E-MAIL ADDRESS OF THE CREATOR KNOWN TO THE CUSTODIAN;

(d) CONDUCTING AN INTERNET SEARCH FOR THE CREATOR; OR

(e) SUBJECT TO APPLICABLE LAW OTHER THAN THIS ARTICLE 23, ATTEMPTING TO CONTACT BY ANY MEANS DESCRIBED IN THIS SUBSECTION (6):

(I) AN HEIR OF THE CREATOR;

(II) A FIDUCIARY, DEVISEE, OR BENEFICIARY DESIGNATED IN THE CREATOR'S ORIGINAL DOCUMENT; OR

(III) IF APPLICABLE, ANOTHER PARTY TO THE DOCUMENT.

(7) "ELECTRONIC" MEANS RELATING TO TECHNOLOGY HAVING ELECTRICAL, DIGITAL, MAGNETIC, WIRELESS, OPTICAL, ELECTROMAGNETIC, OR SIMILAR CAPABILITIES.

(8) "ELECTRONIC ESTATE PLANNING DOCUMENT" AND "ELECTRONIC DOCUMENT" MEAN THE ELECTRONIC RECORD CREATED FROM AN ORIGINAL ESTATE PLANNING DOCUMENT.

(9) "FIDUCIARY" MEANS AN ORIGINAL, ADDITIONAL, OR SUCCESSOR PERSONAL REPRESENTATIVE, CONSERVATOR, AGENT, OR TRUSTEE.

(10) "FILING STATEMENT" MEANS INFORMATION PROVIDED AND DECLARATIONS MADE BY A CUSTODIAN PURSUANT TO SECTION 15-23-111.

(11) "FINANCIAL INSTITUTION" MEANS A FEDERAL- OR STATE-CHARTERED COMMERCIAL BANK, SAVINGS AND LOAN ASSOCIATION, SAVINGS BANK, TRUST COMPANY, OR CREDIT UNION.

(12) "INDEX OF CREATOR NAMES" MEANS THE SEARCHABLE DATABASE CREATED BY THE STATE COURT ADMINISTRATOR PURSUANT TO SECTION 15-23-114 (2).

(13) "ORIGINAL ESTATE PLANNING DOCUMENT" AND "ORIGINAL DOCUMENT" MEAN AN ORIGINAL INSTRUMENT IN WRITING THAT IS ANY WILL DOCUMENT, INCLUDING, BUT NOT LIMITED TO WILLS, AS DEFINED IN SECTION 15-10-201 (59); CODICILS; HOLOGRAPHIC WILLS; DOCUMENTS PURPORTING TO BE WILLS; INSTRUMENTS THAT REVOKE OR REVISE A TESTAMENTARY INSTRUMENT; TESTAMENTARY INSTRUMENTS THAT MERELY APPOINT A PERSONAL REPRESENTATIVE; OTHER TESTAMENTARY INSTRUMENTS, SUCH AS MEMORANDA DISTRIBUTING TANGIBLE PERSONAL PROPERTY, AS DESCRIBED IN SECTION 15-11-513; AND TESTAMENTARY APPOINTMENTS OF GUARDIAN AS DESCRIBED IN SECTION 15-14-202 (1).

(14) "PROFESSIONAL FIDUCIARY" MEANS AN INDIVIDUAL OR ENTITY THAT IS IN THE BUSINESS OF ACTING AS A FIDUCIARY.

(15) "PROFILE" MEANS AN ELECTRONIC RECORD CREATED AND MAINTAINED BY THE STATE COURT ADMINISTRATOR PURSUANT TO SECTION 15-23-114 (3)(d) UNDER THE NAME OF EACH CREATOR FOR WHOM THE STATE COURT ADMINISTRATOR HAS RECEIVED AN ELECTRONIC ESTATE PLANNING

DOCUMENT.

(16) "PROOF OF IDENTITY" MEANS ANY OF THE FOLLOWING:

(a) FOR AN INDIVIDUAL, A RECORD OF THE INDIVIDUAL'S:

(I) PASSPORT, DRIVER'S LICENSE, OR GOVERNMENT-ISSUED NON-DRIVER IDENTIFICATION CARD THAT IS CURRENT OR EXPIRED NOT MORE THAN ONE YEAR BEFORE THE TIME OF PRESENTATION; OR

(II) OTHER FORM OF GOVERNMENT IDENTIFICATION THAT IS CURRENT OR HAS BEEN EXPIRED FOR NOT MORE THAN ONE YEAR BEFORE THE TIME OF PRESENTATION, CONTAINS THE SIGNATURE OR A PHOTOGRAPH OF THE INDIVIDUAL, AND IS SATISFACTORY TO THE STATE COURT ADMINISTRATOR;

(b) FOR A COURT, A RECORD OF A CERTIFIED COURT ORDER;

(c) FOR AN ENTITY, A RECORD OF A WRITING STATING THAT THE INDIVIDUAL MAKING THE REQUEST ON BEHALF OF THE ENTITY IS AN OFFICER OF THE ENTITY AND PROOF OF IDENTITY FOR THE INDIVIDUAL IN THE SAME MANNER AS PROVIDED IN SUBSECTION (16)(a) OF THIS SECTION; AND

(d) FOR A GOVERNMENT AGENCY, A RECORD OF A WRITING STATING THAT THE INDIVIDUAL MAKING THE REQUEST ON BEHALF OF THE AGENCY IS A REPRESENTATIVE OF THE AGENCY AND PROOF OF IDENTITY FOR THE INDIVIDUAL IN THE SAME MANNER AS PROVIDED IN SUBSECTION (16)(a) OF THIS SECTION.

(17) "RECORD" MEANS INFORMATION THAT IS INSCRIBED ON A TANGIBLE MEDIUM OR THAT IS STORED IN AN ELECTRONIC OR OTHER MEDIUM AND IS RETRIEVABLE IN PERCEIVABLE FORM.

(18) "STATE COURT ADMINISTRATOR" MEANS THE STATE COURT ADMINISTRATOR ESTABLISHED PURSUANT TO SECTION 13-3-101.

15-23-104. Applicability. (1) SUBJECT TO SUBSECTION (2) OF THIS SECTION, THIS ARTICLE 23 APPLIES TO AN ORIGINAL ESTATE PLANNING DOCUMENT CREATED BEFORE, ON, OR AFTER THE EFFECTIVE DATE OF THIS ARTICLE 23.

(2) THIS ARTICLE 23 DOES NOT APPLY TO AN ORIGINAL ESTATE PLANNING DOCUMENT OF A CREATOR WHOSE LOCATION IS KNOWN TO THE CUSTODIAN UNLESS THE CREATOR FAILS TO TAKE POSSESSION OF THE DOCUMENT AND THE CUSTODIAN HAS COMPLIED WITH THE REQUIREMENTS OF SECTION 15-23-105.

(3) A CUSTODIAN THAT COMPLIES WITH THE PROVISIONS OF THIS ARTICLE 23 CONCERNING AN ORIGINAL ESTATE PLANNING DOCUMENT IS NOT SUBJECT TO THE REQUIREMENTS OF THE "UNCLAIMED PROPERTY ACT", ARTICLE 13 OF TITLE 38, CONCERNING THAT ORIGINAL DOCUMENT.

(4) NOTHING IN THIS ARTICLE 23 ABROGATES THE DUTIES IMPOSED BY SECTIONS 15-10-111 AND 15-11-516.

15-23-105. Transfer of possession to creator. (1) BEFORE FILING AN ELECTRONIC ESTATE PLANNING DOCUMENT WITH THE STATE COURT ADMINISTRATOR AS PROVIDED IN THIS ARTICLE 23, THE CUSTODIAN SHALL ATTEMPT TO TRANSFER POSSESSION OF THE ORIGINAL ESTATE PLANNING DOCUMENT TO THE CREATOR AFTER A DILIGENT SEARCH.

(2) (a) IF THE ATTEMPT TO TRANSFER THE ORIGINAL DOCUMENT TO THE CREATOR AFTER A DILIGENT SEARCH IS NOT SUCCESSFUL, THE CUSTODIAN SHALL SEND A LETTER TO THE LAST MAILING ADDRESS OF THE CREATOR KNOWN TO THE CUSTODIAN BY FIRST-CLASS MAIL OR CERTIFIED MAIL RETURN RECEIPT REQUESTED, NOTIFYING THE CREATOR THAT IF THE CREATOR DOES NOT TAKE POSSESSION OF THE ORIGINAL DOCUMENT WITHIN NINETY DAYS AFTER THE DATE OF MAILING, THE CUSTODIAN WILL FILE AN ELECTRONIC COPY OF THE ORIGINAL DOCUMENT WITH THE STATE COURT ADMINISTRATOR AND DESTROY THE ORIGINAL DOCUMENT.

(b) IN THE CASE OF AN ORIGINAL DOCUMENT FOUND IN A SAFE DEPOSIT BOX, THE CUSTODIAN MAY SEND THE LETTER REQUIRED BY THIS SUBSECTION (2) ADDRESSED TO THE CREATOR "IN CARE OF" THE LESSEE OR LESSEES OF THE SAFE DEPOSIT BOX AT THE MAILING ADDRESS OF THE LESSEE OR LESSEES LAST KNOWN TO THE CUSTODIAN.

15-23-106. Preservation of an abandoned original estate planning document after diligent search. IF THE CREATOR OF AN ORIGINAL ESTATE PLANNING DOCUMENT CANNOT BE LOCATED OR DOES NOT TAKE POSSESSION OF THE ORIGINAL DOCUMENT AS PROVIDED IN SECTION

15-23-105 AND IF THE CUSTODIAN IS NEITHER ABLE NOR REQUIRED TO TRANSFER POSSESSION OF THE ORIGINAL DOCUMENT TO SOMEONE OTHER THAN THE CREATOR UNDER APPLICABLE LAW OTHER THAN THIS ARTICLE 23, THE ORIGINAL DOCUMENT IS DEEMED ABANDONED FOR THE PURPOSES OF THIS ARTICLE 23, AND THE CUSTODIAN MAY PRESERVE THE ORIGINAL DOCUMENT ELECTRONICALLY AS PROVIDED IN THIS ARTICLE 23.

15-23-107. Privilege. SUBJECT TO APPLICABLE LAW OTHER THAN THIS ARTICLE 23, IF AN ORIGINAL ESTATE PLANNING DOCUMENT IS PRIVILEGED PURSUANT TO SECTION 13-90-107 (1)(b), THE CORRESPONDING ELECTRONIC ESTATE PLANNING DOCUMENT FILED WITH THE STATE COURT ADMINISTRATOR AS PROVIDED IN THIS ARTICLE 23 REMAINS PRIVILEGED.

15-23-108. Exculpation of custodian. A CUSTODIAN IS NOT LIABLE TO A PERSON FOR AN ACTION TAKEN UNDER THIS ARTICLE 23 OR FOR A FAILURE TO ACT AS PROVIDED IN THIS ARTICLE 23 UNLESS THE ACTION OR FAILURE TO ACT IS SHOWN TO HAVE RESULTED FROM THE CUSTODIAN'S BAD FAITH, GROSS NEGLIGENCE, OR INTENTIONAL MISCONDUCT.

15-23-109. Electronic conversion and filing. (1) IF THE CREATOR DOES NOT TAKE POSSESSION OF THE ORIGINAL ESTATE PLANNING DOCUMENT WITHIN NINETY DAYS AFTER THE DATE OF MAILING THE LETTER REQUIRED IN SECTION 15-23-105 (2), THE CUSTODIAN MAY CREATE AN ELECTRONIC ESTATE PLANNING DOCUMENT, WHICH MUST BE IN COLOR AND IN A FORMAT AND USING THE TECHNOLOGY PRESCRIBED BY THE STATE COURT ADMINISTRATOR, AND MAY FILE THE ELECTRONIC DOCUMENT WITH THE STATE COURT ADMINISTRATOR.

(2) AS TO EACH ELECTRONIC ESTATE PLANNING DOCUMENT BEING FILED, THE CUSTODIAN, OR, IF THE CUSTODIAN IS AN ENTITY, AN OFFICER OF THE CUSTODIAN, SHALL:

(a) EXAMINE THE ORIGINAL ESTATE PLANNING DOCUMENT;

(b) BASED UPON THAT EXAMINATION, BE SATISFIED THAT THE DOCUMENT IS AN ORIGINAL ESTATE PLANNING DOCUMENT OF THE CREATOR, AS THOSE TERMS ARE DEFINED IN SECTION 15-23-103;

(c) COMPARE THE ELECTRONIC ESTATE PLANNING DOCUMENT WITH THE ORIGINAL ESTATE PLANNING DOCUMENT; AND

(d) BE SATISFIED THAT THE ELECTRONIC ESTATE PLANNING DOCUMENT IS A TRUE AND CORRECT COPY OF THE ORIGINAL ESTATE PLANNING DOCUMENT.

(3) NOTWITHSTANDING ANY PROVISION OF THIS ARTICLE 23 TO THE CONTRARY, A CUSTODIAN SUBJECT TO THE COLORADO RULES OF PROFESSIONAL CONDUCT SHALL COMPLY WITH THE RULES AS THEY MAY RELATE TO A FILING PURSUANT TO THIS ARTICLE 23 PRIOR TO FILING AN ELECTRONIC ESTATE PLANNING DOCUMENT WITH THE STATE COURT ADMINISTRATOR.

15-23-110. Penalty of perjury. THE ACT OF SUBMITTING A FILING STATEMENT TO THE STATE COURT ADMINISTRATOR PURSUANT TO SECTION 15-23-111 OR SUBMITTING A REQUEST TO THE STATE COURT ADMINISTRATOR PURSUANT TO SECTION 15-23-119, 15-23-120, OR 15-23-122 CONSTITUTES THE AFFIRMATION OR ACKNOWLEDGMENT OF THE SUBMITTER, UNDER THE PENALTY OF PERJURY, THAT THE FILING STATEMENT OR REQUEST IS THE SUBMITTER'S ACT AND DEED, OR THAT THE SUBMITTER IN GOOD FAITH BELIEVES THAT THE FILING STATEMENT OR REQUEST IS THE ACT AND DEED OF THE INDIVIDUAL ON WHOSE BEHALF THE SUBMITTER IS ACTING; THAT THE SUBMITTER AND THE INDIVIDUAL ON WHOSE BEHALF THE SUBMITTER IS ACTING IN GOOD FAITH BELIEVES THE INFORMATION PROVIDED AND DECLARATIONS MADE IN THE FILING STATEMENT OR REQUEST ARE TRUE; AND THAT THE FILING STATEMENT OR REQUEST COMPLIES WITH THE REQUIREMENTS OF THIS ARTICLE 23.

15-23-111. Filing statement. (1) A CUSTODIAN SHALL SUBMIT A FILING STATEMENT FOR EACH ELECTRONIC ESTATE PLANNING DOCUMENT FOR EACH CREATOR SUBMITTED TO THE STATE COURT ADMINISTRATOR PURSUANT TO THIS ARTICLE 23.

(2) A CUSTODIAN SHALL PROVIDE THE FOLLOWING INFORMATION AND MAKE THE FOLLOWING DECLARATIONS ON A FILING STATEMENT FORM FURNISHED BY THE STATE COURT ADMINISTRATOR:

(a) A DECLARATION THAT AFTER ATTEMPTING TO TRANSFER POSSESSION OF THE ORIGINAL ESTATE PLANNING DOCUMENT TO ITS CREATOR AS PROVIDED IN SECTION 15-23-105:

(I) THE CUSTODIAN CANNOT LOCATE THE CREATOR OF THE ORIGINAL

DOCUMENT;

(II) THE CREATOR HAS NOT TAKEN POSSESSION OF THE ORIGINAL DOCUMENT; OR

(III) THE CUSTODIAN HAS NEITHER BEEN ABLE NOR REQUIRED TO TRANSFER POSSESSION OF THE ORIGINAL DOCUMENT TO SOMEONE OTHER THAN THE CREATOR UNDER APPLICABLE LAW OTHER THAN THIS ARTICLE 23;

(b) THE NAME OF THE CREATOR, LAST NAME FIRST;

(c) ALL ALIASES OF THE CREATOR, LAST NAME FIRST, KNOWN TO THE CUSTODIAN;

(d) THE DATE OF BIRTH OF THE CREATOR, IF KNOWN TO THE CUSTODIAN;

(e) SUBJECT TO SUBSECTION (3) OF THIS SECTION, THE LAST MAILING AND PHYSICAL ADDRESSES OF THE CREATOR KNOWN TO THE CUSTODIAN;

(f) REGARDING THE CUSTODIAN:

(I) IF THE CUSTODIAN IS AN INDIVIDUAL, THE NAME AND ADDRESS OF THE INDIVIDUAL;

(II) IF THE CUSTODIAN IS AN ENTITY, THE NAME AND ADDRESS OF THE ENTITY, THE NAME AND POSITION OF THE INDIVIDUAL ACTING ON BEHALF OF THE ENTITY, AND THE INDIVIDUAL'S ADDRESS IF DIFFERENT THAN THAT OF THE ENTITY;

(g) FOR THE ELECTRONIC ESTATE PLANNING DOCUMENT FILED:

(I) THE NAME AND DATE OF THE ELECTRONIC DOCUMENT;

(II) THE CATEGORY OF THE ORIGINAL DOCUMENT, AS DESCRIBED IN SECTION 15-23-103 (13), THAT HAS BEEN CONVERTED TO AN ELECTRONIC DOCUMENT; AND

(III) THE NUMBER OF PAGES OF THE ELECTRONIC DOCUMENT;

(h) A DECLARATION THAT THE CUSTODIAN, OR IF AN ENTITY, THE OFFICER OF THE CUSTODIAN, SUBMITTING THE FILING STATEMENT HAS:

(I) EXAMINED THE ORIGINAL ESTATE PLANNING DOCUMENT;

(II) BASED UPON THAT EXAMINATION, BELIEVES THAT THE DOCUMENT IS AN ORIGINAL ESTATE PLANNING DOCUMENT OF THE CREATOR, AS THOSE TERMS ARE DEFINED IN SECTION 15-23-103;

(III) COMPARED THE ELECTRONIC ESTATE PLANNING DOCUMENT WITH THE ORIGINAL ESTATE PLANNING DOCUMENT; AND

(IV) BASED UPON THAT COMPARISON, BELIEVES THAT THE ELECTRONIC ESTATE PLANNING DOCUMENT IS A TRUE AND CORRECT COPY OF THE ORIGINAL ESTATE PLANNING DOCUMENT;

(i) (I) A DECLARATION THAT, IF THE CUSTODIAN IS SUBJECT TO THE COLORADO RULES OF PROFESSIONAL CONDUCT, THE CUSTODIAN HAS COMPLIED WITH THE RULES AS THEY MAY RELATE TO THIS FILING;

(II) FOR THE PURPOSE OF THE DECLARATION MADE PURSUANT TO THIS SUBSECTION (2)(i), THE STATE COURT ADMINISTRATOR SHALL REFER TO THE COLORADO RULES OF PROFESSIONAL CONDUCT AS THE "COLORADO RULES OF PROFESSIONAL CONDUCT ADOPTED BY THE SUPREME COURT OF COLORADO";

(j) A DECLARATION THAT THE CUSTODIAN HAS COMPLIED WITH ALL APPLICABLE LAW OTHER THAN THIS ARTICLE 23; AND

(k) A DECLARATION THAT THE ACT OF SUBMITTING A FILING STATEMENT TO THE STATE COURT ADMINISTRATOR SUBJECTS THE SUBMITTER AND THE INDIVIDUAL ON WHOSE BEHALF THE SUBMITTER IS ACTING TO THE PENALTY OF PERJURY, PURSUANT TO SECTION 15-23-110, FOR THE INFORMATION PROVIDED AND DECLARATIONS MADE IN THE FILING STATEMENT, WHETHER OR NOT THE INDIVIDUAL IS NAMED IN THE FILING STATEMENT AS THE ONE SUBMITTING THE FILING STATEMENT.

(3) IN THE CASE OF AN ORIGINAL ESTATE PLANNING DOCUMENT FOUND IN A SAFE DEPOSIT BOX, IT IS SUFFICIENT UNDER SUBSECTION (2)(e) OF THIS SECTION TO FURNISH THE LAST MAILING AND PHYSICAL ADDRESSES

OF THE LESSEE OR LESSEES OF THE SAFE DEPOSIT BOX KNOWN TO THE CUSTODIAN.

(4) INFORMATION PROVIDED AND DECLARATIONS MADE IN THE FILING STATEMENT ARE PART OF THE PROFILE FOR EACH CREATOR.

15-23-112. Reliance on filing statement. THE STATE COURT ADMINISTRATOR MAY RELY ON INFORMATION PROVIDED AND DECLARATIONS MADE IN A FILING STATEMENT AND HAS NO DUTY TO MAKE FURTHER INQUIRY.

15-23-113. Fees - disposition - appropriation - cash fund. (1) THE STATE COURT ADMINISTRATOR SHALL DETERMINE AND COLLECT FEES TO COVER THE ASSOCIATED COSTS FOR SUBMITTING THE FOLLOWING:

(a) A FILING STATEMENT, INCLUDING THE ATTACHED ELECTRONIC ESTATE PLANNING DOCUMENT;

(b) A REQUEST FOR RETRIEVAL; AND

(c) A REQUEST FOR DELETION.

(2) THE FEES ESTABLISHED PURSUANT TO THIS SECTION MUST BE BASED ON THE ACTUAL COST OF THE SUBMISSION.

(3) THE STATE COURT ADMINISTRATOR SHALL TRANSMIT FEES COLLECTED PURSUANT TO THIS SECTION TO THE STATE TREASURER, WHO SHALL CREDIT THEM TO THE ELECTRONIC PRESERVATION OF ABANDONED ESTATE PLANNING DOCUMENTS CASH FUND CREATED IN SUBSECTION (4) OF THIS SECTION.

(4) THE ELECTRONIC PRESERVATION OF ABANDONED ESTATE PLANNING DOCUMENTS CASH FUND, REFERRED TO IN THIS SUBSECTION (4) AS THE "FUND", IS HEREBY CREATED IN THE STATE TREASURY. THE FUND CONSISTS OF MONEY CREDITED TO THE FUND PURSUANT TO SUBSECTION (3) OF THIS SECTION AND ANY OTHER MONEY THAT THE GENERAL ASSEMBLY MAY APPROPRIATE OR TRANSFER TO THE FUND. THE STATE TREASURER SHALL CREDIT ALL INTEREST AND INCOME DERIVED FROM THE DEPOSIT AND INVESTMENT OF MONEY IN THE FUND TO THE FUND. SUBJECT TO ANNUAL APPROPRIATION BY THE GENERAL ASSEMBLY, THE JUDICIAL DEPARTMENT

MAY EXPEND MONEY FROM THE FUND FOR THE ADMINISTRATION OF THIS ARTICLE 23.

15-23-114. Duties of the state court administrator. (1) THE STATE COURT ADMINISTRATOR SHALL PROVIDE THE FORMS REQUIRED TO ADMINISTER THE PROVISIONS OF THIS ARTICLE 23.

(2) THE STATE COURT ADMINISTRATOR SHALL CREATE AN INDEX OF CREATOR NAMES THAT IS A SEARCHABLE DATABASE OF ALL NAMES, ALIASES, AND LAST KNOWN PHYSICAL ADDRESSES OF ALL CREATORS FOR WHOM ELECTRONIC ESTATE PLANNING DOCUMENTS ARE FILED WITH THE STATE COURT ADMINISTRATOR AS PROVIDED IN THIS ARTICLE 23.

(3) UPON RECEIPT OF A FILING STATEMENT WITH AN ELECTRONIC ESTATE PLANNING DOCUMENT OF A CREATOR, THE STATE COURT ADMINISTRATOR SHALL:

(a) PROVIDE THE CUSTODIAN WITH A DATE-STAMPED COPY OF THE FILING STATEMENT ACKNOWLEDGING RECEIPT OF THE FILING STATEMENT AND THE ATTACHED ELECTRONIC ESTATE PLANNING DOCUMENT;

(b) ADD TO THE INDEX OF CREATOR NAMES THE NAME OF EACH CREATOR AND THE ALIASES OF THE CREATOR CROSS-REFERENCED TO THE CREATOR'S NAME, LAST NAME FIRST, AND THE LAST KNOWN PHYSICAL ADDRESS OF THE CREATOR AS SET FORTH IN THE FILING STATEMENT;

(c) CREATE AND MAINTAIN A COMPUTER FOLDER FOR EACH CREATOR;

(d) CREATE A PROFILE FOR EACH CREATOR, WHICH MUST BE FILED IN THE COMPUTER FOLDER OF EACH CREATOR AND WHICH MUST CONTAIN THE DATE OF FILING, INFORMATION PROVIDED IN THE FILING STATEMENT, AND DECLARATIONS MADE IN THE FILING STATEMENT; AND

(e) CREATE AND MAINTAIN A SEPARATE ELECTRONIC RECORD OF EACH ELECTRONIC ESTATE PLANNING DOCUMENT FILED FOR THE CREATOR IDENTIFIED IN THE FILING STATEMENT AND STORE THE ELECTRONIC RECORD IN A COMPUTER FOLDER UNDER THE CREATOR'S NAME, LAST NAME FIRST.

(4) (a) THE STATE COURT ADMINISTRATOR MAY ENTER INTO AN

INTERAGENCY AGREEMENT WITH ANOTHER STATE AGENCY TO MAINTAIN ANY COMPUTER FOLDER OR PROFILE REQUIRED BY THIS ARTICLE 23. ANY COMPUTER FOLDER OR PROFILE MAINTAINED PURSUANT TO SUCH AN AGREEMENT IS CONSIDERED TO BE MAINTAINED BY THE STATE COURT ADMINISTRATOR FOR THE PURPOSES OF THIS ARTICLE 23.

(b) AN INTERAGENCY AGREEMENT ENTERED INTO PURSUANT TO THIS SUBSECTION (4) MUST REQUIRE ANY PARTIES TO THE AGREEMENT TO DELIVER ANY INFORMATION OR ELECTRONIC RECORD MAINTAINED BY THE DEPARTMENT PURSUANT TO THE AGREEMENT TO THE STATE COURT ADMINISTRATOR UPON REQUEST.

(5) THE STATE COURT ADMINISTRATOR SHALL ADOPT STANDARDS AND PROCEDURES FOR THE IMPLEMENTATION OF THIS ARTICLE 23.

15-23-115. Destruction of original estate planning document. SUBJECT TO APPLICABLE LAW OTHER THAN THIS ARTICLE 23, THE CUSTODIAN SHALL DESTROY THE ORIGINAL ESTATE PLANNING DOCUMENT AFTER COMPLYING WITH THE PROVISIONS OF THIS ARTICLE 23 AND RECEIVING THE DATE-STAMPED COPY OF THE FILING STATEMENT FROM THE STATE COURT ADMINISTRATOR PURSUANT TO SECTION 15-23-114 (3)(a).

15-23-116. Authenticity of electronic estate planning document. AN ELECTRONIC ESTATE PLANNING DOCUMENT CERTIFIED BY THE STATE COURT ADMINISTRATOR THAT IS MADE FROM AN ORIGINAL ESTATE PLANNING DOCUMENT IS DEEMED TO BE THE ORIGINAL OF THE DOCUMENT FOR ALL PURPOSES UNDER COLORADO LAW.

15-23-117. Public record. (1) THE INDEX OF CREATOR NAMES CREATED PURSUANT TO SECTION 15-23-114 (2) IS A PUBLIC RECORD.

(2) A COMPUTER FOLDER AND ITS CONTENTS, INCLUDING THE CREATOR'S PROFILE, FILING STATEMENTS, AND ELECTRONIC ESTATE PLANNING DOCUMENTS IS NOT A PUBLIC RECORD AND IS NOT SUBJECT TO ANY FEDERAL OR STATE OPEN RECORDS ACT OR ANY REQUEST FOR PUBLIC INFORMATION UNDER ANY FEDERAL, STATE, OR LOCAL LAW.

15-23-118. Access to filing statement. THE STATE COURT ADMINISTRATOR SHALL PROVIDE AN INDIVIDUAL, ENTITY, COURT, OR GOVERNMENT AGENCY THAT IS AUTHORIZED TO RECEIVE A COPY OF A FILING

STATEMENT PURSUANT TO SECTION 15-23-119 OR 15-23-120, AND THAT HAS PROVIDED PROOF OF IDENTITY, ACCESS TO ANY FILING STATEMENT FILED UNDER ANY NAMES OR ALIASES THAT ARE THE SUBJECT OF AN INQUIRY.

15-23-119. Access to electronic estate planning document prior to notification of creator's death. (1) UNTIL NOTIFIED OF A CREATOR'S DEATH AS PROVIDED IN SECTION 15-23-120 (1)(b), THE STATE COURT ADMINISTRATOR MAY PRESUME THAT THE CREATOR IS LIVING.

(2) WHEN A CREATOR IS PRESUMED LIVING, THE STATE COURT ADMINISTRATOR SHALL DELIVER A COPY OF AN ELECTRONIC DOCUMENT CERTIFIED BY THE STATE COURT ADMINISTRATOR TO ANY OF THE FOLLOWING INDIVIDUALS OR ENTITIES UPON REQUEST FOR A COPY OF THE ELECTRONIC ESTATE PLANNING DOCUMENT ON A FORM FURNISHED BY THE STATE COURT ADMINISTRATOR AND PAYMENT OF A RETRIEVAL FEE:

(a) THE CREATOR, UPON PRESENTATION OF PROOF OF IDENTITY OF THE CREATOR;

(b) AN INDIVIDUAL AUTHORIZED TO RECEIVE THE COPY OF AN ELECTRONIC DOCUMENT IN A WRITING SIGNED BY THE CREATOR AND NOTARIZED, UPON PRESENTATION OF:

(I) A RECORD OF THE WRITING; AND

(II) PROOF OF IDENTITY OF THE AUTHORIZED INDIVIDUAL;

(c) AN AGENT OF THE CREATOR, UPON PRESENTATION OF:

(I) A RECORD OF THE POWER OF ATTORNEY;

(II) A RECORD OF THE AGENT'S CERTIFICATION AS TO THE VALIDITY OF THE POWER OF ATTORNEY AND THE AGENT'S AUTHORITY AS PROVIDED IN SECTION 15-14-742; AND

(III) PROOF OF IDENTITY OF THE AGENT;

(d) AN INDIVIDUAL OR ENTITY NOMINATED OR APPOINTED AS A FIDUCIARY IN THE ELECTRONIC DOCUMENT OR APPOINTED BY A COURT, UPON PRESENTATION OF:

(I) A RECORD OF THE ORIGINAL ESTATE PLANNING DOCUMENT OR OF THE CERTIFIED COURT ORDER; AND

(II) PROOF OF IDENTITY OF THE FIDUCIARY;

(e) A COURT-APPOINTED CONSERVATOR FOR THE CREATOR, UPON PRESENTATION OF:

(I) A RECORD OF CERTIFIED LETTERS OF CONSERVATORSHIP; AND

(II) PROOF OF IDENTITY OF THE CONSERVATOR; OR

(f) AN INDIVIDUAL, ENTITY, COURT, OR GOVERNMENT AGENCY AUTHORIZED TO RECEIVE THE COPY OF THE ELECTRONIC DOCUMENT AS PROVIDED IN AN ORDER ENTERED BY A COURT, UPON PRESENTATION OF:

(I) A RECORD OF THE CERTIFIED COURT ORDER; AND

(II) PROOF OF IDENTITY OF THE AUTHORIZED INDIVIDUAL, OR OF THE INDIVIDUAL ACTING ON BEHALF OF THE AUTHORIZED ENTITY, COURT, OR GOVERNMENT AGENCY.

(3) A REQUEST MADE PURSUANT TO THIS SECTION MUST BE MADE ON A FORM PROVIDED BY THE STATE COURT ADMINISTRATOR THAT CONTAINS A DECLARATION THAT THE ACT OF SUBMITTING THE REQUEST TO THE STATE COURT ADMINISTRATOR SUBJECTS THE SUBMITTER AND THE INDIVIDUAL ON WHOSE BEHALF THE SUBMITTER IS ACTING TO THE PENALTY OF PERJURY PURSUANT TO SECTION 15-23-110 FOR THE INFORMATION PROVIDED AND THE DECLARATIONS MADE IN THE REQUEST FORM, WHETHER OR NOT THE INDIVIDUAL IS NAMED IN THE REQUEST AS THE ONE SUBMITTING THE REQUEST.

(4) THE STATE COURT ADMINISTRATOR SHALL FILE A REQUEST FORM SUBMITTED PURSUANT TO SUBSECTION (2) OF THIS SECTION IN THE CREATOR'S COMPUTER FOLDER.

15-23-120. Access to electronic estate planning document after notification of creator's death - definitions. (1) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "AUTHORIZED RECIPIENT" MEANS:

(I) AN INDIVIDUAL OR ENTITY NOMINATED OR APPOINTED AS A FIDUCIARY IN AN ORIGINAL ESTATE PLANNING DOCUMENT OF A CREATOR OR APPOINTED ON BEHALF OF THE ESTATE OF A CREATOR BY A COURT, UPON PRESENTATION OF THE FOLLOWING:

(A) A RECORD OF THE ORIGINAL DOCUMENT OR THE CERTIFIED COURT ORDER; AND

(B) PROOF OF THE IDENTITY OF THE FIDUCIARY;

(II) AN INDIVIDUAL OR ENTITY NAMED AS A DEVISEE UNDER A WILL DOCUMENT OR BENEFICIARY UNDER A TRUST DOCUMENT, UPON PRESENTATION OF THE FOLLOWING:

(A) A RECORD OF THE WILL DOCUMENT OR THE TRUST DOCUMENT; AND

(B) PROOF OF IDENTITY OF THE INDIVIDUAL, OR THE INDIVIDUAL ACTING ON BEHALF OF THE ENTITY, NAMED AS A DEVISEE OR BENEFICIARY;

(III) A COURT-APPOINTED FIDUCIARY FOR AN INDIVIDUAL NAMED AS A DEVISEE UNDER A WILL DOCUMENT OR BENEFICIARY UNDER A TRUST DOCUMENT UPON PRESENTATION OF THE FOLLOWING:

(A) A RECORD OF THE WILL DOCUMENT OR THE TRUST DOCUMENT;

(B) A RECORD OF CERTIFIED LETTERS OF APPOINTMENT OF THE FIDUCIARY; AND

(C) PROOF OF IDENTITY OF THE FIDUCIARY; OR

(IV) AN INDIVIDUAL, ENTITY, COURT, OR GOVERNMENT AGENCY AUTHORIZED TO RECEIVE A COPY OF ANY OR ALL OF THE CONTENTS OF A COMPUTER FOLDER AS PROVIDED IN A COURT ORDER, UPON PRESENTATION OF THE FOLLOWING:

(A) RECORD OF THE CERTIFIED COURT ORDER; AND

(B) PROOF OF IDENTITY OF THE AUTHORIZED INDIVIDUAL, OR OF THE INDIVIDUAL ACTING ON BEHALF OF THE AUTHORIZED ENTITY, COURT, OR GOVERNMENT AGENCY.

(b) "NOTIFICATION OF DEATH" MEANS PRESENTATION TO THE STATE COURT ADMINISTRATOR OF:

(I) A RECORD OF THE CREATOR'S CERTIFIED DEATH CERTIFICATE; OR

(II) A RECORD OF THE CERTIFIED COURT ORDER DETERMINING THAT A CREATOR IS DECEASED.

(2) UPON NOTIFICATION OF DEATH AND A REQUEST FOR ANY OR ALL OF THE CONTENTS OF A COMPUTER FOLDER BY AN AUTHORIZED RECIPIENT ON A FORM FURNISHED BY THE STATE COURT ADMINISTRATOR AND PAYMENT OF A RETRIEVAL FEE, THE STATE COURT ADMINISTRATOR SHALL:

(a) DELIVER A COPY OF THE REQUESTED CONTENTS OF THE COMPUTER FOLDER WITH EACH ELECTRONIC ESTATE PLANNING DOCUMENT CERTIFIED BY THE STATE COURT ADMINISTRATOR TO THE AUTHORIZED RECIPIENT;

(b) AS TO A WILL DOCUMENT OF A CREATOR, LODGE A COPY OF THE ELECTRONIC ESTATE PLANNING DOCUMENT CERTIFIED BY THE STATE COURT ADMINISTRATOR AS REQUIRED BY SECTION 15-11-516; AND

(c) FILE THE REQUEST FORM IN THE CREATOR'S COMPUTER FOLDER.

(3) A REQUEST MADE PURSUANT TO THIS SECTION MUST BE MADE ON A FORM PROVIDED BY THE STATE COURT ADMINISTRATOR THAT CONTAINS A DECLARATION THAT THE ACT OF SUBMITTING THE REQUEST TO THE STATE COURT ADMINISTRATOR SUBJECTS THE SUBMITTER AND THE INDIVIDUAL ON WHOSE BEHALF THE SUBMITTER IS ACTING TO THE PENALTY OF PERJURY PURSUANT TO SECTION 15-23-110 FOR THE INFORMATION PROVIDED AND THE DECLARATIONS MADE IN THE REQUEST FORM, WHETHER OR NOT THE INDIVIDUAL IS NAMED IN THE REQUEST AS THE ONE SUBMITTING THE REQUEST.

15-23-121. Action to establish a claim. IF AN INDIVIDUAL, ENTITY, OR GOVERNMENT AGENCY SUBMITS A REQUEST FOR RETRIEVAL OF A COPY

OF ANY OR ALL OF THE CONTENTS OF A COMPUTER FOLDER AS PROVIDED IN THIS ARTICLE 23 AND THE REQUEST IS DENIED BY THE STATE COURT ADMINISTRATOR OR IS NOT ACTED UPON BY THE STATE COURT ADMINISTRATOR WITHIN NINETY DAYS AFTER ITS SUBMISSION, THE INDIVIDUAL, ENTITY, OR GOVERNMENT AGENCY MAY FILE AN ACTION IN THE PROBATE COURT OF THE CITY AND COUNTY OF DENVER, NAMING THE STATE COURT ADMINISTRATOR AS RESPONDENT, TO RETRIEVE A COPY OF ANY OR ALL OF THE CONTENTS OF THE COMPUTER FOLDER. THE INDIVIDUAL, ENTITY, OR GOVERNMENT AGENCY MUST FILE THE ACTION WITHIN NINETY DAYS AFTER THE DATE OF THE DENIAL BY THE STATE COURT ADMINISTRATOR OR WITHIN ONE HUNDRED EIGHTY DAYS AFTER THE DATE OF THE FILING OF THE REQUEST FOR RETRIEVAL IF THE STATE COURT ADMINISTRATOR HAS FAILED TO ACT ON IT.

15-23-122. Deletion of electronic estate planning documents and computer folders - error correction. (1) (a) THE STATE COURT ADMINISTRATOR SHALL DELETE AN ELECTRONIC ESTATE PLANNING DOCUMENT FILED PURSUANT TO THIS ARTICLE 23 UPON PRESENTATION OF:

(I) A REQUEST BY A CREATOR OF THE DOCUMENT ON A NOTARIZED FORM FURNISHED BY THE STATE COURT ADMINISTRATOR;

(II) PROOF OF IDENTITY OF THE CREATOR; AND

(III) PAYMENT OF A DELETION FEE.

(b) THE STATE COURT ADMINISTRATOR SHALL FILE THE REQUEST FORM IN THE CREATOR'S COMPUTER FOLDER AND SHALL MAINTAIN THE FOLDER FOR THE PERIOD OF TIME SPECIFIED IN SUBSECTION (4) OF THIS SECTION.

(c) UPON REQUEST FOR DELETION PURSUANT TO THIS SUBSECTION (1), THE STATE COURT ADMINISTRATOR SHALL DELETE THE ELECTRONIC DOCUMENT ONLY FROM THE COMPUTER FOLDER OF THE CREATOR WHO REQUESTS THE DELETION.

(2) A REQUEST PURSUANT TO THIS SECTION MUST BE MADE ON A FORM PROVIDED BY THE STATE COURT ADMINISTRATOR THAT CONTAINS THE DECLARATION THAT THE ACT OF SUBMITTING THE REQUEST TO THE STATE COURT ADMINISTRATOR SUBJECTS THE SUBMITTER AND THE INDIVIDUAL ON

WHOSE BEHALF THE SUBMITTER IS ACTING TO THE PENALTY OF PERJURY PURSUANT TO SECTION 15-23-110 FOR THE INFORMATION PROVIDED AND THE DECLARATIONS MADE ON THE REQUEST FORM, WHETHER OR NOT THE INDIVIDUAL IS NAMED IN THE REQUEST AS THE ONE SUBMITTING THE REQUEST.

(3) THE STATE COURT ADMINISTRATOR MAY TAKE SUCH ACTIONS AS THE STATE COURT ADMINISTRATOR DEEMS NECESSARY TO CORRECT ANY TECHNOLOGICAL, TYPOGRAPHICAL, OR CLERICAL ERROR, AND, AT THE STATE COURT ADMINISTRATOR'S DISCRETION, HE OR SHE MAY DELETE A RECORD THAT A CUSTODIAN HAS FILED IN ERROR.

(4) THE STATE COURT ADMINISTRATOR MAY DELETE A COMPUTER FOLDER ONE HUNDRED YEARS AFTER THE DATE OF THE CREATION OF THE FOLDER.

SECTION 2. In Colorado Revised Statutes, 13-3-101, **add** (14) as follows:

13-3-101. State court administrator - repeal. (14) THE STATE COURT ADMINISTRATOR SHALL ADMINISTER THE "COLORADO ELECTRONIC PRESERVATION OF ABANDONED ESTATE PLANNING DOCUMENTS ACT", ARTICLE 23 OF TITLE 15.

SECTION 3. In Colorado Revised Statutes, **repeal and reenact, with amendments,** 15-12-304 as follows:

15-12-304. Informal probate - unavailable in certain cases. (1) APPLICATIONS FOR INFORMAL PROBATE THAT RELATE TO ANY OF THE FOLLOWING MUST BE DECLINED:

(a) ONE OR MORE OF A KNOWN SERIES OF TESTAMENTARY INSTRUMENTS, OTHER THAN A WILL AND ONE OR MORE CODICILS THERETO, THE LATEST OF WHICH DOES NOT EXPRESSLY REVOKE THE EARLIER; OR

(b) A COPY OF THE DECEDENT'S ORIGINAL WILL CERTIFIED BY THE STATE COURT ADMINISTRATOR PURSUANT TO ARTICLE 23 OF THIS TITLE 15.

SECTION 4. In Colorado Revised Statutes, 15-12-402, **amend** (1) introductory portion, (1)(c), and (2) as follows:

15-12-402. Formal testacy or appointment proceedings - petition - contents. (1) Petitions for formal probate of a will, or for adjudication of intestacy with or without request for appointment of a personal representative, must be directed to the court, request a judicial order after notice and hearing, and contain further statements as indicated in this section. A petition for formal probate of a will ~~shall~~ MUST:

(c) State whether the original of the last will of the decedent, OR A COPY OF THE DECEDENT'S ORIGINAL WILL CERTIFIED BY THE STATE COURT ADMINISTRATOR PURSUANT TO ARTICLE 23 OF THIS TITLE 15, is in the possession of the court or accompanies the petition.

(2) If the original will, OR A COPY OF THE DECEDENT'S ORIGINAL WILL CERTIFIED BY THE STATE COURT ADMINISTRATOR PURSUANT TO ARTICLE 23 OF THIS TITLE 15, is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will and indicate that it is lost, destroyed, or otherwise unavailable.

SECTION 5. In Colorado Revised Statutes, 38-13-110, **add** (1)(c) as follows:

38-13-110. Report and payment or delivery of abandoned property. (1) (c) NOTWITHSTANDING ANY OTHER PROVISION OF THIS ARTICLE 13 TO THE CONTRARY, A HOLDER WHO QUALIFIES AS A CUSTODIAN PURSUANT TO SECTION 15-23-103 (5) AND WHO COMPLIES WITH THE PROVISIONS OF THE "COLORADO ELECTRONIC PRESERVATION OF ABANDONED ESTATE PLANNING DOCUMENTS ACT", ARTICLE 23 OF TITLE 15, CONCERNING AN ORIGINAL ESTATE PLANNING DOCUMENT, AS DEFINED IN SECTION 15-23-103 (13), IS NOT SUBJECT TO THE REQUIREMENTS OF THIS ARTICLE 13 CONCERNING THAT ORIGINAL ESTATE PLANNING DOCUMENT.

SECTION 6. Act subject to petition - effective date. (1) Except as otherwise provided in subsection (2) of this section, this act takes effect January 1, 2021; except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within the ninety-day period after final adjournment of the general assembly, then the act, item, section, or part will not take effect unless approved by the people at the general election to be

held in November 2020 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

(2) Section 5 of this act takes effect only if Senate Bill 19-088 does not become law.

KC Becker
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Leroy M. Garcia
PRESIDENT OF
THE SENATE

Marilyn Eddins
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Cindi L. Markwell
SECRETARY OF
THE SENATE

APPROVED May 22, 2019 at 1:23 P.M.
(Date and Time)

Jared S. Polis
GOVERNOR OF THE STATE OF COLORADO

HB 19-1229

Legislative Council Staff
Nonpartisan Services for Colorado's Legislature

FINAL FISCAL NOTE

Drafting Number: LLS 19-0250
Prime Sponsors: Rep. Roberts; Snyder
Sen. Gardner; Lee

Date: September 11, 2019
Bill Status: Signed into Law
Fiscal Analyst: Ariel Hammerquist | 303-866-3469
Ariel.Hammerquist@state.co.us

Bill Topic: ELECTRONIC PRESERVATION OF ABANDONED ESTATE DOC

Summary of Fiscal Impact:
- ☒ State Revenue
- ☒ State Expenditure
- ☐ State Transfer
- ☐ TABOR Refund
- ☒ Local Government (*minimal*)
- ☐ Statutory Public Entity

This bill creates the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act. The Act creates a procedure to determine if an original estate planning document is abandoned, and the process to create an electronic estate planning document. This bill increases state revenue and expenditures on an ongoing basis.

Appropriation Summary: No appropriation is required for this bill.

Fiscal Note Status: The fiscal note reflects the enacted bill.

Table 1
State Fiscal Impacts Under HB 19-1229

		FY 2019-20	FY 2020-21	FY 2021-22
Revenue	Cash Funds	-	-	at least $68,750
Expenditures	General Fund	-	$153,376	-
	Cash Funds	-	-	$67,653
	Centrally Appropriated	-	$12,619	$15,949
	Total	-	$165,995	$83,602
	Total FTE	-	0.3 FTE	0.8 FTE
Transfers		-	-	-
TABOR Refund		-	-	-

EXHIBIT
tabbies
B

Summary of Legislation

This bill creates the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act. If an original estate planning document has been abandoned, the act requires the creation of an electronic estate planning document. An estate planning document is deemed to be abandoned if the possession of the original document cannot be transferred to the creator after conducting a thorough search. This bill also creates the Electronic Preservation of Abandoned Estate Planning Documents Cash Fund and allows the state court administrator's office (SCAO) in the Judicial Department to set and collect fees to cover the costs of electronically preserving estate planning documents. In addition, the SCAO may enter into an interagency agreement with another state agency to maintain any computer folder or profile required under this bill. Finally, the bill creates a process for the SCAO to grant access to electronic documents and provides requirements for the storage and deletion of such documents.

Assumptions

The bill takes effect on January 1, 2021. The newly created cash fund will not have revenue to cover the expenditures created by this bill until individuals can access the electronic documents system. The fiscal note assumes a General Fund appropriation is required for six months during the program implementation period.

State Revenue

Beginning in FY 2021-2022, state cash fund revenue to the Electronic Preservation of Abandoned Estate Planning Documents Cash Fund is expected to increase by at least $68,750 per year, as shown in Table 2. This estimate is based on the assumption that there will be between 2,500 and 5,000 individuals who will access the system per year. This cash fund revenue is subject to TABOR.

Fee Impact on Estate Planning Custodian. Colorado law requires legislative service agency review of measures which create or increase any fee collected by a state agency. These fee amounts are estimates only, actual fees are set administratively by the Judicial Department based on cash fund balance, actual program costs, and the estimated number of individuals who access documents in the system. Assuming at least 2,500 individuals access the system, a fee of $27.50 will generate approximately $68,750 in cash fund revenue. The table below identifies the fee impact of this bill.

Table 2
Fee Impact on HB 19-1229

Fiscal Year	Type of Fee	Proposed Fee	Number Affected	Total Fee Impact
FY 2021-22	Document Access	$27.50	2,500	at least $68,750
			FY 2021-22 Total	**at least $68,750**

State Expenditures

This bill increases state expenditures in the Judicial Department by $165,995 and 0.3 FTE in FY 2020-21, $83,602 and 0.8 FTE in FY 2021-22 and future years. These impacts are show in Table 3 and are discussed below. First year costs assume a January 2020 start date and reflect standard operating expenses and capital outlay costs.

Table 3
Expenditures Under HB 19-1229

	FY 2019-20	FY 2020-21	FY 2021-22
Judicial Department			
Personal Services	-	$23,063	$51,893
Operating Expenses and Capital Outlay Costs	-	$5,083	$760
One-time License Purchase and Set Up Fee	-	$80,230	-
System Development	-	$45,000	-
Maintenance	-	-	$15,000
Centrally Appropriated Costs*	-	$12,619	$15,949
Total Cost	-	**$165,995**	**$83,602**
Total FTE	-	**0.3 FTE**	**0.8 FTE**

** Centrally appropriated costs are not included in the bill's appropriation.*

Judicial Department. The bill increases state expenditures in the Judicial Department beginning in FY 2020-21 for a court programs analyst to process inquiries and access requests, ensure individuals are authorized to receive documents, and maintain a searchable database. In addition, the Judicial Department must create an electronic filing system for abandoned estate documents. The initial system set up is anticipated to cost $125,230. Starting in FY 2021-22, annual maintenance costs of the system will be $15,000.

Centrally appropriated costs. Pursuant to a Joint Budget Committee policy, certain costs associated with this bill are addressed through the annual budget process and centrally appropriated in the Long Bill or supplemental appropriations bills, rather than in this bill. These costs, which include employee insurance and supplemental employee retirement payments, are estimated to be $12,619 in FY 2020-21, $15,949 in FY 2021-22.

Local Government

Beginning in FY 2021-22, local governments will have an increase in workload to change administrative procedures regarding locating and executing estate planning documents that have been abandoned. This impact is assumed to be minimal and absorbable within existing resources.

Effective Date

The bill was signed into law by the Governor on May 22, 2019, and takes effect July 1, 2021, assuming no referendum petition is filed.

State and Local Government Contacts

Counties	County Clerks	Information Technology
Judicial	Local Affairs	Personnel
Regulatory Agencies		

HYPOTHETICAL REGARDING THE COLORADO ELECTRONIC PRESERVATION OF ABANDONED ESTATE PLANNING DOCUMENTS ACT
C.R.S. § 15-23-101, et. seq.

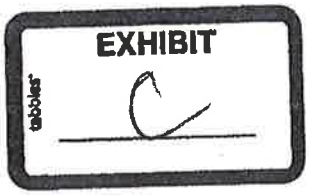
Connie Custodian (the "Custodian") is a lawyer in the twilight of her estate planning career and wants to get rid of abandoned original estate planning documents that she and her partners have stored in the firm's safe deposit box for clients over the years. These original documents may include documents concerning succession such as Wills. The proposed Colorado Electronic Preservation of Abandoned Estate Planning Documents Act ("CEPAEPDA") would create an electronic filing, storage and retrieval system for electronic copies of Wills with the State Court Administrator.

Under CEPAEPDA, before filing an electronic estate planning document with the State Court Administrator, Connie as Custodian will need to conduct a diligent search to try to locate her firm's former clients defined under the Statute as the "Creator". The Custodian is required to mail a letter to the Creator's last known address known by the Custodian. If, within 90 days of the mailing of that letter, the Creator of an original estate planning document cannot be located or does not take possession of the original estate planning document and if the Custodian is not required to transfer possession of the original document to someone other than the Creator, the original document will be deemed abandoned, and the Custodian may preserve the original document electronically as provided by the State Court Administrator.

The Custodian may create an electronic estate planning document in color and in a format using technology prescribed by the State Court Administrator. The Custodian may then file the electronic document after she: (1) examines the original and is satisfied that it is an original; and (2) compares the electronic document to the original and is satisfied that the electronic document is a true and correct copy of the original.

In order to deposit documents with the State Court Administrator, the Custodian must certify in a Filing Statement, under penalty of perjury, that she has made a diligent search for the Creator and has been unable to locate the Creator. The Filing Statement is a statement from the Custodian which states among other things: (1) whether or not the Creator can be located; (2) the Creator has not taken possession of the original document; (3) the Custodian has neither been able nor required to transfer possession of the original document to someone other than the Creator under applicable law other than this Act; (4) a description by category of each document being transferred; and (5) identifying information regarding the Creator of each document.

The Custodian must complete the Filing Statement as to each Creator. The Custodian can also be assured by the revised Rules of Professional Conduct that her deposit of the electronic estate planning documents with the State Court Administrator will preserve the attorney/client privilege and confidentiality of the documents and, as the statute provides, the deposit of the documents does not waive the privilege or confidentiality. Similarly, professional fiduciaries and financial institutions will have no liability after the deposit of electronic estate planning documents with the State Court Administrator. The State Court Administrator may rely on the information



provided and declarations made by the Custodian in the Filing Statement and has no duty to make any further inquiry.

The State Court Administrator will then create an index of Creators names and aliases that is a searchable database for all electronic estate planning documents with the State Court Administrator. The name and each alias of each Creator will be added to the index last name first as listed in each Filing Statement. The State Court Administrator will provide the Custodian with a date stamped copy of the Filing Statement acknowledging receipt of the Filing Statement and electronic estate planning documents. The State Court Administrator will certify that each electronic estate planning document was deposited with their office establishing a chain of custody. Each certified electronic document shall be deemed to be an original estate planning document under Colorado law.

After complying with the above referenced protocol and receipt of the date stamped copy of the Filing Statement, the Custodian may then destroy the original estate planning document. With regard to Wills, an electronic copy of the original Will must be submitted for formal probate.

The index of Creator names, including aliases, is searchable. A computer folder and its contents, including the Creator's profile, the Filing Statement and electronic estate planning documents, are not a public record and are not subject to any federal or state open records act or any specific information under federal, state or local law.

If the State Court Administrator receives a request from the Creator, his agent or authorized individual for a copy of an electronic document on a form provided by the State Court Administrator, upon presentation of proper identification and production of a copy of the executed estate planning document, the State Court Administrator will release the document.

If, however, the Creator is determined to be deceased, the State Court Administrator shall produce the electronic estate planning documents to the authorized recipient upon: (1) presentation of a death certificate or court order; (2) proof that the authorized recipient is appointed by a court as a fiduciary of the Creator's estate or a beneficiary of the Creator's estate, or named as a fiduciary or beneficiary under the requested document, and (3) presentation of proper identification.

The State Court Administrator is also required to honor court orders requiring the lodging of electronic estate planning documents with the particular court in the State of Colorado.

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DRAFT10
11/15/19

CONFORMING AMENDMENTS TO ETHICAL RULES IMPLICATED BY THE COLORADO ELECTORNIC PRESERVATION OF ABANDONED ESTATE PLANNING DOCUMENTS ACT

ETHICAL RULE 1.15A(d) (Property of Client)
New (d)

(d) After complying with the requirements placed upon a lawyer who is a custodian under the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act (Act), the lawyer may destroy a client's original estate planning document after preserving the original document as an electronic record under the definitions and procedures set forth in the Act, provided there are no pending or threatened proceedings involving the original document known to the lawyer and the lawyer has not agreed to the contrary.

ETHICAL RULE 1.15A(e) (Property of Client)
New (e)

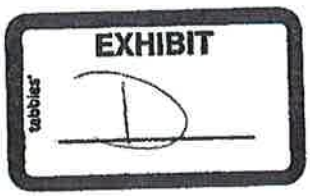
(e) The provisions of Rule 1.15B, Rule 1.15C, Rule 1.15D and Rule 1.15E apply to funds and other property, and to accounts, held or maintained by the lawyer, or caused by the lawyer to be held or maintained by a law firm through which a lawyer renders legal services, in connection with a representation.

C.R.C.P. 251.32(i) (Inventory Counsel)
New (i)

(i) If counsel appointed pursuant to this Rule discovers an original estate planning document including, but not limited to, a will, trust, or power of attorney, after complying with the requirements placed upon a lawyer who is a custodian under the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act (Act), counsel may destroy the original document after preserving the original document as an electronic record under the definitions and procedures set forth in the Act and Rule 1.15A(d).

ETHICAL RULE 1.16A (File Retention)
New Comment [6]

[6] A lawyer appointed as inventory counsel pursuant to C.R.C.P. 251.32(h) does not violate the lawyer's continuing obligation to maintain confidentiality of information related to representation under Rules 1.6 and 1.9 by preserving a client's original estate planning document as an electronic record under the definitions and procedures set forth in the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act and Rule 1.15A(d).



OTHER ETHICAL RULES AND STATUTES AFFECTED BY RULE 1.15A(d)

ETHICAL RULE 1.16A. CLIENT FILE RETENTION
Comment [1]

[1] Rule 1.16A is not intended to impose an obligation on a lawyer to preserve documents that the lawyer would not normally preserve, such as multiple copies or drafts of the same document. A client's files, within the meaning of Rule 1.16A, consist of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice. A lawyer's obligations with respect to client "property" are distinct. Those obligations are addressed in Rules 1.15A and 1.16(d). "Property" generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills.

RULE 251.32(h)

(h) Protective Appointment of Counsel. When an attorney has been transferred to disability inactive status; or when an attorney has disappeared; or when an attorney has died; or when an attorney has been suspended or disbarred and there is evidence that the attorney has not complied with the provisions of C.R.C.P. 251.28, and no partner, executor, or other responsible party capable of conducting the attorney's affairs is known to exist, the chief judge of any judicial district in which the attorney maintained his office, upon the request of the Regulation Counsel, shall appoint legal counsel to inventory the files of the lawyer in question and to take any steps necessary to protect the interests of the attorney in question and the attorney's clients. Counsel appointed pursuant to this Rule shall not disclose any information contained in the files so inventoried without the consent of the client to whom such files relate, except as necessary to carry out the order of the court that appointed the counsel to make such inventory.

INVENTORY COUNSEL TRAINING MANUAL

8. However, if the client file contains original documentation (i.e. original signed documents such as wills, promissory notes, powers of attorney, deeds, checks, or any digital information including CDs, tapes, or video cassettes), these should be returned to clients even if created more than three years prior to the date of the event that triggered appointment of Inventory Counsel.

26. Original Wills: Inventory Counsel should deposit original wills with the Probate Court in the county in which the decedent resided or was domiciled at death for lodging in the records of that court. C.R.S. § 15-11-516.