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

AGENDA

April 29, 2016 9:00 a.m.
Supreme Court Conference Room4244
Ralph Carr Colorado Judicial Center, 4th Floor
2 East 14th Avenue, Denver
Call-in numbers: 720-625-5050 – Access Code: 52033621#
WiFi Access Code: @cce$$0123

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1. Approval of minutes of January 29, 2016 meeting [to be distributed separately]

2. Report re: ABA Ethics 20/20 and other amendments approved on April 7, 2016, and discussion of potential educational outreach [Marcy Glenn, April 8, 2016 email to Committee]

3. Report from Fee Subcommittee [Nancy Cohen and Jamie Sudler, pages 1-42]

4. Report from Orphaned COLTAF Funds Subcommittee [Alec Rothrock, pages 43-45]

5. New Business:

   a. Proposed amendment to Rule 1.6 comments [Marcy Glenn, pages 46-53]

   b. Proposed amendment to ABA Model Rule 8.4 and Comment [3] [Marcy Glenn, pages 54-67]

6. Administrative matters: Select next meeting date

7. Adjournment (before noon)

Chair
Marcy G. Glenn
Holland & Hart LLP
(303) 295-8320
mglenn@hollandhart.com

Memo

To: Standing Rules Committee

From: Jamie Sudler, Chief Deputy Regulation Counsel

Re: Proposed Flat Fee Rule

Date: April 7, 2016

I. Introduction

This memo outlines issues about flat fees and addresses some of the matters that the Office of Attorney Regulation Counsel handles on a regular basis. As discussed below, the current state of the law is not clear about what a lawyer can do if the lawyer has drafted an ambiguous flat fee agreement, or has not communicated the basis or rate of a flat fee in writing.[1]

At the last Standing Rules Committee meeting on January 29, 2016, several drafts of a rule about flat fee arrangements were discussed.[2] After that meeting it was apparent that some of the problems reviewed in this area by OARC may not be fully understood.

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[1] *See* Colo. RPC 1.5(b) which provides in pertinent part that a lawyer who has not regularly represented the client shall communicate in writing the basis or rate of the fee and expenses before or within a reasonable time after commencing the representation.

[2] *See* Memo to Standing Rules Committee, January22, 2016, **Exhibit A** hereto.

The most difficult issue that the subcommittee and the full committee has discussed is what should happen when the attorney-client arrangement is terminated before the goal of the representation is accomplished. Should the lawyer who has drafted an ambiguous agreement, or who has no agreement be allowed to determine unilaterally what she has earned and keep those funds? Or should the lawyer have to return funds and seek determination by a court of the amount the lawyer might be entitled to recover based upon an equitable theory. As discussed below, the recent case of *Matter of Gilbert*, 346 P.3d 1018 (Colo. 2015) does not answer these questions definitively.

II. Flat Fee Matters Addressed by OARC

Some of the major areas in which we see complaints against lawyers involve advanced fees, fee agreements, and fees they claim they earned. Many of these concern flat fees. A portion of these cases result in discipline, and some of them result in diversion out of the discipline process.[3] We also handle less serious cases by dismissing them, and providing guidance to the lawyer about fee issues. Sometimes we will dismiss a case upon the lawyer's agreement to attend Ethics School or Trust Account School.

[3] C.R.C.P. 251.13 Alternatives to Discipline.

In comparison to other areas of attorney misconduct, those relating to fees and fee agreements are near the top of the list both in the number of requests for investigation and the number of rule violations.

Here are some statistics from 2015: at the Intake[4] stage of the process, Fee Issues represented 11% of all the requests for investigation we received. *See* **Exhibit B**. This category was second in number only to requests for investigation about the strategy or tactics of an opposing counsel. At the Intake stage, complaints about fees were slightly higher in number than those about lack of communication or lack of diligence.

A number of those requests for investigation were dismissed, or handled through a diversion agreement at the Intake Division. However, some of them were processed to the Trial Division for more investigation.[5] At that stage, our data shows that in 2015 there were 45 violations of Colo. RPC 1.5 either admitted by the lawyer, found by a Hearing Board, or implicated in a diversion agreement. *See* **Exhibit C**. This number includes more than flat fee issues, but it is unknown how many more. OARC does not keep statistics on how many of those 45 matters involved flat fees.

In an effort to show how flat fee issues have come up, we have attached an **Appendix** to the end of this memo that outlines various flat fee cases for a few years

[4] C.R.C.P. 251.9(b).
[5] C.R.C.P. 251.10

back. The cases are grouped into: A) cases in formal proceeding in front of the Presiding Disciplinary Judge; B) cases that resulted in a diversion agreement; C) cases that were dismissed; and, D) pending cases. The method used to assemble the Appendix was to search our data base for cases that involved the term "flat fee," and also to review the diversion summaries that appear in the Colorado Lawyer each quarter. The Appendix does not represent a complete review of all flat fee cases; there are more, but time constraints led to this summary.

III. Current State of the Law

When *In re Sather*, 3 P.3d 403 (Colo. 2000) was issued by the Supreme Court, this office understood the case to mean that lawyers had to return unearned fees to the client, and the lawyer could not do a unilateral *quantum meruit* analysis of what she earned. If the lawyer had no written fee agreement or communication with the client, the lawyer would have to return all fees advanced and seek a court's determination of *quantum meruit*. The following language was viewed as direction about lawyer regulation in this area:

> In addition to protecting client property, requiring an attorney to keep advance fees in trust until they are earned protects the client's right to discharge an attorney. *See* Colo. RPC 1.16(d) cmt. ("A client has a right to discharge an attorney at any time, with or without cause, subject to liability for payment for the lawyer's services."). *Upon discharge, the attorney must return all unearned fees in a timely manner, even though*

> *the attorney may be entitled to quantum meruit recovery for the services that the attorney rendered and for costs incurred on behalf of the client. See* Colo. RPC 1.16(d); *People v. Crews*, 901 P.2d 472, 474-75 (Colo.1995); *Olsen & Brown*, 889 P.2d at 677.

3 P.3d at 409-10. (emphasis added). *Sather* was focused much more on the issue of whether a lawyer should be required to place a flat fee in trust until it was earned. The issue of whether the Mr. Sather had earned fees under a *quantum meruit* theory and was entitled to the *amount* of fees he retained was not litigated in the case. At the time of the *Sather* matter the critical issue was whether a lawyer had to place the advanced flat fees in trust. The novelty of that entrustment issue eclipsed any concern about the money Mr. Sather retained.

The Court in *Sather* went to great lengths to discuss flat fees, general retainers, and special retainers. *Sather* was important guidance to OARC and all Colorado attorneys.

The Supreme Court has recently clarified that OARC's view of the above language was not quite correct. In *Matter of Gilbert*, 346 P.3d 1018 (Colo. 2015) the Court wrote:

> We conclude that *In re Sather* does not stand for the proposition that where a noncontingent fee agreement is silent as to how the attorney will be paid in the event of early termination, the attorney must return the entire advance fee upon discharge regardless of the work performed to that point.

346 P.3d at 1023.

From the Court's opinion in *Gilbert*, one might conclude that a lawyer can unilaterally determine what is owed under a *quantum meruit* analysis and keep what the lawyer determines to be appropriate.[6]

But the status of the law is not that clear. The Court's opinion in *Gilbert* goes on to state at the end:

> Moreover, by upholding the Hearing Board's determination in this case, *we do not intend to suggest that attorneys may unilaterally determine what they believe they are owed in quantum meruit.* Rather, we simply conclude that the Hearing Board did not err in this case when it determined that Gilbert did not violate Rule 1.16(d) by failing to return that portion of the fee to which she was entitled in quantum meruit.

346 P3d. at 1028.

The language seems to limit the opinion to the specific facts of *Gilbert* which makes it difficult to apply from a regulatory and educational perspective. We are at the point of needing clarification as to how we regulate lawyers not only to protect clients, but to educate lawyers how to handle flat fees.

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[6] It is important to remember that the Court's language in *Gilbert* arose from a case in which a lawyer had no written explanation to the client of how a *quantum meruit* analysis would be done. And also the lawyer had not informed the client of any mileposts or earmarks that explained how the flat fee was earned.

IV. Proposed Rules

OARC's position is that it make sense to have a pattern flat fee arrangement which was circulated in January. *See* **Exhibit D**. And we are urging the full Standing Rules Committee to recommend the following rule[7] to the Supreme Court:

NEW RULE 1.5(__)

[Version 4, from Jan. 22, 2016 Memo, Exhibit C hereto]

(a) The term "flat fee" refers to an arrangement for legal services of an attorney or attorneys under which the client agrees to pay a specified maximum amount for a legal service to be performed by the attorney.

(b) Each flat fee arrangement shall be in writing and shall contain the following:

i. A description of the services the attorney agrees to perform;

ii. A statement of the maximum amount to be paid to the attorney for the services performed;

iii. A description of when or how fees are earned by the attorney, unless the attorney earns no fees until all of the specified legal services are completed;

iv. The amount if any of the fees the attorney is entitled to keep upon termination of the representation before the specified legal services or a portion of them have been performed.

(c) If a flat fee arrangement is not in substantial compliance with the Flat Fee Arrangement form [refer to where from is placed] and the attorney-client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in the event the lawyer asserts that the client has been unjustly enriched.

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[7] For alternative proposed rules *see* **Exhibit A** hereto, pp.2-3.

The proposed rules that have been discussed to date could give needed clarification to flat fee arrangements. There has not been much disagreement about a rule that specifies what a flat fee arrangement should contain. The major controversy in the proposed rules is this: what should happen if a lawyer has no flat fee agreement, or one that does not address what happens to fees upon termination before the objective of the representation is accomplished? Should the lawyer be required to return all of the advanced fee, and submit her *quantum meruit* claim to a court; or should the lawyer be able to determine unilaterally what she is owed despite not having explained in writing to the client how she would do this?

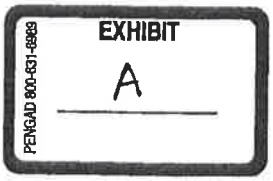
The version of a proposed rule that requires the lawyer to refund all of the advanced fee seems to some to be too harsh and imposes a penalty on a lawyer. However, any lawyer can easily avoid this result by having a simple fee agreement that explains what happens in the event of early termination. *See* **Exhibit D**.

One of the objections that has been expressed about such a rule, besides the penalty argument, is that the lawyer who has to go to court to assert a *quantum meruit* claim, will almost always face a counterclaim for malpractice. While that could be the case, the lawyer can avoid this possibility by having a simple fee arrangement as suggested.

OARC submits that it is not difficult to use a flat fee arrangement patterned after the form included with the proposed rules. The notion that a lawyer, who cannot use a simple fee arrangement, should be able to determine unilaterally what she is owed seems unfair to clients. That result rewards the lawyer for not being clear at the outset of the representation. It can work to deprive a client of needed funds to get their representation concluded by paying a successor lawyer.

V. Conclusion

The proposed rule is fair to the lawyer and to the client, and is similar to Colo. RPC 1.5(c) that requires contingent fee agreements to comply with Chapter 23.3 of the Civil Rules of Procedure. The proposed rule gives lawyers a simple template to follow. It promotes the public interest through compelling clarity in communication about flat fees, and protects clients from lawyers who cannot comply with very simple flat fee arrangements.



Memo

To: Standing Rules Committee

From: Jamie Sudler and Nancy Cohen

Date: January 22, 2016

Subject: Fee Subcommittee Report

Introduction

At the June 5, 2015 meeting of the Standing Rules Committee, a subcommittee was appointed to consider issues concerning flat fees and perhaps other fee issues triggered by 1) *In re: Gilbert,*[1] and, 2) a letter to the Committee from Steve Jacobson, Chair of the Attorney Regulation Committee.

The following members of the Committee agreed to serve on the Subcommittee: Lisa Wayne, David Little, Tom Downey, Cecil Morris, Matt Samuelson, and Gary Blum. Marcy Glenn, Chair of the Standing Rules Committee appointed Nancy Cohen and me to be co-chairs, and she appointed Steve Jacobson to the Subcommittee. The Subcommittee recruited practitioners including Jeff Joseph (immigration), Martha Ridgeway (estate planning), Nancy Elkind (immigration) and Melinda Harper (non-lawyer, CPA), all of whom actively participated in our meetings.

The Subcommittee met 5 times in person with some members calling in. We addressed flat fees almost exclusively at this time, but understand that the Committee may want us to address other fee issues in the future.

The discussions have resulted in the attached draft rules and a draft flat fee arrangement.

The Subcommittee did not reach a consensus on which version it supported. And, there was no one draft that drew the support of a majority of the Subcommittee. However, our sense of the Subcommittee's view as a whole is that a rule in the flat fee area will be helpful not only to protect the public, but also to guide practitioners.

[1] *In re Gilbert,* 346 P.3d 1018 (Colo. 2015).

As our discussions evolved we do not remember anyone stating that we should do nothing in this area.

Proposed Rules

As mentioned, there are 4 versions of a Flat Fee rule submitted for consideration by the whole Committee. The versions are identical in subparagraphs (a) and (b):

> (a) The term "flat fee" refers to an arrangement[2] for legal services of an attorney or attorneys under which the client agrees to pay a specified maximum amount for a legal service to be performed by the attorney.
>
> (b) Each flat fee arrangement shall be in writing and shall contain the following:
>
> i. A description of the services the attorney agrees to perform;
>
> ii. A statement of the maximum amount to be paid to the attorney for the services performed;
>
> iii. A description of when or how fees are earned by the attorney, unless the attorney earns no fees until all of the specified legal services are completed;
>
> iv. The amount if any of the fees the attorney is entitled to keep upon termination of the representation before the specified legal services or a portion of them have been performed.

[2] The Subcommittee used the term "arrangement" instead of "agreement" because Colo. RPC 1.5(b) does not require an agreement, but instead requires the lawyer to give the client a written advice of the basis or rate of the fee and expenses.

The Subcommittee did reach a consensus that (a) and (b) are appropriate. However, particular members may not be in support of a new rule if it contains a subparagraph (c) with which they do not agree. We decided to submit this issue to the Committee as a whole.

The issue on which there was no consensus is what happens if a lawyer's flat fee arrangement does not contain the items in subparagraph (b) above. Version 1 has no provision about what happens. Version 2, 3 and 4 contain alternative provisions.

Version 2 provides:

> (c) If a flat fee arrangement is not in substantial compliance with this Rule then it is unenforceable.

Version 3 provides:

> (c) If a flat fee arrangement is not in substantial compliance with this Rule and the attorney-client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in the event the lawyer asserts that the client has been unjustly enriched.

Version 4 provides:

> (c) If a flat fee arrangement is not in substantial compliance with the Flat Fee Arrangement form [refer to where from is placed] and the attorney-client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in the event the lawyer asserts that the client has been unjustly enriched.

There was much discussion among the members of these drafts and what should happen if a lawyer does not include the basic principles in a flat fee arrangement. Our sense is that the Subcommittee wants a full discussion of these versions at the Committee where people can express their thoughts and listen to other points of view.

Version 4 refers to a Flat Fee Arrangement form. The proposed form is attached and the main motivation for the form is to give lawyers a template they can adapt to their practice. It is a bare bones template, and many lawyers would use the form as a starting point. The form could be used regardless of the version supported by the Committee.

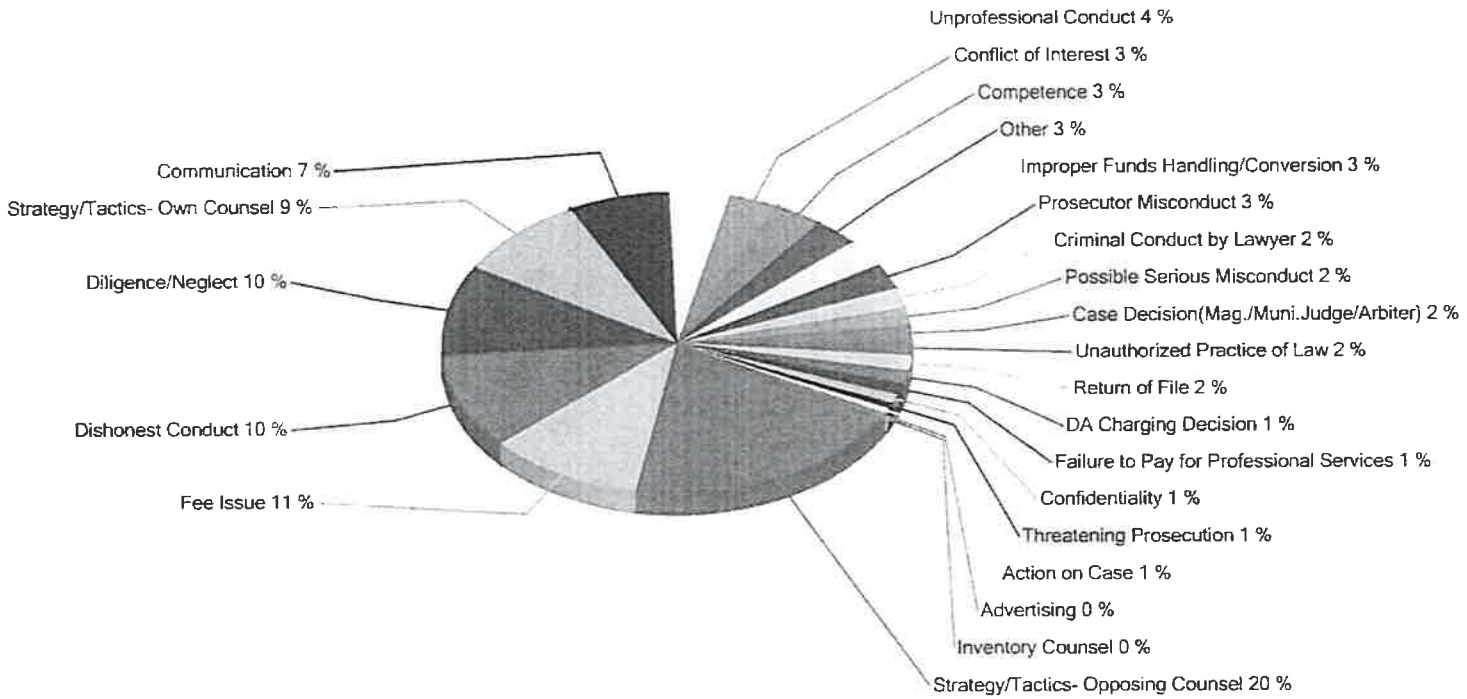
We did not attempt at this point to decide where the form would appear, although, of course, we noted that the Contingent Fee form is in Chapter 23.3 of the Civil Rules of Procedure.

We have not drafted comments to go along with any of the versions. And we did not consider exactly where to place a new flat fee rule; however, Rule 1.5 is the logical place for it. One suggestion is that it could be Rule 1.5(h).

Conclusion

The Subcommittee forwards these proposals to the Committee for discussion and consideration. During that discussion, the members of the Subcommittee will be able to express their views of the different versions.

Colorado Supreme Court
Attorney Regulation Counsel
Central Intake - Nature of Inquiries
January 01, 2015 - December 31, 2015



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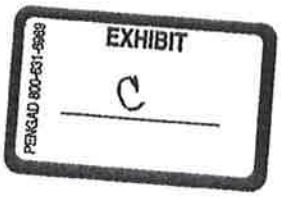


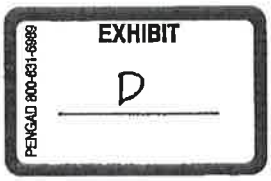
Rule Violation Counts

1/1/2015 Thru 12/31/2015

Rule	
1.1 ~ Rule 1.1 Competence	22
1.15 ~ Rule 1.15 Safekeeping Prop.	4
1.15(a)(2013) ~ Rule 1.15(a)(2013)	2
1.15a ~ Rule 1.15(a)	34
1.15b ~ Rule 1.15(b)	13
1.15c ~ Rule 1.15(c)	15
1.15d1 ~ Rule 1.15(d)(1)	2
1.15j ~ Rule 1.15(j)	1
1.15j1 ~ Rule 1.15(j)(1)	1
1.15j2 ~ Rule 1.15(j)(2)	1
1.16a ~ Rule 1.16(a)	2
1.16a1 ~ Rule 1.16(a)(1)	1
1.16a3 ~ Rule 1.16(a)(3)	1
1.16d ~ Rule 1.16(d)	31
1.2 ~ Rule 1.2 Scope & Objectives	2
1.2(d) ~ Rule 1.2(d)	1
1.2a ~ Rule 1.2(a)	1
1.3 ~ Rule 1.3 Diligence	42
1.4 ~ Rule 1.4 Communication	2
1.4a ~ Rule 1.4(a)	17
1.4a2 ~ Rule 1.4(a)(2)	3
1.4a3 ~ Rule 1.4(a)(3)	15
1.4a4 ~ Rule 1.4(a)(4)	9
1.4b ~ Rule 1.4(b)	15
1.5 ~ Rule 1.5 Fees	1
1.5(d) ~ Rule 1.5(d)	1
1.5a ~ Rule 1.5(a)	11
1.5b ~ Rule 1.5(b)	11
1.5c ~ Rule 1.5 (Fees)	1
1.5c ~ Rule 1.5(c)	1
1.5f ~ Rule 1.5(f)	18
1.5g ~ Rule 1.5(g)	1
1.6 ~ Rule 1.6 Confidentiality	2
1.6a ~ Rule 1.6(a)	1

1.6d ~ Rule 1.6(d)	1
1.7 ~ Rule 1.7 Conflict - General	3
1.7a2 ~ Rule1.7(a)(2)	1
1.8 ~ Rule 1.8 Conflict - Trans.	1
1.8a ~ Rule 1.8(a)	1
1.8c ~ Rule 1.8(c)	1
1.8e ~ Rule 1.8(e)	2
1.8j ~ Rule 1.8(j)	1
1.9 ~ Rule 1.9 Conflict - Fmr Client	2
251.10 ~ Rule 251.10(a)	3
251.21 ~ Rule 251.21	1
251.5 ~ Rule 251.5	11
251.8 ~ Rule 251.8 Serious Misconduct / Felony Conviction	4
251.8.6 ~ Rule 251.8.6 Failure to Cooperate	4
3.1 ~ Rule 3.1 Meritorious Claims	1
3.3a ~ Rule 3.3(a)	1
3.3a1 ~ Rule 3.3(a)(1)	3
3.4 ~ Rule 3.4 Fairness-Opp. Party	1
3.4a ~ Rule 3.4(a)	2
3.4b ~ 3.4(b)	1
3.4c ~ Rule 3.4(c)	16
3.5 ~ Rule 3.5 Impartiality & Decor.	1
4.1 ~ Rule 4.1 Truthfulness	2
4.2 ~ Rule 4.2 Communication	1
4.4 ~ Rule 4.4 Respect for Rights	1
4.5a ~ Rule 4.5(a)	1
5.1(b) ~ Rule 5.1(b)	1
5.3 ~ Rule 5.3 Resp.-Nonlawyer Asst.	1
5.3b ~ Rule 5.3(b)	2
5.3c ~ Rule 5.3(c)	1
5.5a ~ Rule 5.5(a)	3
5.5a1 ~ Rule 5.5(a)(1)	3
5.5a3 ~ Rule 5.5(a)(3)	2
8.1b ~ Rule 8.1(b)	9
8.4b ~ Rule 8.4(b)	9
8.4c ~ Rule 8.4(c)	44
8.4d ~ Rule 8.4(d)	22
Rule 1.15(a)(2008) ~ Rule 1.15(a)(2008)	3
Rule 1.15(b)(2008) ~ Rule 1.15(b)(2008)	2

Rule 1.15(c)(2008) ~ Rule 1.15(c)(2008)	2
UPLCONTEMPT ~ Contempt	1



Flat Fee Arrangement

_____ ("Lawyer") will charge _____ ("Client") fees for providing legal services on the following basis or at the following rate:

I. Legal Services to be Performed.

In exchange for the fees described in this Arrangement, Lawyer will perform the following legal services: [Insert description of case. Example: representation in DUI criminal matter in Jefferson County.]

II. Flat Fee.

This is a flat fee arrangement. Client will pay Lawyer the sum of $_____ for Lawyer's performance of "Work to be Performed" as described in Section I of this Statement. ***Client understands that Client is NOT entering into an hourly rate contract for the fee. This means that Lawyer will devote such time to the case as is necessary, but Lawyer's compensation will not be increased or decreased based upon the amount of hours expended. Instead, Lawyer has offered the Client a fixed fee for Lawyer's services.***

III. When fee is earned.

a. Flat fees will be earned in increments, as follows:

Description of Increment: _____ Amount Earned: _____

Description of Increment: _____ Amount Earned: _____

Description of Increment: _____ Amount Earned: _____

Description of Increment: _____ Amount Earned: _____

Description of Increment: _____ Amount Earned: _____

b. All unearned fees held by Lawyer shall be timely returned to Client at the completion of the representation.

IV. When Fee is Paid.

Client shall pay Lawyer [select one: as work is completed or in advance]. Fees paid in advance shall be placed in the Lawyer's trust account and shall remain the property of Client until they are earned. When a fee is earned pursuant to this arrangement it becomes the property of Lawyer.

V. Right to Terminate Representation.

Client and Lawyer each have the right to terminate the representation at any time and for any reason. In the event the representation is terminated by Client without cause, or by Lawyer with or without cause, Client shall pay, and Lawyer shall be entitled to, all fees earned by Lawyer as described above up to the point of termination. In a litigation matter, Client shall pay, and Lawyer shall be entitled to, all fees earned up to the point that the court grants Lawyer's motion for withdrawal. ***Should the representation be terminated during a period between completions of increments described in Section III above, the client shall pay fees based on a computation of time actually worked by the Lawyer at the rate of_____ per hour. However, such fees shall not exceed the amount that would have been earned had the representation continued until the completion of the next increment.***

VI. Estimate of Costs.

Lawyer anticipates that this representation is likely to result in the following costs, which are the sole responsibility of Client:

Type: _____ Estimated Cost: _____

Type: _____ Estimated Cost: _____

VII. Fee Arbitration [Optional]

Client and Lawyer agree that any disputes that arise between them concerning the fees owed by Client or earned by Lawyer shall be submitted to fee arbitration with . . . . .

APPENDIX

Summary of Recent Cases Involving Flat Fees

Compiled by Jamie Sudler

Chief Deputy Regulation Counsel

A. Formal Proceedings – Cases Filed in front of Presiding Disciplinary Judge

1. 13 PDJ 029 – Stipulation: 90-Day Suspension all Stayed – 2 year probation with refund of about $3,300 to Client.

Client retained Respondent to provide legal services in September of 2009. Client's brother died in Denver, Colorado weeks after inheriting a large amount of money. After an investigation, including an autopsy, the manner of death was ruled an accident. The cause of death was found to be complications from blunt force injuries of the thorax due to a fall.

Client was suspicious of the circumstances of her brother's death Respondent was hired to investigate the facts surrounding the death and the thoroughness of the subsequent police investigation.

Client paid Respondent a flat fee of $35,000 on September 28, 2009. Respondent deposited the check into his COLTAF account. The flat fee was based on an estimated 100 hours of investigative time and approximately $5,000 in expenses.

Respondent did not provide the Client with a written fee agreement or provide any written communication regarding the basis of his fee. There was no agreement, written or oral, between Respondent and the Client regarding when the $35,000 flat fee would be earned. Respondent contends that there was an implied agreement that the flat fee would be earned as Respondent performed legal services on behalf of Client.

Over the next seven months, following Respondent's deposit of the $35,000 fee into to his trust account, Respondent made eleven withdrawals until none of the Client's fee remained in the account.

Respondent never provided the Client with any written accounting or explanation of the services he had performed to earn the various amounts withdrawn from the trust account.

Respondent did not keep written time records. He met with his bookkeeper, who is also his wife, approximately once a week to tell her the percentage of the total work he had completed on the file. She would then transfer the corresponding percentage of the flat fee from the trust account as earned fees.

2. 14 PDJ 038 - six-month suspension all stayed during a two-year probation with conditions including financial monitoring.

Respondent agreed to represent his niece, and her then-husband, with respect to claims arising from a December 2007 automobile accident. Respondent was to handle the representation for a flat fee of $1,000 each, to be collected out of any recovery. (This arrangement was apparently a flat fee to be collected based upon a contingency.)

Respondent did not execute a fee agreement or otherwise provide the clients with a writing setting forth the basis or rate of the fee and expenses for the representation.

This matter was resolved through a stipulation approved by the PDJ for a six-month suspension all stayed during a two-year probation with conditions including financial monitoring.

3. 15 PDJ 046 – Currently Pending in front of PDJ (allegations below are from the complaint and only those related to fees are included):

Respondent represented client in an immigration matter.

Respondent and Client first met on August 31, 2012. On that date, Respondent issued a "Memo" to Client that described their fee agreement. They agreed to a flat fee of $2,000 for the immigration matter, which Respondent would earn at a rate of $200 per hour. Client paid Respondent $600 during their first meeting. Client then paid the balance of the $2,000 fee through monthly installments of $200 per month.

Client also paid approximately $1,700 in filing fees. Respondent deposited the initial $600 payment, as well as all subsequent payments, directly into his operating account.

Respondent deposited the initial $600 into his operating account before he earned it.

Respondent's planned to file for a waiver based on the hardship Client's deportation would impose on her son. Respondent recommended that Client and her husband send their son to a therapist so that their application could be supported by the therapist's opinion. Respondent's I-601A strategy was fatally flawed, because I-601A applications cannot depend on the hardship imposed on a citizen child.

Respondent told Client's husband to file the I-601A forms, but her husband did not know how. He asked to meet with Respondent to discuss the process but Respondent would not return his calls.

Client and her husband sent Respondent a certified letter requesting a fee refund, but it was returned unopened.

Once Client filed a complaint with the Office of Attorney Regulation Counsel, Respondent delivered a packet of information to Client and her husband regarding the I-601A process, but never communicated with them again and never refunded any of his fees.

3. 15 PDJ 035 – Stipulation to Public Censure

Calderon Matter, #14-797

On March 27, 2013, the client (an undocumented immigrant) hired respondent to defend him against charges for second degree assault, menacing, and child abuse. Client had a previous lawyer who provided Respondent the file and a large amount of discovery.

Respondent used an hourly fee agreement form, but added a handwritten note stating the client agreed to a "flat fee of $10,000 for representation through trial." Client signed the fee agreement.

Also on March 27, 2013, Client paid Respondent $2,500 cash. The rest of the fee was to be paid in $500 monthly payments. Trial was set for October 2013. Respondent did not put the Client's initial $2,500 in his trust account, and instead used the $2,500 to pay office expenses. OARC stipulated that Respondent earned the $2,500 within approximately one week of receiving it from the client.

The client's trial was pushed to February 2014. After all evidence was given to the jury for deliberation, the jury came back with a question to the judge. The Judge, Respondent and the deputy district attorney read the question. The wording of the jury's question made it clear the jury was about to find the client guilty of at least second degree assault.

Respondent then took the client out to the hall and told the client about the jury's question and reminded the client he would receive at least five years in jail, and then deportation.

The client was understandably extremely upset, as was Respondent. Respondent then said to his client, "If you were ever thinking of running, now would be the time to do it."

The client did not run. The jury came in and gave the verdict of guilty as to second degree assault, the client was remanded into custody and is now in prison.

Salvator Matter, # 14-3498

On October 5, 2013, Client Husband paid Respondent $5,000 to represent Client's wife. She is an undocumented immigrant. Respondent was hired to defend her against charges of Intent to Defraud, due to her use of a false identification card, and to help her with immigration issues.

Respondent and Client Husband signed a flat fee agreement wherein Respondent agreed to represent Client Wife through disposition of her case for $5,000. Client Husband paid the full amount on October 5, 2013.

Respondent did not put the $5,000 in his trust account or otherwise safeguard the funds. OARC stipulated that Respondent earned the $5,000 during the next month. In November 2013, Client's wife decided to plead guilty to a charge involving moral turpitude, and thus she was scheduled to be deported.

The PDJ approved a stipulation to a public censure.

4. 14 PDJ 075 – Eight-month Stayed Suspension by Stipulation

In late 2011, Client, a dentist, hired Respondent in a collection matter involving a second dentist. Respondent and his client entered into an hourly fee agreement with a retainer. Three weeks later, after negotiation about the fee, the client signed a second fee agreement with the same scope of representation. The agreement stated that the client would pay $3,000.00 immediately and $3,000.00 per week up to an "estimated sum" of $25,000.00. Although Respondent later referred to this agreement as a "flat fee" agreement, he intended it to be an hourly fee agreement with a cap of $25,000.00. No hourly rate in fact appears in the agreement. Respondent did not abide by his obligation to make his fee agreement clear.

Client paid Respondent more than $25,000.00 between late 2011 and mid-2012. Respondent deposited all of those payments into his operating account, believing he had earned them prior to receipt based upon work he had performed. By depositing the funds into his operating account, Respondent commingled his client's funds with his own.

The PDJ approved a stipulation to an 8-month stayed suspension all stayed during an 18-month suspension.

5. 14 PDJ 028 – 90-day suspension stayed for 2 year probation

On November 30, 2012, Respondent agreed to represent Client in a DUI and Vehicular Assault case for the entirety of her case for a flat fee of $2000. Respondent's fee agreement did not contain benchmarks describing when the fee would be earned.

When Client's grandmother gave Respondent two checks totaling $2000 to cover Respondent's fee, he deposited them into his operating account, not his trust account, despite not having earned the funds. Respondent believed he had earned at least a portion of the funds.

Respondent's services were terminated on December 17, 2012, and he agreed to accept $500 of his $2000 fee for work performed to that date. He and Grandmother agreed to meet on December 24, 2012 to receive her refund.

Respondent did not refund the remaining $1500. According to Grandmother, Respondent advised her that he did not have the funds in the bank and could not refund her the total amount until after the beginning of 2013. Respondent states that he told Grandmother that his bookkeeper was not available to issue the check at that time.

When he made that statement, Respondent did have funds available in his operating account to pay Grandmother the full $1500. His bookkeeper issued a check for the full $2000 on December 26, 2012.

On January 8, 2013, Respondent mailed a $2000 check to Grandmother and Client, along with an invoice for $1480, which Respondent said Client owed him.

In November 2014, after a request for investigation was filed, Respondent refunded the $2000 to Grandmother and withdrew his invoice.

The PDJ approved a stipulation to a 90-day suspension stayed for 2 year probation.

6. 15 PDJ 014 – 60-day stayed suspension for one-year probation (prior discipline).

13-6340

Respondent represented Client who had been charged with various crimes. The representation began in 2012 and thereafter Client was charged with other crimes. Respondent did do work in the case: he filed eight (8) motions and he eventually moved to withdraw in May 2013 in Denver District Court cases. Respondent also handled a Department of Social Services case for Client.

The client stated that Respondent was hired on a flat fee basis. Respondent stated that there was no flat fee arrangement and that it was an hourly fee at a rate of $200.00 per hour. Respondent did not advise his client in writing of the basis or rate of his fee. Had he done so, there would not have been any

misunderstanding between Respondent and his client about the fee arrangement. In failing to do so, Respondent violated Colo. RPC 1.5(b). The evidence indicates that all of the money Respondent was paid in the matter, $3,500 was earned.

14-1342

In the second matter, Respondent represented a Client in criminal matters. And similar to his failure to have a written fee agreement in the first matter above, Respondent did not have a written fee agreement, or advice in writing to this client of the basis or rate of his fee. Respondent admits he violated Colo. RPC 1.5(b). As in the earlier matter, the evidence indicates that all of the money Respondent was paid in this matter, $500, was earned.

The PDJ approved a stipulation to a sixty-day stayed suspension during a one-year probation.

B. Diversion Agreements

January 2016

1. Respondent represented a married couple in a bankruptcy proceeding. The parties entered into two flat fee agreements, one for a Chapter 7 bankruptcy and the other for a Chapter 13 bankruptcy; the agreements listed services that were both included and excluded from the flat fee. Both fee agreements stated that if the parties enter into a fee arrangement for additional services not included in the flat fee, the parties would sign a separate hourly fee agreement. After Respondent filed a Chapter 13 bankruptcy petition for the clients, Respondent performed additional hourly work for them. However, the clients did not sign an hourly fee agreement, and Respondent did not contemporaneously communicate with the clients about the additional hourly work being performed. Nearly three years later, Respondent invoiced the clients for approximately $30,000 in additional hourly legal fees. Respondent has not pursued collection of those fees.

   Rules Implicated: Colo. RPC 1.4 and 1.5.

Diversion Agreement: As part of the conditions of the one year diversion agreement, Respondent must attend ethics school, submit to fee arbitration should the client request it, and pay all costs associated with the diversion agreement.

2. Respondent represented a client in a criminal case. The fee agreement called for a "total contractual amount," with a "down payment" of half the total amount, followed by equal payments twice per month thereafter. The fee agreement appeared to contemplate a flat fee but did not contain benchmarks or any other indicator of when the fee was earned. The client made periodic payments. Respondent deposited all payments directly into Respondent's law firm operating account, although it was not clear under the fee agreement whether the payments were earned at the time they were made. Respondent performed substantial work for the client. The client eventually pled guilty to the pending charges.

Rules Implicated: Colo. RPC 1.15(a).

Diversion Agreement: As part of the conditions of the one year diversion agreement, Respondent must submit to a financial audit, attend trust account school, and pay all costs associated with the diversion agreement.

April 2015 - 14-1539 and 14-2636 (not summarized in Colorado Lawyer)

3. Respondent agreed to represent Client on second degree felony assault charges that arose while Client was on parole. There was no written fee agreement or advisement of the basis of the fee. Both Respondent and Client agree that the "initial fee was $3,500

Respondent explained that it was to cover mostly pre-arrest tasks and there would be an additional fee of $500.00 if a plea was reached and more if the case went to trial. Client believed that this was a flat fee meant to cover the matter to resolution. According to Respondent, he explained to Client that if terminated, he would be owed an hourly rate of $400.00. Respondent received a total of $4,497.00 in fees on behalf of Client. Respondent provided documentation that he had worked a total of 14 hours on this matter.

According to Respondent, at the time of his termination he was owed another $500.00 which his firm has written off.

In a second matter Respondent agreed to represent another Client on charges of prohibited use of a weapon, and possession with intent to distribute. On May 5, 2011, Respondent agreed to represent Client for $3,500. There was no written fee agreement or statement explaining the basis of the fee.

Respondent was paid $3,472 in May of 2011. The money was deposited into Respondent's operating account. Client pled guilty on July 22, 2011, and was sentenced on October 21, 2011 to a probationary term of four years.

Respondent agreed to represent Client again on possible probation revocation charges for $5,000. There was no fee agreement or written statement explaining the basis of the fee.

In September 2014, Respondent was terminated by Client. Cllient wrote a letter to Respondent dated September 5, 2014 demanding a refund – no amount was specified.

Rules Implicated: Colo. RPC 1.4(a)(2); 1.5(b); 1.5(f); 1.5(g) 1.15(a).

Diversion Agreement: Three-year diversion agreement with conditions.

February 2015 (Not summarized in Colorado Lawyer) 14-1490

4. On January 16, 2014, Respondent was retained to represent Client in connection with two related criminal matters. Respondent and client signed a legal representation agreement.

   Pursuant to the agreement, the entire pretrial representation would be undertaken for a $3,000 "flat-rate" fee. If a trial were required, the client would be responsible for paying Respondent $1,500 per day of trial.

   Pursuant to the representation agreement, the pre-trial fee of $3,000 would be earned in increments. $1,500 would be an "engagement retainer" and would be earned upon receipt "as it is a fee which is earned as it conveys a certain benefit to the client. The benefit to the client will be that the

'engagement fee' ensures that the attorney will undertake the client's case, the attorney agrees to commit his time to the client's case and causes the attorney to forego other potential employment opportunities as a result of time commitments or conflicts."

The remaining $1,500 of the flat-rate fee would be earned "at the following intervals: A review of the case and preparation for any negotiations with district attorney, filing and handling of any motions, hearings, and final disposition including plea and sentencing hearings, if applicable."

Client paid an initial $1,500 on January 16, 2014. Because this amount was deemed earned upon receipt, Respondent deposited it directly in his operating account.

Client paid the second $1,500 installment of the $3,000 flat fee, which was received by the Respondent on January 23, 2014.

Respondent interpreted his fee agreement to allow him to deposit this entire amount into his operating account because the representation had "entered the phase" described by the language of the fee agreement quoted above. However, that language does not state when the fee would be earned and therefore eligible for a deposit into the operating account rather than the trust account. The language instead suggests that the fee would be earned in increments, or "intervals," although the rate the fee is to be earned is not apportioned among the intervals.

Respondent moved forward with the representation of Client. Plea agreements were discussed but no offer was finalized.

In May of 2014, Respondent's services were terminated. On May 5, 2014, Client's mother demanded a refund of the $3,000 paid to the Respondent. Respondent replied that he would need to review his time records on the case and that he would provide her an accounting.

Two days later, Respondent provided an invoice to Client. The fee agreement provided that Respondent's time would be billed at an hourly rate of $200 per hour in the event of termination. The invoice showed that Respondent was owed $3,820, or $820 over the amount of the fee that would be charged for the entire representation.

The Respondent has not refunded any portion of the $3,000 fee.

Diversion Agreement: As part of the conditions of the one-year Diversion Agreement, respondent agreed to fee arbitration. Respondent must also attend Ethics School.

April 2015 (Not summarized in Colorado Lawyer)

5. Between late 2012 and mid-2013, Respondent was retained by Client to provide representation in two separate matters. The first matter involved Client's friend and roommate. Client retained Respondent to represent roommate with respect to his violation of a protection order obtained by Client's ex-wife.

Respondent charged Client a $5,000 flat fee to represent roommate. In the fee agreement, Respondent erroneously referred to Client as the client, instead of roommate.

Client's mother paid Respondent his $5,000 fee by credit card in four installments. Respondent did not place the four installment payments into his COLTAF account. Respondent provided evidence to investigators showing that one of the installments was paid on November 8, 2012. He was unable to provide evidence to investigators indicating the dates upon which the remaining charges occurred because he does not have the bookkeeping records required by Colo. RPC 1.15(j).

Respondent successfully completed his representation of roommate in December 2012, by which time he had fully earned the $5,000 flat fee.

Also in December 2012, Client retained Respondent to represent him in a modification of child custody matter filed by Client's ex-wife. Again, Respondent charged Client a flat fee of $5,000 for the representation.

Neither of Respondent's fee agreements contained benchmarks indicating when portions of the flat fee would be earned.

Client contends that he paid Respondent $2,000 in cash toward the second $5,000 fee; however, he does not have a receipt for the payment, and

Respondent denies receiving such a cash payment. On May 21, 2013, Client's mother paid $2,908.10 on Client's behalf via credit card to Respondent toward the $5,000 fee.

Respondent had not earned the $2,908.10 payment at the time it was made. However, he did not deposit the payment into his COLTAF account, as required by Colo. RPC 1.5(f) and 1.15(a). According to Respondent's handwritten timesheets, he performed 22.1 hours of work in the custody matter on Client's behalf.

Respondent did not enter an appearance in the domestic relations case. He did engage in settlement negotiations on Client's behalf, as well as arranged and participated in mediation in the modification of child custody matter. When the parties were unable to reach an agreement, a hearing was set for August 5, 2013.

Prior to the hearing, Respondent terminated his representation of Client because of Client's continued threats against him and his family. He advised Client to obtain another attorney and said he would work with new counsel.

Client represented himself at the August 5, 2013 hearing. After a portion of the hearing was continued, Client retained other lawyers to represent him going forward. Respondent timely provided Client's file to his new attorneys.

April 2015

6. Respondent agreed to represent a client in the client's criminal case through a disposition hearing for a flat fee, plus costs. Upon retention, the client was to pay a portion of the fee as an engagement retainer in light of the significant amount of work immediately required of respondent. Respondent failed to communicate in writing the basis or rate of respondent's fee. Because the basis or rate of the fee was not in writing, no portion of the fee paid by the client was designated as an engagement

retainer. Respondent immediately took and spent the initial portion of the fee paid by the client. Because there was no written fee disclosure, respondent improperly took and spent the client's initial payment. Over the next several months, the client paid various additional increments totaling the balance of the fee that was owed. However, all of the payments were late, and respondent sought to withdraw before disposition of the matter. Shortly after the client made the last payment of the total flat fee, the court granted respondents motion to withdraw. The client hired another lawyer to handle the disposition hearing and trial.

Rules Implicated: Colo. RPC 1.5(b) and (f), and 1.15A(a).

Diversion Agreement: As part of the conditions of the one-year Diversion Agreement, respondent must refund the portion of the fee taken as an engagement retainer and engage in fee arbitration regarding the remaining portion of the flat fee. Respondent must also attend Ethics School and Trust Account School.

September 2014

7. Beginning in May 2013, Respondent represented Client in an eviction proceeding against her tenants.

   Respondent had not previously represented Client. He verbally advised her that his fee for "a simple eviction" was $527, which included $400 in attorney's fees, a filing fee of $97, and a process server cost of $30. Respondent did not provide the basis or rate of his fee in writing to Client.

   On May 28, 2013, Client paid Respondent his $527 fee by credit card. Respondent placed Client's funds into his operating account. Respondent should have placed Client's funds into his trust account pursuant to Colo. RPC 1.5(f) because they constituted a flat fee. However, Respondent ultimately earned those funds.

   Client's tenants retained counsel, and the case became contentious. Two days prior to the eviction trial, Respondent asked Client to pay him an additional $500 because of the additional work required on the case. Client agreed, because she was afraid Respondent would withdraw from her case.

Client prevailed at trial and was awarded attorney's fees and costs in the amount of $1,662. Although Respondent initially agreed to a flat fee of $527, he kept track of the hours he worked on Client's case. According to Respondent's records, he incurred $5,566 in fees and costs at his hourly rate of $230. This hourly rate was not communicated to Client, nor did she agree to an hourly fee arrangement. Despite having no hourly fee agreement, Respondent asked Client to pay him the amount of the award, $1,662, and advised her she could recoup those fees and costs from her tenants.

On September 17, 2013, Respondent emailed Client the following:

> I had agreed to reduce my fees to $1,162 and you promised to send that amount right after September 1. Unless the amount is received by Friday Sept 20 my offer to accept the reduced amount will be revoked and the full amount of over $5,500 will be due.

Client paid Respondent an additional $1,662 on September 18, 2013. She has not pursued the tenants for her damages or the attorney's fees and costs.

Rules Implicated: 1.5(a), 1.5(b), and 1.5(f).

Diversion Agreement: As part of the conditions of the one-year diversion agreement, the Respondent must attend Ethics School and pay all costs.

January 2014

8. Respondent met with two family members for the purpose of establishing a trust for their incapacitated mother's property. Respondent failed to explain clearly that his only client was the mother's legal representative. Client signed an hourly fee agreement. After the mother passed away, Client and other family members requested that Respondent complete a different kind of trust. Client and other family members orally agreed to pay respondent a flat fee. Respondent failed to provide Client a written statement communicating the basis or rate of the fee. Client paid Respondent for the trust. Respondent placed the fee into his trust account

and then failed to provide Client an accounting before or after he moved the fee into his operating account. Respondent substantially completed the trust, but did not provide it to Client until six months later. Respondent then failed to communicate with Client to assist in making the final changes to the trust.

Rules Implicated: Colo. RPC 1.4(a)(3), 1.5(b) and 1.15(c).

Diversion Agreement: As part of the conditions of the one-year diversion agreement, the Respondent must attend Ethics School and pay all costs.

October 2013

9. Respondent was retained to represent Client in a Chapter 13 bankruptcy. Respondent and Client entered into a written fee agreement. The fee agreement provided for a flat fee. However, it also contained provisions that provided that if Respondent was terminated, he could bill the client at an hourly rate and that the total charges may exceed the agreed upon flat fee.

   Respondent did not place the funds into a trust account, but instead placed them in a lockbox in Respondent's office. Respondent believed these funds were "more than billed for" before he left for the day. However, the fee agreement did not contain any milestones or earmarks setting forth when Respondent earned and would therefore pay himself any portion(s) flat fee.

   Client decided not to file for bankruptcy and requested a refund. Respondent did not agree to a refund. Instead, he sent the client a bill. The bill itemized work performed at Respondent's hourly rate, with total charges that exceeded the amount of the flat fee. Respondent did not seek to collect any amounts charged over the flat fee that was paid.

   Rules Implicated: Colo. RPC 1.5(a), (f) and (g).

   Diversion Agreement: As part of the conditions of the one-year diversion agreement, the Respondent must attend Trust Account School, Ethics School, either provide client with a refund or submit the

fee dispute to arbitration with the Colorado Bar Association Fee Arbitration Committee, have no further discipline and pay all costs.

January 2013

10. Respondent entered into a flat fee agreement for $800.00 to complete Client's Chapter 7 bankruptcy. Respondent's written basis for his fee did not contain earmarks or guideposts stating when Respondent earned the flat fee. Respondent withdrew about half of the flat fee from his COLTAF account as payment for the initial attorney meeting, for pulling Client's credit report, and for administrative fees. Respondent's withdrawal was not in accordance with Respondent's flat fee agreement.

    Client later decided not to file bankruptcy and requested a refund of any unearned funds. Initially, Respondent told Client that he had earned all of the funds. Later, after recognizing the defects in his written basis for his fee, Respondent refunded to Client all benchmarks for earning his fees.

    Rules Implicated: Colo. RPC 1.3, 1.4(a)(3), 1.5(f), and 7.1.

    Diversion Agreement: As part of the conditions of the two-year diversion agreement, the Respondent must attend ethics school, trust account school, compliance with the Bankruptcy Court's supervision plan, and pay all costs.

July 2012

11. Respondent was paid a fee to handle a bankruptcy matter. Although the respondent worked on the case, the respondent did not file the bankruptcy petition, nor were the fees refunded. Respondent's fee agreement also improperly referred to the fee paid as an engagement fee, as well as a nonrefundable fee and failed to state milestones to reflect when specific fees were earned.

    Rules Implicated: Colo. RPC 1.5(a), 1.5(g), and 8.4(d).

Diversion Agreement: As part of the conditions of the diversion agreement, the Respondent must attend Ethics School, have a practice monitor, refund monies in the bankruptcy case, and pay all costs associated with the two-year diversion agreement.

April 2012

12. In May, 2009, Respondent and Client entered into a written fee agreement for a Chapter 7 bankruptcy. This agreement provided for a flat fee and had guideposts describing when the flat fee was considered earned. However, the fee agreement also provided that it could be converted to an hourly rather than a flat fee at Respondent's discretion.

    In August, 2009, Client had a meeting with Respondent and paid her remaining balance. Thereafter, Client contacted Respondent about the case status in September, October and November of 2009. In December 2009, Client advised Respondent by e-mail that she wanted to meet so they could file her bankruptcy and schedule a court date for the following year. They scheduled a meeting for December 2009. Sometime before this meeting, Respondent advised Client she would have to file for Chapter 13 bankruptcy. Client decided to pursue debt settlement rather than file for Chapter 13 bankruptcy. She decided not to use Respondent to work on her debt settlement.

    Rules Implicated: Colo. RPC 1.3 and 1.4.

    Diversion Agreement: As part of the conditions of the diversion agreement, the Respondent must attend Ethics School and remove the provision in fee agreements providing that it may be converted to an hourly rather than a flat fee agreement at Respondent's discretion; have no further rule violations; and pay costs.

13. In May 2011, a secretary from Respondent's firm gave Client a fee agreement to sign with respect to Respondent's firm representing Client in a Chapter 7 bankruptcy. The fee agreement contained a termination provision advising Client how he would be charged if he terminated the firm. Otherwise, the fee agreement did not contain any earmarks, events

and/or tasks which defined when Respondent's firm earned and would therefore pay itself the flat fee.

Also in May 2011, a secretary from Respondent's firm collected a $1,000.00 retainer from Client. Respondent did not place this money into a COLTAF Trust Account. Client terminated Respondent in May, 2011. He demanded a refund of his $1,000.00 retainer. In July 2011, Client received a call from Respondent's office manager stating they would send him a refund check in the amount of $473.75. After Client spoke with Respondent later that day, she agreed to refund all but $300.00. In July, 2011, the client received a $700.00 refund check and a fee itemization.

Rules Implicated: Colo. RPC 1.15(a).

Diversion Agreement: As part of the conditions of the diversion agreement, the Respondent must attend Ethics School, have no further rule violations and pay all costs associated with the one-year diversion agreement.

C. Cases That Did Not Result in Discipline or Diversion

1. 12-14398

Attorney's Fee agreement provided in pertinent part:

Scope of representation

I [client] understand that I am authorizing the firm of _____ "the firm" to represent me "the client" in the matter of Sex Assault.

. . .

Changes in Contract/Scope of Representation

A new contract must be negotiated if the complexity of the case changes drastically or if the client requires representation in other cases. The representation for this specific case concludes with court

order. The request for revisions, motion for new trial, appeals, new cases, problems with the bondsman, etcetera are not included in this contract.

Calendar of payments

Flat fee: $3,000 Trial Costs: (this is blank on copy that was provided)

While this is a flat fee agreement, in the event that the client decides to terminate the representation before finalization of the contract, they may be charged $250.00/hour for the time that the attorney has dedicated to the case, and $90/hour for the time of the paralegal. In addition the administrative cost will be applied, and the first consultation. The client will receive an invoice within ten business days detailing all expenses paid and all accrued fees, along with a check for the amount, if any is due to the client. In the event that a balance is due from the client this amount will be applied to the total due, bringing the account to a zero balance immediately.

2. 14-690

Complainant was charged with third-degree assault (domestic violence) on in Adams County. The charge arose out of an alleged assault on his former girlfriend. She also filed separately for a civil protective order against Complainant.

Complainant hired Respondent to represent him in the criminal case on October 8, 2013. They entered into a four-sentence fee agreement, which read as follows: "[Respondent] represents [Client] in a third degree assault [sic] for a flat fee of $2500. $2000 is paid today by cash. This agreement is a receipt for the $2000 in cash. Attorney has made no guarantees other than to diligently represent [Client]."

According to Respondent, he had prepared a longer fee agreement that made clear the flat fee would be earned at a rate of $200 per hour, but Client was in a hurry and asked Respondent to prepare something shorter and simpler. Respondent prepared the agreement quoted above, and both he and Client signed it.

Client disputes this claim, and does not recall seeing a longer document or discussing Respondent's hourly rate.

Respondent admits that he should have written his $200 per-hour rate into the shorter fee agreement.

Analysis: Turning to the potential Rule 1.15 violations, our office likely would have gone forward on a case like this before *Gilbert* was decided, because it involves an attorney who agreed to handle a case on a flat fee, without benchmarks, and retained fees after he was terminated.

3. 12-12910

Respondent represented a client in a criminal matter for a flat fee. The client terminated his representation before disposition of the case.

Respondent sent email to a friend of the client, who spoke English, representing the fee agreement. He requested a flat fee of $15,000 if disposition before trial, and a trial fee of $10,000. The trial fee was to be paid 30 days prior to trial. At the time the email was sent, the trial was not set. There was no milestones, either hourly or by task to show when fees were deemed earned. There was no *quantum meruit* clause or mention of an alternative hourly rate.

The client requested an accounting and Respondent stated he earned $5,000 based on 16.9 hours of work at $300 an hour.

OARC determined that the fees did not seem excessive. It was determined that this was a fee dispute. Respondent did not provide an explanation to his client about changing the terms of the fee agreement and transfer of funds from the trust account.

Respondent was required to attend trust account school and refund all funds provided by his client.

4. 14-60 (dismissed with educational language to Respondent)

Respondent's fee agreement with Client in a criminal matter provides that he would be "...compensated at the flat rate of $3,500.00, plus costs,

through disposition of the matter, whether by dismissal, plea bargain, or otherwise, other than trial." Otherwise, the fee agreement did not include any earmarks, events and/or tasks which defined when Respondent earned and would therefore pay himself his flat fee. Under these circumstances, Respondent should not have withdrawn any funds from his COLTAF Account until disposition of the matter as set forth in his fee agreement.

Next, Respondent asserts he provided four billing statements to Client. Client asserts he only received these billing statements with Respondent's response to the request for investigation. If so, Respondent failed to sever Client's interest in the funds he paid to Respondent when Respondent treated those funds as earned. Even more problematic is the lack of detail about the time spent or the basis of the dollar figure that is attributed to the work performed, especially in light of Respodnent using these billing statements to justify treating client funds as earned.

D. Pending Cases not yet resolved

1. 15-2688

Respondent charged $4,000 capped hourly rate for a criminal defense case on "potentially attempted murder." From February, 2015 until fired on June, 15, 2015. Respondent charged an additional $1,000 for going to trial. Client paid a total of $5,040 (costs ended up being more than $40). There are receipts and it appears to have been deposited in the trust account. Respondent has kept the funds although Respondent did not take the case to trial. Respondent has billing records that appear to show the amounts earned; however, the charged rate was higher than the capped or flat rate.

2. 16-446 (recently transferred to Trial Division)

Respondent's fee agreement states:

ATTORNEY FEE:

The cost for legal representation is as follows:

A flat fee of $4000.00

Of this fee, $3000.00 covers my representation at the DMV hearing, if a DMV hearing is held and all pre-trial work done for your criminal case. The fee will not change if no DMV hearing is held.

[Explanation of costs. Omitted here]

Upon execution of this agreement, and no later than the date of filing an entry of appearance, you will provide me a retainer of $3000.00, against which I will charge fees and costs.

An additional retainer of $1,000 will be charged if preparation for trial is necessary, said event to occur when any pretrial motions are filed with the Court on behalf of the client.

The amount of the fee is based upon several factors, the nature and gravity of the offense charged, the complexity of the case, the commitment of the firm to take the case, thus being available to represent you and precluding our acceptance of other employment and the film's best estimate of time which will be expended to represent you.

SERVICES COVERED:

1. Representation in regard to criminal charges of Driving Under the Influence and/or Driving with Excessive Alcohol Content (DUI per se), and/or Careless Driving, and/or leaving the scene of an accident, and/or speeding, and/or no proof of insurance.

2. Representation at a Department of Revenue Hearing in regard to your Colorado driving privileges if such a hearing is held.

3. 15-2428

Respondent's fee agreement states:

SCOPE OF REPRESENTATION

This contract pertains only to the following matter: Representation of [client] in criminal action [xxxxx] filed in the [xxxx] County District Court. Representation includes pre-trial matters, negotiations in an attempt to find a satisfactory resolution without trial, preparation of motions, courtroom representation, trial preparation, and trial. It does not include additional representation in any other civil or criminal action, any additional post-trial representation, or appeal. This Agreement does not cover or include any matter other than the matter described in this paragraph.

LEGAL FEES

Fees are based on a rate of $400.00 per hour as quantum meruit against flat fees as provided here:

$5000.00 due July 15, 2015.

$5000.00 due 10 days before the Preliminary hearing date.

$5,000.00 due 20 days following the preliminary hearing date.

Should a trial be required, an additional retainer of $25,000.00 is required. The dates of separate payments cannot be determined, nor are they due in absence of a trial setting at arraignment. Attorney and Client agree for now that the entire $25,000.00 trial preparation fee is due no less than 45 days before trial. Associate lawyer services, law clerks, in-house investigators, paralegals, and any other necessary staff are billed at $100.00 per hour.

On occasion, the novelty or complexity of your matter, uniqueness of the issues, time limitations placed upon my services, financial amount or criminal penalties involved, or other matters, without limitation, may require additional time. To address these issues of my services, those of other lawyers, legal assistants, or investigators may be necessary. Those services are billed at an hourly rate. The rates of the individuals working on this matter multiplied by the hours they or the Attorney work on it ([ATTORNEY'S] time is paid by flat fee as described in the paragraph above), is the basis for determining additional fees. Time is recorded and billed in tenths of an hour. In the event that you terminate my services or other circumstances require adjustment to an hourly rate, you will receive written notice.

BFW ATTORNEYS BURNS FIGA & WILL

M E M O R A N D U M

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

FROM: Alec Rothrock, Chair
"Orphan Funds" Subcommittee

DATE: April 22, 2016

SUBJECT: Report on Colorado Access to Justice Commission Proposal dated August 7, 2015

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1. At its October 16, 2015 meeting, the Committee formed a subcommittee to consider a request from the Colorado Access to Justice Commission (Commission), the Colorado Bar Association and the Colorado Lawyer Trust Account Foundation (COLTAF) to modify the Colorado Rules of Professional Conduct so as to enable lawyers to transfer funds held in a COLTAF account to COLTAF in two situations: (1) when the lawyer is unable to ascertain the owner of the funds and (2) when the lawyer knows the identity but not the location of the owner of the funds.

2. The members of the subcommittee are the following people:

Anthony Van Westrum
Boston Stanton
Courtney Shephard
David Kirkpatrick
Diana Poole
Jamie Sudler
Mark Schmidt
Matt Samuelson
Ruthanne Polidori
Alec Rothrock

3. In a 1993 formal opinion, the CBA Ethics Committee directed lawyers in the latter situation to the Unclaimed Property Act, C.R.S. § 38-13-102 et seq. (Act). That option is no longer available, because in 2015 the Act was amended to exclude funds held in a

COLTAF account. Therefore, there is currently no Rule of Professional Conduct or statute providing guidance to lawyers in these circumstances.

4. The subcommittee met on two occasions and discussed and debated several drafts by email. The subcommittee considered similar rules (and one statute) adopted in other states. The consensus of the subcommittee is reflected in the proposed rule and comment changes contained in the attachment.

Proposed Rule 1.15B(k)

(k) If a lawyer discovers that he or she does not know the identity or the location of the owner of funds held in the lawyer's COLTAF account, the lawyer must make reasonable efforts to identify and locate the owner. If, after making such efforts, the lawyer cannot determine the identity or the location of the owner, the lawyer must either (1) continue to hold the unclaimed funds in a COLTAF or other trust account or (2) remit the unclaimed funds to COLTAF in accordance with written procedures published by COLTAF and available through its website or upon request. A lawyer remitting unclaimed funds to COLTAF must keep a record of the remittance pursuant to Rule 1.15D(a)(1)(C). If, after remitting unclaimed funds to COLTAF, the lawyer determines both the identity and the location of the owner, the lawyer shall request a refund for the benefit of the owner, in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide upon request.

Proposed Comment [7]

[7] What constitutes "reasonable efforts," within the meaning of Colo. RPC 1.15B(k), will depend on whether the lawyer does not know the identity of the owner of certain funds held in a COLTAF account, or the lawyer knows the identity of the owner of the funds but not his or her location. When the lawyer does not know the identity of the owner of the funds, reasonable efforts include an audit of the COLTAF account to determine how and when the funds lost their association to a particular owner or owners, and whether they constitute attorneys' fees earned by the lawyer or expenses to be reimbursed to the lawyer or a third person. When the lawyer knows the identity but not the location of the owner of the funds, reasonable efforts include attempted contact using last known contact information, reviewing the file to identify and contact third parties who may know the location of the owner, and conducting internet searches. After making reasonable but unsuccessful efforts to identify and locate the owner of the funds, a lawyer's decision to continue to hold funds in a COLTAF or other trust account, as opposed to remitting the funds to COLTAF, does not relieve the lawyer of the obligation to maintain records pursuant to Rule 1.15D(a)(1)(C) or to determine whether it is appropriate to maintain the funds in a COLTAF account, as opposed to a non-COLTAF trust account, pursuant to Colo. RPC 1.15B(b). When COLTAF has made a refund to a lawyer following the lawyer's determination of the identity and the location of their owner, the lawyer's obligations with respect to those funds are set forth in Colo. RPC 1.15A. The disposition of unclaimed funds held in the COLTAF account of a deceased lawyer is to be determined in accordance with written procedures published by COLTAF. Similarly, the disposition of unclaimed funds held in a COLTAF account that are discovered to belong to a deceased person is to be determined in accordance with COLTAF's written procedures.

Proposed Rule 1.15D(a)(1)(C)

(C) For any unclaimed funds remitted to COLTAF pursuant to rule 1.15B(k), the name and last known address of the owner of the funds, if the owner of the funds is known; the efforts made to identify or locate the owner of the funds; the amount of the funds remitted; the period of time during which the funds were held in the lawyer's or law firm's COLTAF account; and the date the funds were remitted.

CYNTHIA H. COFFMAN
Attorney General

DAVID C. BLAKE
Chief Deputy Attorney General

MELANIE J. SNYDER
Chief of Staff

FREDERICK R. YARGER
Solicitor General

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Office of the Attorney General

March 15, 2016

Marcy G. Glenn
Chair, Supreme Court Rules of Professional Conduct Standing Committee
Holland & Hart
555 17th Street, Suite 3200
Denver, CO 80202

RE: *Proposal for an amendment to the comments to Colorado Rule of Professional Conduct 1.6*

Dear Ms. Glenn:

I am writing to request that the Supreme Court Rules of Professional Conduct Standing Committee consider an important issue affecting government entities. Specifically, I request that the Committee consider a comment to the Rules of Professional Conduct clarifying whether a public law office may disclose the total amount of fees or costs incurred on a particular legal matter.

The Colorado Attorney General's Office frequently is asked to disclose the amount of time its attorneys have spent on a particular legal matter, as well as the total amount of expenses incurred in particular litigation. We have been asked for this information, for example, in the context of highly-publicized litigation concerning same-sex marriage, gun control, and the environment. Requests for this information typically are posed by members of the media or citizens under the Colorado Open Records Act ("CORA"), or by the General Assembly under its inherent authority to request information in furtherance of its official duties. These requests are common for public agencies and elected officials at all levels of government.

It has been the long-standing policy of this Office to provide this information whenever doing so is consistent with the Rules of Professional Conduct. I, as well as my predecessor, strongly believe that the public should have access to basic information about legal services expenditures by public entities. These services are

provided at taxpayer expense, and although government lawyers owe their clients a duty of confidentiality, aggregate billing information is not the type of confidential information that should be shielded from public view.[1]

The Rules of Professional Conduct, however, can be understood to place limits on the disclosure of even aggregate billing information that does not reveal specific litigation strategy or other privileged information, and the Rules impose these limits regardless of whether billing information concerns a private or public legal expenses. Specifically, Rule 1.6 prohibits attorneys from revealing "information relating to the representation of a client," and this duty of confidentiality is broader than the protections afforded by the attorney-client privilege. *See, e.g.*, Rule 1.6, cmt. 3.[2]

Public law offices face competing concerns in this area. *See, e.g., Gleason v. Judicial Watch, Inc.*, 292 P.3d 1044, 1045 (Colo. App. 2012) (noting that requests for records of public legal agencies involve friction between two important interests – the public's "important interest" in "the openness of its government, in part to find out what the government is doing" and the need for confidentiality of some records). These concerns are not addressed by Rule 1.6's categorical rule of confidentiality.

The tension between the need for confidentiality on the one hand and transparency in public affairs on the other has resulted in recent years in proposed legislation that would subject the Judicial Branch and public law offices to increased disclosure requirements. The proposals vary in their sweep, but do not appear to fully take into account the duty of confidentiality imposed by the Rules of Professional Conduct. I believe that a relatively modest clarification to the Rules of Professional Conduct is preferable to large scale changes to the law governing public entities, many of which may result in unintended consequences.

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[1] I define aggregate billing information as the total number of hours billed plus other outlays on a particular matter, without any granular or detailed information of the work performed or expert consultation or costs and without elucidation of itemized expenditures or expenses.

[2] Although Rule 1.6(b)(7) permits (but does not require) disclosure of confidential information in order to comply with "other law," it is not clear that CORA qualifies as "other law" that would permit disclosure of aggregate fee information. CORA itself provides that inspection of public records should be denied when a rule promulgated by the Supreme Court, such as Rule 1.6, would prohibit disclosure. § 24-72-204(1)(c), C.R.S.

Case law supports a modest change clarifying that aggregate fee information need not be maintained as confidential. *First*, aggregate information about the legal expenses of public agencies is not the type of sensitive information that implicates the justifications for Rule 1.6's categorical rule of confidentiality.[3] Aggregate billing information – particularly after a matter has concluded – does not reveal client confidences or provide access to litigation strategy. *Cf. United States v. Gonzales*, 150 F.3d 1246, 1266 (10th Cir. 1998) (upholding, in the context of the Criminal Justice Act, a trial court's exercise of its discretion to release total amounts spent on a particular defendant's case at the conclusion of a sentencing hearing).

As a result, some courts have recognized that disclosure of aggregate billing information is not prohibited in all circumstances by Rule 1.6. *Harris v. Baltimore Sun Co.*, 625 A.2d 941 (Md. 1993), involved a newspaper's request under a public information statute that a public defender's office disclose total expenses, including expert witness expenses, incurred in the defense of a capital murder trial. Maryland's highest court determined that disclosure of the information was not necessarily barred by Rule 1.6, provided that disclosure would not pose a risk of harm to the client's interests. *Id.* at 947-48 (noting that for the type of information requested, Rule 1.6's "prohibition is not absolute").

Second, case law in Colorado and many other jurisdictions holds that basic information relating to an attorney's billing does not implicate client confidences and may be disclosed in litigation in response to a court order.[4] "Fee arrangements

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[3] Colorado formal ethics opinions have not directly addressed this issue. The CBA Ethics Committee has found that billing statements that include detailed or substantive information relating to a representation should be held confidential under Rule 1.6. Colorado Ethics Opinion 107, p. 4-341. That opinion, however, did not consider the disclosure of only aggregate billing information.

[4] Courts generally have found that the attorney-client privilege does not prevent testimony or discovery relating to attorney billing records. *See, e.g., In re Marriage of Schneider*, 831 P.2d 919, 921 (Colo. App. 1992) (finding no error in admission of testimony by attorney about the amount of fees paid by his client); *Roe v. Catholic Health Initiatives Colo.*, 281 F.R.D. 632, 636 (D. Colo. 2102) ("[I]nformation that shows the fee amount, the general nature of the services performed, and the case on which the services were performed is not privileged" provided that the billing entries do not reflect the client's motive in seeking legal advice, litigation, strategy, or the specific nature of the services provided). Courts similarly have permitted the disclosure of billing records under public open records laws over objections that the records are privileged. *See, e.g., Cypress Media v. City of Overland Park*, 997 P.2d 681, 692 (Kan. 2000) ("[F]ee arrangements are viewed as merely incidental to the attorney-client relationship and do not usually involve disclosure of confidential communications arising from the professional relationship."); *Commonwealth v.*

usually fall outside the scope of the [attorney-client] privilege because such information ordinarily reveals no confidential professional communication between attorney and client...." *In re Grand Jury Matter*, 926 F.2d 348, 352 (4th Cir. 1991) (refusing to quash subpoena served on attorneys seeking amounts of fees paid).[5]

Third, there are strong public policy arguments for permitting the disclosure of aggregate billing information by public entities. CORA, for example, demonstrates our state's established commitment to public access of government records. *See, e.g,. Benefield v. Colo. Republican Party*, 329 P.3d 262, 264 (Colo. 2014). The presumption in favor of public disclosure is particularly strong when the expenditure of public funds is at issue. *Freedom Newspapers v. Tollefson*, 961 P.2d 1150, 1156 (Colo. App. 1998). These same interests have been recognized in other jurisdictions. "[T]he public has a right to know how the [government] is spending taxpayer money in pending or completed litigation" so that it may "voice its concern or approval" about that spending. *ACLU v. County of L.A. Bd. of Supervisors*, 2014 Cal. Super. LEXIS 339, at *11, 17-18 (Cal. App. Dep't Super. Ct. 2014) (internal citations omitted). And when the billing information "contain[s] information that may provide insight into the attorney's protected litigation strategy, that information can be easily redacted." *Id.*

Public law offices are government entities that should operate with as much transparency and accountability as may be permitted within the bounds of ethical representation. Providing access to aggregate information about the cost of public legal services serves several important interests. It encourages informed debate on

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Scorsone, 251 S.W.3d 328, 330 (Ky. App. 2008) (approving of Attorney General Opinion directing that attorney billing records must be disclosed in response to an open records request when the billing records reflect the general nature of legal services rendered, but that substantive matters protected by attorney-client privilege may be redacted); *Tipton v. Barton*, 747 S.W.2d 325, 332 (Mo. Ct. App. 1988) (finding that billing statements were not privileged because they "are extraneous to [the lawyer's] legal advice or work product"); *see also, e.g., Schein v. N. Rio Arriba Elec. Coop., Inc.*, 932 P.2d 490, 495 (N.M. 1997) (permitting disclosure of billing records to a shareholder and noting that "[i]nquiries into the general nature of legal services provided do not violate the attorney-client privilege because they involve no confidential information.").

[5] Additionally, in some analogous settings, billing information is not required to be maintained as confidential. *See* 18 U.S.C. § 3006A(d)(4) (permitting disclosure of fees for appointed counsel in United States district courts under the Criminal Justice Act); *see also United States v. Cal. Rural Legal Assistance, Inc.*, 722 F.3d 424 (D.C. Cir. 2013) (upholding right of federal inspectors to access federal Legal Services Corporation information, including client identity, financial records and time records).

public policy issues, promotes accountability of elected officials and government agencies, and legitimizes the important work that government agencies and their lawyers do.

In sum, the disclosure of aggregate billing information on matters does not pose a risk of harm to the clients of government lawyers. Given the important interest in government transparency, and Colorado's particularly strong commitment to protecting that interest, I am requesting that the Supreme Court Rules of Professional Conduct Standing Committee consider an amendment to the comments to Rule 1.6. The comment would clarify that aggregate billing information for public legal services is not subject to Rule 1.6, provided that it does not actually reveal any specific information that would harm a client's interest. As an initial proposal, a comment could state,

> *The total amount of fees or costs incurred by a public entity on a particular matter is not "information relating to the representation of a client" which must be maintained as confidential under Rule 1.6(a).*

I would welcome the opportunity to speak with the Standing Committee about this proposal and would appreciate their consideration in clarifying the parameters of Rule 1.6 for public entities.

Sincerely,

CYNTHIA H. COFFMAN
Attorney General

cc: The Honorable Justice Nathan Coats (by separate cover)
The Honorable Justice Monica Marquez (by separate cover)

HOLLAND&HART LLP
THE LAW OUT WEST

Marcy G. Glenn
Phone 303-295-8320
Fax 303-975-5475
mglenn@hollandhart.com

March 21, 2016

Cynthia H. Coffman
Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, CO 80203

Re: Proposal for an Amendment to the Comments to Colorado Rule of Professional Conduct 1.6

Dear Attorney General Coffman:

Thank you for your March 15, 2016 letter, which requested the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct to consider additional commentary to Rule 1.6, to clarify that a public law office may disclose the total amount of fees or costs incurred on a particular legal matter.

This item will be on the agenda for the next meeting of the Standing Committee, on April 29. Following our usual protocol for proposed amendments to rules and comments, I will distribute your letter to the Standing Committee, I anticipate that at the April 29 meeting we will form a subcommittee to evaluate your proposal, and you will be invited to serve on that subcommittee or to designate another attorney in the Attorney General's Office to serve. For that reason—because the subcommittee's consideration of your proposal will not begin until after the April 29 meeting—it is far from essential for you (or another attorney in your office) to be present at that meeting. However, all Standing Committee meetings are public and you are welcome to attend, either in person or by phone. Please let me know if you would like more detailed information regarding the time and place of the April 29 meeting, and call-in information.

Thank you again for your letter. I appreciate your concerns and I look forward to working with you on this project.

Sincerely,

Marcy G. Glenn
of Holland & Hart LLP

cc: The Honorable Nathan B. Coats
The Honorable Monica Márquez

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CYNTHIA H. COFFMAN
Attorney General

DAVID C. BLAKE
Chief Deputy Attorney General

MELANIE J. SNYDER
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Office of the Attorney General

April 6, 2016

Marcy G. Glenn
Chair, Supreme Court Rules of Professional Conduct Standing Committee
Holland & Hart
555 17th Street, Suite 3200
Denver, CO 80202

RE: *Proposal for an amendment to the comments to Colorado Rule of Professional Conduct 1.6*

Dear Ms. Glenn:

Thank you for your letter regarding the Supreme Court Rules of Professional Conduct Standing Committee's consideration of the proposal outlined in my letter of March 15, 2016. I welcome the formation of a subcommittee to consider possible revisions to the comments to Rule 1.6 clarifying the extent to which public law offices may disclose the total amount of fees or costs incurred on a matter.

I have requested that David Blake, Chief Deputy Attorney General, and Stephanie Scoville, Senior Assistant Attorney General, participate on a subcommittee. You may reach them at david.blake@coag.gov and stephanie.scoville@coag.gov with details about the subcommittee's work.

I appreciate your consideration of this issue.

Sincerely,

CYNTHIA H. COFFMAN
Colorado Attorney General

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

NOTICE OF PUBLIC HEARING

Sunday, February 7, 2016
3:00 p.m. to 5:00 p.m.
ABA 2016 MidYear Meeting
Marriott Marquis San Diego Marina
3rd Floor, South Tower
Balboa & Mission Hills Meeting Rooms
San Diego, CA

On December 22, 2015, the ABA Standing Committee on Ethics and Professional Responsibility ("Ethics Committee") issued a draft proposal to amend ABA Model Rule of Professional Conduct 8.4 and Comment [3] to Rule 8.4. The draft proposal is available at

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.authcheckdam.pdf.

The memorandum explaining the Ethics Committee's drafting choices, available at

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_language_choice_memo_12_22_2015.authcheckdam.pdf

It reflects the efforts of the Ethics Committee to examine how the Model Rules of Professional Conduct address discrimination and harassment by lawyers.

The Ethics Committee invites comment on this draft proposal both in writing and at its public hearing.

Persons wishing to speak at the **Sunday, February 7, 2016,** public hearing at the Marriott Marquis San Diego Marina, 3rd Floor, South Tower, Balboa & Mission Hills Meeting Rooms, San Diego, CA should register at abamodelruleamend@americanbar.org by **January 29, 2016**. Speakers should be prepared to speak for four to five minutes and then take questions from the Committee. There may not be enough time to accommodate everyone who wishes to testify. Those registering on-site will be able to speak as time permits.

Please submit all written commentary via e-mail to abamodelruleamend@americanbar.org. NOTE: All written comments received will be made publicly available on the Committee's Model Rule of Professional Conduct page. **The deadline for written comments on this draft proposal is Friday, March 11, 2016.**

After reviewing comments from the public hearing and comments submitted in writing, the Ethics Committee will resume its work with the aim of producing a final Report and Resolution for consideration by the ABA House of Delegates at the August 2016 Annual Meeting in San Francisco, CA.

MEMORANDUM

Standing Committee on Ethics and Professional Responsibility
Draft Proposal to Amend Model Rule 8.4
December 22, 2015

INTRODUCTION

Seventeen years ago, the American Bar Association amended the ABA Model Rules of Professional Conduct ("the Model Rules") to address lawyers who discriminate against others. In 1998, the ABA House of Delegates decided to add a Comment to Model Rule 8.4 to provide that it would be professional misconduct, "prejudicial to the administration of justice," if a lawyer "knowingly manifests by words or conduct, bias or prejudice" against certain categories of persons, while "in the course of representing a client." This was a compromise result reached after six years of proposals and counterproposals.

By addressing this issue in a Comment, however, the compromise did not make manifestations of bias or prejudice such as discrimination or harassment a separate and direct violation of the Model Rules. This is because statements in the Comments are not authoritative. As noted in Paragraph [14] of the Preamble and Scope to the Model Rules: "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." In addition, paragraph [21] of the Preamble and Scope states: "The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." Thus, for many, the ABA has not addressed this issue squarely, in the authoritative manner it would be if it were addressed in the text of a Model Rule.

The Standing Committee on Ethics and Professional Responsibility's proposal moves beyond the Comment to craft a distinct rule within the black letter of the Model Rules of Professional Conduct prohibiting lawyers from engaging in harassment and knowing discrimination in conduct related to the practice of law. By choosing to move the prohibition against discrimination and harassment into a black letter rule, the ABA will join many other professions that prohibit this same behavior in their codes of conduct.[1]

The draft proposal presented here is also a compromise that seeks to harmonize the different views of many individuals and entities. Recently representatives from the Oregon New Lawyers Division drafted a similar proposal for the ABA Young Lawyers Division Assembly to consider. The authors of that resolution explained the need for change eloquently. They wrote:

[1] See Appendix for information about other licensed professionals' anti-discrimination provisions in codes of conduct.

> There is a need for a cultural shift in understanding the inherent integrity of people regardless of their race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability, to be captured in the rules of professional conduct.
>
> This is true because the Model Rules are supposed to ensure the integrity of the legal profession. Indeed, it is a rhetorical question to ask "what is more important to the integrity of the law than ensuring that those who seek out legal representation are not subject to discrimination, harassment, or intimidation simply because of the color of their skin, their gender or gender identity, having a disability or being lesbian, gay, or bisexual?"

RULE AMENDMENTS

Under current Model Rule of Professional Conduct 8.4(d), it is professional misconduct for a lawyer to engage in conduct that is "prejudicial to the administration of justice." Comment [3] to Model Rule 8.4 explains that when, "in the course of representing a client," a lawyer "knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status," such words or conduct violate paragraph (d), if they also are prejudicial to the administration of justice.

The draft proposal released for public comment reads:

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

***

(g) in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

Comment

[3] Paragraph (g) applies to conduct related to a lawyer's practice of law, including the operation and management of a law firm or law practice. It does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment. Harassment or discrimination that violates paragraph (g) undermines confidence in the legal profession and our legal system. Paragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation. Although lawyers should be mindful of their professional obligations under Rule

6.1 to provide legal services to those unable to pay, as well as the obligations attendant to accepting a court appointment under Rule 6.2, a lawyer is usually not required to represent any specific person or entity. Paragraph (g) does not alter the circumstances stated in Rule 1.16 under which a lawyer is required or permitted to withdraw from or decline to accept a representation. ~~A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.~~

Below is a discussion of the changes suggested in the draft proposal.

1. **Scope of the Rule**. The draft proposal establishes that it is professional misconduct for a lawyer to "harass or knowingly discriminate against persons" while engaged in "conduct related to the practice of law."

The draft proposal would expand the coverage of the rule from conduct performed "in the course of representing a client" to conduct that is "related to" the practice of law. "The practice of law" is the term used in the Preamble and Scope of the Model Rules to describe the focus and scope of the Rules.[2] The Preamble to the Model Rules explains that lawyers are representatives of clients, officers of the legal system, and public citizens "having special responsibility for the quality of justice."[3] Lawyers act as advisors, advocates, negotiators, and evaluators for clients. They also act as third-party neutrals. As officers of the legal system, they participate in activities related to the practice of law through court appointments, bar association activities and other, similar conduct.

In the draft proposal Comment, the Ethics Committee specifies one area of conduct that is "related to" the practice of law: the operation and management of a law firm or law practice. This would include conduct at activities such as law firm dinners and events at which the lawyers were present solely because of their association with the law firm. Nationally, there are states that both explicitly include and explicitly exclude those activities.[4] The Ethics Committee determined that the argument for exclusion of those activities was less compelling that for inclusion—one simply cannot demand one level of professional behavior for lawyers that is

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[2] *See* ABA Model Rules of Professional Conduct, Scope [16]: "The Rules simply provide a framework for the ethical practice of law."

[3] ABA Model Rules of Professional Conduct, Preamble [1].

[4] For an example of a jurisdiction that includes employment practices within its anti-discrimination rule of conduct see Washington DC Rule 9.1 Discrimination in Employment and California Rule 2-400 Prohibited Discriminatory Conduct in a Law Practice. New Jersey excludes employment law discrimination from the scope of its rule unless "it has resulted in either an agency or judicial determination of discriminatory conduct." See New Jersey Supreme Court Comment to Rule 8.4.

external to their own law practice while allowing a lesser standard of behavior inside one's own office.

The Ethics Committee has heard from some in the bar that because legal remedies are available to persons who believe that a lawyer or law firm has harassed or discriminated against them in employment, such conduct by lawyers should not also be deemed to be professional misconduct. The Ethics Committee notes, however, that legal remedies are available for other conduct, such as that described in paragraph (c) to Rule 8.4 – fraud, deceit or misrepresentation – but such conduct also constitutes professional misconduct.

2. **Prohibited Activity**. The draft proposal prohibits "harassment and knowing discrimination." The term used in the current Comment -- "words or conduct manifesting bias or prejudice" -- is very broad. It arguably was appropriate when Rule 8.4(d) prohibited such words or conduct only "in the course of representing a client," and only when prejudicial to the administration of justice. However, when the scope of the Rule is refined to cover all conduct related to the practice of law, the Ethics Committee determined it appropriate to balance this broader scope with a more specific definition of the conduct to which the rule would apply.

The terms "harassment" and "discrimination" are defined terms under law; they refer to the adverse, negative consequences of conduct that manifests bias or prejudice. But to simply refer to any "conduct related to the practice of law" that manifests bias or prejudice without reference to whether such conduct constitutes harassment or discrimination, was considered amorphous a basis upon which to define professional misconduct.

The Ethics Committee therefore decided to use the terms "harassment" – which is understood to include the creation of a hostile work environment and is evaluated in terms of the reasonable perception of the victims of such conduct – and "knowing discrimination" – which is understood to include conduct that a person engaging in such conduct knows will result in a person or persons being treated in a different and harmful way because of their membership or perceived membership in one or more of the categories listed in the rule. The word "knowing" was retained when applied to discrimination because the Ethics Committee concluded that conduct which had a non-discriminatory intent, such as hiring decisions based on class rank or the willingness of the applicant to relocate to a particular jurisdiction, should not be a basis for a finding of professional misconduct. In addition, "knows" is a defined term in the Model Rules of Professional Conduct. The Rules define "knows" as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."[5] Because this is the standard used throughout the Model Rules, it is appropriate to incorporate it here.

3. **Protected Groups**. The categories of protected groups now include "ethnicity", "gender identity", and "marital status." These additional categories reflect current concerns regarding discriminatory practices. For example, questions of "ethnicity" may reflect individuals who are

[5] ABA Model Rules of Professional Conduct, Rule 1.0(f).

of mixed national origins or races. "Gender identity" is relevant as a new societal awareness of the individuality of gender has changed the traditional binary concept of sexuality. And the Supreme Court's decision holding that marriage is a fundamental constitutional right regardless of sexual orientation,[6] and the rise in single parenthood in our society, makes the addition of "marital status" apt.

4. **Constitutionally Protected Activities.** To avoid ambiguity and to address the Constitutional concerns that were raised by some commentators, the new Comment explicitly states that the Rule does not apply to conduct that is unrelated to the practice of law or to conduct protected by the First Amendment. The Comment makes clear that a lawyer does retain a "private sphere" where personal opinion, freedom of association, religious expression, and political speech is protected by the First Amendment and not subject to the Rule. We believe this is a useful clarification. The Ethics Committee's research indicated that when state courts adopted similar black letter prohibitions, possible First Amendment challenges and issues were considered. Therefore, adding this language to the Comment would appropriately address this concern.

5. **Advocacy Exception.** The proposal retains but redrafts the advocacy exception contained in the current Comment [3] to Model Rule 8.4. Current Comment [3] includes the statement: "Legitimate advocacy respecting the foregoing factors does not violate paragraph (d)." The draft proposal reads: "Paragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation." The question of whether a person's status or group affiliation is material and relevant to factual or legal issues or arguments in a matter is a clearer standard than "legitimate advocacy" for disciplinary counsel and state courts to apply, as it incorporates concepts already known in the law — "material" and "relevant."

6. **Peremptory Challenges.** The proposal does not include the following statement currently in Comment [3]: "A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule." A concern was raised with the Ethics Committee that this sentence could be read as limiting a trial judge's discretion on whether to refer such conduct for discipline. The Ethics Committee concluded that the Comment to this Rule need not address or take a position, either way, on the weight of evidence in a disciplinary proceeding or pre-empt the disciplinary process.

7. **New Language.** The proposed new Comment includes the following new language: "Although lawyers should be mindful of their professional obligations under Rule 6.1 to provide legal services to those unable to pay, as well as the obligations attendant to accepting a court appointment under Rule 6.2, a lawyer is usually not required to represent any specific person or entity. Paragraph (g) does not alter the circumstances stated in Rule 1.16 under which a lawyer is required or permitted to withdraw from or decline to accept a representation." The Ethics

[6] Obergefell v. Hodges, 576 U.S. ___(2015).

Committee concluded it was important in the context of this rule to remind lawyers of their pro bono and public service responsibilities under Model Rules 6.1 and 6.2, and also that Model Rule 1.16 allows lawyers to limit their practice, accept or decline representation, and withdraw from matters for many reasons. These include when there is a substantial risk that the representation will be materially limited by the lawyer's personal interest.

PROPOSAL HISTORY

This review of Model Rule 8.4(d) and Comment [3] was prompted by a May 2014 letter the ABA's Goal III Commissions (the Commission on Women in the Profession; Commission on Racial and Ethnic Diversity in the Profession; Commission on Disability Rights; and Commission on Sexual Orientation and Gender Identify) wrote to the Standing Committee on Ethics and Professional Responsibility asking it to consider amending the Model Rules to better address issues of harassment and discrimination by lawyers.

As noted above, the last time this issue was addressed in the Model Rules was 17 years ago in 1998 after several failed attempts over a six year period. The result was the adoption of Comment [3] to Rule 8.4. Since then, however, twenty-four jurisdictions have crafted rules of professional conduct that in the black letter of their rules address bias, discrimination, or harassing behavior by a lawyer. These rules vary – some addressing the issue very broadly, some more narrowly.

More recently, the ABA has adopted policy that directly addresses biased behavior and harassment by lawyers and judges. For example, the ABA Model Code of Judicial Conduct, revised and adopted by the House of Delegates in 2007, includes Rule 2.3, *Bias, Prejudice, and Harassment.* In the black letter of the Rule judges are prohibited from speaking or behaving in a way that manifests "bias or prejudice," and from engaging in harassment, "based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation." The Rule also calls upon judges to require lawyers to refrain from this same activity in proceedings before the court.[7]

Also, in February 2015, the ABA House of Delegates adopted revised *ABA Standards for Criminal Justice: Prosecution Function and Defense Function* which now include anti-bias provisions. These provisions are in Standards 3-1.6 and 4.16.[8] These Standards explain that prosecutors and defense counsel should not "manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation,

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[7] ABA Model Code of Judicial Conduct, Rule 2.3 (C) ("A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, based upon attributes including but not limited to race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, lawyers, or others.")

[8] ABA Standards for Criminal Justice: Prosecution Function and Defense Function available at http://www.americanbar.org/groups/criminal_justice/standards.html

gender identity or socioeconomic status." This statement appears in the black letter of the Standards, not in a comment.

These developments, both within the ABA and within legal ethics circles nationally, illustrate the depth of concern about this issue. In the seventeen years since this subject was addressed in the Model Rules of Professional Conduct, perspectives continue to change in our society. Harassment, including sexual harassment, has been recognized for the serious problems that it is. To some, the phrase, "conduct that manifests bias of prejudice," seems outdated. Gender identity, not just sexual orientation, has been identified as a basis for discrimination. Debate has continued as to what ethical effect to give a trial judge's finding that preemptory challenges have been exercised on a discriminatory basis.

In developing this proposal to add a new paragraph (g) to Model Rule 8.4 and amend Comment [3] to MR 8.4, the Ethics Committee has benefitted from the many comments it received at the Roundtable Discussion it held at the 2015 ABA Annual Meeting on an earlier Working Discussion Draft, and from the written comments it received after that meeting, from different ABA Sections, Commissions, Committees and individual members. These comments were each and all carefully considered in the preparation of this revised proposal. The current proposal represents an effort to harmonize the sometimes divergent but always legitimate views we received. Many of the changes reflected in this proposal were prompted by the suggestions made and comments expressed in those communications. At the same time it is important to remember that no rule can capture all unethical or illegal conduct that may occur in this sphere, but this proposal does capture the egregious conduct that diminishes the profession.

CONCLUSION

While this proposal is being presented by the Standing Committee on Ethics and Professional Responsibility, the issue transcends the Model Rules of Professional Conduct. The Model Rules of Professional Conduct are both rules used by the states and courts to establish standards of conduct and professional discipline and, at the same time, they are a statement of the minimum expected by all lawyers. It is time that harassment and discriminatory conduct by a lawyer based on race, religion, sex, disability, LGBTQ status or other factors, be considered professional misconduct when such conduct is related to the practice of law. The question is not whether such conduct is or is not common in our profession. Any such conduct brings disrepute to the profession. Rather, the public has a right to know that as a largely self-governing profession we hold ourselves to normative standards of conduct in all our professional activities, in furtherance of the public's interest in respect for the rule of law and for those who interpret and apply the law, the legal profession.

American Association of University Professors – Statement on Professional Ethics

- 2. Professors make every reasonable effort to foster honest academic conduct and to ensure that their evaluations of students reflect each student's true merit. They respect the confidential nature of the relationship between professor and student. They avoid any exploitation, harassment, or discriminatory treatment of students.
- 3. As colleagues, professors have obligations that derive from common membership in the community of scholars. Professors do not discriminate against or harass colleagues.

American Counseling Association – Code of Ethics

- Section C, Professional Responsibility. Part 5. Nondiscrimination. Counselors do not condone or engage in discrimination against prospective or current clients, students, employees, supervisees, or research participants based on age, culture, disability, ethnicity, race, religion/spirituality, gender, gender identity, sexual orientation, marital/ partnership status, language preference, socioeconomic status, immigration status, or any basis proscribed by law.
- Section C, Part 6. Public Responsibility. Part a. Counselors do not engage in or condone sexual harassment. Sexual harassment can consist of a single intense or severe act, or multiple persistent or pervasive acts.

American Dental Association – Principles of Ethics and Code of Professional Conduct

- **Code of Professional Conduct, Section 4.A. Patient Selection**. While dentists, in serving the public, may exercise reasonable discretion in selecting patients for their practices, dentists shall not refuse to accept patients into their practice or deny dental service to patients because of the patient's race, creed, color, sex or national origin.

American Institute of Architects – Code of Ethics and Professional Conduct

- **Rule 1.401** Members shall not discriminate in their professional activities on the basis of race, religion, gender, national origin, age, disability, or sexual orientation.

American Institute of Certified Public Accountants – Code of Professional Conduct

- 1.400.010 Discrimination and Harassment in Employment Practices. A *member* would be presumed to have committed an act discreditable to the profession, in violation of the "Acts Discreditable Rule" [1.400.001] if a final determination, no longer subject to appeal, is made by a court or an administrative agency of competent jurisdiction that a *member* has violated any antidiscrimination laws of the United States, a state, or a municipality, including those related to sexual and other forms of harassment.

American Medical Association – Principles of Medical Ethics, Principles:

- I. A physician shall be dedicated to providing competent medical care, with compassion and respect for human dignity and rights.
- III. A physician shall respect the law and also recognize a responsibility to seek changes in those requirements which are contrary to the best interests of the patient.
- V. A physician shall continue to study, apply, and advance scientific knowledge, maintain a commitment to medical education, make relevant information available to patients, colleagues, and the public, obtain consultation, and use the talents of other health professionals when indicated.
- VI. A physician shall, in the provision of appropriate patient care, except in emergencies, be free to choose whom to serve, with whom to associate, and the environment in which to provide medical care.

Interpreted in **Opinion 9.12** to mean physicians who offer their services to the public may not decline to accept patients because of race, color, religion, national origin, sexual orientation, gender identity or any other basis that would constitute invidious discrimination.

Interpreted in **Opinion 10.05** to mean physicians cannot refuse to care for patients based on race, gender, sexual orientation, or any other criteria that would constitute invidious discrimination or refuse to provide a specific treatment sought by an individual that is incompatible with the physician's personal, religious, or moral beliefs.

American Nurses Association – Code of Ethics

- Provision 1. The nurse, in all professional relationships, practices with compassion and respect for the inherent dignity, worth, and uniqueness of every individual, unrestricted by considerations of social or economic status, personal attributes, or the nature of health problems.
- 1.1 Respect for human dignity. A fundamental principle that underlies all nursing practice is respect for the inherent worth, dignity, and human rights of every individual. Nurses take into account the needs and values of all persons in all professional relationships.
- 1.2 Relationships to patients. The need for health care is universal, transcending all individual differences. The nurse establishes relationships and delivers nursing services with respect for human needs and values, and without prejudice. An individual's lifestyle, value system and religious beliefs should be considered in planning health care with and for each patient. Such consideration does not suggest that the nurse necessarily agrees with or condones certain individual choices, but that the nurse respects the patient as a person.

American Psychological Association – Ethical Principles of Psychologists and Code of Conduct.

- **Ethical Standard 1.10 Nondiscrimination**. In their work-related activities, psychologists do not engage in unfair discrimination based on age, gender, race, ethnicity, national origin, religion, sexual orientation, disability, socio-economic status, or any basis proscribed by law.
- **Ethical Standard 1.11 Sexual harassment** (a) Psychologists do not engage in sexual harassment.
- **Ethical Standard 1.12 Other harassment.** Psychologists do not knowingly engage in behavior that is harassing or demeaning to persons with whom they interact in their work based on factors such as those persons' age, gender, race, ethnicity, national origin, religion, sexual orientation, disability, language, or socioeconomic status.

National Association of Social Workers – Code of Ethics

- Ethical Standards 4.02. Social workers should not practice, condone, facilitate, or collaborate with any form of discrimination on the basis of race, ethnicity, national origin, color, sex, sexual orientation, gender identity or expression, age, marital status, political belief, religion, immigration status, or mental or physical disability.

National Education Association – Code of Ethics

- Principle 1. The educator strives to help each student realize his or her potential as a worthy and effective member of society. The educator therefore works to stimulate the spirit of inquiry, the acquisition of knowledge and understanding, and the thoughtful formulation of worthy goals. In fulfillment of the obligation to the student, the educator . . . Shall not on the basis of race, color, creed, sex, national origin, marital status, political or religious beliefs, family, social or cultural background, or sexual orientation, unfairly: exclude any student from participation in any program; deny benefits to any student; grant any advantage to any student

National Realtors – Code of Ethics and Standards of Practice

- Article 10. Realtors® shall not deny equal professional services to any person for reasons of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity. Realtors® shall not be parties to any plan or agreement to discriminate against a person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity. Realtors®, in their real estate employment practices, shall not discriminate against any person or persons on the basis of race, color, religion, sex, handicap, familial status, national origin, sexual orientation, or gender identity.

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

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(g) in conduct related to the practice of law, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.

Comment

[3] Paragraph (g) applies to conduct related to a lawyer's practice of law, including the operation and management of a law firm or law practice. It does not apply to conduct unrelated to the practice of law or conduct protected by the First Amendment. Harassment or discrimination that violates paragraph (g) undermines confidence in the legal profession and our legal system. Paragraph (g) does not prohibit lawyers from referring to any particular status or group when such references are material and relevant to factual or legal issues or arguments in a representation. Although lawyers should be mindful of their professional obligations under Rule 6.1 to provide legal services to those unable to pay, as well as the obligations attendant to accepting a court appointment under Rule 6.2, a lawyer is usually not required to represent any specific person or entity. Paragraph (g) does not alter the circumstances stated in Rule 1.16 under which a lawyer is required or permitted to withdraw from or decline to accept a representation. ~~A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.~~

Rule 8.4. Misconduct.

Colo. RPC 8.4(2012)
Rule 8.4. Misconduct.
*****reflects changes received through March 13, 2012*****

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process; or

(h) engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law.

Source: Committee comment amended October 17, 1996, effective January 1, 1997; entire Appendix repealed and readopted April 12, 2007, effective January 1, 2008.

COMMENT

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by word or conduct, bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (g) and also may violate paragraph (d). Legitimate advocacy respecting the foregoing factors does not violate paragraphs (d) or (g). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.