VOLUME 4

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

FOR THE SEVENTH, EIGHTH, AND NINTH MEETINGS

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

AGENDA

January 21, 2005, 1:00 p.m.
Supreme Court Conference Room (5th Floor)

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1. Approval of minutes – To be distributed separately

2. Administrative matter – Select next meeting date

3. Ethics 2000 Subcommittee Report on Rules 1.6 and 1.10 through 1.13 – Michael Berger

   a. First Interim Report of Subcommittee – **See page 16 from October 1, 2004 meeting materials**

   b. Second Interim Report of Subcommittee – **See pages 16-17 from December 3, 2004 meeting materials**

   c. Third Interim Report of Subcommittee – See pages 1-58

4. Other business – Should we defer all other tendered rule changes until completion of review of Ethics 2000 amendments?

5. Adjournment (by 4:00)

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FILE NOTE

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

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

COLORADO SUPREME COURT COMMITTEE
ON RULES OF PROFESSIONAL CONDUCT

ETHICS 2000 SUBCOMMITTEE

INTERIM REPORT NO. 3

JANUARY 14, 2005

The Subcommittee has completed its work through Rule 1.13. This Interim Report No. 3 addresses the changes directed by the full Committee at its December 4, 2004 meeting regarding Rule 1.6 and then proceeds to address Rules 1.10 through 1.13.

Rule 1.6. Attached to this Report is the newly revised version of Rule 1.6. This version of Rule 1.6 contains the changes directed by the full committee at its December 4, 2004 meeting.

In addition, Comment [15] to Rule 1.6 has been revised and expanded to provide additional guidance to lawyers concerning the interplay between Rules 1.6, 1.13, 3.3 and 4.1 and to warn lawyers that while the disclosures authorized by Rule 1.6(b) are committed to the professional discretion of the lawyer, other rules may make such disclosures mandatory irrespective of the permissive nature of the disclosures under Rule 1.6.

The Subcommittee also proposes the addition of a new Comment [5A] to Rule 1.6 to address the authorization for disclosure of information necessary to run conflicts checks. When the conflicts check is within a firm, there is little doubt that the disclosure to other members of the firm is impliedly authorized by Rule 1.6(a). The question is more difficult where the disclosure of information is between firms, to comply with Rules 1.10, 1.11 and 1.12. There is no express authority in any of the Rules for such disclosures. The Subcommittee considered adding a new exception to Rule 1.6(b) to specifically authorize such disclosures, but ultimately determined that it was unwise to add a new, non-uniform exception to the text of Rule 1.6. Instead, the Subcommittee recommends the adoption of a new comment to address the matter.

Rule 1.10. There is considerable controversy among the jurisdictions and commentators as to whether screening should be permitted to overcome imputed disqualification when a lawyer from one private law firm moves to another firm. Rule 1.10, as recommended by the Ethics 2000 Commission and adopted by the ABA House of Delegates, does not authorize screening in this context. A number of state supreme courts, in acting upon the Ethics 2000 proposals, have rejected the ABA position and have adopted rules which permit, under certain and varying circumstances, screening in the private lawyer context. All jurisdictions that have adopted the Model Rules have permitted screening where a government lawyer moves from government service to the private sector. That authorization is contained in Rule 1.11.

The reasons for and against screening have been debated almost endlessly over the years. Proponents of screening assert that the realities of modern day law practice mandate a modern

approach to this issue. The existence of multi-state, indeed multi-national law firms, according to screening proponents, requires some level of screening to avoid automatic imputed disqualification of masses of lawyers. The alternative, to the proponents, is to virtually prohibit lawyers moving from one firm to another. A more colorful way to put it is that lawyers who join a large firm become "Typhoid Marys"; they are forever relegated to that firm throughout their careers. The opponents of screening believe that screening sacrifices the rights of former clients. According to this position, former clients should be able to take comfort knowing that their former lawyers will not move from the prior law firm and be in a position to prejudice their former clients at the new firm.

Complicating the matter further is the treatment of this issue by courts, particularly federal courts. A number of courts, in policing the cases before them, have not felt constrained to apply the ethics rules of the state in which the court sits when it comes to matters of disqualification of lawyers based on conflicts of interest. (This is true even in jurisdictions such as Colorado where the federal court has adopted the state rules of professional conduct with respect to practice before that court.) A number of courts have permitted screening when screening is not authorized by state ethics rules, reasoning (probably correctly) that the courts' interests in the disqualification of lawyers are not necessarily the same as the interests of a state lawyer disciplinary authority. Thus lawyers sometimes are relegated to the very uncomfortable position in which they are not disqualified by a court while that very representation constitutes a continuing violation of state ethics rules, subjecting them to state discipline. While this conundrum (which is in most cases self-inflicted) should not be the decisive factor in determining whether screening is permitted under Rule 1.10, there is an obvious benefit to consistent treatment by the courts and state disciplinary authorities of the same problem.

In a similar vein, a number of state bar ethics committees have suggested that screening should be permitted, even when there is no express authorization for it in the rules of professional conduct. Illustrative is Formal Opinion 88 of the Colorado Bar Association Ethics Committee, which is also attached to this report.

The Colorado Ad Hoc Committee recommended the adoption of proposed Rule 1.10 but did not consider screening. A large majority of the Subcommittee recommends that Colorado adopt a rule that permits screening in the private lawyer context, at least under some circumstances. A minority believes that screening in the private lawyer context should be permitted only with the consent of the former client. Among those who would permit screening without client consent at least in some circumstances, there is disagreement as to whether screening should be prohibited where the personally disqualified lawyer (the lawyer moving from one private firm to another) had major or substantial involvement in the representation at the lawyer's prior firm. A majority of the Subcommittee believes that screening should not be so limited, partly because of the difficulty it determining whether a lawyer had substantial involvement in the representation. Attached to this Report is the proposal of the majority of the Subcommittee. As stated above, a minority of the Subcommittee believes that screening should be permitted only when the personally disqualified lawyer has not had substantial participation in the matter at the prior firm. The language proposed by the minority to effectuate that view, both in the text of Rule 1.10 and the Comments, is also attached to this report.

Rule 1.11

The ABA Model Rules have always permitted screening where a government lawyer joins a private law firm. This situation has long been distinguished (whether for valid reasons is another issue) from the private lawyer situation, discussed above in connection with Rule 1.10. Proposed Rule 1.11 continues this treatment and (irrespective of how the Rule 1.10 screening issue is resolved) the Subcommittee, as did the Colorado Ad Hoc Committee, recommends the adoption of Rule 1.11. The Subcommittee does, however, recommend a change to proposed Rule 1.11(b)(2), to give more substance and guidance regarding the notification requirement. Proposed Rule 1.11(b)(2) tracks the language proposed in Rule 1.10(e)(2). The Subcommittee believes that this change should be made regardless of the outcome of the debate on Rule 1.10 screening.

Rule 1.12. Proposed Rule 1.12 is substantively the same as existing Colo.RPC 1.12, except that the reach of the rule has been broadened to encompass third party neutrals such as mediators. The Subcommittee believes (as did the Colorado Ad Hoc Committee) that this change is salutary and recommends the adoption of proposed Rule 1.12. As with Rule 1.11, the Subcommittee recommends that the notice provision of proposed rule 1.12 (c)(2) be conformed to proposed rule 1.10 (e)(2), irrespective of whether the full committee adopts the Subcommittee's recommendations on Rule 1.10 screening.

Rule 1.13. Like Rule 1.6, and for many of the same reasons, Rule 1.13 is controversial. Following the corporate scandals that erupted in the early 2000's, much thought was given by the ABA as to when a lawyer could or must "blow the whistle" on an organizational client. These debates did not occur in a vacuum. In 2002, Congress enacted the Sarbanes-Oxley Act, which among other things directed the Securities and Exchange Commission to promulgate Rules of Conduct for lawyers representing companies subject to the SEC's jurisdiction, including rules regarding "whistle blowing" by such lawyers.

As proposed by ABA Ethics 2000, the ABA President's Task Force on Corporate Responsibility (the Cheek Commission), and the Colorado Ad Hoc Committee, Rule 1.13 requires "up the ladder" reporting by a lawyer who represents an organization. Upon determining that the client is engaged in activity that violates the law and which is likely to result in substantial injury to the organization, the lawyer must (unless the lawyer reasonably believes that it is not necessary in the best interest on the organization to do so) refer the matter to higher authority within the organization. This requirement includes notifying, if warranted under the circumstances, the highest authority in the organization which, in the case of a corporation is usually the board of directors. This duty remains even if the lawyer is dismissed or resigns. The duty survives the termination of the lawyer's employment or engagement.

The most controversial aspect of proposed Rule 1.13 is what the lawyer must or can do if the highest authority of the organization refuses to cease or rectify the law violation. In that event, proposed Rule 1.13 (c) permits, but does not require, the lawyer to reveal the information to third parties, including law enforcement agencies, irrespective of whether the disclosure would otherwise violate Rule 1.6. It is important to note, however, that the focus of Rule 1.13 is on protection of the organizational client. Unlike Rule 1.6 (b), which is designed to protect persons

other than the lawyer's client, disclosure under Rule 1.13(c) is permitted only when the lawyer "reasonably believes [it] necessary to prevent substantial injury **to the organization.**" (Emphasis added.)

Rule 1.13 does not supplant or trump Rule 4.1 in any manner. Thus there will be circumstances where a lawyer must make disclosure in accordance with Rule 4.1 (and Rule 3.3) even when the disclosure is discretionary under Rule 1.13.

Proposed Rule 1.13 is consistent with the final rules promulgated by the SEC under Sarbanes-Oxley. Although there were many proponents of a rule that mandated whistle blowing by a lawyer if the lawyer's client persisted in the unlawful or fraudulent conduct and although the SEC included such a proposal in its draft rules, the SEC did not adopt such a proposal in its final regulation. (This issue is the subject of additional proposed regulations that were issued by the SEC for comment, but no action has been taken yet on these additional proposed rules.) Instead, like proposed Rule 1.13, the final SEC regulations under Sarbanes-Oxley permit, but do not require, disclosure to the SEC if internal efforts to correct the wrongful behavior are unavailing. And like the Rule 4.1 analysis discussed above, other federal or state substantive laws may compel disclosure by a lawyer to avoid criminal or civil liability by the lawyer even when disclosure under the Sarbanes-Oxley regulations is permissive.

The Subcommittee also attempted to make sense of the varying and somewhat inconsistent mental state provisions contained not only in Rule 1.13 but Rules 1.6, 3.3 and 4.1, as well. The reporter of the ABA Ethics 2000 Commission has candidly stated that the ABA Commission did not give a great amount of attention to the mental state provisions in those (or other) rules. These mental state provisions have great room for improvement. Nevertheless, it is clear that the mental state provisions require a greater degree of certainty on the lawyer's part where the disclosures are mandated than when the disclosures are permissive. This makes sense, and absent a wholesale rewriting of each of these rules, the mental state provisions are workable.

For all of these reasons, the Subcommittee unanimously recommends the adoption of proposed Rule 1.13.

As proposed by Ethics 2000 Subcommittee 1/14/2005
Marked to show changes from prior Subcommittee
Draft submitted to Full Committee

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death, ~~or~~ substantial bodily harm, or the commission of a serious crime;

(2) to prevent the client from committing a ~~crime or~~ fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

* * * * * * * * * *

Comment to RULE 1.6 CONFIDENTIALITY OF INFORMATION

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[5A] Similarly, a lawyer is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to conduct a conflicts check to determine whether a current representation may be continued or a new representation may be accepted consistent with Rules 1.7-1.12. Thus, for conflicts checking purposes, a lawyer usually may disclose, without express client consent, the identity of the client and the basic nature of the representation to insure compliance with Rules such as Rules 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12. Even this basic disclosure, when such disclosures are made between firms for the purpose of complying with Rules 1.10, 1.11 and 1.12, may materially prejudice the interests of the client or former client. In those circumstances, disclosure is prohibited without client consent. In all cases, the disclosures must be limited to the information essential to conduct the conflicts check, and the confidentiality of this information must be agreed to in advance by all lawyers who receive the information.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or

debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[6A] Paragraph (b)(1) also permits disclosure reasonably necessary to prevent the commission of a "serious crime." For purposes of Paragraph (b)(1), a "serious crime" is a crime that is reasonably likely to result in death, substantial bodily injury or substantial injury to the financial interests or property of another. Whether a crime is a "serious" crime within the meaning of Paragraph (b)(1) is not determined exclusively on the basis of whether the crime constitutes a felony. Certain misdemeanors, such as driving under the influence of alcohol or controlled substances may have a great potential for harm to others and may, under appropriate circumstances, constitute a "serious crime." Other crimes, classified under the law as felonies, may not have the potential to cause such harm to others and thus, for the purpose of Paragraph (b)(1), would not be considered to be "serious crimes."

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a ~~crime or~~ fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be

established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. For purposes of paragraph (b)(6), a subpoena is a court order. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[13A] Rule 4.1(b) requires a disclosure when necessary to avoid assisting a client's criminal or fraudulent act, if such disclosure will not violate this Rule 1.6.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). For example, Rule 4.1(b) requires a lawyer to disclose material facts to third persons when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6. See also Rules 1.2(d), ~~4.1(b),~~ 8.1 and 8.3. Other rules permit or require disclosure regardless of whether such disclosure is permitted by this Rule. For example, Rule 1.13(c) permits certain disclosures even when such disclosures would otherwise be prohibited by this Rule. And, Rule 3.3~~, on the other hand~~, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

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January 13, 2005

Ms. Marci Glenn
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Re: Ethics 2000 Revisions to the
Colorado Rules of Professional Conduct

Dear Marci:

I write to ask you to bring before the Standing Committee on the Rules of Professional Conduct a particular concern I have for the proposed changes to Rule 1.6 and specifically the addition of Rule 1.6 (b) (2). The subcommittee currently reviewing the changes to our existing Rules of Conduct as adopted by the American Bar Association and as proposed by the Ad Hoc Committee has declined to address a matter that I believe has serious consequences on the direction and guidance these Rules give to the practicing Bar. The suggested modification would authorize a lawyer to reveal information relating to the representation of a client to secure legal advice about a lawyer's compliance with these Rules. It does not authorize revelation of such information to obtain advice about legal and common law duties to the client.

I am deeply concerned that a lawyer can to reveal information relating to the matter only to secure legal advice about compliance with the Rules of Conduct. By implication, this could well suggest that the lawyer is not permitted to reveal information relating to the matter in order to secure legal advice about the lawyer's duties to a client or compliance with other law that may not necessarily involve compliance with the Rules of Conduct. The narrow authorization to discuss a client's representation only to determine compliance with the Rules may well be interpreted as a prohibition against the lawyer from revealing such information as may be necessary to secure legal advice about the lawyer's other duties to the client or the lawyer's compliance with rules or regulations other than the Rules of Conduct. The maxim *inclusio unius est exclusio alterius* may apply to this provision.

For more than ten years my firm has provided a Hotline calling service to over 500 Colorado lawyers insured by the Bar Association's endorsed malpractice carrier. This service is provided within a lawyer/client relationship whereby the lawyer becomes a client seeking advice

or assistance concerning the lawyer's compliance with duties to the client or the performance of legal obligations other than just limited to compliance with the Rules of Conduct. In order to establish this relationship, where the lawyer seeking assistance becomes a client of this firm, it is necessary for this firm to examine the formulation of the relationship just as it would do with any other prospective client. This means that my firm must perform a conflicts check in order to make sure that the client being served by the calling lawyer is or has not been a client of this firm. This requires the revelation of some information relating to the legal relationship so as to provide enough information to evaluate the potential for a conflict.

In providing assistance to the calling lawyer, it is thereafter necessary to discuss the details of the relationship that give rise to the reason the call is being made. In so doing, the calling lawyer and this firm discuss in as much detail as necessary the circumstance in the relationship giving rise to the question and the discussion about ways to correct or otherwise respond to a difficult situation. During this representation, information concerning the lawyer's underlying representation must be revealed and discussed.

I am concerned that the restriction implied by the modification to Rule 1.6 might be interpreted as a prohibition against this arrangement. In discussing this matter, I should point out that the development of this procedure was discussed at some length and approved by the Colorado Bar Association Ethics Committee and, so far as I know, has never been questioned in any respect. Just as with any other lawyer/client relationship, the information discussed in the Hotline representation is treated as confidential and protected just as the information pertaining to any other lawyer/client relationship would be protected.

I sincerely urge that the Standing Committee modify the proposal for the change to Rule 1.6 (b) (2) to allow lawyers in whose practice problems have arisen that need discussion in order to better serve the client, the opportunity to discuss concerns arising out of the particular representation and in so doing to reveal information relating to the difficulty in the underlying representation. I suggest the following language as an amendment to the proposed change to Rule 1.6 (b) (2):

> (2) To secure legal advice about the lawyer's compliance with these Rules or other obligations to the lawyer's client.

The change suggested by Ethics 2000 and by the Ad Hoc Committee has at least preserved the lawyer's opportunity to reveal information relating to the representation in order to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client. It seems shortsighted for Rules to specifically allow revelation of information relating to the underlying representation where a controversy has arisen, but not to allow such revelation in order to avoid a controversy in the first place.

At the time when the subcommittee's report on the Rules are to be considered by the Standing Committee, I would ask for an opportunity to present an amendment to the

subcommittee's recommendations to expand the lawyer's opportunity for discussion under Rule 1.6. The subcommittee has declined to recommend this change and has suggested that I bring the matter to you directly. I will appreciate any consideration you might give to having this matter presented, and I appreciate your attention to it.

Yours truly,

David C. Little

lkf
cc Subcommittee Members
Michael Berger
James Wallace
Nancy Cohen
Eli Wald
Anthony vanWestrum
Alec Rothrock
Cecil Morris
H. Richard Reeve
John Richilano
Hon. John Webb
John Gleason

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(e) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(2) the personally disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior representation and the screening procedures to be employed) to any affected former client and the former client's current lawyer, if known to the personally disqualified lawyer, to enable the former client to ascertain compliance with the provisions of this Rule; and

(3) the personally disqualified lawyer and the members of the firm with which the personally disqualified lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

* * * * * * * * * *

Comment to RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST:

GENERAL RULE

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law;

or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[5A] Where the conditions of paragraph (e) are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.

[5B] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the personally disqualified lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former

client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

Rule 1.10 – Minority proposal to effectuate screening but only when screened lawyer did not have a substantial role in representation – 01/14/2005

Proposed 1.10(e)(1)

1.10 (1) The matter is not one in which the personally disqualified lawyer had a substantial role.

Comment

[A*] Paragraph (e) of Rule 1.10, does not permit a firm, without the consent of the former client of the disqualified lawyer, to handle a matter with respect to which the disqualified lawyer was personally and substantially involved, or had substantial material information, as noted in Comment D* below.

[B*] If the lawyer has no confidential information about the representation of the former client, the new firm is not disqualified and no screening procedures are required. This would ordinarily be the case if the lawyer did no work on the matter and the matter was not the subject of discussion with the lawyer generally, for example at firm or working group meetings. The lawyer must search his or her files and recollections carefully to determine whether he or she has confidential information. The fact that the lawyer does not immediately remember any details of the former client's representation does not mean that he or she does not in fact possess confidential information material to the matter.

[C*] If the lawyer does have material information about the representation of the client of his former firm, the firm with which he or she is associated may represent a client with interests adverse to the former client of the newly associated lawyer only if the personally disqualified lawyer had no substantial involvement with the matter or substantial material information about the matter, the personally disqualified lawyer is apportioned no part of the fee, and all of the screening procedures are followed, including the requirement that the personally disqualified lawyer and the new firm reasonably believe that the screening procedures will be effective. For example, in a very small firm, it may be difficult to keep information screened. On the other hand, screening procedures are more likely to be successful if the personally disqualified lawyer practices in a different office of the firm from those handling the matter from which the personally disqualified lawyer is screened.

[D*] In situations where the personally disqualified lawyer was substantially involved in a matter, or had substantial material information, the new firm will generally only be allowed to handle the matter if the former client of the personally disqualified lawyer or of the law firm consents and the firm reasonably believes that the representation will not be adversely affected, all as required by Rule 1.7.

[E*] The former client is entitled to review of the screening procedures if the former client believes that the procedures will not be or have not been effective. In some circumstances the former client may attempt to seek judicial review of the screening procedures.

RULE 1.10 — IMPUTED DISQUALIFICATION: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8 (c), 1.9 or 2.2.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

Comment

Definition of "Firm"

For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to the other.

With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7 and 1.9.

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences and, therefore, to the protections provided in Rules 1.6, 1.9 and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations and, thus, has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.

Principles of Imputed Disqualification

The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

Committee Comment

This rule and the comments to this rule are identical to amended Model Rule 1.10 (amended at the February 1989 Mid-Year ABA meeting).

Rule 1.10
Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

COMMENT

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2]–[4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers

currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

88 USE AND MISUSE OF "CONFIDENTIALITY WALLS"

Adopted May 18, 1991.
Amended April 18, 1992.

Introduction

DR 5-105(D) of the Code of Professional Responsibility ("CPR") provides:

> If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate or any other lawyer affiliated with him or his firm may accept or continue such employment.

Rule 1.10(a) of the proposed Model Rules of Professional Conduct[1] ("MRPC") similarly provides:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8(c), 1.9 or 2.2.

As written, these ethical precepts are simple and far-reaching. Unfortunately, they have proven to be too far-reaching; and for years courts and ethics commentators have struggled to reconcile the unyielding language quoted above with other societal goals and with the realities of law practice.[2]

In an effort to avoid imputed disqualification, law firms in both public and private settings have attempted to create a screen or "Confidentiality Wall"[3] around one or more attorneys who themselves would be ethically prohibited from working on a given matter. Over the past few years, the CBA Ethics Committee has received an increasing number of inquiries as to when construction of a Confidentiality Wall is proper and what factors to consider in constructing such a Wall. We attempt by this Formal Opinion to provide some overall guidance on these issues.

At the outset, the Committee notes that these issues implicate a number of important legal and social considerations (which at times may conflict) such as a person's right to counsel of his or her choice, a client's right to confidentiality and loyalty in his or her relationship with legal counsel, and the right of attorneys to move from job to job. *E.g., Manning v. Waring, Cox, James, Sklar and Allen*, 849 F.2d 222, 224 (6th Cir. 1988); *Nemours Foundation v. Gilbane, Aetna, Federal Insurance Co.*, 632 F.Supp. 418, 425 (D. Del. 1986); *Parker v. Volkswagenwerk Aktiengesellschaft*, 245 Kan. 580, 781 P.2d 1099, 1104 (1989) (all discussing the various factors to consider in analyzing whether a Confidentiality Wall can avoid a firm's imputed disqualification). Moreover, these issues oftentimes arise in the context of a contested motion to disqualify an opposing party's law firm, and thus are frequently analyzed in a highly charged setting in which the moving party's motives are just as much a matter for judicial scrutiny as the subject attorney's behavior.[4] *See, Manning*, 849 F.2d at 224 (reporting that motions to disqualify opposing counsel are "becoming an increasingly popular litigation technique."); *cf.* this Committee's Ethics Opinion No. 78 (adopted June 18, 1988) (regarding the ethical considerations to bear in mind in seeking to disqualify opposing counsel by listing counsel as a fact witness at trial).

For these reasons, it is difficult to set forth black letter principles in this area. The authorities on point are at times difficult to reconcile, and are in any event quite fact-specific.

Nevertheless, while the law is still developing in this area, the authorities do provide some general ethical guidance. The Committee, like the Colorado Supreme Court, *see, Osborn v. District Court*, 619 P.2d 41, 46 (Colo. 1980), is "aware of the current trends regarding the erection of a so-called 'Confidentiality Wall' . . . ." By its analysis of various informal requests for ethical guidance,

the Committee is also aware of a number of areas in which some members of the bar fail to appreciate the limited circumstances in which a Confidentiality Wall is appropriate. Accordingly, the Committee believes that it is in a position to provide some useful information to the bar by analyzing these authorities and describing where Confidentiality Walls have been permitted, where they have been found ineffective, and what factors to consider (where a Confidentiality Wall is otherwise proper) in constructing one effectively.

Summary of Opinion

The following discussion may be summarized as follows:

Confidentiality Walls have been permitted in limited circumstances only, as a way of minimizing the risk of inadvertent disclosure of a client's confidences and secrets. The main situation in which a Confidentiality Wall may serve to avoid the otherwise strict rule of imputed disqualification is where an attorney moves from one employer (which represents a certain client) to another employer (representing a different client who might be deemed to have a competing or adverse interest to the client of the first employer). Under proper circumstances set forth below, a Confidentiality Wall may enable the new employer to undertake or continue an engagement which the attorney would not be able to handle on his or her own.

Confidentiality Walls are not permitted as a way of avoiding an attorney's or law firm's duty of undivided loyalty to a client. Accordingly, subject to § 1(b) below, a Confidentiality Wall may not be constructed within a single law firm — no matter how large and diffuse that firm may be — so as to permit that firm simultaneously to represent clients whose interests are adverse in the same or a substantially related matter.

Under those limited circumstances where Confidentiality Walls are permitted, the Wall must be erected in a way which promptly and meaningfully screens the attorney from any contact with the matter at issue.

Analysis

The Colorado Appellate Courts have suggested that a Confidentiality Wall may serve to avoid the imputed disqualification of a public law firm such as a district attorney's or public defender's office. *See, McCall v. District Court*, 783 P.2d 1223 at 1228, n. 6 ("It may be possible for the state public defender to minimize disqualification" by creating a Confidentiality Wall which will prevent one employee's access to information as to the actions of certain co-employees); *Ranum v. Colorado Real Estate Commission*, 713 P.2d 418, 420 (Colo. App. 1985) (approving a Confidentiality Wall within the Attorney General's office, separating attorneys who serve as counsel to various regulatory commissions and attorneys who prosecute charges before hearing officers of those commissions). These cases reflect the Colorado courts' willingness (similar in nature to many other courts and ethics authorities which have addressed the issue) to apply the rule of imputed disqualification in a pragmatic (sometimes referred to as a "functional"), rather than a literal, manner. *See, e.g., Manning*, 849 F.2d at 225 (recognizing, in the context of an imputed disqualification motion under the CPR, the "new realities" of modern law practice, including "law firms employing hundreds of lawyers engaging in a plethora of specialities," "law film mergers," and the frequent movement of attorneys from firm to firm); *Nemours Foundation*, 632 F.Supp. at 425 (recognizing the "philosophy of pragmatism" in the MRPC regarding imputed disqualification, "which balances the expectations of confidentiality of a former client against the importance of allowing a client the representation of his choice and promoting the mobility of attorneys, particularly associates, from one private law firm to another").

While *McCall* and *Ranum* were limited to lawyers in the public sector, the *McCall* Court relied on authorities which, in turn, would permit the erection of a Confidentiality Wall under certain

circumstances in private law firm settings.[5] Authorities from other states, interpreting the CPR, have extended to private law firms the opportunity under appropriate circumstances to avoid imputed disqualification in certain cases by erecting Confidentiality Walls.[6] The Committee concludes that for at least as long as the CPR remains in force, a similar rule should apply in Colorado.[7]

1. *The interests that may justify imputed disqualification in a Confidentiality Wall context.*

In order to evaluate whether a Confidentiality Wall may be effective in avoiding imputed disqualification, it is useful at the outset to identify the concerns that might justify such disqualification in the first place.

Three principal concerns basic to the existence of the attorney-client relationship and the accepted role of lawyers in American society may be implicated by allowing a law firm to represent a given client where one lawyer in that firm is unable to do so:

(a) A lawyer's duty to preserve a client's confidences.

The first concern is confidentiality. Canon 4 of the CPR states: "A lawyer should preserve the confidences and secrets of a client."

To the same effect, Model Rule 1.6(a) provides: "A lawyer shall not reveal information relating to representation of a client. . . ." and Model Rule 1.8(b) provides: "A lawyer shall not use information relating to representation of a client to the disadvantage of the client. . . ."

Confidentiality is a basic tenet of the attorney-client relationship. Unless a client has reasonable assurance that his or her lawyer will not reveal the client's confidences, the client may be unwilling to disclose them to the attorney. This could well affect the attorney's ability to provide proper legal representation.

Confidentiality Walls have succeeded where they have served to minimize the risk of inadvertent disclosure of certain protected information within a public or private law firm.[8] *E.g., Grand Jury Subpoena of Ford v. United States*, 756 F.2d 249, 254 (2d Cir. 1985) (Confidentiality Wall approved within a U.S. Attorney's office, such that one prosecutor may conduct a grand jury investigation of a target defendant while another, properly screened, prosecutor may question the target defendant's husband about his wife's alleged co-conspirators); *Ranum*, 713 P.2d at 420 (discussed in a parenthetical above); *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720, 731-732 (Minn. 1983) (court approves Confidentiality Wall in private law firm representing a defendant, where attorney who joined that firm had previously worked for another private law firm which had represented plaintiff in "at least arguably" a substantially related matter). Under proper circumstances discussed below, a Confidentiality Wall can thus serve to rebut the presumption that a lawyer has shared client confidences with his or her professional colleagues. *E.g., Manning*, 849 F.2d at 225-226; *INA Underwriters Insurance Co. v. Rubin*, 635 F.Supp. at 4-5.[9] In that way, a law firm may continue to represent a client in a given matter, even though (a) one lawyer in the firm is unable to work on it and (b) a client of another firm may be objecting to the arrangement. *Id.*[10]

(b) A lawyer's duty of undivided loyalty to a client.

The second concern is loyalty. The nature of the attorney-client relationship is such that the lawyer must remain loyal to the client. This interest is the subject of Canon 5 of the CPR, which provides: "A lawyer should exercise independent professional judgment on behalf of a client."

Rule 1.7(b) of the MRPC similarly provides: "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests. . . ."

In order for the legal system to operate properly, a client must have confidence that his or her lawyer is acting solely in the client's interests.

Private law firms have attempted to create a Confidentiality Wall between two sets of attorneys who simultaneously represented competing client interests in the same or a substantially related matter. Such efforts have uniformly failed. Thus, in *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977), a law firm which was regional counsel to a national accounting firm was engaged to represent a client whose interests conflicted with the accounting firm's. Under these circumstances, the law firm was not permitted to create a Confidentiality Wall between the attorneys who regularly represented the accounting firm and those attorneys who were simultaneously engaged to represent the adverse client in the same or a substantially related matter. *Id.*, at 229, n. 10 ("No such 'Confidentiality Wall' could be created in a single firm."). The reason for this is simple: A lawyer simply cannot, and cannot be expected to, give undivided loyalty to a client if his or her professional colleagues are simultaneously representing (and presumably giving their undivided loyalty to) another client with adverse interests in the same or a substantially related matter.[11] *See also, Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1267-1268 (7th Cir. 1983) (Confidentiality Wall does not permit a law firm, having been engaged by defendant in a matter, to later represent plaintiff in a substantially related matter); *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1320-1321 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978) (law firm operating out of two cities cannot permit its attorneys in the two separate offices to simultaneously represent adverse interests in a substantially related matter by creating a Confidentiality Wall between the two offices); *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386-1387 (2d Cir. 1976) (where attorney is simultaneously a partner in two separate firms, located in two different cities, one firm cannot represent plaintiff in a lawsuit if the other firm is representing the defendant in a different, but "somewhat similar," matter).[12]

A public law firm is generally prohibited from simultaneously representing conflicting interests in the same or a substantially related matter. While this may be less of a practical problem within a prosecutor's office [whose "attorneys (generally) represent only one 'client,'" *Grand Jury Subpoena of Ford*, 756 F.2d at 254] than in a public defender's office [which may be called upon, consistent with its Sixth Amendment duties, occasionally to assume conflicting litigation positions (*see, Osborn*, 619 P.2d at 41, involving one public defender's challenge to the efficacy of the representation provided by another public defender)], all public law firms are still generally subject to this ethical proscription. However, in *Ranum*, 713 P.2d at 420, the Colorado Court of Appeals permitted one set of attorneys within the Attorney General's office to represent an administrative agency while another set of attorneys in that office prosecuted charges before that agency, so long as an effective Confidentiality Wall was in place.

(c) Avoiding the appearance of impropriety.

The third interest is set forth in Canon 9 of the CPR, which states: "A lawyer should avoid even the appearance of professional impropriety."

Some courts have expressed *in dicta* the position that disqualification may occur in a Confidentiality Wall context solely because of a violation of Canon 9. *E.g., Sierra Vista Hospital, Inc. v. United States*, 639 F.2d 749, 754 (Ct. Cl. 1981); *INA Underwriters Insurance Co.*, 635 F.Supp. at 5. Other courts have based their ruling that a firm must be disqualified (notwithstanding its timely erection of a Confidentiality Wall) on Canon 9. *E.g., Cinema 5*, 528 F.2d at 1386-1387; *Petroleum Wholesale, Inc. v. Marshall*, 751 S.W.2d 295 (Tex. Civ. App. 1988). However, in every such case where disqualification has been ordered in ostensible reliance on Canon 9, there has also been a viola-

tion shown of other Canons. The Committee knows of no occasion in a Confidentiality Wall context where a lawyer was disciplined or a firm was disqualified solely because of a subjective failure to avoid the "appearance of professional impropriety" but where the attorney or firm complied with every other Disciplinary Rule. *Cf. Food Brokers, Inc. v. Great Western Sugar Co.*, 680 P.2d 857, 859 (Colo. App. 1984) (disqualification of private attorneys under Canon 9 requires some other "specific identifiable impropriety" such as a violation of Canon 4). Indeed, the difficulty in applying the subjective dictates of Canon 9's "appearance of impropriety" standard has led to its omission from the MRPC.

Accordingly, in analyzing the issue of Confidentiality Walls in the context of the CPR, the Committee does not believe that Canon 9, by itself, is an adequate reason to erect a Confidentiality Wall or to seek disqualification of opposing counsel for failing to erect one; and the absence of any "appearance of impropriety" standard in the MRPC obviates any need to analyze Confidentiality Walls in that context.

2. *The framework for analyzing when Confidentiality Walls are permitted as a way of avoiding a law firm's imputed disqualification.*

In Section 1, the Committee explained, in general terms, that a Confidentiality Wall will enable a law firm to avoid imputed disqualification only in the context of preventing the inadvertent disclosure of confidential information. The Committee now addresses a series of more specific fact patterns. In this way, we hope to provide further guidance as to when a Confidentiality Wall is likely to succeed or fail. For, as the authorities show, the mere establishment of a Confidentiality Wall will not, *per se*, cause a court or disciplinary authority to conclude that there is no risk of an inadvertent disclosure of client confidences.

As discussed above, in determining whether a Confidentiality Wall can be erected, a firm (and a court in the context of a motion to disqualify) is called upon to balance certain conflicting interests, including the client's right to counsel of his or her choice, the lawyer's duty to preserve a client's confidences and to remain loyal to the client, the risk of inadvertent disclosure of client confidences, and a lawyer's ability to move from job to job.[13] Depending on the facts of a given case, one of these factors may assume heightened importance.

For purposes of the following discussion, we shall assume that an attorney ("Attorney") leaves one employer ("First Firm"), which represented one client ("First Firm's Client") in a certain lawsuit ("Lawsuit 1"),[14] to join another employer ("Second Firm") which represents another client ("Second Firm's Client"), whose litigation interests in Lawsuit 1 or a different lawsuit ("Lawsuit 2"), are somehow adverse to those of the First Firm's Client.[15] We assume further that the First Firm's Client does not give his or her consent to the Attorney's new position at the Second Firm. *See*, nn. 10-11, *supra*.

Under these circumstances, the Second Firm is obligated at the outset to determine whether it can continue to serve as the Second Firm's Client's attorney in light of the authorities discussed in this Opinion. If the Second Firm believes that it can so remain as counsel, it risks a motion to disqualify being filed out of concern that it has not taken adequate steps to prevent an inadvertent disclosure of the First Firm's Client's confidences.

With the foregoing fact pattern in mind, where there is no relationship whatsoever between the circumstances of Lawsuit 1 and Lawsuit 2 and where the Second Firm is not involved in Lawsuit 1, there is no need for the Second Firm to erect a Confidentiality Wall. *See, Smith v. Whatcott*, 757 F.2d at 1100; *INA Underwriters Insurance Co. v. Nalibotsky*, 594 F.Supp. 1199, 1210-1211 n. 8 (E.D. Pa. 1984). If Lawsuit 1 is not related to Lawsuit 2, there is little reason to believe that the Attorney has received any secrets or confidences of the First Firm's Client which might unduly advantage the Second Firm's representation of the Second Firm's Client. *See also, Osborn*, 619 P.2d at 48.

However, it may be difficult to show that there is no relationship whatsoever between those engagements. As an example, even if the facts and issues don't overlap from one case to another, it may well be that a litigant's overall litigation strategy (either one of extreme aggressiveness or one evincing a willingness to settle on the eve of trial) may itself be deemed a "confidence" in need of protection. *See, e.g., Novo Terapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc.*, 607 F.2d 186, 188-189 (7th Cir. 1979) (rejecting a "mathematical evaluation" as the test of a substantial relationship and concluding that that test "involves a realistic appraisal of the possibility that confidences had been disclosed in the one matter which may be harmful to the client in the other."); *Chugach Electric Association v. District Court*, 370 F.2d 441, 443 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967) (disqualification ordered where plaintiff's counsel, who had served as defendant's in-house counsel, "was in a position to acquire knowledge casting light on the purposes of later acts and agreements" undertaken after the attorney left defendant's employ). The Committee urges the bar to err on the side of cautiousness in erecting Confidentiality Walls where there is even the slightest reason to believe that a relationship exists between the two Lawsuits.

Where there is any relationship between the two Lawsuits, a Confidentiality Wall should be constructed around an attorney who did not work on the First Firm's Client's legal matters. *See, Chambers v. Superior Court*, 121 Cal.App.3d 893, 175 Cal Rptr. 575, 580 (1981) (no showing that high-ranking government attorney acquired confidential information about the matters in dispute; hence, properly constructed Confidentiality Wall will avoid the Second Firm's disqualification); *Ross v. Canino*, 93 N.J. 402, 461 A.2d 585, 589 (1983) (same); *Jenson*, 335 N.W.2d at 732 (same, but in the context where the First Firm was a private law firm). Where the Attorney did not work on the First Firm's Client's legal matters, there is little risk of prejudice to the First Firm's Client arising from any inadvertent disclosure of that Client's confidences. In those circumstances, the courts generally will defer to considerations of the Attorney's rights of job mobility and the Second Firm's Client's right to select counsel of his or her choice, and permit the Second Firm to remain as counsel upon its proper construction of a Confidentiality Wall.

However, a different situation exists where the Attorney, while at the First Firm, performed legal services for the First Firm's Client. Such a situation poses a great risk of harm to the First Firm's Client from an inadvertent disclosure of that Client's confidences. The risk is indeed great enough that, in many instances, the Second Firm cannot remain as counsel of record even if it timely constructs a Confidentiality Wall.

For instance, if in the course of Lawsuit 1, the Attorney leaves the First Firm (which represents one litigant) to join the Second Firm (which represents the adverse litigant), the key question in determining whether a Confidentiality Wall will succeed in avoiding the Second Firm's imputed disqualification is whether the Attorney was privy to the First Firm's Client's confidences. Under circumstances where the Attorney actually worked on the matter in dispute (and was thus presumed to have received client confidences bearing on the matter, *see*, note 9, *supra*), courts have regularly found that even a properly constructed Confidentiality Wall at the Second Firm will not avoid the risk of improper disclosure of the First Firm's Client's confidences and, thus, have disqualified the Second Firm. *E.g., Cheng v. GAF Corp.*, 631 F.2d 1052 at 1058; *United States v. Uzzi*, 549 F.Supp. 979, 983-984 (S.D.N.Y. 1982); *State of Nebraska ex rel. Freezer Services, Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245, 253 (1990); *Petroleum Wholesale*, 751 S.W.2d at 300; *Edward J. DeBartolo Corp.*, 516 So.2d at 7; *see also, Manning*, 849 F.2d at 227 (appellate court remands the matter to trial court to see if the Attorney actually worked for the opposing party in the same case; if so, the Second Firm would be disqualified despite properly constructing a Confidentiality Wall).

Let us say, instead, that the Attorney leaves the First Firm after Lawsuit 1 has concluded, but during the pendency of a second lawsuit, Lawsuit 2, involving the First Firm's Client. The risk of

prejudice to the First Firm's Client from any inadvertent disclosure of that Client's confidences may or may not be great, depending on the relationship between the two Lawsuits.

As the relationship between the two Lawsuits becomes increasingly "substantial," the risk increases (if the Attorney was privy to the First Firm's Client's confidences, *see*, note 9, *supra*) that the First Firm's Client will be prejudiced by any inadvertent disclosure of that Client's confidences; and the less likely it is that even a properly constructed Confidentiality Wall would suffice under those circumstances. *See, e.g., Haagen-Dazs Co., Inc. v. Perche No! Gelato, Inc.*, 639 F.Supp. 282 at 287 (disqualification where "substantial relationship" found between two lawsuits). Where there is a "substantial relationship" between the two Lawsuits,[16] then – as with the above example of the Attorney moving from the First Firm to the Second Firm during the pendency of Lawsuit 1 – the risk is great that the First Firm's Client's confidences inadvertently may be disclosed. Certainly if the Second Firm fails to establish a Confidentiality Wall, it should be disqualified from any further involvement in Lawsuit 2 under circumstances where Lawsuit 1 and Lawsuit 2 are substantially related. *E.g., Smith v. Whatcott*, 757 F.2d at 1101; *EZ Paintr Corp. v. Padco, Inc.*, 746 F.2d 1459, 1462 (Fed. Cir. 1984).

What is or is not a "substantial relationship" may, of course, be a difficult question in any given instance. In some cases, particularly where the Attorney and the First Firm performed extensive services for the First Firm's Client over a sustained period of time, the term "substantial relationship" may require a far more searching analysis than where the Attorney and the First Firm represented the First Firm's Client only briefly, in an isolated matter. *See*, note 16, *supra*.

3. *Factors to consider in constructing a Confidentiality Wall.*

We have discussed a series of circumstances under which a Confidentiality Wall may be constructed. But even in those circumstances, the Second Firm may remain as counsel of record only if it establishes a Confidentiality Wall in the proper way. *E.g., Atasi Corp. v. Seagate Technology*, 847 F.2d 826, 831 (Fed. Cir. 1988) (disqualifying the Second Firm where that Firm undertook to create a Confidentiality Wall, but failed to do so effectively).

The Committee is in no position to investigate or comment upon the effectiveness of any given Confidentiality Wall; nor is this Opinion intended to identify the sole factors to consider in constructing one. However, the authorities set forth certain general characteristics of a properly constructed Confidentiality Wall, which any given law firm should consider in the course of determining whether and how it might construct one effectively.

The first factor is timeliness. A firm's best chance of erecting an effective Confidentiality Wall depends in great part on the speed with which the Wall is established. Before the Attorney is hired by the Second Firm, the Attorney and the Second Firm should identify all instances as to which the Attorney's work at the First Firm might give rise to the need for a Confidentiality Wall at the Second Firm. The Second Firm should critically assess whether it may continue to serve as counsel of record in Lawsuit 1 or Lawsuit 2, even upon erecting a Confidentiality Wall around the Attorney. Then, if the Second Firm concludes that it can continue to serve as counsel of record in Lawsuit 1 or Lawsuit 2 by erecting a Confidentiality Wall, the Second Firm should construct the Wall in advance of the Attorney's arrival. In this regard, *see, Papanicolaou v. Chase Manhattan Bank, N.A.*, 720 F.Supp. 1080 at 1087 (Confidentiality Wall ineffective when created in response to a motion for disqualification); *Haagen-Dazs*, 639 F.Supp. at 287 (disqualification ordered where undue delay in creating Confidentiality Wall).

Second, the Attorney must be excluded from all relevant files, participation in the representation at issue, and discussion with any employee in the office about the matter being screened. The

files of the matter in question should be moved from any central filing area to a separate room which the Attorney should be instructed not to enter. Where the Second Firm has a firm-wide computer network, any data on the network should be protected in some manner from the Attorney's inadvertent access. Telephone messages, intraoffice memoranda, and any documents regarding the matter that are not of record should be kept from the Attorney. In this regard, *see, Nemours Foundation*, 632 F.Supp. at 429; *City of Hoquiam v. Public Employment Relations Committee*, 29 Wash.App. 319, 628 P.2d 1314, 1322-1323 (1986), *rev'd on other grounds*, 97 Wash.2d 481, 646 P.2d 129 (1982); *Petroleum Wholesale*, 751 S.W.2d at 297.

Third, all employees of the Second Firm should be warned not to discuss any facet of the subject engagement with the Attorney, or even to discuss the matter in his or her presence. Thus, in *Atasi*, 847 F.2d at 831, the court rejected a Confidentiality Wall and disqualified the Second Firm where only the Attorney, and not the remainder of the Firm, was made aware of its establishment. *See also, City of Hoquiam*, 628 P.2d at 1322-1323.

Fourth, the firm should segregate any fees earned from the matter in question, so that the Attorney does not reap any direct financial benefit from it. *See, Kovacevic v. Fair Automotive Repair*, 641 F.Supp. 237, 244 (N.D. Ill. 1986); Model Rule 1.11(a)(1). This may not be possible in the case of an associate who receives a fixed salary, *see, Armstrong v. McAlpin*, 606 F.2d 28, 34 (2d Cir. 1979), *rev'd en banc*, 625 F.2d 433 (2d Cir. 1980), *vacated on procedural grounds*, 449 U.S. 1106 (1981) (describing *in dictum* the practical difficulties of avoiding a sharing of fees in this context), but is feasible in the case of partners.

Finally, courts have examined the size of the firm in determining whether a Confidentiality Wall can be effective. *Compare, Cheng*, 631 F.2d at 1058 (35-attorney firm is a "relatively small firm" by New York standards, such that "it is unclear . . . how disclosures, admittedly inadvertent, can be prevented throughout the course of this representation.") *with Higdon v. Superior Court*, 227 Cal.App.3d 167, 278 Cal.Rptr. 588, 595 (1991) (mere fact that firm was composed of only two attorneys would not, by itself, invalidate an otherwise effective Confidentiality Wall). In deciding whether a Confidentiality Wall can be effective, the Second Firm must give careful consideration to its own physical configuration.

Conclusion

The effective use of Confidentiality Walls in proper circumstances can facilitate the movement of attorneys and non-lawyers from employer to employer, while minimizing the risk of inadvertent disclosure of any client confidences learned at the previous job. However, the circumstances where Confidentiality Walls will be permitted are limited, and a Confidentiality Wall, to be effective, must be established timely and must meaningfully prevent the risk of such inadvertent disclosure.

NOTES

1. The Colorado Supreme Court has adopted the Colorado Rules of Professional Conduct effective January 1, 1993.

2. The Committee, in its Formal Opinion No. 75 (adopted June 20, 1987) [16 *The Colorado Lawyer* 1429 (Aug. 1987)], noted that it is impossible to reconcile a strict reading of the imputed disqualification rule not only with the Committee's own conclusions about ethical conduct but also with similar conclusions reached by courts and disciplinary authorities.

3. For a further description of Confidentiality Walls and some of the circumstances in which they have been utilized, *see, e.g., McCall v. District Court*, 783 P.2d 1223, 1228 n. 6 (Colo. 1989); Mullins & Hutchins,

"The 'Chinese Wall' in Colorado," 19 *The Colorado Lawyer* 429 (March 1990); Note, "The Chinese Wall Defense to Law-Firm Disqualification," 128 *U. Pa. L.Rev.* 677 (1980); Merrick, "Government Service and the Chinese Wall: An Accommodation Founded on Practicality," 52 *U. Colo. L.Rev.* 499 (1981); Wine-Banks, "Ethics of Switching Sides—II," 16 *Loyola U. Chi. L.J.* 516 (1985).

4. It is not so much the Committee's purpose to provide the bar with a road map to avoid disqualification as it is to provide ethical guidance. The Committee cautions that a lawyer and law firm will not be deemed to have acted ethically merely by winning a contested motion to disqualify. In this regard, *see, Roth v. Roth*, 84 Ill. App.3d 240, 405 N.E.2d 851, 854 (1980) (court refuses to disqualify firm where no prejudice to moving party is shown, but proceeds to "note[] that we do not pass upon the question whether disciplinary action would be appropriate."); *Armstrong v. McAlpin*, 625 F.2d 433, 444, 446 (2d Cir. 1980) (*en banc*), *vacated on procedural grounds*, 449 U.S. 1106 (1981) ("The current uncertainty over what is 'ethical' underscores . . . the wisdom . . . of adopting a restrained approach that focuses primarily on preserving the integrity of the trial process . . . [and leaves ethical disputes to be] addressed by the 'comprehensive disciplinary machinery' of the state and federal bar.").

5. *See, Weglarz v. Bruck*, 128 Ill. App.3d 1, 470 N.E.2d 21(1984), *cited in, McCall, supra*, note 3 at 1228 n. 6, in which the court's discussion of Confidentiality Walls involved solely the behavior of private practitioners. While the *Weglarz* court rejected the Confidentiality Wall under the facts there at issue, the court upheld *in dictum* the use of Confidentiality Walls "where the attorney can clearly and effectively show that he had no knowledge of the confidences and secrets of the client." *Weglarz* at 24. *See also*, Note, "The Chinese Wall Defense to Law-Firm Disqualification," 128 *U. Pa. L.Rev.* 677 (1980), also cited in that same footnote in *McCall*, which, in turn, cited other cases in which private firms avoided disqualification due to their timely erection of Confidentiality Walls.

6. These rules likewise apply to in-house corporate legal staffs. *E.g.*, Miller and Warren, "Conflicts of Interest and Ethical Issues for the Inside and Outside Counsel," 40 *Bus.Law.* 631, 638-640, 644-646 (1985); *Haagen-Dazs Co., Inc. v. Perche No! Gelato, Inc.*, 639 F.Supp. 282, 286-287 (N.D. Cal. 1986) (lawyer's knowledge gained while serving as in-house counsel to a corporate litigant requires disqualification of firm representing the corporation's adversary, notwithstanding firm's erection of a Confidentiality Wall, where the attorney left the corporation for that firm).

7. The authorities differ under the MRPC as to when a Confidentiality Wall would be proper in a private law firm setting. While a consensus exists that private firms can avoid imputed disqualification by erecting a Confidentiality Wall around an attorney who has left the public sector for that firm, *see*, Model Rule 1.11(a), some courts, in interpreting the MRPC, have rejected the effectiveness of a Confidentiality Wall where an attorney moves from one private law firm to another. *E.g., Parker v. Volkswagenwerk Aktiengesellschaft*, 781 P.2d 1099 at 1106 (1989); *Edward J. DeBartolo Corp. v. Petrin*, 516 So.2d 6, 8 (Fla. App. 1987); *Roberts v. Hutchins*, 572 So.2d 1231, 1234 n. 3 (Ala. 1990). These courts have based their rulings on the fact that Model Rule 1.11 expressly authorizes the use of a Confidentiality Wall where an attorney moves from public to private employment, whereas no similar enabling language appears elsewhere in the Model Rules addressing an attorney's movement from one private firm to another. This reasoning has been sharply criticized by commentators, *e.g.*, Goldberg, "The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly," 72 *U. Minn. L.Rev.* 227, 278-281 (1987), and has been flatly rejected by other courts interpreting the MRPC. *See, e.g., Nemours Foundation v. Gilbane, Aetna, Fed. Ins.*, 632 F.Supp. 418 at 428 (D.Del. 1986) ("Once it is admitted that a Chinese Wall can rebut the presumption of imputed knowledge in former government attorney cases, it becomes difficult to insist that the presumption is irrebuttable when the disqualified attorney's previous employment was private and not public. To hold fast to such a proposition would logically require a belief that privately employed attorneys are inherently incapable of being effectively screened, as though they were less trustworthy or more voluble than their ex-Government counterparts. If former government attorneys can be screened effectively, it follows that former private attorneys can too. . . ." [quoting from *INA Underwriters Insurance Co. v. Rubin*, 635 F.Supp. 1, 5 (E.D. Pa. 1983), which in turn quoted from Note, "The Chinese Wall Defense to Law Firm Disqualification," 128 *U. Pa. L.Rev.* 677, 701(1980)]). Even the Comments to the MRPC seem to conflict on the point, for on the one hand they criticize "the concept of imputation [of disqualification] with unqualified rigor," *see*, Comment to Model Rule 1.9 – which would appear to permit at least the same type of Confidentiality Wall rules that exist under the CPR where an attorney leaves one private firm for another – while on the other hand those same Comments call for "different provisions . . . for the movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. *See,*

Comment to Model Rule 1.10. The Committee does not believe there should be different Confidentiality Wall rules for similarly situated public and private sector attorneys; yet the Committee is currently in no position to predict how the MRPC will be applied on this point in Colorado, in the event the MRPC is adopted here.

8. Obviously, a Confidentiality Wall, no matter how elaborate, cannot prevent an intentional disclosure of client confidences. *See*, Goldberg, "The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly," 72 *U. Minn. L.Rev.* 227, 279-281 (1987). But general ethical principles are not established with the kind of paranoia that would require protection against such intentional wrongdoing. The Committee assumes that attorneys will try to act honorably. Ample sanctions already exist to deal with any attorney who might intentionally seek to disclose a client's confidences in violation of the CPR and MRPC.

9. Some courts, in Confidentiality Wall contexts, have distinguished (the Committee believes effectively) two different presumptions regarding client confidences. *E.g., Jenson* and *INA*, cited in the text above; *see also, Smith v. Whatcott*, 757 F.2d 1098, 1100 (10th Cir. 1985); *Cheng v. GAF Corp.*, 631 F.2d 1052, 1056 (2d Cir. 1980), *vacated on procedural grounds*, 450 U.S. 903 (1981). The first presumption is that where an attorney performs legal services directly for a client, the attorney is presumed to have received confidential information from the client relating to the subject of the representation. Under this line of authority, this first presumption is irrebuttable, in order to avoid disputes (which might themselves undermine the client's rights of confidentiality) as to what the client did and didn't disclose to the attorney. *Cf. Osborn v. District Court*, 619 P.2d 41 (Colo. 1980) at 48 (recognizing the presumption that the client reposed confidences in the attorney, although not in a Confidentiality Wall setting). The second presumption is that an attorney who has obtained client confidences has shared them with all of his or her professional colleagues within the law firm. It is this second presumption which has been held, under proper circumstances, to be rebuttable through the establishment of an effective Confidentiality Wall. An exception to the irrebuttable nature of the first presumption may exist in the case of junior associates or law clerks, who may be able to show that their involvement in a given matter was so limited that they learned no client confidences whatsoever. *E.g., Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 753-754, 756 (2d Cir. 1975) (cited approvingly in *Osborn*); New Jersey Ethics Opinion 633 (issued November 2, 1989).

10. Inasmuch as a client can consent to any disclosure of confidential information, *see*, DR 4-101(C)(1); Model Rule 1.6(a), the issuance of such consent could obviate the need for a Confidentiality Wall. A client should also have the prerogative to withhold such consent unless an effective Confidentiality Wall is established. A law firm may conclude that it is prudent under the circumstances to promptly disclose, to the attorney's former employer, the reasons for erecting a Confidentiality Wall and the extent of the Wall so erected. In this way, counsel might work together to avoid any risk of inadvertent disclosure of a client's confidences and to maintain public confidence in the legal system. (Such disclosure is indeed required under certain circumstances. *See*, MRPC 1.11(a).) The Committee encourages all counsel to avoid controversy where possible as to whether a client's confidences are truly at risk of being inadvertently disclosed, where a firm creates an effective Confidentiality Wall around the affected attorney. It is improper for a lawyer to counsel a client to withhold such consent merely to secure some tactical advantage. *E.g.*, DR 7-102(A)(1); Model Rule 3.1; Comments to Model Rule 3.4 (recognizing the need for "fair competition in the adversary system"); *Manning v. Waring, Cox, James, Sklar and Allen*, 849 F.2d 222 (6th Cir. 1988) at 224; the Committee's Formal Opinion No. 78 (adopted June 18, 1988).

11. Of course, a client may consent, after full disclosure, to some arrangements in which the attorney's independent professional judgment is at risk of being impaired. *See*, DR 5-101(A); DR 5-105(C); Model Rule 1.7; *see also*, note 10 *supra.*

12. Confidentiality Walls have also been deemed ineffective in permitting a law firm to remain as counsel of record in a given lawsuit, where an attorney in that firm violated rules of professional conduct in a way which was deemed to have an impact in the overall conduct of that case. Thus, in *Papanicolaou v. Chase Manhattan Bank, N.A.*, 720 F.Supp. 1080, 1087 (S.D.N.Y. 1989), where an attorney for defendant spoke directly with plaintiff (in violation of DR 7-104 and Model Rule 4.2) and proceeded to disparage plaintiff's attorney, the wrongdoing attorney's law firm was not permitted to remain as defendant's counsel even after creating a Confidentiality Wall around the wrongdoer.

13. At the same time, a firm should attempt to avoid imposing a "substantial hardship" on the client from having to engage new counsel. *Cf.* DR 5-101(B)(4); Model Rule 3.7(a)(3) (regarding disqualification in the context of an attorney serving as a witness). This factor is one which courts have used only sparingly in denying disqualification motions in a Confidentiality Wall context, and is one which law firms should not rely

on as a sole basis for remaining as a litigant's counsel of record. An example of how this factor is generally applied is in *Jenson v. Touche Ross & Co.*, 355 N.W.2d 720 (Minn. 1983) at 732. There, the court, in permitting a law firm to remain involved as counsel of record, considered the fact that the lawsuit was years old when the attorney left one firm (representing one litigant) for another (representing the opposing litigant). But the court appears to have given at least as much (if not greater) weight to the facts that the attorney's contacts with the lawsuit were minimal and that the client of the first firm could not demonstrate any true harm arising from the attorney's job switch, so long as an effective Confidentiality Wall was in place at the second firm. *See also, Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980) at 1057-1058, where a law firm was disqualified (despite its erection of a Confidentiality Wall) from a lawsuit which was pending for over two years by the time the firm hired an attorney who had previously worked for the law firm representing the adverse party. The Committee cautions that before any firm proceeds to hire an attorney under these circumstances, the firm give serious consideration to the risk of its own disqualification and the consequential harm which may befall its own client.

14. The Committee has selected a litigation context for illustrative purposes only. There is just as much need for a Confidentiality Wall in a business setting (where an attorney who has worked at a firm representing one party to a transaction joins another firm representing the other party to that transaction) or any other setting where the risk exists of an inadvertent disclosure of client confidences.

15. The need for a Confidentiality Wall applies as well in the case of non-lawyer employees who move from job to job. *See, e.g.*, DR 4-101(D) (regarding an attorney's duty to cause his or her non-lawyer employees to preserve a client's confidences); Model Rule 5.3 (same); ABA Informal Opinion 88-1526 (regarding erection of Confidentiality Walls around non-lawyer employees); *Kapco Manufacturing Co. v. C & O Enterprises, Inc.*, 637 F.Supp. 1231, 1238-1239 (N.D. Ill. 1985) (law firm avoids disqualification by screening office manager/secretary who was privy to confidential information while employed at another law firm). A non-lawyer may have access to such sensitive information at one job that a second employer, upon hiring the non-lawyer, may have to withdraw (or be disqualified) from representing a client with interests which conflict with those of the First Firm's Client, even if the Second Firm erects a Confidentiality Wall. Certainly, if the non-lawyer proceeds to disclose the First Firm's Client's confidences to employees at the Second Firm, that Firm should withdraw (or be disqualified) from any matter as to which the First Firm's Client may be injured from the improper disclosure. *E.g., Williams v. Trans World Airlines, Inc.*, 588 F.Supp. 1037, 1044-1045 (W.D. Mo. 1984) (Second Firm disqualified where secretary disclosed the First Firm's Client's confidences).

16. In *Osborn v. District Court, supra*, note 9 at 47, n. 10, the Colorado Supreme Court defined a "substantially related" matter by referring to its holding in *Roberts v. People*, 11 Colo. 213, 17 P. 637 (1888), in which it used the phrase "facts of which are somewhat interwoven"; *see also, Food Brokers v. Great Western Sugar Co.*, 680 P.2d 857 (Colo. App. 1984) at 858 ("In determining whether there is a substantial relationship, similarities between the two factual situations and the legal questions posed must be considered."). However, there is nothing in *Osborn* or *Food Brokers* to suggest that the Colorado Supreme Court has limited its definition of "substantial relationship" to these two tests; and as discussed in the text, there is reason to believe that a broader definition could be applied.

RULE 1.11: SPECIAL CONFLICTS OR INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

~~(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.~~

(2) the disqualified lawyer gives prompt written notice (which shall contain a general description of the disqualified lawyer's prior participation in the matter and the screening procedures to be employed), to the government agency to enable the government agency to ascertain compliance with the provisions of this Rule; and

(3) the disqualified lawyer and the members of the firm with which the personally disqualified lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

(c) Except as law may otherwise expressly pemait, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Comment to Rule 1.11 SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts .of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation role for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency mad another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

RULE 1.11 — SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Comment

This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and

waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

Committee Comment

The Committee recommends adoption of this Model Rule. It is a substantial improvement over the related Rule in the Code because it provides more specific guidance in recurring situations which are not directly addressed in the Code. Further, this Model Rule actually was developed in response to and codifies suggestions originally made by the Colorado Bar's comments regarding omissions in the preliminary draft of the Model Rules in 1980.

Rule 1.11
Special Conflicts of Interest for Former and Current Government Officers and Employees

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

COMMENT

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk

exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

RULE 1.12: FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD PARTY NEUTRAL

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

~~(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.~~

(2) the disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior participation in the matter and the screening procedures to be employed), to the parties and any appropriate tribunal, to enable the parties and the tribunal to ascertain compliance with the provisions of this Rule; and

(3) the disqualified lawyer and the members of the firm with which the personally disqualified lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Comment to Rule 1.12 FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (13). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

RULE 1.12 — FORMER JUDGE OR ARBITRATOR

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after the disclosure.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party in other unrelated matters.

Comment

This Rule generally parallels Rule 1.11. The term "personally and substantially" signified that a judge who was a member of a multi-member court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those rules correspond in meaning.

Committee Comment

The Committee recommends adoption of this Model Rule as proposed. This Model Rule addresses specific recurring questions not so identified in the Code.

Rule 1.12

Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

COMMENT

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer"

includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those Rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

As proposed by Ethics 2000 Subcommittee 1/14/2005
No changes from Colorado Ad Hoc Committee Proposal

RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to the information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment to Rule 1.13 ORGANIZATION AS CLIENT

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (19) makes clear, however, that, when the lawyer knows that the organization is likely to be substantially injured by action or an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation mad its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct

contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organization client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (3) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(3)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(3)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a client arising out of an alleged violation of law. This is necessary in under to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (3) or (c), or who withdraws in circumstances

that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

Government Agency

[9] The duty defined ha this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (g) recognized that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an

action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

RULE 1.13 — ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization which acts through its duly authorized constituents, and the lawyer owes allegiance to the organization itself, and not its individual stockholders, directors, officers, employees, representatives or other persons connected with the entity.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due con-

sideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant consideration. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders and other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, but only in those instances in which such representation will not affect the lawyer's allegiance to the entity itself, and also subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.

Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents or an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organization client in order to carry out the representation or as otherwise permitted by Rule 1.6.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such circumstances, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, 1.16, 3.3, or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public businesses involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority. See note on Scope.

Clarifying the Lawyer's Role

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain indepen-

dent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for the constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Committee Comment

The proposed Rule has no direct counterpart in the Model Code and is essentially modeled after ABA Rule 1.13. The Committee has, however, taken the language from EC 5-18 of the Code and added that language to the "black letter" law of Rule 1.13(a) to make more explicit the focus of the lawyer's professional responsibility when representing a corporation. The word "individual" modifies the terms "stockholders, directors, officers, employees, representatives and other persons connected with the entity" in order to clarify that ultimately the shareholders or directors, collectively, frequently are the highest authority which can act for the organization and are thus the ultimate group to which the lawyer owes loyalty.

Rule 1.13
Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the

dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

COMMENT

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

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[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] The organization's highest authority to whom a matter may be referred ordi-

narily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[5] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

Government Agency

[6] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[7] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[8] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

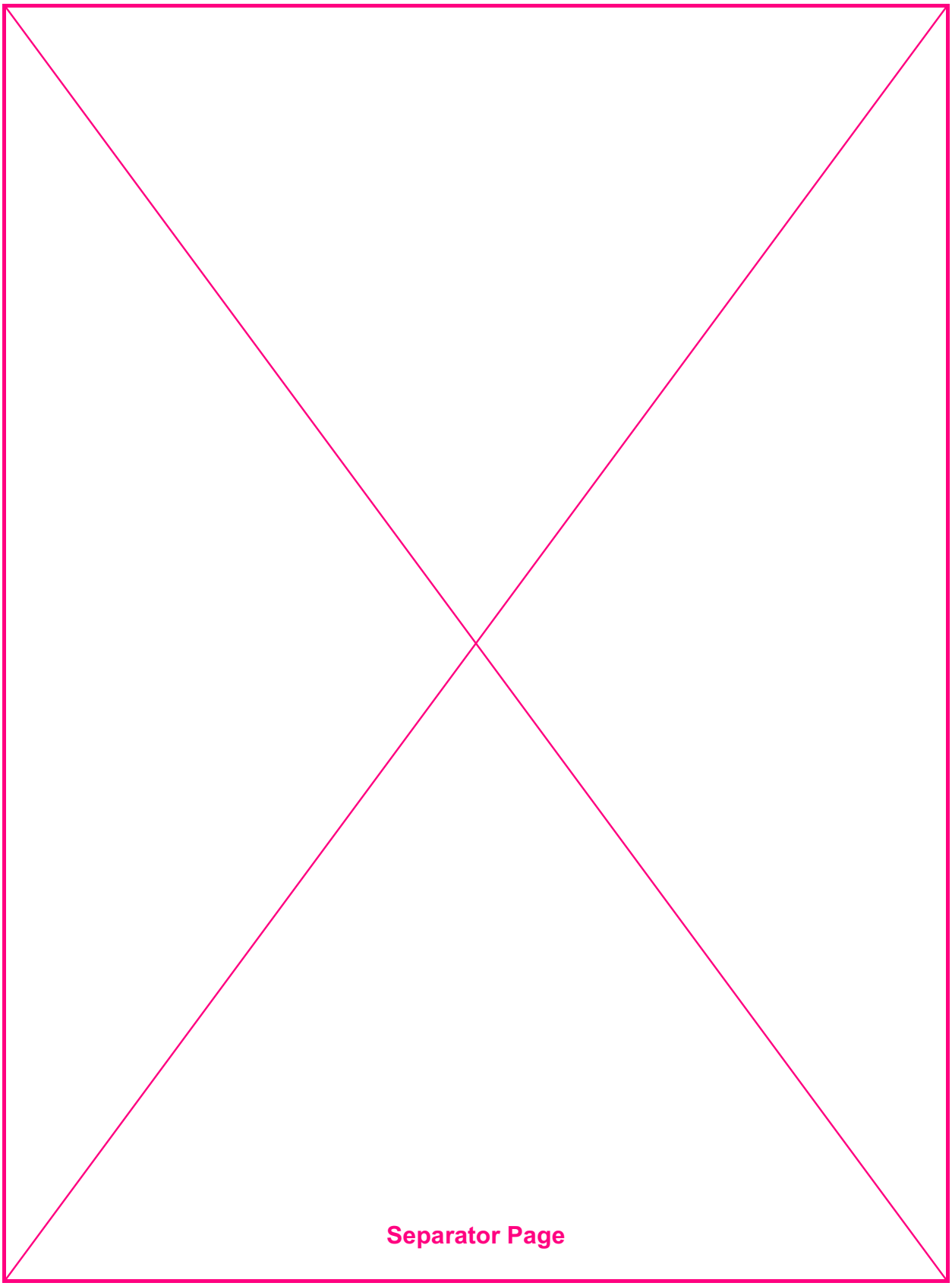
Dual Representation

[9] Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[10] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[11] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.



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

AGENDA

March 23, 2005, 1:00 p.m.
Supreme Court Conference Room (5th Floor)

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1. Approval of minutes – To be distributed via separate e-mail on March 21, or at the meeting

   a. December 3, 2004 meeting

   b. January 21, 2005 meeting

2. Administrative matter – Select next meeting date

3. Ethics 2000 Subcommittee Report on Rules 1.6 (comment), 1.10, 1.14. 1.15, 1.16, 1.18, 2.1, 2.2 – Michael Berger

   a. First Interim Report of Subcommittee – **See pages 16 and 84-98 from October 1, 2004 meeting materials**

   b. Second Interim Report of Subcommittee – **See pages 16-17 from December 3, 2004 meeting materials**

   c. Third Interim Report of Subcommittee – **See pages 1-2 and 5-29 from January 21, 2005 meeting materials, and Dave Little's January 13, 2005 letter distributed at January 21, 2005 meeting**

   d. Fourth Interim Report of Subcommittee – See attached pages 1-82

4. Proposed amendment to Rule 1.8(e) – See attached pages 83-89

5. Adjournment (by 4:00)

Chair
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FILE NOTE

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

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

COLORADO SUPREME COURT

RULES OF PROFESSIONAL CONDUCT COMMITTEE

ETHICS 2000 SUBCOMMITTEE

INTERIM REPORT NO. 4

March 16, 2005

With the exception of Rule 1.17, the Subcommittee has completed its consideration of the 1.x series of the Ethics 2000 rules approved by the American Bar Association. The Subcommittee has also considered Rules 2.1 and 2.2. The Subcommittee has a reasonable expectation that the pace of its work will accelerate. Many of the 1.x series of the Rules are particularly problematic and those rules have taken far longer to analyze than we first contemplated.

Rule 1.6. At the last meeting of the full Committee, the Committee reversed course from the prior meeting and voted to adopt the text of Rule 1.6 as approved by the ABA and the Colorado Ad Hoc Committee. Comments [5A] and [9] to Rule 1.6 were returned to the Subcommittee for further work. Comment [5A] does not appear in either the ABA version or the Colorado Ad Hoc Committee version of the Rule. It is intended to provide clarification as to when a lawyer who is moving from one firm to another may disclose information protected by Rule 1.6 to perform a conflicts check. Strangely, there is nothing in the ABA approved rule (or anything else in the Rules) that addresses this matter. Upon further consideration by the Subcommittee, Comment [5A] was revised to read as follows:

> "[5A] A lawyer moving (or contemplating a move) from one firm to another is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to detect conflicts of interest. Thus, a lawyer usually may disclose, without express client consent, the identity of the client and the basic nature of the representation, in order to insure compliance with Rules 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12. Under unusual circumstances, where even this basic disclosure could materially prejudice the interests of a client or former client, disclosure is prohibited without client consent. In all cases, the disclosures must be limited to the information essential to

conduct the conflicts check, and all lawyers who receive the information must agree in advance to its confidentiality."

Comment [9] to Rule 1.6 provides guidance as to when a lawyer may disclose information protected by Rule 1.6(a) to obtain advice regarding the lawyer's compliance with the Rules of Professional Conduct. Extensive discussions were had at the prior Committee meeting as to whether the text of Rule 1.6(b)(4) should be broadened to explicitly permit disclosures regarding issues that arise about the lawyer's compliance with the standard of care owed to the client. Because of concerns about uniformity and the potential of unintended consequences that often attach to custom changes to the Model Rules, the Committee voted not to amend the text of the rule. Instead, the Subcommittee was directed to redraft Comment [9] to express the concept that because of the breadth of the Rules, a lawyer's disclosure of information protected by Rule 1.6(a) will generally be permitted to enable the lawyer to meet his or her broader duties such as the standard of care. After much debate, and the consideration of a wide variety of alternatives (including going back to the full Committee for reconsideration of the Committee's prior vote on this issue) the majority of the Subcommittee recommends the adoption of the following Comment [9];

"[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct. FOR EXAMPLE, RULE 1.6(B)(4) AUTHORIZES DISCLOSURES THAT THE LAWYER REASONABLY BELIEVES ARE NECESSARY TO SEEK ADVICE INVOLVING THE LAWYER'S DUTY TO PROVIDE COMPETENT REPRESENTATION UNDER RULE 1.1. IN ADDITION, THIS RULE PERMITS DISCLOSURE OF INFORMATION THAT THE LAWYER REASONABLY BELIEVES IS NECESSARY TO SECURE LEGAL ADVICE CONCERNING THE LAWYER'S BROADER DUTIES, INCLUDING THOSE ADDRESSED IN RULES 3.3, 4.1 AND 8.4."

Comment [6A], previously recommended by the Subcommittee to accompany the "serious crime" version of Rule 1.6 previously approved by the Committee, has been deleted given the Committee's vote to recommend the adoption of the ABA version of Rule 1.6

This now completes the Subcommittee's work on Rule 1.6.

Rule 1.10. At the January 2005 meeting of the full committee, the Committee voted to permit screening in some cases involving the movement of a lawyer from a private firm to another firm, but limited screening to lawyers who were not "primarily responsible" for the prior representation. As a result of that vote, the Rule and Comments were returned to the Subcommittee for further drafting. The Subcommittee struggled to define "primary responsibility." The perceived objective of the Committee is to permit screening as to those lawyers who had some, but not extensive, involvement and/or responsibility for the prior representation, and to prohibit screening where the lawyer was so involved with the prior representation that the risk of inadvertent disclosure (and the client's subjective perceptions of the lawyer's switching sides) are too great to ignore.

First, it is important to note what we are not dealing with in Rule 1.10. If the lawyer at the former firm did not acquire information protected by Rules 1.6 and 1.9(c) that was material to the matter, then that lawyer is not disqualified at the new firm and the new firm is not, therefore, vicariously disqualified. See Rule 1.9(b). Thus, in Rule 1.10, we are dealing with the following spectrum: at one end, the moving lawyer has material information regarding the former representation but had minimal involvement in the management or direction of the representation; at the other end, the lawyer is the lead lawyer or partner in charge of the prior representation. The obvious difficulty with the formulation suggested by the Subcommittee is that no bright lines are being drawn and there inevitably will be situations (perhaps many) where the lawyers involved simply do not know whether they may be successfully screened or not. One answer to this dilemma (though perhaps not a satisfactory answer) is that it is appropriate, given the strong interests of the former client, that any uncertainty be construed against screening. In any event, here are the Subcommittee's recommendations regarding Rule 1.10(e):

> 1.10(e) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
>
> 1.10(e)(1). the matter is not one for which the personally disqualified lawyer had primary responsibility. Primary responsibility denotes substantial participation in the management and direction of the matter.
>
> 1.10(e)(2). the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;
>
> 1.10(e)(3). the personally disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior representation and the screening procedures to be employed) to any affected former client and the former client's current lawyer, if known to the personally disqualified lawyer, to

enable the former client to ascertain compliance with the provisions of this Rule; and

1.10(e)(4). the personally disqualified lawyer and the partners of the firm with which the personally disqualified lawyer is now associated, reasonably believes that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

The Subcommittee further recommends the addition of a new Comment [5A] to Rule 1.10:

"Screening is permissible under this Rule only if the partners of the firm and the personally disqualified lawyer reasonably believe that the screening procedures will be effective. In a small firm it may be difficult to successfully screen the personally disqualified lawyer."

Rule 1.11. Previously approved by the full Committee with conforming changes to Rule 1.11(b)(2) & (3) to conform to Rule 1.10(e)(3) & (4), as recommended by the Subcommittee.

Rule 1.12. Previously approved by the full Committee with conforming changes to Rule 1.11(c)(2) & (3) to conform to Rule 1.10(e)(3) & (4), as recommended by the Subcommittee.

Rule 1.13. Previously approved by the full Committee, as recommended by the Subcommittee.

Rule 1.14. Several members of the Subcommittee noted that Comments [9] and [10] appear to go beyond any authorizations contained in the text of the rule. Nevertheless, the Subcommittee (as did the Colorado Ad Hoc Committee) believes Comments [9] and [10] provide important guidance in this difficult representational context and unanimously voted to recommend the adoption of ABA Rule 1.14.

Rule 1.15. Over the years, Colorado has made substantial changes to Rule 1.15, reflecting (among other things), the Colorado Supreme Court's decisional law regarding non-refundable retainers and similar issues. As a result, the Colorado Ad Hoc Committee recommended that Colorado's version of Rule 1.15 be retained, rather than adopt the new ABA version. The Subcommittee agrees with that recommendation. In addition, the Subcommittee elected to consider certain amendments recently recommended by the COLTAF board of directors to conform the rule to (or immunize it from) recent decisions of the United States Supreme Court regarding Fifth Amendment "takings" that may arise by state mandated programs requiring interest on client funds to be paid to someone other than the client. The Colorado Ad Hoc Committee did not consider the COLTAF proposed amendments. The Subcommittee considered the COLTAF proposed amendments and unanimously voted to recommend adoption of Rule 1.15 as proposed by the Colorado Ad Hoc Committee, together with all of the changes recommended by the COLTAF task force.

Rule 1.16. The Subcommittee recommends the adoption of ABA proposed Rule 1.16 with one change to Comment [7]. The Subcommittee believes that the word "Permissive" rather than the word "Optional" in the heading of the Comment more accurately reflects the concept addressed. The Colorado Ad Hoc Committee recommended the adoption of ABA proposed Rule 1.16 without change.

Rule 1.17. The Subcommittee debated at length whether the existing Colorado Rule should be retained, particularly given its recent vintage, instead of the ABA proposed rule. The substantive differences between the existing Colorado rule and the ABA proposal include whether the selling lawyer must cease the practice of law (as required by the ABA rule) and whether the entire practice must be sold to comply with the rule. The Subcommittee has not finished its work on this Rule; the Subcommittee will report to the full Committee on this rule at the next meeting of the Committee.

Rule 1.18. The Colorado Ad Hoc Committee recommended the adoption of Rule 1.18 with one non-substantive change in the text of the rule and another non-substantive change to Comment [9]. The Subcommittee believes that ABA Rule 1.18 is a very useful addition to the Rules and recommends its adoption with the changes recommended by the Colorado Ad Hoc Committee.

Rule 2.1. The ABA version of Rule 2.1 did not change from the prior ABA version. The Colorado Supreme Court previously amended Rule 2.1 to impose a requirement that the lawyer advise the client of alternative forms of dispute resolution. Such a provision was added to the Comment of the Ethics 2000 version of the ABA rule. The Colorado Ad Hoc Committee recommended that the sentence added to the text of the rule by the Colorado Supreme Court be retained. The Subcommittee agrees and recommends the retention of existing Colorado Rule 2.1 with the new ABA comment.

Rule 2.2. The ABA has deleted Rule 2.2 because it caused confusion as to whether and when a lawyer may represent multiple clients to resolve their differences. These issues are better addressed in the Rule 1.7 framework. The Colorado Ad Hoc Committee agreed with the deletion of Rule 2.2 and so does the Subcommittee.

As proposed by Ethics 2000 Subcommittee 3/15/2005
Includes changes directed by Full Committee at January 2005 Meeting
Marked to show changes from COLORADO AD HOC COMMITTEE PROPOSAL

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

* * * * * * * * * *

Comment to RULE 1.6 CONFIDENTIALITY OF INFORMATION

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[5A] A lawyer moving (or contemplating to move) from one firm to another is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to conduct a conflicts check to determine whether the lawyer or the new firm is or would be disqualified. Thus, for conflicts checking purposes, a lawyer usually may disclose, without express client consent, the identity of the client and the basic nature of the representation to insure compliance with Rules such as Rules 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12. Under unusual circumstances, even this basic disclosure may materially prejudice the interests of the client or former client. In those circumstances, disclosure is prohibited without client consent. In all cases, the disclosures must be limited to the information essential to conduct the conflicts check, and the confidentiality of this information must be agreed to in advance by all lawyers who receive the information.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or

debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct. For example, Rule 1.6(b)(4) authorizes disclosures that the lawyer reasonably believes are necessary to seek advice involving the lawyer's duty to provide competent representation under Rule 1.1. In addition, this rule permits disclosure of information that the lawyer reasonably believes is necessary to secure legal advice concerning the lawyer's broader duties, including those addressed in Rule 3.3, 4.1 and 8.4.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. For purposes of paragraph (b)(6), a subpoena is a court order. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[13A] Rule 4.1(b) requires a disclosure when necessary to avoid assisting a client's criminal or fraudulent act, if such disclosure will not violate this Rule 1.6.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). For example, Rule 4.1(b) requires a lawyer to disclose material facts to third persons when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6. See also Rules 1.2(d), ~~4.1(b),~~ 8.1 and 8.3. Other rules permit or require disclosure regardless of whether such disclosure is permitted by this Rule. For example, Rule 1.13(c) permits certain disclosures even when such disclosures would otherwise be prohibited by this Rule. And, Rule 3.3~~, on the other hand~~, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Marcy Glenn

From: Michael Berger [MBerger@wckblaw.com]

Sent: Monday, March 21, 2005 9:04 AM

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

Subject: Supreme Court Rules of Professional Conduct Committee--Ethics 2000 Subcommittee-- Updated Rule 1.10(e) proposal

After the mailing of Interim Report No. 4 and the accompanying materials, the Ethics 2000 Subcommittee has further considered Rule 1.10(e). Attached to this email is the updated Subcommittee recommendation on Rule 1.10(e). The Subcommittee is divided as to whether Rule 1.10(e) should read "management AND direction" or "management OR direction."

Michael H. Berger, Chair, Ethics 2000 Subcommittee

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-----Original Message-----
From: Nina Stanberry [mailto:NStanberry@hollandhart.com]
Sent: Thursday, March 17, 2005 11:18 AM
To: Alexander Rothrock; Anthony van Westrum; Boston Stanton; Bryan VanMeveren; Cecil Morris; Cynthia Covell; David Little; David Stark; Eli Wald; Henry Reeve; Hon. Edward Nottingham; Hon. John Webb; Hon. Michael Bender; Hon. Nathan Coats; James Casey; James Wallace; John Gleason; John Richilano; Kenneth Pennywell; Lisa Wayne; Michael Berger; Nancy Cohen; Scott Peppet; Tuck Young; Valerie Dewey; William Lucero; William Prakken
Cc: Marcy Glenn
Subject: Colo. Sup. Ct. Standing Committee on CRPC

Third section is attached.

THIS REPLACES THE DRAFT THAT ACCOMPANIED
INTERIM REPORT NO. 4
As proposed by Ethics 2000 Subcommittee 3/21/2005
Includes concept of screening provided screened lawyer
was not primarily responsible for the matter
Marked to show changes from
Colorado Ad Hoc Committee Proposal

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(e) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the matter is not one for which the personally disqualified lawyer substantially participated in the management [or] [and] direction of the matter;

(2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(3) the personally disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior representation and the screening procedures to be employed) to any affected former client and the former client's current lawyer, if known to the personally disqualified lawyer, to enable the former client to ascertain compliance with the provisions of this Rule; and

(4) the personally disqualified lawyer and the members of the firm with which the personally disqualified lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

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Comment to RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST:

GENERAL RULE

Definition of "Firm"

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is

the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[5A] Screening is permissible under this Rule only if the partners of the firm and the personally disqualified lawyer reasonably believe that the screening procedures will be effective. In a small firm it may be difficult to successfully screen the personally disqualified lawyer.

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

As proposed by Ethics 2000 Subcommittee 3/15/2005
Includes concept of screening provided screened lawyer
was not primarily responsible for the matter
Marked to show changes from
Colorado Ad Hoc Committee Proposal

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(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(e) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the matter is not one for which the personally disqualified lawyer had primary responsibility. Primary responsibility denotes substantial participation in the management and direction of the matter;

(2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(3) the personally disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior representation and the screening procedures to be employed) to any affected former client and the former client's current lawyer, if known to the personally disqualified lawyer, to enable the former client to ascertain compliance with the provisions of this Rule; and

(4) the personally disqualified lawyer and the members of the firm with which the personally disqualified lawyer is now associated, reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.

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[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

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[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[5A] Screening is permissible under this Rule only if the partners of the firm and the personally disqualified lawyer reasonably believe that the screening procedures will be effective. In a small firm it may be difficult to successfully screen the personally disqualified lawyer.

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

RULE 1.14: CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

* * * * * * * * *

Comment to RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on

behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

RULE 1.14 — CLIENT UNDER A DISABILITY

(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) Not only can the mental, physical or other condition of the client impose additional responsibilities on the lawyer, the fact that a client is impaired does not relieve the lawyer of the obligation to obtain information from the client to the extent possible.

(c) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot act in the client's own interest.

Comment

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Disclosure of the Client's Condition

Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

Committee Comment

The ABA Rule is being recommended but with the addition of a new subsection (b). The ABA subsection (b) becomes subsection (c), and the language in the proposed subsection (b) is derived from EC 7-11 and EC 7-12 of the Code which make clear that a lawyer should obtain all pos-

sible aid from the client. By making these aspirational provisions of the Code part of the "black letter" law of the Rule, more definitive and appropriate direction as to the nature of ethical conduct is provided.

Rule 1.14
Client with Diminished Capacity

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

COMMENT

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in

discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decisionmaking tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the

lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

As proposed by Ethics 2000 Subcommittee 03/15/05
No changes from Colorado Ad Hoc Committee Proposal
except for addition of COLTAF proposals

RULE 1.15: SAFEKEEPING PROPERTY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(f) Required Bank Accounts. Every lawyer in private practice in this state shall maintain in a financial institution doing business in Colorado, in the lawyer's own name, or in the name of a partnership of lawyers, or in the name of the professional corporation or limited liability corporation of which the lawyer is a member, or in the name of the lawyer or entity by whom employed:

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

(2) A business account into which all funds received for professional services shall be deposited.

(3) One or more of the trust accounts may be the account or accounts described in Rule 1.15(e)(2), known as COLTAF (Colorado Lawyer Trust Account Foundation) accounts.

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

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

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

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

(g) Required Accounting Records. Lawyers, partnerships of lawyers, and professional companies in private practice in this state shall maintain in a current status and retain for a period of seven years after the event which they record:

(1) Appropriate receipt and disbursement records of all deposits in and withdrawals from accounts specified in subsection (a) of this rule and any other bank account which concerns their practice of law, specifically identifying the date, source and description of each item deposited as well as the date, payee, and purpose of each disbursement. All trust account receipts shall be deposited intact and the duplicate deposit slip should be sufficiently detailed to identify each item. All trust account withdrawals shall be made only by authorized bank or wire transfer or by check payable to a named payee and not 1o cash. Only a lawyer admitted to practice law in this state or a person supervised by such shall be an authorized signatory on a trust account; and,

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

(3) Copies o f all retainer and compensation agreements with clients; and,

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

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

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

(7) All bank statements and prenumbered canceled checks; and,

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

(h) Type and Availability of Accounting Records. The financial books and other records required by subsections (f) and (g) of this rule shall be maintained in accordance with generally accepted accounting principles, such as the accrual method, the cash basis method and the income tax method. Bookkeeping records may be maintained by computer provided they otherwise comply with this Rule and provided further that printed copies can be made on demand in accordance with this subsection or subsection (g). They shall be located at the principal Colorado office of each lawyer, partnership, professional corporation, or limited liability corporation.

(i) Dissolutions. Upon the dissolution of any partnership of lawyers or of any professional corporation or limited liability corporation, the former partners or shareholders shall make appropriate

arrangements for the maintenance by one of them or by a successor form of the records specified in subsection (g) of this Rule.

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

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Comment to RULE 1.15 SAFEKEEPING PROPERTY

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

Trust accounts of funds of clients or third persons held in connection with a representation must be interest-bearing for the benefit of the client or third person or for the benefit of the Colorado Lawyer Trust Account Foundation where the funds are nominal in amount or expected to be held for a short period of time. A lawyer should exercise good faith judgment in determining initially whether funds are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing account for the benefit of the client or third person. The lawyer should also consider such other factors a (i) the costs of establishing and maintaining the account, service charges, accounting fees, and tax report procedures; (ii) the nature of the transaction(s) involved; and (iii) the likelihood of delay in the relevant proceedings. A lawyer should review at reasonable intervals whether changed circumstances require further action respecting the deposit of such funds, including without limitation the action described in subparagraph 1.15(e)(2)(d).

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

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

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

The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the

applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. See Rule 1.16(d) for standards applicable to retention of client papers.

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

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

COLORADO SUPREME COURT
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January 24, 2005

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

Re: Rule 1.15 — COLTAF Issues

Dear Marcy:

I am forwarding the enclosed letter from David Butler to your attention in your capacity as Chair of the Supreme Court's Standing Committee on the Rules of Professional Conduct. I know that you are aware of Mr. Butler's proposed rule changes on behalf of COLTAF. I leave to your discretion when and how you want to present this to the Committee.

Very truly yours,

John S. Gleason
Regulation Counsel

JSG/sb

Enclosures

Copy: David Butler, Esq. (w/out encls.)

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HOLLAND&HART LLP
THE LAW OUT WEST

David Butler
Phone (303) 295-8172
Fax (303) 975-5428
dbutler@hollandhart.com

January 20, 2005

John S. Gleason, Esq.
Regulation Counsel, Colorado Supreme Court
600 17th Street, Suite 2005
Denver, CO 80202

Re: Rule 1.15

Dear John:

Following up on our conversation, I enclose a proposed amended version of Rule 1.15 which combines the changes proposed by the ABA Ethics 2000/Colorado Rules of Professional Conduct Committee and the additional changes which COLTAF recommends (marked to show which is which). I recognize that you are not necessarily committed to support the changes proposed by your Committee, but they looked pretty good to me so I combined the two sources.

As we discussed, this is not likely to be taken up promptly, but it might as well be made ready for future consideration.

My thought on the precedent from the Missouri Court of Appeals (apparently shared by our three Justices although we only touched on it briefly) is that the precedent is not very valuable in our context. The plaintiff and the court apparently did not consider the fact that the United States Supreme Court in both *Phillips* and *Brown* identified as the "taking" the payment over of the interest, rather than the establishment of the IOLTA account. Although a lawyer can decide not to participate at all, any lawyer who does have an IOLTA account is fully subject to the applicable rule. So if the Colorado Rule allows the lawyer to leave a client's money in the COLTAF account for too long, the potential taking of the client's property interest in the earnings of the account arises from the operation of the Rule itself and not from any option exercised by the lawyer, as was held to be the case in the State of Washington. This was held to undercut the usefulness of the precedent, even granting the United States Supreme Court denial of certiorari.

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Aspen Billings Boise Boulder Cheyenne Colorado Springs Denver Denver Tech Center Jackson Hole Salt Lake City Santa Fe Washington, D.C.

I look forward to getting your thoughts.

Very truly yours,

Dave

David Butler

DB:jr
Enclosure
cc: Jonathan D. Asher
Elizabeth M. Steele
James S. Sudler
Charles C. Turner

SAFEKEEPING PROPERTY; INTEREST-BEARING ACCOUNTS TO BE ESTABLISHED FOR THE BENEFIT OF THE CLIENT OR THIRD PERSONS OR THE COLORADO TRUST ACCOUNT FOUNDATION; NOTICE OF OVERDRAFTS; RECORD-KEEPING

Amended and Adopted by the Court, April 18, 2001

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

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

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

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

(e)

(1) Except as may be prescribed by subparagraph (2) below, interest earned on accounts in which the funds are deposited (less any deduction for service charges or fees of the depository institution) shall belong to the clients or third persons

whose funds have been so deposited; and the lawyer or law firm shall have no right or claim to such interest.

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

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

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

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

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

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

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

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

law firm for the benefit of such client or third person in accordance with written procedures which the Colorado Lawyer Trust Account Foundation shall publish and make available through its website and shall provide to any lawyer or law firm upon request.

(3) Information necessary to determine compliance or justifiable reason for non-compliance with subparagraph (e)(2) shall be included in the annual attorney registration statement. The Colorado Lawyer Trust Account Foundation shall assist the court in determining whether lawyers or law firms have complied in establishing the trust account required under subparagraph (e)(2). If it appears that a lawyer or law firm has not complied where it is feasible to do so, the matter may be referred to the disciplinary counsel for investigation and proceedings in accordance with C.R.C.P. 241.

(f) Required Bank Accounts. Every attorney in private practice in this state shall maintain in a financial institution doing business in Colorado, in the attorney's own name, or in the name of a partnership of attorneys, or in the name of the professional corporation or limited liability corporation of which the attorney is a member, or in the name of the attorney or entity by whom employed:

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

(2) A business account into which all funds received for professional services shall be deposited.

(3) One or more of the trust accounts may be the account or accounts described in Rule 1.15(e)(2), known as COLTAF (Colorado LAWYER Trust Account Foundation) accounts.

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

(5) The name of institutions in which such accounts are maintained and identification numbers of each account shall be recorded on a statement filed

with the annual attorney registration payment, pursuant to Rule 227(2). Such information shall be available for use in accordance with paragraph (g) of this Rule. For all COLTAF accounts, the account numbers, the name the account is under, and the depository institution shall be indicated on the same statement.

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

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

(g) Required Accounting Records. Lawyers, partnerships of lawyers, and professional ~~corporation and limited liability corporations~~companies in private practice in this state shall maintain in a current status and retain for a period of seven years after the event which they record:

(1) Appropriate receipt and disbursement records of all deposits in and withdrawals from accounts specified in subsection (a) of this rule and any other bank account which concerns their practice of law, specifically identifying the date, source and description of each item deposited as well as the date, payee, and purpose of each disbursement. All trust account receipts shall be deposited intact and the duplicate deposit slip should be sufficiently detailed to identify each item. All trust account withdrawals shall be made only by authorized bank or wire transfer or by check payable to a named payee and not to cash. Only an attorney admitted to practice law in this state or a person supervised by such shall be an authorized signatory on a trust account; and,

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

(3) Copies of all retainer and compensation agreements with clients; and,

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

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

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

(7) All bank statements and prenumbered canceled checks; and,

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

(h) Type and Availability of Accounting Records. The financial books and other records required by subsections (f) and (g) of this rule shall be maintained in accordance with generally accepted accounting principles, such as the accrual method, the cash basis method and the income tax method. Bookkeeping records may be

maintained by computer provided they otherwise comply with this Rule and provided further that printed copies can be made on demand in accordance with this subsection or subsection (g). They shall be located at the principal Colorado office of each attorney, partnership, professional corporation, or limited liability corporation.

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

(j) Availability of Records. Any of the records required to be kept by this Rule shall be produced in response to a subpoena duces tecum issued in connection with proceedings pursuant to C.R.C.P. 241. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege.

COMMENT TO RULE 1.15

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

Trust accounts of funds of clients or third persons held in connection with a representation must be interest-bearing for the benefit of the client or third person or for the benefit of the Colorado Lawyer Trust Account Foundation where the funds are nominal in amount or expected to be held for a short period of time. A lawyer should exercise good faith judgment in determining initially whether funds are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing account for the benefit of the client or third person. The lawyer should also consider such other factors as (i) the cost of establishing and maintaining the account, service charges, accounting fees, and tax report procedures; (ii) the nature of the transaction(s) involved; and (iii) the likelihood of delay in the relevant proceedings. A lawyer should review at reasonable intervals whether changed circumstances require further action respecting the deposit of such funds, including without limitation the action described in subparagraph 1.15(e)(2)(d).] - (COLTAF)

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

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

means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

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

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

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RULE 1.15 — SAFEKEEPING PROPERTY; INTEREST-BEARING ACCOUNTS TO BE ESTABLISHED FOR THE BENEFIT OF THE CLIENT OR THIRD PERSONS OR THE COLORADO LAWYER TRUST ACCOUNT FOUNDATION; NOTICE OF OVERDRAFTS; RECORD KEEPING

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

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

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

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

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

(2) If not held in accounts with the interest paid to clients or third persons as provided in (e) (1), a lawyer or law firm shall establish a pooled interest-bearing insured depository

account for funds of clients or third persons which are nominal in amount or are expected to be held for a short period of time in compliance with the following provisions:

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

(b) The account shall include funds of clients or third persons which are nominal in amount or are expected to be held for a short period of time.

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

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

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

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

(3) Information necessary to determine compliance or justifiable reason for noncompliance with subparagraph (e) (2) shall be included in the annual attorney registration statement. The Colorado Lawyer Trust Account Foundation shall assist the court in determining whether lawyers or law firms have complied in establishing the trust account required under subparagraph (e) (2). If it appears that a lawyer or law firm has not complied where it is feasible to do so, the matter may be referred to the attorney regulation counsel for investigation and proceedings in accordance with C.R.C.P. 241.

(f) Required Bank Accounts. Every attorney in private practice in this state shall maintain in a financial institution doing business in Colorado, in the attorney's own name, or in the name of a partnership of attorneys, or in the name of the professional corporation or limited liability corporation of which the attorney is a member, or in the name of the attorney or entity by whom employed:

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

(2) A business account into which all funds received for professional services shall be deposited.

(3) One or more of the trust accounts may be the account or accounts described in Rule 1.15(e)(2), known as COLTAF (Colorado Lawyer Trust Account Foundation) accounts.

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

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

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

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

(g) Required Accounting Records. Attorneys, partnerships of attorneys, professional corporation and limited liability corporations in private practice in this state shall maintain in a current status and retain for a period of seven years after the event which they record:

(1) appropriate receipt and disbursement records of all deposits in and withdrawals from accounts specified in subsection (a) of this rule and any other bank account which concerns their practice of law, specifically identifying the date, source and description of each item deposited as well as the date, payee, and purpose of each disbursement. All trust account receipts shall be deposited intact and the duplicate deposit slip should be sufficiently detailed to identify each item. All trust account withdrawals shall be made only by authorized bank or wire transfer or by check payable to a named payee and not to cash. Only an attorney admitted to practice law in this state or a person supervised by such shall be an authorized signatory on a trust account; and,

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

(3) copies of all retainer and compensation agreements with clients; and,

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

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

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

(7) all bank statements and prenumbered canceled checks; and,

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

(h) Type and Availability of Accounting Records. The financial books and other records required by subsections (f) and (g) of this rule shall be maintained in accordance with generally accepted accounting principles, such as the accrual method, the cash basis method and the income tax method. Bookkeeping records may be maintained by computer provided they otherwise comply with this Rule and provided further that printed copies can be made on demand in accordance with this subsection or subsection (g). They shall be located at the principal Colorado office of each attorney, partnership, professional corporation, or limited liability corporation.

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

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

Source: (a) amended and (g) to (j) added June 25, 1998, effective January 1, 1999; (f) added June 25, 1998, effective July 1, 1999; IP(f), (f)(3), and (f)(6) amended and adopted May 13, 1999, effective July 1, 1999; (e)(3) corrected and effective November 9, 1999; (f)(7) added and adopted April 18, 2001, effective July 1, 2001.

Comment

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

Trust accounts of funds of clients or third persons held in connection with a representation must be interest-bearing for the benefit of the client or third person or for the benefit of the Colorado Lawyer Trust Account Foundation where the funds are nominal in amount or expected to be held for a short period of time. A lawyer should exercise good faith judgment in determining initially whether funds are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing account for the benefit of the client or third person. The lawyer should also consider such other factors as (i) the cost of establishing and maintaining the account, service charges, accounting fees, and tax report procedures; (ii) the nature of the transaction (s) involved; and (iii) the likelihood of delay in the relevant proceedings. A lawyer should review at reasonable intervals whether changed circumstances require further action respecting the deposit of such funds.

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

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

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

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

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

Committee Comment

This Rule is similar in substance to the Code. See DR 9-102. The Rule extends the concept to monies held for the benefit of third parties, which probably is implied under the Code.

Rule 1.15
Safekeeping Property

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

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

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

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current

basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., ABA Model Financial Recordkeeping Rule.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

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Comment to Rule 1.16 DECLINING OR TERMINATING REPRESENTATION

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

~~Optional~~ Permissive Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists

on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

RULE 1.16 — DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) A lawyer may not request permission to withdraw in matters pending before a tribunal and may not withdraw in other matters unless such request or such withdrawal is because:

(1) the client:

(A) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law[;]

(B) personally seeks to pursue an illegal course of conduct[;]

(C) insists that the lawyer pursue a course of conduct that is illegal or that is prohibited by these rules[;]

(D) by other conduct renders it unreasonably difficult for the lawyer to carry out the lawyer's employment effectively[;]

(E) insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited by these rules; or

(F) deliberately disregards an agreement or obligation to the lawyer as to expenses or fees; or

(2) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal; or

(3) the lawyer's client knowingly and freely assents to termination of the lawyer's employment; or

(4) the lawyer believes in good faith in a proceeding pending before a tribunal that the tribunal will find the existence of other good cause for withdrawal.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.

Comment

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Whether future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for a conservatorship or similar protection of the client. See Rule 1.14.

Optional Withdrawal

A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct

even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.

Whether or not a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawal or being discharged by the organization's highest authority is beyond the scope of these Rules.

Committee Comment

Rule 1.16(a) is similar to Code provision DR 1-109. Rule 1.16(b) is generally similar to Code provision DR 2-110(C), and has been revised to restrict counsel's flexibility in permissive withdrawals. The revisions are patterned after DR 2-110. The concept of permitting withdrawal where "other good cause for withdrawal exists," found in the ABA Model Rules has been deleted. The Committee believes that the public is best served when a specific basis for withdrawal is required. Rule 1.16(c) and (d) are substantially similar to Code provisions DR 2-110(A)(1), (2) and (3).

Rule 1.16
Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

COMMENT

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the

past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

RULE 1.17: SALE OF LAW PRACTICE

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

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

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

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

(1) the proposed sale;

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

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

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

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

* * * * * * * * * *

Comment to RULE 1.17 SALE OF LAW PRACTICE

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

Termination of Practice by the Seller

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

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

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

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

Sale of Entire Practice or Entire Area of Practice

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

Client Confidences, Consent and Notice

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

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected

to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera. (A procedure by which such an order can be obtained needs to be established in jurisdictions in which it presently does not exist).

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

Fee Arrangements Between Client and Purchaser

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

Other Applicable Ethical Standards

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

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

Applicability of the Rule

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

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

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

RULE 1.17 — SALE OF LAW PRACTICE

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

(a) The entire practice is sold to one or more lawyers or law firms.

(b) The fees charged clients shall not be increased by reason of the sale, and a purchaser shall not pass on the cost of good will to a client. The purchaser may, however, refuse to undertake the representation unless the client consents to pay fees regularly charged by the purchaser for rendering substantially similar services to other clients prior to the initiation of the purchase negotiations, except that any written fee agreements between seller and clients must be honored.

(c) Written notice of the pending sale shall be given at least sixty days prior to the date of transfer of responsibility for the client's file. Incident to the sale the seller shall provide to such client, via certified mail, return receipt requested, directed to the client's last known address, written notice, which shall include:

(1) notice of the fact of the proposed sale;

(2) the identity of the purchaser;

(3) the terms of any proposed change in the fee agreement permitted under paragraph (c);

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

(5) notice that the client's consent to the transfer of the client's file to the purchaser will be presumed if the client does not retain other counsel or otherwise object within 60 days of receipt of the notice. If the purchaser has identified a conflict of interest that the client cannot waive and that prohibits the purchaser from undertaking the client's matter, the notice shall advise that the client should retain substitute counsel to assume the representation and arrange to have the substitute counsel contact the seller.

(d) The notice may describe the purchaser's qualifications, including the seller's opinion of the purchaser's suitability and competence to assume representation of the client, but only if the seller has made a reasonable effort to arrive at an informed opinion.

(e) If certified mail is not effective to give the client notice, the seller, or the purchaser in the event the selling lawyer is deceased or disabled, shall take such steps as may be reasonable under the circumstances to give the client actual notice of the proposed sale and the other information required in paragraph (c). If no response to the notice is received within 60 days of the mailing of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client.

(f) The sale of the goodwill of a law practice may be conditioned upon the seller ceasing to engage in the private practice of law for a reasonable period of time within the geographical area in which the practice had been conducted.

(g) If substitution of the purchasing lawyer or law firm in a pending matter is required by the tribunal, the purchasing lawyer or law firm shall provide for same promptly.

(h) Admission to or withdrawal from a partnership or professional company, retirement plans, and similar arrangements, or a sale limited to tangible assets of a law practice is not a purchase or sale for purposes of this rule.

(i) Notwithstanding Rule 1.5(d), the purchase price for the practice may be based upon a portion of the fees collected from the clients of the law practice, even if the division of such fees is not in proportion to the services performed or the responsibilities assumed by the seller and purchaser.

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

Comment

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

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

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

Selling Entire Practice

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

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

Termination of Practice by the Seller

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

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

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

Conflicts

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

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

Client Confidences, Consent and Notice

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

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

Fee Arrangements Between Client and Purchaser

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

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

Deceased, Disabled or Disappeared Lawyer

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

CLIENT-LAWYER RELATIONSHIP

Rule 1.17
Sale of Law Practice

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

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

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

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

(1) the proposed sale;

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

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

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

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

COMMENT

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

Termination of Practice by the Seller

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

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

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

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

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

Sale of Entire Practice or Entire Area of Practice

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

Client Confidences, Consent and Notice

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

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

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

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

Fee Arrangements Between Client and Purchaser

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

Other Applicable Ethical Standards

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

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

Applicability of the Rule

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

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

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

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

RULE 1.18: DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to the prospective client, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

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Comment to RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and

whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Rule 1.18
Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate information to a lawyer are entitled to pro-

tection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a

matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

RULE 2.1: ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

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Comment to RULE 2.1 ADVISOR

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to

initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

COUNSELOR

RULE 2.1 — ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the

client's situation. In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

Comment

Scope of Advice

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act as if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

A lawyer should exert the lawyer's best efforts to insure that decisions of the client are made only after the client has been informed of relevant considerations. Advice of a lawyer to the client need not be confined to purely legal considerations. A lawyer should advise each client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision making process the fullness of the lawyer's experience as well as the lawyer's objective viewpoint. In assisting a client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. The lawyer may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client

and not for the lawyer. In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

The last sentence of Rule 2.1 addresses the issue of alternative dispute resolution ("ADR"). Common forms of ADR include arbitration, mediation, and negotiations. Depending upon the circumstances, it may be appropriate for the lawyer to discuss with the client factors such as cost, speed, effects on existing relationships, confidentiality and privacy, scope of relief, statutes of limitation, and relevant procedural rules and statutes.

Committee Comment

This provision is consistent with the Code except that it raises the consideration of the providing of non-legal advice to a rule, while the Code treats the subject matter only as aspirational, in EC 7-8, which provision has been added as the penultimate paragraph of the Comment.

COUNSELOR

Rule 2.1
Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

COMMENT

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely

to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

As proposed by Ethics 2000 Subcommittee 03/15/05
No changes from Colorado Ad Hoc Committee Proposal

RULE 2.2 INTERMEDIARY

Rule 2.2 is deleted.

RULE 2.2 — INTERMEDIARY

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with and provides full disclosure in writing to each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent, in writing, to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

Comment

A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.

The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such

as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association.

A lawyer acts as intermediary in seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest, arranging a property distribution in settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails, the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

Consultation

In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so, and proceed only upon obtaining written consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

Paragraph (b) is an application of the principle expressed in Rule 1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

Withdrawal

Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.

Committee Comment

This rule has been adopted by most states without change. We have added that the attorney provide "full disclosure in writing" and receive the client's consent "in writing" as well. The providing of full disclosure in writing creates potential significant problems for the lawyer who must determine what constitutes full disclosure with the obvious peril that hindsight may demonstrate that determination to be incorrect. However, this involves a lawyer in an attorney-client relationship with two (2) or more clients with differing interests, and an attorney should only take on the role of intermediary if it is clear the attorney can do so effectively, and the clients are fully advised of the risks. This is consistent with the Code. See DR 5-105(B), (C) and EC 5-20.

Rule 2.2
Intermediary

[Deleted 2002]

[Model Rule 2.2 was deleted in 2002. Issues relating to lawyers acting as intermediaries are dealt with in the Comment to Rule 1.7. Intermediation and the conflict-of-interest issues it raises are no longer treated separately from any other multiple-representation conflicts. For further explanation of the deletion of Rule 2.2, see ABA Report to the House of Delegates, No. 401 (Feb. 2002), Model Rule 2.2, Reporter's Explanation of Changes.]

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February 3, 2005

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

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

Dear Marcy:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Ben Aisenberg

Bennett S. Aisenberg

Enclosure

Rules amendment would allow loans to clients

Court sets March 19 deadline for comments

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

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

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

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

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

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

In connection with one of Rule 17

MORE LOANS, PAGE 6

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LOANS, FROM PAGE 5

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

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

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

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

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

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

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

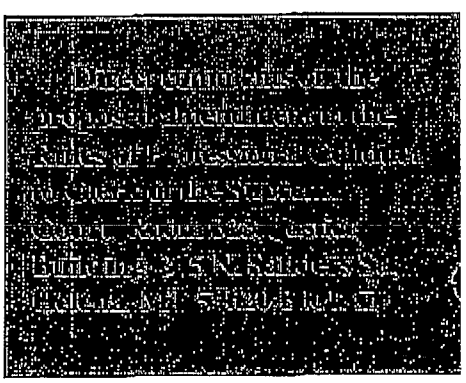
2. That after the expiration of the comment period referred to herein and upon further order of this Court, Rule 1.8(e) be amended as follows:

A lawyer may not make or guarantee a loan to a client in connection with pending or contemplated litigation that the lawyer is conducting for the client except that the lawyer may:

(1) make or guarantee a loan covering court costs and expenses of litigation, the repayment of which to the lawyer may be contingent on the outcome of the matter; and

(2) make or guarantee a loan on fair terms, the repayment of which to the lawyer may be contingent on the outcome of the matter, if: (i) the loan is needed to enable the client to withstand delay in litigation that otherwise might unjustly induce the client to settle or dismiss a case because of financial hardship rather than on the merits; (ii) the loan is used only for basic living expenses; (iii) the client faces demonstrable financial hardship that relates to, and arises out of, the injuries and claims for which the lawyer is representing the client; and (iv) the lawyer does not promise, offer, or advertise the loan before being retained by the client; and

4. That the Court is accepting written comments, suggestions and criticisms regarding the proposed amended rule through March 19, including comment on whether 37-61-408, MCA, may be implicated by the proposed amendments to the Rule. The Court specifically invited comments from the Ethics Committee, and reserved the possibility of ordering oral argument after the comment period has expired. □



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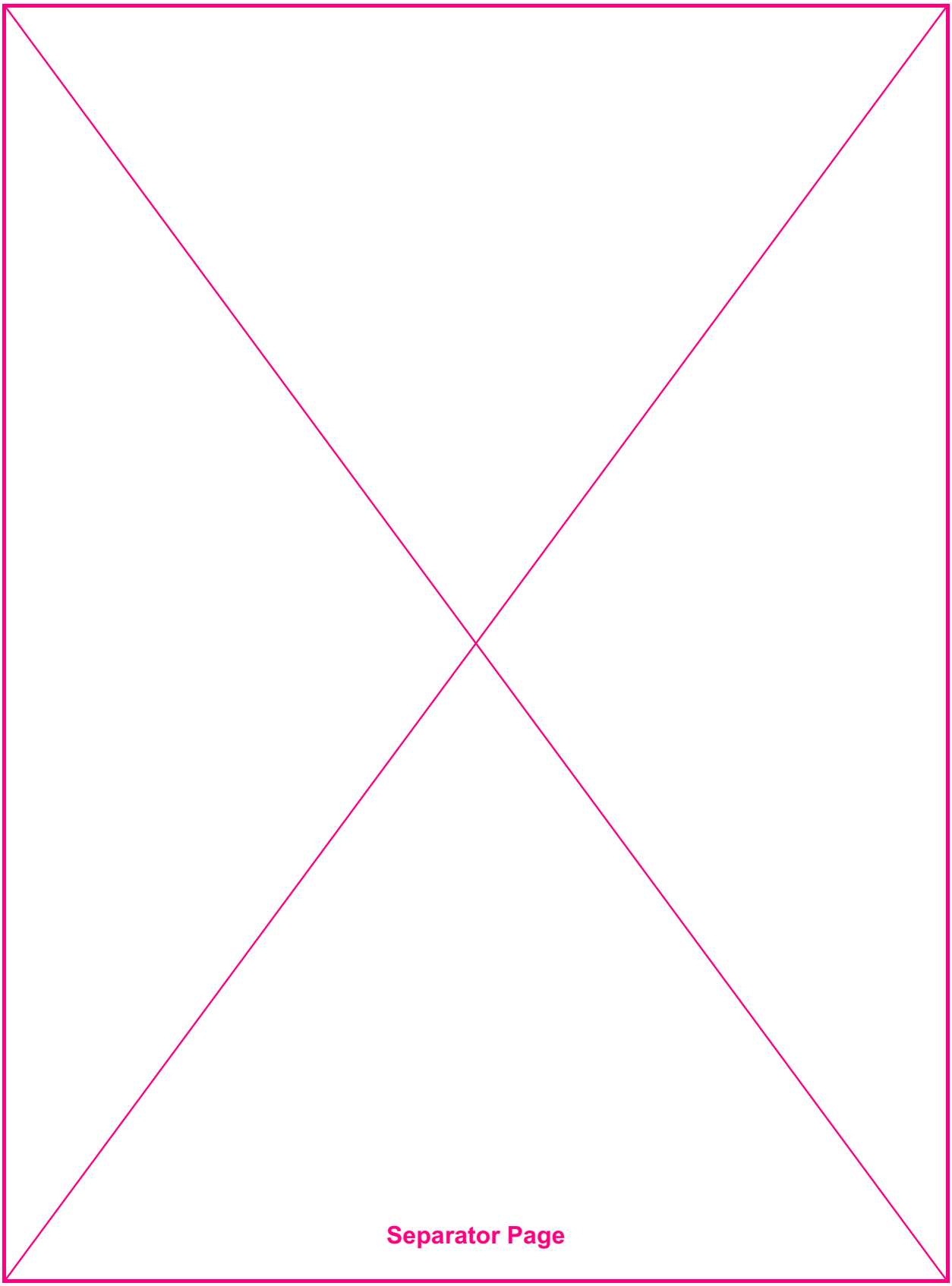

Separator Page

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

AGENDA

May 20, 2005, 9:00 a.m.
Supreme Court Conference Room (5th Floor)

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1. Approval of minutes – To be distributed via separate e-mail during week of May 16, or at the meeting

2. Administrative matter – Select next meeting date

3. Ethics 2000 Subcommittee Report on Rules 1.15, 1.17, 2.3, 2.4, 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 3.7, 3.8, 3.9 – Michael Berger

   a. Interim Report No. 4 of Subcommittee – **See pages 4-5, 23-45, and 55-65 from March 23, 2005 meeting materials**

   b. Interim Report No. 5 of Subcommittee – See attached pages 1-77

4. Adjournment (by noon)

Chair
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FILE NOTE

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

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

COLORADO SUPREME COURT

COMMITTEE ON RULES OF PROFESSIONAL CONDUCT

ETHICS 2000 SUBCOMMITTEE

INTERIM REPORT NO. 5

MAY 13, 2005

The Subcommittee has now completed its work through the end of the 3.x series of rules. The following are the recommendations of the Subcommittee.

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

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

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

Rule 1.17. Sale of Law Practice. The Ethics 2000 version of Rule 1.17 differs from existing Colorado Rule 1.17 in that the Ethics 2000 version permits the sale of an "area of practice", while existing Colo.RPC permits only the sale of an "entire practice." The Ad Hoc Committee recommended the adoption of the Ethics 2000 version of Rule 1.17, with one minor exception regarding the amount of time a client has to object to the transfer of the client's file in sections (c) (5) and (c) (e). Although the current Colorado version of Rule 1.17 is of fairly recent vintage, the Subcommittee agrees with the recommendation of the Ad Hoc Committee and recommends the adoption of Ethics 2000 Rule 1.17 with the change recommended by the Ad Hoc Committee, as noted above.

Rule 2.3. Evaluation for Use by Third Persons. The principal change between the existing Colorado rule and the Ethics 2000 proposed rule is that under the Ethics 2000 version "informed consent" is only required when the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely. This change appears to make sense. When a client requests a lawyer to provide an opinion for the benefit of third parties (it is difficult to imagine a situation where the lawyer would provide such an opinion without a request by the client) and where the opinion is consistent with the client's interests, there appears to be no good reason to require the client's "informed consent." Where, however, the opinion or evaluation for the use of a third party is likely to materially and adversely affect the client's interests, the requirement of informed consent is necessary to protect the client's interests. The Ad Hoc Committee recommended the adoption of Ethics 2000 Rule 2.3 and Comments. The Subcommittee agrees with that recommendation.

Rule 2.4. Lawyer Serving as Third-Party Neutral. Ethics 2000 Rule 2.4 is new; it has no counterpart in the current Colorado Rules. Both the Ad Hoc Committee and the Subcommittee believe that proposed Rule 2.4 provides valuable guidance to lawyers who serve as third party neutrals.

However, the Subcommittee recommends that the Committee bring to the attention of the Colorado Supreme Court the necessity or desirability of an amendment to C.R.C.P. 265, to permit lawyers to provide arbitration, mediation and expert witness services through a law firm operated pursuant to Rule 265. As presently written, a law firm operating pursuant to Rule 265 may only engage in the practice of law. Most authorities consider the providing of arbitration, mediation and expert witness services to not constitute the practice of law. In the Subcommittee's view, there is no good reason to require lawyers in a law firm to set up a separate entity to provide law- related services such as arbitration, mediation and expert witness services and that CRCP 265 should be amended accordingly.

Rule 3.1. Meritorious Claims and Contentions.

Ethics 2000 Rule 3.1 makes explicit that there must be a basis, both in law and fact, for a position taken by a lawyer. The current Colorado rule states that there must be a "basis" to bring or defend a proceeding, without specifying that the basis must be in both law and fact. The Subcommittee believes that the "law and fact" basis requirement is implicit in existing Colorado Rule 3.1 and that, therefore, there is no substantive change in the proposed rule. Otherwise, the proposed rule is the same as the existing Colorado Rule. The Ad Hoc Committee recommended the adoption of Ethics 2000 Rule 3.1 and Comments and the Subcommittee joins that recommendation.

Rule 3.2. Expediting Litigation.

Ethics 2000 Rule 3.2 is identical to the former Model Rule and existing Colorado Rule 3.2. Both the Ad Hoc Committee and the Subcommittee recommend the adoption of Rule 3.2 and the Comments in their entirety.

Rule 3.3. Candor Toward the Tribunal. Ethics 2000 Rule 3.3 makes a substantive change to the prior Model Rule. In the new version of the rule, **all** false statements of fact and law are

proscribed, whether material or not. Under the prior version of the Model Rule and existing Colorado RPC 3.3, only **material** false statements of fact and law are prohibited. A large majority of the Subcommittee agrees with the Ethics 2000 Commission that all false statements of fact and law should be prohibited. A minority of the Subcommittee voted in favor of retention of existing Rule 3.3 which prohibits only material false statements, on the basis that that discipline is warranted only when a material false statement is made. The majority believes that the concern of the minority is mitigated, if not eliminated, by the requirement that false statements of fact and law are subject to discipline only if the lawyer "knowingly" makes the statement. In the majority's view, if a lawyer knowingly makes a false statement of law or fact, discipline is warranted; lawyers should not knowingly make false statements, whether material or not, to a tribunal. The Ad Hoc Committee recommended the adoption of Ethics 2000 Rule 3.3.

That mens rea requirement contained in Rule 3.3 (and other rules) prompted a more general discussion of the definition of "knowingly" contained in Rule 1.0(f) (which the full Committee has already approved). It was pointed out by members of the Subcommittee that the definition of "knowingly" contained in Rule 1.0(f) does not take into account the Colorado Supreme Court's decisional law which, for most purposes, equates reckless conduct with knowing conduct. See, e.g., *People v. Small*, 962 P.2d 258, 260 (Colo. 1998.)(copy attached). The Subcommittee considered four possible courses of action in this regard. The first was to change the definition in Model Rule 1.0(f) to include "reckless conduct" within its scope. The second was to insert comments to the substantive rules where the Supreme Court's holding appeared applicable. The third possible course of action was not to change the Model Rules or Comments at all but bring to the attention of the Colorado Supreme Court the apparent inconsistency between the Court's decisional law and Model Rule 1.0(f). The fourth course of action, and the one chosen by the Subcommittee, was to insert a comment into Rule 1.0(f) to alert lawyers that in certain circumstances, reckless conduct is tantamount to knowing conduct in Colorado. As a result, the Subcommittee recommends the addition of a comment to Rule 1.0(f) to place lawyers on notice that the Supreme Court has equated recklessness with knowledge, at least in certain circumstances. The proposed Comment reads as follows:

> [7A]The Colorado Supreme Court has held that "with one important exception [involving knowing misappropriation of property] we have considered a reckless state of mind, constituting scienter, as equivalent to "knowing" for disciplinary purposes." *In the Matter of Egbune*, 971 P.2d 1065, 1069 (Colo.1999). See also *People v. Rader,* 822 P.2d 950 (Colo. 1992); *People v. Small*, 962 P.2d 258, 260 (Colo. 1998) (both apparently reducing the "knowledge"standard to one of "recklessness" even when "knowledge" is expressed as the required level of scienter).[1]

[1] The proposed text of Rule 1.0(f), Comment [7A], was drafted by a Subcommittee member and edited by the Chair of the Subcommittee. Because of time constraints, the Subcommittee has not considered this specific language although the concept has been approved by a majority of the Subcommittee.

Rule 3.4. Fairness to Opposing Party and Counsel.

The Ad Hoc Committee recommended the adoption of Ethics 2000 Rule 3.4, with one substantive change. The Ad Hoc Committee noted that Rule 16, Part III (a) of the Colorado Rules of Criminal Procedure prohibits a lawyer from recommending that any person (other than the defendant) refrain from giving relevant information regarding a criminal matter. As a result, Ethics 2000 Rule 3.4 (f)(1) does not accurately reflect existing Colorado law. The Ad Hoc Committee proposed an addition to that section as well as a change to Comment [4] to reflect the state of current Colorado law and the Subcommittee agrees with those recommendations.

In addition, the Subcommittee concluded that Ethics 2000 Rule 3.4, Comment [3] does not accurately reflect the existing practice in Colorado (or elsewhere.) with respect to the compensation of lay witnesses. In 1998, the Colorado Bar Association Ethics Committee issued Formal Opinion 103. In that Opinion, the Ethics Committee concluded that in a civil action a lawyer may reimburse a fact witness not only for expenses incurred but also for the reasonable value of the witness's time expended in testifying and preparing to testify. That opinion appears to be consistent with the great weight of modern authorities addressing this issue.

The CBA Ethics Opinion addressed only civil cases. Some members of the Subcommittee were concerned about the application of such a rule to criminal proceedings. The concerns in this regard were several. First of all, in almost all cases, the prosecution has far greater resources than the defendant. If the prosecution has the ability to compensate fact witnesses, indigent defendants may have a constitutional right to have the state fund similar compensation for defense fact witnesses. Aside from the fiscal impact, numerous motions to require the government to fund such compensation could adversely impact the business of the criminal courts. In addition, the concern was expressed that while paying a fact witness for testimony is tolerable in a civil case, given the lesser values that are implicated in a civil case, the concept of paying for testimony in a criminal case is simply intolerable given the heightened liberty interests at stake. Others noted that the payment of fact witnesses—informants—is already an established part of the criminal justice system.

After much discussion, the Subcommittee concluded that the determination of these serious criminal justice policy questions are beyond the scope of this Committee and should be taken up by the Court and its criminal justice committees. Obviously, the Supreme Court has the power to enact a rule (whether in the Rules of Criminal Procedure, or otherwise) that prohibits the compensation of fact witnesses in criminal cases. Were the Court to do so, it would be unethical conduct for a lawyer to compensate a fact witness in a criminal matter, because the payment would be an "inducement to a witness that is prohibited by law", in violation of Colo.RPC and Ethics 2000 Rule 3.4(b).

Accordingly, the Subcommittee recommends that Comment [3] of the ABA Ethics 2000 Rule 3.4 be amended to read as follows:

> "With regard to paragraph (b) it is not improper to pay an expert or non-expert's expenses or to compensate an expert witness on terms permitted by law. It is improper to pay any witness a contingent fee for testifying. A lawyer may reimburse a non-expert witness

not only for expenses incurred in testifying but also for the reasonable value of the witness's time expended in testifying and preparing to testify, so long as such reimbursement is not prohibited by law. The amount of such compensation must be reasonable based on all relevant circumstances, determined on a case-by-case basis."

With these two changes, the Subcommittee recommends the adoption of Ethics 2000 Rule 3.4 and the Comments.

Rule 3.5. Impartiality and Decorum of the Tribunal. The Ad Hoc Committee recommended a change to Ethics 2000 Rule 3.5 to impose additional restrictions upon lawyer's contacts with jurors after the jury is discharged. The Subcommittee agrees that additional restrictions upon juror contacts are necessary but does not agree with the language proposed by the Ad Hoc Committee. The Subcommittee unanimously recommends that a new Rule 3.5(c)(4) be adopted as follows:

[A lawyer shall not (c) communicate with a juror or prospective juror after discharge of the jury if]

"(4) the communication is intended to or is reasonably likely to demean, embarrass, or criticize the jurors or their verdicts."

The Subcommittee debated at length whether the Supreme Court's opinion in *Stewart v. Rice*, 47 P.3d 316 (Colo. 2002) (copy attached) requires additional prohibitory provisions in Rule 3.5. Dictum in that case may stand for the proposition that it is unethical conduct for a lawyer to communicate (directly or through an agent) with a juror, for the purpose of obtaining evidence to impeach a jury's verdict where the evidence obtained is not admissible under Colorado Rule of Evidence 606(b). A significant minority of the Subcommittee recommended that a new Rule 3.5(c)(5) be adopted to prohibit juror communications where:

"(5) the communication is for the purpose of soliciting juror testimony, affidavits, or statements to impeach the verdict without a basis under Rule 606(b) of the Colorado Rules of Evidence."

A small minority of the Subcommittee recommended that in addition to, or in lieu of proposed Rule 3.5(c) (5), set forth above, that a new Rule 3.5(c) (6) be added prohibiting juror communications when:

"(6) the lawyer or the lawyer's agent does not inform the juror, at the onset of the communication, that any information provided by the juror may be presented to the court for purposes of setting aside the jury's verdict."

The majority of the Subcommittee rejected these two proposals for several reasons. First, it will be difficult, or impossible, to determine, at the outset whether the purpose of the lawyer's communication was to obtain evidence admissible under CRE 606 (b) or whether the lawyer was

engaging in juror harassment to seek to uncover information that CRE 606(b) renders inadmissible. Colorado has rejected an outright ban on juror communications, apparently on the belief that there is value to communications between lawyers and jurors. Other courts, including the United States District Court for the District of Colorado, have prohibited all juror contacts without a court order.

Moreover, the majority is of the view that a "disclaimer", such as the one set forth above in proposed Rule 3.5(c)(6), is tantamount to a rule that juror communications are not appropriate at all without a specific court order. If the Court decides to ban juror contacts, then that ban should be enacted directly, and not through the way of such a disclaimer.

For all of these reasons, the Subcommittee recommends the adoption of Ethics 2000 Rule 3.5 and Comments with the modifications to Rule 3.5(c) (4) set forth above.

Rule 3.6. Trial Publicity.

The former ABA Model Rule was drafted to accommodate the competing interests between the First Amendment and a criminal defendant's constitutional right to a fair trial. Ethics 2000 Rule 3.6 is substantially the same as the prior Model Rule and existing Colo. RPC 3.6. The only substantive change from the current Colorado rule is that a "lawyer's assessment of the likelihood that a statement will be disseminated by means of public communication [is to] be judged from the perspective of a reasonable lawyer rather than a reasonable person." Ethics 2000 Commission Reporter's Explanation of Changes, Model Rule 3.6.

One member of the Subcommittee pointed out the apparent inconsistency between the safe harbor contained in Ethics 2000 (and present Colo. RPC) 3.6(b)(2), and Comment [5](1). Rule 3.6(b)(2) permits a lawyer to disclose "information contained in a public record." Records of criminal convictions are generally matters of public record. Comment [5](1) indicates that the "criminal record of a party" is information that may have a material prejudicial effect on a proceeding and thus may not be disclosed.

Despite this apparent inconsistency, the Subcommittee is in favor of adoption of Ethics 2000 Rule 3.6. The Ad Hoc Committee also recommended the adoption of Ethics 2000 Rule 3.6 and the Comments.

Rule 3.7. Lawyer as Witness.

Ethics 2000 Rule 3.7 is little changed from the prior ABA Model Rule. When the Colorado Supreme Court adopted the Model Rules in 1993, it changed, at the recommendation of the Colorado Model Rules Committee, the presumption contained in ABA Model Rule 3.7(b) as to when a lawyer was permitted to continue representation when the lawyer or a lawyer in the same firm was likely to be a necessary witness. The Ad Hoc Committee was of the view that consistency with Ethics 2000 Rule 3.7 was preferable to any perceived benefit of the presumption contained in existing Colo. RPC 3.7. The Subcommittee agrees with the Ad Hoc Committee's analysis and recommends the adoption of Ethics 2000 Rule 3.7 and the Comments.

Rule 3.8. Special Responsibilities of a Prosecutor

The changes made in Ethics 2000 Rule 3.8 from ABA Model Rule 3.8 and current Colorado Rule 3.8 are of style, not substance. As a result, the Subcommittee recommends and the Ad Hoc Committee recommended adoption of Ethics 2000 Rule 3.8 and the Comments.

Rule 3.9. Advocate in Non Adjudicative Proceedings

The structure of Ethics 2000 Rule 3.9 is strange. It incorporates by reference into the non-adjudicative proceeding context, rules that, by their express terms, are applicable only to adjudicative proceedings. The Ad Hoc Committee recommended a number of stylistic and substantive changes to Ethics 2000 Rule 3.9 which, in part, correct the structure. The principal substantive change is to delete the requirement that a lawyer-participant in a non-adjudicative proceeding disclose controlling authority, which is required in an adjudicative proceeding under Rule 3.3(a)(2). Aside from the fact that it is not clear what "controlling authority" means in the context of a legislative, rule-making, or other non-adjudicative proceeding, the requirement makes little sense in such a proceeding. The Subcommittee believes that the changes suggested by the Ad Hoc Committee are salutary and recommends adoption of Rule 3.9 and the Comments, as amended by the Ad Hoc Committee.

As proposed by Ethics 2000 Subcommittee 05/13/05
Changes from Colorado Ad Hoc Committee Proposal
are marked (COLTAF and OARC proposed changes)

RULE 1.15: SAFEKEEPING PROPERTY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(f) Required Bank Accounts. Every lawyer in private practice in this state shall maintain in a financial institution doing business in Colorado, in the lawyer's own name, or in the name of a partnership of lawyers, or in the name of the professional corporation or limited liability corporation of which the lawyer is a member, or in the name of the lawyer or entity by whom employed:

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

(2) A business account into which all funds received for professional services shall be deposited.

(3) One or more of the trust accounts may be the account or accounts described in Rule 1.15(e)(2), known as COLTAF (Colorado Lawyer Trust Account Foundation) accounts.

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

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

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

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

(g) Required Accounting Records. Lawyers, partnerships of lawyers, and professional companies in private practice in this state shall maintain in a current status and retain for a period of seven years after the event which they record:

(1) Appropriate receipt and disbursement records of all deposits in and withdrawals from accounts specified in subsection (a) of this rule and any other bank account which concerns their practice of law, specifically identifying the date, source and description of each item deposited as well as the date, payee, and purpose of each disbursement. All trust account receipts shall be deposited intact and the duplicate deposit slip should be sufficiently detailed to identify each item. ~~All trust account withdrawals shall be made only by authorized bank or wire transfer or by check payable to a named payee and not to cash. Only a lawyer admitted to practice law in this state or a person supervised by such shall be an authorized signatory on a trust account~~; and,

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

(3) Copies o f all retainer and compensation agreements with clients; and,

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

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

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

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

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

(h) Type and Availability of Accounting Records. The financial books and other records required by subsections (f) and (g) of this rule shall be maintained in accordance with generally accepted accounting principles, such as the accrual method, the cash basis method and the income tax method. Bookkeeping records may be maintained by computer provided they otherwise comply with this Rule and provided further that printed copies can be made on demand in accordance with this subsection or subsection (g). They shall be located at the principal Colorado office of each lawyer, partnership, professional corporation, or limited liability corporation.

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

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

(k) Management of Trust Account.

1. ATM or Debit Cards. Lawyers shall not use any debit card or automated teller machine card to withdraw funds from a trust account.
2. All trust account withdrawals and transfers shall be made only by a lawyer admitted to practice law in this state or by a person supervised by such lawyer and may be made only by authorized bank or wire transfer or by check payable to a named payee. Cash withdrawals and checks made payable to "Cash" are prohibited.
3. Cancelled Checks. Lawyers shall request that their trust account bank return to them, photo static or electronic images of cancelled checks written on the trust account. If the bank provides electronic images, the lawyer shall either maintain paper copies of the electronic images or maintain the electronic images in readily obtainable format.
4. Persons Authorized to Sign. Only a lawyer admitted to practice law in this state or a person supervised by such shall be an authorized signatory on a trust account;
5. Trial Balances. A regular trial balance of the individual client ledgers shall be maintained and reconciled at least quarterly with the applicable bank statements.

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Comment to RULE 1.15 SAFEKEEPING PROPERTY

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

Trust accounts of funds of clients or third persons held in connection with a representation must be interest-bearing for the benefit of the client or third person or for the benefit of the Colorado Lawyer Trust Account Foundation where the funds are nominal in amount or expected to be held for a short period of time. A lawyer should exercise good faith judgment in determining initially whether funds are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing account for the benefit of the client or third person. The lawyer should also consider such other factors a (i) the costs of establishing and maintaining the account, service charges, accounting fees, and tax report procedures; (ii) the nature of the transaction(s) involved; and (iii) the likelihood of delay in the relevant proceedings. A lawyer should review at reasonable

intervals whether changed circumstances require further action respecting the deposit of such funds, including without limitation the action described in subparagraph 1.15(e)(2)(d).

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

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

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

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

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

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

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

RULE 1.17: SALE OF LAW PRACTICE

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

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

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

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

(1) the proposed sale;

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

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

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

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

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Comment to RULE 1.17 SALE OF LAW PRACTICE

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

Termination of Practice by the Seller

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

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

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

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

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

Sale of Entire Practice or Entire Area of Practice

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

Client Confidences, Consent and Notice

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

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

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

Fee Arrangements Between Client and Purchaser

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

Other Applicable Ethical Standards

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

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

Applicability of the Rule

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

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

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

RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

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Comment to RULE 2.3 EVALUATION FOR USE BY THIRD PERSONS

Definition

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a pros pective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the ease if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should

advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

RULE 2.3 — EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Comment

Definition

An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.

A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to Third Person

When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Financial Auditors' Requests for Information

When a question concerning the legal situation of a client arises at the insistence of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Committee Comment

There is no counterpart to Rule 2.3 in the Code. Rule 2.3 generally codifies current practice with respect to third-party (non-client) use of, and reliance upon, a lawyer's services. It is a helpful addition.

As proposed by Ethics 2000 Subcommittee 5/13/05
No changes from Colorado Ad Hoc Committee Proposal
No changes from ABA Ethics 2000 Model Rule

RULE 2.4 LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

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Comment to RULE 2.4 LAWYER SERVING AS THIRD-PARTY NEUTRAL

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decision maker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this rule or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1

As proposed by Ethics 2000 Subcommittee 5/13/05
No changes from Colorado Ad Hoc Committee Proposal
No changes from ABA Ethics 2000 Model Rule

RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

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Comment to RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

ADVOCATE

RULE 3.1 — MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

The professional responsibility of a lawyer derives from membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. Each member of our society is entitled to have his or her conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue or defense.

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Committee Comment

The Committee felt that this provision is an improvement on DR 7-102(A) which makes it improper for a lawyer to "file a suit...when he knows or when it is obvious that such action would serve merely to harass or maliciously injure." The Rule talks in terms of "frivolous" actions, rather than in terms that seem to speak to the motivation of the attorney. The Rule also seems preferable in that it sets out more clearly an objective standard for evaluating the conduct of the attorney. Some language from EC 7-1 was added at the start of the Comments to the Rule to emphasize that this Rule is not inconsistent with a lawyer's obligation to seek vigorously a client's lawful objectives through lawful means.

As proposed by Ethics 2000 Subcommittee 5/13/05
No changes from Colorado Ad Hoc Committee Proposal
No changes from ABA Ethics 2000 Model Rule

RULE 3.2 EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

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Comment to RULE 3.2 EXPEDITING LITIGATION

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

RULE 3.2 — EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Committee Comment

The Committee viewed this Rule as an important one and an improvement over the Code in that it places on attorneys a positive obligation to make reasonable efforts to expedite litigation and it also makes clear that delaying tactics engaged in solely for the purpose of benefiting a client are improper.

As proposed by Ethics 2000 Subcommittee 5/13/05
No changes from Colorado Ad Hoc Committee Proposal
No changes from ABA Ethics 2000 Model Rule

RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

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Comment to RULE 3.3 CANDOR TOWARD THE TRIBUNAL

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents

ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is tree or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the *Comment* to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness m present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably

believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done--making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final

judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

RULE 3.3 — CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and later learns that the evidence is false, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be condoned by lawyers.

Misleading Legal Argument

The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to the client. The advocate may urge any permissible construction of the law favorable to the lawyer's client, without regard to the lawyer's professional opinion as to the likelihood that the construction will ultimately prevail.

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. But having made such disclosure, the lawyer may challenge its soundness in whole or part.

False Evidence

A lawyer should present any admissible evidence the client desires to have presented unless the lawyer knows, or from facts within the lawyer's knowledge should know, that such testimony or evidence is false, fraudulent or perjured.

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when the persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility

of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should take reasonable remedial measures.

Constitutional Requirements

The general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client—applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Duration of Obligation

A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to be False

Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex

parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Committee Comment

Much of this Rule is substantially similar to provisions of the Code. The major difference is, of course, (a)(4) which places on the lawyer the obligation to take reasonable remedial measures in a situation where the lawyer comes to know that he or she has offered evidence that the lawyer knows to be false. (Under section (b) this obligation only continues until the end of the proceeding.) Unlike the present Code, there is no exception in this Rule from the obligation to take remedial measures for client perjury or other false evidence presented by the client. Thus even if the lawyer's knowledge of the falsity of the evidence presented is the result of privileged information, the lawyer must take reasonable remedial measures.

A lawyer's obligation when faced with client perjury is, of course, one of the most controversial problems in professional ethics. The comments to Rule 3.3 nicely bring out the other alternative positions on client perjury. On balance the Committee felt that the position put forward in Rule 3.3, which might necessitate revealing the perjury in certain situations, represented the proper balance among a lawyer's duty to protect client confidences, a lawyer's obligation to the court and a lawyer's duty not to assist in the commission of a crime.

C

Supreme Court of Colorado,
En Banc.
The PEOPLE of the State of Colorado, Complainant,
v.
E. Giancarlo SMALL, Attorney-Respondent.
No. 98SA139.

June 29, 1998.

In attorney discipline proceeding, the Supreme Court accepted conditional admission and inquiry panel's recommendation and held that attorney's misconduct in falsely testifying under oath that he had insurance at time of automobile accident which gave rise to litigation warranted public censure.

Publicly censured.

West Headnotes

[1] **Courts** 107
106k107 Most Cited Cases
Unpublished summaries of attorney disciplinary cases involving private discipline were not binding precedent on Supreme Court in attorney disciplinary case.

[2] **Attorney and Client** 58
45k58 Most Cited Cases
Attorney's misconduct in falsely testifying under oath that he had insurance at time of automobile accident which gave rise to his small claims court action warranted public censure. Rules of Prof.Conduct, Rules 3.3(a)(1), 8.4(c).

*258 Linda Donnelly, Disciplinary Counsel, James S. Sudler, Assistant Disciplinary Counsel, Denver, for Complainant.

Jay P.K. Kenney, Darren R. Cantor, Denver, for Attorney-Respondent.

PER CURIAM.

This is a lawyer discipline case. The complainant and the respondent, E. Giancarlo Small, entered into a stipulation, agreement, and conditional admission of misconduct. *See* C.R.C.P. 241.18. The parties agreed to discipline in the range of a private censure to *259 public censure. In approving the conditional admission, an inquiry panel of the supreme court grievance committee recommended that Small be publicly censured. We accept the conditional admission and the inquiry panel's recommendation.

I

Small was admitted to practice law in this state in 1994. The conditional admission provides that on March 8, 1994, Small was involved in an automobile accident in which his vehicle, an Audi, was struck from behind by a vehicle driven by Patricia A. Corbin. Corbin agreed to pay Small's damages, and he obtained three estimates. Corbin contended that even the lowest estimate was too high and she refused to pay it. Small filed an action against Corbin in the Jefferson County Small Claims Court on October 12, 1994.

At the trial, Small was called to testify and was asked if he had insurance at the time of the accident. In fact, Small did not have insurance on the Audi after December 12, 1993, and thus had no insurance at the time of the accident. Nevertheless, under oath, and under questioning by both Corbin and the court, Small asserted that he had insurance for the Audi and that he had chosen not to file an uninsured motorist claim with his insurer. He gave an elaborate and untruthful explanation why he had not filed an uninsured motorist claim.

The conditional admission states that Small's "testimony at trial of his case against Ms. Corbin was false. The respondent knew his testimony was false, or he testified with reckless disregard for the truth of his testimony." The parties have also stipulated that Small's false testimony did not actually harm Corbin because the court's award of damages in Small's favor was not based on its belief that Small had insurance on the date of the accident. According to the parties, "the only damage caused by the respondent's misrepresentation was to the legal system by the disrepute that is brought on it and lawyers in general by such misrepresentation."

Small admits that the foregoing conduct violated Colo. RPC 3.3(a)(1) (knowingly making a false statement of material fact or law to a tribunal); and Colo. RPC 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).

II

The inquiry panel approved the conditional

admission, with the recommendation that Small receive a public censure. The complainant asserts that public discipline is appropriate. Small urges the court to conclude that private discipline is adequate. Under the ABA *Standards for Imposing Lawyer Sanctions* 6.12 (1991 & Supp.1992) (ABA *Standards*):

> Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

On the other hand, a public censure

> is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Id. at 6.13. A private censure is only appropriate "when a lawyer engages in an isolated instance of neglect in determining whether statements or documents are false ... and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding." *Id.* at 6.14.

Small's argument for private discipline is that "recklessness" should be equated with "negligence" for purposes of applying the ABA *Standards*. We disagree. As we explained in *People v. Rader*, 822 P.2d 950, 953 (Colo.1992):

> *Under certain circumstances, an attorney's conduct can be so careless or reckless that it must be deemed to be knowing and *260 will constitute a violation of a specific disciplinary rule.* We believe that the element of scienter is shown with respect to a violation of DR 1-102(A)(4) [now Colo. RPC 8.4(c)] when it is established that the attorney "deliberately closed his eyes to facts he had a duty to see ... or recklessly stated as facts things of which he was ignorant." *United States v. Benjamin*, 328 F.2d 854, 862 (2d Cir.) (holding that government could meet its burden of proving willfulness in a prosecution for conspiracy to defraud in sale of unregistered securities by showing that defendant auditor had deliberately closed his eyes to facts that were plainly to be seen or recklessly stated as facts things of which he was ignorant), *cert. denied*, 377 U.S. 953, 84 S.Ct. 1631, 12 L.Ed.2d 497 (1964). *See also B & B Asphalt Co. v. T.S. McShane Co.*, 242 N.W.2d 279, 284 (Iowa 1976) (the element of scienter requires a showing that the alleged false representations were made with knowledge that they were false and this requirement is met when the evidence shows that the representations were made in reckless disregard of their truth or falsity).

(Emphasis added; some citations omitted.) With one important exception, we have considered a reckless state of mind, constituting scienter, as equivalent to "knowing" for disciplinary purposes. *See, e.g., People v. Sims*, 913 P.2d 526, 530 (Colo.1996) ("The hearing board found that the respondent's conduct was so careless and reckless that, when taken in combination with the fact that he deliberately closed his eyes to facts he had a duty to see, the conduct must be deemed to be knowing and thus sufficient to establish a violation of DR 1-102(A)(4)."); *People v. Walker*, 832 P.2d 935, 936 (Colo.1992) ("In our view, the respondent's mental state when he submitted the vouchers for payment must be deemed to be knowing because he acted with at least a reckless disregard for the propriety of multiple and duplicative billing in court-appointed cases.").

[1] The one exception is in cases involving a lawyer's *misappropriation* of another's property:

> The single most important factor in determining the appropriate level of discipline in this case is whether the respondent's misappropriation of client funds was knowing, in which case disbarment is the presumed sanction, or whether it was reckless, or merely negligent, suggesting that a period of suspension is adequate. The hearing board specifically found that the respondent's mental state during the mismanagement of his trust and operating accounts was not one of simple negligence, but was reckless.

People v. Zimmermann, 922 P.2d 325, 329 (Colo.1996) (citations omitted). This case does not involve either misappropriation or a sanction of disbarment, so this exception does not apply. While Corbin may not have sustained actual damage due to Small's false testimony under oath at the trial, we consider it apparent that Small's misrepresentations threatened to cause a "potentially adverse effect on the legal proceeding." ABA *Standards* 6.12. We conclude therefore that a period of suspension is the presumed disciplinary sanction in this case. *See id.* [FN1]

> FN1. In his analysis of discipline, Small refers to certain summaries of disciplinary cases involving private discipline that he

> believes implicate similar, or more serious misconduct. We have recently rejected this approach. "The summaries are necessarily brief synopses of private, unpublished discipline, that intrinsically cannot fully reflect the facts of the particular case. Moreover, the private censures themselves, being unpublished, do not constitute the binding precedent that a published opinion of this court would." *People v. Meier*, 954 P.2d 1068, 1071 (Colo.1998). Citation and reliance on unpublished discipline proceedings is therefore discouraged in this court.

According to the complainant, the following mitigating factors are present: Small has not been previously disciplined in four years of practice, *see id.* at 9.32(a); he is inexperienced in the practice of law, *see id.* at 9.32(f) [FN2] ; and he has expressed remorse for his misconduct, *see id.* at 9.32(*l*). The complainant also asserts that when Small testified falsely that he had insurance, he had a dishonest or selfish motive, which is an aggravating ***261** factor. *See id.* at 9.22(b). We agree. Operating a motor vehicle without the required insurance policy or certificate of self-insurance is a traffic offense. *See* § 42-4-1409, 11 C.R.S. (1997). Small's motive in testifying as he did was both dishonest and selfish.

> FN2. Inexperience in the practice of law is not particularly relevant to the misconduct in this case involving false testimony. We accord it little or no weight in our analysis of discipline.

[2] In *People v. Bertagnolli*, 861 P.2d 717, 721 (Colo.1993), we held that the failure of the lawyer to correct an error in the testimony of one of the lawyer's witnesses of which the lawyer was aware in an arbitration proceeding warranted a public censure. Because Bertagnolli's conduct went beyond mere negligence, like Small's in this case, we found private discipline inadequate. *See id.* Considering the seriousness of the misconduct together with the factors in mitigation, we agree that a public censure is warranted in this case. Had the false testimony in this case gone to a dispositive and material fact, however, we would have found a public censure too lenient. *See People v. Kolbjornsen*, 917 P.2d 277, 279 (Colo.1996) (suspending lawyer for a year and a day for falsely denying at his trial for failing to provide proof of insurance that he had been driving without insurance). Accordingly, we accept the conditional admission and the inquiry panel's recommendation. At least one member of the court would have rejected the stipulation.

III

The respondent, E. Giancarlo Small, is hereby publicly censured. It is further ordered that Small pay the costs of this proceeding in the amount of $456.25 within thirty days after this opinion is announced to the Supreme Court Grievance Committee, 600 Seventeenth Street, Suite 920-S, Denver, Colorado 80202.

962 P.2d 258, 98 CJ C.A.R. 3448

END OF DOCUMENT

As proposed by Ethics 2000 Subcommittee 5/13/2005[1].
Comment is new; there is no comment to ABA Ethics 2000 Model Rule 1.10(k)

Rule 1.0(f) [no change]

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

Comment: [new]

[7A]The Colorado Supreme Court has held that "with one important exception [involving knowing misappropriation of property] we have considered a reckless state of mind, constituting scienter, as equivalent to "knowing" for disciplinary purposes." In the Matter of Egbune, 971 P.2d 1065, 1069 (Colo.1999). See also People v. Rader, 822 P.2d 950 (Colo. 1992); People v. Small, 962 P.2d 258, 260 (Colo. 1998.) (both apparently reducing the "knowledge"standard to one of "recklessness" even when "knowledge" is expressed as the required level of scienter).

[1] The proposed text of Rule 1.0(f), Comment [7A], was drafted by a Subcommittee member and edited by the Chair of the Subcommittee. Because of time constraints, the Subcommittee has not considered this specific language although the concept has been approved by a majority of the Subcommittee.

As proposed by Ethics 2000 Subcommittee 5/13/05
Marked to show changes from Colorado Ad Hoc Committee Proposal
Changes from ABA Ethics 2000 Model Rule:
(f)(1), Comments [3] and [4]

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client and the lawyer is not prohibited by other law from making such a request; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

* * * * * * * * * *

Comment to RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable

law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] ~~With regard to paragraph (b), it is improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.~~ With regard to paragraph (b), it is not improper to pay an expert or non-expert's expenses or to compensate an expert witness on terms permitted by law. It is improper to pay any witness a contingent fee for testifying. A lawyer may reimburse a non-expert witness not only for expenses incurred in testifying but also for the reasonable value of the witness's time expended in testifying and preparing to testify, so long as such reimbursement is not prohibited by law. The amount of such compensation must be reasonable based on all relevant circumstances, determined on a case-by-case basis.

[4] Paragraph (f) permits a lawyer to advise relatives and employees of a client to refrain from giving information to another party because the relatives or employees may identify their interests with those of the client. See also Rule 4.2. However, Colorado Rules of Criminal Procedure Rule 16 may preclude such a request in a criminal matter.

RULE 3.4 — FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative of a client or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Comment

The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

With regard to paragraph (b), it is not improper to pay a witness' expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of the lawyer's personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as the guilt or innocence of an accused is not a proper subject for argument to the triers of fact. It is improper as to factual matters because admissible evidence possessed by a lawyer should be presented only

as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to the client. However, a lawyer may argue based on the lawyer's own analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, because employees may identify their interests with those of the client. See also Rule 4.2.

Committee Comment

Many of the provisions of Rule 3.4 are similar to provisions in the Code. The main differences occur in subsections (d) and (f). Subsection (d) has no Code analog but the Committee felt that (d) was a sound addition because abuse of discovery is a serious problem with our system of justice. Subsection (f) is a little broader than DR 7-106(C)(5) in that it allows a lawyer to give advice in certain circumstances to relatives or employees of a client. The Committee felt it was appropriate to broaden the Code provision to allow a lawyer to request that a relative or employee of a client not volunteer information to another party because in many such situations the relative or employee will identify with the interests of the client.

Some language from EC 7-24 was added to the Comment section because the Committee felt that this language was helpful in explaining the reasons why the conduct elaborated in subsection (e) is proscribed.

Rule 3.4
Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an

offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

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As proposed by Ethics 2000 Subcommittee 5/13/05
Marked to show changes from Colorado Ad Hoc Committee Proposal
Changes from ABA Ethics 2000 Model Rule:
(b)(4)

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by menus prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(4) ~~the communication is likely to embarrass the juror with respect to the verdict of the jury or is likely to influence the juror or the potential juror in future jury service; or~~the communication is intended to or is reasonably likely to demean, embarrass, or ciriticize the jurors or their verdicts; or

(d) engage in conduct intended to disrupt a tribunal.

* * * * * * * * * *

Comment to RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

RULE 3.5 — IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

Comment

Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Committee Comment

The Committee felt that this provision was uncontroversial because it simply makes it unethical to do what is already illegal and is very similar to present Code provisions. Section (c) was viewed as an improvement because it is more specific than DR 7-106(C)(6) which proscribes "undignified or discourteous" courtroom conduct.

Rule 3.5
Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

Briefs and Other Related Documents

Supreme Court of Colorado,
En Banc.
David STEWART, Jr., minor, by and through his next friend and mother, Chiquita STEWART, Petitioner,
v.
Velma I. RICE, Respondent.
No. 00SC970.

May 13, 2002.
As Modified on Denial of Rehearing June 3, 2002.

Mother of minor who had sustained permanent head injuries in automobile accident brought action on minor's behalf against second driver involved in collision. The District Court, El Paso County, James M. Franklin and Thomas K. Kane, JJ., entered judgment on jury verdict for minor, and denied post-trial motions. Appeals were taken. The Court of Appeals, 25 P.3d 1233, Roy, J., affirmed in part and remanded in part. Mother appealed. The Supreme Court, Hobbs, J., held that juror affidavits submitted by defense counsel seeking new trial did not qualify for the exceptions to the rule of evidence that banned solicitation and use of juror affidavits to address the validity of the jury verdict, and thus were not admissible.

Reversed.

West Headnotes

[1] **Courts** 97(1)
106k97(1) Most Cited Cases
When a state rule of evidence is similar to the federal rule, courts may look to the federal authority for guidance in construing the state rule.

[2] **Federal Civil Procedure** 2371
170Ak2371 Most Cited Cases
The federal counterpart to the state rule of evidence that bans solicitation and use of juror testimony or affidavits to address the validity of a jury verdict is grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences. Rules of Evid., Rule 606(b).

[3] **Criminal Law** 957(1)
110k957(1) Most Cited Cases

[3] **Trial** 344
388k344 Most Cited Cases
The state rule of evidence that bans solicitation and use of juror testimony or affidavits to address the validity of a jury verdict applies to all civil and criminal cases. Rules of Evid., Rule 606(b).

[4] **Trial** 344
388k344 Most Cited Cases
The state rule of evidence that bans solicitation and use of juror testimony or affidavits to address the validity of a jury verdict has three fundamental purposes: to promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion. Rules of Evid., Rule 606(b).

[5] **Trial** 339(4)
388k339(4) Most Cited Cases
While a jury may change or modify its verdict up to the point the trial court accepts the verdict and discharges the jury, the court may not recall the jurors for this purpose once they leave the judge's control; this rule helps to ensure that jury verdicts will not be tainted by any outside influence and promotes the finality of verdicts.

[6] **Appeal and Error** 930(1)
30k930(1) Most Cited Cases
During post-trial and appellate proceedings, courts must view the jury's verdict in the light most favorable to it.

[7] **Trial** 352.1(1)
388k352.1(1) Most Cited Cases
Special verdict forms and the instructions that go with them assist a jury with its deliberations; signing the verdict form acknowledges the verdict as the product of each juror's deliberation.

[8] **Appeal and Error** 930(2)
30k930(2) Most Cited Cases
The law presumes that jurors have followed the court's instructions and have discharged their duties faithfully.

[9] New Trial 142
275k142 Most Cited Cases
Juror affidavits submitted by defense counsel seeking new trial, after jury returned verdict for minor injured in motor vehicle collision, did not qualify for the exceptions to the rule of evidence that banned solicitation and use of juror affidavits to address the validity of the jury verdict, and thus were not admissible in new trial proceeding; the affidavits did not allege that extraneous prejudicial information was improperly brought to the jurors' attention or that improper outside influence was exerted upon the jurors, but rather testified to the jury's deliberative process and the intent and meaning of the jury's verdict, each juror affirmed the verdict in open court upon the trial court's polling, and there was no clerical error in the completion of the verdict form. Rules of Evid., Rule 606(b); Rules Civ.Proc., Rule 60(a).

***317** Lloyd C. Kordick & Associates, Lloyd C. Kordick, Colorado Springs, Colorado, Attorney for Petitioner.

Patterson, Nuss & Seymour, P.C., Franklin D. Patterson, Brian C. Proffitt, Englewood, Colorado, Attorneys for Respondent.

Justice HOBBS delivered the Opinion of the Court.

The court of appeals in *Stewart v. Rice*, 25 P.3d 1233 (Colo.App.2000) considered juror affidavits in directing the trial court to review its previous denial of a new trial motion. We hold that Colorado Rule of Evidence 606(b) barred consideration of the juror affidavits because they did not address matters within the rule's two exceptions: extraneous prejudicial information improperly brought to the juror's attention or improper outside influence exerted upon a juror.

After the trial court discharged the jury, defense counsel obtained five juror affidavits through an investigator and then used them to support a new trial motion. Plaintiff's counsel then obtained counter-affidavits from the same five jurors, rejecting what they had said in the defense affidavits.

The case had gone to a six person jury on the issue of damages only. The trial court instructed the jury in the use of a special verdict form containing three separate lines for the entry of noneconomic, economic, and physical impairment damages. The jury returned a verdict for $696,000.00 in noneconomic damages, $440,000.00 in economic damages, and $1,136,000.00 in physical impairment damages.

The trial court read the written verdict aloud verbatim, and then polled each juror at the request of defense counsel. Each juror answered "yes" to the trial court's question, "Is that your verdict in this case?"

Defense counsel realized later that the sum of the economic and noneconomic damages amounted to $1,136,000.00, the same amount the jury had entered on the third line for physical impairment damages. Defense counsel sent an investigator to contact the jurors. He did so repeatedly. Five of the six jurors signed affidavits which defense counsel offered to demonstrate that the jury ***318** did not intend to make an award for physical impairment damages. Instead, so the defense alleged in its new trial motion, the jury meant the third line of its written verdict to state the total of its damages award. When plaintiff's counsel contacted the same five jurors, they executed counter-affidavits. These affidavits reaffirmed what the jurors had said when polled by the trial court, that the recorded verdict was theirs.

We determine that the affidavits were inadmissible under Colorado Rule of Evidence 606(b). [FN1] Accordingly, the court of appeals should have excluded the affidavits from consideration. We reverse and reinstate the jury's verdict and the trial court's judgment.

> FN1. We granted certiorari on the following issue: "Whether the court of appeals misapplied C.R.E. 606(b) and prior precedent by accepting certain jury affidavits and remanding the case for a hearing to determine whether the verdict recorded was the verdict intended by the jury."

I.

This lawsuit arose from a motor vehicle accident in Colorado Springs. The Petitioner, David Stewart ("Stewart"), the plaintiff in the trial court, was riding as a passenger in a vehicle driven by his mother, Chiquita Stewart, when a vehicle driven by the defendant, Velma Rice ("Rice"), the Respondent in this case, turned onto the street in front of the Stewarts' car and the two vehicles collided. Stewart suffered injuries to his neck, back, and nervous system and sued Rice.

The case went to the jury on the issue of damages

only. Special Verdict Form B required the jury to answer two questions: "Did the plaintiff, David Stewart, Jr., incur injuries, damages or losses?" and "Was the defendant, Velma I. Rice's, negligence a cause of any of the injuries, damages or losses claimed by the plaintiff?" Because the jury answered "yes" to both questions, it proceeded to answer three additional questions regarding its award of damages in three separate categories. The jury answered each question as follows:

> a. What is the total amount of damages, if any, incurred by the plaintiff for noneconomic losses or injuries, excluding any damages for physical impairment? Noneconomic losses or injuries are those losses or injuries described in numbered paragraphs 1 and 5 of Instruction 12. You should answer "0" if you determine there were none.
> **ANSWER: $** ***696,000.00***
> b. What is the total amount of damages, if any, incurred by the plaintiff for economic losses, excluding any damages for physical impairment? Economic losses are those losses described in numbered paragraphs 2 and 3 of Instruction 12. In computing the amount of the economic losses incurred by the plaintiff, you must exclude those amounts you are instructed to exclude in Instruction 12. You should answer "0" if you determine there were none.
> **ANSWER: $** ***440,000.00***
> c. What is the total amount of damages incurred by the plaintiff for physical impairment? You should answer "0" if you determine there were none.
> **ANSWER: $** ***1,136,000.00***

In regard to Paragraph c, the trial court instructed the jury to:

> State your answer to the following questions relating to the damages incurred by the plaintiff and caused by the negligence of defendant ....
> ....
> c. What is the total amount of damages incurred by the plaintiff for physical impairment? You should answer "0" if you determine there were none.

No part of the court's instructions or the verdict form asked the jury to calculate or enter its award of total damages for all three categories.

Each of the jurors signed the special verdict form. Upon receiving the verdict quoted above, the trial court read it back verbatim to the jury. It then polled the jurors individually, at the request of defense counsel. Each juror answered "yes" to the trial court's question, "Is that your verdict?"

Pursuant to section 13-21-102.5, 5 C.R.S. (1998), the trial court reduced the noneconomic damages award of $696,000.00 to $250,000.00. It then totaled the amounts for *319 the three categories of damages, calculated and added the interest owed, and entered judgment for Stewart in the amount of $2,925,640.00. [FN2]

> FN2. This amount did not include costs and interest in connection with the judgment, which matter the trial court should address on remand.

After the trial court had discharged the jury, Rice's counsel directed a private investigator to obtain the signatures of jurors on form affidavits interpreting the jurors' intent and the meaning of the verdict they had signed. After repeated contacts, five jurors signed Rice's affidavits; the sixth juror refused to sign the affidavit.

Rice moved for a new trial on causation and damages pursuant to C.R.C.P. 59. She contested the jury's verdict on grounds that (1) it was the product of "passion, prejudice or other ill motive"; (2) "the jury acted in reckless disregard of the instructions of law given it and did not even read the verdict form and instruction 12, or if read, misperceived"; and (3) "the impairment verdict was the sum of the other two [damages categories]."

There were six jurors. To prove the jury's intent to make an award of damages different from that appearing on the special verdict form each had signed, Rice offered five juror affidavits. Three of the affidavits stated that:

> The award of $1,136,000.00 for Question C was the sum of the award for Question A of $696,000.00 and Question B of $440,000.00.
> We intended that our total verdict was to be the amount entered on Line "C", and did not intend that the amount on Line "C" be added to the amounts on Lines "A" and "B". We intended our total verdict to be the amount on Line "C".

The other two affidavits omitted the second paragraph.

Stewart's attorney then countered with affidavits by the same five jurors stating that the jury had come to consensus, the written verdict they signed accurately recorded their verdict, they felt pressured into signing the defense affidavits, the defense investigator had contacted them repeatedly, and the investigator had made them feel like "idiots." [FN3] One of these jurors also signed a separate affidavit reciting that the investigator had said the jury verdict was excessive

and a $50,000.00 settlement offer had been discussed between the parties before trial. The sixth juror refused to execute any affidavit.

> FN3. A typical counter-affidavit recited, in part:
> We all reached a consensus after carefully reading and studying the jury instructions. There was no clerical error at the time we filled out our jury form. Each one of us agreed on the amount we entered in each of the three categories for noneconomic injury, for economic injury and for impairment. All of us knew what these figures were at the time we signed the verdict form. I and the rest of the jurors were polled and we all agreed that this was our verdict.
> ....
> This special investigator showed me affidavits that were signed by other jurors in the case. I felt that I was compelled to sign affidavits if other jurors had agreed that this, in fact, had occurred.
> ....
> Since the verdict, I have been repeatedly contacted by the investigator and he has shown me affidavits of other jurors and discussed with me in detail how I might have arrived at certain things. He has made it difficult for me ... and to some extent confused the events of the jury deliberations.... I feel that my jury service was a wasted effort, that it was done in vain and that I and the other jurors are being accused of being idiots or not doing our job properly. `I now have very negative and bad feelings about the system. I felt that the criticism of our performance was offensive.

Citing Colorado Rule of Evidence 606(b), Stewart moved to strike the defense affidavits. Stewart also filed a "Motion to Stop Jury Harassment" with affidavits of two jurors. Because the trial court did not rule on Rice's new trial motion, it was denied by operation of C.R.C.P. 59(j).

Rice appealed. She argued in her briefs to the court of appeals that the evidence did not support the economic damages award. She did not challenge the sufficiency of the evidence for the physical impairment award. Instead, referring to the amount the jury placed on the physical impairment line of its signed verdict, she contended that: "We know from the juror affidavits following trial that there was a mistake of more than *320 $1,000,000.00 in just one line of the verdict form."

The court of appeals rejected Rice's contention that the evidence did not support the jury's award for economic damages in the amount of $440,000.00. The court of appeals rejected Stewart's cross-appeal, which alleged that Colorado's noneconomic damages cap was unconstitutional. Based on the defense affidavits, the court of appeals ordered the trial court to inquire into the jury's verdict and to consider granting a new trial. *Stewart*, 25 P.3d at 1237. The court of appeals affirmed the trial court's judgment in all other respects.

We reverse the judgment of the court of appeals and reinstate the jury's verdict and the trial court's judgment.

II.

We hold that CRE 606(b) barred the court of appeals from considering the juror affidavits because they did not address matters within the rule's two exceptions: extraneous prejudicial information improperly brought to the juror's attention or improper outside influence exerted upon a juror.

We proceed with our analysis by examining Colorado's common law and CRE 606(b), which codified the common law and contains two exceptions. We also examine the basis for the clerical error exception. We point out that our standard jury instruction allowing post-verdict contact between jurors and parties or their attorneys does not allow the abuse of the jurors and the jury system that occurred in this case. Finally, we determine that the affidavits in this case are inadmissible under CRE 606(b), and defense counsel established no basis under C.R.C.P. 60(a) for clerical error.

CRE 606(b) is a broad ban against the solicitation and use of juror testimony, affidavits, or statements addressing the validity of a jury verdict. The rule provides two limited exceptions. The rule provides:

> **(b) Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly

> brought to the juror's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.
> CRE 606(b).

C.R.C.P. 60(a) addresses clerical error. This rule provides:

> **(a) Clerical Mistakes.** Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal such mistakes may be so corrected before the case is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

C.R.C.P. 60(a). These rules severely restrict contacting a juror to obtain testimony, affidavits, or statements regarding a verdict.

A.

Colorado Common Law

Long before CRE 606(b), we adopted Lord Mansfield's rule [FN4] prohibiting juror testimony about their deliberations and verdict. Our common-law cases identified a broad prohibition ***321** against impeaching a verdict through juror testimony. Generally, after leaving the courtroom, jurors could not testify to any matter concerning the intent or meaning of their verdict or their thought processes in reaching it. *See Wray v. Carpenter*, 16 Colo. 271, 273, 27 P. 248, 248 (1891); *Knight v. Fisher*, 15 Colo. 176, 180, 25 P. 78, 80 (1890).

> FN4. Lord Mansfield established the rule that a juror could not "allege his own turpitude." *Vaise v. Delaval*, 99 Eng. Rep. 944 (K.B. 1785) (refusing to accept into evidence the affidavits of jurors to show they had arrived at their verdict by lot). Jurisdictions in the United States widely adopted this common-law rule as their own. *See Tanner v. United States*, 483 U.S. 107, 117, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987).

We applied this rule in a number of cases. *See, e.g., Richards v. Richards*, 20 Colo. 303, 303-04, 38 P. 323, 323-24 (1894) (rejecting affidavits alleging that jurors failed to consider appellant's counterclaim and stating that "no affidavit, deposition or other sworn statement of a juror will be received to impeach the verdict"); *Johnson v. People*, 33 Colo. 224, 242-43, 80 P. 133, 139 (1905) (stating that "[i]t is scarcely necessary to say that a juror will not be permitted to impeach his own verdict by affidavit"); *Richards v. Sanderson*, 39 Colo. 270, 282, 89 P. 769, 773 (1907) (stating that "[i]t is well settled that the affidavit of a juror cannot be received to impeach a verdict"); *Kreiser v. People*, 199 Colo. 20, 22, 604 P.2d 27, 28 (1979) (holding that the trial judge erred in re-empanelling the jury for a poll and subsequent correction of an error in the verdict form).

Our common-law cases also addressed limited exceptions to this rule. These cases foreshadowed exceptions to CRE 606(b)'s broad prohibition on jury testimony or affidavits. *See, e.g., Butters v. Wann*, 147 Colo. 352, 356-58, 363 P.2d 494, 496-97 (1961) (allowing juror affidavit regarding juror's independent, extra-judicial investigation during trial into decedent's drinking habits); *Wharton v. People*, 104 Colo. 260, 265-66, 90 P.2d 615, 617-18 (1939) (allowing consideration of juror affidavit alleging improper, prolonged coercion by other jurors which compelled juror to assent to death penalty verdict).

B.

CRE 606(b)

We adopted CRE 606(b) in 1980. Substantially similar to its federal counterpart, CRE 606(b) is an exclusionary rule codifying Lord Mansfield's rule; it contains two exceptions.

[1][2] When our rule is similar to the federal rule, we may look to the federal authority for guidance in construing our rule. *Air Communication & Satellite, Inc. v. EchoStar Satellite Corp.*, 38 P.3d 1246, 1251 (Colo.2002). CRE 606(b)'s federal counterpart is "grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences." *Tanner v. United States*, 483 U.S. 107, 121, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987). A commentator emphasizes the breadth of the federal rule's prohibition against turning the jurors into witnesses:

> It would have been hard to paint with a broader brush, and in terms of subject, Rule 606(b)'s exclusionary principle reaches everything which relates to the jury's deliberations, unless one of the exceptions applies.

Christopher B. Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 Neb. L. Rev. 920, 935 (1978).

[3] CRE 606(b) applies to all civil and criminal cases. *Ravin v. Gambrell*, 788 P.2d 817, 820 (Colo.1990). It broadly prohibits using juror testimony to contest a verdict. A juror:

> may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.

CRE 606(b). The rule bars affidavits and statements, as well as testimony:

> Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Id. CRE 606(b) embodies the common-law rule protecting and preserving jury deliberations:

> The first half of the first sentence of Rule 606(b) represents the embodiment of the common law tradition of protecting and preserving the integrity of jury deliberations *322 by declaring jurors generally incompetent to testify as to any matter directly pertinent to, and purely internal to, the emotional or mental processes of the jury's deliberations.

Arthur Best et al., *Colorado Evidence: 2001 Courtroom Manual* 137 (2000). CRE 606(b) provides two narrow exceptions. A juror:

> may testify on the question whether extraneous prejudicial information was improperly brought to the juror's attention or whether any outside influence was improperly brought to bear upon any juror.

Id.

[4] CRE 606(b) has three fundamental purposes: to promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion. *See Ravin*, 788 P.2d at 820; *Santilli v. Pueblo*, 184 Colo. 432, 433-34, 521 P.2d 170, 171 (1974).

[5] These purposes also underlie other Colorado law protecting the jury process. While a jury may change or modify its verdict up to the point the trial court accepts the verdict and discharges the jury, [FN5] the court may not recall the jurors for this purpose once they leave the judge's control. *Montanez v. People*, 966 P.2d 1035, 1037 (Colo.1998). "This rule helps to ensure that jury verdicts will not be tainted by any outside influence ... and promotes the finality of verdicts." *Id.*

FN5. In *Kreiser v. People*, 199 Colo. 20, 23 n. 1, 604 P.2d 27, 29 n. 1 (1979) we narrowed the holding of *Schoolfield v. Brunton*, 20 Colo. 139, 142, 36 P. 1103, 1104 (1894). In *Kreiser*, we held that the court could not reassemble the jurors and poll them regarding the intent of their verdict after the jury had dispersed.

[6][7] During post-trial and appellate proceedings, courts must view the jury's verdict in the light most favorable to it. *See Bohrer v. DeHart*, 961 P.2d 472, 477 (Colo.1998) ("We defer to jury verdicts when jurors have been properly instructed and the record contains evidence to support the jury's findings."). Special verdict forms and the instructions that go with them assist a jury with its deliberations; signing the verdict form acknowledges the verdict as the product of each juror's deliberation. *See, e.g., id.* at 477-78.

[8] CRE 606(b) protects the jurors in performing their public service and their post-verdict privacy. It acts to restrain disappointed litigants. The law presumes that jurors have followed the court's instructions and have discharged their duties faithfully. *Bear Valley Church of Christ v. DeBose*, 928 P.2d 1315, 1331 (Colo.1996).

Under CRE 606(b), as with our common law, we have excluded juror testimony or affidavits divulging juror deliberations, thought processes, confusion, mistake, intent, or other verdict impeaching grounds. *See, e.g., People v. Garcia*, 752 P.2d 570, 584 (Colo.1988) (refusing to accept affidavits regarding jurors' mental processes); *People v. McCoy*, 764 P.2d 1171, 1177 (Colo.1988) ("It is well established ... that a juror's affidavit that attempts to explain the mental processes of the jury cannot be used to impeach a jury verdict."); *Neil v. Espinoza*, 747 P.2d 1257, 1261, 1261-62 (Colo.1987) (concluding that juror's affidavit addressed "the sort of 'mental process' into which the litigants and the court may not inquire"); *Crespin v. People*, 721 P.2d 688, 691 n. 6 (Colo.1986) (barring consideration of juror testimony asserting jurors' failure to consider one of the charges against defendant).

Other jurisdictions are in accord. [FN6] Under circumstances analogous to the case before us, courts have refused to allow jurors to revisit their damages verdict. The West Virginia Supreme Court rejected juror affidavits *323 in *McDaniel v. Kleiss*, 198 W.Va. 282, 480 S.E.2d 170, 172-74 (1996). The trial court had allowed juror testimony about jury

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confusion in apportioning fault when calculating its damage award, and then entering its verdict on the verdict form. The court said:

> FN6. Most states have rules mirroring Federal Rule of Evidence 606(b). *See, e.g.,* Ala. R. Evid. 606(b); Alaska R. Evid. 606(b); Ariz. R. Evid. 606(b); Ark. R. Evid. 606(b); Conn.Super. Ct. § 42-33; Conn.Super. Ct. § 16-34; Del. R. Evid. 606(b); Idaho R. Evid. 606(b); Burns I.R.E. 606(b); Iowa R. Evid. 606(b); Me. R. Evid. 606(b); Md. R. 5-606(b); Minn. Evid. R. 606(b); Miss. R. Evid. 606(b); Neb.Rev.Stat. § 27-606; N.M. R. Evid. 11-606(b); N.D. R. Evid. 606(b); Ohio R. Evid. 606(b); 12 Okla. Stat. § 2060(b); Pa. R. Evid. 606(b); R.I. Evid. R. 606(b); S.C. R. Evid. 606(b); S.D. Codified Laws § 19-14-7; Tenn. Evid. R. 606(b); Tex.R. Evid. 606(b); Utah R. Evid. 606(b); Vt. R. Evid. 606(b); W. Va. R. Evid. 606(b); Wis. Stat. § 906.06(2); Wyo. R. Evid. 606(b).

> If in fact the jurors did reduce the amount of damages awarded to Mr. McDaniel before writing their damage calculations on the verdict form, this constitutes confusion regarding the comparative negligence principles. A juror's confusion regarding the law is treated as intrinsic to the deliberative process itself.

McDaniel, 480 S.E.2d at 175.

The Maine Supreme Court has held juror testimony about damages calculations to be inadmissible. *See Taylor v. Lapomarda*, 702 A.2d 685, 689 (Me.1997); *see also Chalmers v. City of Chicago*, 88 Ill.2d 532, 59 Ill.Dec. 76, 431 N.E.2d 361, 365 (1982) (prohibiting inquiry of jurors regarding their intent and possible confusion). Maine has adopted a plain meaning application of the rule and its specified exceptions, because the rule promotes:

> (1) the need for stability of verdicts; (2) the need to conclude litigation and desire to prevent any prolongation thereof; (3) the need to protect jurors in their communications to fellow jurors made in the confidence of secrecy of the jury room; (4) the need to save jurors harm[ ] from tampering and harassment by disappointed litigants; [and] (5) the need to foreclose jurors from abetting the setting aside of verdicts to which they may have agreed reluctantly in the first place or about which they may in the light of subsequent developments have doubts or a change of attitude.

Lapomarda, 702 A.2d at 688.

The First Circuit has prohibited inquiry under the federal rule into the jury's intent in awarding damages. *See Plummer v. Springfield Terminal Ry. Co.*, 5 F.3d 1, 5 (1st Cir.1993). *But see McCullough v. Consol. R. Corp.*, 937 F.2d 1167, 1172 (6th Cir.1991) (permitting the trial court to inquire into the damages verdict before the jury left the jury room, and pointing out that the trial court's amendment of the verdict stemmed "from jurors' own volition and not from any overreaching by the parties or their counsel"); *see also Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1547 (10th Cir.1993) (permitting trial court to ask the jury foreman how properly to read the jury's verdict). [FN7]

> FN7. The Tenth Circuit's opinion suggests, but does not explicitly state, that the trial court asked this question prior to discharging the jury.

Our case law supports a plain meaning application of CRE 606(b) and its two stated exceptions. *See, e.g., Harper v. People*, 817 P.2d 77, 86 (Colo.1991) (reversing conviction and remanding for a new trial because trial court refused to entertain juror testimony about potential for unfair prejudice from widespread media publicity about the trial); *Ravin*, 788 P.2d at 821 (finding a reasonable possibility that comments by bailiff, overheard by jurors, influenced the jury's ultimate verdict); *Wiser v. People*, 732 P.2d 1139, 1143 (Colo.1987) (examining juror testimony to determine whether extraneous influence, in this case consultation of a dictionary, resulted in prejudice to the defendant, but deciding ultimately that the use of the dictionary, while improper, did not require reversal of the conviction); *Alvarez v. People*, 653 P.2d 1127, 1131 (Colo.1982) (allowing juror testimony to show that a juror's use of a dictionary during trial substantially prejudiced the defendant).

Under Colorado law, a party desiring to challenge a jury verdict must pursue remedies not involving juror testimony, except as CRE 606(b) provides. For example, a party may move for a new trial, *see* C.R.C.P. 59(a)(1); may move for judgment notwithstanding the verdict, *see* C.R.C.P. 59(a)(2); may challenge the verdict as excessive, *see Higgs v. Dist. Court*, 713 P.2d 840, 860-61 (Colo.1985); or may pursue other mechanisms under the law for relief.

C.R.C.P. 59 requires affidavits in connection with a new trial motion made for grounds listed in C.R.C.P. 59(d), but CRE 606(b) acts to preclude juror

affidavits as a *324 basis for seeking post-trial relief, unless the CRE 606(b) exceptions apply.

Some courts recognize clerical error as a reason to allow juror testimony into evidence. Because Rice attempts to fit within a clerical error exception, we now discuss this potential exception.

C.

Clerical Error

The Wisconsin Supreme Court allows juror testimony about clerical error, but only if all of the jurors agree that their verdict was incorrectly reported and if the party requesting correction "promptly" informs the court. *See* *State v. Williquette*, 190 Wis.2d 677, 526 N.W.2d 144, 153 (1995).

The Mississippi Supreme Court points out that clerical error occurs when the foreperson incorrectly transcribes the jury's verdict. *Martin v. State*, 732 So.2d 847, 853 (Miss.1998) ("The error here is not 'clerical,' as would be the case where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed the defendant was not guilty."). Some federal decisions also address clerical error. *See id.* at 853-54 (discussing federal cases).

Maryland has a strong policy against inquiring into jury verdicts. *See* *Oxtoby v. McGowan*, 294 Md. 83, 447 A.2d 860, 870 (1982) (stating that "[r]egardless of the rule in other jurisdictions, in Maryland, it is well settled that a juror cannot be heard to impeach his verdict, whether the jury conduct objected to be misbehavior or mistake").

Maine gives a plain meaning application to Rule 606(b), finds no exception for clerical error in that rule, and allows consideration of clerical error only under its counterpart to our C.R.C.P. 60(a), which addresses clerical error. *See* *Lapomarda*, 702 A.2d at 689; *accord* *McDaniel*, 480 S.E.2d at 178.

We agree with the Maine Supreme Court's approach. We give effect to both CRE 606(b) and C.R.C.P 60(a) as they are written. Clerical errors in judgments, orders, or other parts of the record may occur at any time during a proceeding. C.R.C.P. 60(a) permits their correction by the court sua sponte or upon motion of any party.

The clerical error must be readily ascertainable, typically upon the face of the document. *See* *In re Marriage of Kelm*, 878 P.2d 34, 36 (Colo.App.1994) (remanding case to trial court to correct a written order that referred to the husband both as Respondent and Petitioner because the order's reasonable meaning was clear), *aff'd in part, rev'd in part on other grounds*, 912 P.2d 545 (Colo.1996).

Clerical error in a verdict form does not include an alleged error that either alters the legal effect of the jury's verdict, *see* *Chalmers*, 59 Ill.Dec. 76, 431 N.E.2d at 365, or addresses the jury's misunderstanding or misapplication of the court's jury instructions. CRE 606(b) bars such an inquiry. *See* *Santilli v. Pueblo*, 184 Colo. 432, 433-34, 521 P.2d 170, 171 (1974).

Clerical error corrections to a jury's verdict are disfavored. When the trial court has polled each juror and the jurors state that the verdict is theirs, a challenge for clerical error will rarely be successful. *See* Mueller, *supra*, at 959; *see also* *United States v. Chereton*, 309 F.2d 197, 200 (6th Cir.1962). Colorado has a strong presumption in favor of upholding verdicts that jurors have acknowledged as their own:

> Here the record is clear. The trial court read the verdict for petitioner in open court, and all the jurors assented to it. Each juror was questioned, reinforcing the evidence of the jury's intentions. The verdict for the petitioner in open court is the verdict of the jury.

Tyler v. Dist. Court, 200 Colo. 254, 257, 613 P.2d 899, 901 (1980).

D.

Abusive Practices

Colorado law recognizes that jurors, upon leaving the courtroom, may encounter influences that cause them to question their verdict. The law acts to prevent unsettling of jury verdicts by such encounters. *See* *Montanez*, 966 P.2d at 1037.

*325 To avoid abusive practices towards jurors after completion of their service, the First Circuit Court of Appeals prohibits post-verdict interviews of jurors by counsel, litigants, or their agents, except under the supervision of the district court and then only in such extraordinary situations as are deemed appropriate. *See* *United States v. Kepreos*, 759 F.2d 961, 967 (1st Cir.1985). That court decries unbridled post-verdict questioning of jurors:

> Permitting the unbridled interviewing of jurors could easily lead to their harassment, to the exploitation of their thought processes, and to diminished confidence in jury verdicts, as well as

> to unbalanced trial results depending unduly on the relative resources of the parties.
> *Id.*

The Second Circuit Court of Appeals said that "complicity by counsel in a planned, systematic, broad-scale, post-trial inquisition of the jurors by a private investigator or investigators is reprehensible." *United States v. Brasco*, 516 F.2d 816, 819 (2d Cir.1975).

The Federal District Court for Colorado has a local rule prohibiting any attorney or party from contacting a juror without written authority signed by the trial judge. *See* D.C. Colo. LR 47.2.

In contrast, Colorado's standard post-verdict jury instruction allows attorneys, parties, and investigators to speak with willing jurors. *See* Colorado CJI-Civ. § 1:16. The trial court delivered such an instruction here:

> The attorneys or the parties, at the conclusion of a jury trial, may desire to talk with the members of the jury concerning the reasons for their verdict. For your guidance, you are advised that it is entirely proper for you to talk with the attorneys or the parties, and you are at liberty to do so. However, you are not required to do so. Whether you do so or not is entirely a matter of your own choice. Undoubtedly, your decision will be respected. *However, if* you decline to discuss the case and an attorney or *a party or an investigator* persists in discussing the case over your objection or *becomes critical of your service as a juror, please report the incident to me.*
> (Emphasis added.)

Under this instruction, jurors are free to discuss any aspect of their service they care to, including their deliberations, how they viewed the evidence and reached their verdict, and how they view the intent and meaning of their verdict, but none of this can become evidence unless one or both of the CRE 606(b) exceptions apply to the case. CJI-Civ. § 1:16 reinforces the purposes of CRE 606(b) and protects the administration of justice, by requiring a juror to report to the court any criticism that an attorney, investigator, or party makes of the juror's service.

Attorneys, parties, and investigators must respect the language of CRE 606(b) and CJI-Civ. § 1:16 and their purposes. Colorado's safe zone for post-verdict contact with jurors depends on responsible professional conduct. Attorneys may benefit from learning how the jurors viewed their case. But, they may not make jurors witnesses except under the provisions of 606(b). This requires a proper showing that the juror testimony, affidavit, or statement is admissible under the rule's exceptions.

The case before us demonstrates that abuse of the jurors and the jury system can occur if attorneys, or persons acting under their direction, do not respect: (1) CRE 606(b)'s broad prohibition against making jurors witnesses; and (2) the safe-zone purpose of CJI-Civ. § 1:16 allowing post-verdict contact.

An attempt to make the jurors witnesses without a basis in CRE 606(b)'s exceptions constitutes an abuse of the rule, the jury instruction, the jurors, and the administration of justice. According to the jurors' counter-affidavits, the investigator acting under the attorney's direction: (1) criticized the jurors' performance and their verdict; (2) referred to pre-trial settlement discussions; (3) said the jury's verdict was excessive; and (4) whipsawed jurors into signing the form ***326** affidavits by saying that other jurors had signed the affidavit. [FN8]

> FN8. One of the affidavits specifically addressed the investigator's conduct:
> 1. I have been contacted several times by a special investigator hired by the defense attorney in this case.
> 2. That on the first occasion I had to talk to the special investigator, he told me specifically that even $1,000,000.00 was kind of high.
> 3. That the special investigator stated that before trial they were getting ready to settle the case for $50,000.00.
> 4. It was my assumption that this $50,000.00 settlement would be coming from [an insurance company] since they were mentioned during jury selection.
> 5. I think this statement was made to get me to sign an affidavit by suggesting that our verdict was too high.
> 6. As members of the jury we cooperated with each other, we read the instructions very carefully and considered the damage instructions in arriving at our verdict.
> 7. I felt that the special investigator was suggesting that we had not acted correctly in awarding damages in the case. It was suggested by him that we had awarded more damages than were appropriate for the case. I interpreted this to be a criticism of my jury service.

Plaintiff's counsel responded to defense counsel's affidavits by obtaining plaintiff-prepared affidavits from the same five jurors, in which they recanted their defense-prepared affidavits. These jurors were rightfully upset about the judicial system as a result of post-verdict, attorney-initiated interrogation. Yet, the defense counsel affidavits had no basis in CRE 606(b)' s exceptions or C.R.C.P. 60(a)'s provision for clerical error.

We now turn to the inadmissibility of the defense juror affidavits in this case.

E.

Rice's Juror Affidavits Are Inadmissible

The affidavits in this case violate CRE 606(b) and are inadmissible. They testify to the jury's deliberative process and the intent and meaning of the jury's verdict, not either of the rule's two exceptions.

In her Motion for Post-Trial Relief, Rice used the affidavits to impeach the verdict. She alleged that the jury had not read the court's instructions, or had misunderstood them, and the court could repose no confidence in the verdict:

> The essence of Defendant's position on the subject of a new trial is the conclusion is inescapable that the verdict form was not read, the instruction (number 12) was not read, the instruction number 3 regarding surmise and conjecture was not read, if these instructions were either not read or not understood, and certainly not applied, how can the Court repose any confidence in the jury's analysis of any issue?

None of these grounds falls within the two CRE 606 exceptions.

On appeal, Rice changed her tactic to argue that the affidavits proved clerical error:

> CRE 606(b) does not preclude juror affidavits testifying to a jury's post-deliberative conduct. Post-deliberative conduct is that conduct occurring after the jury has reached its verdict and concluded its deliberations. Since post-deliberative conduct necessarily occurs after the conclusion of the jury's deliberations, courts have held that it is not subject to 606(b).
>
> ....
>
> Post deliberative conduct includes the occurrence of clerical error, the unintended rendering of a verdict due to a mistake in the ministerial act of recording the verdict. The affidavits at issue before this court testify to the occurrence of a clerical error following this jury's deliberations.

[9] We conclude that Rice attempted to impeach the jury's verdict with inadmissible evidence she was trying to characterize as admissible. Clearly, Rice's attorney dispatched the investigator for the purpose of contradicting the verdict. The attorney wanted to show that the signed verdict was not what it appeared to be. The object was to prove that the jury: (1) did not intend to award Stewart damages for physical impairment; (2) forgot to make a physical impairment award; (3) confused the third interrogatory in the special verdict form as asking for the total damages award; (4) disregarded the court's instructions and the special verdict *327 form's plain language; or (5) any or all of these.

This inquiry defied the plain language of the written and signed verdict form, the court's instructions, and each juror's affirmation of the verdict through individual trial court polling. The third line of the special verdict form asked the jury if Stewart had incurred damages for physical impairment. The jury answered with the amount of $1,136,000.00. Each juror signed the verdict and answered during polling that the verdict was his or hers.

Nevertheless, defense counsel directed the investigator to contact the jurors, repeatedly invading their privacy at home and work, for the purpose of impeaching the verdict.

The defense inquiry contravened the language and purposes of CRE 606(b). These purposes are to promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion. Agreeing on the contents of the jury's damages verdict was an integral part of the jury's deliberative process, not a ministerial task. The defense affidavits attacked the jurors' performance, an inadmissible arena.

The affidavits the defense obtained from the jurors are inadmissible under CRE 606(b). [FN9] No matter involving the two CRE 606(b) exceptions allowed the affidavits. All of the jurors had signed this verdict, which specified the amount of the physical impairment award on the special verdict form. Each juror affirmed the verdict in open court upon the trial court's polling. The defense counsel brought no clerical error cognizable under C.R.C.P. 60(a) to the trial court's attention.

> FN9. We need not address the admissibility of the plaintiff's counter-affidavits, because they would not have been tendered except in

response to the defense affidavits.

The verdict stands.

III.

Accordingly, we reverse the judgment of the court of appeals. Because the court of appeals affirmed the trial court's judgment in all other respects, we reinstate the trial court's judgment, and we direct the court of appeals to enter its mandate consistent with this opinion.

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Briefs and Other Related Documents (Back to top)

• 2001 WL 34685803 (Appellate Brief) Respondent's Answer Brief (Oct. 09, 2001)Original Image of this Document with Appendix (PDF)

• 2001 WL 34379066 (Appellate Brief) Petitioner's Opening Brief (Aug. 20, 2001)Original Image of this Document (PDF)

• 2000 WL 34235755 (Appellate Brief) Reply to Answer Brief (Nov. 05, 2000)Original Image of this Document (PDF)

END OF DOCUMENT

As proposed by Ethics 2000 Subcommittee 5/13/05
No changes from Colorado Ad Hoc Committee Proposal
No changes from ABA Ethics 2000 Model Rule

RULE 3.6 TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

* * * * * * * * * *

Comment to RULE 3.6 TRIAL PUBLICITY

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the

information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the role applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

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(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Source: Entire Rule and comment replaced and adopted June 12, 1997, effective January 1, 1998.

Comment

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

There are, on the other hand, certain subjects which are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness or the identity of a witness, or the expected testimony of a party or witness;

(2) In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) Information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) The fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Nonjury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

Model Code Comparison

Rule 3.6 is similar to DR 7-107 except as follows: First, Rule 3.6 adopts the general criterion of "substantial likelihood of materially prejudicing an adjudicative proceeding" to describe impermissible conduct. Second, Rule 3.6 makes clear that only attorneys who are, or have been involved in a proceeding, or their associates, are subject to the rule. Third, Rule 3.6 omits the particulars in DR 7-107(b), transforming them instead into an illustrative compilation as part of the rule's commentary that is intended to give fair notice of the kinds of statements that are generally thought to be more likely than other kinds of statements to pose unacceptable dangers to the fair administration of justice. Whether any statement will have a substantial likelihood of materially prejudicing an adjudicatory proceeding will depend upon the facts of each case. The particulars of DR 7-107(c) are retained in Rule 3.6(b), except DR 7-107(c)(7), which provided that a lawyer may reveal "[a]t the time of seizure, a description of the physical evidence seized, other than a confession, admission or statement." Such revelations may be substantially prejudicial and are frequently the subject of pretrial suppression motions whose success would be undermined by disclosure of the suppressed evidence to the press. Finally, Rule 3.6 authorizes a lawyer to protect a client by making a limited reply to adverse publicity substantially prejudicial to the client.

As proposed by Ethics 2000 Subcommittee
No change from Colorado Ad Hoc Committee Proposal
or ABA Ethics 2000 Model Rule

RULE 3.7 LAWYER AS WITSNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

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Comment to RULE 3.7 LAWYER AS WITNESS

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a fn-m is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

RULE 3.7 — LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless the requirements of Rule 1.7 or Rule 1.9 have been met.

Comment

Combining the roles of advocate and witness can involve a conflict of interest between the lawyer and client and can prejudice the opposing party. If a lawyer is both counsel and witness, the lawyer becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his or her own credibility.

The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has first hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.

Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest Rule 1.10 disqualifies the firm also.

Committee Comment

The Committee disagreed with the approach taken in section (b) of the Model Rules version of Rule 3.7 which stated that a lawyer could act as an advocate, even if another lawyer in the advocate's firm was going to testify, unless precluded by either Rule 1.7 or Rule 1.9. In such a situation, a lawyer is not required to argue his or her own credibility to the fact-finder. But there is still a potential conflict of interest which can be serious in such situations. For example, it may be that the firm relationship between the advocate-lawyer and the witness-lawyer may make the witness seem less credible to the jury. The Committee felt that (b) of 3.7 did not give sufficient emphasis to the conflicts of interest that can arise in such situations. Thus the Committee changed the emphasis in (b) considerably to state that a lawyer shall not act as an advocate in such a situation unless the lawyer first complies with the requirements of Rules 1.7 or 1.9.

RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would b e prohibited from making under Rule 3.6 or this Rule.

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Comment to RULE 3.8 SPECIAL RESPONSIBILITIES OF A PROSECUTOR

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary heating and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of on uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extra judicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law- enforcement personnel and other relevant individuals.

RULE 3.8 — SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, except that this does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has waived the rights to counsel and silence.

(d) make timely disclosure to the defense of all evidence of information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:

(1) the prosecutor reasonably believes:

(i) the information sought is not protected from disclosure by any applicable privilege;

(ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(iii) there is no other feasible alternative to obtain the information.

(2) (Deleted.)

Source: (f) and comment amended and adopted and (2) deleted, effective February 19, 1997.

Comment

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural

justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

Committee Comment

Because this provision is based to a considerable extent on the ABA Standards of Criminal Justice Relating to the Prosecution Function which many jurisdictions have adopted and because it deals with a specialized area of practice, the Committee felt it should leave this provision as it was set out in the Model Rules.

RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity. Further, in such a representation, the lawyer:

(a) shall conform to the provisions of Rules 3.3(a)(1), 3.3(a)(3), 3.3(b), 3.3(c), and 3.4(a) and (b);

(b) shall not engage in conduct intended to disrupt such proceeding unless such conduct is protected by law; and

(c) may engage in ex parte communications, except as prohibited by law.

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Comment to RULE 3.9 ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it and on the candor of the lawyer. For this reason the lawyer must conform to Rules 3.3(a)(1), 3.3(a)(3), 3.3(b), 3.3(c), and 3.4(a) and (b) in such representation.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations in applicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

[4] This Rule recognizes that the lawyer's conduct and communications described in Rules 3.9(b) and (c) may be protected by constitutional or other legal principles.

RULE 3.9 — ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Comment

In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

In all appearances before legislative bodies, municipal councils, administrative agencies, and the like, a lawyer should identify himself or herself and, if the lawyer is appearing in a representative capacity, indicate that fact. The lawyer should also disclose to the agency the identity of the client or clients on whose behalf the lawyer is appearing, unless the identity is privileged.

Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

This Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

Committee Comment

This Rule takes some of the provisions that were in the Code and that applied to lawyers appearing before tribunals, such as DR 7-106(B)(1), and extends those provisions to apply equally in front of administrative or legislative bodies. The Committee approved this Rule reasoning that most of the provisions in this Rule are already embodied in EC 7-15, EC 7-16 and EC 7-8 and belong in a Rule. The comments to the Rule were expanded to include some language from EC 7-15 that help explain a lawyer's obligations when appearing before administrative or legislative bodies.

Rule 3.9
Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

COMMENT

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.