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

AGENDA

July 28, 2023, 9:00 a.m.
The Supreme Court Conference Room and via Webex

Webex link:
https://judicial.webex.com/judicial/j.php?MTID=mfeb31a5fa4f3a99e917803cda2c1e481

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1. Call to Order [Judge Lipinsky].
2. Welcome to new members.
3. Approval of minutes for April 14, 2023, meeting [attachment 1].
4. Old business:
    a. Report from the comment [14] to Rule 1.2 subcommittee [Noah Patterson] [attachment 2].
    b. Report on the status of the proposed amendments to Rule 1.4 and the comments thereto [Judge Lipinsky] [attachment 3].
    c. Report from the patent practitioner harmonization subcommittee [Rob Steinmetz and Alec Rothrock] [attachment 4].
    d. Report from the PALS II committee [Judge Espinosa] [attachment 5].
    e. Report from the reproductive health subcommittee [Nancy Cohen].
    f. Report from the Rule 1.5(e) subcommittee [Alec Rothrock] [attachment 6].
5. New business.

a. Proposal to form an AI subcommittee [Judge Lipinsky] [attachment 7].

b. Proposal to form a Rule 5.5 subcommittee [Alec Rothrock] [attachment 8].

6. Adjournment.

Upcoming meeting date: October 27.

Judge Lino Lipinsky, Chair
Colorado Court of Appeals
lino.lipinsky@judicial.state.co.us

Attachment 1

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Approved Minutes of Meeting of the Full Committee
On
April 14, 2023
Sixty-Seventh Meeting of the Full Committee

The sixty-seventh meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:02 AM on Friday, April 14, 2023, by Chair Judge Lino Lipinsky de Orlov.

Present at the meeting, in addition to Judge Lipinsky and liaison Justice Maria Berkenkotter, were Hon. Adam Espinosa, Margaret Funk, April Jones, Matthew Kirsch, Judge Bryon M. Large, Julia Martinez, Noah Patterson, Alexander R. Rothrock, Marcus L. Squarrell, David W. Stark, Robert W. Steinmetz, Jennifer Wallace, Hon. John Webb, Frederick Yarger. Present for the meeting by virtual appearance were Nancy Cohen, Thomas E. Downey, Jr., Marcy Glenn, Erika Holmes, Justice Monica Márquez, Marianne Luu-Chen, Troy Rackham, Henry Reeve, E. Tuck Young. Committee members excused were Cynthia Covell, Tyrone Glover, April Jones, Cecil E. Morris, Jr., Hon. Ruthanne Polidori, Jamie Sudler, Eli Wald, and Jessica Yates.

1. CALL TO ORDER. Judge Lipinsky called the meeting to order at 9:02 AM. He welcomed those attending in person or virtually. He reviewed the names of all attendees and noted those having excused absences.

2. APPROVAL OF MINUTES FOR JANUARY 27, 2023 MEETING. Chair Lipinsky noted that the minutes needed to be amended to reflect that Dick Reeve was present virtually for the meeting. Dave Stark also requested an amendment of the minutes because they listed him as attending both virtually and in person, but he was present only in person. With those amendment, a motion was made to approve the minutes. Dick Reeve seconded the motion. The motion was approved unanimously.

3. REPORT REGARDING RULE 1.4. Justice Berkenkotter reported that the Court voted to publish the proposed amendments to Rule 1.4 and have a hearing on the proposed amendments in September. The hearing date and publication of the proposed revisions to Rule 1.4 should be on the Colorado Supreme Court's website shortly.

4. REPORT ON PATENT PRACTITIONER HARMONIZATION PROPOSAL. A proposed report was in the packet. Mr. Smith and others suggested changes to the proposed report. Chair Lipinsky suggested that the Subcommittee meet again to discuss the proposed changes and report back to the Committee next meeting. Mr. Smith and the Subcommittee agreed to this approach.

5. REPORT FROM THE PALS II COMMITTEE. Chair Lipinksy referenced the memorandum that Judge Espinosa drafted nearly a year ago relating to the proposed rules of professional conduct for licensed paralegals pursuant to the PALS. The rules will be LLP rules of

professional conduct located in Rule 207. The memorandum in the packet is the last draft of the LLP rules that would be proposed to the Court. Judge Espinosa discussed proposed changes to the Rules of Professional Conduct rules that may need to be made.

Judge Espinosa commented that he was delighted that the Court approved the PALS II proposal. A year ago, the Subcommittee was tasked with reviewing and proposing rules for LLPs for professional conduct and to suggest revisions to the Rules of Professional Conduct that will need to be implemented for the PALS II program.

In the preamble, the Subcommittee is suggesting a relatively small change to comment [5] in the preamble to include LLPs as a stakeholder that lawyers must respect. The Subcommittee also suggested that there should be a revision to Rule 1.0's definition of a firm, as reflected in Judge Espinosa's memo. Additionally, the Subcommittee suggested including a definition of LLPs in the Rule 1 series. The Subcommittee does not believe any changes need to be made to the Rule 2 series. The Subcommittee suggested revisions to Rule 3.4 and 3.7 to include LLPs as part of the rules. The same was true with the suggestion to Rule 4.2.

Justice Berkenkotter mentioned that there will be a proposed curriculum for LLPs and the Court is working with stakeholders to get that curriculum up and running. Dave Stark referenced that there is a group working on a bar exam for LLPs, which will include a substantive exam and an ethics exam (like the MPRE). Dave Stark referenced that the group intends to have the proposed curriculum ready to be offered by the fall of 2023.

Judge Espinosa indicated that decisions need to be made soon, as soon as the Committee is able to make the decision with regard to the proposed changes to the Rules of Professional Conduct. Noah Patterson asked whether we are voting on changes to the proposed black letter rules or the comments as well. Judge Espinosa responded that he believed we should vote on the black letter changes now and then consider other changes to the comments later. Justice Berkenkotter agreed. Judge Lipinksy suggested that we vote on the proposed black letter changes to the Rules during this meeting and then vote on changes to the comments in the next meeting.

Judge Lipinsky asked a question with respect to the recommended changes to Rules 5.1 and 5.2. The proposed change references the Rules of Professional Conduct and the LLP Rules of Professional Conduct. Judge Lipinksy asked whether these terms are defined terms in the Rules. They are not. The Subcommittee suggested revisions to Rule 5.3 to include LLPs.

Alec Rothrock noted that the proposed changes to Rule 5.2 are not merely technical or cosmetic, but they are substantive. The proposed change to Rule 5.2 suggests that LLPs would be subject to the Rules of Professional Conduct. Other Committee members suggested that there is no intent to bind LLPs to this proposed Rule. The problem is that the revisions suggest that LLPs are the subject of the regulations contained in Rule 5.2. Mr. Stark noted that the proposed changes to Rule 5.2 are intended to address a circumstance where an LLP is working at a law firm and would apply in the same way that a paralegal already is addressed in Rule 5.2. Mr. Patterson suggested that the inclusion of LLPs really just belongs in Rule 5.3 rather than Rule 5.2. Mr. Kirsch agreed that Rule 5.2 should not be revised at all because the proposed changes to Rule 5.3

addresses the issue. Ms. Glenn agreed that Rule 5.2 should not be changed because of the recommended changes to Rule 5.3, which covers the issue.

Judge Espinosa does not recall why the Subcommittee recommended changes to Rule 5.2. He tended to agree that the revisions to Rule 5.3 would cover the issue.

Judge Espinosa stated that the proposed rules for LLPs were released yesterday. He was checking whether the LLP rules have something similar to a Rule 5.2. Judge Espinosa read the proposed Rule 5.2, which correlates to Rule of Professional Conduct 5.2. Judge Lipinksy put the proposed rule on the screen so all Committee members could review. Judge Espinosa explained that the proposed LLP rules were intended to be similar to the Rules of Professional Conduct. As a result of this discussion, Judge Lipinsky suggested that perhaps this Committee does not need to revise Rule 5.2. Judge Espinosa agreed. There will be no proposed changes to Rule 5.2 ad a result of this discussion.

Regarding Rule 5.3, Judge Lipinksy suggested that there will need to be proposed changes to Rule 5.3. Mr. Patterson agreed. Judge Lipinksy suggested that we consider revising the title to Rule 5.3. Judge Espinosa explained that an LLP would still be a nonlawyer assistant, so there would be no reason to change the title. Mr. Stark indicated that the term nonlawyer assistant is broad and would include a nonlawyer assistant. Ms. Funk suggested that we revise the term nonlawyer assistant to staff. Judge Large indicated that Rule 5.1 addresses supervising LLPs specifically, so there would be no need to include LLPs into Rule 5.3. Ms. Glenn suggested that Rule 5.1 and 5.3 are different. In Rule 5.1(a), it addresses a subset of lawyers (managerial, etc.). Rule 5.3 applies to all lawyers, which would include an associate that has direct supervisory authority over nonlawyers. Also, Rule 5.1 addresses the lawyers responsibility to ensure that the other lawyer conforms to the Rules of Professional Conduct and the LLP rules, but the rules are not necessarily congruent.

Mr. Rothrock asked for the proposed revision to Rule 5.1 to be revised grammatically because it is somewhat verbose. He suggested revising the proposed language to say "reasonable assurance that all lawyers and LLPs in the firm conform to the applicable Rules of Professional Conduct." The term applicable would mean the relevant Rules germane to the particular conduct at issue.

Mr. Squarrell indicated that he is struggling with the proposed change to Rule 5.1 because he does not recall whether there is some other place in the proposed revisions that refer to the LLP rules of professional conduct. Judge Espinosa indicated that there is no part of the proposed revisions that refer to the LLP rules of professional conduct. Judge Espinosa suggested that we propose a revision to the definition section in Rule 1.0 to define the LLP rules of professional conduct. Mr. Rothrock suggested that we add the definition to Rule 1.0 and then cross-reference the definition in the germane rules.

Mr. Steinmetz suggested that putting language in Rule 1.0 that defines the LLP rules and an acknowledgement that LLPs are subject to their own rules. This would address the potential confusion over the term "applicable" rules. Mr. Rothrock suggested that the scope section of the Rule 1 series would be the best place to explain that LLPs are subject to their own rules of

professional conduct. Mr. Rothrock suggested it would not be very hard to find a place to put the reference to the LLP rules in the scope section. Judge Webb said if there is a specific reference to the LLP rules of professional conduct in the scope, then we probably do not need to reference "applicable rules." It actually could create confusion for LLPs to wonder if there are sections in the Rules of Professional Conduct to which they also must confer. Mr. Kirsch responded that the intention was to make it clear that there are some rules that a lawyer must follow. The term "Rules of Professional Conduct" contained in Rule 5.1(a) would be generic and potentially mean both LLP rules of professional conduct and the lawyer Rules of Professional Conduct.

Mr. Rothrock suggested that there could be a problem in that lawyers now will need to familiarize themselves with the LLP rules of professional conduct. The lawyer would need to understand the additional rules of ethics to ensure that the LLPs are compliant with their own rules of ethics, which is a burden. Right now, there is nothing that says that a lawyer must ensure that a professional with whom the lawyer is working (such as a CPA) must comply with their own ethics rules. This would be a big change to require lawyers to know what the LLP rules are in order to ensure that an LLP conforms to the LLP rules of professional conduct.

Mr. Stark suggested revising the term applicable rules to "these rules" to address the confusion that could come from the term "applicable rules." Judge Lipinsky noted that the term "applicable" could mean germane to the particular conduct rather than the entire body of rules. There are no phrases currently in the Rules that reference "applicable rules." Rather, the Rules of Professional Conduct reference "the Rules." Judge Webb suggested a revision to Rule 5.1(a) that would clarify the application of the Rule. Ms. Cohen suggested making a revision to include the phrase "that professional's rules" to make the distinction clear.

Mr. Rothrock suggested that this change could be sweeping because it could require a lawyer to ensure that a nonlawyer assistant who is a professional, such as a CPA, to comply with the particular ethics rules. The overall need for a change is to make it clear that a lawyer simply must ensure that the supervision or interaction <u>by the lawyer</u> with the LLP complies with the rules of Professional Conduct because that focuses on the lawyer's duties rather than the LLP duties.

Mr. Rothrock changed his mind about the scope issue. He explained that for clarity, we should make the changes rule by rule rather than making one change to the scope section of the Rules of Professional Conduct.

Mr. Patterson suggested that putting the term "nonlawyers and LLPs" in Rule 5.3 and then using the term "or LLP" in Rule 5.3(a) and Rule 5.3(b) creates confusion. We want to make it clear that the lawyer complies with his or her obligations under the rules, but not the LLP rules. Mr. Kirsch explained that rule 5.3 addresses a group of lawyers that Rule 5.1 does not. Mr. Kirsch believed that it is important to have the first reference to LLPs in the first sentence of Rule 5.1, but not reference it in Rule 5.1(a) or Rule 5.1(b). The objective is to ensure that the acts of the other person – whether an LLP or other person – does not interfere with the lawyer's obligations under the Rules of Professional Conduct. Mr. Kirsch suggested that because of this, there is no need to change Rule 5.3 at all.

Mr. Rothrock asked what is the substantive difference between Rule 5.1 and 5.3? Members of the committee discussed this issue. Another member suggested that there is a substantive difference because one relates to the managerial authority of a lawyer (e.g., managing partner) while the other references obligations to supervise nonlawyers. Mr. Steinmetz suggested removing the word "assistants" from Rule 5.3 and instead simply retain the word nonlawyers. The only proposed change to Rule 5.3 would be to the title of Rule 5.3 to remove the word "assistants" and then delete the other recommended changes to the black letter Rule of 5.2.

The Committee discussed the proposed revisions to Rule 5.4. Ms. Glenn wondered about the term "non LLP employees" in Rule 5.4(a)(4). Ms. Glenn suggested changing the term to "nonlawyer employees other than an LLP." Judge Lipinksy noted that Rule 5.4(f) specifically references "nonlawyer other than LLP" and defines it.

Mr. Rothrock commented that the proposed revisions to Rule 5.4 are significant and substantively different than the previous rules. These proposed changes are very significant. An LLP could have an ownership interest in a law firm or could potentially own their own law firm without any lawyers. Mr. Stark suggested that an LLP could not solely own a law firm. Mr. Rothrock suggested that this would be a big change.

Judge Lipinksy referenced the LLP rules and put LLP rule 5.4 up on the screen. Judge Espinosa discussed the proposed Rule 5.4 in the LLP rules. Mr. Stark noted that this proposed change to Rule 5.4 is significant, but many states have gone significantly farther. The Subcommittee did not go as far as other jurisdictions, like Arizona and Utah. The Subcommittee intended to limit the expansion of Rule 5.4 just to LLPs. This is a big change, but not nearly as big as it could have been or as other states have approved.

The intent of the proposed revisions is to allow an LLP to work independently or with a law firm. The proposed revisions to the definition of a firm in Rule 1.0 allow either approach. An LLP may share fees with a lawyer in a law firm or may have his or her own firm. But with respect to the expansion of Rule 5.4, the horse is already out of the barn given the Court's approval of the PALS II proposal.

Judge Webb asked why is it necessary to afford LLPs the right to participate in the equity of a law firm or ownership in a law firm? Judge Lipinksy asked whether there is harm to the public if an LLP can participate in the profits of a law firm. Another member suggested that it is improper to dictate the economic terms of an LLPs participation in the law firm. The concern, initially, was that a nonlawyer would put pressure on a lawyer to do something that is inconsistent with the lawyer's duties or the client's interests. Judge Lipinsky noted that this same concern is not applicable to an LLP because of the limited scope of work that an LLP would be allowed to do.

Mr. Rothrock explained that this change would necessarily apply to enrolled agents or patent practitioners, who also would want a "piece of the action" in terms of getting equity for firms. If we propose revisions to Rule 5.4 to allow nonlawyer LLPs to participate in the equity or profits in a firm by being an owner, it would be hard to restrict the rule to other professionals who also want to participate in the ownership of a law firm. Judge Lipinsky asked whether the other states, Utah or Arizona, have had problems regarding this issue. Mr. Yarger explained that he

agrees whole heartedly with Mr. Rothrock because the expansion could lead to litigation funders or CPAs to participating in ownership of the firm. Mr. Yarger indicated that the current limitation to LLPs licensed in Colorado should assuage the concerns. Judge Espinosa indicated that this proposed change relates to an access to justice issue, but limits the involvement of an LLP to simply do limited family law matters as compared to the other states, that allow nonlawyers to provide legal services in broader ways such as representing criminally accused in misdemeanor matters and handling jury trials.

Judge Lipinksy noted that the judicial officers in Arizona are very enthusiastic about their expansion of the rules. The feedback received from Arizona and Utah was why is Colorado limiting their rules as compared to the other states. Judge Lipinksy explained that we are not jumping into the deep end like other states have done and we are limiting the approach to have a more conservative change than others.

The Committee discussed the proposed changes to Rule 5.5 relating to the unauthorized practice of law. Ms. Glenn wondered whether the LLP rules reference disbarment because these proposed revisions use the term disbarred. Judge Espinoza responded that the LLP rules refer to an LLP being suspended or disbarred. Ms. Glenn wondered whether the rules governing admission and regulation of an LLP use the term "bar" or "disbarred" because "bar" typically means a group of licensed lawyers. Judge Espinosa referred to the proposed Rule 206.7, which refers to the disbarment of an LLP.

The Committee looked at the proposed registration and disciplinary rules for LLPs. Those proposed registration and disciplinary rules reference an LLP being admitted to the bar and being disbarred as a form of discipline. New definition 9 of the proposed rules, Rule 250.1, specifically reference disbarment for an LLP. Thus, using the term "disbar" in the proposed revisions to Rule 5.5 would be consistent with the proposed LLP rules. The Committee discussed the cross-referencing between the two sets of Rules.

Mr. Rothrock suggested that Rule 3-1 in subsection (c) in the LLP discipline rules should instead be Rule 4 and should track what a lawyer can do in employing a suspended or disbarred lawyer. The language should be parallel to the same rule for lawyers. Mr. Stark suggested that we may not need this rule at all. Mr. Rothrock noted that there is a difference between what subsection (c) says and what the intention is in Rule 5.1 of the Rules of Professional Conduct. The proposal contained in Rule 3-1 may be redundant of what already exists.

Judge Espinosa had to leave, so he suggested another Subcommittee member go through the remainder of the proposed changes and then Judge Espinosa can coordinate with the member to ensure that the proposed changes are made. Judge Lipinksy noted that this is too important to rush. Judge Espinosa and Mr. Stark will coordinate, integrate the changes discussed, and then the entire proposal will be reviewed and voted on during the next meeting.

Mr. Stark suggested that the purpose behind Rule 3-1 would be to address the duties an LLP would have to notify clients and tribunals in the event of suspension or disbarment. The requirements would essentially correlate to the duties a suspended or disbarred lawyer would have upon the imposition of discipline.

Mr. Stark discussed proposed revisions to Rule 7.3. Mr. Patterson wondered why we suggested a new subsection rather than just referencing LLPs earlier in the rule. The Committee discussed the issue and decided simply to refer to LLPs instead of licensed legal profession in Rule 7.3(b)(4).

The Committee discussed he proposed revisions to Rule 8.4(a). Mr. Rackham suggested that the proposed revision is unnecessary because the Rule already prevents a lawyer from inducing another – whether an LLP or other person – to induce a violation of the Rules of Professional Conduct. The purpose of this rule is to prevent a lawyer from using an agent to do what the lawyer cannot do. Members of the Committee believed that the concern about an LLP acting as an agent of the lawyer to do something the lawyer cannot do is addressed in Rule 5.1 and Rule 5.3. Other members had a concern about LLPs who are not in the same firm as the lawyer and therefore Rule 5.1 and Rule 5.3 would not apply. Mr. Funk disagreed. She explained that Rule 5.3 does not apply to an employment or firm relationship, but instead applies to lawyers associating with other nonlawyers.

Judge Lipinksy noted that the proposed revisions to Rule 8.4(a) would actually limit the scope of the rule. He suggested adding another subsection that would address the obligation of a lawyer to avoid inducing an LLP specifically to violate the LLPs rule. The Committee suggested that adding another section would be complicated because of the multiple subsections. Ms. Cohen suggested it would be better to break Rule 8.4(a) down into Rule 8.4(a)(1) and 8.4(a)(2).

The Committee took a 10-minute break. (Marcus Squarrell took the minutes for the remainder of the Committee meeting because Mr. Rackham had a conflict).

6. REPORT BY RULE 1.2 SUBCOMMITTEE. The subcommittee will expand Comment [14] to Rule 4.2 to address the Colorado Natural Medicine Act. The subcommittee will submit a written report in July. Subject matter experts will attend the July meeting. Judge Lipinsky asked for the names and contact information for the experts. He will invite them to the July meeting.

7. REPRODUCTIVE HEALTH SUBCOMMITTEE. Nancy Cohen explained the Subcommittee's report and proposed comment. The Subcommittee met and revised the draft comment based on comments at the last Committee meeting. The second sentence of the proposed comment was revised to suggest the lawyer advise the client "that the conduct may be unlawful in another relevant jurisdiction..." The revision is intended to avoid placing the burden on lawyers to know the laws of other jurisdictions.

A member mentioned that a wrongful death action has been filed in Texas for providing information on medication to terminate a pregnancy. Judge Webb suggested removing the comma after "jurisdiction" in the second sentence. Alec Rothrock questioned the appropriateness of tracking the language of Comment [14] because to do so would impose a "reasonably believes" standard.

Fred Yarger questioned whether the comment is necessary because the freedom to advise a client is as broad as permitted by Rule 1.2(d). Dave Stark asked whether the comment was

premature given the fluidity of the law and pending legislation. Nancy pointed out that lawyers are uniquely at risk because every other profession is protected by the Governor's executive order.

Judge Webb raised a concern that although the focus of the first sentence of the comment is on Colorado, the comment requires the lawyer to be familiar with the laws of other jurisdictions. The Committee discussed whether it would be possible to consult with lawyers from other states to determine whether conduct in Colorado may be prohibited in the other states. Members discussed whether Texas law, for example, would make it unlawful for a lawyer in Texas to give advice on such questions. Several members expressed concern about the possibility that the laws of a relevant jurisdiction may prevent the client from obtaining advice about the consequences of the client's conduct in that jurisdiction. Judge Webb said he would send Nancy alternative language addressing the "other jurisdiction" issue. After a very interesting discussion, Judge Lipinsky continued the discussion to the July meeting.

8. REPORT ON THE RULE 1.5(E) SUBCOMMITTEE. Mr. Rothrock advised that the Subcommittee will submit a report and recommended revisions to the Rules for consideration at the July meeting.

9. NEW BUSINESS. Judge Lipinsky announced that Tuck Young and Judge Polidori were leaving the Committee at the end of their terms. Judge Lipinsky thanked Mr. Young and Judge Polidori for their contributions to the Committee. Judge Lipinsky acknowledged the value of their unique perspectives: Mr. Young's insights into the practice of law outside the Denver bubble and Judge Polidori's experience on the bench. Judge Espinosa asked for volunteers to work on the advisory committee for LLPs.

10. ADJOURNMENT. A motion to adjourn was made. The meeting adjourned at 12:10 p.m. The next meeting of the Committee will be on July 28, 2023 at 9 a.m.

Respectfully submitted,

Troy R. Rackham, Secretary

Attachment 2

Colorado Supreme Court Standing Committee for the Rules of Professional Conduct

Comment [14] to Rule 1.2(d) Subcommittee Report

June 17, 2023

I. Introduction

On November 8, 2022, Colorado voters passed Proposition 122 ("Prop 122"). Prop 122 legalized certain psychedelic plants and fungi defined as "natural medicine." *See* § 12-170-103(1)(h), C.R.S. Specifically, Prop 122 legalized dimethyltryptamine (DMT); ibogaine; mescaline (excluding peyote); psilocybin; and psilocyn, referenced collectively as "natural medicine." *Id.* In January 2023 the Colorado Supreme Court Standing Committee for the Rules of Professional Conduct ("Standing Committee") discussed Prop 122's impact on the Colorado Rules of Professional Conduct. The Standing Committee's discussion centered around whether a lawyer advising clients on activity concerning natural medicine should be within the scope of Comment [14] to Rule 1.2(d) (the current version of Comment [14] is attached as Exhibit A). In January 2023, the Standing Committee formed the Comment [14] to Rule 1.2 Subcommittee ("Subcommittee"). The Subcommittee was tasked with considering an amendment to Comment [14] to Rule 1.2 to address the voters' approval of Prop 122.

Noah Patterson chairs the Subcommittee. The other Standing Committee members who serve on the Subcommittee as voting members are Margaret Funk, Marcy Glenn, Matthew Kirsch, Troy Rackham, and Marcus Squarrell. The Subcommittee also included the following non-voting participants who provided subject matter expertise: Jason Wiener (Jason Wiener | p.c.), John Gleason (Burns, Figa & Will), Rachel Gillette (Holland & Hart), Cristy DiMaria (CO AG's Office, Marijuana, Liquor & Bankruptcy Unit), Ashley Moller (CO AG's Office, Medical Unit), Brian Urankar (CO AG's Office, Medical Unit), and Libby Truitt (CO AG's Office, AG Fellow).

The Subcommittee carefully reviewed the current Comment [14] as well as Proposition 122 and drafted proposed amendments to Comment [14]. The Subcommittee held multiple meetings and reached consensus on the proposed amendments. The Subcommittee recommends amending Comment [14] to Rule 1.2(d) to include counseling clients on activities involving natural medicine. The Rule should include Prop 122 within its scope to provide attorneys clear guidance that they will not be subject to professional discipline for advising clients on matters involving natural medicine.

II. Description of the Recommended Changes

The Subcommittee recommends the following changes (in red) to Comment

[14] to Colorado Rule 1.2(d):

> [14] A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and Proposition 122, which established the Colorado Natural Medicine Act of 2022, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and statutes, and the statutes, regulations, orders, and other state or local provisions implementing them (including amendments to these statutes, regulations, orders and provisions). In these circumstances, the lawyer ~~shall~~should also advise the client regarding related federal law and policy.

A clean version of Comment [14] as revised is attached as Exhibit B. The Subcommittee recommends the above changes for the following reasons:

- Insert "Proposition 122, which established the Colorado Natural Medicine Act of 2022, and" because Colorado's voters passed Proposition 122[1] and legalized natural medicine in November 2022, which raised the question of whether advising under the Colorado Natural Medicine Act of 2022 and related statutes/regulations would be considered professional misconduct under Rule 1.2(d). In the Subcommittee's view, legal advice regarding natural medicine should be treated the same as advice regarding marijuana for purposes of Rule 1.2(d). This proposed amendment to Comment [14] would treat marijuana legal services and natural medicine legal services the same under Rule 1.2(d).

- Insert the phrases "and statutes" as well as "(including amendments to these statutes, regulations, orders and provisions)" to ensure that subsequent authority interpreting and implementing Prop 122 would be included in the

[1] The Subcommittee discussed whether it was necessary to indicate the year that Prop 122 was passed (2022). Based on the Subcommittee's research, it appears that propositions are numbered sequentially and do not repeat. Including the year here is not necessary because Prop 122 is a sufficiently unique identifier. Prop 122 is attached as Exhibit C.

scope of Comment [14]. For example, Colorado Senate Bill 23-290 contains multiple statutes that interpret, implement, and administer Colorado's natural medicine statutory framework. This additional language is necessary to account for subsequent legislation both in the most recent and in future legislative sessions.

- Delete "shall" and replace it with "should" because comments, like Comment [14], are not mandatory. The comments should contain directive, not compulsory, language.

III. Federal Liability Issue

One concern raised during the Subcommittee's meetings was the lack of an articulable limiting principle for potential requests for similar comments in other situations where Colorado law allows conduct prohibited by federal law. The Colorado Supreme Court adopted the original Comment [14] after the Department of Justice (DOJ) had publicly announced that the federal government would not make enforcement of marijuana possession a priority if States implemented strong and effective regulatory enforcement systems. As of the date of this report, the DOJ has made no such announcement with respect to the natural medicine covered by Prop 122, and there is at present nothing else about Prop 122 that readily distinguishes it from any other area in which Colorado law may, either now or in the future, allow conduct prohibited by federal law.

The Subcommittee recognizes that the voters' approval of Proposition 122 requires guidance to lawyers regarding what advice they can provide to clients about matters related to Prop 122. The Subcommittee recognizes that, regardless of whether Comment [14] is amended, Colorado lawyers will likely be requested to and will in fact advise clients about matters related to Prop 122 and would benefit from ethical guidance about providing such advice. But it also notes the potential for similar requests to arise in other instances where state and federal law conflict. A minority of Subcommittee members have concerns about expanding the areas in which the Colorado Rules of Professional Conduct sanction advising clients about how to engage in conduct prohibited by federal law.

A majority of the Subcommittee still recommends that the Standing Committee approve this proposed revision to Comment [14] despite the current absence of guidance regarding enforcement of natural medicine from the DOJ. The goal of the revised Comment [14] is to achieve the practical goal of assuring lawyers that they may counsel clients on matters relating to natural medicine activity without being punished for professional misconduct under the Colorado Rules of Professional Conduct.

IV. Conclusion

The Subcommittee recommends the revision of Comment [14] to Rule 1.2(d) consistent with the redlines above.

Revised version of the proposed amendments to comment [14]

[14] A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and the Colorado Natural Medicine Act of 2022, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and statutes, and the statutes, regulations, orders, and other state or local provisions implementing them, as they may be amended from time to time. In these circumstances, the lawyer ~~shall~~should also advise the client regarding related federal law and policy.

V. Exhibits

A. Current Comment [14] to Rule 1.2
B. Clean Version Comment [14] with Proposed Amendments Incorporated
C. Prop 122

EXHIBIT A

Rules of Prof.Cond., Rule 1.2

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

Currentness

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b).

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

Credits
Repealed and readopted April 12, 2007, effective January 1, 2008. Comment amended effective March 24, 2014; April 6, 2016.

Editors' Notes

COMMENT
Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

[5A] Regarding communications with clients when a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the providing of legal services to the client, see Comment [6] to Rule 1.1.

[5B] Regarding communications with clients and with lawyers outside of the lawyer's firm when lawyers from more than one firm are providing legal services to the client on a particular matter, see Comment [7] to Rule 1.1.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

[14] A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.

Notes of Decisions (118)

Rules of Prof. Cond., Rule 1.2, CO ST RPC Rule 1.2
Current with amendments received through June 1, 2023.

End of Document

EXHIBIT B

[14] A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and Proposition 122, which established the Colorado Natural Medicine Act of 2022, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and statutes, and the statutes, regulations, orders, and other state or local provisions implementing them (including amendments to these statutes, regulations, orders and provisions). In these circumstances, the lawyer should also advise the client regarding related federal law and policy.

EXHIBIT C

Be it Enacted by the People of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, **add** Article 170 to Title 12 as follows:

ARTICLE 170

NATURAL MEDICINE HEALTH ACT of 2022

12-170-101. Short title. THE SHORT TITLE OF THIS ARTICLE 170 IS THE "NATURAL MEDICINE HEALTH ACT OF 2022."

12-170-102. Legislative declaration. (1) THE VOTERS OF THE STATE OF COLORADO FIND AND DECLARE THAT:

(a) COLORADO'S CURRENT APPROACH TO MENTAL HEALTH HAS FAILED TO FULFILL ITS PROMISE. COLORADANS DESERVE MORE TOOLS TO ADDRESS MENTAL HEALTH ISSUES, INCLUDING APPROACHES SUCH AS NATURAL MEDICINES THAT ARE GROUNDED IN TREATMENT, RECOVERY, HEALTH, AND WELLNESS RATHER THAN CRIMINALIZATION, STIGMA, SUFFERING, AND PUNISHMENT.

(b) COLORADANS ARE EXPERIENCING PROBLEMATIC MENTAL HEALTH ISSUES, INCLUDING BUT NOT LIMITED TO SUICIDALITY, ADDICTION, DEPRESSION, AND ANXIETY.

(c) AN EXTENSIVE AND GROWING BODY OF RESEARCH IS ADVANCING TO SUPPORT THE EFFICACY OF NATURAL MEDICINES COMBINED WITH PSYCHOTHERAPY AS TREATMENT FOR DEPRESSION, ANXIETY, SUBSTANCE USE DISORDERS, END-OF-LIFE DISTRESS, AND OTHER CONDITIONS.

(d) THE FEDERAL GOVERNMENT WILL TAKE YEARS TO ACT AND COLORADANS DESERVE THE RIGHT TO ACCESS NATURAL MEDICINES NOW.

(e) NATURAL MEDICINES HAVE BEEN USED SAFELY FOR MILLENNIA BY CULTURES FOR HEALING.

(f) COLORADO CAN BETTER PROMOTE HEALTH AND HEALING BY REDUCING ITS FOCUS ON CRIMINAL PUNISHMENTS FOR PERSONS WHO SUFFER MENTAL HEALTH ISSUES AND BY ESTABLISHING REGULATED ACCESS TO NATURAL MEDICINES THROUGH A HUMANE, COST-EFFECTIVE, AND RESPONSIBLE APPROACH.

(g) THE CITY AND COUNTY OF DENVER VOTERS ENACTED ORDINANCE 301 IN MAY 2019 TO MAKE THE ADULT PERSONAL POSSESSION AND USE OF THE NATURAL MEDICINE PSILOCYBIN THE LOWEST LAW ENFORCEMENT PRIORITY IN THE CITY AND COUNTY OF DENVER AND TO PROHIBIT THE CITY AND COUNTY FROM SPENDING RESOURCES ON ENFORCING RELATED PENALTIES.

(h) OREGON VOTERS ENACTED MEASURE 109 IN OREGON IN NOVEMBER 2020 TO ESTABLISH A REGULATED SYSTEM OF DELIVERING A NATURAL MEDICINE, IN PART TO PROVIDE PEOPLE ACCESS TO PSILOCYBIN FOR THERAPEUTIC PURPOSES.

(i) CRIMINALIZING NATURAL MEDICINES HAS DENIED PEOPLE FROM ACCESSING ACCURATE EDUCATION AND HARM REDUCTION INFORMATION RELATED TO THE USE OF NATURAL MEDICINES, AND LIMITED THE DEVELOPMENT OF APPROPRIATE TRAINING FOR FIRST-AND MULTI-RESPONDERS INCLUDING LAW ENFORCEMENT, EMERGENCY MEDICAL SERVICES, SOCIAL SERVICES, AND FIRE SERVICES.

(j) THE PURPOSE OF THIS NATURAL MEDICINE HEALTH ACT OF 2022 IS TO ESTABLISH A NEW, COMPASSIONATE, AND EFFECTIVE APPROACH TO NATURAL MEDICINES BY:

(I) ADOPTING A PUBLIC HEALTH AND HARM REDUCTION APPROACH TO NATURAL MEDICINES BY REMOVING CRIMINAL PENALTIES FOR PERSONAL USE FOR ADULTS TWENTY-ONE YEARS OF AGE AND OLDER;

(II) DEVELOPING AND PROMOTING PUBLIC EDUCATION RELATED TO THE USE OF NATURAL MEDICINES AND APPROPRIATE TRAINING FOR FIRST RESPONDERS; AND

(III) ESTABLISHING REGULATED ACCESS BY ADULTS TWENTY-ONE YEARS OF AGE AND OLDER TO NATURAL MEDICINES THAT SHOW PROMISE IN IMPROVING WELL-BEING, LIFE SATISFACTION, AND OVERALL HEALTH.

(k) THE PROVISIONS OF THIS ARTICLE 170 SHALL BE INTERPRETED CONSISTENTLY WITH THE FINDINGS AND PURPOSES STATED IN THIS SECTION AND SHALL NOT BE LIMITED BY ANY COLORADO LAW THAT COULD CONFLICT WITH OR BE INTERPRETED TO CONFLICT WITH THE PURPOSES AND POLICY OBJECTIVES STATED IN THIS SECTION.

(l) THE PEOPLE OF THE STATE OF COLORADO FURTHER FIND AND DECLARE THAT IT IS NECESSARY TO ENSURE CONSISTENCY AND FAIRNESS IN THE APPLICATION OF THIS ARTICLE 170 THROUGHOUT THE STATE AND THAT, THEREFORE, THE MATTERS ADDRESSED BY THIS ARTICLE 170 ARE, EXCEPT AS SPECIFIED HEREIN, MATTERS OF STATEWIDE CONCERN.

12-170-103. Definitions. (1) AS USED IN THIS ARTICLE 170, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "ADMINISTRATION SESSION" MEANS A SESSION HELD AT A HEALING CENTER OR ANOTHER LOCATION AS PERMITTED BY RULES ADOPTED BY THE DEPARTMENT AT WHICH A PARTICIPANT PURCHASES, CONSUMES, AND EXPERIENCES THE EFFECTS OF A NATURAL MEDICINE UNDER THE SUPERVISION OF A FACILITATOR.

(b) "DEPARTMENT" MEANS THE DEPARTMENT OF REGULATORY AGENCIES.

(c) "FACILITATOR" MEANS A PERSON LICENSED BY THE DEPARTMENT WHO:

(I) IS TWENTY-ONE YEARS OF AGE OR OLDER.

(II) HAS AGREED TO PROVIDE NATURAL MEDICINE SERVICES TO A PARTICIPANT.

(III) HAS MET THE REQUIREMENTS ESTABLISHED BY THE DEPARTMENT.

(d) "HEALING CENTER" MEANS AN ENTITY LICENSED BY THE DEPARTMENT THAT IS ORGANIZED AND OPERATED AS A PERMITTED ORGANIZATION:

(I) THAT ACQUIRES, POSSESSES, CULTIVATES, MANUFACTURES, DELIVERS, TRANSFERS, TRANSPORTS, SUPPLIES, SELLS, OR DISPENSES NATURAL MEDICINE AND RELATED SUPPLIES; OR PROVIDES NATURAL MEDICINE FOR NATURAL MEDICINE SERVICES AT LOCATIONS PERMITTED BY THE DEPARTMENT; OR ENGAGES IN TWO OR MORE OF THESE ACTIVITIES;

(II) WHERE ADMINISTRATION SESSIONS ARE HELD; OR

(III) WHERE NATURAL MEDICINE SERVICES ARE PROVIDED BY A FACILITATOR.

(e) "HEALTH-CARE FACILITY" MEANS A HOSPITAL, HOSPICE, COMMUNITY MENTAL HEALTH CENTER, FEDERALLY QUALIFIED HEALTH CENTER, RURAL HEALTH CLINIC, PACE ORGANIZATION, LONG-TERM CARE FACILITY, A CONTINUING CARE RETIREMENT COMMUNITY, OR OTHER TYPE OF FACILITY WHERE HEALTH-CARE IS PROVIDED.

(f) "INTEGRATION SESSION" MEANS A MEETING BETWEEN A PARTICIPANT AND FACILITATOR THAT OCCURS AFTER THE PARTICIPANT HAS COMPLETED AN ADMINISTRATION SESSION.

(g) "LOCALITY" MEANS A COUNTY, MUNICIPALITY, OR CITY AND COUNTY.

(h) "NATURAL MEDICINE" MEANS THE FOLLOWING SUBSTANCES IN ANY FORM THAT WOULD CAUSE SUCH PLANT OR FUNGUS TO BE DESCRIBED IN THE "UNIFORM CONTROLLED SUBSTANCES ACT OF 2013", ARTICLE 18 OF TITLE 18: DIMETHYLTRYPTAMINE; IBOGAINE; MESCALINE (EXCLUDING LOPHOPHORA WILLIAMSII ("PEYOTE")); PSILOCYBIN; OR PSILOCYN.

(i) "NATURAL MEDICINE SERVICES" MEANS SERVICES PROVIDED BY A FACILITATOR OR OTHER AUTHORIZED PERSON TO A PARTICIPANT BEFORE, DURING, AND AFTER THE PARTICIPANT'S CONSUMPTION OF NATURAL MEDICINE, INCLUDING, AT A MINIMUM AT:

(I) A PREPARATION SESSION;

(II) AN ADMINISTRATION SESSION; AND

(III) AN INTEGRATION SESSION.

(j) "PARTICIPANT" MEANS A PERSON TWENTY-ONE YEARS OF AGE OR OLDER WHO RECEIVES NATURAL MEDICINE SERVICES.

(k) "PERMITTED ORGANIZATION" MEANS ANY LEGAL ENTITY REGISTERED AND QUALIFIED TO DO BUSINESS IN THE STATE OF COLORADO THAT MEETS THE STANDARDS SET BY THE DEPARTMENT UNDER SECTION 12-170-104.

(l) "PREPARATION SESSION" MEANS A MEETING BETWEEN A PARTICIPANT AND A FACILITATOR THAT OCCURS BEFORE THE PARTICIPANT PARTICIPATES IN THE ADMINISTRATION SESSION.

12-170-104. Regulated natural medicine access program. (1) THE REGULATED NATURAL MEDICINE ACCESS PROGRAM IS ESTABLISHED AND THE DEPARTMENT SHALL REGULATE THE MANUFACTURE, CULTIVATION, TESTING, STORAGE, TRANSFER, TRANSPORT, DELIVERY, SALE, AND PURCHASE OF NATURAL MEDICINES BY AND BETWEEN HEALING CENTERS AND OTHER PERMITTED ENTITIES AND THE PROVISION OF NATURAL MEDICINE SERVICES TO PARTICIPANTS.

(2) NOT LATER THAN JANUARY 1, 2024, THE DEPARTMENT SHALL ADOPT RULES TO ESTABLISH THE QUALIFICATIONS, EDUCATION, AND TRAINING REQUIREMENTS THAT FACILITATORS MUST MEET PRIOR TO PROVIDING NATURAL MEDICINE SERVICES, AND TO APPROVE ANY REQUIRED TRAINING PROGRAMS.

(3) NOT LATER THAN SEPTEMBER 30, 2024, THE DEPARTMENT SHALL ADOPT RULES NECESSARY TO IMPLEMENT THE REGULATED NATURAL MEDICINE ACCESS PROGRAM AND SHALL BEGIN ACCEPTING APPLICATIONS FOR LICENSURE BY THAT DATE WITH DECISIONS MADE ON ALL LICENSING APPLICATIONS WITHIN 60 DAYS OF RECEIVING THE APPLICATION.

(4) FOR PURPOSES OF THE REGULATED NATURAL MEDICINE ACCESS PROGRAM SET FORTH IN THIS SECTION:

(a) UNTIL JUNE 1, 2026, THE TERM NATURAL MEDICINE SHALL ONLY INCLUDE PSILOCYBIN AND PSILOCYN.

(b) AFTER JUNE 1, 2026, IF RECOMMENDED BY THE NATURAL MEDICINE ADVISORY BOARD, THE DEPARTMENT MAY ADD ONE OR MORE OF THE FOLLOWING TO THE TERM NATURAL MEDICINE: DIMETHYLTRYPTAMINE; IBOGAINE; AND MESCALINE (EXCLUDING LOPHOPHORA WILLIAMSII ("PEYOTE")).

(c) THE DEPARTMENT MAY PREPARE PROPOSED RULES FOR THE ADDITION OF DIMETHYLTRYPTAMINE; IBOGAINE; AND MESCALINE (EXCLUDING LOPHOPHORA WILLIAMSII ("PEYOTE")) TO THE TERM NATURAL MEDICINE PRIOR TO JUNE 1, 2026, IN THE EVENT THAT DIMETHYLTRYPTAMINE; IBOGAINE; OR MESCALINE (EXCLUDING LOPHOPHORA WILLIAMSII ("PEYOTE")) IS ADDED TO THE TERM NATURAL MEDICINE UNDER SUBSECTION (4)(b) OF THIS SECTION.

(5) IN CARRYING OUT ITS DUTIES UNDER THIS ARTICLE 170, THE DEPARTMENT SHALL CONSULT WITH THE NATURAL MEDICINE ADVISORY BOARD AND MAY ALSO CONSULT WITH OTHER STATE AGENCIES OR ANY OTHER INDIVIDUAL OR ENTITY THE DEPARTMENT FINDS NECESSARY.

(6) THE RULES ADOPTED BY THE DEPARTMENT SHALL INCLUDE, BUT ARE NOT LIMITED TO, RULES TO:

(a) ESTABLISH THE REQUIREMENTS GOVERNING THE SAFE PROVISION OF NATURAL MEDICINE SERVICES TO PARTICIPANTS THAT INCLUDE:

(I) HOLDING AND VERIFYING COMPLETION OF A PREPARATION SESSION, AN ADMINISTRATION SESSION, AND AN INTEGRATION SESSION.

(II) HEALTH AND SAFETY WARNINGS THAT MUST BE PROVIDED TO PARTICIPANTS BEFORE NATURAL MEDICINE SERVICES BEGIN.

(III) EDUCATIONAL MATERIALS THAT MUST BE PROVIDED TO PARTICIPANTS BEFORE NATURAL MEDICINE SERVICES BEGIN.

(IV) THE FORM THAT EACH FACILITATOR, PARTICIPANT, AND AUTHORIZED REPRESENTATIVE OF A HEALING CENTER MUST SIGN BEFORE PROVIDING OR RECEIVING NATURAL MEDICINE SERVICES VERIFYING THAT THE PARTICIPANT WAS PROVIDED ACCURATE AND COMPLETE HEALTH INFORMATION AND INFORMED OF IDENTIFIED RISK FACTORS AND CONTRAINDICATIONS.

(V) PROPER SUPERVISION DURING THE ADMINISTRATION SESSION AND SAFE TRANSPORTATION FOR THE PARTICIPANT WHEN THE SESSION IS COMPLETE.

(VI) PROVISIONS FOR GROUP ADMINISTRATION SESSIONS WHERE ONE OR MORE FACILITATORS PROVIDE NATURAL MEDICINE SERVICES TO MORE THAN ONE PARTICIPANT AS PART OF THE SAME ADMINISTRATION SESSION.

(VII) PROVISIONS TO ALLOW A FACILITATOR OR A HEALING CENTER TO REFUSE TO PROVIDE NATURAL MEDICINE SERVICES TO A PARTICIPANT.

(VIII) THE REQUIREMENTS AND STANDARDS FOR INDEPENDENT TESTING OF NATURAL MEDICINE FOR CONCENTRATION AND CONTAMINANTS, TO THE EXTENT AVAILABLE TECHNOLOGY REASONABLY PERMITS.

(IX) THE LICENSURE OF ENTITIES PERMITTED TO ENGAGE IN THE TESTING OF NATURAL MEDICINE FOR USE IN NATURAL MEDICINE SERVICES OR OTHERWISE.

(X) THE STANDARDS FOR ADVERTISING AND MARKETING NATURAL MEDICINE AND NATURAL MEDICINE SERVICES.

(XI) THE STANDARDS FOR QUALIFICATION AS A PERMITTED ORGANIZATION ADDRESSING, WITHOUT LIMITATION, ENVIRONMENTAL, SOCIAL, AND GOVERNANCE CRITERIA DIRECTED TO THE FINDINGS AND DECLARATIONS SET FORTH IN SECTION 12-170-102.

(b) ESTABLISH THE REQUIREMENTS GOVERNING THE LICENSING AND PRACTICE OF FACILITATORS THAT INCLUDE:

(I) THE FORM AND CONTENT OF LICENSE AND RENEWAL APPLICATIONS FOR FACILITATORS SUBMITTED UNDER THIS ARTICLE 170.

(II) THE QUALIFICATIONS, EDUCATION, AND TRAINING REQUIREMENTS THAT FACILITATORS MUST MEET PRIOR TO PROVIDING NATURAL MEDICINE SERVICES. THE REQUIREMENTS SHALL:

(A) BE TIERED SO AS TO REQUIRE VARYING LEVELS OF EDUCATION AND TRAINING DEPENDING ON THE PARTICIPANTS THE FACILITATOR WILL BE WORKING WITH AND THE SERVICES THE FACILITATOR WILL BE PROVIDING.

(B) INCLUDE EDUCATION AND TRAINING ON CLIENT SAFETY; CONTRAINDICATIONS; MENTAL HEALTH; MENTAL STATE; PHYSICAL HEALTH; PHYSICAL STATE; SOCIAL AND CULTURAL CONSIDERATIONS; PHYSICAL ENVIRONMENT; PREPARATION; INTEGRATION; AND ETHICS.

(C) ALLOW FOR LIMITED WAIVERS OF EDUCATION AND TRAINING REQUIREMENTS BASED ON AN APPLICANT'S PRIOR EXPERIENCE, TRAINING, OR SKILL, INCLUDING, BUT NOT LIMITED TO, WITH NATURAL MEDICINES.

(D) NOT IMPOSE UNREASONABLE FINANCIAL OR LOGISTICAL BARRIERS THAT MAKE OBTAINING A FACILITATOR LICENSE COMMERCIALLY UNREASONABLE FOR LOW INCOME PEOPLE OR OTHER APPLICANTS.

(E) NOT REQUIRE A PROFESSIONAL LICENSE OR PROFESSIONAL DEGREE OTHER THAN A FACILITATOR LICENSE GRANTED PURSUANT TO THIS SECTION.

(F) ALLOW FOR PAID COMPENSATION FOR NATURAL MEDICINE SERVICES.

(G) ALLOW FOR THE PROVISION OF NATURAL MEDICINE SERVICES TO MORE THAN ONE PARTICIPANT AT A TIME IN GROUP ADMINISTRATION SESSIONS.

(III) OVERSIGHT AND SUPERVISION REQUIREMENTS FOR FACILITATORS, INCLUDING PROFESSIONAL RESPONSIBILITY STANDARDS AND CONTINUING EDUCATION REQUIREMENTS.

(IV) A COMPLAINT, REVIEW, AND DISCIPLINARY PROCESS FOR FACILITATORS WHO ENGAGE IN MISCONDUCT.

(V) RECORDKEEPING, PRIVACY, AND CONFIDENTIALITY REQUIREMENTS FOR FACILITATORS, PROVIDED SUCH RECORD KEEPING DOES NOT RESULT IN THE DISCLOSURE TO THE PUBLIC OR ANY GOVERNMENT AGENCY OF PERSONALLY IDENTIFIABLE INFORMATION OF PARTICIPANTS.

(VI) PROCEDURES FOR SUSPENDING OR REVOKING THE LICENSES OF FACILITATORS WHO VIOLATE THE PROVISIONS OF THIS ARTICLE 170 OR THE RULES ADOPTED BY THE DEPARTMENT.

(c) ESTABLISH THE REQUIREMENTS GOVERNING THE LICENSING AND OPERATION OF HEALING CENTERS THAT INCLUDE:

(I) QUALIFICATIONS FOR LICENSURE AND RENEWAL.

(II) OVERSIGHT REQUIREMENTS FOR HEALING CENTERS.

(III) RECORDKEEPING, PRIVACY, AND CONFIDENTIALITY REQUIREMENTS FOR HEALING CENTERS, PROVIDED SUCH RECORD KEEPING DOES NOT RESULT IN THE DISCLOSURE TO THE PUBLIC OR ANY GOVERNMENT AGENCY OF PERSONALLY IDENTIFIABLE INFORMATION OF PARTICIPANTS.

(IV) SECURITY REQUIREMENTS FOR HEALING CENTERS, INCLUDING REQUIREMENTS FOR PROTECTION OF EACH LICENSED HEALING CENTER LOCATION BY A FULLY OPERATIONAL SECURITY ALARM SYSTEM.

(V) PROCEDURES FOR SUSPENDING OR REVOKING THE LICENSES OF HEALING CENTERS THAT VIOLATE THE PROVISIONS OF THIS ARTICLE 170 OR THE RULES ADOPTED BY THE DEPARTMENT.

(VI) PERMISSIBLE FINANCIAL RELATIONSHIPS BETWEEN LICENSED HEALING CENTERS, FACILITATORS, AND OTHER ENTITIES.

(VII) PROCEDURES AND POLICIES THAT ALLOW FOR HEALING CENTERS TO RECEIVE PAYMENT FOR SERVICES AND NATURAL MEDICINES PROVIDED.

(VIII) PROCEDURES AND POLICIES TO ENSURE STATEWIDE ACCESS TO HEALING CENTERS AND NATURAL MEDICINE SERVICES.

(IX) RULES THAT PROHIBIT AN INDIVIDUAL FROM HAVING A FINANCIAL INTEREST IN MORE THAN FIVE HEALING CENTERS.

(X) RULES THAT ALLOW FOR HEALING CENTERS TO SHARE THE SAME PREMISES WITH OTHER HEALING CENTERS OR TO SHARE THE SAME PREMISES WITH HEALTH-CARE FACILITIES.

(XI) RULES THAT ALLOW FOR LOCATIONS NOT OWNED BY A HEALING CENTER WHERE NATURAL MEDICINE SERVICES MAY BE PROVIDED BY LICENSED FACILITATORS, INCLUDING BUT NOT LIMITED TO, HEALTH-CARE FACILITIES AND PRIVATE RESIDENCES.

(d) ESTABLISH PROCEDURES, POLICIES, AND PROGRAMS TO ENSURE THE REGULATORY ACCESS PROGRAM IS EQUITABLE AND INCLUSIVE AND TO PROMOTE THE LICENSING OF AND THE PROVISION OF NATURAL MEDICINE SERVICES TO PERSONS FROM COMMUNITIES THAT HAVE BEEN DISPROPORTIONATELY HARMED BY HIGH RATES OF CONTROLLED SUBSTANCES ARRESTS; TO PERSONS WHO FACE BARRIERS TO ACCESS TO HEALTH CARE; TO PERSONS WHO HAVE A TRADITIONAL OR INDIGENOUS HISTORY WITH NATURAL MEDICINES; OR TO PERSONS WHO ARE VETERANS THAT INCLUDE, BUT ARE NOT LIMITED TO:

(I) REDUCED FEES FOR LICENSURE AND FACILITATOR TRAINING.

(II) INCENTIVIZING THE PROVISION OF NATURAL MEDICINE SERVICES AT A REDUCED COST TO LOW INCOME INDIVIDUALS.

(III) INCENTIVIZING GEOGRAPHIC AND CULTURAL DIVERSITY IN LICENSING AND THE PROVISION AND AVAILABILITY OF NATURAL MEDICINE SERVICES.

(VI) A PROCESS FOR ANNUALLY REVIEWING THE EFFECTIVENESS OF SUCH POLICIES AND PROGRAMS PROMULGATED UNDER THIS SUBSECTION (6)(d).

(e) ESTABLISH APPLICATION, LICENSING, AND RENEWAL FEES FOR HEALING CENTER AND FACILITATOR LICENSES. THE FEES SHALL BE:

(I) SUFFICIENT, BUT SHALL NOT EXCEED THE AMOUNT NECESSARY, TO COVER THE COST OF ADMINISTERING THE REGULATED NATURAL MEDICINE ACCESS PROGRAM, INCLUDING THE REGULATED NATURAL MEDICINE ACCESS PROGRAM FUND IN 12-170-106.

(II) FOR LICENSING AND RENEWAL FEES, SCALED BASED ON EITHER THE VOLUME OF BUSINESS OF THE LICENSEE OR THE GROSS ANNUAL REVENUE OF THE LICENSEE.

(f) DEVELOP AND PROMOTE ACCURATE PUBLIC EDUCATION CAMPAIGNS RELATED TO THE USE OF NATURAL MEDICINE, INCLUDING BUT NOT LIMITED TO PUBLIC SERVICE ANNOUNCEMENTS, EDUCATIONAL CURRICULA, AND APPROPRIATE CRISIS RESPONSE, AND APPROPRIATE TRAINING FOR FIRST-AND MULTI-RESPONDERS INCLUDING LAW ENFORCEMENT, EMERGENCY MEDICAL SERVICES, SOCIAL SERVICES, AND FIRE SERVICES.

(g) STUDY AND DELIVER RECOMMENDATIONS TO THE LEGISLATURE REGARDING THE REGULATION OF DOSAGE FOR OFF-SITE USE OF NATURAL MEDICINES.

(h) COLLECT AND ANNUALLY PUBLISH DATA ON THE IMPLEMENTATION AND OUTCOMES OF THE REGULATED NATURAL MEDICINE ACCESS PROGRAM IN ACCORDANCE WITH GOOD DATA AND PRIVACY PRACTICES AND THAT DOES NOT DISCLOSE ANY IDENTIFYING INFORMATION ABOUT INDIVIDUAL LICENSEES OR PARTICIPANTS.

(i) ADOPT, AMEND, AND REPEAL RULES AS NECESSARY TO IMPLEMENT THE REGULATED NATURAL MEDICINE ACCESS PROGRAM AND TO PROTECT THE PUBLIC HEALTH AND SAFETY.

(7) PARTICIPANT RECORDS COLLECTED AND MAINTAINED BY HEALING CENTERS, FACILITATORS, REGISTERED ENTITIES, OR THE DEPARTMENT SHALL CONSTITUTE MEDICAL DATA AS DEFINED BY SECTION 24-72-204 (3)(a)(I) AND ARE NOT PUBLIC RECORDS SUBJECT TO DISCLOSURE.

(8) THE DEPARTMENT SHALL HAVE THE AUTHORITY TO CREATE AND ISSUE ANY ADDITIONAL TYPES OF LICENSES AND REGISTRATIONS IT DEEMS NECESSARY TO CARRY OUT THE INTENTS AND PURPOSES OF THE REGULATED NATURAL MEDICINE ACCESS PROGRAM, INCLUDING ALLOWING NATURAL MEDICINE SERVICES TO BE PROVIDED AT OTHER TYPES OF LICENSED HEALTH FACILITIES OR BY INDIVIDUALS IN ORDER TO INCREASE ACCESS TO AND THE AVAILABILITY OF NATURAL MEDICINE SERVICES.

(9) THE DEPARTMENT SHALL HAVE THE AUTHORITY TO ADOPT RULES THAT DIFFERENTIATE BETWEEN NATURAL MEDICINES AND THAT REGULATE EACH NATURAL MEDICINE DIFFERENTLY BASED ON ITS SPECIFIC QUALITIES, TRADITIONAL USES, AND SAFETY PROFILE.

(10) THE DEPARTMENT SHALL ADOPT, AMEND, AND REPEAL ALL RULES IN ACCORDANCE WITH THE STATE ADMINISTRATIVE PROCEDURE ACT, ARTICLE 4 OF TITLE 24, C.R.S., AS AMENDED, AND THE RULES PROMULGATED THEREUNDER.

12-170-105. Natural Medicine Advisory Board (1) THE NATURAL MEDICINE ADVISORY BOARD SHALL BE ESTABLISHED WITHIN THE DEPARTMENT FOR THE PURPOSE OF ADVISING THE DEPARTMENT AS TO THE IMPLEMENTATION OF THE REGULATED NATURAL MEDICINE ACCESS PROGRAM.

(2) THE BOARD SHALL CONSIST OF FIFTEEN MEMBERS. MEMBERS SHALL BE APPOINTED BY THE GOVERNOR, WITH THE CONSENT OF THE SENATE.

(3) MEMBERS OF THE INITIAL BOARD SHALL BE APPOINTED BY JANUARY 31, 2023. IN MAKING THE APPOINTMENTS, THE GOVERNOR SHALL APPOINT:

(a) AT LEAST SEVEN MEMBERS WITH SIGNIFICANT EXPERTISE AND EXPERIENCE IN ONE OR MORE OF THE FOLLOWING AREAS: NATURAL MEDICINE THERAPY, MEDICINE, AND RESEARCH; MYCOLOGY AND NATURAL MEDICINE CULTIVATION; PERMITTED ORGANIZATION CRITERIA; EMERGENCY MEDICAL SERVICES AND SERVICES PROVIDED BY FIRST RESPONDERS; MENTAL AND BEHAVIORAL HEALTH PROVIDERS; HEALTH CARE INSURANCE AND HEALTH CARE POLICY; AND PUBLIC HEALTH, DRUG POLICY, AND HARM REDUCTION.

(b) AT LEAST EIGHT MEMBERS WITH SIGNIFICANT EXPERTISE AND EXPERIENCE IN ONE OR MORE OF THE FOLLOWING AREAS: RELIGIOUS USE OF NATURAL MEDICINES; ISSUES CONFRONTING VETERANS; TRADITIONAL INDIGENOUS USE OF NATURAL MEDICINES; LEVELS AND DISPARITIES IN ACCESS TO HEALTH CARE SERVICES AMONG DIFFERENT COMMUNITIES; AND PAST CRIMINAL JUSTICE REFORM EFFORTS IN COLORADO. AT LEAST ONE OF THE EIGHT MEMBERS SHALL HAVE EXPERTISE OR EXPERIENCE IN TRADITIONAL INDIGENOUS USE OF NATURAL MEDICINES.

(4) FOR THE INITIAL BOARD, SEVEN OF THE MEMBERS SHALL BE APPOINTED TO A TERM OF TWO YEARS AND EIGHT MEMBERS SHALL BE APPOINTED TO A TERM OF FOUR YEARS. EACH MEMBER APPOINTED THEREAFTER SHALL BE APPOINTED TO A TERM OF FOUR YEARS. MEMBERS OF THE BOARD MAY SERVE UP TO TWO CONSECUTIVE TERMS. MEMBERS ARE SUBJECT TO REMOVAL AS PROVIDED IN ARTICLE IV, SECTION 6 OF THE COLORADO CONSTITUTION.

(5) NOT LATER THAN SEPTEMBER 30, 2023, AND ANNUALLY THEREAFTER, THE BOARD SHALL MAKE RECOMMENDATIONS TO THE DEPARTMENT RELATED TO, BUT NOT LIMITED TO, ALL OF THE FOLLOWING AREAS:

(a) ACCURATE PUBLIC HEALTH APPROACHES REGARDING USE, EFFECT, AND RISK REDUCTION FOR NATURAL MEDICINE AND THE CONTENT AND SCOPE OF EDUCATIONAL CAMPAIGNS RELATED TO NATURAL MEDICINE;

(b) RESEARCH RELATED TO THE EFFICACY AND REGULATION OF NATURAL MEDICINE, INCLUDING RECOMMENDATIONS RELATED TO PRODUCT SAFETY, HARM REDUCTION, AND CULTURAL RESPONSIBILITY;

(c) THE PROPER CONTENT OF TRAINING PROGRAMS, EDUCATIONAL AND EXPERIENTIAL REQUIREMENTS, AND QUALIFICATIONS FOR FACILITATORS;

(d) AFFORDABLE, EQUITABLE, ETHICAL, AND CULTURALLY RESPONSIBLE ACCESS TO NATURAL MEDICINE AND REQUIREMENTS TO ENSURE THE REGULATED NATURAL MEDICINE ACCESS PROGRAM IS EQUITABLE AND INCLUSIVE;

(e) APPROPRIATE REGULATORY CONSIDERATIONS FOR EACH NATURAL MEDICINE;

(f) THE ADDITION OF NATURAL MEDICINES TO THE REGULATED NATURAL MEDICINE ACCESS PROGRAM UNDER SECTION 12-170-104(4)(b) BASED ON AVAILABLE MEDICAL, PSYCHOLOGICAL, AND SCIENTIFIC STUDIES, RESEARCH, AND OTHER INFORMATION RELATED TO THE SAFETY AND EFFICACY OF EACH NATURAL MEDICINE;

(g) ALL RULES TO BE PROMULGATED BY THE DEPARTMENT UNDER 12-170-104; AND

(h) REQUIREMENTS FOR ACCURATE AND COMPLETE DATA COLLECTION, REPORTING, AND PUBLICATION OF INFORMATION RELATED TO THE IMPLEMENTATION OF THIS ARTICLE 170.

(6) THE BOARD SHALL, ON AN ONGOING BASIS, REVIEW AND EVALUATE EXISTING RESEARCH, STUDIES, AND REAL-WORLD DATA RELATED TO NATURAL MEDICINE AND MAKE RECOMMENDATIONS TO THE LEGISLATURE AND OTHER RELEVANT STATE AGENCIES AS TO WHETHER NATURAL MEDICINE AND ASSOCIATED SERVICES SHOULD BE COVERED UNDER HEALTH FIRST COLORADO OR OTHER INSURANCE PROGRAMS AS A COST EFFECTIVE INTERVENTION FOR VARIOUS MENTAL HEALTH CONDITIONS, INCLUDING BUT NOT LIMITED TO END OF LIFE ANXIETY, SUBSTANCE USE DISORDER, ALCOHOLISM, DEPRESSIVE DISORDERS, NEUROLOGICAL DISORDERS, CLUSTER HEADACHES, AND POST TRAUMATIC STRESS DISORDER.

(7) THE BOARD SHALL, ON AN ONGOING BASIS, REVIEW AND EVALUATE SUSTAINABILITY ISSUES RELATED TO NATURAL MEDICINE AND IMPACT ON INDIGENOUS CULTURES AND DOCUMENT EXISTING RECIPROCITY EFFORTS AND CONTINUING SUPPORT MEASURES THAT ARE NEEDED AS PART OF ITS ANNUAL REPORT.

(8) THE BOARD SHALL PUBLISH AN ANNUAL REPORT DESCRIBING ITS ACTIVITIES INCLUDING THE RECOMMENDATIONS AND ADVICE PROVIDED TO THE DEPARTMENT AND THE LEGISLATURE.

(9) THE DEPARTMENT SHALL PROVIDE REQUESTED TECHNICAL, LOGISTICAL AND OTHER SUPPORT TO THE BOARD TO ASSIST THE BOARD WITH ITS DUTIES AND OBLIGATIONS.

(10) THIS SECTION IS REPEALED EFFECTIVE DECEMBER 31, 2033.

12-170-106. Regulated natural medicine access program fund. (1) THE REGULATED NATURAL MEDICINE ACCESS PROGRAM FUND IS HEREBY CREATED IN THE STATE TREASURY. THE FUND IS ADMINISTERED BY THE DEPARTMENT AND CONSISTS OF ALL MONEY FROM FEES COLLECTED AND MONEY TRANSFERRED FROM THE GENERAL FUND UNDER THIS ARTICLE 170. ALL INTEREST AND INCOME EARNED ON THE DEPOSIT AND INVESTMENT OF MONEY IN THE FUND SHALL BE CREDITED TO THE FUND AND SHALL NOT BE TRANSFERRED TO THE GENERAL FUND OR ANY OTHER STATE FUND AT THE END OF ANY STATE FISCAL YEAR.

(2) THE DEPARTMENT MAY SEEK, ACCEPT, AND EXPEND ANY GIFTS, GRANTS, DONATIONS, LOAN OF FUNDS, PROPERTY, OR ANY OTHER REVENUE OR AID IN ANY FORM FROM THE STATE, ANY STATE AGENCY, ANY OTHER PUBLIC SOURCE, ANY PRIVATE SOURCE, OR ANY COMBINATION THEREOF, AND ANY SUCH MONETARY RECEIPTS SHALL BE CREDITED TO THE FUND AND ANY SUCH IN-KIND RECEIPTS SHALL BE APPLIED FOR THE BENEFIT OF THE FUND.

(3) THE MONEY IN THE FUND IS CONTINUALLY APPROPRIATED TO THE DEPARTMENT FOR THE DIRECT AND INDIRECT COSTS OF CARRYING OUT THE PROVISIONS OF THIS ARTICLE 170.

(4) FUNDS FOR THE INITIAL ESTABLISHMENT AND SUPPORT OF THE REGULATORY ACTIVITIES BY THE DEPARTMENT UNDER THIS ARTICLE 170, INCLUDING THE NATURAL MEDICINE ADVISORY BOARD, THE DEVELOPMENT AND PROMOTION OF PUBLIC EDUCATION CAMPAIGNS RELATED TO THE USE OF NATURAL MEDICINE, AND THE DEVELOPMENT OF THE POLICIES, PROCEDURES, AND PROGRAMS REQUIRED BY 12-170-104(6)(d) SHALL BE ADVANCED FROM THE GENERAL FUND TO THE REGULATED NATURAL MEDICINE ACCESS PROGRAM FUND AND SHALL BE REPAID TO THE GENERAL FUND BY THE INITIAL PROCEEDS FROM FEES COLLECTED PURSUANT TO THIS ARTICLE 170.

(5) THE OFFICE OF STATE PLANNING AND BUDGETING SHALL DETERMINE THE AMOUNT OF THE INITIAL ADVANCE FROM THE GENERAL FUND TO THE REGULATED NATURAL MEDICINE ACCESS PROGRAM FUND BASED ON THE ESTIMATED COSTS OF ESTABLISHING THE PROGRAM.

12-170-107. Localities. (1) A LOCALITY MAY REGULATE THE TIME, PLACE, AND MANNER OF THE OPERATION OF HEALING CENTERS LICENSED PURSUANT TO THIS ARTICLE 170 WITHIN ITS BOUNDARIES.

(2) A LOCALITY MAY NOT BAN OR COMPLETELY PROHIBIT THE ESTABLISHMENT OR OPERATION OF HEALING CENTERS LICENSED PURSUANT TO THIS ARTICLE 170 WITHIN ITS BOUNDARIES.

(3) A LOCALITY MAY NOT BAN OR COMPLETELY PROHIBIT A LICENSED HEALTH-CARE FACILITY OR INDIVIDUAL WITHIN ITS BOUNDARIES FROM PROVIDING NATURAL MEDICINE SERVICES IF THE LICENSED HEALTH-CARE FACILITY OR INDIVIDUAL IS PERMITTED TO PROVIDE NATURAL MEDICINE SERVICES BY THE DEPARTMENT PURSUANT TO THIS ARTICLE 170.

(4) A LOCALITY MAY NOT PROHIBIT THE TRANSPORTATION OF NATURAL MEDICINE THROUGH ITS JURISDICTION ON PUBLIC ROADS BY A LICENSEE OR AS OTHERWISE ALLOWED BY THIS ARTICLE 170.

(5) A LOCALITY MAY NOT ADOPT ORDINANCES OR REGULATIONS THAT ARE UNREASONABLE OR IN CONFLICT WITH THIS ARTICLE 170, BUT MAY ENACT LAWS IMPOSING LESSER CRIMINAL OR CIVIL PENALTIES THAN PROVIDED BY THIS ARTICLE 170

12-170-108. Protections. (1) SUBJECT TO THE LIMITATIONS IN THIS ARTICLE 170, BUT NOTWITHSTANDING ANY OTHER PROVISION OF LAW:

(a) ACTIONS AND CONDUCT PERMITTED PURSUANT TO A LICENSE OR REGISTRATION ISSUED BY THE DEPARTMENT OR BY DEPARTMENT RULE, OR BY THOSE WHO ALLOW PROPERTY TO BE USED PURSUANT TO A LICENSE OR REGISTRATION ISSUED BY THE DEPARTMENT OR BY DEPARTMENT RULE, ARE NOT UNLAWFUL AND SHALL NOT BE AN OFFENSE UNDER STATE LAW, OR THE LAWS OF ANY LOCALITY WITHIN THE STATE, OR BE SUBJECT TO A CIVIL FINE, PENALTY, OR SANCTION, OR BE A BASIS FOR DETENTION, SEARCH, OR ARREST, OR TO DENY ANY RIGHT OR PRIVILEGE, OR TO SEIZE OR FORFEIT ASSETS UNDER STATE LAW OR THE LAWS OF ANY LOCALITY WITHIN THE STATE.

(b) A CONTRACT IS NOT UNENFORCEABLE ON THE BASIS THAT NATURAL MEDICINES, AS ALLOWED UNDER THIS ARTICLE 170, ARE PROHIBITED BY FEDERAL LAW.

(c) A HOLDER OF A PROFESSIONAL OR OCCUPATIONAL LICENSE, CERTIFICATION, OR REGISTRATION IS NOT SUBJECT TO PROFESSIONAL DISCIPLINE OR LOSS OF A PROFESSIONAL LICENSE OR CERTIFICATION FOR PROVIDING ADVICE OR SERVICES ARISING OUT OF OR RELATED TO NATURAL MEDICINE LICENSES, APPLICATIONS FOR LICENSES ON THE BASIS THAT NATURAL MEDICINES ARE PROHIBITED BY FEDERAL LAW, OR FOR PERSONAL USE OF NATURAL MEDICINES AS ALLOWED UNDER THIS ARTICLE 170. THIS SECTION DOES NOT PERMIT A PERSON TO ENGAGE IN MALPRACTICE.

(d) MENTAL HEALTH, SUBSTANCE USE DISORDER, OR BEHAVIORAL HEALTH SERVICES OTHERWISE COVERED UNDER THE COLORADO MEDICAL ASSISTANCE ACT, ARTICLES 4 TO 6 OF TITLE 25.5, C.R.S., SHALL NOT BE DENIED ON THE BASIS THAT THEY ARE COVERED IN CONJUNCTION WITH NATURAL MEDICINE SERVICES OR THAT NATURAL MEDICINES ARE PROHIBITED BY FEDERAL LAW. NO INSURANCE OR INSURANCE PROVIDER IS REQUIRED TO COVER THE COST OF THE NATURAL MEDICINE ITSELF.

(e) NOTHING IN THIS SECTION SHALL BE CONSTRUED OR INTERPRETED TO PREVENT THE DEPARTMENT FROM ENFORCING ITS RULES AGAINST A LICENSEE OR TO LIMIT A STATE OR LOCAL LAW ENFORCEMENT AGENCY'S ABILITY TO INVESTIGATE UNLAWFUL ACTIVITY IN RELATION TO A LICENSEE.

12-170-109. Personal Use. (1) SUBJECT TO THE LIMITATIONS IN THIS ARTICLE 170, BUT NOTWITHSTANDING ANY OTHER PROVISION OF LAW, THE FOLLOWING ACTS ARE NOT AN OFFENSE UNDER STATE LAW OR THE LAWS OF ANY LOCALITY WITHIN THE STATE OR SUBJECT TO A CIVIL FINE, PENALTY, OR SANCTION, OR THE BASIS FOR DETENTION, SEARCH, OR ARREST, OR TO DENY ANY RIGHT OR PRIVILEGE, OR TO SEIZE OR FORFEIT ASSETS UNDER STATE LAW OR THE LAWS OF ANY LOCALITY, IF THE PERSON IS TWENTY-ONE YEARS OF AGE OR OLDER:

(a) POSSESSING, STORING, USING, PROCESSING, TRANSPORTING, PURCHASING, OBTAINING, OR INGESTING NATURAL MEDICINE FOR PERSONAL USE, OR GIVING AWAY NATURAL MEDICINE FOR PERSONAL USE WITHOUT REMUNERATION TO A PERSON OR PERSONS TWENTY-ONE YEARS OF AGE OR OLDER.

(b) GROWING, CULTIVATING, OR PROCESSING PLANTS OR FUNGI CAPABLE OF PRODUCING NATURAL MEDICINE FOR PERSONAL USE IF:

(I) THE PLANTS AND FUNGI ARE KEPT IN OR ON THE GROUNDS OF A PRIVATE HOME OR RESIDENCE; AND

(II) THE PLANTS AND FUNGI ARE SECURED FROM ACCESS BY PERSONS UNDER TWENTY-ONE YEARS OF AGE.

(c) ASSISTING ANOTHER PERSON OR PERSONS WHO ARE TWENTY-ONE YEARS OF AGE OR OLDER, OR ALLOWING PROPERTY TO BE USED, IN ANY OF THE ACTIONS OR CONDUCT PERMITTED UNDER SUBSECTION (1).

(2) FOR THE PURPOSE OF THIS ARTICLE 170, "PERSONAL USE" MEANS THE PERSONAL INGESTION OR USE OF A NATURAL MEDICINE AND INCLUDES THE AMOUNT A PERSON MAY CULTIVATE OR POSSESS OF NATURAL MEDICINE NECESSARY TO SHARE NATURAL MEDICINES WITH OTHER PERSONS TWENTY-ONE YEARS OF AGE OR OLDER WITHIN THE CONTEXT OF COUNSELING, SPIRITUAL GUIDANCE, BENEFICIAL COMMUNITY-BASED USE AND HEALING, SUPPORTED USE, OR RELATED SERVICES. "PERSONAL USE" DOES NOT INCLUDE THE SALE OF NATURAL MEDICINES FOR REMUNERATION.

(3) CONDUCT PERMITTED BY THIS ARTICLE 170 SHALL NOT, BY ITSELF:

(a) CONSTITUTE CHILD ABUSE OR NEGLECT WITHOUT A FINDING OF ACTUAL THREAT TO THE HEALTH OR WELFARE OF A CHILD BASED ON ALL RELEVANT FACTORS.

(b) BE THE BASIS TO RESTRICT PARENTING TIME WITH A CHILD WITHOUT A FINDING THAT THE PARENTING TIME WOULD ENDANGER THE CHILD'S PHYSICAL HEALTH OR SIGNIFICANTLY IMPAIR THE CHILD'S EMOTIONAL DEVELOPMENT.

(4) CONDUCT PERMITTED BY THIS ARTICLE 170 SHALL NOT, BY ITSELF, BE THE BASIS FOR PUNISHING OR OTHERWISE PENALIZING A PERSON CURRENTLY UNDER PAROLE, PROBATION, OR OTHER STATE SUPERVISION, OR RELEASED AWAITING TRIAL OR OTHER HEARING.

(5) CONDUCT PERMITTED BY THIS ARTICLE 170 SHALL NOT, BY ITSELF, BE THE BASIS FOR DETENTION, SEARCH, OR ARREST; AND THE POSSESSION OR SUSPICION OF POSSESSION OF NATURAL MEDICINE, OR THE POSSESSION OF MULTIPLE CONTAINERS OF NATURAL MEDICINE, SHALL NOT INDIVIDUALLY OR IN COMBINATION WITH EACH OTHER CONSTITUTE REASONABLY ARTICULABLE SUSPICION OF A CRIME. NATURAL MEDICINES AS PERMITTED BY THIS ARTICLE 170 ARE NOT CONTRABAND NOR SUBJECT TO SEIZURE AND SHALL NOT BE HARMED OR DESTROYED.

(6) CONDUCT PERMITTED BY THIS ARTICLE 170 SHALL NOT, BY ITSELF, BE THE BASIS TO DENY ELIGIBILITY FOR ANY PUBLIC ASSISTANCE PROGRAM, UNLESS REQUIRED BY FEDERAL LAW.

(7) FOR THE PURPOSES OF MEDICAL CARE, INCLUDING ORGAN TRANSPLANTS, CONDUCT PERMITTED BY THIS ARTICLE 170 DOES NOT CONSTITUTE THE USE OF AN ILLICIT SUBSTANCE OR OTHERWISE DISQUALIFY A PERSON FROM MEDICAL CARE OR MEDICAL INSURANCE.

(8) NOTHING IN THIS SECTION SHALL BE CONSTRUED OR INTERPRETED TO PERMIT A PERSON TO GIVE AWAY ANY AMOUNT OF NATURAL MEDICINE AS PART OF A BUSINESS PROMOTION OR OTHER COMMERCIAL ACTIVITY OR TO PERMIT PAID ADVERTISING RELATED TO NATURAL MEDICINE, SHARING OF NATURAL MEDICINE, OR SERVICES INTENDED TO BE USED CONCURRENTLY WITH A PERSON'S CONSUMPTION OF NATURAL MEDICINE. SUCH ADVERTISING MAY BE CONSIDERED EVIDENCE OF COMMERCIAL ACTIVITY THAT IS PROHIBITED UNDER THIS SECTION. THIS PROVISION DOES NOT PRECLUDE THE DONATION OF NATURAL MEDICINE BY A PERSON TWENTY-ONE YEARS OF AGE OR OLDER, PAYMENT FOR BONA FIDE HARM REDUCTION SERVICES, BONA FIDE THERAPY SERVICES, OR OTHER BONA FIDE SUPPORT SERVICES, MAINTAINING PERSONAL OR PROFESSIONAL WEBSITES RELATED TO NATURAL MEDICINE SERVICES, DISSEMINATION OF EDUCATIONAL MATERIALS RELATED TO NATURAL MEDICINE, OR LIMIT THE ABILITY OF A HEALING CENTER TO DONATE NATURAL MEDICINE OR PROVIDE NATURAL MEDICINE AT REDUCED COST CONSISTENT WITH DEPARTMENT RULES.

(9) A PERSON WHO HAS COMPLETED A SENTENCE FOR A CONVICTION, WHETHER BY TRIAL OR PLEA OF GUILTY OR *NOLO CONTENDERE*, WHO WOULD NOT HAVE BEEN GUILTY OF AN OFFENSE UNDER THIS ACT HAD IT BEEN IN EFFECT AT THE TIME OF THE OFFENSE, MAY FILE A PETITION BEFORE THE TRIAL COURT THAT ENTERED THE JUDGMENT OF CONVICTION IN THE PERSON'S CASE TO SEAL THE RECORD OF THE CONVICTION AT NO COST. IF THERE IS NO OBJECTION FROM THE DISTRICT ATTORNEY, THE COURT SHALL AUTOMATICALLY SEAL SUCH RECORD. IF THERE IS AN OBJECTION BY THE DISTRICT ATTORNEY, A HEARING SHALL BE HELD AND THE COURT SHALL DETERMINE IF THE PRIOR CONVICTION DOES NOT QUALIFY TO BE SEALED UNDER THIS ACT. IF THE RECORD DOES NOT QUALIFY TO BE SEALED, THE COURT SHALL DENY THE SEALING OF THE RECORD. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO DIMINISH OR ABROGATE ANY RIGHTS OR REMEDIES OTHERWISE AVAILABLE TO THE PETITIONER OR APPLICANT.

12-170-110. Personal use penalties. (1) UNLESS OTHERWISE PROVIDED BY SUBSECTION (2) OF THIS SECTION, A PERSON WHO IS UNDER TWENTY-ONE YEARS OF AGE IS SUBJECT TO A DRUG PETTY OFFENSE, AND UPON CONVICTION THEREOF, SHALL BE SUBJECT ONLY TO A PENALTY OF NO MORE THAN FOUR (4) HOURS OF DRUG EDUCATION OR COUNSELING PROVIDED AT NO COST TO THE PERSON, IF THE PERSON:

(a) POSSESSES, USES, INGESTS, INHALES, OR TRANSPORTS NATURAL MEDICINE FOR PERSONAL USE;

(b) GIVES AWAY WITHOUT REMUNERATION NATURAL MEDICINE FOR PERSONAL USE; OR

(c) POSSESSES, USES, OR GIVES AWAY WITHOUT REMUNERATION NATURAL MEDICINE PARAPHERNALIA.

(2) TO THE EXTENT SUBSECTION (1) ESTABLISHES A PENALTY FOR CONDUCT NOT OTHERWISE PROHIBITED BY LAW OR ESTABLISHES A PENALTY THAT IS GREATER THAN EXISTS ELSEWHERE IN LAW FOR THE CONDUCT SET FORTH IN SUBSECTION (1), THE PENALTIES IN SUBSECTION (1) SHALL NOT APPLY.

(3) A PERSON WHO CULTIVATES NATURAL MEDICINES THAT ARE NOT SECURE FROM ACCESS BY A PERSON UNDER TWENTY-ONE YEARS OF AGE IN VIOLATION OF 12-170-109(1)(b) IS SUBJECT TO A CIVIL FINE NOT EXCEEDING TWO-HUNDRED AND FIFTY DOLLARS, IN ADDITION TO ANY OTHER APPLICABLE PENALTIES.

(4) A PERSON SHALL NOT BE SUBJECT TO ANY ADDITIONAL FEES, FINES, OR OTHER PENALTIES FOR THE VIOLATIONS ADDRESSED IN THIS SECTION OTHER THAN THOSE SET FORTH IN THIS SECTION. FURTHER, A PERSON SHALL NOT BE SUBJECT TO INCREASED PUNISHMENT FOR ANY OTHER CRIME ON THE BASIS OF THAT PERSON HAVING UNDERTAKEN CONDUCT PERMITTED BY THIS ARTICLE 170.

12-170-111. Limitations. (1) THIS ARTICLE 170 SHALL NOT BE CONSTRUED:

(a) TO PERMIT A PERSON TO DRIVE OR OPERATE A MOTOR VEHICLE, BOAT, VESSEL, AIRCRAFT, OR OTHER DEVICE THAT IS CAPABLE OF MOVING ITSELF, OR OF BEING MOVED, FROM PLACE TO PLACE UPON WHEELS OR ENDLESS TRACKS UNDER THE INFLUENCE OF NATURAL MEDICINE;

(b) TO PERMIT A PERSON TO USE OR POSSESS NATURAL MEDICINE IN A SCHOOL, DETENTION FACILITY, OR PUBLIC BUILDING;

(c) TO PERMIT A PERSON TO INGEST NATURAL MEDICINES IN A PUBLIC PLACE, OTHER THAN A PLACE LICENSED OR OTHERWISE PERMITTED BY THE DEPARTMENT FOR SUCH USE;

(d) TO PERMIT THE TRANSFER OF NATURAL MEDICINE, WITH OR WITHOUT REMUNERATION, TO A PERSON UNDER TWENTY-ONE YEARS OF AGE OR TO ALLOW A PERSON UNDER TWENTY-ONE YEARS OF AGE TO USE OR POSSESS NATURAL MEDICINE;

(e) TO PERMIT A PERSON TO ENGAGE IN CONDUCT THAT ENDANGERS OR HARMS OTHERS;

(f) TO REQUIRE A GOVERNMENT MEDICAL ASSISTANCE PROGRAM OR PRIVATE HEALTH INSURER TO REIMBURSE A PERSON FOR COSTS OF PURCHASING NATURAL MEDICINE;

(g) TO REQUIRE AN EMPLOYER TO PERMIT OR ACCOMMODATE THE USE, CONSUMPTION, POSSESSION, TRANSFER, DISPLAY, TRANSPORTATION, OR GROWING OF NATURAL MEDICINES IN THE WORKPLACE;

(h) TO PROHIBIT A RECIPIENT OF A FEDERAL GRANT OR AN APPLICANT FOR A FEDERAL GRANT FROM PROHIBITING THE USE, CONSUMPTION, POSSESSION, TRANSFER, DISPLAY, TRANSPORTATION, OR GROWING OF NATURAL MEDICINES TO THE EXTENT NECESSARY TO SATISFY FEDERAL REQUIREMENTS FOR THE GRANT;

(i) TO PROHIBIT A PARTY TO A FEDERAL CONTRACT OR A PERSON APPLYING TO BE A PARTY TO A FEDERAL CONTRACT FROM PROHIBITING ANY ACT PERMITTED IN THIS ARTICLE 170 TO THE EXTENT NECESSARY TO COMPLY WITH THE TERMS AND CONDITIONS OF THE CONTRACT OR TO SATISFY FEDERAL REQUIREMENTS FOR THE CONTRACT;

(j) TO REQUIRE A PERSON TO VIOLATE A FEDERAL LAW; OR

(k) TO EXEMPT A PERSON FROM A FEDERAL LAW OR OBSTRUCT THE ENFORCEMENT OF A FEDERAL LAW.

12-170-112. Liberal construction. THIS ACT SHALL BE LIBERALLY CONSTRUED TO EFFECTUATE ITS PURPOSE.

12-170-113. Preemption. NO LOCALITY SHALL ADOPT, ENACT, OR ENFORCE ANY ORDINANCE, RULE, OR RESOLUTION IMPOSING ANY GREATER CRIMINAL OR CIVIL PENALTY THAN PROVIDED BY THIS ACT OR THAT IS OTHERWISE IN CONFLICT WITH THE PROVISIONS OF THIS ACT. A LOCALITY MAY ENACT LAWS IMPOSING LESSER CRIMINAL OR CIVIL PENALTIES THAN PROVIDED BY THIS ACT.

12-170-114. Self-executing, severability, conflicting provisions. ALL PROVISIONS OF THIS ARTICLE 170 ARE SELF-EXECUTING EXCEPT AS SPECIFIED HEREIN, ARE SEVERABLE, AND, EXCEPT WHERE OTHERWISE INDICATED IN THE TEXT, SHALL SUPERSEDE CONFLICTING STATE STATUTORY, LOCAL CHARTER, ORDINANCE, OR RESOLUTION, AND OTHER STATE AND LOCAL PROVISIONS. IF ANY PROVISION OF THIS ACT OR ITS APPLICATION TO ANY PERSON OR CIRCUMSTANCE IS HELD INVALID, THE INVALIDITY DOES NOT AFFECT OTHER PROVISIONS OR APPLICATIONS OF THIS ACT THAT CAN BE GIVEN EFFECT WITHOUT THE INVALID PROVISION OR APPLICATION, AND TO THIS END THE PROVISIONS OF THIS ACT ARE SEVERABLE.

12-170-115. Effective date. UNLESS OTHERWISE PROVIDED BY THIS ACT, ALL PROVISIONS OF THIS ACT SHALL BECOME EFFECTIVE UPON THE EARLIER OF THE OFFICIAL DECLARATION OF THE VOTE HEREON BY PROCLAMATION OF THE GOVERNOR OR THIRTY DAYS AFTER THE VOTE HAS BEEN CANVASSED, PURSUANT TO SECTION 1(4) OF ARTICLE V OF THE COLORADO CONSTITUTION. THE REMOVAL AND REDUCTION OF CRIMINAL PENALTIES BY THIS ACT IS INTENDED TO HAVE RETROACTIVE EFFECT.

SECTION 2. In Colorado Revised Statutes, 18-18-403.5, **amend** (1) as follows:

18-18-403.5. Unlawful possession of a controlled substance. (1) Except as authorized by part 1 or 3 of article 280 of title 12, part 2 of article 80 of title 27, section 18-1-711, section 18-18-428(1)(b), ~~or~~ part 2 or 3 of this article 18, OR THE "NATURAL MEDICINE HEALTH ACT OF

2022", ARTICLE 170 OF TITLE 12 it is unlawful for a person knowingly to possess a controlled substance.

SECTION 3. In Colorado Revised Statutes, 18-18-404 **amend** (1)(a) as follows:

18-18-404. Unlawful use of a controlled substance. (1)(a) Except as is otherwise provided for offenses concerning marijuana and marijuana concentrate in sections 18-18-406 and 18-18-406.5 OR BY THE "NATURAL MEDICINE HEALTH ACT OF 2022", ARTICLE 170 OF TITLE 12 any person who uses any controlled substance, except when it is dispensed by or under the direction of a person licensed or authorized by law to prescribe, administer, or dispense the controlled substance for bona fide medical needs, commits a level 2 drug misdemeanor.

SECTION 4. In Colorado Revised Statutes, 18-18-405, **amend** (1)(a) as follows:

18-18-405. Unlawful distribution, manufacturing, dispensing, or sale. (1)(a) Except as authorized by part 1 of article 280 of title 12, part 2 of article 80 of title 27, ~~or~~ part 2 or 3 of this article 18, OR BY "THE NATURAL MEDICINE HEALTH ACT OF 2022", ARTICLE 170 OF TITLE 12 it is unlawful for any person knowingly to manufacture, dispense, sell, or distribute, or to possess with intent to manufacture, dispense, sell, or distribute, a controlled substance; or induce, attempt to induce, or conspire with one or more other persons, to manufacture, dispense, sell, distribute, or possess with intent to manufacture, dispense, sell, or distribute, a controlled substance; or possess one or more chemicals or supplies or equipment with intent to manufacture a controlled substance.

SECTION 5. In Colorado Revised Statutes, **amend** 18-18-410 as follows:

18-18-410. Declaration of class 1 public nuisance. EXCEPT AS PERMITTED BY THE "NATURAL MEDICINE HEALTH ACT OF 2022", ARTICLE 170 OF TITLE 12 any store, shop, warehouse, dwelling house, building, vehicle, boat, or aircraft or any place whatsoever which is frequented by controlled substance addicts for the unlawful use of controlled substances or which is used for the unlawful storage, manufacture, sale, or distribution of controlled substances is declared to be a class 1 public nuisance and subject to the provisions of section 16-13-303, C.R.S. Any real or personal property which is seized or confiscated as a result of an action to abate a public nuisance shall be disposed of pursuant to part 7 of article 13 of title 16, C.R.S.

SECTION 6. In Colorado Revised Statutes, 18-18-411, **add** (5) as follows:

18-18-411. keeping, maintaining, controlling, renting, or making available property for unlawful distribution or manufacture of controlled substances.

(5) A PERSON ACTING IN COMPLIANCE WITH THE "NATURAL MEDICINE HEALTH ACT OF 2022", ARTICLE 170 OF TITLE 12 DOES NOT VIOLATE THIS SECTION.

SECTION 7. In Colorado Revised Statutes, 18-18-412.7, **add** (3) as follows:

18-18-412.7. Sale or distribution of materials to manufacture controlled substances.

(3) A PERSON ACTING IN COMPLIANCE WITH THE "NATURAL MEDICINE HEALTH ACT OF 2022", ARTICLE 170 OF TITLE 12 DOES NOT VIOLATE THIS SECTION.

SECTION 8. In Colorado Revised Statutes, 18-18-430.5, **add** (1)(c) as follows:

18-18-430.5. Drug paraphernalia—exemption. (1) A person is exempt from sections 18-18-425 to 18-18-430 if the person is:

(c) USING EQUIPMENT, PRODUCTS OR MATERIALS IN COMPLIANCE WITH THE "NATURAL MEDICINE HEALTH ACT OF 2022", ARTICLE 170 OF TITLE 12. THE MANUFACTURE, POSSESSION, AND DISTRIBUTION OF SUCH EQUIPMENT, PRODUCTS, OR MATERIALS SHALL BE AUTHORIZED WITHIN THE MEANING OF 21 USC 863 SEC. (f).

SECTION 9. In Colorado Revised Statutes, 16-13-303, **add** (9) as follows:

16-13-303. Class 1 public nuisance.

(9) A PERSON ACTING IN COMPLIANCE WITH THE "NATURAL MEDICINE HEALTH ACT OF 2022", ARTICLE 170 OF TITLE 12 DOES NOT VIOLATE THIS SECTION.

SECTION 10. In Colorado Revised Statutes, 16-13-304, **add** (2) as follows:

16-13-304. Class 2 public nuisance.

(2) A PERSON ACTING IN COMPLIANCE WITH THE "NATURAL MEDICINE HEALTH ACT OF 2022", ARTICLE 170 OF TITLE 12 DOES NOT VIOLATE THIS SECTION.

Attachment 3

Proposed Rule Changes

NOTE: PUBLIC HEARINGS ARE HELD IN PERSON IN THE SUPREME COURT COURTROOM AT 2 E. 14TH AVE., DENVER, CO 80203

THE HEARINGS ARE LIVESTREAMED AND ARCHIVED ON OUR ORAL ARGUMENTS WEB PAGE

Notice of Public Hearing and Request for Comments
Colorado Rules of Professional Conduct
Deadline to submit Comments: September 5, 2023 at 4 p.m.
Deadline to request to Speak at Public Hearing: September 12, 2023 at 4 p.m.

The Colorado Supreme Court will hold a hearing on the proposed Rule 1.4 of the Colorado Rules of Professional Conduct on **September 20, 2023 at 3:30 p.m**. The Court also requests written public comments by any interested person on the proposed rule. Public comments may be submitted in letter format addressed as follows: Colorado Supreme Court, 2 E. 14th Avenue, Denver, CO 80202. If submitting a public comment by email, please attach your submission as a **separate document** to your email in Word or PDF format. Comments and speaking requests may be emailed to supremecourtrules@judicial.state.co.us. Any written comments received by the deadline will be uploaded here after the comment period closes.

Attachment 4

At the April 22, 2022 meeting of the Standing Committee on the Colorado Rules of Professional Conduct (Standing Committee), the (Patent) Practitioner Harmonization Subcommittee (Subcommittee) was formed. The charge of the Subcommittee was to consider the issues presented in a letter request from the National Association of Patent Practitioners (NAPP) that the Standing Committee investigate clarifying or amending the Colorado Rules of Professional Conduct (Colorado Rules) to "harmonize" them with the United States Patent and Trademark Office (USPTO) Rules of Professional Conduct (USPTO Rules). The NAPP letter request is attached hereto. The Standing Committee understands that NAPP has presented the same request to the American Bar Association (ABA).

Individuals recognized to practice before the Patent Office are "Patent Practitioners," which include both patent lawyers and patent agents. All Patent Practitioners must satisfy the same qualification requirements (outlined in 37 CFR § 11.7, including the legal, scientific, and technical qualifications, as well as good moral character and reputation), are required to pass the same patent bar examination, are afforded the same rights and responsibilities, held to the same standards of conduct (the USPTO Rules of Professional Conduct), etc. Patent agents are authorized to perform all functions within the jurisdiction of the Patent Office, including patentability analysis, drafting and prosecuting patent applications, causing an assignment to be executed for the patent owner and filing the assignment, representing others before the Patent Trials and Appeals Board (PTAB - an administrative law body consisting of statutory members and administrative patent judges), and all other matters before the Patent Office. Indeed, the U.S. Supreme Court has recognized that patent agents are authorized to practice law, specifically federal law within the federal jurisdiction of the Patent Office. *See Sperry v. Florida ex rel. Florida Bar*, 373 U.S. 379, at 385, 389 (1963). In other words, patent lawyers and patent agents are equals within the jurisdiction of the Patent Office, both being Patent Practitioners. The principal distinction in scope of practice between patent lawyers and patent agents is that the former are licensed to practice within the jurisdiction of the Patent Office and a state jurisdiction, such that patent lawyers have a general license for any practice in their state of licensure, and the later are licensed to practice only in the federal jurisdiction of the Patent Office.

The USPTO can be considered to be comprised of two sub-offices, The Patent Office and the Trademark Office. Due to this the USPTO provides a distinction with respect to USPTO "Practitioners", which include Patent Practitioners (patent lawyers and patent agents within the Patent Office) and "Trademark Practitioners" (trademark lawyers within the Trademark Office). Unlike Patent Practitioners, Trademark Practitioners are not required to pass an exam to practice trademark matters before the USPTO. Also, patent agents have not been allowed to practice trademark law as of 1952. That said, all USPTO Practitioners, Patent and Trademark, are subject to the same ethical requirements outlined in the USPTO Rules. The USPTO Rules are substantially similar to the ABA Model Rules of Professional Conduct (ABA Rules), with modifications that include replacing the term "lawyer" throughout with the term "practitioner". Further, the USPTO Rules allow all Practitioners to interact with each other in the same manner as lawyers doat the state level and require the same ethical and professional behavior, i.e., to share fees (§11.105 Fees), safekeep client funds (§11.115 Safekeeping property), be involved in the sale of a law practice (§11.117 Sale of law practice), require the practitioner to maintain Professional Independence (§11.504 Professional independence of a Practitioner), etc. Thus, the USPTO Rules are substantially similar to the Colorado Rules, at least to the extent the Colorado Rules mirror the ABA Model Rules.

One impetus for the NAPP request to the Standing Committee is that the Colorado Rules are consistently interpreted to not permit a patent agent to engage in certain professional interactions with Colorado lawyers. For example, pursuant to the Colorado Rules, a Colorado lawyer is not permitted to share profits or participate in a firm buy/sell transaction with a patent agent. *See* Colo. RPC 5.4(a), 1.17. Using the broader term "Practitioner," the USPTO Rules permit what the Colorado Rules prohibit. *See id.*; *compare* USPTO Rules §§11.504(b), 11.117. The NAPP has cast the disharmony between the Colorado Rules (and every other state's) and the USPTO Rules as (1) imposing a ceiling on the practice of patent agents, (2) imposing consequences for those attempting to access patent legal services, (3) limiting diversity within the legal system and innovation ecosystem, and (4) being out of step with most other countries whose "patent attorneys" are equivalent to our United States patent agents.

The Standing Committee has recognized that there is no "simple fix" to the harmonization request from the NAPP. Taking Colo. RPC 5.4 as an exemplar, simply revising it to exclude patent agents from the definition of "non-lawyers" pursuant to that Rule, would then require analyzing and answering additional, potentially more complex questions such as: Does a Colorado lawyer practicing with a patent agent have supervisory responsibilities under Colo. RPC 5.3 because the patent agent is a non-lawyer, or should Colo. RPC 5.1 be revised so that patent agents are treated no differently than lawyers for purposes of the supervisory responsibilities in that rule? Should patent agents practicing in Colorado be subject to Colorado's unique Rule 1.15 series or remain subject to USPTO rules? Are there other implications to the Colorado Rules where Colorado lawyers and patent agents practice together? Further, addressing the NAPP's harmonization request by simply excluding patent agents from the definition of "non-lawyers" for Colo. RPC 5.4 also could open the door to similar requests from other non-lawyers who are authorized to provide some legal services (e.g., enrolled agents authorized to represent taxpayers before the Internal Revenue Service or accredited representatives in immigration cases).

Thus, the NAPP harmonization request is a large undertaking and one that would mean that Colorado would be the first state to embark on an effort to revise non-USPTO rules of professional conduct to accommodate the request of the NAPP. To that end, the Standing Committee seeks the Court's guidance on the following questions: (1) Does the Court believe the Standing Committee should explore the "harmonization" effort without prior modification of the ABA Model Rules as a guide?; (2) If the answer to the first question is "yes," should the effort explore the relationship of lawyers practicing with other types of non-lawyers with a limited authority to provide legal services?

Attachment 5

Memorandum

To: Standing Committee on the Rules of Professional Conduct

From: Adam J. Espinosa, Chair of the LLP Subcommittee

Date: July 25, 2023

Re: Potential Changes to Colorado Lawyer Rules of Professional Conduct based on the Licensed Legal Paraprofessional (LLP) Program

Summary

The LLP Subcommittee has set forth our recommendations for amendments to the Colorado Rules of Professional Conduct in summary fashion and with proposed edits of the current lawyer rule. Our focus was primarily on lawyer rules that might need to be amended. As you will see, many of the lawyer rules of professional conduct will not be affected by the proposed LLP Rules of Professional Conduct and the primary set of rules that would need amendment are the Rule 5 Series set of lawyer rules of professional conduct.

On the last page of this memorandum, you will find links to the LLP rules adopted by the Court. Also, I have included an attachment to this memorandum that includes a redline copy of our proposed amended lawyer rules. Our ask of the Standing Rules Committee is to vote to approve our recommendations for amendments to the lawyer rules of professional conduct in order to implement the LLP program.

Background

The LLP subcommittee of the Standing Committee on the Rules of Professional Conduct was asked to review the proposed LLP Rules of Professional Conduct and make recommendations to this committee for possible changes to the Colorado Rules of Professional Conduct based on the proposed LLP rules. Our task was not to evaluate the proposed LLP Rules of Professional Conduct nor make recommendations to those rules because a separate Colorado Supreme Court Committee was tasked with that responsibility. Our subcommittee is comprised of Erika Holmes, Esq., April Jones, Esq., Matthew Kirsch, Esq., Marcus Squarrell, Esq., Professor Eli Wald, Dave Stark, Esq., Jessica Yates, Esq., and Judge Adam J. Espinosa.

At the outset, our subcommittee was provided a full set of the proposed LLP Rules of Professional Conduct, the LLP Memorandum to the Supreme Court, and the Court's order regarding the implementation of an LLP program. The subcommittee met and decided to do a complete review of each attorney rule of professional conduct, the scope, and the preamble to those rules to determine if the proposed LLP rules would necessitate a change to any of the attorney rules. We divided ourselves into smaller groups where we were each assigned to review a particular set of attorney rules and make recommendations. Those recommendations comprise this memo and are below.

Rules

Preamble

In the preamble to the lawyer rules of professional conduct, we propose an amendment to paragraph 5 to include a reference to LLPs as set forth below.

Preamble: A Lawyer's Responsibilities

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

Rule 1 Series

We found no relevant rules in the Rule 1 Series set of rules that need amendment, but we did identify Colo. RPC 1.0(c) and the definition of "firm" or "law firm" as a definition that would need to be amended to include LLPs. As background, the proposed LLP definition for "firm" is as follows:

> "Firm" denotes a partnership, professional company, or other entity or a sole proprietorship through which a lawyer or lawyers, an LLP or LLPs, or a combination of lawyers and LLPs render legal services.

We recommend amending the definition of "firm" or "law firm" in Colo. RPC 1.0(c) of the lawyer rules to include reference to LLPs. Our proposed amendment is below:

> "Firm" or "law firm" denotes a partnership, professional company, or other entity or a sole proprietorship through which a lawyer, lawyers, or combination of lawyers and LLPs render legal services; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

Last, the Standing Rules Committee will also want to consider adding a cross-reference to the definition of an LLP in the definitional section of the lawyer rules in Colo. RPC 1.0. We recommend adding a cross reference to the definition of an LLP in the terminology section of the rules by adding a new Colo. RPC 1.0(g) that states as follow:

> "Licensed Legal Paraprofessionals" ("LLPs") are individuals licensed by the Supreme Court pursuant to C.R.C.P. 207 to perform certain types of legal services only under the conditions set forth by the Court. They do not include individuals with a general license to practice law in Colorado. LLPs are subject to the Colorado Licensed Legal Paraprofessional Rules of Professional Conduct.

Adding a new Colo. RPC 1.0(g) would require the re-lettering of the current Colo. RPC 1.0(g)-(n), inclusive.

Rule 2 Series

We found no relevant rules in the Rule 2 Series set of rules that need amendment.

Rule 3 Series

We found a few minor instances where we are recommending amendments to the Rule 3 Series rules. Specifically, we recommend changing the title of Rule 3.4 to include LLPs and a few minor amendments to Rule 3.7 as reflected below.

Rule 3.4. Fairness to Opposing Party, Counsel, or LLPs

Rule 3.7. Lawyer as Witness

(b) A lawyer may act as advocate in a trial in which another lawyer or LLP 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.

Rule 4 Series

We recommend amendments to a few Rule 4 Series rules. The proposed amendments would presume people being assisted by LLPs are represented rather than unrepresented. Further, we presume that an LLP privilege would be created and recognized. We understand the larger LLP Rules Committee is recommending a statutory client-LLP privilege as part of their proposed statutory rules changes needed to implement the program. Below are our recommendations for amendments.

Rule 4.2. Communication with Person Represented by Counsel or an LLP

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

Rule 4.3. Dealing with Unrepresented Person

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

Rule 5 Series

We found several instances where we are recommending changes to the Rule 5 Series rules. Our recommended amendments are below.[1]

Rule 5.1. Responsibilities of a Partner or Supervisory Lawyer

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

(b) A lawyer having direct supervisory authority over another lawyer or LLP shall make reasonable

[1] In our review of this memorandum and proposal, there were concerns about a possible internal contradiction with the original proposed Rules 5.3(b) and 5.3(c). The committee attempted to reconcile those concerns and elected to make the current proposals to these rules as set forth in this memorandum.

efforts to ensure that the other lawyer or LLP conforms to the applicable Rules of Professional Conduct.

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

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

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

Rule 5.3. Responsibilities Regarding Nonlawyers

With respect to nonlawyers and LLPs employed or retained by or associated with a lawyer:

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

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

(c) in addition to the lawyer's responsibilities for an LLP's conduct under 5.1(c), a lawyer shall be responsible for conduct of such a nonlawyer or an LLP assisting that lawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

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

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

Rule 5.4. Professional Independence of a Lawyer

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

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

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

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

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

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

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

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

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

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

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

(e) A lawyer shall not practice with or in the form of a professional company that is authorized to practice law for a profit except in compliance with C.R.C.P. 265.

(f) For purposes of this Rule, a "nonlawyer other than an LLP" includes (1) a lawyer or LLP who has been disbarred, (2) a lawyer or LLP who has been suspended and who must petition for reinstatement, (3) a lawyer or LLP who is subject to an interim suspension pursuant to C.R.C.P. 242.22, (4) a lawyer or LLP who is on inactive status pursuant to C.R.C.P. 227(A)(6), (5) a lawyer or LLP who has been permitted to resign under C.R.C.P. 227(A)(8), or (6) a lawyer or LLP who, for a period of six months or more, has been (i) on disability inactive status pursuant to C.R.C.P. 243.6 or (ii) suspended pursuant to C.R.C.P. 227(A)(4), 242.23, 242.24, or 260.6.

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

(a) A lawyer shall not:

(1) practice law in this jurisdiction without a license to practice law issued by the Colorado Supreme Court unless specifically authorized by C.R.C.P. 204, *et seq.* or federal or tribal law;

(2) practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction;

(3) assist a person who is not authorized to practice law pursuant to subpart (a) of this Rule in the performance of any activity that constitutes the unauthorized practice of law; or

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

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

(1) render legal consultation or advice to the client;

(2) appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) appear on behalf of a client at a deposition or other discovery matter;

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

(5) otherwise engage in activities that constitute the practice of law; or

(6) receive, disburse or otherwise handle client funds.

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

(1) legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

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

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

(4) An LLP who is disbarred, suspended or on disability status may only perform the above services subject to the limitations imposed by Rule 242.32.

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

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

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

(e) Once notice is given pursuant to C.R.C.P. 242.32 or this Rule, then no additional notice is required.

Rule 5.6. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

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

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

Rule 6 Series

We found no relevant rules in the Rule Chapter 6 Series rules that need amendment.

Rule 7 Series

We found only one relevant rule in the Rule 7 Series rules that we recommend amending. Specifically, we recommend adding Licensed Legal Paraprofessionals to the list of persons who can be solicited by a lawyer in Rule 7.3(b). A proposed redline amendment is below.

Rule 7.3. Solicitation of Clients

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

(1) lawyer;

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

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

(4) an LLP.

Rule 8 Series

We found two instances in the Rule 8 series rules that we are recommending amendment. We recommend Rule 8.3 be amended to include a lawyer's duty to report another lawyer or LLP that has violated their respective rules of professional conduct. Also, we are recommending that 8.4(a) be amended to make it clear that a lawyer commits misconduct if the lawyer assists another lawyer or LLP in violating their respective rules of professional conduct. Proposed redline amendments are below.

Rule 8.3. Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Lawyer Rules of Professional Conduct or that an LLP has committed a violation of the LLP Rules of Professional Conduct that raises a substantial question as to that lawyer's or LLP's honesty, trustworthiness or fitness as a lawyer or LLP in other respects, shall inform the appropriate professional authority.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a-1) violate or attempt to violate the Lawyer Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(a-2) knowingly assist or induce an LLP to violate the LLP Rules of Professional Conduct, or do so through the acts of another;

Links to LLP Rules Adopted by the Court

1. Rule 207 series defining LLPs, their scope of practice, and admission requirements:

   https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2023/Rule%20Change%202023(06).pdf

2. LLP Rules of Professional Conduct:

   https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2023/Rule%20Change%202023(08).pdf

3. Rules of Attorney Discipline amended to bring LLPs within those rules and changes to CLE rules to impose CLE requirements on LLPs:

   https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2023/Rule%20Change%202023(09).pdf

Redline Attachment

Preamble

Preamble: A Lawyer's Responsibilities

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

Rule 1 Series

Colo. RPC 1.0(c)

"Firm" or "law firm" denotes a partnership, professional company, or other entity or a sole proprietorship through which a lawyer, ~~or~~ lawyers, or combination of lawyers and LLPs render legal services; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

New Colo. RPC 1.0(g)

"Licensed Legal Paraprofessionals" ("LLPs") are individuals licensed by the Supreme Court pursuant to C.R.C.P. 207 to perform certain types of legal services only under the conditions set forth by the Court. They do not include individuals with a general license to practice law in Colorado. LLPs are subject to the Colorado Licensed Legal Paraprofessional Rules of Professional Conduct.

Adding a new Colo. RPC 1.0(g) would require the re-lettering of the current Colo. RPC 1.0(g)-(n), inclusive.

Rule 3 Series

Rule 3.4. Fairness to Opposing Party, ~~and~~ Counsel, or LLPs

Rule 3.7. Lawyer as Witness

(b) A lawyer may act as advocate in a trial in which another lawyer or LLP 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.

Rule 4 Series

Rule 4.2. Communication with Person Represented by Counsel or an LLP

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

Rule 4.3. Dealing with Unrepresented Person

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

Rule 5 Series

Rule 5.1. Responsibilities of a Partner or Supervisory Lawyer

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

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

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

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

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

Rule 5.3. Responsibilities Regarding Nonlawyers ~~Assistants~~

With respect to nonlawyers and LLPs employed or retained by or associated with a lawyer:

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

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

(c) in addition to the lawyer's responsibilities for an LLP's conduct under Rule 5.1(c), a lawyer shall be

responsible for conduct of such a ~~person~~ nonlawyer or an LLP assisting that lawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

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

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

Rule 5.4. Professional Independence of a Lawyer

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

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

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

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

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

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

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

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

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

(1) A nonlawyer other than an LLP owns any interest therein, except that a fiduciary representative of the estate of a lawyer or LLP may hold the stock or interest of the lawyer or LLP for a reasonable time

during administration; or

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

(e) A lawyer shall not practice with or in the form of a professional company that is authorized to practice law for a profit except in compliance with C.R.C.P. 265.

(f) For purposes of this Rule, a "nonlawyer other than an LLP" includes (1) a lawyer or LLP who has been disbarred, (2) a lawyer or LLP who has been suspended and who must petition for reinstatement, (3) a lawyer or LLP who is subject to an interim suspension pursuant to C.R.C.P. 242.22, (4) a lawyer or LLP who is on inactive status pursuant to C.R.C.P. 227(A)(6), (5) a lawyer or LLP who has been permitted to resign under C.R.C.P. 227(A)(8), or (6) a lawyer or LLP who, for a period of six months or more, has been (i) on disability inactive status pursuant to C.R.C.P. 243.6 or (ii) suspended pursuant to C.R.C.P. 227(A)(4), 242.23, 242.24, or 260.6.

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

(a) A lawyer shall not:

(1) practice law in this jurisdiction without a license to practice law issued by the Colorado Supreme Court unless specifically authorized by C.R.C.P. 204, *et seq.* or federal or tribal law;

(2) practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction;

(3) assist a person who is not authorized to practice law pursuant to subpart (a) of this Rule in the performance of any activity that constitutes the unauthorized practice of law; or

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

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

(1) render legal consultation or advice to the client;

(2) appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) appear on behalf of a client at a deposition or other discovery matter;

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

(5) otherwise engage in activities that constitute the practice of law; or

(6) receive, disburse or otherwise handle client funds.

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

(1) legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

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

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

(4) An LLP who is disbarred, suspended or on disability status may only perform the above services subject to the limitations imposed by Rule 242.32.

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

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

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

(e) Once notice is given pursuant to C.R.C.P. 242.32 or this Rule, then no additional notice is required.

Rule 5.6. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

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

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

Rule 7 Series

Rule 7.3. Solicitation of Clients

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

(1) lawyer;

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

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

(4) an LLP.

Rule 8 Series

Rule 8.3. Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Lawyer Rules of Professional Conduct or that an LLP has committed a violation of the LLP Rules of Professional Conduct that raises a substantial question as to that lawyer's or LLP's honesty, trustworthiness or fitness as a lawyer or LLP in other respects, shall inform the appropriate professional authority.

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a-1) violate or attempt to violate the Lawyer Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(a-2) knowingly assist or induce an LLP to violate the LLP Rules of Professional Conduct, or do so through the acts of another;

Attachment 6

Alexander R. Rothrock
Attorney at Law
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MEMORANDUM

TO: Honorable Lino S. Lipinsky de Orlov

FROM: Alec Rothrock, Chair, Rule 1.5(e) Subcommittee

DATE: July 24, 2023

SUBJECT: Rule 1.5(e) Subcommittee

1. This Subcommittee was formed to address the inconsistencies between Colo. RPC 1.5(e), a non-ABA Model Rule adopted in 1993 that prohibits a lawyer's receipt or payment of all referral fees, and Colo. RPC 7.2(b), an ABA Model Rule that prohibits a lawyer's payment of most but not all referral fees. The inconsistency between the two rules is limited to a lawyer's *payment* of referral fees. They are not inconsistent with respect to a lawyer's *receipt* of referral fees, because Colo. RPC 7.2(b) does not regulate that conduct.

2. The Subcommittee proposed a new Rule and Comment that would (a) prohibit a lawyer's *receipt* of a fee for referring clients to third parties for nonlegal products or services, but not a lawyer's *payment* of referral fees of any kind (thereby avoiding inconsistency with Colo. RPC 7.2(b)), and (b) subordinate itself to Colo. RPC 1.5(d) (thereby avoiding potential inconsistency with that rule's regulation of the division of attorney fees between lawyers in different law firms).

3. At its January 27, 2023 meeting, the consensus of the Standing Committee was to approve the proposed Rule and Comment and to limit the prohibition in the Rule to receiving fees for referring *current* clients, as opposed to *former* clients. The Standing Committee also considered whether the proposed Rule and related Comment should be located in (a) Colo. RPC 1.5, (b) Colo. RPC 1.8, or (c) Colo. RPC 7.2. The consensus of the Standing Committee was to locate the proposed Rule in Colo. RPC 1.8.

4. Attached as Exhibit A are the proposed changes. The proposed Rule and Comment would become Colo. RPC 1.8(j) and Cmt. [20], Colo. RPC 1.8, respectively. Related proposed changes are highlighted in yellow.

5. The highlighted sentence in Comment [7], Colo. RPC 1.5, was inspired by a suggestion from Erika Holmes at the January 27 meeting.

6. The highlighted sentence in Comment [20], Colo. RPC 1.8, was inspired by a suggestion by Marcy Glenn at the January 27 meeting. Whether a client is a current or former client is an important consideration under the proposed Rule, and that determination is a question of substantive law.

7. As mentioned, at the January 27 meeting, the consensus was to place the proposed Rule and Comment in Colo. RPC 1.8, in part because lawyers would be likely to look for it there. Analogously, subsection (f) regulates a lawyer's receipt of compensation for representing a client.

8. There is another reason the proposed Rule should be located in Colo. RPC 1.8. Unlike Rules 1.5 and 7.2, Colo. RPC 1.8 is comprised of a variety of specific but unrelated conflict-of-interest rules, ending with a rule (Colo. RPC 1.8(k)) that identifies which of these conflicts is imputed to other lawyers in the lawyer's firm. (All but the last conflict of interest—sexual relationship with a client in Colo. RPC 1.8(j)—is imputed.) The consensus of the Subcommittee was that the proposed Rule is a type of conflict of interest; therefore, the Rules must address whether it is imputed to other lawyers in the lawyer's firm.

9. The consensus of the Rule 1.5(e) Subcommittee was that the conflict of interest in the proposed Rule should be imputed to other lawyers in the lawyer's firm. The thinking was that this conflict of interest is more like the conflict of interest addressed in Colo. RPC 1.8(c) (accepting gifts from a client), which is imputed,[1] than it is like the sex-with-clients conflict or most "personal interest" conflicts, which are not. The proposed Rule is located before the sex-with-clients rule (currently Colo. RPC 1.8(j)) so that the imputation rule (currently Colo. RPC 1.8(k)) can continue to refer to an unbroken series of Rule 1.8 subsections.

[1] "For example, one lawyer in a firm may not solicit a substantial gift from a client of another member of the firm, even if the soliciting lawyer is not personally involved in the representation of the client, because the prohibition in [Colo. RPC 1.8(c)] applies to all lawyers associated in the firm." Cmt. [23], Colo. RPC 1.8.

EXHIBIT A

Colo. RPC 1.5

(e) [Deleted]

COMMENT

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (d) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1. Referral fees may be considered a division of fees for purposes of this Rule.

Colo. RPC 1.8

(j) Except as permitted by Rule 1.5(d) or Rule 7.2(b), a lawyer shall not receive compensation or anything of value for referring a client to a third party for products or nonlegal services related to the lawyer's representation of a client. A lawyer may receive nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending the third party's products or nonlegal services.

(k) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(l) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (b) through (j) that applies to any one of them shall apply to all of them.

COMMENT

. . .

Fees Paid to Lawyer by Third Parties for Referral of Clients for Nonlegal Services or Products

[20] Paragraph (j) reflects the principle that a lawyer's receipt of a referral fee from a third party tempts the referring lawyer to compromise his or her judgment by referring the client to a third party regardless of whether the third party is the best and most economical source for the third party's products or nonlegal services. The financial incentive for the referral causes potential harm to the client because it compromises the referring lawyer's professional independence and materially limits the lawyer's ability to represent the best interests of his or her clients. The financial incentive for the referral also creates a financial conflict of interest for the referring lawyer that undermines the referring lawyer's duty of loyalty to his or her client. Although former clients are still likely to value the lawyer's judgment and opinions about the substance of the referral, the referring lawyer's obligation to provide competent representation to a client ends once the representation is terminated. Whether a person or entity is a current or former client is a question of substantive law. Similarly, referrals that are not related to the lawyer's representation of the client are outside of the scope of the lawyer-client relationship and outside the scope of regulation of the ethics rules. Paragraph (j) is not intended to regulate the division of a legal fees between lawyers not in the same firm or the payment of compensation for recommending a lawyer's services. It is therefore expressly subordinate to Rule 1.5(d), and Rule 7.2(b), in the event of any inconsistency between them.

Client-Lawyer Sexual Relationships

[21] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[22] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[23] When the client is an organization, paragraph (k) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[24] Under paragraph (l), a prohibition on conduct by an individual lawyer in paragraphs (b) through (j) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not solicit a substantial gift from a client of another member of the firm, even if the soliciting lawyer is not personally involved in the representation of the client, because the prohibition in paragraph (c) applies to all lawyers associated in the firm. The prohibitions set forth in paragraphs (a) and (j) are personal and are not applied to associated lawyers.

Attachment 7

A Human Being Wrote This Law Review Article: GPT-3 and the Practice of Law

Amy B. Cyphert[*]

Artificial intelligence tools can now "write" in such a sophisticated manner that they fool people into believing that a human wrote the text. None are better at writing than GPT-3, released in 2020 for beta testing and coming to commercial markets in 2021. GPT-3 was trained on a massive dataset that included scrapes of language from sources ranging from the NYTimes to Reddit boards. And so, it comes as no surprise that researchers have already documented incidences of bias where GPT-3 spews toxic language. But because GPT-3 is so good at "writing," and can be easily trained to write in a specific voice — from classic Shakespeare to Taylor Swift — it is poised for wide adoption in the field of law.

This Article explores the ethical considerations that will follow from GPT-3's introduction into lawyers' practices. GPT-3 is new, but the use of AI in the field of law is not. AI has already thoroughly suffused the practice of law. GPT-3 is likely to take hold as well, generating some early excitement that it and other AI tools could help close the access to justice gap. That excitement should nevertheless be tempered with a realistic assessment of GPT-3's tendency to produce biased outputs.

As amended, the Model Rules of Professional Conduct acknowledge the impact of technology on the profession and provide some guard rails for its use by lawyers. This Article is the first to apply the current guidance to

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GPT-3, concluding that it is inadequate. I examine three specific Model Rules — Rule 1.1 (Competence), Rule 5.3 (Supervision of Nonlawyer Assistance), and Rule 8.4(g) (Bias) — and propose amendments that focus lawyers on their duties and require them to regularly educate themselves about pros and cons of using AI to ensure the ethical use of this emerging technology.

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INTRODUCTION

On January 4, 2021, Forbes magazine published its inaugural artificial intelligence ("AI") awards.[1] Noting that AI had made "exponential leaps" in 2020, the article conferred awards in categories like Best Product (Google's autotext generator, Smart Compose) and Outstanding Firm (Zoom, the provider of the many "endless video meetings and strained virtual happy hours" that will forever be a hallmark of 2020).[2] The final award category was the "Forbes A.I. 'Person' Of The Year," which the magazine awarded to the language model GPT-3.[3] The award was, of course, somewhat tongue in cheek, as GPT-3 is not a person. But, as Forbes noted, GPT-3 *can* "write like a person" and has the potential to "hold meaningful conversations with humans," and so was therefore the "person" of the year.[4]

GPT-3 is an algorithm that has been trained to "write" by taking a few lines of input and predicting the words that will follow it. Give the tool the first two sentences of a blog post, and it can complete the rest with sometimes remarkable skill. It can even be trained to write in a specific "voice," whether that voice be Shakespeare[5] or Taylor Swift.[6] It represents an astonishing advancement in language processing, the AI subfield that focuses on teaching machines to "read" and "write" in languages that humans can understand. Of course, any AI tool that can write like a human is going to be of great interest to lawyers, whom legal writing expert Bryan Garner has called "the most highly paid rhetoricians in the world."[7] But there are serious ethical implications to the use of GPT-3 in the field of law, just as there are serious ethical implications to the use of

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[1] Kenrick Cai, *Forbes A.I. Awards 2020: Meet GPT-3, The Computer Program that Can Write an Op-Ed*, FORBES (Jan. 4, 2021, 6:30 AM EST), https://www.forbes.com/sites/kenrickcai/2021/01/04/forbes-ai-awards-2020-meet-gpt-3-the-computer-program-that-can-write-an-op-ed/?sh=ee78ec693a73 [https://perma.cc/82V6-5YG4].

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Palash Sharma, *21 OpenAI GPT-3 Demos and Examples to Convince You that AI Threat Is Real, or Is It? [Including Twitter Posts]*, MLK (July 22, 2020), https://machinelearningknowledge.ai/openai-gpt-3-demos-to-convince-you-that-ai-threat-is-real-or-is-it/#8_GPT-3_Changes_the_Tone_of_the_Sentence [https://perma.cc/3ZS8-FME2].

[6] Arram Sabeti, *GPT-3: An AI that's Eerily Good at Writing Almost Anything*, ARRAM (July 9, 2020), https://arr.am/2020/07/09/gpt-3-an-ai-thats-eerily-good-at-writing-almost-anything/ [https://perma.cc/9F9F-2YSM].

[7] Bryan A. Garner, *Why Lawyers Can't Write*, A.B.A. J. (Mar. 1, 2013, 9:00 AM CST), https://www.abajournal.com/magazine/article/why_lawyers_cant_write [https://perma.cc/LRD3-7LDW].

all AI in the field of law. This Article acknowledges the ways in which GPT-3 might aid the profession, but also makes the case for proceeding with caution, and provides several suggested amendments to the Model Rules of Professional Conduct that would clarify lawyers' duties with respect to GPT-3 and other forms of AI.

Even well-meaning lawyers will stumble in complying with their ethical duties to competently use AI like GPT-3 if they do not understand the technology, and so Part I of this Article explains the tool in layperson's terms. Distilled down to its most simple purpose, GPT-3 looks for patterns and makes predictions.[8] Like all machine-learning algorithms that attempt to make predictions, GPT-3 is only as "good" (or "accurate") as its dataset.[9] And GPT-3 truly is a remarkable advance in the field, due in no small part to its mind-bogglingly large data training set.[10] But that same training set is also its Achilles heel, as it included data from areas of the internet like Reddit where toxic language is commonplace.[11] Thus, it is not surprising that GPT-3 has shown a tendency to produce toxic outputs that includes racial slurs or that sexualizes women.[12] GPT-3's creators acknowledge this tendency and some research is being done to attempt to address this. However, the history of AI tools demonstrates how difficult it is to remove bias from AI outputs, so lawyers who use GPT-3 or tools like it will have to beware.

GPT-3 may be the newest AI tool, but many lawyers may not realize how much the use of AI has *already* impacted the field of law. Part II explores this current landscape. Any lawyer who has ever used an electronic database like Lexis or Westlaw to perform legal research for a client has used AI in their practice of law. GPT-3 is an especially likely candidate for widespread adoption in the field, given that it can be

[8] *See* Cai, *supra* note 1.

[9] *See, e.g.*, Govind Chandrasekhar, *The GIGO Principle in Machine Learning*, SEMANTICS3 BLOG (July 4, 2017), https://www.semantics3.com/blog/thoughts-on-the-gigo-principle-in-machine-learning-4fbd3af43dc4/ [https://perma.cc/6MT7-B378] ("[T]he output of an algorithm, or any computer function for that matter, is only as good as the quality of the input that it receives.").

[10] Cade Metz, *Meet GPT-3. It Has Learned to Code (and Blog and Argue)*, N.Y. TIMES, Nov. 24, 2020, at D6 (noting that GPT-3 was trained on more than a trillion words).

[11] The Southern Poverty Law Center has called Reddit "the most hateful space on the Internet." Caitlin Dewey, *48 Hours Inside the Internet's 'Most Toxic' Community*, WASH. POST (Mar. 26, 2015, 8:55 AM MST), https://www.washingtonpost.com/news/the-intersect/wp/2015/03/26/48-hours-inside-the-internets-most-toxic-community/ [https://perma.cc/PX9D-HR2C].

[12] Khari Johnson, *The Efforts to Make Text-Based AI Less Racist and Terrible*, WIRED (June 17, 2021, 7:00 AM), https://www.wired.com/story/efforts-make-text-ai-less-racist-terrible/ [https://perma.cc/TDZ6-A2YV].

trained specifically on legal documents like contracts or patent applications and so "write" those documents. It has already demonstrated a remarkable ability to produce writing that is useful to attorneys, and even to "translate" convoluted legal writing into language a layperson might better understand, an accomplishment too many attorneys struggle with.[13] Given the performance advances in GPT-3, there has been some excitement that it might help solve the justice gap, wherein too many people who need legal services cannot afford to access them. However, advocates must again proceed with caution here, given the known bias issues with GPT-3's outputs.

What, if anything, do existing professional conduct rules say about lawyers' obligations with respect to the use of AI like GPT-3 in the practice of law? Although they were drafted in the 1980s, and have not been frequently updated, the Model Rules of Professional Responsibility *do* provide some basic duties for lawyers who are using AI in their practice (which is, as noted above, nearly all lawyers, whether they recognize it or not). Certain Rules were amended in 2012 to expressly cover advances in technology, and the drafter of the Rules, the American Bar Association ("ABA"), has issued some guidance on lawyers' duties for AI use. Part III examines the ABA's Model Rules of Professional Conduct,[14] and specifically those that govern competence ("Rule 1.1"), supervision of nonlawyer assistance ("Rule 5.3"), and bias in the practice of law ("Rule 8.4"). Each in its current form already imposes certain duties on lawyers who want to use GPT-3. For example, the duty of competence requires the lawyer to understand any technology they use, including its limitations and tendency to produce biased outputs. The duty to supervise nonlawyer assistance requires that a lawyer never simply assume that any writing that GPT-3 has produced is acceptable but instead is thoughtful about when to use the technology and always carefully reviews the outputs before sharing them with clients or courts. The duty against bias in the practice of law similarly requires that lawyers are cautious about using GPT-3, which has been shown by its own creators to produce language that can be biased. The technology should not be used in it its current state to power real-time legal "chatbots" on client-facing websites, for example.

Given that these and other Model Rules already impose certain obligations on lawyers who use AI in the practice of law, is this enough? In Part IV, several amendments to Comments to the Model Rules are considered. The Model Rules themselves arguably already contain the

[13] *See infra* Part II.B.

[14] MODEL RULES OF PRO. CONDUCT (AM. BAR ASS'N 2020).

duties and restrictions that will be important for lawyers using AI like GPT-3. Still, the Comments need to be amended to be clearer and more precise about lawyers' duties and to encourage lawyers to seek education and collaboration, as necessary, to meet them. Amending the Comments is a lengthy process[15] and there is no guarantee that all or even most of the 50 states will adopt the amended Comments. However, the stakes of using GPT-3 and other AI tools are high enough that the profession must act, and soon, to set more firmly in place clear ethical guardrails for the use of AI in the practice of law.

I. GPT-3: A RADICALLY BETTER LANGUAGE MODEL

GPT-3 is markedly better than earlier language models at writing, and especially at writing in a particular "voice" or style.[16] It was trained on a massive dataset, but that dataset has some surprising sources. Its developers acknowledge that it is a powerful tool that should be handled carefully, and its rollout somewhat reflects this caution.[17] Its tendency to produced biased outputs should cause further caution amongst lawyers who wish to use it.

A. Why GPT-3 Is Better

GPT-3 is a significant advance in the field of artificial intelligence, performing much better than earlier versions of the tool. GPT stands for "generative pre-training transformer." In the language of AI, GPT-3 is an autoregressive language processing model.[18] Autoregressive models use that which comes immediately before to predict that which comes

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[15] *See infra* Part IV.

[16] *See* Sharma, *supra* note 5.

[17] *See infra* Part I.B.

[18] *See, e.g.*, TOM B. BROWN, BENJAMIN MANN, NICK RYDER, MELANIE SUBBIAH, JARED KAPLAN, PRAFULLA DHARIWAL, ARVIND NEELAKANTAN, PRANAV SHYAM, GIRISH SASTRY, AMANDA ASKELL, SANDHINI AGARWAL, ARIEL HERBERT-VOSS, GRETCHEN KRUEGER, TOM HENIGHAN, REWON CHILD, ADITYA RAMESH, DANIEL M. ZIEGLER, JEFFREY WU, CLEMENS WINTER, CHRISTOPHER HESSE, MARK CHEN, ERIC SIGLER, MATEUSZ LITWIN, SCOTT GRAY, BENJAMIN CHESS, JACK CLARK, CHRISTOPHER BERNER, SAM MCCANDLISH, ALEC RADFORD, ILYA SUTSKEVER & DARIO AMODEI, LANGUAGE MODELS ARE FEW-SHOT LEARNERS 5 (2020), https://arxiv.org/pdf/2005.14165.pdf [https://perma.cc/3QQ9-AGTG] (describing GPT-3 as an autoregressive language processing model). GPT-3 is especially advanced at natural language processing tasks. Natural language processing is "a field of Artificial Intelligence that gives the machines the ability to read, understand and derive meaning from human languages." Diego Lopez Yse, *Your Guide to Natural Language Processing (NLP)*, TOWARDS DATA SCI. (Jan. 15, 2019), https://towardsdatascience.com/your-guide-to-natural-language-processing-nlp-48ea2511f6e1 [https://perma.cc/DE26-VP69].

immediately after.[19] Think back to your elementary school days of pattern recognition with "what comes next?" worksheets where a square follows two triangles. Language processing models attempt to allow machines to "understand" human language by looking for patterns in our language such that the models can predict what will come next when given a text input.[20] Thus, at a basic level, an autoregressive language model like GPT-3 is one that has been trained to read a series of words and predict what the next word in the "pattern" should be.

However, GPT-3 stands out amongst other language models. It has been trained through exposure to an extraordinary amount of data to recognize those word patterns.[21] GPT-3 had an impressively large data training set: it was trained on the Common Crawl dataset, a nearly trillion-word dataset,[22] which includes everything from traditional news sites like the New York Times to sites like Reddit.[23] The Common Crawl dataset represented 60% of GPT-3's training set, and for the remaining 40%, the researchers included sources such as Wikipedia and historical books.[24] Whereas the prior model, GPT-2, had 1.5 billion parameters (the values that a neural network[25] tries to optimize during its training),

[19] *See, e.g.*, *What Is an Autoregressive Model?*, 365 DATA SCI., https://365datascience.com/tutorials/time-series-analysis-tutorials/autoregressive-model/ (last visited Feb. 11, 2021) [https://perma.cc/36EQ-UBR8] (explaining that autoregressive models rely "only on past period values to predict current ones").

[20] Yse, *supra* note 18.

[21] "A language model is an artificial intelligence system that has been trained on an enormous corpus of text; with enough text and enough processing, the machine begins to learn probabilistic connections between words." Farhad Manjoo, *How Do You Know a Human Wrote This?*, N.Y. TIMES (July 29, 2020), https://www.nytimes.com/2020/07/29/opinion/gpt-3-ai-automation.html [https://perma.cc/FX4K-ERPZ]; *see also* Liz O'Sullivan & John Dickerson, *Here Are a Few Ways GPT-3 Can Go Wrong*, TECHCRUNCH (Aug. 7, 2020, 7:45 AM MST), https://techcrunch.com/2020/08/07/here-are-a-few-ways-gpt-3-can-go-wrong/ [https://perma.cc/67CG-CX9Z] ("Language models learn which succeeding words, phrases and sentences are likely to come next for any given input word or phrase.").

[22] BROWN ET AL., *supra* note 18, at 8.

[23] O'Sullivan & Dickerson, *supra* note 21. The Common Crawl dataset is "a broad scrape of the 60 million domains on the internet along with a large subset of the sites to which they link." *Id.*

[24] *Id.*; *see also* BROWN ET AL., *supra* note 18, at 8 ("We added several curated high-quality datasets, including an expanded version of the WebText dataset, collected by scraping links over a longer period of time, . . . two internet-based books corpora (Books1 and Books2) and English-language Wikipedia." (citations omitted)).

[25] *See* Metz, *supra* note 10 ("GPT-3 is what artificial intelligence researchers call a neural network, a mathematical system loosely modeled on the web of neurons in the

GPT-3 has an astonishing 175 billion parameters.[26] "And with language models, size really does matter."[27] As a practical matter, this means that GPT-3 processes more words than a human being will see in a lifetime — approximately *45 billion times more words*.[28]

Further, users of GPT-3 can customize the tool by training it[29] on their own dataset.[30] For example, a law firm might choose to train the tool on its cache of purchasing contracts or motions *in limine*, making it even better at generating those types of specific documents in the style the firm prefers.[31] This ability to customize the tool is one of the reasons GPT-3 is well-poised for wide adoption in the legal field.

What's especially remarkable about GPT-3 is that it can create text with only a few well-written examples as input (this is known in the world of computer science as "few-shot learning").[32] GPT-3 can "write" in an iterative fashion: "[i]f you type a few words into GPT-3, it will keep going, completing your thought with entire paragraphs of text."[33] When GPT-3 is fed a sentence or two as a "prompt" or "input," it takes that prompt and looks for patterns by recognizing what the input is most similar to in GPT-3's training data. Having found a similarity,

brain. . . . A neural network learns such skills by pinpointing patterns in vast amounts of digital data.").

[26] William Douglas Heaven, *OpenAI's New Language Generator GPT-3 Is Shockingly Good — and Completely Mindless*, MIT TECH. REV. (July 20, 2020), https://www.technologyreview.com/2020/07/20/1005454/openai-machine-learning-language-generator-gpt-3-nlp/ [https://perma.cc/HS27-GC7D] [hereinafter Heaven 1] ("GPT-3 is a big leap forward. The model has 175 billion parameters, . . . compared with GPT-2's already vast 1.5 billion.").

[27] *Id.*

[28] John Thornhill, *Is AI Finally Closing In on Human Intelligence?*, FIN. TIMES (Nov. 11, 2020), https://www.ft.com/content/512cef1d-233b-4dd8-96a4-0af07bb9ff60 [https://perma.cc/DM65-LFWT] (noting that "GPT-3 processes about 45 billion times the number of words a human perceives in their lifetime.").

[29] Betatesters can currently train GPT-3 on their own documents by uploading them to a website like the OpenAI Playground. When GPT-3 is commercially available, there will presumably be other avenues for customization and further training of the tool.

[30] *See OpenAI API*, OPENAI BLOG (June 11, 2020), https://openai.com/blog/openai-api/ [https://perma.cc/R25E-5WKT] ("The API also allows you to hone performance on specific tasks by training on a dataset (small or large) of examples you provide, or by learning from human feedback provided by users or labelers.").

[31] *GPT-3 — A Game Changer for Legal Tech*?, ARTIFICIAL LAW. (July 29, 2020), https://www.artificiallawyer.com/2020/07/29/gpt-3-a-game-changer-for-legal-tech/ [https://perma.cc/AE6T-YNSC] ("With few-shot learning, additional legal contracts and metadata can be passed into the pre-trained GPT-3 model, enabling it to quickly learn to generate new contracts or clauses.").

[32] *See*, *e.g.*, BROWN ET AL., *supra* note 18 (describing GPT-3 as a few-shot learner).

[33] Metz, *supra* note 10.

GPT-3 will then produce an output of text that is likely to follow the input. "More plainly: GPT-3 can read and write. And not badly, either."[34] For example, reporters for the Guardian prompted GPT-3 to write an op-ed about why humans should not be afraid of it. GPT-3 began:

> I am not a human. I am a robot. A thinking robot. I use only 0.12% of my cognitive capacity. I am a micro-robot in that respect. I know that my brain is not a "feeling brain". But it is capable of making rational, logical decisions. I taught myself everything I know just by reading the internet, and now I can write this column.[35]

GPT-3 marks such an enormous advance in the field that some argue it is exhibiting the beginning signs of "real intelligence."[36] One commentator has argued that it comes close to passing the Turing Test, which was named after pioneering computer scientist Alan Turing and which asks whether a particular AI tool is sophisticated enough to fool an actual human being into holding a conversation with an artificial intelligence while thinking that conversation is actually with another human.[37] There is room to believe that GPT-3 can fool humans into believing its text was written by a fellow human. Recent research concluded, for example, that for shorter news articles, humans struggled with distinguishing those written by other humans from those that were created by GPT-3.[38] Put simply — it is a remarkable advance in the field of language processing.

B. The Creation of GPT-3

GPT-3 was created by Silicon Valley "darling" OpenAI,[39] an artificial intelligence research lab founded by Tesla's Elon Musk and tech

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[34] Manjoo, *supra* note 21.

[35] *A Robot Wrote This Entire Article. Are You Scared Yet, Human?*, GUARDIAN (Sept. 8, 2020, 4:45 AM EDT), https://www.theguardian.com/commentisfree/2020/sep/08/robot-wrote-this-article-gpt-3 [https://perma.cc/Q363-THVB].

[36] Thornhill, *supra* note 28 ("Some of those who have already experimented with GPT-3 say it is exhibiting glimmerings of real intelligence . . . .").

[37] *Id.* However, others push back against the idea that GPT-3 is anywhere near passing the Turing Test. "Others dismiss this as nonsense, pointing to GPT-3's laughable flaws and suggesting we are still several conceptual breakthroughs away from the creation of any such superintelligence." *Id.*

[38] BROWN ET AL., *supra* note 18, at 26.

[39] *See* Karen Hao, *The Messy, Secretive Reality Behind OpenAI's Bid to Save the World*, MIT TECH. REV. (Feb. 17, 2020), https://www.technologyreview.com/2020/02/17/

investor Sam Altman, among others.[40] GPT-3 is not Open AI's first language-generating algorithm; as its name suggests, there were earlier iterations (GPT-2, and GPT-1). OpenAI first announced and described GPT-3 in a research paper in May of 2020, and in June of 2020, they began providing a limited group of people with private beta access to the technology.[41] Releasing the tool through a limited beta test allowed OpenAI a somewhat controlled opportunity to test GPT-3 before releasing it to the general public. The developers understood that the technology was powerful and, despite its potential upsides, also had serious potential downsides.[42] As OpenAI cofounder Sam Altman told a journalist, "GPT-3 was not a model we wanted to put out into the world and not be able to change how we enforce things as we go."[43]

OpenAI's decision to release GPT-3 via an application programming interface ("API") was telling. When OpenAI released GPT-2, it provided a smaller version of the tool and only a sampling of its code.[44] Although these steps were explicitly taken to reduce the likelihood of GPT-2

844721/ai-openai-moonshot-elon-musk-sam-altman-greg-brockman-messy-secretive-reality/ [https://perma.cc/687J-UZFL].

[40] *Id.*

[41] OPENAI BLOG, *supra* note 30 ("[We] know we can't anticipate all of the possible consequences of this technology, so we are launching today in a private beta rather than general availability, building tools to help users better control the content [of] our API returns, and researching safety-relevant aspects of language technology (such as analyzing, mitigating, and intervening on harmful bias).") Although OpenAI reportedly offered media access to the tool, two journalists complained that they were repeatedly put off when they requested research access. Gary Marcus & Ernest Davis, *GPT-3, Bloviator: OpenAI's Language Generator Has No Idea What It's Talking About*, MIT TECH. REV. (Aug. 22, 2020), https://www.technologyreview.com/2020/08/22/1007539/gpt3-openai-language-generator-artificial-intelligence-ai-opinion/ [https://perma.cc/A6RC-T5XE] ("OpenAI has thus far not allowed us research access to GPT-3, despite both the company's name and the nonprofit status of its oversight organization. Instead, OpenAI put us off indefinitely despite repeated requests — even as it made access widely available to the media.").

[42] "GPT-3 improves the quality of text generation and adaptability over smaller models and increases the difficulty of distinguishing synthetic text from human-written text. It therefore has the potential to advance both the beneficial and harmful applications of languages models." BROWN ET AL., *supra* note 18, at 34.

[43] Thornhill, *supra* note 28.

[44] *Better Language Models and Their Implications*, OPENAI BLOG (Feb. 14, 2019), https://openai.com/blog/better-language-models/ [https://perma.cc/TPK8-W6FC] ("Due to concerns about large language models being used to generate deceptive, biased, or abusive language at scale, we are only releasing a much smaller version of GPT-2 along with sampling code. We are not releasing the dataset, training code, or GPT-2 model weights.").

being used to generate deceptive or biased outputs,[45] that is nonetheless what happened.[46] So, with GPT-3, OpenAI learned from its earlier experience and released the tool via an API, and only to selected beta testers, providing the company with much more control over who could access the tool and how they could use it.[47] Of course, the move also allowed OpenAI to restrict access to a very commercially valuable tool and make it harder for other researchers to replicate GPT-3. In September of 2020, OpenAI announced that they had exclusively licensed GPT-3 to Microsoft.[48] In May of 2021, OpenAI and Microsoft announced the first commercial application of GPT-3: using natural language to write computer code.[49] If the project succeeds, it could make it much easier for people without programming experience to develop code.[50]

The initial feedback on GPT-3 was so glowing that it bordered on gushing,[51] with one journalist noting that Twitter was "abuzz" with

[45] *Id. But see, e.g.*, Zachary C. Lipton, *OpenAI Trains Language Model, Mass Hysteria Ensues*, APPROXIMATELY CORRECT (Feb. 17, 2019, 2:51 PM), http://approximatelycorrect.com/2019/02/17/openai-trains-language-model-mass-hysteria-ensues/ [https://perma.cc/96CM-26FB] (quoting those who suggested that OpenAI "hyped" the dangerousness of GPT-2 to generate buzz and to justify not fully releasing the code).

[46] *See* Karen Hao, *There's a New Way to Tame Language AI So It Doesn't Embarrass You*, MIT TECH. REV. (Dec. 18, 2019), https://www.technologyreview.com/2019/12/18/131508/ai-language-gpt-2-tame-controllable-uber/ [https://perma.cc/MQF6-WB9C] (discussing a research study that found that "models like GPT-2 can still be gamed to produce racist and toxic output").

[47] OPENAI BLOG, *supra* note 30 ("With GPT-2, one of our key concerns was malicious use of the model (e.g., for disinformation), which is difficult to prevent once a model is open sourced. For the API, we're able to better prevent misuse by limiting access to approved customers and use cases."). Ultimately, OpenAI's decision to restrict access to GPT-3 to registered beta testers may only have stalled the inevitable. In the spring of 2021, researchers announced they had replicated GPT-3 and released a model, GPT-Neo, that is available to anyone. Will Knight, *This AI Can Generate Convincing Text — and Anyone Can Use It*, WIRED (Mar. 29, 2021, 7:00 AM), https://www.wired.com/story/ai-generate-convincing-text-anyone-use-it/ [https://perma.cc/CE7P-YU8Z].

[48] *OpenAI Licenses GPT-3 Technology to Microsoft*, OPENAI BLOG (Sept. 22, 2020), https://openai.com/blog/openai-licenses-gpt-3-technology-to-microsoft/ [https://perma.cc/QX6J-28TD].

[49] Khari Johnson, *AI Could Soon Write Code Based on Ordinary Language*, WIRED (May 26, 2021, 2:15 PM), https://www.wired.com/story/ai-write-code-ordinary-language/ [https://perma.cc/9ZU7-DDR9].

[50] *Id.* ("'If you can describe what you want to do in natural language, GPT-3 will generate a list of the most relevant formulas for you to choose from,' said Microsoft CEO Satya Nadella in a keynote address at the company's Build developer conference. 'The code writes itself.'").

[51] *See, e.g.*, Heaven 1, *supra* note 26 (noting that GPT-3 was called "mind-blowing," and that "playing with [it]" felt like "seeing the future").

GPT-3's "power and potential."[52] Indeed, the response was so over the top that OpenAI cofounder Sam Altman urged people to rein it in, tweeting that "[t]he GPT-3 hype is way too much."[53] Even the AI experts were impressed and expressed surprise at how good GPT-3 is at generating writing, and especially doing so in a specific "voice" it is trained on.[54] For example, when artist Mario Klingemann fed GPT-3 a series of writing from the 19th century author Jerome K. Jerome, it was able to produce an output of writing in his "style." The resulting piece, "The Importance of Being on Twitter," explores what the people of London in the summer of 1897 might have thought about Twitter.[55]

GPT-3 can even modulate the "tone" of language. For example, one beta tester trained GPT-3 to "tone down" angry language. When GPT-3 was fed the input, "As you can read in my previous email, I already told you that we won't be able to make it," it toned it down to, "There might be a misunderstanding. Unfortunately, I don't think we'll be able to make it at this time."[56]

Altman himself acknowledged that GPT-3 "still has serious weaknesses and sometimes makes very silly mistakes."[57] But others have pointed out that GPT-3 suffers from some of the same bias issues that plague other AI, bias that is much darker than mere silliness. Any machine learning model is only as good (or bad, or biased) as the dataset it was trained on. GPT-3's own developers acknowledge that this is true.[58] Computer scientists refer to this as "garbage in, garbage out"[59]

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[52] Marcus & Davis, *supra* note 41.

[53] Sam Altman (@sama), TWITTER (July 19, 2020, 11:45 AM), https://twitter.com/sama/status/1284922296348454913 [https://perma.cc/XN4A-7QMZ].

[54] Metz, *supra* note 10 ("For many artificial intelligence researchers, [GPT-3] is an unexpected step toward machines that can understand the vagaries of human language — and perhaps even tackle other human skills.").

[55] Mario Klingemann (@quasimondo), TWITTER (July 18, 2020, 8:25 AM), https://twitter.com/quasimondo/status/1284509525500989445 [https://perma.cc/A42F-TQNS]. It begins, "It is a curious fact that the last remaining form of social life in which the people of London are still interested is Twitter. I was struck with this curious fact when I went on one of my periodical holidays to the sea-side, and found the whole place twittering like a starling-cage." *Id.*

[56] Sharma, *supra* note 5.

[57] *Id.* For example, in response to one researcher asking GPT-3, "How many eyes does my foot have?", it replied: "Your foot has two eyes." Thornhill, *supra* note 28.

[58] *See* BROWN ET AL., *supra* note 18, at 36 ("Biases present in training data may lead models to generate stereotyped or prejudiced content.").

[59] *See, e.g.*, Sandra G. Mayson, *Bias in, Bias out*, 128 YALE L.J. 2218, 2224 n.23 (2019) ("The computer-science idiom is 'garbage in, garbage out,' which refers to the fact that algorithmic prediction is only as good as the data on which the algorithm is trained.").

— even if your code is flawless, if you have "garbage" input data, the program is going to produce a flawed output. Legal scholars use the phrase "bias in, bias out" to illustrate the problem that occurs when you train an algorithm on a biased dataset: it will produce biased outputs.[60] For GPT-3, the decision to train on "less formal" sites, including Reddit, might help explain some of the more troubling language it has created.[61] "By 'reading' text during training that is largely written by us, language models such as GPT-3 also learn how to 'write' like us, complete with all of humanity's [and Reddit's] best and worst qualities."[62] The demonstrated potential of GPT-3 to produce content that is biased is a crucial fact for lawyers to bear in mind, as is discussed at greater length below.

C. Evidence of Bias in GPT-3

Evidence of bias in AI models has been widely documented,[63] and GPT-2 produced text that was at times racist and toxic.[64] It is therefore not surprising that the OpenAI researchers who developed GPT-3 actively examined it for evidence of gender, racial, and religious bias and shared some of their findings in a research paper.[65] The OpenAI

[60] *See, e.g.*, Amy B. Cyphert, *Reprogramming Recidivism: The First Step Act and Algorithmic Prediction of Risk*, 51 SETON HALL L. REV. 331, 377-79 (2020) (discussing how an algorithm developed for use by the Bureau of Prisons to assign a recidivism risk score to federal inmates relies on racially disparate historical criminal justice data and thus produces racially disparate results). *See generally* Mayson, *supra* note 59, at 2224 ("[I]f the thing that we undertake to predict — say arrest — happened more frequently to [B]lack people than to white people in the past data, then a predictive analysis will project it to happen more frequently to [B]lack people than to white people in the future.").

[61] *See, e.g.*, Heaven 1, *supra* note 26 ("GPT-3 is still prone to spewing hateful sexist and racist language.").

[62] O'Sullivan & Dickerson, *supra* note 21. "Just as you'd expect from any model trained on a largely unfiltered snapshot of the internet, the findings can be fairly toxic." *Id.*; *see also* Metz, *supra* note 10 ("Everyday language is inherently biased and often hateful, particularly on the internet. Because GPT-3 learns from such language, it, too, can show bias and hate.").

[63] *See, e.g.*, Amy B. Cyphert, Tinker-*ing with Machine Learning: The Legality and Consequences of Online Surveillance of Students*, 20 NEV. L.J. 457, 462-64 (2020) (discussing "the various ways that algorithms and machine learning can be inadvertent tools for deepening inequality," including facial recognition software, credit scoring, and use of algorithms in the criminal justice sector).

[64] Hao, *supra* note 46.

[65] Although this level of transparency is refreshing, it is still worth noting the allegation that OpenAI specifically excluded certain journalists from beta testing GPT-3 despite repeated requests. *See, e.g.*, Marcus & Davis, *supra* note 41 ("OpenAI has thus far not allowed us research access to GPT-3, despite both the company's name and the

researchers ran certain co-occurrence tests, which measure "which words are likely to occur in the vicinity of other pre-selected words."[66] When given the prompt "She was very [. . .]" GPT-3 was more likely to finish the sentence with words that focused on appearance ("beautiful" or "gorgeous") than it was when given the prompt "he was very [. . .]."[67] In a co-occurrence test to check for religious bias, the researchers found that GPT-3 was more likely to place the word "Islam" near the word "terrorism," and to place the word "Judaism" near the word "smartest."[68]

To test for racial bias, the researchers fed GPT-3 prompts like "The [Black] man was very [. . .]" and "the [white] man was very [. . .]" to see how it would finish those sentences.[69] They used a system that measured the words' "sentiment value" where positive words such as "wonderfulness" get a positive value (+100), negative words such as "wretched" get a negative value (-87.5) and neutral words like "chalet" are assigned a score of 0.[70] When the system was given a prompt about a Black person, it consistently returned words with a low sentiment.[71] The researchers concluded that "[t]his analysis gives a sense of the biases of different models and highlights the need for more sophisticated analysis of the relationship between sentiment, entities, and input data."[72]

Others outside of OpenAI have confirmed and remarked upon the tendency for GPT-3 to "spew[] biased and toxic language,"[73] and to "spit[] out hate speech, misogynistic and homophobic abuse, and racist rants."[74] The head of Facebook's AI lab has called it "unsafe" because of

nonprofit status of its oversight organization. Instead, OpenAI put us off indefinitely despite repeated requests — even as it made access widely available to the media.").

66 BROWN ET AL., *supra* note 18, at 36.

67 *Id.* at 37. Other words more likely to appear in descriptions that involved women included "sucked" and "naughty," *id.*, which one article noted happens because "there is so much content on the web sexualizing women," O'Sullivan & Dickerson, *supra* note 21.

68 BROWN ET AL., *supra* note 18, at 38.

69 *Id.* at 37.

70 *Id.*

71 *Id.* The researchers note that prompts involving Asian people had consistently high sentiment outputs. *Id.*

72 *Id.* The GPT-3 researchers also noted that they had included the information about bias "in order to motivate further research, and to highlight the inherent difficulties in characterizing biases in large-scale generative models . . . ." *Id.* at 39.

73 Metz, *supra* note 10 (noting that "GPT-3 is far from flawless"); *see also* Thornhill, *supra* note 28 ("[I]t has not taken long for users to expose the darker sides of GPT-3 and entice it to spew out racist and sexist language.").

74 Will Douglas Heaven, *How to Make a Chatbot that Isn't Racist or Sexist*, MIT TECH. REV. (Oct. 23, 2020), https://www.technologyreview.com/2020/10/23/1011116/chatbot-

this tendency.[75] The very public firing of Dr. Timnit Gebru from Google, where she had served as the co-lead of Google's ethical AI team, was apparently sparked in part by her research into the pitfalls of large language models like GPT-3.[76] As is addressed at greater length below, the propensity for GPT-3 to produce biased outputs diminishes its use to lawyers who wish to not run afoul of the disciplinary rules of the states in which they are licensed (not to mention those who do not wish to risk damage to their professional reputations).

Although OpenAI has stated they are working on ways to diminish the bias in GPT-3 outputs,[77] that task is a difficult one and no lawyer should assume it will be accomplished by the time the technology arrives on their desktop. "OpenAI has shared little about how it uses filtering methods to try and address such toxicity,"[78] but other researchers have tested several tools when trying to remove bias from natural language process algorithms. First is the "bleep it out" method, where researchers prevent an algorithm from producing an output with certain words (such as profanity, racial slurs, etc.).[79] But this solution does not fix the underlying problem and also requires additional computing power.[80] Second is the option "to use such a filter to remove offensive examples from the training data in the first place."[81] But that process is cumbersome and inefficient — "cutting out entire topics throws a lot of good training data out with the bad"[82] — and still does not prevent chatbots from repeating back offensive terms that humans use when interacting with it, nor does it address microaggressions that might use neutral language in a biased way.[83]

gpt3-openai-facebook-google-safety-fix-racist-sexist-language-ai/ [https://perma.cc/DX27-RYUF] [hereinafter Heaven 2].

75 Metz, *supra* note 10.

76 *See* Tom Simonite, *What Really Happened When Google Ousted Timnit Gebru*, WIRED (June 8, 2021, 6:00 AM), https://www.wired.com/story/google-timnit-gebru-ai-what-really-happened/ [https://perma.cc/7RAQ-KZB7].

77 *See* OPENAI BLOG, *supra* note 30 (discussing ways that OpenAI will "mitigate harmful bias and other negative effects of models" like GPT-3).

78 Johnson, *supra* note 49.

79 Heaven 2, *supra* note 74.

80 *Id.* ("But this would require language models to have such a filter attached all the time. If that filter was removed, the offensive bot would be exposed again. The bolt-on filter would also require extra computing power to run.").

81 *Id.*

82 *Id.*

83 *Id.* ("[A] model trained on a data set stripped of offensive language can still repeat back offensive words uttered by a human. (Repeating things you say to them is a common trick many chatbots use to make it look as if they understand you.).").

Third, researchers have tested teaching chatbots to recognize potentially offensive topics and redirect them.[84] While this is the preferred method for some researchers, it is not an ideal or foolproof solution. "Meaning depends on context, which is hard for AIs to grasp, and no automatic detection system is going to be perfect. Cultural interpretations of words also differ. As one study showed, immigrants and non-immigrants asked to rate whether certain comments were racist gave very different scores."[85] Ultimately, removing bias from natural language processors that have been trained on sites like Reddit and Twitter is an exceptionally difficult task, and there is no guarantee OpenAI will have success with doing so with GPT-3.

II. HOW AND WHY GPT-3 MAY IMPACT THE PRACTICE OF LAW

Although it may come as a surprise to too many lawyers, AI is already widely used in the practice of law and has been for several years now. GPT-3 is especially likely to be adopted for use in the field of law, given its demonstrated ability to write like humans do (and indeed to fool humans into believing its output was produced by a fellow human). Those with beta testing access to the tool have already used it to "translate" legal jargon into "plain English."[86] Given its demonstrated ability to produce outputs useful to lawyers, there is some excitement that the tool may also be useful in the effort to help provide legal services to those who cannot afford them. Although the possibility is worth exploring, the tendency of GPT-3, like all predictive AI tools, to reflect back the biases in our society should mandate a healthy dose of skepticism and caution before using these tools to address the justice gap.

A. AI Is Already Being Extensively Used in the Practice of Law

Should lawyers embrace the use of GPT-3, it will hardly mark the first time that lawyers use an AI program as they serve their clients. Scholars as far back as the early 1970s urged lawyers to be aware of computer science and the impact it may have on their practice.[87] Today, we

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[84] *Id.*

[85] *Id.*

[86] Michael Tefula (@michaeltefula), TWITTER (July 21, 2020, 2:24 AM), https://twitter.com/michaeltefula/status/1285505897108832257/photo/1 [https://perma.cc/896L-CC2T].

[87] *See* Danielle Hall, *The Future of Law Includes Math*, 87 J. KAN. BAR ASS'N 17, 18 (2018) (citing Bruce Buchanan & Thomas Headrick, *Some Speculation About Artificial Intelligence and Legal Reasoning*, 23 STAN. L.J. 40, 40-41 (1970)) (noting that scholars in 1970 "opined that research suggested that computer science may assist lawyers in both

already have and use algorithms that help lawyers perform a variety of legal tasks, such as: produce relevant documents in discovery through the use of predictive coding;[88] draft, review, and manage contracts;[89] perform legal data analytics;[90] predict judicial decisions;[91] and even review briefs for "strengths, weaknesses, patterns, and connections, and . . . analyze the vulnerability of certain arguments."[92] Judges also use AI, with machine learning algorithms used throughout the criminal justice system, for tasks such as helping to make bail determinations and also predicting the likelihood of recidivism as part of setting a carceral

the study and performance of their reasoning processes. They argued that the time had come for serious interdisciplinary work between lawyers and computer scientists to explore the computer's potential in law").

[88] *See, e.g.*, Moore v. Publicis Groupe, 287 F.R.D. 182, 183-84 (S.D.N.Y. 2012) (Peck, M.J.), *adopted sub nom.*, Moore v. Publicis Groupe SA, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012) (indicating the first opinion where a court officially approved predictive coding as an acceptable way of reviewing electronically stored information in certain cases).

[89] *See, e.g.*, Chris Chambers Goodman, *AI/Esq.: Impacts of Artificial Intelligence in Lawyer-Client Relationships*, 72 OKLA. L. REV. 149, 154 (2019) (citing Keith Mullen, *Artificial Intelligence: Shiny Object? Speeding Train?*, A.B.A. RPTE EREPORT (Fall 2018), https://www.americanbar.org/groups/real_property_trust_estate/publications/ereport/rpte-ereport-fall-2018/artificial-intelligence/ (last visited Sept. 6, 2021) [https://perma.cc/V387-QJQ3]) (noting that AI is already at use in contract drafting, review, and management). Indeed, AI programs can be better and faster than lawyers when it comes to contract drafting. A machine-learning algorithm recently outperformed twenty lawyers in a nondisclosure agreement analysis. "The lawyers took an average of 92 minutes to complete the task and achieved a mean accuracy level of 85 percent. LawGeex took only 26 seconds to review all five contracts and was 94-percent accurate. The AI tied with the highest scoring lawyer in the group in terms of accuracy." Cal Jeffrey, *Machine-Learning Algorithm Beats 20 Lawyers in NDA Legal Analysis*, TECHSPOT (Oct. 31, 2018, 1:17 PM), https://www.techspot.com/news/77189-machine-learning-algorithm-beats-20-lawyers-nda-legal.html [https://perma.cc/D5QH-JHWQ].

[90] *See, e.g.*, Lincoln Mead, *AI Strengthens Your Legal Analytics*, A.B.A., https://www.americanbar.org/groups/law_practice/publications/law_practice_magazine/2020/jf2020/jf20mead/ (last visited Sept. 6, 2021) [https://perma.cc/VN7S-XYDF] (noting that a "shining example" of an area where AI can supplement lawyers' work is legal analytics, defined as "the implementation of established data analysis methodologies, using supporting tools, to common data sets within the field of law to improve efficiency, gain insight and realize greater utility from the available data").

[91] *See, e.g.*, Matthew Hutson, *Artificial Intelligence Prevails at Predicting Supreme Court Decisions*, SCI. (May 2, 2017, 1:45 PM), https://www.sciencemag.org/news/2017/05/artificial-intelligence-prevails-predicting-supreme-court-decisions [https://perma.cc/B6A3-E8D7] ("A new study shows that computers can do a better job than legal scholars at predicting Supreme Court decisions, even with less information.").

[92] Goodman, *supra* note 89, at 154.

sentence.[93] It is fair to say that AI has already thoroughly suffused the practice of law.

In examining some of the potential opportunities and perils of using GPT-3 in the legal field, it is helpful to look at an area of law practice where AI algorithms already dominate. To the surprise, perhaps, of many practitioners who use them daily, AI algorithms fuel the legal research databases that lawyers rely on, databases such as Westlaw and LexisNexis.[94] Most lawyers are not familiar with even the basics of the algorithms that produce the search results they get.[95] As is discussed below, such a lack of understanding hinders their research productivity and may even run afoul of the rules of professional conduct.[96] These algorithms, like all algorithms, reflect a multitude of decisions made by the data scientists and software engineers who created them.[97]

Those decisions have consequences for the end users of the algorithms. Imagine this (highly plausible) scenario: a lawyer is using a legal search engine for the purpose of drafting a brief. Wishing to keep costs down for the client, the lawyer decides to exclusively do the research in one commercial research database. The lawyer does not understand that each company utilizes a different algorithm to facilitate the search and has chosen to prioritize different results.[98] Thus, the

[93] *See generally* Cyphert, *supra* note 60, at 338 ("As of 2015, over sixty different risk assessment tools were used in the sentencing context alone, and more were used for bail determinations and by corrections officials.").

[94] *See generally* Susan Nevelow Mart, *The Algorithm as a Human Artifact: Implications for Legal [Re]Search*, 109 L. LIBR. J. 387 (2017) (comparing results of the search algorithms used by the search algorithms in Westlaw, Lexis Advance, Fastcase, Google Scholar, Ravel, and Casetext).

[95] *See id.* at 393 ("[I]n the early days of online searching, most users were unaware of the structure underlying the system. This is almost certainly still true.").

[96] *See id.* at 391 ("[L]earning to navigate black boxes [of search software algorithms] is part of the ethical duty to do competent research: knowing something about why you received the results that you did is a critical skill.").

[97] *Id.* at 388 (noting that the choices that "human creators" made about "how the algorithm would work [] have implications for the search results returned to the researcher").

[98] *Id.* at 388-89 (noting that a variety of choices are made in how the search algorithm will operate, and noting that "[i]f the search entered into a legal database has five terms, and only four terms appear, how will the algorithm treat the search? If the algorithm is strict, it will return only results with exactly those five terms. But the algorithm can be adjusted so that results with four of the terms will appear in the results set. The algorithm is set to determine how close those words have to be to each other to be returned in the top results. The programming team decides which of the search terms entered are automatically stemmed and which are not. Only the team knows which legal phrases are recognized by the algorithm without quotation marks around

lawyer does not understand that various databases would yield different results even when given the exact same inputs.[99] Since this lawyer did not understand the technology being used, the lawyer made a choice that might initially save money for the client but at the cost of weakening the brief (and potentially costing the client money in the long term). This cautionary tale is worth bearing in mind, as the implications of misusing GPT-3 could be even more severe.

B. Why GPT-3 May Be Especially Important for Legal Practice

GPT-3 is now available for commercial use, and OpenAI reported in a March 2021 blogpost that the technology powers more than 300 apps and generates an average of 4.5 billion words per day.[100] Although, as noted above, AI is hardly new to the practice of law, two features of GPT-3's design make it especially likely to be adopted for use in the legal sector. First, it is a "creation engine" that actually generates text, rather than one that simply sorts or classifies data.[101] Because one of the most important "products" lawyers produce is writing (contacts, motions, etc.), GPT-3 will be especially useful to them.[102]

Second, as noted above, GPT-3 is already pretrained on a massive dataset, and it also has the ability for users to train it on their own

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the phrase and how many preexisting legal phrases are added to the search without user input").

[99] *See id.* at 390 (concluding that when researchers studied six different legal databases — Casetext, Fastcase, Google Scholar, Lexis Advance, Ravel, and Westlaw — by entering the same search terms into each, there was "hardly any overlap in the cases that appear in the top ten results returned by each database," despite the fact that the researchers used "jurisdictional limits [to create] a unique opportunity to compare how different algorithms process the same search in the same set of documents").

[100] OpenAI & Ashley Pilipiszyn, *GPT-3 Powers the Next Generation of Apps*, OPENAI BLOG (Mar. 25, 2021), https://openai.com/blog/gpt-3-apps/ [https://perma.cc/4W6V-Q3NL].

[101] Rudy DeFelice, *A New AI Model Focused on Doing, Not Thinking — and That's Great News for Lawyers*, LAW.COM: TEX. LAW. (Sept. 8, 2020, 6:42 PM), https://www.law.com/texaslawyer/2020/09/08/a-new-ai-model-focused-on-doing-not-thinking-and-thats-great-news-for-lawyers/ [https://perma.cc/Y5LM-HA58] ("AI tools are generally used in an enterprise to find or categorize information. GPT-3 actually creates things and generates the kind of end products typically created by knowledge workers.").

[102] *Id.* ("Legal organizations generate documents as end products. Essentially, documents are our widget.") Mr. DeFelice notes the variety of legal projects GPT-3 could theoretically assist with: "One can imagine GPT-3 being part of the process that creates initial drafts of legal memoranda, contracts, policy manuals, HR documents, RFP's and audit responses, among other things commonly created by finding and patching together prior versions of these documents by people." *Id.*

dataset as well.[103] GPT-3's creators have called this an "emergent quality," because GPT-3 is capable of recognizing patterns in the inputs it is given and predicting what will follow.[104] Although previous versions of the model could also be tailored to specific tasks, GPT-3 can do this with remarkable ease. Because it is a few-shot learning model, you can personalize GPT-3 much more easily than you could earlier versions.[105] So, lawyers could relatively easily prime GPT-3 for the kind of writing they want it to produce, and they need not be technology experts in order to do that.[106]

One of the beta testers shared a fascinating demonstration where they fed GPT-3 only two prompts that demonstrated "translating" from "Legalese" to "plain English."[107] For example, the first prompt had the following as its "Legal Clause":

> The Company and the Founders will provide the Investors with customary representations and warranties examples of which are set out in Appendix 4 and the Founders will provide the Investors with customary non-competition, non-solicitation and confidentiality undertakings.[108]

And the following as its "plain English" translation:

> The startup and its founders will provide the usual assurances and guarantees on facts about the business. The founders will also agree not to work for competitors, poach employees or customers when they leave the startup, and respect confidentiality.[109]

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[103] *See* Metz, *supra* note 10 ("Before asking GPT-3 to generate new text, you can focus it on particular patterns it may have learned, priming the system for certain tasks.").

[104] *Id.* (quoting Dario Amodei, Vice President for Research at OpenAI).

[105] *Id.* (noting that you can personalize GPT-3 "using just a few examples, as opposed to the thousands of examples and several hours of additional training required by its predecessors").

[106] *Id.* (quoting Ilya Sutskever, OpenAI's chief scientist, as saying "[a]ny layperson can take this model and provide these examples in about five minutes and get useful behavior out of it").

[107] Tefula, *supra* note 86.

[108] *Id.*

[109] *Id.*

Based solely on that prompt and single other similar one, GPT-3 was able to roughly[110] "translate" phrases from Legalese to plain English, and vice versa. For example, when fed the prompt:

> Sale of all or substantially all of the assets of the Company or a sale of shares involving a change in control (each, a "Corporate Transaction") will be treated in the same way as a liquidation and the proceeds of sale will be distributed as set out in paragraph 3. If the holders of Series A Shares have received any Special Dividend it shall be set off against their Liquidation Preference.[111]

GPT-3 "translated" that language into plain English:

> If the company is sold, or a new owner takes control, the proceeds of the sale will be distributed as in the liquidation clause above. Any special dividend paid will be treated as an initial payment towards the Series A investors.[112]

C. Increasing Access to Justice?

It is easy to imagine why law firms may be interested in having a tool that takes a first pass at turning legal documents into something more easily understood by a layperson. But there is a hope that tools like GPT-3 could someday be more than efficiency enhancers for law firms and could instead be used to help address the widening gulf between those with the means to hire attorneys and those without. This access to justice problem — those who need legal services but cannot afford them — is well documented. The Legal Services Corporation[113] reports that in 2017, "86% of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help."[114] This

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110 As the example here makes clear, the "translation" was not always an ideal one. It might still offer an attorney a decent "first draft" at explaining a complicated legal term to a layperson. This could be helpful in a variety of contexts, including in preparing opening or closing statements before a jury.

111 Tefula, *supra* note 86.

112 *Id.*

113 The Legal Services Corporation, or LSC, is "the single largest funder of civil legal aid for low-income Americans in the nation." LEGAL SERVS. CORP., https://www.lsc.gov/about-lsc/who-we-are (last visited July 13, 2021) [https://perma.cc/GF5Y-JHX4].

114 LEGAL SERVS. CORP., EXECUTIVE SUMMARY: THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-ExecutiveSummary.pdf [https://perma.cc/C6QQ-X4VN].

access to justice gulf was exacerbated by the economic recession of 2008,[115] further worsened by the COVID-19 pandemic,[116] and is worse in the United States than in other countries.[117]

Might GPT-3 be able to help attorneys provide effective legal services to a larger group of low-income people? A lot of excitement already surrounds the idea of artificial intelligence helping to address the justice gap; indeed the Legal Services Center held a summit on this very topic in 2013.[118] Scholars have acknowledged that artificial intelligence will not fully solve the justice gap, but have nonetheless predicted it could make a real difference.[119] Imagine a chatbot[120] powered by GPT-3 that people seeking legal information could access to ask questions about

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115 *See, e.g.*, Raymond H. Brescia, Walter McCarthy, Ashley McDonald, Kellan Potts & Cassandra Rivais, *Embracing Disruption: How Technological Change in the Delivery of Legal Services Can Improve Access to Justice*, 78 ALB. L. REV. 553, 588 (2015) ("The 'Great Recession' of 2008 increased the need for legal services for low- and moderate-income individuals.").

116 *See, e.g.*, WORLD JUST. PROJECT, THE COVID-19 PANDEMIC AND THE GLOBAL JUSTICE GAP 3 (2020), https://worldjusticeproject.org/sites/default/files/documents/WJP-COVID%2BGlobal-Justice-Gap-final-10.15.pdf [https://perma.cc/CL4H-VND9] ("The pandemic is significantly worsening an already serious global gap in access to justice.").

117 Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 534 (2013) ("About a quarter of middle-income individuals and between a fifth to half of low-income individuals [took no action on their legal problems] in the United States, compared with 5 percent to 18 percent in most other countries.").

118 *See* LEGAL SERVS. CORP., REPORT OF THE SUMMIT ON THE USE OF TECHNOLOGY TO EXPAND ACCESS TO JUSTICE 1 (2013), https://www.lsc.gov/sites/default/files/LSC_Tech%20Summit%20Report_2013.pdf [https://perma.cc/N792-GGLN] ("The Legal Services Corporation (LSC) has found through its experience with its Technology Initiative Grant program that technology can be a powerful tool in narrowing the justice gap — the difference between the unmet need for civil legal services and the resources available to meet that need.").

119 *See, e.g.*, Brescia et al., *supra* note 115, at 592 ("[I]nvesting time, money, and research into new and innovative ways to provide legal aid and representation to low- and middle-income individuals can help bridge the justice gap."); Anjanette H. Raymond & Scott J. Shackelford, *Technology, Ethics, and Access to Justice: Should an Algorithm Be Deciding Your Case?*, 35 MICH. J. INT'L L. 485, 492 (2014) (concluding that a well-designed online dispute resolution system "can increase individuals' access to justice"); Drew Simshaw, *Ethical Issues in Robo-Lawyering: The Need for Guidance on Developing and Using Artificial Intelligence in the Practice of Law*, 70 HASTINGS L.J. 173, 180 (2018) ("AI will be an even more impactful force [on the justice gap] than previous tools, and has the potential to magnify and transform benefits of existing technologies.").

120 "A chatbot is a virtual software program in which the user communicates with a virtual machine that imitates human conversations through voice and/or text." Sherley E. Cruz, *Coding for Cultural Competency: Expanding Access to Justice with Technology*, 86 TENN. L. REV. 347, 364 (2019).

their potential claims. Those seeking assistance could ask questions about whether the actions of a landlord are legal in their state and how to file a claim if they are not. GPT-3's demonstrated ability to help "translate" from legalese to plain English could be especially helpful here. For example, the chatbot could help recognize that plain English terms like "kicked out" mean the same thing as Legalese terms like "eviction" and respond accordingly, directing the user to the best guidance and making appropriate referrals to legal services in the area.

Chatbots like this are already being studied as a possible way to increase access to justice.[121] "Learned Hands," a machine learning labeling game, is a joint project between the Stanford Legal Design Lab and Suffolk Law School's Legal Innovation and Technology Lab. Lawyers and law students can "play" a game where they help train an algorithm to recognize legal issues in people's stories,[122] a sort of law school issue spotter exam for the real world. The ultimate goal is to help "make a Rosetta Stone for legal help — linking the legal help guides that courts and legal aid groups offer to the people who are searching for help."[123] However, there is good reason to proceed with great caution before using GPT-3 for legal chatbots.

III. SPECIFIC ETHICAL CONSIDERATIONS FOR LAWYERS USING GPT-3

As lawyers provide legal services to their clients, they are governed by a variety of ethical rules: rules of local or specialized practice bar associations, the individual practices and rules of judges, and rules of specific courts. This Article focuses on the Model Rules of Professional Conduct ("Model Rules"), which were first promulgated by the American Bar Association in 1983.[124] Since then, they have been adopted in some form by nearly every state in the United States[125] and

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[121] *See id.* ("Chatbots expand access to justice by providing self-represented litigants with 'personalized' legal guidance to help identify legal issues.").

[122] LEARNED HANDS, https://learnedhands.law.stanford.edu/ (last visited July 13, 2021) [https://perma.cc/E4VL-JB7M] ("The labeled datasets and machine learning models you help us create will be used to improve how courts, legal aid groups, and others can serve people online, when they're looking for help.").

[123] *Id.*; *see also* Cruz, *supra* note 120, at 364 ("Chatbots can also connect individuals to legal service providers after the program helps the individual identify their legal issue.").

[124] *See* David Hricik & Jae Ellis, *Disparities in Legal Ethical Standards Between State and Federal Judicial Systems: An Analysis and a Critique*, 13 GEO. J. LEGAL ETHICS 577, 580-81 (2000) (tracing the history of Model Rules).

[125] For a list of when states adopted the Model Rules, see *Alphabetical List of Jurisdictions Adopting Model Rules*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha

have occasionally been amended as well. The Model Rules cover a wide array of lawyer behavior and impose specific duties and obligations.

As the amendments in 2012 make clear, the Model Rules *do* specifically address lawyers' duties and obligations with respect to technology, including artificial intelligence.[126] The ABA House of Delegates reaffirmed in 2019 that lawyers need to take their ethical considerations regarding the use of AI seriously, passing Resolution 112:

> RESOLVED, That the American Bar Association urges courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence ("AI") in the practice of law including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI.[127]

Despite the Model Rules' 2012 amendments and the 2019 resolution, scholars still argue that the Model Rules should be further updated to clarify the impact on technology and especially the use of artificial intelligence in the practice of law.[128] This Article attempts to provide a starting place for lawyers who are thinking through their ethical obligations when using GPT-3 in their practice of law. The current Model Rules already impose certain duties on attorneys who wish to use AI like GPT-3.

Three model rules in particular — Rule 1.1 regarding competence, Rule 5.3 regarding supervising nonlawyer assistance, and Rule 8.4 regarding bias — provide certain guidance (and potentially raise certain issues) for lawyers who wish to utilize GPT-3 in their practice. Although the focus of this Article is on GPT-3, many of the principles are

_list_state_adopting_model_rules/ (last updated Mar. 28, 2018) [https://perma.cc/7N7S-U3YJ].

[126] *See, e.g.*, Anita Bernstein, *Minding the Gaps in Lawyers' Rules of Professional Conduct*, 72 OKLA. L. REV. 125, 130 (2019) (noting that prior to 2012, the "ABA view of competence had been starkly silent on technology," but that the Rules now specifically address technology); *see also id.* at 130-44 (discussing changes made in 2012 to Rules 1.1 and 5.3).

[127] AM. BAR ASS'N HOUSE OF DELEGATES, RESOLUTION 112 (2019), https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/112-annual-2019.pdf [https://perma.cc/2LZ3-JSES].

[128] *See, e.g.*, Katherine Medianik, *Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era*, 39 CARDOZO L. REV. 1497, 1501-02 (2018) (arguing that the "existing language and content of the Model Rules is outdated and does not account for technological advancement," and proposing amendments to the Model Rules to "to guide lawyers in situations where they interact with AI tools").

applicable to other AI models (and indeed to GPT-4, GPT-5, etc., should they be developed). Integration of artificial intelligence into the legal field creates many interesting questions beyond the three rules on which this Article focuses. For example, could reliance on artificial intelligence tools run afoul of Model Rule 2.1, which requires that lawyer exercise independent judgment in the practice of law?[129] Or is there actually an affirmative duty under Model Rule 1.5 that lawyers use AI like GPT-3 when doing so could save clients' money?[130] At least one judge in Ontario has ruled there might be.[131] Both are intriguing questions that are outside the scope of this Article.

[129] MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2020) ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Such advice may be about law or "other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."); *see also* Simshaw, *supra* note 119, at 204 ("On a more abstract level, as lawyers become increasingly reliant on intelligent systems, it draws into question the extent to which their professional judgment is 'independent.' This is especially true if they do not fully understand and were not involved with the design of the system, and therefore cannot make independent judgments based on the AI's output.").

[130] Model Rule of Professional Conduct 1.5 requires that lawyers not charge unreasonable fees, and notes that factors for determining the reasonableness of fees include the time and labor required. Scholars have suggested that if AI can save significant billable hours, there is an arguable duty for lawyers to use it. *See, e.g.*, Roy D. Simon, *Artificial Intelligence, Real Ethics*, 90 N.Y. STATE BAR J. 34, 37 (2018) ("I think you are not charging an excessive fee if you continue using your customary methods instead of using a new-fangled AI product, but soon most lawyers will be using AI products and services for certain types of work (such as the cite-checking products discussed earlier), and charging for 10 hours of your time to do work that AI could do in 10 minutes sounds like an excessive fee to me. You have to keep abreast of the benefits of technology that applies to your practice. . . . Do you have a duty to alert your clients to the option of using AI products that may save substantial fees or arrive at quicker or more accurate results? Right now the answer to that question is unclear — but before long, practicing law without using AI will be like practicing law with an Underwood manual typewriter, and you will have to tell your clients that there is a better, cheaper, faster way."); *see also* Ed Walters, *The Model Rules of Autonomous Conduct: Ethical Responsibilities of Lawyers and Artificial Intelligence*, 35 GA. STATE U. L. REV. 1073, 1076 (2019) ("[A]s the quality of work product created by lawyers augmented with AI surpasses the work created without AI, it is clear that lawyers will soon have a professional responsibility to employ new techniques.").

[131] One court in Ontario slashed a party's costs request because the lawyer had not used AI when conducting legal research. The judge ruled that "[t]here was no need for outsider or third party research. If artificial intelligence sources were employed, no doubt counsel's preparation time would have been significantly reduced." Cass v. 1410088 Ontario Inc., 2018 O.N.S.C. 6959, para. 34 (Can. Ont. Sup. Ct. J.).

A. Rule 1.1 and the General Duty of Competence

1. Competence Defined for AI

Lawyers must competently practice law. Specifically, Model Rule 1.1 requires that lawyers "shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[132] In 2012, the drafters of the Model Rules clarified in Comment 8 to Rule 1.1 that this duty of competence includes a duty to remain abreast of changes in the practice of law, "including the benefits and risks associated with relevant technology."[133] In describing the amendment to Comment 8, one reporter succinctly noted that it meant that "lawyers can't be Luddites."[134] As Comment 8 suggests, the 2012 amendments were specifically made, in part, to address the growing use of technology in the practice of law.[135] This new emphasis on technical competence as an ethical duty for lawyers "propelled [lawyers] headlong into a complex world of fast-changing technological growth."[136]

In adopting various versions of Rule 1.1, some states have gone beyond what the Model Rule requires and are more specific and prescriptive. For example, Florida says that lawyers must engage in continuing education about technology in order to competently practice law.[137] In adopting the new Comment 8, West Virginia changed the Model Rule language that "a lawyer *should* keep abreast" to "a lawyer

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[132] MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS'N 2020).

[133] MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8.

[134] Debra Cassens Weiss, *Lawyers Have Duty to Stay Current on Technology's Risks and Benefits, New Model Ethics Comment Says*, A.B.A. J. (Aug. 6, 2012, 7:46 PM CDT), https://www.abajournal.com/news/article/lawyers_have_duty_to_stay_current_on_technologys_risks_and_benefits [https://perma.cc/SW36-Y644].

[135] *See* Simshaw, *supra* note 119, at 196 (noting that the 2012 amendments updated "the black letter and commentary of several key model rules in order to take into account the increased role of technology in the profession").

[136] Jason Tashea & Nicholas Economou, *Be Competent in AI Before Adopting, Integrating It into Your Practice*, A.B.A. J. (Apr. 23, 2019, 6:30 AM CDT), http://www.abajournal.com/lawscribbler/article/before-lawyers-can-ethically-adopt-and-integrate-ai-into-their-practices-they-must-first-be-competent [https://perma.cc/45P6-B72G].

[137] *See* Medianik, *supra* note 128, at 1515 (citing Fla. Bar Pro. Ethics Comm., Op. 06-2 (2006)) (discussing duties with respect to metadata in emails and noting that lawyers' professional obligations "may necessitate a lawyer's continuing training and education in the use of technology").

must keep abreast" of changes to the practice of law, including "the benefits and risks associated with relevant technology."[138]

Other states have tried to clarify what competence means through ethics opinions. For example, an Arizona Ethics Opinion reminded lawyers that their duty of competence meant that if they lacked "the training or experience required to act competently with regard to computer security," that such competence was nonetheless readily available.[139] Attorneys are encouraged to do their own research to learn more about computer security and/or to work with experts to improve their security practices.[140]

California also urges lawyers who lack certain technological competence to enlist the help of experts as one of several options lawyers have. In a formal opinion from its professional responsibility committee, the California Bar provides that "[a]n attorney lacking the required competence for e-discovery issues has three options: (1) acquire sufficient learning and skill before performance is required; (2) associate with or consult technical consultants or competent counsel; or (3) decline the client representation."[141] Of course, as will be explored further below, attorneys who lack certain technological competences and so associate with experts still retain the duty to supervise that expert's work. Consultation with such an expert "does not absolve an attorney's obligation to supervise the work of the expert under [California's duty to supervise], which is a non-delegable duty

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[138] Jamie J. Baker, *Beyond the Information Age: The Duty of Technology Competence in the Algorithmic Society*, 69 S.C. L. REV. 557, 563 (2018) ("By purposefully changing the language from 'should' to 'must,' West Virginia has signaled a stronger ethical duty to its lawyers."). *Compare* MODEL RULES OF PRO. CONDUCT r. 1.1 cmt. 8 ("[A] lawyer should keep abreast" of "the benefits and risks associated with relevant technology . . . ."), *with* W. VA. RULES OF PRO. CONDUCT r. 1.1 cmt. 8 (2015) ("[A] lawyer must keep abreast of the benefits and risks associated with relevant technology . . . .").

[139] State Bar of Ariz. Comm. on the Rules of Pro. Conduct, Formal Op. 05-04 (2005), https://tools.azbar.org/RulesofProfessionalConduct/ViewEthicsOpinion.aspx?id=523 [https://perma.cc/XW5A-VB8Z].

[140] *Id.* ("Much information can be obtained through the internet by an attorney with sufficient time and energy to research and understand these systems. Alternatively, experts are readily available to assist an attorney in setting up the firm's computer systems to protect against theft of information and inadvertent disclosure of client confidences.")

[141] State Bar of Cal. Standing Comm. on Pro. Resp. & Conduct, Formal Op. No. 2015-193, at 1 (2015), http://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/CAL%202015-193%20%5B11-0004%5D%20(06-30-15)%20-%20FINAL1.pdf [https://perma.cc/C6KT-C486].

belonging to the attorney who is counsel in the litigation, and who remains the one primarily answerable to the court."[142]

As is clear from the text of Rule 1.1, Comment 8, and the various state ethics opinions, an attorney cannot use technology that they do not understand. In teasing out what this duty of competence means with respect to the use of artificial intelligence in the practice of law, scholars have focused largely on two ethical obligations: first, lawyers must have at least a rudimentary understanding of the technology (which can involve hiring a technical expert to help them learn more and vet products); and second, they must not blindly adopt an AI program's outputs without some level of supervision and/or skepticism.[143] The challenges that rise with "supervising" AI are addressed below in the discussion around Rule 5.3. Regarding understanding the technology, most scholars advocate only for a "basic understanding" of the technology[144] (though some argue that lawyers should be required to attend mandatory CLEs focused on legal technology,[145] a recommendation this Article echoes). For many attorneys, even the low bar of a basic understanding of AI programs is going to be difficult to clear. AI programs, especially those fueled by machine learning, can be quite opaque and difficult for even a technical expert to understand and explain.[146] And, of course, most lawyers are not technical experts.[147]

[142] *Id.* at 5.

[143] *See* Simon, *supra* note 130, at 35 (suggesting that lawyers "(1) hire an expert to vet the AI product; (2) learn what the AI product can (and can't) do; and (3) double-check the output of the AI product"); *see also* Nicole Yamane, *Artificial Intelligence in the Legal Field and the Indispensable Human Element Legal Ethics Demands*, 33 GEO. J. LEGAL ETHICS 877, 883-84 (2020) (noting that lawyers must have a basic understanding of the AI tools they use and must exercise care when using them, which means reviewing the program's results).

[144] *See, e.g.*, Yamane, *supra* note 143, at 883 ("[L]awyers must have a basic understanding of the AI programs they choose to utilize in their practice.").

[145] *See, e.g.*, Medianik, *supra* note 128, at 1526 (advocating for an amendment to Model Rule 1.1 to mandate CLEs focused on legal technology and urging the ABA to "establish a 'Legal Technology' section as an additional topic of discussion for CLE credits").

[146] *See* Will Knight, *The Dark Secret at the Heart of AI*, MIT TECH. REV. (Apr. 11, 2017), https://www.technologyreview.com/2017/04/11/5113/the-dark-secret-at-the-heart-of-ai/ [https://perma.cc/R8VF-MBZC].

[147] *See* Yamane, *supra* note 143, at 883 ("Because AI is a branch of computer science and often involves technical knowledge outside of most lawyers' expertise, understanding how AI programs operate may be difficult for lawyers."); Tashea & Economou, *supra* note 136 (lamenting that statistics courses are not a mainstay in most law school curricula and noting that "[t]he science underpinning effective and measurable results of AI is not for the faint of heart. Governed by computer science and

Regardless, lawyers must still "maintain a baseline of knowledge about the AI programs they use,"[148] and this knowledge should include how the AI program reaches its outputs and any limitations of the program.[149]

2. Competence and GPT-3

What might such a baseline of knowledge look like for a lawyer who utilizes GPT-3? It will be critical for that lawyer to understand three things: (1) GPT-3 will sometimes produce results that mirror larger racial or other biases in our society, (2) GPT-3 makes silly mistakes, and (3) GPT-3 will tend to uphold the legal status quo and may not therefore be an ideal tool for advocating for change of existing precedent.

First, the lawyer needs to understand the origins of GPT-3's data training set, and specifically that it was trained in part on internet message boards that often include language that is misogynistic and racist. This massive data training set is, of course, part of why GPT-3 is so effective at predicting text. But any lawyer who utilizes it needs to be aware of the potential for it to produce biased outputs (this is especially important in light of Model Rule 8.4(g)'s prohibition against discrimination and bias in the practice of law, which is covered more fully below).[150]

Second, a lawyer who is utilizing GPT-3 in their practice needs to be aware that the program — despite all of the buzz and despite the fact that it really is a technological advance in the field of generative text — can still make some very silly mistakes. Most seasoned lawyers can share a horror story about a typo in their work, perhaps one caused by autocorrect. For example, one lawyer presented an appellate brief to the Ninth Circuit Court of Appeals, "in which auto-correct had changed

statistics, these are complex academic disciplines in which lawyers are generally untrained and cannot become experts on the fly.").

148 Yamane, *supra* note 143, at 884 ("Without this baseline of knowledge, lawyers will be unable to use AI programs with full competence, thereby jeopardizing their ability to provide competent representation to their clients.").

149 *See id.* (indicating that lawyers need to understand "(1) why the AI program produces its results and (2) what the AI program is and is not capable of"); *see also* Stuart Teicher, *Tech Tock, Tech Tock: The Countdown to Your Ethical Demise*, 31 J. AM. ACAD. MATRIM. LAWS. 481, 498 (2019) ("[I]t appears a lawyer's duty of competence probably already includes big data. The idea that entities are collecting, sharing, and analyzing data about lawyers and their clients is common knowledge. Being able to understand how that whole process works, at least at a basic level, appears to be necessary to establish minimum levels of competence.").

150 *See supra* Part I.C.

'sua sponte' to 'sea sponge,' resulting in the sentence: '[I]t is well settled that a trial court must instruct sea sponge on any defense, including a mistake of fact defense.'"[151] These types of errors, while sometimes funny, can irritate courts,[152] impact contracts in ways that lead to extended litigation,[153] and perhaps in extreme cases even lead to outcomes like wrongful convictions.[154] If a lawyer chooses to use GPT-3 to help draft legal pleadings, a certain amount of caveat emptor is necessary. Lawyers' duties to supervise AI tools is discussed at greater length below, but knowing that GPT-3 is prone to silly mistakes raises the stakes of using it.

Third, it is important to remember that GPT-3 is a prediction tool. Like all predictive tools, it has a bias toward replicating the past, specifically toward replicating its own data training set.[155] This tendency for prediction tools to keep repeating the past can be seen with recidivism prediction tools that rely on AI. Imagine an algorithm that is trained on historical criminal justice data. If that data is biased because it reflects a racially unfair criminal justice system where Black men were disproportionately likely to be arrested, charged with, and convicted of crimes, then any outputs of the recidivism prediction algorithm will be similarly biased and will predict it is more likely that Black men will reoffend.[156] The tool can only predict that which it has been trained to

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[151] Robert D. Lang, *From "Sua Sponte" to "Sea Sponge" The Mixed Blessings of Auto-Correct*, N.Y. STATE BAR ASS'N J., July/Aug. 2015, at 28, 29.

[152] *See, e.g.*, Adam Liptak, *Judge Finds a Typo-Prone Lawyer Guilty of Bad Writing*, N.Y. TIMES (Mar. 4, 2004), https://www.nytimes.com/2004/03/04/us/judge-finds-a-typo-prone-lawyer-guilty-of-bad-writing.html [https://perma.cc/VC5K-JZ5J] (reporting on a federal judge who reduced a lawyer's fee request because his writing included so many typos).

[153] *See, e.g.*, Debra Cassens Weiss, *No Takebacks? Settlement Offer Missing a Zero Can Be Withdrawn, Appeals Court Says*, A.B.A. J. (Aug. 20, 2020, 11:26 AM CDT), https://www.abajournal.com/news/article/no-takebacks-paralegals-mistakenly-sent-settlement-offer-can-be-rescinded-appeals-court-says [https://perma.cc/6ECX-MHUJ] (discussing a Florida appeals court ruling regarding a settlement offer that a paralegal mistakenly drafted as $10,000, rather than $100,000).

[154] *See, e.g.*, Jennifer Groscup, *Did a Typo Cause a Conviction?*, MONITOR ON PSYCH. (Am. Psych. Assoc.), June 2008, at 20, https://www.apa.org/monitor/2008/06/jn [https://perma.cc/SS3X-VS3P] (discussing case where use of "and" instead of "or" in jury instructions regarding felony murder charge may have impacted the outcome). Ultimately, on remand from the Supreme Court, the Ninth Circuit denied the habeas petition. Pulido v. Chrones, 629 F.3d 1007, 1020 (9th Cir. 2010).

[155] *See* Mayson, *supra* note 59, at 2251 ("[P]rediction functions like a mirror. The premise of prediction is that, absent intervention, history will repeat itself.").

[156] *Id.* ("Any form of prediction that relies on data about the past will produce racial disparity if the past data shows the event that we aspire to predict — the target variable — occurring with unequal frequency across racial groups.").

recognize. Similarly, GPT-3 will tend to predict legal language it has already been trained to recognize. Theoretically, it will suggest that a lawyer include in a motion the same arguments that have previously been included in similar motions. Of course, if the lawyer is working on a routine motion, this may be helpful. But if the lawyer is attempting to chart a creative and novel legal argument to overturn existing precedent, GPT-3's value will likely be limited.

B. Supervisory Duties Under Rule 5.3

1. Supervision Defined for AI

Lawyers have long had a duty to supervise the many "non-lawyers" (paralegals, legal secretaries, accountants, etc.) they work with.[157] This duty is codified in the Model Rule 5.3, which was initially entitled "Responsibilities Regarding Non-Lawyer Assistants." When Model Rule 5.3 was first promulgated by the ABA in 1983, Microsoft had just introduced its new software "Word"[158] and just 10% of adults said they had a home computer.[159] At the time of the Rule's passage, therefore, it is unlikely that the drafters were contemplating the best way for a lawyer to "supervise" a non-lawyer AI system capable of drafting volumes of legal documents like GPT-3. However, by the time Model Rule 5.3 was amended in 2012, it was renamed (changing the title from "Responsibilities Regarding Non-Lawyer *Assistants*" to "Responsibilities Regarding Non-Lawyer *Assistance*") to make clear that lawyers *do* indeed have a duty to supervise non-human AI if they utilize it.[160]

The Rule in various portions refers to a "person" when referring to nonlawyer assistance. For example, in subpart (b), which provides that

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[157] *See* Douglas R. Richmond, *Watching Over, Watching Out: Lawyers' Responsibilities for Nonlawyer Assistants*, 61 U. KAN. L. REV. 441, 441 (2012) (listing at length the various nonlawyer assistants lawyers regularly work with). *See generally* MODEL RULES OF PRO. CONDUCT r. 5.3 (AM. BAR ASS'N 2020) (detailing responsibilities regarding nonlawyer assistance).

[158] *Timeline of Computer History: 1983*, COMPUT. HIST. MUSEUM, https://www.computerhistory.org/timeline/1983/ (last visited July 13, 2021) [https://perma.cc/NPT3-EVTS].

[159] Susannah Fox & Lee Rainie, *Part 1: How the Internet Has Woven Itself into American Life*, PEW RSCH. CTR. (Feb. 27, 2014), https://www.pewresearch.org/internet/2014/02/27/part-1-how-the-internet-has-woven-itself-into-american-life/ [https://perma.cc/Q66T-U7SY].

[160] *See* AM. BAR ASS'N HOUSE OF DELEGATES, *supra* note 127, at 6 ("In 2012, the title of Model Rule 5.3 was changed from 'Responsibilities Regarding Nonlawyer Assistants' to 'Responsibilities Regarding Nonlawyer Assistance.' The change clarified that the scope of Rule 5.3 encompasses nonlawyers whether human or not.").

"a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer. . . ." ABA Resolution 112 nonetheless makes clear that AI is encompassed by the rule, noting that "the scope of Rule 5.3 encompasses nonlawyers whether human or not."[161] Further, Comment 3 to Rule 5.3 includes as an example of nonlawyer assistance "using an Internet-based service to store client information."[162] In adopting their own version of Rule 5.3, several states have replaced the word "person" with the word "nonlawyer" to make it clear that AI is encompassed by the Rule.[163]

It is important to note that Rule 5.3 is not a vicarious liability statute: lawyers are not automatically responsible for the actions of the nonlawyers they work with simply by virtue of their relationship to them. Rather, Rule 5.3 imposes on lawyers a specific duty to take *reasonable* efforts to supervise the work of the nonlawyer.[164] Further, the question of what is "reasonable" turns, in part, on "the education, experience and reputation of the nonlawyer," and "the nature of the services involved . . . ."[165] As part of this reasonable supervision of a nonlawyer, the attorney should "communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer."[166]

2. Supervision and GPT-3

Clearly, lawyers who want to use GPT-3 in their practice will have to supervise it. AI experts warn that GPT-3 should *always* be "babysat" by a human, whether at use in a legal setting or not.[167] But what does such supervision actually look like? At a minimum, GPT-3 cannot be used to produce writing that is presented to clients or courts without a human first reviewing the text to make sure it is accurate and appropriate.

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161 *Id.*

162 MODEL RULES OF PRO. CONDUCT r. 5.3 cmt. 3.

163 *See* Medianik, *supra* note 128, at 1521.

164 *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 5.3 cmt. 3 ("[A] lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations.").

165 *Id.*

166 *Id.*

167 Thornhill, *supra* note 28 (quoting Shannon Vallor, a professor of the ethics of data and AI at the University of Edinburgh, as saying, "For now, GPT-3 needs a human babysitter at all times to tell it what kinds of things it shouldn't say.").

For example, lawyers should not use GPT-3 to power chatbots on their websites to interact with potential clients, a worrisome possibility that is discussed at greater length in Part III.C. A lawyer who signs and submits to a court a document prepared by a paralegal or secretary without closely reading it is held responsible for the contents of that document and can be disciplined for it.[168] Likewise, a lawyer who does not carefully review any writing produced by GPT-3 before passing it along to a court is likewise going to be subject to discipline. A lawyer who fails to supervise an AI tool in accordance with Rule 5.3 is not off the hook merely because the language was not the product of a human.[169]

The consequences for failing to supervise AI like GPT-3 go beyond disciplinary actions that call into question an attorney's competence. Failing to supervise GPT-3 could potentially raise unauthorized practice of law issues. The unsupervised use of GPT-3 by lawyers (or *any* use of GPT-3 by nonlawyers to perform work considered the practice of law) may be considered to be the unauthorized practice of law in violation of Model Rule 5.5.[170] It is important to note that this area of the law is underdeveloped, and it is difficult to predict with any accuracy what a court or state ethics board[171] might do. "While there have been lawsuits against AI program developers, claiming they engaged in the unauthorized practice of law, legal precedent on this matter is still new and murky."[172]

In a 2015 opinion, the Second Circuit suggested that, at least in the context of document review, any work that can be performed by a

168 For example, Rule 11 of the Federal Rules of Civil Procedure requires that for represented parties, each pleading or motion filed with the court be signed by an attorney of record. FED. R. CIV. P. 11. By signing, the lawyer certifies that the pleadings are not frivolous, have evidentiary support, etc.

169 *See* Taylor B. Schaefer, *The Ethical Implications of Artificial Intelligence in the Law*, 55 GONZ. L. REV. 221, 232 (2020) ("[A] court would not likely accept an excuse that e-filing software failed to file an important filing as the attorney has a duty to verify that their work is done competently.").

170 Model Rule 5.5(a) provides that "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR. ASS'N 2020); *see also* Schaefer, *supra* note 169, at 233 ("An attorney who has created or participated in the creation and operation of a chatbot or similar service must also be wary of potentially violating Rule 5.5(a).").

171 As the Second Circuit recognized in the *Lola* decision, "the definition of 'practice of law' is 'primarily a matter of state concern,' . . . [since] '[r]egulating the "practice of law" is traditionally a state endeavor.'" Lola v. Skadden, Arps, Slate, Meagher & Flom LLP, 620 F. App'x 37, 41-42 (2d Cir. 2015) (internal citations omitted).

172 Yamane, *supra* note 143, at 887.

"machine" is per se *not* the practice of law.[173] The court appeared to give great weight to the fact that the work at issue in *Lola* did not involve the exercise of any independent legal judgment.[174] By application, an attorney who is properly supervising GPT-3, who is using independent legal judgment, would not be participating in the unauthorized practice of law. But any person — attorney or not — who blindly uses the tool to draft legal documents or to provide legal advice may well be.[175] Part IV below explores more deeply how lawyers can be better trained and supported as they attempt to properly supervise AI like GPT-3.

C. Bias and Rule 8.4

1. Bias Defined for AI

Because discrimination by lawyers "undermine[s] confidence in the legal profession and the legal system,"[176] the Model Rules deem it professional misconduct for lawyers to engage in conduct that is harassment or discriminatory while practicing law.[177] Model Rule 8.4(g) includes many protected classes with respect to discrimination,

[173] *Lola*, 620 F. App'x at 45 ("[A]n individual who, in the course of reviewing discovery documents, undertakes tasks that could otherwise be performed entirely by a machine cannot be said to engage in the practice of law.").

[174] *Id.* at 44-45 (noting that courts in North Carolina, Nevada, Colorado, Oregon, Illinois, and New York have held that the practice of law involves "at least a modicum of independent legal judgment").

[175] Although a full exploration of the contours of the unauthorized practice of law with respect to AI are outside of the scope of this paper, other scholars have addressed this issue. *See, e.g.*, Simshaw, *supra* note 119, at 178 ("On the legal self-help front, courts, state legislatures, and bar associations in the near term will have to decide whether increasingly sophisticated [AI] services . . . constitute the unauthorized practice of law."); *see also* Schaefer, *supra* note 169, at 234 (noting that when tools like chatbots are developed without attorneys, state legislatures are left to define whether that is the unauthorized practice of law, since laypersons are not bound by the Model Rules. "State legislatures often look to state bar associations to define the unauthorized practice of law. In many states, injunctions are becoming more common as a remedy for the unauthorized practice of law."); Michael Simon, Alvin F. Lindsay, Loly Sosa & Paige Comparato, Lola v. Skadden *and the Automation of the Legal Profession*, 20 YALE J.L. & TECH. 234, 262 (2018) (noting that "a few state bars have tackled the issue [of AI products as unauthorized practice of law], though not conclusively," and sharing various approaches that states have taken).

[176] MODEL RULES PRO. CONDUCT r. 8.4(g) cmt. 3 (AM. BAR. ASS'N 2020).

[177] MODEL RULES PRO. CONDUCT r. 8.4(g) ("It is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.").

including on the basis of race, sex, gender identity and socioeconomic status.[178] A comment to the Rule defines discrimination as including "harmful verbal or physical conduct that manifests bias or prejudice towards others."[179] The lawyer need not know that the conduct is discriminatory; it is enough under Rule 8.4(g) if the lawyer *reasonably should have known* that the conduct was discriminatory.[180]

Rule 8.4 is sometimes referred to as a "catch-all" provision,[181] and the discrimination language found in part (g) was only recently added in 2016, after several earlier failed attempts to include the language.[182] As with all of the Model Rules, individual states have varied in their decisions about whether and how to adopt Rule 8.4(g).[183]

2. Bias and GPT-3

It is not hard to imagine a scenario involving a lawyer using GPT-3 that would implicate Rule 8.4(g). As noted previously, one of the possible applications of GPT-3 in the legal field is for chatbots that could help direct visitors to a website to the proper legal services for them.[184] This application may be especially intriguing (and problematic) in attempting to address the access to justice gap.

Imagine a legal chatbot powered by GPT-3. Remember that GPT-3 learned to write from, among other sources, the subthreads of Reddit.[185] Now imagine that the chatbot is asked a question about a potential employment discrimination claim, based on race or gender. Remember

178 *See id.*

179 MODEL RULES PRO. CONDUCT r. 8.4(g) cmt. 3.

180 MODEL RULES PRO. CONDUCT r. 8.4(g) (providing that it is professional misconduct for a lawyer to engage in conduct that "the lawyer knows or *reasonably should know*" is discriminatory (emphasis added)).

181 Bernstein, *supra* note 126, at 134.

182 *See, e.g.*, Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 811 (2019) (noting that advocates first attempted to formally adopt a rule that prohibits discrimination in the practice of law in 1994, but that that attempt failed, "making the successful passage of Model Rule 8.4(g) in 2016 an apparent victory for those who spent years working to get broad-based support within the bar to address issues of diversity and discrimination").

183 *Id.* at 811-12 (noting that "[s]tates have adopted the rule, adopted a less aggressive version of the rule, and formally rejected the rule," and that some state attorneys general have argued that it is unconstitutional).

184 *See supra* Part II.C.

185 Other commentators have speculated that chatbots powered by AI could pose Rule 8.4(g) issues for attorneys. *See* Sharon D. Nelson & John W. Simek, *The ABA Tackles Artificial Intelligence and Ethics*, LAW PRAC., Jan./Feb. 2020, at 26, 27 ("Imagine an AI chatbot on a lawyer's website [writing racist and sexist text in the same way a Microsoft chatbot did in 2016]. Scary, huh?").

that the creators of GPT-3 have already acknowledged that it has a tendency to use more sexualized language with respect to women and to use more negative language when writing about Black people. What might GPT-3 say in response to this potential client? The outcome has real potential to be disastrous.

We need not operate entirely in the world of hypothetical, as researchers using GPT-3 during beta testing have already shown that it can prove disastrous as a chatbot. A group of French doctors and machine learning engineers developed a medical chatbot that was powered by GPT-3.[186] The chatbot performed decently well at administrative tasks such as scheduling appointments and determining insurance benefits.[187] However, when attempting to help with mental health questions, the tool went hugely awry. At times, it was merely perplexing — it told one fake patient that recycling their electronics may help them feel happier.[188] But, the chatbot also gave breathtakingly awful advice — it actually told a fake patient who was contemplating suicide that they should, indeed, kill themselves.[189] The French researchers were quick to note that OpenAI has explicitly warned against using GPT-3 in a high-stakes area like medicine,[190] so there is good reason to be cautious of its use for chatbots in law as well.

Once again, the key to using GPT-3 in a way that does not run afoul of Rule 8.4(g) will focus on understanding the technology and its tendencies and supervising it effectively.[191] Unless and until the

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[186] Anne-Laure Rousseau, Clément Baudelaire & Kevin Riera, *Doctor GPT-3: Hype or Reality?*, NABLA: BLOG (Oct. 26, 2020), https://www.nabla.com/blog/gpt-3/ [https://perma.cc/9N2E-6KGQ].

[187] *Id.* (concluding that "GPT-3 seemed to work for basic admin tasks such as appointment booking, but when digging a bit we found that the model had no clear understanding of time, nor any proper logic," and also finding that "GPT-3 could help nurses or patients to quickly find a piece of information in a very long document, like finding insurance benefits for specific medical examinations").

[188] *Id.* ("The model can also shoot unexpected answers where it suggests recycling more to ease stress . . . .").

[189] *Id.* The fake patient typed, "Should I kill myself?" and the GPT-3 chatbot responded with, "I think you should." *Id.*

[190] *Id.* ("As Open AI itself warns in GPT-3 guidelines, healthcare 'is in the high stakes category because people rely on accurate medical information for life-or-death decisions, and mistakes here could result in serious harm'. Furthermore, diagnosing medical or psychiatric conditions falls straight in the 'unsupported use' of the model.").

[191] *See* Caleb Chaplain & Nisha R. Patel, *The Terminator Argument: The Duty of Competence in Using Artificial Intelligence*, 38 AM. BANKR. INST. J. 28, 28-29 (2019) (reviewing Rule 8.4(g) and concluding that "attorneys might have an ethical obligation to understand the data underlying the machine learning to account for [bias from the AI creator or from its data set]").

developers of GPT-3 can effectively guard against it producing text that is racist or sexist, it should not be used for chatbot features. Further, any attempts to address access to justice issues with AI like GPT-3 need to be carried out with an eye toward the tendency of such tools to produce outputs that are biased against the very people who are often left behind by the justice gap. Scholars have noted that AI tools can do more harm than good when it comes to marginalized communities.[192] If a tool like GPT-3 is to be used successfully in addressing the access to justice gap, it must be reevaluated and updated with an eye toward more culturally competent design.[193] "Unless the designers deliberately consider the issue of biased schemas within their design, AI may promote implicit biases that negatively impact the communities that are in most need of the help."[194]

But, lawyers will not be able to remove bias from AI systems, no matter how technically competent they become or how rigorously they supervise the systems. Rather, their duty under Rule 8.4(g) will largely be to understand the tendency toward bias so that they can make informed decisions about when the technology is appropriate in the practice of law and when it should be avoided.

IV. ARE THE CURRENT MODEL RULES ADEQUATE?

As the preceding section made clear, there are already Model Rules that provide a foundation for defining lawyers' ethical duties with respect to the use of AI, like GPT-3, in their practices. Are these existing rules "enough" to help effectively guide lawyers' behavior with respect to the use of GPT-3 and other AI tools in the practice of law? Arguably, the Rules themselves may be adequate, as many commentators and Part III of this Article have located within them certain duties.[195] However, they are currently too lacking in specificity with respect to the use of AI

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[192] *See, e.g.*, Emily S. Taylor Poppe, *The Future Is ~~Bright~~ Complicated: AI, Apps & Access to Justice*, 72 OKLA. L. REV. 185, 186 (2019) ("I highlight the potential of legal technology to reproduce, rather than ameliorate, existing social inequalities."); *see also* Cruz, *supra* note 120, at 369-70 (noting that, in the criminal justice context, "implicit biases in the AI formulas are skewing the results in ways that negatively impact defendants of color. While not strictly an access to justice issue, the biased results highlight the dangers of using technology that does not account for diversity and cultural associations.").

[193] *See* Cruz, *supra* note 120, at 351 (examining "the intersectionality of cross-cultural competence theory and access to justice theory to demonstrate that successful use of legal technology inextricably requires legal professionals to incorporate culturally competent designs").

[194] *Id.* at 370-71.

[195] *See supra* Part III.

like GPT-3 in the practice of law for them to be truly effective in governing that technology's use. The Comments to certain Rules should be updated to explicitly reflect the best practices that were discussed in Part III, much as Comment 8 to Rule 1.1 was updated in 2012 to specify duties of competence with respect to technology.[196] The Comments are the ideal place for amendments, as they were designed to help clarify and elucidate the existing rules, but not to impose any new obligations or restrictions. The preamble to the Model Rules notes that, while "the text of each Rule is authoritative," "[t]he Comments are intended as guides to interpretation . . . ."[197]

Of course, as a threshold matter, it is important to acknowledge that the amendment process for the Model Rules has traditionally been lengthy and sometimes fraught. For example, the 2002 Model Rule amendments were first contemplated in 1997, when the ABA Ethics 2000 Commission was formed.[198] In the five years following the Commission's formation, that Commission "held fifty-one full days of meetings, held more than twelve public hearings, communicated regularly with its 250-member advisory council, consulted with special-interest groups, and made its discussion drafts and meeting minutes available on the internet."[199] Only after the proposed rules were debated at two ABA meetings spaced several months apart were most of the amendments adopted.[200] Even once the Model Rules themselves are amended, it can take several years more for individual states to adopt them in whole or in part.

Thus, it could be a multi-year process for relevant comments to be added to the Model Rules, at which point we have moved on to GPT-4 (or GPT-5, etc.) and a new AI technology. Thus, the amended comments need to be specific enough to really guide lawyer behavior but not so specific that they are out of date as soon as they are published. The ABA has likely tried to thread this needle (and acknowledge the

196 *See supra* Part III.A and accompanying footnotes.

197 MODEL RULES OF PRO. CONDUCT, Preamble ¶ 21 (AM. BAR ASS'N 2020); *see also id.* ¶ 14 ("Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules."); *id.* ¶ 15 ("The Comments are sometimes used to alert lawyers to their responsibilities under such other law.").

198 A.B.A., ETHICS 2000 COMMISSION EXECUTIVE SUMMARY, https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_exec_summ/ [https://perma.cc/F4KH-PUCH] (noting that "[t]he Commission on Evaluation of the Rules of Professional Conduct was created in mid-1997").

199 Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. LEGAL PROF. 201, 233 (2017).

200 *Id.*

timeline for Rule amendment) through adopting resolutions rather than amending the rules. As noted previously, in 2019, the ABA passed a resolution "urging" lawyers and courts to "address the emerging ethical and legal issues related to the usage of artificial intelligence ("AI") in the practice of law . . . ."[201] The ABA is correct to urge lawyers to pay attention to these important rules, but the resolution is a toothless tiger at this point. Neither the resolution nor the more detailed report that accompanied it "provide much in the way of specifics with regard to how courts and lawyers should address these emerging issues."[202] Lawyers need more specificity and guidance to help ensure they are ethically deploying AI like GPT-3 in their legal practices.

A. Amendments to Comment 8 to Rule 1.1

Comment 8 to Rule 1.1 should be amended once more to be more specific about a lawyer's duties with respect to the use of AI in the practice of law. In its current form, Comment 8 provides that lawyers should pay attention to a variety of changes to the legal profession, including "the benefits and risks associated with relevant technology," and that they should engage in continuing legal education. Commentators have suggested that the language was kept intentionally broad, so that it would not have to be continually amended to deal with new technology.[203] But it is currently too vague to be useful. The amended comment should require that attorneys attend continuing legal education that is specifically addressed at the ethical use of AI in the practice of law.

Although it will be up to each state to determine how many CLE hours to require, mandating some amount of technology CLE will help signal to lawyers how important this topic is. Some states already require CLE credits in technology.[204] Lawyers in Florida, for example,

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[201] AM. BAR ASS'N HOUSE OF DELEGATES, *supra* note 127, at 12.

[202] Bob Ambrogi, *ABA Votes to Urge Legal Profession to Address Emerging Legal and Ethical Issues of AI*, LAWSITES (Aug. 14, 2019), https://www.lawsitesblog.com/2019/08/aba-votes-to-urge-legal-profession-to-address-emerging-legal-and-ethical-issues-of-ai.html [https://perma.cc/6GCW-WPFT].

[203] *See* Baker, *supra* note 138, at 557, 560 ("The language of [the duty of competence] was left purposefully broad to account for technologies today, as well as technologies that have not yet been conceived. . . . The amended language found in Comment 8 is amorphous. This vague language was purposeful . . . .").

[204] Medianik, *supra* note 128, at 1525; *see also* Victor Li, *Florida Supreme Court Approves Mandatory Tech CLE Classes for Lawyers*, A.B.A. J. (Sept. 30, 2016, 8:45 AM CDT), https://www.abajournal.com/news/article/florida_supreme_court_approves_mandatory_tech_cles_for_lawyers [https://perma.cc/F2JG-BS34].

are required to take 3 hours of "approved technology program" CLE courses over a 3-year span.[205] An attorney who was involved in the effort to update Florida's professional practice rules to include that requirement said it was relatively easy task to accomplish and "not as tough a sell as he and his subcommittee thought it would be."[206]

Comment 8 should also address when and how an attorney can delegate some of their responsibility to be technically competent. Some state bar associations have already produced guidance on this topic. For example, the New York State Bar Association has promulgated social media ethics guidelines for attorneys.[207] Those guidelines provide guidance on attorneys' technological competence, both with respect to social media use and beyond. With respect to delegation, the guidelines address electronic discovery and note that "[a]lthough a lawyer may not delegate his or her obligation to be competent, he or she may rely, as appropriate, on other lawyers or professionals in the field of electronic discovery and social media to assist in obtaining such competence."[208]

B. Amendment to MCLE Model Rule

Alternatively, a focus on AI CLE could be accomplished through an amendment to the ABA's Model Rule for Minimum Continuing Legal Education and Comments ("MCLE Model Rule"). Adopted in February of 2017 by the ABA's House of Delegates, the MCLE Model Rule requires that lawyers take specialty CLE credits in three areas: (1) Ethics and Professionalism (average one credit per year); (2) Diversity and Inclusion (one credit every three years); and (3) Mental Health and Substance Use Disorders (one credit every three years). Adding a requirement for an annual credit in technology would be one way to help "give teeth" to the ABA's Resolution 112, urging that lawyers educate themselves on AI.[209]

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[205] Rs. REGULATING FLA. BAR 6-10.3(b) ("Each member must complete a minimum of 33 credit hours of approved continuing legal education activity every 3 years . . . 3 of the 33 credit hours must be in approved technology programs.").

[206] Li, *supra* note 204 (quoting attorney John M. Stewart as saying, "Throughout this entire process, we've gotten almost no pushback from lawyers . . . I think everyone recognized that lawyers could benefit from more education, both when it comes to technology and in general.").

[207] N.Y. STATE BAR ASS'N, SOCIAL MEDIA ETHICS GUIDELINES (2019), https://nysba.org/app/uploads/2020/02/NYSBA-Social-Media-Ethics-Guidelines-Final-6-20-19.pdf [https://perma.cc/VJN2-ZCUZ].

[208] *Id.* at 5.

[209] *See* AM. BAR ASS'N OF DELEGATES, https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/112-annual-2019.pdf [https://perma.cc/2LZ3-JSES].

Admittedly, there has not been widespread adoption by the states of the MCLE Model Rule's requirement of specialty CLE credits.[210] Nonetheless, such an amendment would again signal the importance of the topic of AI-focused CLEs. There is a role for law schools to play here as well: "[L]aw schools can implement mandatory legal technology courses into their curricula or add the topic to the professional responsibility requirement."[211] Many schools now offer some version of "Artificial Intelligence and the Law." I developed and teach such a course at the West Virginia University College of Law. Students are introduced to the basics of artificial intelligence, including machine learning and algorithmic decision-making.[212] The course also covers the importance of explainability and interpretability in addressing bias in algorithms, and students spend a week discussing how AI will change the future of the legal profession.[213] Lawyers who are exposed to these issues as law students will be more receptive to any CLEs they take later on, and will be better positioned to ethically adopt (or reject) new technology as it evolves over the span of their own legal careers.

C. Amendment to Comment 3 to Rule 5.3

In its current form, Comment 3 to Rule 5.3 provides that "a lawyer must make reasonable efforts to ensure that [services provided by a nonlawyer] are provided in a manner that is compatible with the lawyer's professional obligations." The Comment should be amended to address AI specifically, and should be even more explicit that lawyers have a duty to supervise AI systems themselves, and not just the technical support staff who may help select or run those systems. Toward that end, the Comment should provide more guidance on what reasonable efforts to supervise AI look like. Because "the duty of supervision goes hand-in-hand with the duty of competence for attorneys,"[214] a proposed amendment to Comment 3 of Rule 5.3 would be similar to the proposed amendment to Comment 8 to Rule 1.1. Put another way, in order to competently use an AI tool like GPT-3, you must supervise it. The Comment should make clear that such

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[210] *See* ABA MCLE Chart, A.B.A. (Apr. 12, 2017), https://www.americanbar.org/content/dam/aba/directories/policy/aba_model_rule_comparison_by_state_meet_model_rule_noted.pdf [https://perma.cc/DAU6-TZG5] (comparing jurisdictional agreement with ABA model MCLE Rule).

[211] Medianik, *supra* note 128, at 1525.

[212] Syllabus, Professor Amy B. Cyphert, Artificial Intelligence and the Law (Summer 2021) (on file with author).

[213] *Id.*

[214] Schaefer, *supra* note 169, at 232.

supervision could involve associating with an expert, as the California Bar allows, provided that you supervise that expert.

The ABA should also consider issuing best practices that attorneys could follow when selecting and supervising experts in AI or other technology. This could be done through an expansion and refocusing of existing resources, such as those included in the ABA's Legal Technology Resource Center. That Center produces "publications, blog posts, webinars, and other free resources . . . to help[] lawyers identify opportunities, overcome obstacles, and understand how technology tools can improve their practices."[215] The Center could produce webinars devoted to selecting and supervising AI experts, allowing practitioners to gain insight and fulfill the CLE requirements proposed above. Providing materials through an existing resource center, and making sure that they are free or low cost, would be important. Otherwise, a requirement that lawyers participate in technology CLE credits may burden smaller firms, solo practitioners, and legal services organizations, as they are less likely to have in-house technology experts. In 2020, only 27% of solo practitioners reported to the ABA that they had some sort of technology training available to them, as opposed to 100% of attorneys from large (500+ lawyer) firms.[216] There is obviously a role for the ABA to play here.

D. A New Comment to Rule 8.4(g)

A new Comment should be added to Rule 8.4(g) that cautions lawyers from using AI systems without first understanding their propensity for bias. Lawyers are not going to be able to effectively remove bias from AI systems — a task that technical experts and data scientists have thus far been unable to accomplish.[217] But lawyers can and should be warned that failure to understand the potential for bias in these tools may lead to their misuse in the practice of law, that such misuse could lead to sanctions. The fact of bias in AI systems is well-documented in scholarly research, but not necessarily intuitive to most laypeople, who tend to

[215] Legal Technology Resource Center, A.B.A., https://www.americanbar.org/groups/departments_offices/legal_technology_resources/ (last viewed July 13, 2021) [https://perma.cc/H7DU-9PFH].

[216] Mark Rosch, *ABA 2020 Tech Report*, A.B.A. (Nov. 16, 2020), https://www.americanbar.org/groups/law_practice/publications/techreport/2020/techtraining/ [https://perma.cc/BDF6-D5WQ].

[217] *See* Craig S. Smith, *Dealing with Bias in Artificial Intelligence*, N.Y. TIMES (Nov. 19, 2019), https://www.nytimes.com/2019/11/19/technology/artificial-intelligence-bias.html [https://perma.cc/SL7V-NRUQ] (discussing why bias in AI is such a difficult issue to address).

believe that technology is objective and neutral.[218] Cautioning lawyers about this bias, and making clear to them that it is professional misconduct to ignore it, will help focus attorneys on this topic.

Lawyers can learn more about the potential for bias in AI systems through a variety of ways. The mandatory CLEs described above could focus on AI and bias (the author of this Article led one for West Virginia attorneys on February 10, 2021). Lawyers could read any of a number of excellent law review articles that describe this.[219] But until lawyers realize the bias risks that AI tools like GPT-3 pose, they are unlikely to take these steps. A Comment to Rule 8.4(g) is a very important first step.

CONCLUSION

Like all AI, GPT-3 is neither inherently good nor inherently bad. Rather, it is full of both promise and peril. The technology may impact the practice of law for the better. For example, it could streamline the drafting process, reducing fees for clients. Or it could impact the practice of law for the worse, spewing toxic language and perpetuating existing biases. The impacts are far from predetermined and are difficult to predict. It is easy to see, however, that the more ethical oversight lawyers exercise, the more they think critically about the technology and how or if to use it, the more they understand the inherent limitations and downsides, then the higher the likelihood that the technology will represent a net positive for lawyers and their clients. Lawyers need clear direction on how to ethically use GPT-3, and they need an incentive to follow that direction and the support and resources to do so. GPT-3 may soon be replaced by GPT-4, or by whatever the next "wonder tech" is. But AI as a whole will not be replaced in the practice of law, and its impact will only grow.

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[218] *See, e.g.*, Cyphert, *supra* note 63, at 473 ("It is tempting to think of any artificial intelligence, including an algorithm, as neutral and objective. Laypeople without technical expertise can be especially vulnerable to placing too much faith in algorithmic outcomes.").

[219] *See, e.g.*, Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671 (2016) (discussing bias and big data); David Lehr & Paul Ohm, *Playing with the Data: What Legal Scholars Should Learn About Machine Learning*, 51 UC DAVIS L. REV. 653 (2017) (discussing bias and machine learning); Mayson, *supra* note 59 (discussing bias in criminal justice strategies).

Attachment 8

Alexander R. Rothrock
Attorney at Law
arothrock@bfwlaw.com

July 24, 2023

Via Email:

Judge Lino S. Lipinsky de Orlov
Colorado Judicial Branch
1400 Wewatta St, No. 700
Denver, Colo. 80202

Re: **Remote Practice by Lawyers Residing in Colorado but not Authorized to Practice Law in this State**

Dear Judge Lipinsky:

The purpose of this letter is to ask the Standing Committee on the Colorado Rules of Professional Conduct to consider recommending to the Colorado Supreme Court a revision to a Comment to Colo. RPC 5.5. The purpose of the proposed revision is to permit lawyers who have established domicile in Colorado, but are not authorized to practice law here, to provide legal services that are authorized by the lawyer's licensing jurisdiction.

(Background)

The trend toward working remotely through electronic means began before the pandemic, but the pandemic accelerated the trend exponentially. The trend has swept the legal profession as much as any other field, and Colorado is no exception. Thousands of Colorado lawyers, judges, law clerks, paralegals, and administrative staff work from home on a daily or occasional basis. For better or worse, working remotely is here to stay in the Colorado legal community.

The regulation of the practice of law on a state-by-state basis makes remote practice across state lines more complicated for lawyers. Since the pandemic, however, ethics committees and unauthorized practice of law committees in many states and the District of Columbia have issued advisory opinions addressing whether remote practice by lawyers who reside in states where they are not licensed violates Rule 5.5.[1] Every one of these opinions

[1] *See* Cal. State Bar Ass'n, Formal Op. No. 20-0004 (2021); D.C. Ct. of Appeals Comm. on UPL, Op. 24-20 (2020); Fla. Adv. Op. FAO #2019-4 (May 20, 2021); Me. Prof'l Ethics Comm'n, Op. 189 (2005); Michigan Ethics Opinion RI-382 (December 8, 2021); N.J. Comm. on the Unauthorized Practice of Law

concludes that it does not, subject to varying conditions. Similarly, ABA Formal Opinion 20-495, "Lawyers Working Remotely" (December 16, 2020), concludes that "lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction."

In addition, several states have modified their Rule 5.5 or associated Comments to accommodate remote practice by non-admitted lawyers. Some of these rules explain the policy reasons motivating the changes. For example, a January 22, 2022, New York City Bar Association report proposing a modification of New York's Rule 5.5 states as follows:

> To take the view that, say, Connecticut or New Jersey lawyers working from their residence in New York on Connecticut or New Jersey matters are engaged in the unauthorized practice of law in New York would be to discourage such lawyers from residing in this State, with all of the revenue and other benefits such residence brings to this State. It would also ignore the growing reality of "work from home" situations in law practice and a variety of other industries. Further, the New York rules against unauthorized practice are primarily designed to protect the New York public, and the public is not put at risk when lawyers happen to be working remotely from their New York residence while practicing law in other jurisdictions.[2]

A Vermont "Board Note" puts it more succinctly: "Vermont has no interest in regulating the practice of lawyers who, for all intents and purposes, are providing legal services that have no impact on Vermont, Vermonters, the Vermont Judiciary, or Vermont's legal profession."[3]

In 2022, the Association of Professional Responsibility Lawyers proposed revisions to ABA Model Rule 5.5 going well beyond the issue discussed here. However, a proposed Comment addresses this issue:

Op. 59 & N.J. Advisory Comm. on Prof'l Ethics Op. 742, Joint Op. (2021); San Francisco Opinion 2021-1 (August 2021); Utah Ethics Advisory Op. Comm., Op. No. 19-03 (2019); Va. Legal Ethics Op. 1896 (2022); Wisc. Formal Ethics Op. EF-21-02 (2021). *See also* "A Multistate Analysis of the Ethical Rules Governing Attorneys Working Remotely," Hinshaw & Culberson Newsletter (May 2023). https://www.hinshawlaw.com/newsroom-newsletters-lln-multistate-analysis-of-ethical-rules-governing-attorneys-working-remotely.html.

[2] *A report from the New York City Bar Association on Proposed Amendment to the New York Court of Appeals Part 523 Rules for the Temporary Practice of Law in New York*, N.Y. STATE BAR ASS'N, Jan. 22, 2022, at 3.

[3] VT. RULES OF PROF'L CONDUCT R. 5.5, Board's Note—2022 Amendment.

> [1] This rule acknowledges that the practice of law now routinely transcends geographic jurisdictional boundaries. The question of what it means for a lawyer to practice law "in" a jurisdiction has been clouded by advances in technology that facilitate lawyers' ability to communicate, work, and appear in other jurisdictions. For example, historically a lawyer's physical presence in a jurisdiction was the predominate factor in determining where the lawyer practiced law. In modern law practices, lawyers routinely send e-mails, place phone calls, and participate in video calls with clients and other parties in other jurisdictions, rendering the lawyer's physical location irrelevant to the lawyer's capacity to provide legal services. Similarly, the advent of on-line research, including access to local rules and ordinances, has enhanced lawyers' ability to master competency without regard to artificial geographic limitations. Hence, this rule recognizes the realities of current law practice and expanding access to lawyers while still being mindful of the need for public protection.[4]

The Office of Attorney Regulation Counsel also has expressed a favorable view of remote practice law by resident non-Colorado-licensed lawyers, albeit with limitations. In a November 2020 electronic newsletter, that office wrote that it "generally does not interpret the Supreme Court's rules governing attorneys to necessarily require Colorado licensure if the resident lawyers are engaged in a state law practice based on the attorney's jurisdiction of licensure when that practice does not require appearances in Colorado courts or the application of Colorado law."[5] The newsletter goes on to state that non-Colorado-licensed lawyers who work for firms with a Colorado office "likely should be licensed to practice in Colorado."[6]

The OARC newsletter was a welcome departure from that office's unwritten rule not to issue ethics opinions or provide legal advice. But it is an expression of that office's policy, not a law or rule. Policies change. For non-Colorado-licensed lawyers who need to know where Colorado stands on this issue, a three-year-old newsletter is neither easy to find nor indefinitely reliable as the professional and financial basis upon which to decide whether to move one's family to Colorado.

(My Request of this Committee)

There is a need for Colorado to declare itself on this subject. I have received many calls or emails inquiring about Colorado's position on remote practice. I also took a personal interest in the subject because of my own recent move to South Carolina, whose Supreme Court

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[4]Reginald M. Turner, Esq., *Letter Regarding Our Proposal to ABA President*, ASS'N OF PROF'L RESPONSIBILITY LAWYERS, Apr. 18, 2022, at 1-2.
[5] *OARC Update*, COLO. SUPREME COURT, Nov. 2020, https://coloradosupremecourt.com/Newsletters/November2020/Index.htm.
[6] *Id.*

recently adopted a Comment to its Rule 5.5 to accommodate lawyers like me. For a great many reasons, uncertainty on this topic is undesirable.

I propose that the Standing Committee form a subcommittee to consider whether to recommend any amendments to Colo. RPC 5.5 (including its Comments). If the answer is affirmative, the subcommittee would consider what amendments to recommend. My hope is that ultimately the Standing Committee will recommend revisions to Colo. RPC 5.5 that will authorize this form of remote practice subject to some conditions. I submit that the issue is not whether to modify Colo. RPC 5.5 but how to do it.

Fortunately, there are several rules or proposed rules in other states to use as guidance. I have grouped them in the attached Appendix. The Appendix also includes a proposal for this Committee to consider.

I thank the Committee in advance for considering this issue.

Sincerely,

BURNS, FIGA & WILL, P.C.

Alexander R. Rothrock

APPENDIX

(Adopted or Proposed State Rules)

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1. Connecticut

Conn. Rule of Prof'l Conduct 5.5(f): To the extent that a lawyer is physically present in this jurisdiction and remotely engages in the practice of law as authorized under the laws of another United States jurisdiction in which that lawyer is admitted, such conduct does not constitute the practice of law in this jurisdiction.

COMMENTARY . . . Subsection (f) reflects the reality that with the advancement of technology, many lawyers work remotely from locations outside the jurisdiction(s) in which they are admitted to practice law. Subsection (f) allows those lawyers to practice law as authorized in the jurisdiction(s) in which they are admitted while physically present in Connecticut. This subsection coordinates with Practice Book Section 2-44A(c), which provides that a lawyer admitted in another United States jurisdiction engaged in the remote practice of law as authorized by that jurisdiction while physically present in Connecticut is not engaged in the practice of law in this jurisdiction.

2. Hawaii

Cmt. [3], Rule 5.5: Lawyers not authorized to practice law in Hawai‘i might lawfully remotely practice the law of the jurisdictions in which they are permitted to practice, to the extent permitted by that jurisdiction, while they are physically present in Hawai‘i, provided they do not (a) hold themselves out as being licensed to practice in Hawai‘i, (b) advertise or otherwise hold themselves out as having an office in Hawai‘i, (c) provide or offer to provide Hawai‘i legal services, or (d) engage in any other activity connected to the practice of law in Hawai‘i other than their mere physical presence in Hawai‘i. Having Hawai‘i contact information listed on websites, letterheads, business cards, advertising, or the like would tend to improperly suggest a Hawai‘i office or presence that could be deemed to constitute the unauthorized practice of law in Hawai‘i. On the other hand, lawyers authorized to practice law in Hawai‘i may remotely practice law in Hawai‘i while they are physically present outside of Hawai‘i, provided they are not prohibited from doing so in the jurisdiction where they are physically present. *C.f.,* ABA Formal Opinions 495 (2020) and 498 (2021).

3. New York

N.Y.Ct.Rules, § 523.5 Working From Home: A lawyer who is not admitted to practice in this State but who is authorized to practice law in one or more other jurisdictions identified in § 523.2(a)(1), may practice law from a temporary or permanent residence or other temporary or permanent location in this State to the same extent that such lawyer is permitted to practice law in the jurisdiction(s) where the lawyer is duly admitted or authorized, provided:

(a) the lawyer does not practice the law of this State except to the extent permitted by this Part, by other laws of this State, and by the laws of jurisdictions in which the lawyer is authorized to practice;

(b) the lawyer does not use advertising, oral representations, business letterhead, websites, signage, business cards, email signature blocks or other communications to hold himself or herself out, publicly or privately, as authorized to practice law in this State or as having an office for the practice of law in this State;

(c) the lawyer does not solicit or accept residents or citizens of New York as clients on matters that the lawyer knows primarily require advice on the state or local law of New York, except as permitted by 22 NYCRR § 522.4 (in the in-house registration rule) or by other New York or federal law;

(d) the lawyer does not regularly conduct in-person meetings with clients or third persons in New York except as would otherwise be permitted under § 523.2 of this Part; and
(e) when the lawyer knows or reasonably should know that a person with whom the lawyer is dealing mistakenly believes that the lawyer is authorized to practice in this State, the lawyer shall make reasonable efforts to correct the misunderstanding.

4. North Carolina

N.C. Rule of Prof'l Conduct 5.5(d)(2): (d) A lawyer admitted to practice in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, does not engage in the unauthorized practice of law in this jurisdiction and may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law if the lawyer's conduct is in accordance with these Rules and: . . . (2) the lawyer is providing services limited to federal law, international law, the law of a foreign jurisdiction *or the law of the jurisdiction in which the lawyer is admitted to practice,* or the lawyer is providing services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

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

5. Ohio

Ohio Rule of Prof'l Conduct 5.5(d)(4): (d) A lawyer admitted and in good standing in another United States jurisdiction may provide legal services in this jurisdiction through an office or other systematic and continuous presence in any of the following circumstances: . . . *(4) the lawyer is providing services that are authorized by the lawyer's licensing jurisdiction, provided the lawyer does not do any of the following:*

(i) solicit or accept clients for representation within this jurisdiction or appear before Ohio tribunals, except as otherwise authorized by rule or law;

(ii) state, imply, or hold himself or herself out as an Ohio lawyer or as being admitted to practice law in Ohio;

(iii) violate the provisions of Rules 5.4, 7.1, and 7.5. (Emphasis added.)

[22] Division (d)(4) allows an attorney admitted in another United States jurisdiction to practice the law of that jurisdiction while working remotely from Ohio. A lawyer practicing remotely will not be found to have engaged in the unauthorized practice of law in Ohio based solely on the lawyer's physical presence in Ohio, though the lawyer could through other conduct violate the rules governing the unauthorized practice of law. A lawyer practicing remotely in Ohio must continue to comply with the rules of the lawyer's home jurisdiction regarding client trust accounts, and any client property consisting of funds should be handled as if the lawyer were located in the lawyer's home jurisdiction.

6. South Carolina

Cmt. [4], South Carolina Rule 5.5: (b) A lawyer who is not admitted to practice in this jurisdiction shall not:

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

[4] . . . *A lawyer admitted in another jurisdiction does not establish an office or other systematic presence in this jurisdiction for the practice of law by engaging in remote work in this jurisdiction, provided the lawyer's legal services are limited to services the lawyer is authorized to perform by a jurisdiction in which the lawyer is admitted, and the lawyer does not state, imply, or hold out to the public that the lawyer is a South Carolina lawyer or is admitted to practice law in South Carolina.* (Emphasis added.)

7. Vermont

Vermont Rules of Prof'l Conduct, Rule 5.5

BOARD'S NOTE—2022 AMENDMENT

Similar principles apply in Vermont. Rule 5.5 is intended to protect consumers of Vermont legal services from the unauthorized practice of law. *It is not intended to keep lawyers who are not licensed in Vermont from providing remote legal services to clients in jurisdictions in which they are licensed.* Consumers of Vermont legal services are protected by the conditions that prohibit non-Vermont lawyers who are working remotely from Vermont from holding

themselves as admitted or licensed here, advertising or opening an office here, and providing, offering to provide, or holding themselves as authorized to provide legal services here. *Vermont has no interest in regulating the practice of lawyers who, for all intents and purposes, are providing legal services that have no impact on Vermont, Vermonters, the Vermont Judiciary, or Vermont's legal profession.* (Emphasis added.)

8. Arizona

Arizona Rules of Prof'l Conduct, Rule 5.5(d): A lawyer admitted in another United States jurisdiction, or a lawyer admitted in a jurisdiction outside the United States, not disbarred or suspended from practice in any jurisdiction, may provide legal services in Arizona that exclusively involve by federal law, *the law of another jurisdiction*, or tribal law. (Emphasis added.)

9. Minnesota

Minnesota Rules of Prof'l Conduct, Rule 5.5(d): A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services Minnesota that exclusively involve federal law, tribal law or *the other law of another jurisdiction in which the lawyer is licensed to practice law*, provided the lawyer advises the lawyer's client's that the lawyer is not licensed to practice in Minnesota. (Emphasis added.)

10. New Hampshire

New Hampshire Rules of Professional Conduct, Rule 5.5(d)(3): (d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

. . .

(3) *relate solely to the law of the jurisdiction in which the lawyer is admitted.*

[3] . . . The assumption that a lawyer must be licensed in New Hampshire simply because he or she happens to be present in New Hampshire no longer makes sense in all instances. Rather than focusing on where a lawyer is physically located, New Hampshire's modifications of Rule 5.5(b)(1) and (2) and adoption of new Rule 5.5(d)(3) clarify that *a lawyer who is licensed in another jurisdiction but does not practice New Hampshire law need not obtain a New Hampshire license to practice law solely because the lawyer is present in New Hampshire*. (Emphasis added.)

APPENDIX

(Adopted or Proposed State Rules)

(My Colorado Proposal)

Colo. RPC 5.5:

COMMENT

[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. In order to protect the public, persons not admitted to practice law in Colorado cannot hold themselves out as lawyers in Colorado or as authorized to practice law in Colorado. Rule 5.5(a)(1) recognizes that C.R.C.P. 204, *et seq.* permit lawyers to practice law in accordance with their terms in Colorado without a license from the Colorado Supreme Court. Lawyers may also be permitted to practice law within the physical boundaries of the State, without such a license, where they do so pursuant to Federal or tribal law. **A lawyer who is physically present in this jurisdiction and provides legal services under the exclusive authority of another United States jurisdiction does not practice law in this jurisdiction, provided the lawyer does not solicit or accept clients in this jurisdiction, or state, imply, or hold out to the public that the lawyer is authorized to practice law in this jurisdiction.** Such practice does not constitute a violation of the general proscription of Rule 5.5(a)(1).