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

AGENDA

September 24, 2021, 9:00 a.m.

Webex link:
https://judicial.webex.com/judicial/j.php?MTID=m370ea974583aaad7df93130ad05a8081

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1. Introductory remarks [Judge Lipinsky].
2. Approval of minutes for June 25, 2021 meeting [attachment 1].
3. Old business:
   a. Approval of amendments to Rule 1.5(b) "Scope of Representation" and comment [2] [Justice Márquez or Justice Berkenkotter] [attachment 2].
   b. Proposed revision to Rule 3.8(d) and comment [3], and subcommittee report [Jessica Yates, Dan Rubinstein, and Lucy Ohanian] [attachment 3].
   c. Proposal regarding Rule 1.4 [Dave Stark and Jessica Yates] [attachment 4].
   d. Report from Rule 1.5(e) Subcommittee [Alec Rothrock] [attachment 5].
4. New business.
5. Adjournment.

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

Submitted Minutes of Meeting of the Full Committee
On June 25, 2021
Sixtieth Meeting of the Full Committee
Virtual meeting in Response to Covid-19 Restrictions

The sixtieth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 AM on Friday, June 25, 2021, by Chair Marcy G. Glenn. The meeting was conducted virtually in response to Covid-19 restrictions.

Present in person at the meeting, in addition to Marcy G. Glenn and liaison justice, Justice Maria Berkenkotter, and Justice Monica Márquez were Nancy L. Cohen, Cynthia F. Covell, Thomas E. Downey, Jr., April Jones, Judge Lino S. Lipinsky de Orlov, Marianne Luu-Chen, Julia Martinez, Cecil E. Morris, Jr., Noah C. Patterson, Judge Ruthanne N. Polidori, Henry Richard Reeve, Marcus L. Squarrell, David W. Stark, Eli Wald, Jennifer J. Wallace, Lisa M. Wayne, Judge John R. Webb, Frederick R. Yarger, Jessica E. Yates, and Tuck Young. Judge Adam J. Espinosa, Margaret Funk, Judge William R. Lucero, Alexander R. Rothrock, and Jamie S. Sudler, III were excused from attendance. Absent from attendance was Boston H. Stanton, Jr. Erika Holmes attended the meeting as a guest.

1. Meeting Materials: Approval of Minutes of March 5, 2021 Meeting.

   The Chair had provided the submitted minutes of the 59th meeting of the committee held on March 5, 2021 to the members prior to the meeting. The minutes were approved.

2. Membership and Leadership Update.
   The membership and leadership update was provided by the Chair and The Hon. Lino Lipinsky.

   The Chair advised the committee that member Boston H. Stanton, Jr. had advised that the demands of his practice precluded his continued membership and that he had regretfully resigned. The Chair noted that member Stanton had been an original member of the committee, thanked him for his service, and wished him well in his future personal and professional endeavors.

   The Chair reviewed the June 17, 2021 Order of the Supreme Court, State of Colorado reappointing the following members of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct for a 3-year term effective July 21, 2021 and expiring on June 30, 2024:

   Nancy L. Cohen

The Hon. Adam Espinosa
Marcy G. Glenn
The Hon. Lino Lipinsky
The Hon. William R. Lucero
Noah Patterson
David W. Stark
Jamie S. Sudler
Eli Wald
Lisa M. Wayne
The Hon. John R. Webb
Jessica Yates

The Chair advised the committee that she was stepping down from her role as Chair effective June 30, 2021 and reviewed the additional portion of the June 17, 2021 Order of the Supreme Court, State of Colorado appointing The Hon. Lino Lipinsky as Chair of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct for a three- year term effective July 1, 2021 and expiring on June 30, 2024.

The Chair also reviewed the June 18, 2021 Order of the Supreme Court, State of Colorado appointing the following individuals as members of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct for a 3-year term effective July 1, 2021 and expiring on June 30, 2024:

Erika L. Holmes
Matthew Kirsch
Troy Rackham
Robert W. Steinmetz

Justice Márquez provided extended comments thanking the Chair for her service as Chair since the inception of the committee in 2003. Justice Márquez commended the Chair for her incredible work, leadership, and significant contributions to the committee and the bar in the fields of ethics and the rules governing professional conduct. Justice Márquez congratulated Judge Lipinsky noting that he had "big shoes to fill" in his new role as Chair.

The Chair thanked Justice Márquez for her kind remarks and thanked all the members of the committee, past and present, for their work on the rules of professional conduct. She paid brief special tribute to former members the late Anthony "Tony" Van Westrum and Jim Wallace for their significant contributions to the committee. The Chair described her service on the committee as the highlight of her legal career and expressed her happiness at being able to continue to serve as a member of the committee.

Judge Lipinsky noted that he was shocked to learn the Chair was stepping down and even more surprised to learn that the Court wanted to him to assume the position as Chair. He acknowledged that he had "big shoes to fill" and likened his new role as being similar to past Presidents of the United States who had followed legendary Presidents such as George Washington and Franklin Delano Roosevelt. Judge Lipinsky pledged his

commitment to the committee and its members to continue the high standards established by the outgoing Chair. He concluded his remarks suggesting that the committee further recognize the Chair's contributions at its next meeting.

3. Old Business:

   A. Status Report on Rule 1.5 (b) "Scope of Representation."

      Justice Berkenkotter provided a brief report on the status of the recommended amendments to Rule 1.5 (b) "Scope of Representation. She noted that the proposed amendments had been posted for public comment, and that the comment period was open until August 16, 2021. She noted that no comments had been made as of the date of the meeting.

   B. Status Report on Proposed Housekeeping Amendments to Rule 1.1., Comment 6, and Rule 5.5 (a)(1) and Comment 1.

      The Chair reported on the proposed housekeeping amendments to Rule 1.1., Comment 6, and Rule 5.5 (a) (1) and Comment 1 noting that the Court had adopted the proposed amendments on May 20, 2021.

   C. Rule 3.8 (d) Subcommittee Report.

      Member Yates provided a report relating to the Rule 3.8 (d) Subcommittee. She reviewed the history surrounding the formation of the subcommittee and highlighted the diverse practice backgrounds of the subcommittee members. She reported that the committee had met several times, thanked the committee for their diligent work and thanked Judge Webb for his assistance in drafting language addressing concerns raised by the decision in *In re Attorney C*, 47 P.3d 1167 (Colo. 2002). Member Yates advised that the subcommittee expects to have draft language for the full committee's consideration at its September, 2021 meeting. She noted that during the subcommittee's work, concerns had been raised with respect to Rule 3.8 (f) and new legislation requiring district attorneys to publish certain reports relating to allegations of excessive force. Member Yates indicated that her subcommittee will also examine whether additional amendments to Rule 3.8 (f) are required because of this recent legislation. The Chair thanked member Yates and the members of her committee for their quick and thorough action on the issues presented.

   D. Rule 1.5 (e) Subcommittee.

      The Chair provided a brief report on behalf of the Rule 1.5 (e) subcommittee. The Chair noted that the committee was not ready to provide a full report, that its discussions to date had suggested some sentiment for the elimination of Rule 1.5 (e) provided there was some potential language added to Rule 7.2 regarding the prohibition on referral fees. The Chair noted that the subcommittee would provide a full report at the September meeting.

E. Discussion of Rule 6.1 Voluntary Pro Bono activities.
Member Covell noted that a subcommittee had been formed to examine the language of Rule 6.1 following publication of a law review article written by Judge Daniel Taubman, which suggested that the language of the rule was vague, overbroad, and in need of revision. Member Covell identified the members of her subcommittee (Co-Chair Troy Rackham, Judge Dan Taubman, Judge Randie Polidori, Aaron Goldman, Jerry Pratt, Dave Simmons, Ed Gassman, Bob Keatinge, Jared McCluskey, Loren Brown, Judge Gale Miller, Bill Tanis, and Dave Stark), noting that many of the subcommittee members were also members of the Ethics Committee of the Colorado Bar Association and/or the Access to Justice Committee. She emphasized that the subcommittee's charge was limited to addressing the overbreadth and vagueness identified in Judge Taubman's article. The subcommittee spent considerable time developing proposed revisions to address the vagueness and overbreadth concerns. Covell stated that Rule 6.1 focuses on provision of legal services to the poor; it is not intended to address provision of other important types of pro bono legal services, such as services to nonprofit organizations with other missions, or impact litigation intended to protect the rights of other groups. The subcommittee worked to craft language that would continue to support and encourage lawyers to provide legal services on a pro bono basis to "low income individuals." The Colorado Lawyers Committee provided input to the subcommittee, expressing concern that revisions to the language of Rule 6.1 could potentially adversely impact the willingness of attorneys to provide pro bono services to nonprofit organizations. Member Covell reported that, after much discussion and deliberation, the subcommittee was not able to reach a consensus on all of the proposed revisions to Rule 6.1, and determined that the changes on which they had reached agreement were quite limited and did not warrant the time-consuming and potentially challenging process of seeking Supreme Court approval. Several members of the committee, who also served on the subcommittee, expressed their willingness to make changes to the rule, but also noted their concerns that such changes might reduce the overall pro bono participation by members of the bar.

4. New Business.
There was no new business presented for the committee's consideration.

5. Administrative Matters. Dates for the next meeting were discussed. The Chair advised that members would be informed of the next meeting dates via email.

6. Adjournment. The meeting was adjourned at 9:41 AM.

Respectfully submitted,
Thomas E. Downey, Jr., Secretary

Attachment 2

PERMANENT RECORD 2021

Description of Rule Changes
Rules adopted, amended, repealed, and corrected
Through September 9, 2021

RULE CHANGE 2021(18)
COLORADO RULES OF PROFESSIONAL CONDUCT
Rule 1.5
Amended and Adopted by the Court, En Banc, September 9, 2021, effective January 1, 2022.

RULE CHANGE 2021(17)
COLORADO RULES OF PROBATE PROCEDURE AND COLORADO PROBATE CODE FORMS
Rule 57
Forms 910, 913, 914, 920, 921, 924, and 926
Amended and Adopted by the Court, En Banc, July 23, 2021, effective immediately.

RULE CHANGE 2021(16)
COLORADO RULES OF CRIMINAL PROCEDURE
Rule 43
Amended and Adopted by the Court, En Banc, July 15, 2021, effective immediately.

RULE CHANGE 2021(15)
COLORADO CODE OF JUDICIAL CONDUCT
Rules 1.2, 2.3, 2.12, and 2.15
Amended and Adopted by the Court, En Banc, June 3, 2021, effective immediately.

RULE CHANGE 2021(14)
COLORADO RULES OF PROBATE PROCEDURE AND COLORADO PROBATE CODE FORMS
Rules 40 and 57
Forms 813, 822, 824, 825, 826, 827, 828, 829, 830, 834, 835, 843, 850, 877, 882, 885, 897, 910, 913, 914, 916, 919, 920, 921, 922, 924, 926, 940, 990, and 991
Amended and Adopted by the Court, En Banc, June 17, 2021, effective June 21, 2021.

RULE CHANGE 2021(13)
RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN COLORADO
Rules 202.2, 204.1, 204.2, 204.3, 204.4, 204.5, 204.6, 205.1, 205.2, 209.2, 210.2, 227
Amended and Adopted by the Court, En Banc, May 20, 2021, effective July 1, 2021.

RULE CHANGE 2021(12)
COLORADO RULES FOR MAGISTRATES
Rule 5
Amended and Adopted by the Court, En Banc, May 20, 2021, effective July 1, 2021.

RULE CHANGE 2021(11)
PUBLIC ACCESS TO INFORMATION AND RECORDS
Rule 2
Amended and Adopted by the Court, En Banc, May 20, 2021, effective July 1, 2021.

RULE CHANGE 2021(10)
COLORADO RULES OF PROFESSIONAL CONDUCT
Rules 1.1, 1.3, 1.15D, 1.15E, 5.4, and 5.5
Amended and Adopted by the Court, En Banc, May 20, 2021, effective July 1, 2021.

RULE CHANGE 2021(09)
COLORADO RULES OF JUDICIAL DISCIPLINE
Rules 2 and 33.5
Amended and Adopted by the Court, En Banc, May 20, 2021, effective July 1, 2021.

RULE CHANGE 2021(08)
COLORADO CODE OF JUDICIAL CONDUCT
Rule 1.1
Amended and Adopted by the Court, En Banc, May 20, 2021, effective July 1, 2021.

RULE CHANGE 2021(07)
COLORADO RULES OF PROCEDURE REGARDING ATTORNEY DISCIPLINE AND DISABILITY PROCEEDINGS, COLORADO ATTORNEYS' FUND FOR CLIENT PROTECTION AND MANDATORY CONTINUING LEGAL EDUCATION AND JUDICIAL EDUCATION
Rules 241, 242, 242.1, 242.2, 242.3, 242.4, 242.5, 242.6, 242.7, 242.8, 242.9, 242.10, 242.11, 242.12, 242.13, 242.14, 242.15, 242.16, 242.17, 242.18, 242.19, 242.20, 242.21, 242.22, 242.23, 242.24, 242.25, 242.26, 242.27, 242.28, 242.29, 242.30, 242.31, 242.32, 242.33, 242.34, 242.35, 242.36, 242.37, 242.38, 242.39, 242.40, 242.41, 242.42, 242.43, 243, 243.1, 243.2, 243.3, 243.4, 243.5, 243.6, 243.7, 243.8, 243.9, 243.10, 243.11, 243.12, 243.13, 244, 244.1, 244.2, 244.3, 244.4, 251.1, 251.2, 251.3, 251.4, 251.5, 251.6, 251.7, 251.8, 251.8.5, 251.8.6, 251.9, 251.10, 251.11, 251.12, 251.13, 251.14, 251.15, 251.16, 251.17, 251.18, 251.19, 251.20, 251.21, 251.22, 251.23, 251.27, 251.28, 251.29, 251.30, 251.31, 251.32, 251.33, 251.34, and 253 **AND** 250.3, 250.7, 254, 255
Amended and Adopted by the Court, En Banc, May 20, 2021, effective for cases filed with the Presiding Disciplinary Judge or the Supreme Court on or after July 1, 2021, and as to all other matters covered by these rules, effective July 1, 2021.

RULE CHANGE 2021(06)
UNIFORM LOCAL RULES FOR ALL STATE WATER COURT DIVISIONS
Chapter 36 Uniform Local Rules for All State Water Court Divisions Note and Rule 11
Amended and Adopted by the Court, En Banc, May 3, 2021, effective immediately.

RULE CHANGE 2021(05)
COLORADO RULES OF PROCEDURE REGARDING ATTORNEY DISCIPLINE AND DISABILITY PROCEEDINGS, COLORADO ATTORNEYS' FUND FOR CLIENT

PROTECTION, AND MANDATORY CONTINUING LEGAL EDUCATION AND JUDICIAL EDUCATION
Rules 250.1, 250.2, 250.6, 250.9 and 250.10
Amended and Adopted by the Court, En Banc, April 15, 2021, effective July 1, 2021.

RULE CHANGE 2021(04)
RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN COLORADO
Rules 203.2, 203.3, 205.3, 205.4, 205.6, 208.2, and 209.5
Amended and Adopted by the Court, En Banc, April 15, 2021, effective July 1, 2021.

RULE CHANGE 2021(03)
COLORADO RULES OF EVIDENCE
Rules 404, 803, and 901
Amended and Adopted by the Court, En Banc, March 29, 2021, effective immediately as to Rules 803 and 901, and effective as to Rule 404 for cases on or after July 1, 2021.

RULE CHANGE 2021(02)
COLORADO RULES OF PROCEDURE REGARDING ATTORNEY DISCIPLINE AND DISABILITY PROCEEDINGS, COLORADO ATTORNEYS' FUND FOR CLIENT PROTECTION, AND MANDATORY CONTINUING LEGAL EDUCATION AND JUDICIAL EDUCATION
Rule 250.3
Amended and Adopted by the Court, En Banc, January 14, 2021, effective immediately.

RULE CHANGE 2021(01)
COLORADO RULES OF CIVIL PROCEDURE
Rules 6, 16, 16.1, 26, and 121 §1-8 and §1-9
Amended and Adopted by the Court, En Banc, January 7, 2021, effective April 1, 2021.

RULE CHANGE 2021(18)
COLORADO RULES OF PROFESSIONAL CONDUCT

Rule 1.5. Fees

(a) [NO CHANGE]

(b) Before or within a reasonable time after commencing the representation, ~~When the lawyer has not regularly represented the client, the basis or rate of the fee and expenses~~ the lawyer shall ~~be~~ communicate~~d~~ to the client~~,~~ in writing:
~~, before or within a reasonable time after commencing the representation.~~

(1) the basis or rate of the fee and expenses for which the client will be responsible, except when the lawyer will continue to charge a regularly represented client on the same basis or rate; and

(2) the scope of the representation, except when the lawyer will perform services that are of the same general kind as previously rendered to a regularly represented client.

The lawyer shall communicate promptly to the client in writing a~~A~~ny changes in the basis or rate of the fee or expenses ~~shall also be promptly communicated to the client, in writing~~.

(c) – (h) [NO CHANGE]

COMMENT

[1] [NO CHANGE]

[2] In a new client-lawyer relationship, the scope of the representation and the basis or rate of the fee and expenses must be promptly communicated in writing to the client, but the communication need not take the form of a formal engagement letter or agreement, and it need not be signed by the client. ~~Moreover, i~~It is not necessary to recite all the factors that underlie the basis or rate of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, to identify the factors that may be taken into account in finally fixing the fee, or to furnish the client with a simple memorandum or the lawyer's customary fee schedule. Similarly, it is not necessary to recite all the anticipated services that comprise, or the exclusions from, the scope of representation, so long as the communication accurately conveys the agreement with the client.

When a~~the~~ lawyer has regularly represented a client~~,~~ and the lawyer will continue to charge the client on the same basis or rate, the lawyer is not required to communicate the basis or rate of the fee and expenses. In such circumstances, the~~y~~ lawyer and client ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible.~~,~~

When a lawyer will perform services for a regularly represented client that are of the same general kind as previously rendered, the lawyer is not required to communicate the scope of the new representation. Whether services are of "the same general kind as previously rendered"

depends on consideration of the totality of the circumstances surrounding the services previously rendered and those that will be rendered. Circumstances that may be relevant include, but are not limited to, the type of the services rendered (e.g., litigation or transactional), the subject matter of the services rendered (e.g., breach of contract or patent infringement), and the sophistication of the client.

Whether the client-lawyer relationship is new or one where the lawyer has regularly represented the client, ~~but when there has been a change from their previous understanding~~any changes in the basis or rate of the fee or expenses ~~should~~ must be ~~promptly~~ communicated in writing. ~~In a new client-lawyer relationship, the basis or rate of the fee must be promptly communicated in writing to the client, but the communication need not take the form of a formal engagement letter or agreement, and it need not be signed by the client. Moreover, it is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, to identify the factors that may be taken into account in finally fixing the fee, or to furnish the client with a simple memorandum or the lawyer's customary fee schedule.~~ Changes in the scope of the representation may occur frequently over the course of the representation and are not required to be communicated in writing; however, other rules of professional conduct may require additional communications and communicating such changes in writing may help avoid misunderstandings between clients and lawyers. When other developments occur during the representation that render an earlier communication substantially inaccurate or inadequate, a ~~revised~~ subsequent written communication ~~should be provided to the~~may help avoid misunderstandings between clients and lawyers. ~~All flat fee arrangements must be in writing and must comply with paragraph (h) of this Rule. All contingent fee arrangements must be in writing, regardless of whether the client-lawyer relationship is new or established. See C.R.C.P., Ch. 23.3, Rule 1.~~

[3] – [18] [NO CHANGE]

Form Flat Fee Agreement [NO CHANGE]

Rule 1.5. Fees

(a) [NO CHANGE]

(b) Before or within a reasonable time after commencing the representation, the lawyer shall communicate to the client in writing:

(1) the basis or rate of the fee and expenses for which the client will be responsible, except when the lawyer will continue to charge a regularly represented client on the same basis or rate; and

(2) the scope of the representation, except when the lawyer will perform services that are of the same general kind as previously rendered to a regularly represented client.

The lawyer shall communicate promptly to the client in writing any changes in the basis or rate of the fee or expenses.

(c) – (h) [NO CHANGE]

COMMENT

[1] [NO CHANGE]

[2] In a new client-lawyer relationship, the scope of the representation and the basis or rate of the fee and expenses must be promptly communicated in writing to the client, but the communication need not take the form of a formal engagement letter or agreement, and it need not be signed by the client. It is not necessary to recite all the factors that underlie the basis or rate of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, to identify the factors that may be taken into account in finally fixing the fee, or to furnish the client with a simple memorandum or the lawyer's customary fee schedule. Similarly, it is not necessary to recite all the anticipated services that comprise, or the exclusions from, the scope of representation, so long as the communication accurately conveys the agreement with the client.

When a lawyer has regularly represented a client and the lawyer will continue to charge the client on the same basis or rate, the lawyer is not required to communicate the basis or rate of the fee and expenses. In such circumstances, the lawyer and client ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible.

When a lawyer will perform services for a regularly represented client that are of the same general kind as previously rendered, the lawyer is not required to communicate the scope of the new representation. Whether services are of “the same general kind as previously rendered” depends on consideration of the totality of the circumstances surrounding the services previously rendered and those that will be rendered. Circumstances that may be relevant include, but are not

limited to, the type of the services rendered (e.g., litigation or transactional), the subject matter of the services rendered (e.g., breach of contract or patent infringement), and the sophistication of the client.

Whether the client-lawyer relationship is new or one where the lawyer has regularly represented the client, any changes in the basis or rate of the fee or expenses must be communicated in writing. Changes in the scope of the representation may occur frequently over the course of the representation and are not required to be communicated in writing; however, other rules of professional conduct may require additional communications and communicating such changes in writing may help avoid misunderstandings between clients and lawyers. When other developments occur during the representation that render an earlier communication substantially inaccurate or inadequate, a subsequent written communication may help avoid misunderstandings between clients and lawyers.

[3] – [18] [NO CHANGE]

Form Flat Fee Agreement [NO CHANGE]

Amended and Adopted by the Court, En Banc, September 9, 2021, effective January 1, 2022.

By the Court:

Monica M. Márquez
Justice, Colorado Supreme Court

Attachment 3

COLORADO SUPREME COURT
ATTORNEY REGULATION COUNSEL

Attorney Regulation Counsel
Jessica E. Yates

Chief Deputy Regulation Counsel
Margaret B. Funk

Deputy Regulation Counsel
April M. McMurrey

Deputy Regulation Counsel
Dawn M. McKnight

Deputy Regulation Counsel
Gregory G. Sapakoff

Attorneys' Fund for Client Protection
Unauthorized Practice of Law

Assistant Regulation Counsel
Jane B. Cox
Jill Perry Fernandez
Erin Robson Kristofco
Michelle LeFlore
Jody McGuirk
Michele Melnick
Justin P. Moore
Alan C. Obye
Lisa E. Pearce
Matt Ratterman
Catherine Shea
Jacob M. Vos
Rhonda White-Mitchell
E. James Wilder

Professional Development Counsel
Jonathan P. White

September 14, 2021

Dear Members of the Supreme Court Standing Committee on the Rules of Professional Conduct:

Pursuant to the work of the subcommittee formed to address potential changes to Colo. RPC 3.8(d), please find attached a proposed rule Colo. RPC 3.8(d) and corresponding comment [3] that would replace the current versions of each. (**Attachments A-C.**) In addition, the subcommittee has proposed a change to Colo. RPC 3.8(f). (**Attachment D.)**

Membership of the Subcommittee

The subcommittee was comprised of state prosecutors, federal prosecutors, state public defenders, and private criminal defense counsel, as well as numerous members from the Standing Committee. The membership list and affiliations are as follows:

Tamara Brady, Private Defense Attorney
Michael Dougherty, District Attorney, Boulder County
James Karbach, Colorado Public Defender's Office
Matthew Kirsch, U.S. Attorney's Office and Standing Rules Committee Member
Marna Lake, Private Defense Attorney
Julia Martinez, U.S. Attorney's Office and Standing Rules Committee Member
Cecil Morris, Standing Committee Member
Lucienne Ohanian, Colorado Public Defender's Office
Noah Patterson, Standing Committee Member
Hon. Ruthanne Polidori (Ret.), Standing Committee Member
Tom Raynes, Executive Director, Colorado District Attorney's Council
Dick Reeve, Standing Committee Member
Alec Rothrock, Standing Committee Member

Dan Rubinstein, District Attorney, Mesa County
Rob Shapiro, Attorney General's Office
Dave Stark, Standing Committee Member
Jamie Sudler, Standing Committee Member
Lisa Wayne, Private Defense Attorney and Standing Committee Member
Hon. John Webb (Ret.), Standing Committee Member
Hon. Elizabeth Weishaupl, 18th Judicial District Judge
Jessica Yates, Attorney Regulation Counsel and Standing Committee Member

Objectives of the Subcommittee

The subcommittee sought to more clearly set forth a prosecutor's duties to timely disclose evidence or information under Colo. RPC 3.8(d) that could negate guilt, affect a defendant's critical decisions in a case (including a plea decision) and affect a defendant's sentence, and to diligently seek such information when it is in the possession of other law enforcement agencies.

The subcommittee also sought to add rule and comment language that would expressly abrogate parts of *In re Attorney C*, 47 P. 3d 1167 (Colo. 2002), specifically that case's holding that Colo. RPC 3.8(d) is not violated unless a prosecutor intended to not timely disclose material information, and that information is not material unless the outcome of the overall criminal proceeding would have been different if the information was more timely disclosed.

Work of the Subcommittee on Colo. RPC 3.8(d)

The subcommittee was provided resource documents that included versions of other states' RPC 3.8(d), other states' relevant case law, and a copy of *In re Attorney C*.

Many members of the subcommittee observed that *In re Attorney C* provides for a purely retrospective view of materiality (whether the evidence would make a difference in the entire criminal proceeding) to determine whether Colo. RPC 3.8(d) has been violated. Case law about other rules of professional conduct generally reflects that lawyers are expected to interpret and apply those rules prospectively or contemporaneously. *In re Attorney C* also provides that there is no regulatory violation of Colo. RPC 3.8(d) unless the Office of Attorney Regulation Counsel ("OARC") can show that the prosecutor intended to not disclose exculpatory evidence. In other words, OARC would need to demonstrate by clear and convincing evidence that a prosecutor had "the conscious objective or

purpose to accomplish a particular result" from withholding the evidence. *In re Attorney C,* 47 P.3d at 1173 (citing the definition of intent from ABA *Standards for Imposing Lawyer Sanctions* 6.2). The combination of these two aspects of *In re Attorney C* were viewed by many members as near-complete bars to regulatory enforcement of Colo. RPC 3.8(d).

The subcommittee's initial meetings featured facilitated discussions about the experience of criminal defense attorneys in obtaining exculpatory evidence on a timely basis. These stakeholders shared that Colo. RPC 3.8(d) and its interpretive case law fail to adequately address timely disclosure in the context of plea bargaining. They also were concerned that there was no express obligation to ensure that participating agencies have provided the prosecutor information in the case. These are the types of situations that the remedy of a trial continuance often cannot address.

Prosecutors participating in the subcommittee shared valuable perspectives about the logistical challenges involved in ensuring that prosecutors' files are complete and include information from other agencies. Prosecutors also noted that some information could exist that defense counsel would deem relevant to a particular strategy unknown to prosecutors. Prosecutors also stated that although impeachment evidence might be viewed as important to the defense, it could be very burdensome and impractical if a prosecutor was required to seek out impeachment evidence from other agencies in the context of their other cases (cases other than the one for which discovery is being provided).

I provided resource materials and guidance about the regulatory process, including the very low number of ethical cases that move forward involving alleged Colo. RPC 3.8(d) violations. I also explained that, generally speaking, the OARC draws a distinction between good-faith oversights and intentional misconduct in deciding whether to move forward or simply seek to educate the lawyer.

The proposed rule and comment reflect the outcome of these discussions and an agreement by these key stakeholders as to language they believe is sufficiently clear to practitioners in criminal law, setting forth appropriate and clear ethical duties for prosecutors without mandating conduct that would be unfair or unrealistic for a typical prosecutor. While there were a number of contributors in our meetings and other very productive conversations among stakeholders, Dan Rubinstein and Lucienne Ohanian actively led many discussions and worked with interested individuals to achieve a consensus proposal. (**Attachments A-C.)**

Work of the Subcommittee on Colo. RPC 3.8(f)

Dan Rubinstein and other prosecutors requested that the subcommittee also consider a proposed change to Colo. RPC 3.8(f) that is unrelated to the work above but is unlikely to be controversial and would be of interest to the same stakeholders. He relayed that SB20-217, now codified at C.R.S. § 18-8-802(1.5)(g), requires district attorneys to publish a report when a law enforcement officer has not been charged after being investigated for excessive force or related allegations. He pointed out that a district attorney's comprehensive discussion about an incident may disclose information about another officer who is being charged.

Colo. RPC 3.8(f) restricts what prosecutors can publicly state about pending cases, though there are numerous exceptions permitted under Colo. RPC 3.6(b) and (c). None of the exceptions are expressed in a way that clearly allows extrajudicial statements that may be permitted or required by other law. In contrast, for example, Colo. RPC 1.6(b)(8) allows a lawyer to disclose otherwise client confidential information "to comply with other law or a court order."

Accordingly, the subcommittee also approved a proposed change to Colo. RPC 3.8(f) that would add "or other law" to the list of sources permitting such extrajudicial communications. (**Attachment D.**)

We look forward to discussing these proposals with the Standing Committee.

Sincerely,

Jessica E. Yates
Attorney Regulation Counsel

Attachment A – Proposed revision to 3.8(d)

The prosecutor in a criminal case shall:

***

(d) timely disclose to the defense all information, regardless of admissibility, that the prosecutor knows or reasonably should know could negate the guilt of the accused, mitigate the offense, or affect a defendant's critical decisions in the case, except when the prosecutor is relieved of this responsibility by statute, rule or protective order of the tribunal. This information includes all unprivileged and unprotected mitigation information the prosecutor knows or reasonably should know could affect the sentence. A prosecutor may not condition plea negotiations on postponing disclosure of information known to the prosecutor that negates the guilt of the accused. The prosecutor must make diligent efforts to obtain information subject to this rule that the prosecutor knows or reasonably should know exists, including by making disclosure requests to agencies known to the prosecutor to be involved in the case, and alerting the defense to the information if the prosecution is unable to obtain it;

***

Attachment B – Proposed revision to Comment [3]

Comment

***

[3] Paragraph (d) has been revised considerably from the language interpreted by *In re Attorney C*, 47 P. 3d 1167 (Colo. 2002) (adopting the materiality standard and disclosure requirements from *Brady v. Maryland*, 373 U.S. 83 (1963)). The current language departs from this materiality standard because *Brady* employs a retrospective view of whether the outcome of the proceedings would have been different had the disclosure been made. Instead, paragraph (d) now imposes a duty on a prosecutor to make the disclosure irrespective of its expected effect on the outcome of the proceedings. However, a finding of a violation of paragraph (d) should not itself be the basis for relief in a criminal case. See Scope [20]. Paragraph (d) also requires prosecutors to evaluate the timeliness of disclosure at the time they possess the information at issue in light of case-specific factors, such as the status of plea negotiations, the imminence of a critical stage in the proceedings, whether the information relates to a prosecution's witness who will be called to testify at the next hearing, and whether the information pertains only to credibility or negates the guilt of the accused. The phrase could "affect a defendant's critical decisions in the case" includes the decision whether to accept a plea disposition. This rule also recognizes that procedural rules, such as Crim. P. 16, may allow a prosecutor to withhold evidence about informants or other sensitive subjects. Whether a prosecutor reasonably should know of the existence of information that must be disclosed will depend on the facts and circumstances of the case, including whether anyone has alerted the prosecutor to the likely existence of information that has not yet been discovered. The last sentence of paragraph (d) is satisfied by an inquiry limited to information known to the agency as a result of activity in the current case.

***

Attachment C – Redline 3.8(d) and Comment [3]

Rule 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) - (c) [NO CHANGE]

(d) ~~make~~ timely disclos~~ure~~e to the defense ~~of~~ all ~~evidence or~~ information, regardless of admissibility, that the ~~known to the~~ prosecutor knows or reasonably should know could~~that tends to~~ negate the guilt of the accused, ~~or~~ mitigate~~s~~ the offense, or ~~and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor,~~ affect a defendant's critical decisions in the case, except when the prosecutor is relieved of this responsibility by statute, rule, or ~~a~~ protective order of the tribunal~~;~~. This information includes all unprivileged and unprotected mitigation information the prosecutor knows or reasonably should know could affect the sentence. A prosecutor may not condition plea negotiations on postponing disclosure of information know to the prosecutor that negates the guilt of the accused. The prosecutor must make diligent efforts to obtain information subject to this rule that the prosecutor knows or reasonably should know exists, including by making disclosure requests to agencies known to the prosecutor to be involved in the case, and alerting the defense to the information if the prosecution is unable to obtain it;

(e) [NO CHANGE]

(1) – (3) [NO CHANGE]

(f) – (g) [NO CHANGE]

(1) – (2) [NO CHANGE]

(A) – (B) [NO CHANGE]

(h) [NO CHANGE]

COMMENT

[1] – [2] [NO CHANGE]

[3] ~~The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.~~ Paragraph (d) has been revised considerably from the language interpreted by *In re Attorney C*, 47 P. 3d 1167 (Colo. 2002) (adopting the materiality standard and disclosure requirements from *Brady v. Maryland*, 373 U.S. 83 (1963)). The current language departs from this materiality standard because *Brady* employs a retrospective view of whether the outcome of the proceedings would have been different had the disclosure been made. Instead, paragraph (d) now imposes a duty on a prosecutor to make the disclosure irrespective of its expected effect on the outcome of the proceedings. However, a finding of a violation of paragraph (d) should not itself be the basis for relief in a criminal case. See Scope [20]. Paragraph (d) also requires prosecutors to evaluate the timeliness of disclosure at the time they possess the information at issue in light of case-specific factors, such as the status of plea negotiations, the imminence of a critical stage in the proceedings, whether the information relates to a prosecution's witness who will be called to testify at the next hearing, and whether the information pertains only to credibility or negates the guilt of the accused. The phrase could "affect a defendant's critical decisions in the case" includes the decision whether to accept a plea disposition. This rule also recognizes that procedural rules, such as Crim. P. 16, may allow a prosecutor to withhold evidence about informants or other sensitive subjects. Whether a prosecutor reasonably should know of the existence of information that must be disclosed will depend on the facts and circumstances of the case, including whether anyone has alerted the prosecutor to the likely existence of information that has not yet been discovered. The last sentence of paragraph (d) is satisfied by an inquiry limited to information known to the agency as a result of activity in the current case.

[3A] [NO CHANGE]

[4] – [9] [NO CHANGE]

Attachment D – Proposed revision to Colo. RPC 3.8(f)

The prosecutor in a criminal case shall:

***

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused unless such comments are permitted under Rule 3.6(b) or 3.6(c) or other law, and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

Attachment 4

COLORADO SUPREME COURT
ATTORNEY REGULATION COUNSEL

Attorney Regulation Counsel
Jessica E. Yates

Chief Deputy Regulation Counsel
Margaret B. Funk

Deputy Regulation Counsel
April M. McMurrey

Deputy Regulation Counsel
Dawn M. McKnight

Deputy Regulation Counsel
Gregory G. Sapakoff

Attorneys' Fund for Client Protection
Unauthorized Practice of Law

Assistant Regulation Counsel
Jane B. Cox
Jill Perry Fernandez
Erin Robson Kristofco
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Justin P. Moore
Alan C. Obye
Lisa E. Pearce
Matt Ratterman
Catherine Shea
Jacob M. Vos
Rhonda White-Mitchell
E. James Wilder

Professional Development Counsel
Jonathan P. White

September 9, 2021

Dear Members of the Supreme Court Standing Committee on the Rules of Professional Conduct:

The Malpractice Insurance Subcommittee was formed by the Supreme Court Advisory Committee to address the possibility of mandatory professional liability insurance. Please find attached a letter that will be considered by the Advisory Committee at the meeting on September 17, 2021.

We look forward to discussing these proposals with the Standing Committee.

Sincerely,

Jessica E. Yates
Attorney Regulation Counsel

COLORADO SUPREME COURT
ATTORNEY REGULATION COUNSEL

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Jacob M. Vos
Rhonda White-Mitchell
E. James Wilder

Professional Development Counsel
Jonathan P. White

Dear Advisory Committee Members:

I am writing on behalf of the members of the Malpractice Insurance Subcommittee, which the Supreme Court Advisory Committee on Attorney Regulation formed and authorized to review and evaluate issues concerning the possibility of mandatory professional liability insurance. Dan Vigil has been chairing this subcommittee, which has met a number of times in 2021 over Zoom. The other members of this subcommittee are: Dave Stark, Nancy Cohen, Chuck Goldberg, Chuck Turner, Michael ("Mick") Mihm, Troy Rackham, Rob Steinmetz, Tamara Pester, Amy DeVan, Laura Koupal, Margaret Funk, and Jessica Yates. Subcommittee's recommendation regarding mandatory disclosure of professional liability insurance details to prospective and actual clients:

The subcommittee spent some time discussing the idea of mandating the purchase of malpractice insurance – something required by Oregon (bar-wide pool) and Idaho (individually-obtained insurance). However, a number of other jurisdictions have considered and rejected such proposals. There are significant uncertainties about both the cost of requiring all private practitioners to obtain professional liability insurance, and the degree to which the public is in fact protected as a result of such coverage.

The subcommittee decided to table that discussion in order to explore the alternative of mandatory disclosures to clients about whether a lawyer has malpractice insurance. Recently, the Washington Supreme Court decided to adopt such an alternative when faced with concerns raised by members of the bar in that state regarding mandatory insurance. A disclosure requirement can ensure that prospective clients consider for themselves the relative importance of coverage for damages they could sustain from a lawyer's failure to meet the standard of care in

an engagement. Such a requirement also could incentivize uninsured or underinsured lawyers to obtain more protective coverage.

The subcommittee is recommending that the Supreme Court adopt a strong disclosure rule, and asks that the Advisory Committee refer the matter to the Supreme Court's Standing Committee on the Rules of Professional Conduct for that committee's consideration.

Details regarding a potential disclosure requirement:

Colorado does not currently require lawyers to have malpractice insurance. It is not clear whether prospective clients simply assume that lawyers have insurance, or whether the typical client thinks about it at all. The Colorado Supreme Court requires lawyers to indicate during annual registration whether they have malpractice insurance, and the simple yes/no answer to that question is publicly displayed in the Attorney Search function of the OARC website. But prospective or actual clients would not know, unless they asked the lawyer, what the limits of coverage might be, or whether insurance coverage is likely to be available. For example, basic coverage of $100,000 per claim/$300,000 aggregate per year is known to "erode" quickly because it easily costs (at least) $100,000 to defend a legal malpractice case, and most basic policies' limits include the cost of defense. If a prospective client had simply assumed the availability of insurance coverage, they are likely to be unpleasantly surprised if a lawyer is uninsured or has obtained only basic coverage.

There are a number of states that require lawyers to make a more precise disclosure to individual clients at the time of engagement. These include California, South Dakota, New Mexico, Pennsylvania, and Washington. These states have amended their rules of professional conduct, typically at RPC 1.4, to mandate this particular communication. Copies of their rules are attached to this letter.

Some states require that the communication comply with requirements for informed consent (as that term is defined under the applicable rules of professional conduct) confirmed in writing. Some require a signed client acknowledgment. Many states provide sample or form language for the communication.

After discussion about the benefits of full disclosure to prospective clients while recognizing that some clients could be harmed if the lawyer had to wait for the client's written acknowledgment before beginning work, the subcommittee is

recommending that Colo. RPC 1.4 be amended with a disclosure requirement that constitutes informed consent confirmed in writing but does not have to be signed by a client. This would be consistent with rules that generally do not require that clients sign a fee agreement (unless it is a contingent fee agreement).

Given that "informed consent" under the Rules of Professional Conduct requires an explanation of material risks as well as reasonably available alternatives, the subcommittee also recommends the adoption of form disclosure language that would be deemed sufficient for rule compliance. The subcommittee anticipates that the disclosures would include the per claim and aggregate limits of the lawyer's insurance, and an explanation that there may not be insurance funds available to pay a claimant if insurance funds have been exhausted to pay for a defense to a malpractice claim. It also may be prudent to have a "substantial compliance" provision akin to that for contingent fee agreements.

Consistent with states such as New Mexico, the subcommittee recommends that the disclosure requirement apply to attorneys admitted into a case on a pro hac vice basis. However, government attorneys, in-house counsel, and legal services organization attorneys would be exempt.

The subcommittee discussed whether lawyers with higher-coverage insurance policies should be exempt from the disclosure/informed consent requirement. For example, if a lawyer's policy provides $1 million aggregate coverage, or $250,000 in coverage with endorsements that provide separate defense costs coverage, is it as necessary to set forth such detailed disclosures and obtain a client's informed consent to proceed with the engagement? After all, for most purposes, the client is protected and does not need to make coverage a condition of the client's decision to retain the lawyer. Ultimately the subcommittee decided to raise the issue but not make a specific recommendation on the dollar threshold of coverage suitable to waive the disclosure/informed consent requirement.

The subcommittee discussed the importance of record retention for this disclosure, and recommends that the rule require records to be retained for six years.

Additional recommendation regarding C.R.C.P. 265:

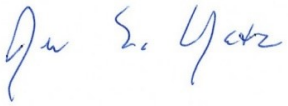
C.R.C.P. 265, which allows Colorado lawyers to practice as a professional company (which could help insulate them from individual liability) if they comply

with that rule, requires insurance of the lesser of two calculations: $100,000 per claim/$300,000 aggregate as multiplied by the number of attorneys in the company, or $500,000/$2 million company-wide coverage.

The rule was last amended by the Court in 2009. A number of subcommittee members suggested that the insurance limits of this rule perhaps should be increased. Such a matter would likely need to be referred to the Standing Rules Committee as well, perhaps with a new subcommittee with members of this committee or the Civil Rules Committee as members.

The subcommittee respectfully requests that the Advisory Committee consider both matters for referral.

Sincerely,



Jessica E. Yates

Rules of Prof. Conduct, Rule 1.4, 42 Pa.C.S.A.

Rule 1.4. Communication

Currentness

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer in private practice shall inform a new client in writing if the lawyer does not have professional liability insurance of at least $100,000 per occurrence and $300,000 in the aggregate per year, subject to commercially reasonable deductibles, retention or co-insurance, and shall inform existing clients in writing at any time the lawyer's professional liability insurance drops below either of those amounts or the lawyer's professional liability insurance is terminated. A lawyer shall maintain a record of these disclosures for six years after the termination of the representation of a client.

Credits

Adopted Oct. 16, 1987, effective April 1, 1988. Amended Aug. 23, 2004, effective Jan. 1, 2005; Dec. 30, 2005, effective July 1, 2006. *Comment* revised Oct. 22, 2013, effective in 30 days [Nov. 21, 2013].

Editors' Notes

EXPLANATORY COMMENT

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations--depending on both the importance of the action under consideration and the feasibility of consulting with the client--this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected A lawyer should promptly respond to or acknowledge client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's

overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interests or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client.

Disclosures Regarding Insurance

Paragraph (c) does not apply to lawyers in full-time government practice or full-time lawyers employed as in-house counsel and who do not have any private clients.

Lawyers may use the following language in making the disclosures required by this rule:

(1) No insurance or insurance below required amounts when retained: "Pennsylvania Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have professional liability insurance of at least $100,000 per occurrence and $300,000 in the aggregate per year and if, at any time, a lawyer's professional liability insurance drops below either of those amounts or a lawyer's professional liability insurance coverage is terminated. You are therefore advised that (name of attorney or firm) does not have professional liability insurance coverage of at least $100,000 per occurrence and $300,000 in the aggregate per year."

(2) Insurance drops below required amounts: "Pennsylvania Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have professional liability insurance of at least $100,000 per occurrence and $300,000 in the aggregate per year and if, at any time, a lawyer's professional liability insurance drops below either of those amounts or a lawyer's professional liability insurance coverage is terminated. You are therefore advised that (name of attorney or firm)'s professional liability insurance dropped below at least $100,000 per occurrence and $300,000 in the aggregate per year as of (date)."

(3) Insurance terminated: "Pennsylvania Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have professional liability insurance of at least $100,000 per occurrence and $300,000 in the aggregate per year and if, at any time, a lawyer's professional liability insurance drops below

either of those amounts or a lawyer's professional liability insurance coverage is terminated. You are therefore advised that (name of attorney or firm)'s professional liability insurance has been terminated as of (date)."

A lawyer or firm maintaining professional liability insurance coverage in at least the minimum amounts provided in paragraph (c) is not subject to the disclosure obligations mandated by the rule if such coverage is subject to commercially reasonable deductibles, retention or co-insurance. Deductibles, retentions or co-insurance offered, from time to time, in the marketplace for professional liability insurance for the size of firm and coverage limits purchased will be deemed to be commercially reasonable.

CODE OF PROF. RESP. COMPARISON

This Rule has no direct counterpart in the Disciplinary Rules of the Code. DR 6-101(A)(3) provides that a lawyer shall not "Neglect a legal matter entrusted to him." DR 9-102(B)(1) provides that a lawyer shall "Promptly notify a client of the receipt of his funds, securities, or other properties." EC 7-8 states that "A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." EC 9-2 states that "a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client."

Notes of Decisions (5)

Rules of Prof. Conduct, Rule 1.4, 42 Pa.C.S.A., PA ST RPC Rule 1.4
Current with amendments received through July 1, 2021.

End of Document

South Dakota Codified Laws
Title 16. Courts and Judiciary
Chapter 16-18. Powers and Duties of Attorneys (Refs & Annos)
Appendix to Chapter 16-18 South Dakota Rules of Professional Conduct (Refs & Annos)
Client-Lawyer Relationship

SDCL Rules of Professional Conduct, Appendix, Ch. 16-18 Rule 1.4

Rule 1.4. Communication

Currentness

(a) A lawyer shall:

(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) Keep the client reasonably informed about the status of the matter;

(4) Promptly comply with reasonable requests for information; and

(5) Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) If a lawyer does not have professional liability insurance with limits of at least $100,000, or if during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly disclose to a client by including as a component of the lawyer's letterhead, using the following specific language, either that:

(1) “This lawyer is not covered by professional liability insurance;” or

(2) “This firm is not covered by professional liability insurance.”

(d) The required disclosure in 1.4(c) shall be included in every written communication with a client.

(e) This disclosure requirement does not apply to lawyers who are members of the following classes: § 16-18-20.2(1),(3),(4) and full-time, in-house counsel or government lawyers, who do not represent clients outside their official capacity or in-house employment.

Credits

Source: SL 2004, ch 327 (Supreme Court Rule 03-26), eff. Jan. 1, 2004.

Editors’ Notes

COMMENT:

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client’s consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client’s objectives. In some situations--depending on both the importance of the action under consideration and the feasibility of consulting with the client--this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client’s behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer’s regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer’s staff, acknowledge receipt of the request and advise the client when a response may be expected. Client

communications should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

[8] The 1998 amendments establish that the absence of professional liability insurance is a material fact which must be disclosed to clients. The disclosure shall be made at the inception of the attorney-client relationship, or promptly thereafter. Further, if a lawyer has liability insurance and allows it to lapse or if the policy is terminated, there is an affirmative duty to make the disclosure to all clients with active files. The rule provides for uniform disclosure language and mandates that the written disclosure shall be a component of the lawyer's letterhead. Since the rule mandates disclosure only to the client, it necessarily means that lawyers without malpractice insurance will have to maintain two sets of letterhead--one for communications with the client and another for all other letters. Component of the letterhead means pre-printed. In other words, when a lawyer prepares his or her letterhead for printing, the disclosure must appear on the face of the letterhead using the precise language provide in Rule 1.4(c), (d) and (e). It should be noted that Rule 7.5 relating to a lawyer's letterhead requires that this disclosure be printed in black ink and in a type size no smaller than used for printing of the lawyer's name on the letterhead.

Notes of Decisions (5)

S D C L RPC, App, Ch. 16-18 Rule 1.4, SD ST RPC APP CH 16-18 Rule 1.4
Current through laws of the 2021 Regular Session effective March 25, 2021, Executive Order 2021-04 and Supreme Court Rule 21-06

End of Document

Prof.Conduct, Rule 1.4.2
Formerly cited as CA ST RPC Rule 3-410

Rule 1.4.2. Disclosure of Professional Liability Insurance

Currentness

(a) A lawyer who knows[1] or reasonably should know* that the lawyer does not have professional liability insurance shall inform a client in writing,* at the time of the client's engagement of the lawyer, that the lawyer does not have professional liability insurance.

(b) If notice under paragraph (a) has not been provided at the time of a client's engagement of the lawyer, the lawyer shall inform the client in writing* within thirty days of the date the lawyer knows* or reasonably should know* that the lawyer no longer has professional liability insurance during the representation of the client.

(c) This rule does not apply to:

(1) a lawyer who knows* or reasonably should know* at the time of the client's engagement of the lawyer that the lawyer's legal representation of the client in the matter will not exceed four hours; provided that if the representation subsequently exceeds four hours, the lawyer must comply with paragraphs (a) and (b);

(2) a lawyer who is employed as a government lawyer or in-house counsel when that lawyer is representing or providing legal advice to a client in that capacity;

(3) a lawyer who is rendering legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client;

(4) a lawyer who has previously advised the client in writing* under paragraph (a) or (b) that the lawyer does not have professional liability insurance.

Credits

(Adopted, eff. Nov. 1, 2018.)

Editors' Notes

COMMENT

[1] The disclosure obligation imposed by paragraph (a) applies with respect to new clients and new engagements with returning clients.

[2] A lawyer may use the following language in making the disclosure required by paragraph (a), and may include that language in a written* fee agreement with the client or in a separate writing:

"Pursuant to rule 1.4.2 of the California Rules of Professional Conduct, I am informing you in writing that I do not have professional liability insurance."

[3] A lawyer may use the following language in making the disclosure required by paragraph (b):

"Pursuant to rule 1.4.2 of the California Rules of Professional Conduct, I am informing you in writing that I no longer have professional liability insurance."

[4] The exception in paragraph (c)(2) for government lawyers and in-house counsels is limited to situations involving direct employment and representation, and does not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. If a lawyer is employed by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity is presumed to know* whether the lawyer is or is not covered by professional liability insurance.

Notes of Decisions (1)

Footnotes

1 An asterisk (*) identifies a word or phrase defined in the terminology rule, rule 1.0.1.

Prof. Conduct, Rule 1.4.2, CA ST RPC Rule 1.4.2
California Rules of Court, California Rules of Professional Conduct, and California Code of Judicial Ethics are current with amendments received through June 15, 2021. California Supreme Court, California Courts of Appeal, Guidelines for the Commission of Judicial Appointments, Commission on Judicial Performance, and all other Rules of the State Bar of California are current with amendments received through June 15, 2021.

End of Document

NMRA, Rule 16-104

RULE 16-104. COMMUNICATION

Effective: July 1, 2020

Currentness

A. Status of matters. A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Paragraph E of Terminology of the Rules of Professional Conduct, is required by these rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

B. Client's informed decision-making. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

C. Disclosure of professional liability insurance.

(1) If, at the time of the client's formal engagement of a lawyer, the lawyer does not have a professional liability insurance

policy with limits of at least one-hundred thousand dollars ($100,000) per claim and three-hundred thousand dollars ($300,000) in the aggregate, the lawyer shall inform the client in writing using the form of notice prescribed by this rule. If during the course of representation, an insurance policy in effect at the time of the client's engagement of the lawyer lapses, or is terminated, the lawyer shall provide notice to the client using the form prescribed by this rule.

(2) The form of notice and acknowledgment required under this Paragraph shall be:

NOTICE TO CLIENT

Pursuant to Rule 16-104(C) NMRA of the New Mexico Rules of Professional Conduct, I am required to notify you that ["I" or "this Firm"] [do not][does not][no longer] maintain[s] professional liability malpractice insurance of at least one-hundred thousand dollars ($100,000) per occurrence and three-hundred thousand dollars ($300,000) in the aggregate.

.....

Attorney's signature

CLIENT ACKNOWLEDGMENT

I acknowledge receipt of the notice required by Rule 16-104(C) NMRA of the New Mexico Rules of Professional Conduct that [insert attorney or firm's name] does not maintain professional liability malpractice insurance of at least one-hundred thousand dollars ($100,000) per occurrence and three-hundred thousand dollars ($300,000) in the aggregate.

.....

Client's signature

(3) As used in this Paragraph, "lawyer" includes a lawyer provisionally admitted under Rule 24-106 NMRA and Rules 26-101 through 26-106 NMRA; however it does not include a lawyer who is a full-time judge, in-house corporate counsel for a single corporate entity, or a lawyer who practices exclusively as an employee of a governmental agency.

(4) A lawyer shall maintain a record of the disclosures made pursuant to this rule for six (6) years after termination of the reprsesentation[1] of the client by the lawyer.

(5) The minimum limits of insurance specified by this rule include any deductible or self-insured retention, which must be paid as a precondition to the payment of the coverage available under the professional liability insurance policy.

(6) A lawyer is in violation of this rule if the lawyer or the firm employing the lawyer maintain a professional liability policy with a deductible or self-insured retention that the lawyer knows or has reason to know cannot be paid by the lawyer or the lawyer's firm in the event of a loss.

Credits

[Amended effective Nov. 3, 2008; Nov. 2, 2009.]

Editors' Notes

COMMITTEE COMMENTARY

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these rules require that a particular decision about the representation be made by the client, Subparagraph (1) of Paragraph A of this rule requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. *See* Paragraph A of Rule 16-102 NMRA of the Rules of Professional Conduct.

[3] Subparagraph (2) of Paragraph A requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations-depending on both the importance of the action under consideration and the feasibility of consulting with the client-this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, Paragraph A(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, Paragraph A(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Paragraph E of Terminology of the Rules of Professional Conduct.

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. *See* Rule 16-114 NMRA of the Rules of Professional Conduct. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. *See* Rule 16-113 NMRA of the Rules of Professional Conduct. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Paragraph C of Rule 16-304 NMRA of the Rules of Professional Conduct directs compliance with such rules or orders.

Disclosure of Professional Liability Insurance

[8] Paragraph C of this rule requires a lawyer to disclose to the clients whether the lawyer has professional liability insurance satisfying the minimum limits of coverage set forth in the rule. Subparagraph (3) of Paragraph C defines "lawyer" to include lawyers provisionally admitted under Rule 24-106 NMRA and Rules 26-101 to 26-106 NMRA. Rule 24-106 NMRA applies to out-of-state lawyers who petition to be allowed to appear before the New Mexico courts. Rules 26-101 to 26-106 NMRA apply to foreign legal consultants. Subparagraph (4) of Paragraph C requires a lawyer to maintain a record of disclosures made under this rule for six (6) years after termination of the representation of the client by the lawyer. In this regard, the lawyer should note that trust account records must be kept for five (5) years but the statute of limitations for a breach of contract claim is six (6) years. Subparagraph (5) of Paragraph C provides that the minimum limits of insurance specified by the rule includes any deductible or self-insured retention. In this regard, the use of the term "deductible" includes a claims expense deductible. The professional liability insurance carrier must agree to pay, subject to exclusions set forth in the policy, all amounts that an insured becomes legally obligated to pay in excess of the deductible or self-insured retention shown on the declarations page of the policy.

[Commentary adopted effective Nov. 3, 2008. Amended effective Nov. 2, 2009; Dec. 31, 2013.]

Notes of Decisions (46)

Footnotes

[1] So in original.

NMRA, Rule 16-104, NM R RPC Rule 16-104
Current with amendments received through June 1, 2021.

End of Document

THE SUPREME COURT OF WASHINGTON

IN THE MATTER OF THE SUGGESTED AMENDMENT TO RPC 1.4—COMMUNICATION

O R D E R

NO. 25700-A-1351

The Washington State Bar Association Board of Governors, having recommended the adoption of the suggested amendment to RPC 1.4—Communication, and the Court having considered the suggested amendment, and having determined that the suggested amendment will aid in the prompt and orderly administration of justice;

Now, therefore, it is hereby

ORDERED:

(a) That the suggested amendment as attached hereto is adopted.

(b) That pursuant to the emergency provisions of GR 9(j)(1), the suggested amendment will be published in the Washington Reports and will become effective September 1, 2021.

DATED at Olympia, Washington this 4th day of June, 2021.

González, C.J.

Gordon McCloud, J.

Madsen, J.

Yu, J.

Montoya-Lewis, J.

Stephens, J.

Whitener, J.

GR 9 COVER SHEET
Suggested Amendments to

RULES OF PROFESSIONAL CONDUCT

Rule 1.4

A. Proponent

Washington State Bar Association

B. Spokespersons

Kyle Sciuchetti, President
Washington State Bar Association

Staff Contact: Douglas J. Ende, Chief Disciplinary Counsel
Washington State Bar Association

C. Purpose

The proponent recommends adoption of suggested amendments to Rule 1.4 of the Rules of Professional Conduct (RPC) that would require disclosure of a lawyer's malpractice insurance status to clients and prospective clients if the lawyer's insurance does not meet minimum levels. It would also provide guidance on the application of the rule through the addition of six new comments.

I. OVERVIEW AND HISTORY

Washington lawyers are not required to have professional liability insurance coverage. They are, however, required to report to the Washington State Bar Association (WSBA), on a yearly basis, whether they have such coverage. Adopted by the Court in 2007, Rule 26 of the Admission and Practice Rules (APR) requires this information to be reported annually, which occurs as part of the WSBA's licensing process. All Washington lawyers are required to certify whether they are engaged in the private practice of law and, if so, whether or not they are covered by, and intend to maintain, professional liability insurance. Recent WSBA reporting data shows that 14% of Washington lawyers in private practice consistently report being uninsured.

In September 2017, the WSBA Board of Governors (BOG) approved formation of the WSBA Mandatory Malpractice Insurance Task Force to evaluate the characteristics of uninsured

lawyers and the consequences for clients when lawyers are uninsured, to examine regulatory systems that require professional liability insurance, and to gather information and comments from WSBA members and others. The Task Force was also charged with determining whether to recommend mandatory malpractice insurance for lawyers in Washington, and, if so, developing a model and a draft rule for consideration by the BOG.

In February 2019, the Task Force issued its final report, recommending mandatory professional liability insurance for lawyers engaged in the private practice of law and proposing an amendment to APR 26 that would establish a "free market" regulatory model.[1] The Task Force cited the regulatory objectives of assuring accessible civil remedies for clients harmed by lawyer mistakes and protection of the public as chief among the reasons for its recommendation.

At its May 17, 2019, meeting, after deliberation about the Task Force report and public discussion, the BOG voted against adoption of the "free market" mandatory malpractice model. The BOG reached its decision after consideration of more than 580 comments from members and others that expressed very real and compelling concerns regarding mandating insurance. Members overwhelmingly opposed mandatory malpractice insurance, expressing concerns regarding cost, the likely adverse impact on pro bono services provided by retiring, retired, and semi-retired members, un-insurability for some high-risk practitioners and practices, the inappropriate delegation of licensing prerogatives to the insurance industry, the risk of increasing insurance premiums for all lawyers through the creation of a captive market, and the financial burden such a mandate would impose upon individual lawyers and the viability of their practices, especially solo and small firm lawyers.[2]

In the wake of the vote, however, several governors suggested that the BOG consider some other models evaluated by the Task Force that might serve to protect the public against the risk of errors committed by uninsured lawyers. Consequently, on January 21, 2020, WSBA Past-President Rajeev Majumdar convened the Ad Hoc Committee to Investigate Alternatives to Mandatory Malpractice Insurance to gather information and advise the BOG on potential viable alternatives to mandatory malpractice insurance.[3] This Committee is chaired by WSBA President Kyle Sciuchetti and composed primarily of select members of the WSBA Committee

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[1] The full report and related Task Force materials are available at https://www.wsba.org/insurance-task-force.

[2] The full set of comments received by the Task Force and the BOG is available at https://www.wsba.org/insurancetask-force.

[3] Just prior to the launch of this Committee, by order dated December 4, 2019, the Supreme Court published for public comment a proposed amendment to APR 26. (The extended deadline for public comment on the proposed amendment is September 30, 2020). The proponent of the proposed amendment is Equal Justice Washington, which is unaffiliated with the WSBA. The proposed amendment is identical to the "free market" model originally proposed by the Task Force. By letter dated January 26, 2020, WSBA expressed its opposition to proposed APR 26, https://www.courts.wa.gov/court_Rules/proposed/2019Dec/APR26/Rajeev%20Majumdar%20-%20APR%2026.pdf.

on Professional Ethics and the former WSBA Mandatory Malpractice Insurance Task Force, as well as members of the BOG and a public member.

From March to September 2020, the Committee explored approaches to public protection other than mandating malpractice insurance, including enhanced malpractice insurance disclosure requirements and proactive management based regulation. Ultimately, the Committee focused on a rule requiring disclosure of a lawyer's insurance status to clients when the lawyer is uninsured or underinsured. The WSBA proposes this suggested rule as a less burdensome and more practicable regulatory requirement that will responsibly protect the public without having an unreasonable impact on private practitioners.

II. SUGGESTED RULE

The proposed rule amendment includes both a new RPC 1.4(c) and proposed new Comments [8]-[13] to RPC 1.4. The language is drawn from enhanced disclosure rules in several other states, including California, Pennsylvania, New Hampshire, New Mexico, and South Dakota, with New Mexico's RPC 16-104(c) having the most influence.

Substance of the Proposal. Specifically, the suggested new RPC 1.4(c) would require a lawyer, before or at the time of commencing representation of a client, to provide notice to the client in writing if the lawyer is not covered by professional liability insurance at specified minimum levels. The lawyer would have to promptly obtain written informed consent from that client. In addition, a lawyer whose malpractice insurance policy lapses or is terminated must within 30 days either obtain a new policy or obtain written consent from existing clients.

The proposal was structured to address the major concerns underlying the BOG's decision not to require mandatory insurance. The cost to a lawyer of compliance with the proposed notice requirement, as compared to requiring acquisition of insurance, is insubstantial.

As reflected in proposed new Comment [8], a lawyer without a basic level of professional liability insurance might not pay for damages or losses a client incurs due to the lawyer's mistakes or negligence. Consequently, clients should have sufficient information about whether the lawyer maintains a minimum level of lawyer professional liability insurance so the client can intelligently determine whether they wish to engage, or continue to engage, that lawyer.

The new RPC 1.4(c) would require a lawyer to provide disclosure if the lawyer is without a specified level of lawyer professional liability insurance. The lawyer would have to promptly obtain every client's acknowledgement and informed consent to uninsured or underinsured representation. The proposed amendment includes disclosure and consent language which, if used, would serve as a "safe harbor" for compliance with the rule. A lawyer would have to maintain a record of disclosures and consents for at least six years.

Certain lawyers would be excluded from the insurance disclosure requirements, including judges, arbitrators and mediators, in-house lawyers for a single entity, and employees of governmental agencies.

A proposed comment clarifies that the notice to a client may be delayed in certain emergency situations.

Minimum levels of professional liability insurance. The proposal recommends that for the disclosure requirements under RPC 1.4(c), the minimum level of insurance should be at least $100,000 per occurrence and $300,000 in the aggregate ("$100K/$300K"), which are the mandatory malpractice insurance levels in Idaho and the lowest levels of insurance offered by ALPS, the WSBA-endorsed professional liability insurance provider. The Mandatory Malpractice Insurance Task Force found (at p. 17 of its report) that nationally 89.1% of malpractice claims are resolved for less than $100,000 (including claims payments and expenses). According to ALPS, for all Washington claims where payments were made by ALPS, its average loss payment was $119,856 and average loss expenses were about $40,454.82. Given these statistics, the proposed minimum level of insurance of $100K/$300K is reasonable and sufficient.

Lawyers covered by the rule. The proposal would apply to each "lawyer," defined as:

- lawyers with an active status with the WSBA;
- emeritus pro bono status lawyers; and
- lawyers permitted to engage in limited practice under APR 3(g), i.e., visiting lawyers.

The disclosure requirement would not apply to:

- judges, arbitrators, and mediators not otherwise engaged in the practice of law;
- in-house counsel for a single entity;
- government lawyers practicing in that capacity; and
- employee lawyers of nonprofit legal services organizations, or volunteer lawyers, where the nonprofit entity provides malpractice insurance coverage at the minimum levels.

D. <u>Hearing:</u>

A hearing is not requested.

E. <u>Expedited Consideration:</u>

Expedited consideration is not requested.

RPC 1.4
COMMUNICATION

(a)–**(b)** [Unchanged.]

(c) A lawyer shall communicate to a client or prospective client a lack of minimum levels of lawyer professional liability insurance as required by the provisions of this Rule.

(1) A lawyer not covered by lawyer professional liability insurance in the amounts specified in paragraph (c)(4) shall, before or at the time of commencing representation of a client, notify the client in writing of the absence of such insurance coverage and promptly obtain the client's informed consent in writing. A lawyer who knows or reasonably should know that the lawyer's professional liability insurance policy has either lapsed or been terminated during the representation shall within 30 days either (i) obtain a new policy in the required amounts or (ii) provide notice in writing to the client and promptly obtain the client's informed consent in writing. If a lawyer does not obtain a new policy in the required amounts or provide notice to the client and obtain the client's informed consent in writing within 30 days of a lapse or termination, the lawyer shall withdraw from representation of the client

(2)(i) A notice to the client in substantially the following form satisfies the notice requirements of paragraph (c)(1):

> Under Rule 1.4(c) of the Washington Rules of Professional Conduct, I must obtain your informed consent to provide legal representation, and ensure that you understand and acknowledge that [I][this Firm] [do not][does not][no longer] maintain[s] [any lawyer professional liability insurance (sometimes called malpractice insurance)] [lawyer professional liability insurance (sometimes called malpractice insurance)] of at least one hundred thousand dollars ($100,000) per occurrence, and three hundred thousand dollars ($300,000) for all claims submitted during the policy period (typically 12 months). Because [I][we] do not carry this

insurance coverage, it could be more difficult for you to recover an amount sufficient to compensate you for your loss or damages if [I am][we are] negligent.

_____

Lawyer's Signature

(ii) A client consent and acknowledgment in substantially the following form satisfies the informed consent requirements of paragraph (c)(1):

I acknowledge and supply this written consent, required by Rule 1.4(c) of the Washington Rules of Professional Conduct, that [insert attorney or firm's name] [does not][no longer] maintain[s] [any lawyer professional liability insurance (sometimes called malpractice insurance)][lawyer professional liability insurance (sometimes called malpractice insurance)] with at least maximum coverage of $100,000 for each claim, and at least $300,000 for all claims submitted during the policy period (typically 12 months), and I consent to representation by [the lawyer][the firm].

_____

Client's Signature

(3) A lawyer shall maintain a record of notices of disclosure to clients, and the signed consents and acknowledgments received from clients, for at least six (6) years after the representation is terminated.

(4) As used in this paragraph (c), "lawyer" means an active member of the Washington State Bar Association, and any other person authorized by the Washington State Supreme Court to engage in the practice of law, including emeritus pro bono status lawyers and lawyers permitted to engage in the limited practice of law in this state as provided in Admission and Practice Rule (APR) 3(g); however, as used in this paragraph (c), "lawyer" does not include, (i) a judge, arbitrator, or mediator not otherwise engaged in the practice of law; (ii) in-house counsel for a single entity; (iii) an employee of a governmental agency

practicing law in that capacity; (iv) an employee of a nonprofit legal service organization, or a lawyer volunteering with such an organization, where the nonprofit legal service organization provides lawyer professional liability insurance coverage at the minimum levels required by this paragraph to that employee or volunteer pro bono lawyer. "Lawyer professional liability insurance" means a professional liability insurance policy that provides coverage for claims made against the lawyer that arise from an act, error, or omission in the lawyer's performance of legal services to a client, with limits of liability of at least one hundred thousand dollars ($100,000) per occurrence, and three hundred thousand dollars ($300,000) for all claims submitted during the policy period.

Comment

[1]–[7] [Unchanged.]

Additional Washington Comments (8-13)

Insurance Disclosure

[8] A lawyer without a basic level of professional liability insurance might not pay for damages or losses a client incurs that result from the lawyer's mistakes or negligence. Consequently, prospective clients and clients should have sufficient information about whether the lawyer maintains a minimum level of lawyer professional liability insurance so they can intelligently determine whether they wish to engage, or continue to engage, that lawyer. Paragraph (c) requires a lawyer to provide disclosure if the lawyer is without a level of lawyer professional liability insurance specified in paragraph (c), and to obtain each client's acknowledgement and informed consent. Client consent should be obtained promptly—ordinarily within 10 days of the lawyer's providing disclosure. Certain lawyers are excluded from the disclosure requirements of Rule 1.4(c), including full-time judges, arbitrators and mediators, in-house lawyers for a single entity, and employees of governmental agencies. If a lawyer serving as a judge represents clients outside judicial duties, or an in-house lawyer or government employee represents other clients, such a

judge or lawyer is subject to the requirements of Rule 1.4(c) regarding those representations.

[9] As used in paragraph (c), a lawyer who "maintains" or "is covered by" lawyer professional liability insurance is an insured lawyer under a lawyer professional liability insurance policy providing coverage regarding claims relating to legal services provided by that lawyer. The minimum limits of lawyer professional liability insurance specified by paragraph (c)(4) include any deductible or self-insured retention that must be paid by the lawyer or the lawyer's law firm for claim expenses and damages. Lawyer professional liability insurance, as defined in paragraph (c)(4), does not include an insurance policy with a deductible or self-insured retention that the lawyer knows or has reason to know cannot be paid by the lawyer or the firm if a loss occurs.

[10] Whether the disclosure and notice obligations of paragraph (c) apply to a Washington-licensed lawyer practicing in another jurisdiction is determined by the choice of law provisions of Rule 8.5(b).

[11] In addition to complying with paragraph (c), every active member of the bar must comply with the reporting requirements of Admission and Practice Rule (APR) 26, under which lawyers in the private practice of law are required to annually report their insurance coverage to the Washington State Bar Association.

[12] Withdrawal from a representation under paragraph (c)(1) is a circumstance where withdrawal is obligatory under Rule 1.16(a)(1) because the representation would violate the Rules of Professional Conduct. The withdrawal shall be accomplished in conformity with the requirements of Rule 1.16(c) and (d).

[13] In an emergency where the health, safety, or a financial interest of a person is threatened with imminent and irreparable harm, a lawyer not covered by lawyer professional liability insurance in the amounts specified in paragraph (c)(4) may take legal action on behalf of such a person even though the person cannot receive or evaluate the

notice required by paragraph (c)(1) or there is insufficient time to provide it. A lawyer who represents a person in such an exigent situation shall provide the notice required by paragraph (c)(1) as soon as reasonably practicable.

Attachment 5

BFW ATTORNEYS
BURNS FIGA & WILL

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

MEMORANDUM

TO: Honorable Lino S. Lipinsky de Orlov

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

DATE: September 17, 2021

SUBJECT: Rule 1.5(e) Subcommittee—Proposal for Committee Action

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1. Unique to Colorado, Colo. RPC 1.5(e)[1] prohibits lawyers from paying or receiving referral fees. The Colo. RPC do not define "referral fees."

2. With several exceptions, Colo. RPC 7.2(b)[2] prohibits lawyers from paying referral fees or other compensation for recommending the lawyer's services. It is identical to ABA Model Rule 7.2(b). Colo. RPC 7.2(b) does not regulate a lawyer's receipt of referral fees.

3. To some degree, Colo. RPC 1.5(e) and Colo. RPC 7.2(b) overlap and conflict. For example, Colo. RPC 1.5(e) prohibits lawyers from paying any referral fees, whereas Colo. RPC 7.2(b)(2) permits lawyers to pay fees to referral services that are not-for-profit or "qualified." The Rule 1.5(e) Subcommittee believes that to the degree these two rules conflict, Colo. RPC 1.5(e) should yield to Colo. RPC 7.2(b).

---

[1] "Referral fees are prohibited." Colo. RPC 1.5(e).

[2] Colo. RPC 7.2(b) states as follows:

> A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services except that a lawyer may:
>
> (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
> (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;
> (3) pay for a law practice in accordance with Rule 1.17;
> (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:
> (i) the reciprocal referral agreement is not exclusive; and
> (ii) the client is informed of the existence and nature of the agreement; and
> (5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

4. At a minimum, the Committee should recommend the revision of Colo. RPC 1.5(e) to make it expressly subject to Colo. RPC 7.2(b).

5. Another option open to the Committee is to recommend the elimination of Colo. RPC 1.5(e). Without more, the deletion of Rule 1.5(e) would leave Colo. RPC 7.2(b) to regulate the payment of referral fees and other rules of professional conduct to regulate the receipt of referral fees. Although Colorado has no ethics opinion or case addressing a lawyer's receipt of compensation for referring current clients to third parties, many other states do. Most of these opinions analyze the lawyer's obligations under Rules 1.7(a)(2)[3] and 1.8(a).[4] About half conclude that the Rule 1.7(a)(2) conflict is waivable by the client with appropriate disclosure and informed client consent. The other half conclude that this conflict is not waivable because referral fee arrangements "compromise the referring attorney's professional independence" and create a financial conflict of interest for the referring attorney that undercuts the attorney's duty of loyalty to his or her client. J. Dzienkowski and R. Peroni, "Conflicts of Interest in Lawyer Referral Arrangements with Nonlawyer Professionals, 21 *Geo. J. Legal Ethics* 197, 209-10 (Spring 2008).

6. The out-of-state ethics opinions generally do not address a lawyer's receipt of compensation from a third party for the referral of non-clients, probably because Rules 1.7(a)(2) and 1.8(a) are not applicable to a lawyer's receipt of compensation from a third party for the referral of non-clients.

7. If the Court eliminated Colo. RPC 1.5(e), I and perhaps other members of the CBA Ethics Committee would urge it to issue a formal opinion addressing the propriety of a lawyer's receipt of compensation for the referral of current clients to a third party. If the CBA Ethics Committee agreed to issue such an opinion, the committee likely would agree with the consensus in other states that the question turns largely if not entirely on an application of Colo.

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[3] A lawyer has a conflict of interest when there is a "significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Colo. RPC 1.7(a)(2).

[4] A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

RPC 1.7(a)(2) and Colo. RPC 1.8(a). It is anyone's guess whether that opinion would agree with those states that consider the conflict waivable or with those states that consider it nonwaivable. This is a classic policy issue.

8. Nothing prevents this Committee from recommending a rule that decides this policy issue. However, if the Committee believes there is a conflict under Colo. RPC 1.7(a)(2) but that the conflict is waivable, or that the issue of waivability is best addressed in a CBA Ethics Committee opinion, the Committee should recommend the simple elimination of Colo. RPC 1.5(e).

9. If, on the other hand, the Committee believes there is a conflict under Colo. RPC 1.7(a)(2) that is not waivable, it could recommend a revision of Colo. RPC 1.5(e) that prohibits a lawyer from receiving compensation for referring clients to third parties, such as the following:

> A lawyer shall not accept compensation for referring a client to a third party for products or services related to the lawyer's representation of the client.

10. The consensus of the Rule 1.5(e) Subcommittee is the Committee should recommend the above revision of Rule 1.5(e). The Rule 1.5(e) Subcommittee believes that Rule 1.5(e) should be revised so that it (a) applies only to lawyers' receipt of compensation from third parties for the referral of current clients and (b) prohibits that conduct.

11. As proposed, revised Rule 1.5(e) would not conflict with Rule 7.2(b), because it would not apply to lawyers' payment of compensation for referrals. There would be no need for the rules to cross-reference each other. Nor would revised Rule 1.5(e) prevent lawyers from accepting compensation from third parties for referring non-clients, including strangers but also prospective and former clients.

12. The qualifying phrase in the proposed rule, "for products or services related to the lawyer's representation of the client," would mean that a lawyer could receive compensation for referring a client to a third party if the referral was unrelated to the lawyer's representation of the client. For example, a lawyer representing a client in a worker's compensation case could accept compensation for referring the client to a financial adviser, but a lawyer representing a client in estate planning could not accept such compensation. *See* N.Y. State Op. 1086, 2016 WL 1533281 * 3 (Mar. 7, 2016) (conflict inherent in lawyer's receipt of compensation from third party for referral of client is waivable when product or service is fairly uniform among providers and is "unconnected to any particular legal services").

13. If the Committee believes Rule 1.5(e) should be revised to make it applicable only to lawyers' receipt of referral fees, it should also consider whether to recommend relocating it to a rule where lawyers might more readily find it. Rule 1.5(e) is now located in Rule 1.5, which deals with the charging of fees for legal services. It may be more natural to include the rule in Colo. RPC 1.8, which is an assortment of specific conflict of interest rules. Indeed, Colo. RPC 1.8 includes a rule regulating when a lawyer may accept compensation for legal services

from a person who is not a client. Another possible location for revised Colo. RPC 1.5(e) is Colo. RPC 7.2. Colo. RPC 7.2(b) regulates the payment of referral fees and authorizes "reciprocal referral agreements" between lawyers and nonlawyers.

14. The consensus of the Rule 1.5(e) Subcommittee is that because proposed Rule 1.5(e) addresses a specific conflict of interest situation, it should be reorganized as Colo. RPC 1.8(k), and current Colo. RPC 1.8(k) should become Colo. RPC 1.8(l). The subcommittee also believes that the conflict addressed in revised Rule 1.5(e) should be imputed to other lawyers in a lawyer's firm and that new Colo. RPC 1.8(l) should be modified accordingly.