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

AGENDA

January 8, 2021, 9:00 a.m.
VIRTUAL MEETING IN RESPONSE TO COVID-19 RESTRICTIONS
Meeting invitation with connection info to arrive via email next week

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1. Approval of minutes for September 25, 2020 meeting [To be distributed separately]

2. Report from Rule 1.5(b) "Scope of Representation" Subcommittee [Noah Patterson, pp. 001 - 011]

3. New Business:

   a. Advisory Committee's proposed renumbering amendments to Rules 1.3, 1.15D, 1.15E, 5.4, and 5.5 [Jessica Yates, pp. 012 - 016]

   b. Potential housekeeping amendment to Rule 5.5(a)(1) and cmt. [1] [John Lebsack, pp. 017 - 018]

   c. Potential amendment to Rule 4.5(a) [Marcy Glenn, pp. 019 - 021]

4. Administrative matters:

   a. Select next meeting date

5. Adjournment (before noon)

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Colorado Supreme Court Standing Committee for the Rules of Professional Conduct

Rule 1.5(b) Subcommittee—Supplemental Report
December 2, 2020

I. Introduction

At the September 25, 2020 meeting of the Colorado Supreme Court Standing Committee for the Rules of Professional Conduct ("the Committee"), the Rule 1.5(b) Subcommittee ("the Subcommittee") presented proposed changes to Rule 1.5(b) of the Colorado Rules of Professional Conduct as well as to Comment [2] to Rule 1.5.[1] After discussion regarding the proposed changes to the rule and comment, the Committee asked the Subcommittee to continue work on the proposed changes.

In response to the discussion at the September 25th meeting, the Subcommittee has drafted three options for the Committee to consider. In particular, the options are intended to address the comment at the September 25th meeting that the phrase "except when the lawyer will continue to charge a regularly represented client on the same basis or rate" in the first sentence of the proposed revised Rule 1.5(b) is confusing (*i.e.*, it may not be clear under this phrase whether lawyers representing regularly represented clients must communicate the scope of the representation).

Once the Committee provides guidance regarding which revised Rule 1.5(b) option it likes best, the Subcommittee can then work on a proposed Comment [2] that best complements the version of the rule chosen.

II. Option #1: use the option presented at the 9/25/20 meeting with one small change.

Option #1 is very similar to the proposed version of Rule 1.5(b) presented at the Committee's September 25th meeting. *See* STANDING COMMITTEE 009 (from 9/25/20 Committee meeting materials). The only difference is the insertion of "continue to" in between "will" and "charge" in the first sentence, as discussed at that meeting. The benefit of this option is that it tracks closely with the ABA's Model Rule 1.5(b), which is attached as **Exhibit A**. The track changes below show the proposed changes from the current version of Colorado's Rule 1.5(b).

> (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation, except when the lawyer will continue

[1] *See* pages 008–061 of the materials for the September 25, 2020 Standing Committee meeting.

to charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be promptly communicated to the client, in writing.

III. Option #2: separate the concepts of "basis or rate" and "scope of representation" into separate sentences.

Option #2 separates the concept of "scope of representation" from the concept of "basis or rate of the fee and expenses." This option takes inspiration from New York's Rule 1.5(b) and borrows some phrasing from New York's rule (*e.g.*, "perform services that are of the same general kind as previously rendered" in the last sentence of Option #2 below). New York's Rule 1.5(b) is attached as **Exhibit B**. Option #2 does not include any track changes to show the differences from the current Colorado Rule 1.5(b). It is intended to parallel the substance of Option #1 above, except it makes the exception for communication of the scope of representation dependent on the provision of services "that are of the same general kind as previously rendered to the client."

> (b) The basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation, except when the lawyer will continue to charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be promptly communicated to the client, in writing. The scope of the representation shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation, except when the lawyer will perform services that are of the same general kind as previously rendered to a regularly represented client.[2]

IV. Option #3: simplify the rule by stating what a lawyer must communicate in writing.

Option #3 is intended to parallel the substance of Option #2 above but attempts to simplify the requirements of the proposed changes to Rule 1.5(b). It does this by stating, in three parts, what a lawyer must communicate in writing under Rule 1.5(b). Like Option #2, this option does not include any track changes to show the differences from the current Colorado Rule 1.5(b). Unlike Option #1 or #2,

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[2] The Subcommittee considered using the phrase "the client" instead of "a regularly represented client" at the end of this sentence, but a majority of the Subcommittee prefers "a regularly represented client" because this is a term of art used in the Model Rule. The other perspective is that "a regularly represented client" is cumbersome and unnecessary compared to "the client."

this option uses the term "promptly" instead of "before or within a reasonable time after commencing the representation."

(b) The lawyer shall communicate promptly 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;

(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;[3] and

(3) any changes in the basis or rate of the fee or expenses.

V. Conclusion

The Subcommittee requests the Committee's guidance on which rule option it should use moving forward to create a proposed revised Comment [2].

[3] The Subcommittee considered using the phrase "the client" instead of "a regularly represented client" at the end of this sentence, but a majority of the Subcommittee prefers "a regularly represented client" because this is a term of art used in the Model Rule. The other perspective is that "a regularly represented client" is cumbersome and unnecessary compared to "the client."

April 14, 2020

Rule 1.5: Fees

Client-Lawyer Relationship

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable.

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RULE 1.5:
FEES AND DIVISION OF FEES

(a) A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule. This provision shall not apply when the lawyer will charge a regularly represented client on the same basis or rate and perform services that are of the same general kind as previously rendered to and paid for by the client. Any changes in the scope of the representation or the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a

writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge or collect:

(1) a contingent fee for representing a defendant in a criminal matter;

(2) a fee prohibited by law or rule of court;

(3) a fee based on fraudulent billing;

(4) a nonrefundable retainer fee; provided that a lawyer may enter into a retainer agreement with a client containing a reasonable minimum fee clause if it defines in plain language and sets forth the circumstances under which such fee may be incurred and how it will be calculated; or

(5) any fee in a domestic relations matter if:

(i) the payment or amount of the fee is contingent upon the securing of a divorce or of obtaining child custody or visitation or is in any way determined by reference to the amount of maintenance, support, equitable distribution, or property settlement;

(ii) a written retainer agreement has not been signed by the lawyer and client setting forth in plain language the nature of the relationship and the details of the fee arrangement; or

(iii) the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary. A lawyer shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

(e) In domestic relations matters, a lawyer shall provide a prospective client with a Statement of Client's Rights and Responsibilities at the initial conference and prior to the signing of a written retainer agreement.

(f) Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program established by the Chief Administrator of the Courts and approved by the Administrative Board of the Courts.

(g) A lawyer shall not divide a fee for legal services with another lawyer who is not associated in the same law firm unless:

(1) the division is in proportion to the services performed by each lawyer

or, by a writing given to the client, each lawyer assumes joint responsibility for the representation;

(2) the client agrees to employment of the other lawyer after a full disclosure that a division of fees will be made, including the share each lawyer will receive, and the client's agreement is confirmed in writing; and

(3) the total fee is not excessive.

(h) Rule 1.5(g) does not prohibit payment to a lawyer formerly associated in a law firm pursuant to a separation or retirement agreement.

Comment

[1] Paragraph (a) requires that lawyers not charge fees that are excessive or illegal under the circumstances. The factors specified in paragraphs (a)(1) through (a)(8) are not exclusive, nor will each factor be relevant in each instance. The time and labor required for a matter may be affected by the actions of the lawyer's own client or by those of the opposing party and counsel. Paragraph (a) also requires that expenses for which the client will be charged must not be excessive or illegal. A lawyer may seek payment for services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging an amount to which the client has agreed in advance or by charging an amount that reflects the cost incurred by the lawyer, provided in either case that the amount charged is not excessive.

[1A] A billing is fraudulent if it is knowingly and intentionally based on false or inaccurate information. Thus, under an hourly billing arrangement, it would be fraudulent to knowingly and intentionally charge a client for more than the actual number of hours spent by the lawyer on the client's matter; similarly, where the client has agreed to pay the lawyer's cost of in-house services, such as for photocopying or telephone calls, it would be fraudulent knowingly and intentionally to charge a client more than the actual costs incurred. Fraudulent billing requires an element of scienter and does not include inaccurate billing due to an innocent mistake.

[1B] A supervising lawyer who submits a fraudulent bill for fees or expenses to a client based on submissions by a subordinate lawyer has not automatically violated this Rule. In this situation, whether the lawyer is responsible for a violation must be determined by reference to Rules 5.1, 5.2 and 5.3. As noted in Comment [8] to Rule 5.1, nothing in that Rule alters the personal duty of each lawyer in a firm to abide by these Rules and in some situations, other Rules may impose upon a supervising lawyer a duty to ensure that the books and records of a firm are accurate. *See* Rule 1.15(j).

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Court rules regarding engagement letters require that such an understanding be memorialized in writing in certain cases. *See* 22 N.Y.C.R.R. Part

1215. Even where not required, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee, and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the excessiveness standard of paragraph (a). In determining whether a particular contingent fee is excessive, or whether it is excessive to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may regulate the type or amount of the fee that may be charged.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. *See* Rule 1.16(e). A lawyer may charge a minimum fee, if that fee is not excessive, and if the wording of the minimum fee clause of the retainer agreement meets the requirements of paragraph (d)(4). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). A fee paid in property instead of money may, however, be subject to the requirements of Rule 1.8(a), because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made if its terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. In matters in litigation, the court's approval for the lawyer's withdrawal may be required. *See* Rule 1.16(d). It is proper, however, to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[5A] The New York Court Rules require every lawyer with an office located in New York to post in that office, in a manner visible to clients of the lawyer, a "Statement of Client's Rights." See 22 N.Y.C.R.R. § 1210.1. Paragraph (e) requires a lawyer in a domestic relations matter, as defined in Rule 1.0(g), to provide a prospective client with the "Statement of Client's Rights and Responsibilities," as further set forth in 22 N.Y.C.R.R. § 1400.2, at the initial conference and, in any event, prior to the signing of a written retainer agreement.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained or upon obtaining child custody or

visitation. This provision also precludes a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders. *See* Rule 1.0(g) (defining "domestic relations matter" to include an action to enforce such a judgment).

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not affiliated in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well. Paragraph (g) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole in a writing given to the client. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the client's agreement must be confirmed in writing. Contingent fee arrangements must comply with paragraph (c). Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. *See* Rule 5.1. A lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. *See* Rule 1.1.

[8] Paragraph (g) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm. Paragraph (h) recognizes that this Rule does not prohibit payment to a previously associated lawyer pursuant to a separation or retirement agreement.

Disputes over Fees

[9] A lawyer should seek to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. The New York courts have established a procedure for resolution of fee disputes through arbitration and the lawyer must comply with the procedure when it is mandatory. Even when it is voluntary, the lawyer should conscientiously consider submitting to it.

COLORADO RULES OF PROFESSIONAL CONDUCT

Rules 1.3, 1.15D, 1.15E, 5.4, and 5.5

Rule 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT [1] – [4] [NO CHANGE]

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer); C.R.C.P. 2445~~51.32(h)~~.

Rule 1.15D. Required Records

(a) – (c) [NO CHANGE]

(d) Any of the records required to be kept by this Rule shall be produced in response to a subpoena duces tecum issued by the Regulation Counsel in connection with proceedings pursuant to C.R.C.P. 2425~~1~~ or C.R.C.P. 243. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding, and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege of the lawyer's client.

Rule 1.15E. Approved Institutions

(a) – (b) [NO CHANGE]

(c)(1) – (c)(3)(ii) [NO CHANGE]

(4) The financial institution agrees to cooperate fully with the Regulation Counsel and to produce any trust account records on receipt of a subpoena for the records issued by the Regulation Counsel in connection with any proceeding pursuant to C.R.C.P. 242 or C.R.C.P. 2435~~1~~. Nothing herein shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule, but such charges shall not be a transaction cost to be charged against funds payable to the COLTAF program.

(c)(5) – (c)(13) [NO CHANGE]

Rule 5.4. Professional Independence of a Lawyer

(a) – (e) [NO CHANGE]

(f) For purposes of this Rule, a "nonlawyer" includes (1) a lawyer who has been disbarred, (2) a lawyer who has been suspended and who must petition for reinstatement, (3) a lawyer who is subject to an interim suspension ~~has been immediately suspended~~ pursuant to C.R.C.P. 2425~~1~~.228 ~~or 251.20(d)~~, (4) a lawyer who is on inactive status pursuant to C.R.C.P. 227(A)(6), ~~or~~ (5) a lawyer who has been permitted to resign under C.R.C.P. 227(A)(8), or (6) a lawyer who, for a period of six months or more, has been (i) on disability inactive status pursuant to C.R.C.P. 2435~~1~~.623 or (ii) suspended pursuant to C.R.C.P. 227(A)(4), 2425~~1~~.238~~.5~~, 242.24,~~227(A)(4)~~ or 260.6~~, or 251.8.6~~.

COMMENTS [1] – [3] [NO CHANGE]

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

(a) – (d) [NO CHANGE]

(e) Once notice is given pursuant to C.R.C.P. 2425~~1~~.3228 or this Rule, then no additional notice is required.

COMMENTS [1] – [6] [NO CHANGE]

Rule 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT [1] – [4] [NO CHANGE]

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer); C.R.C.P. 244.

Rule 1.15D. Required Records

(a) – (c) [NO CHANGE]

(d) Any of the records required to be kept by this Rule shall be produced in response to a subpoena duces tecum issued by the Regulation Counsel in connection with proceedings pursuant to C.R.C.P. 242 or C.R.C.P. 243. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding, and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege of the lawyer's client.

Rule 1.15E. Approved Institutions

(a) – (b) [NO CHANGE]

(c)(1) – (c)(3)(ii) [NO CHANGE]

(4) The financial institution agrees to cooperate fully with the Regulation Counsel and to produce any trust account records on receipt of a subpoena for the records issued by the Regulation Counsel in connection with any proceeding pursuant to C.R.C.P. 242 or C.R.C.P. 243. Nothing herein shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule, but such charges shall not be a transaction cost to be charged against funds payable to the COLTAF program.

(c)(5) – (c)(13) [NO CHANGE]

Rule 5.4. Professional Independence of a Lawyer

(a) – (e) [NO CHANGE]

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

COMMENTS [1] – [3] [NO CHANGE]

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

(a) – (d) [NO CHANGE]

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

COMMENTS [1] – [6] [NO CHANGE]

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

As amended through Rule Change 2018(6), effective April 12, 2018

(a) A lawyer shall not:

(1) practice law in this jurisdiction without a license to practice law issued by the Colorado Supreme Court unless specifically authorized by C.R.C.P. 204 or C.R.C.P. 205 or federal or tribal law;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) Once notice is given pursuant to C.R.C.P. 251.28 or this Rule, then no additional notice is required.

COMMENT

[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. In order to protect the public, persons not admitted to practice law in Colorado cannot hold themselves out as lawyers in Colorado or as authorized to practice law in Colorado. Rule 5.5(a)(1) recognizes that C.R.C.P. 204 and C.R.C.P. 205 permit lawyers to practice law in accordance with their terms in Colorado without a license from the Colorado Supreme Court. Lawyers may also be permitted to practice law within the physical boundaries of the State, without such a license, where they do so pursuant to Federal or tribal law. Such practice does not constitute a violation of the general proscription of Rule 5.5(a)(1).

* * *

Marcy Glenn

From: Marcy Glenn
Sent: Tuesday, October 13, 2020 8:56 PM
To: Scott R. Osgood; Jack Tanner
Cc: Jess Ham; 'hammer@hammer-law.com'
Subject: RE: 4.5(a)

Dear Scott:

The next meeting of the Standing Committee is on January 8, 2021. I will include your email to the CBA Ethics Committee, referred to the Standing Committee by Jack Tanner, on the agenda for that meeting. When presented with proposed rule amendments, the Standing Committee typically decides whether to form a subcommittee to study the proposal. I'll let you know after the January meeting whether the Standing Committee decided to do so with respect to your proposal to amend Rule 4.5. If a subcommittee is formed, we would welcome your participation on it.

Thank you for taking the time to share your concern about this issue.

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From: Scott R. Osgood <scott@oshlaw.com>
Sent: Tuesday, October 13, 2020 3:46 PM
To: Jack Tanner <Jtanner@fwlaw.com>
Cc: Jess Ham <jham@cobar.org>; 'hammer@hammer-law.com' <hammer@hammer-law.com>; Marcy Glenn <MGlenn@hollandhart.com>
Subject: RE: 4.5(a)

External Email

Thank you, Jack. I confess that the nuances of ethics is not an area I normally dive into, but in spite of a predominantly transactional practice, I have had the threat tossed at me a number of times. I am sure my experience is not unique. It has bothered me because it smacks so much of extortion.

Sincerely,

Scott R. Osgood

Osgood & Osgood, LLC
2586 Trailridge Drive East, Suite 200
Lafayette, Colorado 80026
http://www.oshlaw.com
Voice: 303-442-0165
Fax: 888-594-4079

From: Jack Tanner <Jtanner@fwlaw.com>
Sent: Tuesday, October 13, 2020 3:38 PM
To: Scott R. Osgood <scott@oshlaw.com>
Cc: Jess Ham <jham@cobar.org>; 'hammer@hammer-law.com' <hammer@hammer-law.com>; Marcy Glenn <MGlenn@hollandhart.com>
Subject: RE: 4.5(a)

Scott,

I am currently chair of the CBA Ethics Committee, and your email was forwarded to me. Thanks for your interest in legal ethics (not a subject everyone cares about).

Because your inquiry contemplates a rule change, it is far outside our committee's scope. We assist Colorado lawyers in following the Rules, but have no power to amend the Rules.

The Supreme Court has set up a standing committee to consider rule changes. It's chair is Marcy Glenn. I am copying her on this, and will let her take it from here.

Jack
303.894.4495

From: Scott R. Osgood <scott@oshlaw.com>
Sent: Friday, October 9, 2020 11:57 AM
To: ethicsinquiry <ethicsinquiry@cobar.org>
Subject: [EXTERNAL] 4.5(a)

Dear Sirs:

I would like to suggest that the committee consider an update to Rule 4.5(a) which precludes a lawyer from threatening criminal, administrative, or disciplinary charge to obtain an advantage in a civil matter. As the internet has developed, it

has become a common threat by lawyers that they or their clients will file negative information about the other party on social media and other electronic sources, which threat is used to obtain an advantage in a civil matter. The threat to file negative information using the internet is particularly insidious, because there is no check on the truth or falsity of the allegations, because the negative information never goes away, and because the potential for lasting harm to the other party is enormous. A lawyer's use of such a threat is every bit an attempt to obtain an unfair advantage as is the threat of criminal or disciplinary action. I am therefore requesting that the committee consider recommending an update to Rule 4.5(a) to add to the list of actions considered unethical threats for purposes of gaining an advantage in a civil matter that the attorney or their client will post negative information about the other party on social media or other electronic means of mass communication.

Sincerely,

Scott R. Osgood

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