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

AGENDA

November 4, 2016 9:00 a.m.
2 East 14th Ave., Conf. Rm. 2215 **– Look for Melissa Meirink on Floor 2**
Call-in numbers: 720-625-5050 – Access Code: 41835247#
WiFi Access Code: To be provided at the meeting

---

1. Approval of minutes of July 22, 2016 meeting [pp. 1-18]

2. Transfer of responsibility for the Contingent Fee Rules [Judge Berger & Marcy Glenn, pp. 19-22]

3. Report on Orphaned COLTAF Funds amendments [Marcy Glenn, pp. 23-67]

4. Report from Fee Subcommittee [Nancy Cohen & Jamie Sudler, pp. 68-73 (proposed form agreement to be distributed separately)]

5. Report from Rule 1.6 Subcommittee (A.G. Coffman proposal) [Marcy Glenn, for Dave Stark]

6. Report from Rule 2.1 (Family Law Advisory) Subcommittee [Alec Rothrock, pp. 74-95]

7. Report from Civil Rules Committee's Subcommittee on Judicial Expectations Amendments to CRCP [Judge Webb, pp. 24-29 of July 22, 2016 materials]

8. New Business:

    a. Potential adoption of ABA Model Rule 8.4(g) [Jim Coyle, pp. 96-99]

9. Administrative matters: Select next meeting date

10. Adjournment (before noon)

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

9213709_1

These submitted minutes have not yet been approved by the Committee

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee On July 22, 2016 (Forty-fourth Meeting of the Full Committee)

The forty-fourth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, July 22, 2016, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Justice Center.

Present in person at the meeting, in addition to Marcy G. Glenn and Justice Nathan B. Coats, were Committee members Federico C. Alvarez, Judge Michael H. Berger, Nancy L. Cohen, James C. Coyle, David C. Little, Cecil E. Morris, Jr., Judge Ruthanne Polidori, Alexander R. Rothrock, Marcus L. Squarrell, Jr., David W. Stark, James S. Sudler III, Anthony van Westrum, and Judge John R. Webb. Present by conference telephone were members Gary B. Blum, Cynthia F. Covell, Lisa M. Wayne, and E. Tuck Young. Excused from attendance were Justice Monica M. Márquez and members Helen E. Berkman, Thomas E. Downey, Jr., John M. Haried, Judge William R. Lucero, Christine A. Markman, Henry R. Reeve, Matthew A. Samuelson, Boston H. Stanton, and Eli Wald. Also present was Supreme Court staff attorney Melissa C. Meirink and guests Melinda Harper and Joan H. McWilliams.

I. *Meeting Materials; Minutes of April 29, 2016 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the forty-third meeting of the Committee, held on April 29, 2016. Those minutes were approved with one correction.

II. *Acknowledgment of Retirement of James S. Sudler III as Chief Deputy Regulation Counsel.*

The Chair reported to the Committee that James S. Sudler III will retire at the end of the month from his position as Chief Deputy Regulation Counsel of the Colorado Office of Attorney Regulation Counsel, retiring after twenty-four years of service to that office. She said that Sudler will remain in practice as a private lawyer and will remain a member of this Committee.

The Chair said more about Sudler, taking his initials, *JSS*, as her motif:

- *J* she drew into "just great," "just so smart," "just *just.*" To be sure the Committee understood the last reference, she added, "He is *just*, a good quality in a prosecutor."

- The Chair noted that Sudler has given her two *S*'s to work with and said they stand for lots of things: One of them can stand for "steady," for bringing a calm, steady temperament both to handling a lawyer who has gotten in trouble and to leading our Committee in the drafting of changes to complex Rules of Professional Conduct, such as in the wholesale revision of the COLTAF Rules. Although it did not fit her *S* motif to say so, she added that Sudler does not hold grudges.

- And the Chair pointed out that the *S*'s are squared, giving an exponential quality to Sudler's attributes. Having him on this Committee is, the Chair said, like having several of him doing what he says he will do: It gets done; the Chair need not push him to get done whatever he undertakes to do.

The Committee knew the man of whom Glenn spoke, and it gave him warm applause.

III. *Subcommittee on Flat Fees.*

The Chair asked Sudler and Nancy L. Cohen to report to the Committee on the further consideration of lawyers' flat fees by the subcommittee formed at the fortieth meeting of the Committee on June 25, 2015.

Sudler named, for the Committee, the members of the subcommittee, including lawyers who are not members of this Committee, characterizing them all as diligent participants in the subcommittee's work: Sudler, Cohen, Gary B. Blum, Thomas N. Downey, Nancy B. Elkind, Melinda M. Harper, Ericka L. Holmes, Steven K. Jacobson, Jeffrey D. Joseph, David C. Little, Joan H. McWilliams, Cecil E. Morris, Martha L. Ridgway, Matthew A. Samuelson, Marcus L. Squarrell, and Lisa M. Wayne.

Sudler directed the Committee to his memorandum dated July 22, 2016, which was included in the materials for this meeting. He said the subcommittee had revised its proposal, editing it from the version that had been considered by the Committee at its forty-third meeting on April 29, 2016. Following the style of the Rules of Professional Conduct, the word "attorney" was changed to "lawyer" throughout the draft. The definition of "flat fee arrangement" was streamlined:

> The term "flat fee arrangement" refers to an arrangement for legal services of a lawyer under which the client agrees to pay a specified maximum amount for a legal service to be performed by the attorney. Each flat fee arrangement shall be in writing and shall contain the following: . . . .

That definition, he noted, now uses the term "arrangement" rather that "agreement," reflecting that, under Rule 1.5(b), it is "the basis or rate of the fee and expenses [that] shall be communicated to the client, in writing . . . ."

All of the subcommittee members are in favor of the proposal — although no vote had been taken, he noted — except that there is disagreement about what should happen if the lawyer does not comply with the requirements of the proposed rule, this Rule 1.5(h). He suggested to the Chair that his memorandum, included within this meeting's materials, might be used in the Committee's discussion of the proposal.

And, lastly, Sudler noted that the proposal contains a suggested form for a lawyer's flat fee arrangement that would comply with the proposed rule.

In addition to providing a version of the rule in which no provision is made for a lawyer's noncompliance, the subcommittee's proposal contains three alternatives fixing a remedy for a flat fee arrangement that is not in substantial compliance with the rule — or, if the rule contains a flat fee arrangement form, that is not in substantial compliance with that form. Those alternatives are listed in Sudler's memorandum as follows:

[Alternative 1 - No subparagraph (v.) addressing non-compliance]

[Alternative 2]:

v. If a flat fee arrangement is not in substantial compliance [*sic*] this Rule then it is unenforceable.

[Alternative 3]:

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

[Alternative 4]:

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

Those alternatives are up for debate, he said.

The subcommittee's proposal for a form of flat fee arrangement is not yet fully developed. Sudler said the subcommittee's intention is that the form would be a suggested form set forth fully in Chapter 23, C.R.C.P. He added that he had suggested this form to the enforcement agencies in other states and that they were receptive to the idea of making such a form available for the lawyer's use.

Cohen added that most of the members of the subcommittee had accepted all of the first four subsections of proposed Rule 1.5(h) — subsections 1.5(h)i. through 1.5(h)iv.[1] If the Committee favors inclusion of a form of flat fee arrangement, it should return the matter to the subcommittee for more work on the content of that form.

A member noted his objection to the phrase "flat fee arrangement" as being a phrase that would foster resistance among many lawyers. When one has a fee deal, it is in fact a contract. Lawyers customarily use the term "arrangement" only to refer to deals — arrangements — between lawyers to split fees. This concept of a flat fee, he said, is a contract and should thus be called an "agreement."

To that, Cohen recalled that the Court had rejected this Committee's initial proposal for Rule 1.5(b), which would have referred to a "written fee agreement."[2] She commented that the deal "I

---

1. The numbering style used in the Rules of Professional Conduct would have the subprovisions of a Rule 1.5(h) be numbered by consecutive arabic numerals contained in parentheses, such as Rule 1.5(h)(1). These minutes use the numbering scheme adopted in the proposed rule, as stated on the third page of subcommittee's report to the Committee that was included in the materials for this forty-fourth meeting, in which the subprovisions are enumerated with lower-case roman numerals without parentheses.

—Secretary

2. As proposed by this Committee to the Court on December 30, 2005, Rule 1.5(b) would have read [emphasis added]—

> (b) When the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. *Except as provided in a written fee agreement*, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a).

(continued...)

will charge you $500 for a will" is a contract but that implies that both parties must sign the contract. But Rule 1.5(b) requires — if the lawyer has not regularly represented the client — only that the lawyer communicate the basis and rate of fee to the client "in writing"; it does not refer to a "contract" or "agreement" or require that any other aspect of the engagement be stated in writing.

To that, the member who had characterized the flat fee "arrangement" as an "agreement" responded by noting that Rule 1.5(a) provides broadly that "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." And, he noted, contracts need not be in writing nor signed by both parties.

Another member agreed with that position, saying it makes no sense to put a flat fee deal in writing and yet not call it an "agreement." The phrase used in the proposed rule, he said, should be "flat fee agreement."

Another member also agreed, saying that, although the "ethics world" avoids the term "agreement" or "contract" — because Rule 1.5(b) says only that the "the basis or rate of the fee and expenses shall be communicated to the client, in writing" — at least the remainder of the lawyer's deal with the client is an agreement between them, whether or not reduced to a writing.

Yet another member agreed, saying that he would use the term "contract" for this purpose, although he suggested that all of the rules should be examined so that a consistent terminology — "agreement" or "contract" — is used. And another member expressed his agreement with that, noting that Rule 1 of Chapter 23.3, C.R.C.P., governing contingent fees, requires a "written agreement" for a "contingent fee agreement."

Cohen suggested that, if the phrase is switched from "flat fee arrangement" to "flat fee agreement," then a comment should be added to clarify that the agreement need not be signed by the client. Existing Comment [2] already provides, "A written communication must disclose the basis or rate of the lawyer's fees, but it need not take the form of a formal engagement letter or agreement, and it need not be signed by the client."

Sudler said he agreed with the change from "flat fee arrangement" to "flat fee agreement," saying the subcommittee had been dancing around the terminology for a long time because of a concern about the avoidance of the word "agreement" in Rule 1.5(b). In fact, the term "flat fee agreement" had initially been favored within the OARC.

A member who had not previously spoken on the matter said he agreed with use of the phrase "flat fee agreement." And he felt that, if the rule is going to set forth criteria for an acceptable agreement, then it should provide a form for such an agreement. But he asked how proposed Rule 1.5(h) would fit alongside existing Rule 1.5(b), which contains no requirement regarding fees when the lawyer *has* "regularly represented the client." If it is intended that no "written communication" is required for a flat fee within a regular representation, that should be stated.

A member questioned the characterization of a "flat fee" arrangement or agreement as one in which the client agrees to pay "a specified maximum amount" for a legal service. She questioned whether an agreement by which a lawyer agreed to prepare a will for $2,000 — a fee that was fixed regardless of whether the lawyer's bill computed at the lawyer's nominal hourly rate would be higher or

---

2. (...continued)

—Secretary

lower than $2,000 — would be an agreement for a "flat fee" under this definition, as it did not specify a "*maximum* amount" but, rather, just a set fee. She said she was confused by this terminology.

To that, Cohen said the subcommittee intended both; she directed the member to the comments to the rules, which speak both about "flat" fees and "fixed" fees, and she suggested looking at Rule 2 of Chapter 23.3 for alternatives. The subcommittee had gone both ways, but its intent is to cover both maximum-fee arrangements and fixed-fee arrangements — that is, to cover both the agreement to charge based on an hourly rate but with a cap and the agreement to charge a stated fee regardless of the time accrued for the services. Comment [12] is intended, she said, to explain the point. In any event, the subcommittee's intention is to cover both types of arrangements.

The member who had questioned the application of the definition to the fixed fee then asked about the consequences of non-compliance with the requirements of the proposed rule in a circumstance in which the fees, computed at the lawyer's normal hourly rate, would be less than the agreed fixed fee because the time actually accrued to render the services turned out to be less than the estimate upon which the agreed fixed fee had been calculated. In that case, she thought, the lawyer would argue that the arrangement had not been for a "maximum fee" as contemplated by the proposed definition of a "flat fee agreement" and, therefore, the lawyer's arrangement with the client had not been within the scope of the proposed rule.

To that, a member who had served on the subcommittee said the subcommittee's intention was to cover both situations, intention being the guideline. Thus, a flat fee arrangement for a case involving a small crime, in which the client "pled out" early, so that the lawyer's fee based on an hourly rate computation would have been lower than the agreed fixed fee, would be covered by the proposed rule.

The member who had questioned the application of the rule to the case of a regular representation said he, too, was concerned with the implications of the word "maximum" in the definition of the "flat fee agreement." He suggested that the word simply be deleted from that definition, so that it would read, "The term 'flat fee arrangement' refers to an arrangement for legal services of a lawyer under which the client agrees to pay a specified amount for a legal service to be performed by the attorney." In his view, an agreement that the fee would not exceed a maximum amount was not a "flat fee agreement" and the rule, with his modification, would not cover that agreement. But, he added, there was no need for the client's protection in the maximum-fee situation, since the statement of the maximum amount of the fee was entirely to the client's benefit, the fee otherwise being calculated based on the accrual of time as contemplated by existing Rule 1.5(b).

To that, another said that such an arrangement might not be just about a maximum, a cap, as when the lawyer and the client have agreed to a representation that anticipates various stages of services. The member who had raised the question, though, characterized the staged-representation situation as a variety of the flat fee agreement, in which the fee for each stage, determined by the agreement of the lawyer and the client, was fixed, not limited by a "maximum amount." In effect, the agreement is that, if the lawyer accomplishes a defined stage, the lawyer is to be paid a stated fee for that accomplishment, rather than be paid a fee determined by the number of hours accrued to accomplish that stage multiplied by an agreed rate, subject to a maximum which the fee could not exceed.

The member who had first questioned whether a fixed fee agreement would be included within the proposed definition of a "flat fee agreement," with its reference to a "maximum" fee, agreed with that analysis of the staged-services arrangement and agreed that the problem could be fixed by deleting the word "maximum" from the proposed definition.

Cohen asked that member whether a definition that read, "The term 'flat fee arrangement' refers to an arrangement for legal services of a lawyer under which the client agrees to pay a specified amount for a legal service to be performed by the attorney," would be acceptable. The member agreed that it would be acceptable. And, in answer to Sudler's follow-up question, that member said that definition would cover the fixed fee situation.

To all of this, another lawyer said, "We sound like a bunch of lawyers." If, he said, a client came in to the lawyer's office and said, "I want you do to this for that fee," we would have no problem writing the contract for those services at that fee. In his view, the subcommittee and this Committee have danced around the matter because of the initial use of the word "arrangement" and the erroneous thought that lawyers have arrangements for fees rather than agreements for fees. Why, he asked, have we been so concerned to avoid saying that the rule applies both to an agreement for legal services at a specified fee and to an agreement for legal services at a fee not that would not exceed a specified maximum amount? If we drop reference to an "arrangement" and forthrightly call it an "agreement," lawyers will draft appropriate contracts to express their deals with their clients. He added a reference to an ethics opinion from Ohio that, in his view, did a good job of saying that fixed fees and maximum fees have different connotations. Flat fees are part of the fixed-fee concept. He suggested that the first paragraph of the proposed rule be rewritten to "call it what it is": an agreement in writing.

The member who had questioned the application of the rule to the case of a regular representation said he liked the direction in which the discussion was now headed, because it simplified things. But, he asked, what is the meaning of the reference to "a portion of them" in proposed Rule 1.5(h)iv, reading, "The amount, if any, of the fees the lawyer is entitled to keep upon termination of the representation before the specified legal services or *a portion of them* have been performed." To the suggestion that this was intended to cover the circumstance where the lawyer has provided some, but not all, of the services agreed to be rendered to the client, the member responded that the text covered even the case where the lawyer had done nothing. It was, he thought, an incorrect phrasing.

The member who had characterized the discussion as if it were among a bunch of lawyers suggested sending the entire matter back to the subcommittee for further consideration and refinement.

A member who had not previously spoken said that, if the matter is as complex as the Committee has been making it in this discussion, then it should be dealt with by way of comment and not just by the presentation of a prescribed form of agreement.

Cohen asked her subcommittee co-chair Sudler what the subcommittee had understood to be the difference between Alternative 3 and Alternative 4 for proposed Rule 1.5(h)v.[3] In response, Sudler

---

3. The two proposed alternatives read—

[Alternative 3]:

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

[Alternative 4]:

v. If a flat fee arrangement is not in substantial compliance with the Flat Fee Arrangement form [refer to where from is placed] and the attorney client relationship is terminated before the representation

(continued...)

recalled that one of the issues the subcommittee had dealt with is what should happen if a representation is terminated midway between the accomplishment of two milestones or stages. In such a situation, the agreement might provide that the lawyer's fee for the partially completed stage would be computed by application of a stated hourly rate to the time actually accrued working on the uncompleted stage.

But a member characterized the two alternatives this way: Alternative 3 deals with the question of when the lawyer may transfer the client's advanced deposit from the COLTAF account to the lawyer's account as earned fees, while Alternative 4 states what must happen in the event the representation is terminated before completion of the agreed services. Alternative 3 is all about the accomplishment of milestones; Alternative 4 is the new concept that is intended to clarify, in light of *Gilbert*, what happens upon a premature termination of the representation.

Another member agreed with that characterization of the alternatives, saying that Alternative 4 is about quantum meruit recovery upon a premature termination of the representation. In that respect, Alternative 4 is akin to the contingency fee rules, found in Chapter 23.3, C.R.C.P. Alternative 3 invites the lawyer to determine, by agreement, what happens in the event of premature termination: The lawyer can pick and choose and write the contract as he and the agree.

A member said that he was struggling with the mix of concepts — flat fees, fixed fees, lump-sum fees. He felt the rule needed to be very clear in stating its requirements, so that lawyers could successfully comply with those requirements. The rule cannot be useful just for sophisticated corporate general counsel writing forms for retainer agreements with outside lawyers; the OARC does not deal with those kinds of cases. Rather, we need to consider lawyers who are dealing with clients who lack sophistication in their engagements of lawyers for legal services. The Committee, he said, is dancing around that issue, trying to write a rule that protects the general public when entering into what may be a financially expensive arrangement; understandably, we want to write such a rule while not adversely impacting agreements between sophisticated clients and their lawyers.

To that, Cohen asked, how do we do that? The rule will nevertheless apply both to the sophisticated client and the unsophisticated client. And, she added, the rule may well impact law firms that work across lots of enforcement jurisdictions, inside and outside Colorado.

The member replied to Cohen that, even if our focus is limited to legal service arrangements governed only by Colorado laws and rules, there will be a fundamental difference between the sophisticated client and the unsophisticated client. The examples given of the cases seen by the OARC involve the general public, the unsophisticated client. But, he added, perhaps it simply must be accepted

---

3. (...continued)

> is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in the event the lawyer asserts that the client has been unjustly enriched.

The alternatives differ as follows (comparing Alternative 4 over Alternative 3):

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

—Secretary

that the proposed rule will apply to the agreement for legal services for a sophisticated client and the agreement with the general public, the unsophisticated client. Yet the rule needs to be very clearly stated. He himself did not know what the terms mean: What is the difference between a "specified maximum amount" and a "specified amount"? They both state a maximum.

The member who was clearly still thinking that the Committee was sounding like a bunch of lawyers asked whether the proposed rule would apply to the agreement that contemplated the client making payment only at the end of the engagement rather than by making an initial deposit into the lawyer's COLTAF account. He asked whether this proposed rule ought to apply only to the latter case, that of an up-front deposit toward subsequently earned fees.

A member made this motion:

(1) That the phrase be changed from "flat fee arrangement" to "flat fee agreement" throughout the proposed rule.

(2) That proposed Rule 1.5(h)iii be revised to read, "A description of when or how fees are deemed to be earned by the lawyer during the course of the representation."

(3) And that the phrase "or a portion of them" be deleted from proposed Rule 1.5(h)iv, so that it would read, "The amount, if any, of the fees the lawyer is entitled to keep upon termination of the representation before the specified legal services have been performed."

To Cohen's question, the movant clarified that the word "arrangement" — found in the phrase "refers to an arrangement" in the introductory portion of the proposal — should also be changed to "agreement."

A member said he was intrigued by another member's comment that the proposal is a solution to a problem that exists only when the client has made a deposit into a COLTAF account to cover future fees. That, he said is the context to which we should be limiting the proposal, and such a limitation would remove the sophisticated corporate client's agreement for legal services of a flat-fee or a maximum-fee type.

To that, another member said she thought we were attempting to deal not only with the advance deposit toward future fees but also with the situation where, even absent such a deposit, the lawyer has not yet done what was agreed to be done — for a fixed fee rather than one computed by application of an hourly rate to accrued time — before the engagement was terminated.

The member who had raised the concern about the proposal's application to the sophisticated client said that we had been led to consider the case of an advanced deposit against future fees — the case where the client has put his last dollars into the lawyer's COLTAF account and cannot afford to pay another lawyer for a continuation of the services when the engagement of the first lawyer is terminated but the client's funds remain tied up in his COLTAF account; and, he prophesied, we could write a rule that dealt only with that situation, one that spoke of "advanced fees." To that, Sudler responded that it would be harder than it sounds to write such a rule.

Sudler added that the subcommittee's intention is to deal with both that circumstance of the advanced deposit against future fees and the circumstance where the lawyer's services are terminated before completion and the lawyer seeks payment for the work done before termination when the agreement stated only a single amount for fully completed services.

A member advocated that the Committee write a rule "that avoided what the lawyer would argue in court" for recovery of fees for services partially rendered up to a premature termination of the representation, whether or not there was an advanced deposit against future fees. We need, she said, a "rule for good hygiene." That would be an accomplishment in itself, even if it were not limited just to flat fees. She asked, if we are to cover only the circumstance of the advanced deposit against future fees, why would that not also include, in addition to the flat fee, the advance deposit against future fees that are to be determined on the basis of a hourly rate, where the client disputes the claimed accrual of time.

A member added that the lynchpin of the problem is the advanced deposit against future fees, and he asked that we not lose track of the *Sather* case that dealt with the lawyer who took an advanced payment into his operating account and then did not perform the agreed services. He added that member Alexander R. Rothrock has written an entire article on that issue.

A member made a substitute motion that the proposed rule be sent back to the subcommittee, to be considered further using this discussion as fertilizer. The motion was seconded. The movant noted his agreement that the rule should be written to cover both the case of premature termination of services where there has been an advanced deposit against a flat fee for future services and the case of premature termination of services, to be charged on a flat fee, but where there has been no such advanced deposit.

A member said he read the existing proposal as already dealing with the flat fee case that does not call for an advanced deposit. He added that many fee agreements do not require advance deposits: "I will provide discovery services in this case for $100,000, fixed." That kind of agreement gives the client the benefit of certainty in budgeting for litigation. This rule should provide for that situation as well as for the situation involving the advanced deposit against future fees.

The Chair asked for, and received, a withdrawal of the pending motion so that she could take a straw poll on the prior motion, with its four elements. The straw poll that was then taken resulted in Committee approval of all four of the elements.

Cohen noted her sense that the Committee believes that the rule — which apparently will cover fee deals that can be quite complex when the clients are sophisticated — should deal only with "the small firm," not with those lawyers that have sophisticated clients and practices. A member who was participating by conference telephone concurred with that assessment: The rule should protect the "small-practice" lawyer and that lawyer's clients.

A member asked, if the proposal were going back to the subcommittee, that it deal with the concepts of unjust enrichment — referred to in the third and fourth alternatives to Rule 1.5(h)v of the existing proposal — and quantum meruit, mentioned in the course of the Committee's discussion. He asked how the lawyer could argue that he benefitted the client if the engagement were terminated before completion of the services. What is the benefit to the client in an engagement for the drafting of a will if the engagement is terminated after the lawyer accrues time receiving necessary information from the client but before there is a drafting product? If we provide a rule for that circumstance, and the lawyer can show compliance with that rule, then the rule will be of value to the lawyer, too, and not just to the ex-client.

The Chair noted that the subcommittee will not be bound by this discussion that the Committee has had of the proposal in its existing form, when the proposal is returned to the subcommittee for further work.

The Chair asked for the members' straw poll on the question of whether the rule should cover any "flat fee" or only "flat fees" against which an advance deposit has been taken.

By way of a discussion of the matter put to the straw poll, a member said that the rule should apply without regard to who holds the money — it should not turn on whether there was an advanced deposit against future fees. The member suggested that a comment could be added to clarify that some of the rule's requirements would not apply if there were no advanced deposit against future fees, if there were, indeed, some such provisions in the final version of the rule. And, he added, there could be a comment's reference to Rule 1.5(f).[4]

The straw vote was taken, the members voting that the subcommittee should draft the rule to cover all flat fee agreements rather than just those requiring an advanced deposit against future fees. A member who was participating by conference telephone expressed his disagreement with that result, saying any coverage of the case where there had been no advanced deposit would be over-regulation. A member who was present in the room added his agreement with that position.

A member asked that the subcommittee give special consideration to consistency in terminology among the comments to Rule 1.5, noting that existing Comments [12], [14], and [15] speak of "'flat fees'" and "'lump-sum' fees."

Upon that warning, Cohen asked Michael H. Berger, who chairs the Court's standing committee on the Rules of Civil Procedure, whether this Committee should be coordinating with that committee, given the different terminology that is used in the rules governing contingency fees found in Chapter 23.3, C.R.C.P. Berger responded first by noting the oddity of having the contingency fee rules placed in the C.R.C.P. rather than the Rules of Professional Conduct but then adding that this Committee should confer with the other committee if it sees need for changes to coordinate terminology.

Responding to Berger's observations, the Chair said that a part of her sees a need for a joint subcommittee of the two Rules Committees to look together at both the fixed/flat fee case and the contingent fee case. But she added that this highly-functioning subcommittee of this Committee should continue its useful work of developing a rule to deal with fixed/flat fees — while keeping its eye on the contingency fee rules of Chapter 23.3.

The Chair added that the subcommittee certainly should also be looking at consistency within the Rule 1.5 comments.

Sudler asked whether the Committee had yet developed a sense about whether the proposed rule should provide a form for the fixed fee agreement; was that a premature question? Cohen added that, if the Committee thinks a form should be included, then it should consider the content of that form.

James C. Coyle, Attorney Regulation Counsel, responded by referring to an existing proactive management group and its awareness that small-firm practitioners want guidance in this area. It would help them to provide them with forms for these kinds of agreements.

---

4. Rule 1.5(f) reads—

1.5 Fees

> (f) Fees are not earned until the lawyer confers a benefit on the client or performs a legal service for the client. Advances of unearned fees are the property of the client and shall be deposited in the lawyer's trust account pursuant to Rule 1.15(f)(1) until earned. If advances of unearned fees are in the form of property other than funds, then the lawyer shall hold such property separate from the lawyer's own property pursuant to Rule 1.15(a).

—Secretary

The Chair asked for the Committee's response to the question of whether the Committee should now seek a joint effort with the Standing Committee on the Rules of Civil Procedure. Berger, the chair of that other committee, suggested that the two committees ask the Court to move the contingency fee rules from the C.R.C.P. to the C.R.P.C.; they are wholly out of place in the Rules of Civil Procedure. Berger recalled, without characterizing the occasion, that once before this Committee belatedly went to the other committee with concerns about the contingency fee rules.

The Chair and Berger agreed that they would jointly write a request to the Court to move the contingency fee rules from the C.R.C.P. to the C.R.P.C.

To the Chair's question, Sudler suggested that this Committee should not now take up the content of a proposed form for flat fee agreements; the subcommittee has this Committee's comments on the form from earlier Committee meetings, from which it can work. The Chair concurred, noting that the content of any proposed form might well depend on decisions still to be made about the substantive content of proposed Rule 1.5(h), including whether or not the rule will deal only with agreements that require advanced deposits against future fees.

A member said she thinks there should be an alternative to deal with the case in which the client does not dispute a portion of the fees claimed by the lawyer upon a premature termination of the engagement but does dispute other parts of the lawyer's claim. In that circumstance, may the lawyer retain the undisputed portion and pursue quantum meruit for the balance? She reads the *Gilbert* decision to say that the lawyer may do so in that case, but she does not see that circumstance covered in the subcommittee' proposed rule.

The Chair responded by recalling that, at the Committee's forty-third meeting, on April 29, 2016, it had determined that the lawyer should be permitted to retain — or collect — the undisputed portion in that case. A member recalled having thus proposed that the lawyer could take the undisputed portion of the fees into the operating accounts as payment.

As the discussion drew to a close, the Chair invited each of the members to communicate with subcommittee chairs Cohen and Sudler if they had ideas to contribute to the subcommittee as it worked further on the proposal.

IV. *Status of COLTAF Rules Amendments*

The Chair reported that she has submitted to the Court the Committee's proposal for a new Rule 1.15B(k), a new Comment [7] to Rule 1.15A, and new Rule 1.15D(a)(1)(C), as approved at the Committees' forty-third meeting, on April 29, 2016. The proposal would permit lawyers to continue to hold "orphaned funds" in their trust accounts or give them to COLTAF under certain circumstances. The Court has asked that comments on the proposal be submitted to the Court by September 15, 2016.

The Chair noted that Diana M. Poole, director of the Colorado Lawyers' Trust Account Foundation, had sent her a gracious note of thanks for the Committee' proposal.

Both the Chair's submittal letter to the Court and Diana M. Poole's letter to the Chair were included in the materials provided to the members for this meeting of the Committee.

V. *Rule 1.6 and Information Regarding Legal Fees of Public Entities*

At the Chair's request, David W. Stark reported that a subcommittee has been formed to consider the addition of a comment to Rule 1.6 that would except, from the Rule 1.6 prohibition of a lawyer's revealing client information, information regarding the totals of attorney fee billings and expenses devoted to individual clients by public entities. Stark said that the subcommittee has had two meetings and has formed working groups to consider various facets of the proposal. He noted that legislation or court rules regarding this matter have been proposed in Colorado and other jurisdictions, including the submission of legislation in the 2016 Colorado General Assembly that was not enacted, and that the matter has been considered in legal cases in other jurisdictions and in legal writings. Among the issues are whether such a principle would be properly located within the Rules of Professional Conduct; perhaps the matter should be dealt with by statute and then automatically included within the exception of Rule 1.6(b)(7) permitting disclosure of client information "to comply with other law."

Stark said the subcommittee has had "spirited discussion" and added that he has requested input from the Colorado Attorney General and from the State Public Defender.

VI. *Proposed Amendments to Rule 2.1 and Its Comment[5] Regarding Consideration of Children in Parenting Disputes.*

The Chair introduced Joan H. McWilliams, of McWilliams Mediation Group Ltd., to the Committee, to discuss proposals to amend Rule 2.1 and its Comment [5].[5] The proposed amendment to Rule 2.1 would cause it to read (the proposed amendment is in italics) as follows:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. *In a matter involving the allocation of parental rights and responsibilities, an attorney should advise the client of the importance of minimizing the adverse impact that parental conflict can have on the minor children.* In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

And the proposed amendment to Comment [5] to Rule 2.1 would cause it to read (the proposed amendment is in italics) as follows:

> [5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, *when a matter involves the allocation of parental rights and responsibilities, it may be necessary under Rule 1.4 to inform the client of the importance of minimizing the adverse impact that parental conflict can have on minor children. Likewise,* when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the

---

5. McWilliams proposal was set forth in a memorandum that was included with the materials the Chair provided to the Committee for this meeting, beginning on p. 15 of the materials.

—Secretary

client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

McWilliams began her discussion with the statement that a lawyer engaged in a matter involving conflict between parents of minor children should advise the lawyer's client of the adverse impact that the conflict may have on those children, notwithstanding it is the parent, and not those children, who is the lawyer's client in the engagement. Many practitioners in matrimonial practice, she said, consider only the interests of their client, the parent, and do not undertake to provide cautions for the benefit of the minor children.

The proposed amendment would tell such practitioners that they "should" advise their clients of "the importance of minimizing the adverse impact' of the parental conflict on the children. McWilliams stressed that the amended rule would not establish an absolute requirement that such advice be given.

McWilliams reported that the concept contained in the proposals was adopted by the American Academy of Matrimonial Lawyers in 2000 and that the specific proposals were approved by the Colorado Bar Association Family Law Section executive council in March 2016. As explained in her memorandum, which was included in the materials provided to the Committee for this meeting, the Colorado Bar Association Ethics Committee considered the proposals in May 2016 and, although disapproving of any amendment to the text of Rule 2.1, approved an amendment to Comment [5] of the rule such as that she now proposed to this Committee.[6]

---

6. From the approved minutes of the meeting of the Colorado Bar Association Ethics Committee on May 21, 2016 [the proposed amendments to Rule 2.1 and its Comment [5] that the Ethics Committee considered are the same as those considered by this Committee at this forty-fourth meeting]:

> Joan McWilliams was here as a guest and representative of the Family Law Section to ask the Committee's approval to proposed amendment to Colo. RPC 2.1. This proposed amendment was discussed in the section for over a year. It was tabled because of concerns about third party liability, or reduction of the strict privity rule. The Colorado Supreme Court decided the Baker v. Wood, Ris & Hames case and affirmed the strict privity rule. So that may be less of a concern now. The proposed amendment would change Rule 2.1 to include language providing: "In a matter involving the allocation of parental rights and responsibilities, an attorney should advise the client of the importance of minimizing the adverse impact that parental conflict can have on the minor children." Ms. McWilliams discussed the bases for the proposed changes of the rule and the need for the proposed changes. She believes that the proposed amendment covered the previous objections to the proposal. There was a discussion about whether these proposed changes were needed. Discussion among many members of the committee that the language was good. Others discussed why this was needed if this was a best practice, as opposed to an ethical requirement. In response, a member suggested that there are many lawyers who are just hanging their shingle out of law school and this gives those kind of lawyers good guidance. Others discussed the fact that the language would fit better in a comment to the rule rather than in the black letter of the rule. Some discussed how divorce cases are handled and that there are courses ordered to attempt to ensure that parents minimize the adverse impact of the divorce on the family. The paper here in the ethics packet, which has underlining, is just for illustrative purposes. It is not part of the proposal. Motion was made to approve the changes to the comment, but not changes to the rule. Motion was seconded. Discussion about whether the language in the proposed comment, which suggests that informing the client "may be necessary under Colo. RPC 1.4" should be removed and the language in the rule should be moved to the comment. Members discussed whether "should" is equivalent to "may be necessary." Another member believed that the word "should" should remain and the provision should be in the comment rather than the rule.
>
> Another proposed amendment would be to cross-reference Colo. RPC 1.1. This was a friendly amendment. Motion proposed to amend the motion to include language that in interacting with other counsel in a divorce matter, the lawyer should minimize the impact that parental conflict can have on minor children in the lawyer's interactions

(continued...)

Following McWilliams' presentation, a member asked whether the proposals were intended to require lawyers to take an action they would not be likely to take otherwise — give their clients the referenced advice about the harm of conflict to minor children — or were intended, instead, to give lawyers permission to take that action when they now feel they may not do so under the current rule. McWilliams said she appreciated the distinction contained in the question and responded that she believes it is the latter. In her view, the Supreme Court's decision in *Baker v. Wood, Ris & Hames*,[7] affirming the "strict privity rule," clarified that lawyers may provide such advice to a parent without incurring liability to the non-client, the child, so that the proposals, if contained in the Rules of Professional Conduct issued by the Court, would confirm that the specified advice might be given without incurrence of liability to the children.

A member asked the Chair whether a subcommittee would be appointed to consider these proposals, so that discussion would not be appropriate at this time. The Chair indicated that current discussion of the proposals would be appropriate now, and the member proceeded to state her objection to the proposals. The proposals would deviate from the Model Rules of Professional Conduct that have been the base for the Colorado rules; and it would inject an unenforceable concept that a lawyer "should" take a specific action, "should" give specific advice to a client in a particular circumstance. Additionally, the member thought it inappropriate to burden the rules with a specificity that applied to only one practice area within the legal profession, as this would apply only to family law practice.

Further, the member said, the proposals were directed at changing the conduct of clients, not regulating the conduct of lawyers: It is the parent who might adversely affect the child by inappropriate behavior. She noted that jurisdictions commonly provide parenting classes to follow divorces and added that the adverse effects on children that can come from parental strife are not dependent not the existence of a marriage but can come, too, from unwed parents. The member believed that the proposals would not be effective to change the behavior of those — the parents — whose behavior was of concern. The parenting programs already exist; those parents who do not take advantage of those programs are the ones likely to behave improperly, with or without this advice from the lawyers. The member concluded her remarks by noting that over seventy percent of marriage dissolution cases are filed *pro se* and, so, do not present the possibility for such advice from counsel.

Another member clarified that sixty-five percent of cases involving parenting issues proceed with neither party being represented by counsel.

---

6. (...continued)

with other counsel in the divorce proceeding. Others expressed the concern that this dilutes the obligations to clients. Specifically, the proposed amendment would be to take the proposed 1 language in the rule and: (1) change it to say: "in a matter involving the allocation of parental rights and responsibilities an attorney should attempt to minimize the adverse impact that parental conflict can have on the minor children;" and (2) move that language to the comment. There was a discussion that maybe the proposal should be to another rule.

Motion to table because there are multiple, potentially conflicting alternatives that are being discussed. Motion to table was carried.

—Secretary

7. Baker v. Wood, Ris & Hames, Professional Corporation, 364 P.3d 872, 874 (Colo. 2016).

—Secretary

To these points, McWilliams agreed that the proposals would not "catch all cases," but she noted that many cases do proceed with counsel and concluded that, in those cases, the suggestion contained in the "should" admonition could be helpful. She added that the term "should" is already found in Rule 2.1, in its admonition that, "In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution that might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought."

A member expressed his desire that the Chair appoint a subcommittee to consider the proposals, and the Chair said that she would do so, in part in recognition of the limited attendance of members at this meeting. She had concluded that, given the breadth of outside support for the proposals, it was incumbent on this Committee to give the matter due consideration. If, as had been suggested, this is not appropriate for a rule or comment but might, instead, be the subject of an opinion of an ethics committee, that could be the result of such due consideration. The Chair said she would circulate a sign-up sheet for membership on such subcommittee and would welcome the participation of non-Committee members such as McWilliams.

VII. *Proposed Amendment to C.R.C.P. Rule 121 Adding § 1-27, "Judicial Expectations for Professionalism and Civility."*

The Chair invited Judge Michael H. Berger, who chairs the Colorado Supreme Court's standing committee on the Colorado Rules of Civil Procedure, to discuss a proposal to add a new section, § 1-27, to Rule 121 of the Rules of Civil Procedure. The proposal was set forth in the materials provided to the Committee for this meeting.

Berger began by saying the proposal had been submitted to the C.R.C.P. standing committee just a couple of weeks preceding this forty-third meeting of this Committee, although it had begun within a joint effort of the Colorado Bar Association and the Denver Bar Association Professionalism Coordinating Council. The C.R.C.P. standing committee has itself scheduled what Berger characterized as a "philosophical discussion" of the matter at its September 2016 meeting. Berger said that Judge John R. Webb would chair the C.R.C.P. consideration, which would be fortunate because of Webb's participation on both rules committees.

But, Berger added, he wanted to know what this committee thought, preliminarily, of the addition of this unusual concept within the C.R.C.P. He said he had met with Judge Jonathon Shamis, who had chaired the subcommittee of the CBA/DBA Professionalism Coordinating Council, to gather as much information as he could in advance of the September meeting of the C.R.C.P. standing committee. And, he said, at the Office of Attorney Regulation Counsel, Coyle is aware of the proposal

Coyle then said that the proposal has been discussed at the national level of bar regulators for a long time, for the professional conduct rules do not provide for "civility" and the bar regulators do not have jurisdiction to respond to the complaints they receive about lawyers' incivility. The best response they can now offer is the advice to "go to your professional group" and discuss the problem there. Coyle spoke about this matter at a conference in Wyoming in 2014, finding there that the judges wanted something in the rules applicable to cases in their courtrooms by which they could quickly and effectively respond to incivility, something that would enable them to apply sanctions for incivility in their courtrooms, without entry of the matter into a record or required forwarding of the matter to the disciplinary regulators. Wyoming has had such a rule of civil procedure for four years, enabling judges to make reference to the rule in case management orders and to cite the rule when dealing with incivility in their courtrooms; Wyoming judges have said that the rule has had a positive effect.

Coyle added that this proposal was taken before the CBA/DBA Professionalism Coordinating Council and there received broad approval; he noted that the council has about 140 members, of whom about thirty participate at its monthly meetings. He added that the proposal is not intended to be invoked in specific cases pending before the OARC and is not intended to impose a reporting requirement under Rule 8.3 on judges who encounter uncivil conduct in their courtrooms.

A member asked what is the problem that the proposal is intended to solve: Do judges believe they do not have the authority to sanction or admonish lawyers for uncivil behavior? If a lawyer receives such a sanction in the course of the proceeding, would the OARC believe that it had an obligation to commence disciplinary proceedings against the lawyer?

Noting those are good questions, Coyle said he has learned from chief judges that they are seeking some base that is uniform, a base that they can comfortably apply as a matter of protocol. The judges are concerned about establishing their own, differing protocols for their courtrooms. He added that, to his surprise, there is also a concern about the adverse implications, to the judges themselves within the judicial performance review system, of their criticism of lawyer misconduct — the concern of adverse effect on judicial performance ratings. There is a belief that the uniformity offered by a statement of a standard in a rule would permit the judges to deal with civility issues in their courtrooms without being singled out for subsequent criticism in the ratings process.

The member who had asked what was the problem to be solved then noted that, if a judge has ruled that the lawyer has violated this rule, as proposed, by inappropriate conduct, that must necessarily result in a "knowing violation" of Rule 3.6(c) and subject the lawyer to discipline by the OARC. The member understood the judges' concerns about the adverse impact of sanctions for incivility in their courtrooms, absent a rule to point to as the basis for such sanction, but the member would be concerned that this proposal could have unintended consequences of this sort.

Coyle replied that he appreciated the reference to Rule 3.6, but the OARC cannot pursue discipline without proof of the lawyer's requisite knowledge of the violation; accordingly, cases of this sort would not be of high priority for that office. He added that, "If a judge says, 'Stop that,' we already review those cases."

Another member followed up on the concerns just expressed, asking Coyle whether this rule, if adopted, would just be a "back door" into the OARC for a lawyer who did not like the conduct of opposing counsel. Coyle replied that he hoped that would not occur and that, if it did, the proposed comment, reading—

> Action taken under this practice standard does not constitute discipline as contemplated by C.R.C.P. 251.6, nor does imposition of a sanction under this practice standard preclude the reporting of an attorney's misconduct to the Office of Attorney Regulation Counsel. The sanctions applicable under this practice standard may be imposed independently or in conjunction with other available remedies.

—would enable the office easily to resolve the matter.

To that, the member who had asked the question suggested that the comment Coyle cited says just the opposite of his proposition: It says that the imposition of a sanction by the judge would not preclude the reporting of misconduct to the OARC. Should, he asked, the cited text instead read, "imposition of a sanction under this practice standard is not intended to lead to a reporting of an attorney's misconduct to the OARC"?

Another member, who had not previously spoken to the proposal, acknowledged that his own strong feelings about rules of "professionalism" and "civility" were well known and then said that he strongly opposed this proposal. If, as Coyle has said, this proposal is intended to address conduct that is not now subject to discipline under the Rules of Professional Conduct, then we should address that conduct within the discipline context of those Rules and not under the procedural context of the Rules of Civil Procedure. He added that he sees enough bad conduct among judges, and he suggested that such a rule be applied first to them, then maybe to lawyers. He added that C.R.P.C. 8.4(d), stating that "It is professional misconduct for a lawyer to: . . . (d) engage in conduct that is prejudicial to the administration of justice," should suffice to take care of the problems posited as reasons for this proposal. He could not support this proposal unless and until he was convinced that there is an "absolute hole" in the Rules of Professional Conduct in this regard.

To that, Coyle replied that the OARC has no intention of making "civility" or "professionalism" of this sort a topic within the Rules of Professional Conduct. It is not the OARC's goal to become involved in professionalism issues.

The member who had just articulated his strong opposition to the proposal said that he had twice been held in contempt of court for pushing the boundaries and not being courteous when serving as a public defender in his youth. He could envision a judge who would apply this rule of civil procedure when the judge did not like the course counsel was taking with a case, and that would harm both clients and justice; in his view, this rule's potential for abuse by a judge would be too dangerous to permit the rule to exist.

Another member who had not previously spoken to the proposal added the observation that the greater the substance of the dispute being litigated the more the lawyers are contentious; and, when counsel are being loud or vigorous, they fail to monitor themselves, but they can observe their opponents acting inappropriately and will invite the court to sanction those opponents under the proposed rule if it is adopted. The rule would be invoked in very subjective circumstances, and, therefore, it would be difficult to assure that the rule would be appropriately applied. He agreed that it would be dangerous to invite judges to use such a rule for "mere discourtesy." Judges can control their courtrooms; they are already given training in how to use their powers and to use those powers sparingly. He recalled a case arising in Colorado Springs in which a judge had issued an order on a matter; when the opposing counsel raised the matter of courtesy, the judge was confronted with whether he was thereby precluded from reconsidering his prior order.

Another member recalled a case in which the judge understood that a filing could be struck for its offending language, while the filing lawyer was given leave to refile without the offending language. The member noted that judges are overworked and could use this proposed rule to "act out."

The member who had referred to the Colorado Springs case pointed to the references in the proposal to taking up undue amounts of time and forecast that the proposal would permit judges to deny particular filings by saying, "That is a waste of time; I already know where I stand on that matter," depriving the lawyer of the opportunity to perform his duty to his client to make the specific argument to the judge.

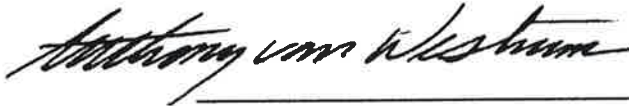
Noting that the Committee would not be able to give any specific input about the proposal to the C.R.C.P. standing committee before the latter committee's September meeting, the Chair asked Berger what response he would like from the Committee at this meeting. Berger replied that he simply had wanted to collect ideas from this kind of discussion before that September meeting. The Chair said she would emphasize to absent members of this Committee that the matter had been discussed and suggest to them that, if they had pertinent comments, to pass those comments on to Berger.

Webb spoke to encourage members to participate in the Berger/Webb subcommittee of the Civil Rules Committee when it takes up the proposal. Berger confirmed that suggestion, noting that there will be a lengthy consideration of the proposal before the C.R.C.P. standing committee: Should this be a rule at all? If so, what should it say?

VIII. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 11:40 a.m. The next scheduled meeting of the Committee will be on Friday, November 4, 2016, beginning at 9:00 a.m., in the Supreme Court Conference Room.

RESPECTFULLY SUBMITTED,



Anthony van Westrum, Secretary

[These submitted minutes have not yet been approved by the Committee.]

Court of Appeals
STATE OF COLORADO
2 EAST FOURTEENTH AVENUE
DENVER, COLORADO 80203
720-625-5000

Michael H. Berger
Judge

August 11, 2016

Honorable Nathan B. Coats
Liaison Justice, Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct

Honorable Allison Eid,
Liaison Justice, Colorado Supreme Court Civil Rules Committee

Honorable Monica Márquez,
Liaison Justice, Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct

Re: Reallocation of responsibility for the Contingent Fee Rules, Chapter 23.3, C.R.C.P.

Dear Justices Coats, Eid, and Márquez:

By this letter, the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct (Professional Conduct Committee) and the Colorado Supreme Court Civil Rules Committee (Civil Rules Committee) jointly request that the Court reallocate the

responsibility for the Colorado Rules on Contingent Fees from the Civil Rules Committee to the Professional Conduct Committee.

The reasons for this request are:

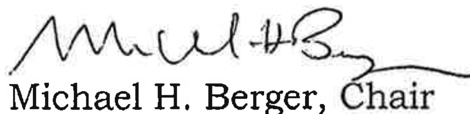
1. The Rules Governing Contingent Fees (Contingent Fee Rules) currently are found in Chapter 23.3, C.R.C.P. (They are not easy to find.) As such, the Civil Rules Committee historically has exercised responsibility for those rules. However, on at least two previous occasions when amendments to those rules were thought advisable, the Court appointed an ad-hoc committee to address such changes. After the ad-hoc committee completed its work, its recommendations were presented to the Civil Rules Committee for consideration and recommendations to the Court. The adoption of the Contingent Fee Rules and (we believe) all of the amendments to those rules antedate the formation of the Professional Conduct Committee.
2. At the Court's request in *Matter of Gilbert*, 2015 CO 22 n.12, the Professional Conduct Committee is considering the promulgation of rules to regulate fixed fee agreements between lawyers and clients. It is likely that these rules proposals, which we expect the Professional Conduct Committee to recommend be included in Rule 1.5(f) of the Rules of Professional Conduct, will also contain a proposed form for flat fee engagements. It is likely that the Professional Conduct Committee will propose that the form be contained in a new appendix to the Rules of Professional Conduct.
3. If the Rules of Professional Conduct are amended to include a form for fixed fee engagements, it makes logical sense that the proposed form for contingent fee engagements (and perhaps the rules themselves) now contained in Chapter 23.3 of the Civil Rules be located in the same place.
4. In the course of considering a new rule to regulate flat fee agreements, the Professional Conduct Committee has observed

that the Rules of Professional Conduct and the Contingent Fee Rules variously refer to fees paid in advance in a predetermined amount as "flat fees," "fixed fees," and "lump-sum fees." The Civil Rules Committee and the Professional Conduct Committee believe it would be useful to recommend the adoption of uniform terminology in the two sets of rules, which would be more easily accomplished if the Court were to transfer responsibility for the Contingent Fee Rules to the Professional Conduct Committee.

5. The Rules of Professional Conduct already extensively regulate fee agreements between lawyers and clients. Other than the Contingent Fee Rules, the Rules of Civil Procedure do not regulate fee agreements between lawyers and clients.
6. Many members of the Professional Conduct Committee have extensive experience and expertise with the ethical and practical considerations of lawyer-client fee agreements, including both fixed fee and contingent fee agreements. In contrast, fewer members of the Civil Rules Committee have such experience or expertise.

Respectfully submitted,

Marcy G. Glenn, Chair
Colorado Supreme Court
Standing Committee on the
Colorado Rules of Professional
Conduct



Michael H. Berger, Chair

Colorado Supreme Court Civil
Rules Committee

HOLLAND & HART LLP
THE LAW OUT WEST

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

October 3, 2016

Christopher T. Ryan
Clerk of the Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Proposed Amendments to Colo. RPC 1.15A, 1.15B, and 1.15D

Dear Mr. Ryan:

I write as Chair of the Court's Standing Committee on the Rules of Professional Conduct. In lieu of additional comments, the Standing Committee relies on (a) my June 6, 2016 letter to Justices Coats and Márquez, (b) the August 7, 2015 letter and attachments from the proponents of the amendments to the Standing Committee (attached as Exhibit C to the June 6 letter), and (c) the subcommittee's April 22, 2016 report (attached as Exhibit D to the June 6 letter).

In the event the Court receives comments opposing the proposed amendments, the Standing Committee requests the Court to schedule a hearing in which representatives of the proponents and the Standing Committee could address any concerns voiced by other commenters.

Respectfully,

Marcy G. Glenn, Chair
Colorado Supreme Court Standing Committee
on the Rules of Professional Conduct

MGG:ko
cc: Standing Committee on the Rules of Professional Conduct (via email)

HOLLAND&HART LLP
THE LAW OUT WEST

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

June 6, 2016

The Honorable Nathan B. Coats
Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

The Honorable Monica Márquez
Colorado Supreme Court
2 East 14th Avenue
Denver, CO 80203

VIA EMAIL AND U.S. MAIL

Re: Proposed Amendments to Rule 1.15B and Comment to Rule 1.15A of the Colorado Rules of Professional Conduct

Dear Justices Coats and Márquez:

I write on behalf of the Court's Standing Committee on the Colorado Rules of Professional Conduct (the Standing Committee), which is recommending the following proposed amendments to Rule 1.15B and the Comment to Rule 1.15A of the Colorado Rules of Professional Conduct (Colo. RPC).

By letter dated August 7, 2015, the Colorado Access to Justice Commission, the Colorado Bar Association, and the Colorado Lawyer Trust Account Foundation (COLTAF) (collectively, the Proponents) proposed amendments to Colo. RPC 1.15B and 1.15D (the Orphaned COLTAF Funds Amendments) to accomplish two purposes: (1) to provide direction to lawyers and law firms regarding the disposition of funds in COLTAF accounts where the proper recipient of the funds cannot be identified or, if identified, cannot be located; and (2) to serve the administration of justice by providing additional, much-needed resources for Colorado's legal aid delivery system.

At the Standing Committee's October 16, 2015 meeting, a subcommittee was formed to study the proposed Orphaned COLTAF Funds Amendments.[1] The subcommittee reported to the full

[1] Standing Committee member Alec Rothrock chaired the subcommittee. Additional members were Standing Committee members Ruthanne Polidori, Boston Stanton, Matt Samuelson, Jamie Sudler, and Anthony Van Westrum, and non-members David Kirkpatrick (a private practitioner in Durango), Diana Poole (COLTAF's Executive Director), Mark Schmidt (COLTAF Director), and Courtney Shephard (an associate at Mr. Rothrock's firm).

Standing Committee at its January 29, 2016 and April 29, 2016 meetings. At the April meeting, the subcommittee submitted a brief report with two proposed new rule provisions and one proposed new comment, which the full Standing Committee voted to recommend to the Court, with minor edits. On May 31, 2016, after further discussions, the Standing Committee voted to recommend further amendments to the Court. Word documents prepared by Jenny Moore, containing clean and redlined versions of the proposed Orphaned COLTAF Funds Amendments, are attached as, respectively, Exhibits A and B.

The proposed amendments differ in some respects from the amendments initially proposed by the Proponents. However, we have been advised that the Proponents support the proposed Orphaned COLTAF Funds Amendments.

For further background on the proposed amendments, I refer you to the Proponents' August 7, 2015 letter and attachments, which are attached as Exhibit C, and to the subcommittee's April 22, 2016 report, which is attached as Exhibit D.

The Standing Committee respectfully asks the Court to favorably consider the proposed Orphaned COLTAF Funds Amendments. We defer to the Court's judgment as to whether it is appropriate to request comments and/or to schedule these proposed amendments for hearing. However, we note that there is some urgency to adoption of the amendments. The Standing Committee was advised by practitioners and regulators alike that this problem confronts lawyers with some regularity. Previously, Colorado Bar Association Ethics Committee Formal Opinion 95, entitled "Funds of Missing Clients," advised that unclaimed trust funds may be considered abandoned property under the Unclaimed Property Act, C.R.S. §§ 38-13-101, *et seq.* However, last year the General Assembly passed, and the Governor signed, a bill that exempts orphaned COLTAF funds from the Act; this bill appears as an attachment to Exhibit C. At its May 2016 meeting, the Ethics Committee withdrew Formal Opinion 95. As a result, lawyers currently have no guidance, much less definitive rules, regarding how to handle unclaimed funds in their trust accounts.

Sincerely,

Marcy G. Glenn
of Holland & Hart LLP

MGG:ko
Enclosure
cc: Chris Markman, Esq. (via email, w/enclosures)
Melissa Meirink, Esq. (via email, w/enclosures)
Jenny Moore, Esq. (via email, w/enclosures)

8775955_1

bcc: ✓CRPC Standing Committee Members (via email, w/enclosures)
Diana M. Poole, Esq.

8775955_1

EXHIBIT A

Rule 1.15A. General Duties of Lawyers Regarding Property of Clients and Third Parties

(a) – (d) **[NO CHANGE]**

COMMENT

[1] – [6] **[NO CHANGE]**

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

Rule 1.15B. Account Requirements

(a) – (j) **[NO CHANGE]**

(k) If a lawyer discovers that the lawyer does not know the identity or the location of the owner of funds held in the lawyer's COLTAF account, or the lawyer discovers that the owner of the funds is deceased, the lawyer must make reasonable efforts to identify and locate the owner or the owner's heirs or personal representative. If, after making such efforts, the lawyer cannot determine the identity or the location of the owner, or the owner's heirs or personal representative, the lawyer must either (1) continue to hold the unclaimed funds in a COLTAF or other trust account or (2) remit the unclaimed funds to COLTAF in accordance with written procedures published by COLTAF and available through its website or upon request. A lawyer remitting unclaimed funds to COLTAF must keep a record of the remittance pursuant to Rule

1.15D(a)(1)(C). If, after remitting unclaimed funds to COLTAF, the lawyer determines both the identity and the location of the owner or the owner's heirs or personal representative, the lawyer shall request a refund for the benefit of the owner or the owner's estate, in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide upon request.

Rule 1.15D. Required Records

(a) A lawyer shall maintain, or shall cause the lawyer's law firm to maintain, in a current status and shall retain or cause the lawyer's law firm to retain for a period of seven years after the event that they record:

(1) An appropriate record-keeping system identifying each separate person for whom the lawyer or the law firm holds funds or other property and adequately showing the following:

(A) For each trust account the date and amount of each deposit; the name and address of each payor of the funds deposited; the name and address of each person for whom the funds are held and the amount held for the person; a description of the reason for each deposit; the date and amount of each charge against the trust account and a description of the charge; the date and amount of each disbursement; and the name and address of each person to whom the disbursement is made and the amount disbursed to the person.

(B) For each item of property other than funds, the nature of the property; the date of receipt of the property; the name and address of each person from whom the property is received, the name and address of each person for whom the property is held and, if interests in the property are held by more than one person, a statement of the nature and extent of each person's interest in the property, to the extent known; a description of the reason for each receipt; the date and amount of each charge against the property and a description of the charge; the date of each delivery of the property by the lawyer; and the name and address of each person to whom the property is delivered by the lawyer.

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

(2) Appropriate records of all deposits in and withdrawals from all other bank accounts maintained in connection with the lawyer's legal services, specifically identifying the date, payor, and description of each item deposited as well as the date, payee, and purpose of each disbursement;

(3) Copies of all written communications setting forth the basis or rate for the fees charged by the lawyer as required by Rule 1.5(b), and copies of all writings, if any, stating other terms of engagement for legal services;

(4) Copies of all statements to clients and third persons showing the disbursement of funds or the delivery of property to them or on their behalves;

(5) Copies of all bills issued to clients;

(6) Records showing payments to any persons, not in the lawyer's regular employ, for services rendered or performed; and

(7) Paper copies or electronic copies of all bank statements and of all canceled checks.

(b) – (d) **[NO CHANGE]**

EXHIBIT B

Rule 1.15A. General Duties of Lawyers Regarding Property of Clients and Third Parties

(a) – (d) **[NO CHANGE]**

COMMENT

[1] – [6] **[NO CHANGE]**

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

Rule 1.15B. Account Requirements

(a) – (j) **[NO CHANGE]**

(k) If a lawyer discovers that the lawyer does not know the identity or the location of the owner of funds held in the lawyer's COLTAF account, or the lawyer discovers that the owner of the funds is deceased, the lawyer must make reasonable efforts to identify and locate the owner or the owner's heirs or personal representative. If, after making such efforts, the lawyer cannot determine the identity or the location of the owner, or the owner's heirs or personal representative, the lawyer must either (1) continue to hold the unclaimed funds in a COLTAF or other trust account or (2) remit the unclaimed funds to COLTAF in accordance with written procedures published by COLTAF and available through its website or upon request. A lawyer remitting unclaimed funds to COLTAF must keep a record of the remittance pursuant to Rule

1.15D(a)(1)(C). If, after remitting unclaimed funds to COLTAF, the lawyer determines both the identity and the location of the owner or the owner's heirs or personal representative, the lawyer shall request a refund for the benefit of the owner or the owner's estate, in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide upon request.

Rule 1.15D. Required Records

(a) A lawyer shall maintain, or shall cause the lawyer's law firm to maintain, in a current status and shall retain or cause the lawyer's law firm to retain for a period of seven years after the event that they record:

(1) An appropriate record-keeping system identifying each separate person for whom the lawyer or the law firm holds funds or other property and adequately showing the following:

(A) For each trust account the date and amount of each deposit; the name and address of each payor of the funds deposited; the name and address of each person for whom the funds are held and the amount held for the person; a description of the reason for each deposit; the date and amount of each charge against the trust account and a description of the charge; the date and amount of each disbursement; and the name and address of each person to whom the disbursement is made and the amount disbursed to the person.

(B) For each item of property other than funds, the nature of the property; the date of receipt of the property; the name and address of each person from whom the property is received, the name and address of each person for whom the property is held and, if interests in the property are held by more than one person, a statement of the nature and extent of each person's interest in the property, to the extent known; a description of the reason for each receipt; the date and amount of each charge against the property and a description of the charge; the date of each delivery of the property by the lawyer; and the name and address of each person to whom the property is delivered by the lawyer.

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

(2) Appropriate records of all deposits in and withdrawals from all other bank accounts maintained in connection with the lawyer's legal services, specifically identifying the date, payor, and description of each item deposited as well as the date, payee, and purpose of each disbursement;

(3) Copies of all written communications setting forth the basis or rate for the fees charged by the lawyer as required by Rule 1.5(b), and copies of all writings, if any, stating other terms of engagement for legal services;

(4) Copies of all statements to clients and third persons showing the disbursement of funds or the delivery of property to them or on their behalves;

(5) Copies of all bills issued to clients;

(6) Records showing payments to any persons, not in the lawyer's regular employ, for services rendered or performed; and

(7) Paper copies or electronic copies of all bank statements and of all canceled checks.

(b) – (d) **[NO CHANGE]**

EXHIBIT C

Colorado Access to Justice Commission

RECEIVED
Holland & Hart

AUG 10 2015

August 7, 2015

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

Re: Proposed Amendments to Rule of Professional Conduct 1.15 regarding unclaimed funds in COLTAF accounts

Dear Ms. Glenn and Members of the Standing Committee:

The Colorado Access to Justice Commission (ATJC), the Colorado Bar Association (CBA), and the Colorado Lawyer Trust Account Foundation (COLTAF) are proposing amendments to Colorado Rules of Professional Conduct 1.15B and 1.15D. The purpose of the proposed amendments is twofold: first, to provide direction to lawyers and law firms regarding the disposition of funds in COLTAF accounts where the proper recipient of the funds cannot be identified or, if identified, cannot be located; and second, to serve the administration of justice by providing additional, much-needed resources for Colorado's legal aid delivery system.

During the 2015 legislative session, with the support of the ATJC, the CBA, and COLTAF, the Colorado Legislature passed a bill (House Bill 15-1371) that exempts funds held in COLTAF accounts from Colorado's Unclaimed Property Act. The Governor signed that measure on May 29, 2015. This new law represents the successful first step in a two-step process to realize a proposal that was included in a comprehensive funding plan for civil legal aid, which was prepared by the ATJC and approved by the CBA Board of Governors on November 9, 2013. The proposal was intended to capture unclaimed funds in COLTAF accounts to support Colorado's chronically under-funded legal aid delivery system.

The second step in realizing this proposal involves the proposed amendments to CRPC 1.15B and 1.15D, which would clarify what lawyers should do with so-called "orphaned funds" in their COLTAF accounts in light of the new law. This clarification is particularly important because the only guidance that is currently provided for Colorado lawyers on the subject is CBA Ethics Opinion 95. Issued in 1993, Ethics Opinion 95 directs lawyers to the Unclaimed Property Act as an option with respect to unclaimed client funds that are nominal in amount, and as potentially mandatory when dealing with funds that are not nominal. The new law obviously renders this guidance obsolete.

1900 Grant Street, 9th Floor, Denver CO 80203 • 303-860-1115

The proposed amendments provide an appropriate and beneficial resolution to the issue of orphaned funds in COLTAF accounts. They provide a simpler, more streamlined process than was available to lawyers under the Unclaimed Property Act. This is particularly important because the issue of orphaned funds can arise during times of transition, such as when a firm dissolves or when a lawyer dies and someone else is left with the task of making final disbursements from his or her COLTAF account and then closing the account. Directing these funds to COLTAF will assist lawyers in the orderly disposition of orphaned funds, thus helping them better manage their COLTAF accounts, while at the same time yielding revenue that can be put to productive use in supporting civil legal assistance to the indigent in Colorado.

We have enclosed a copy of the proposed amendments, as well as copies of House Bill 15-1371, the CBA Board of Governor's Resolution, a chart of similar rules or statutes in other states, and a list of how certain issues were considered and resolved to arrive at the proposed amendments.

We respectfully request the Standing Committee's prompt consideration of the proposed amendments, and your recommendation to the Colorado Supreme Court for its consideration and approval, in order to provide necessary guidance to the Bar and additional resources for Colorado's civil legal aid delivery system.

Sincerely,

Frederick J. Baumann, Esq.
Chair, Colorado Access to Justice Commission

Loren M. Brown, Esq.
President, Colorado Bar Association

Susan P. Klopman, Esq.
President, Colorado Lawyer Trust Account Foundation

Proposed amendments to the Colorado Rules of Professional Conduct regarding the disposition of unclaimed funds held in lawyer COLTAF accounts

Proposed amendment to CRPC 1.15B (Account Requirements)

Add new paragraph (k): When, after reasonable efforts, a lawyer cannot locate or identify the owner of funds held in the lawyer's or law firm's COLTAF account for a period of two years, the lawyer shall remit the funds to COLTAF. A lawyer or law firm remitting such funds to COLTAF shall keep a record of the remittance pursuant to Rule 1.15D(a)(1)(C). If, within two years of remitting such funds to COLTAF, the lawyer identifies or locates the owner of the funds, the lawyer shall request a refund from COLTAF, for the benefit of the owner of the funds, in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide upon request.

Proposed amendment to CRPC 1.15D (Required Records)

Add new paragraph (a)(1)(C): For any unclaimed funds remitted to COLTAF pursuant to Rule 1.15B(k), the name and last known address of the owner of the funds, if the owner of the funds is known; the efforts made to identify or locate the owner of the funds; the amount of the funds remitted; the period of time during which the funds were held in the lawyer's or law firm's COLTAF account; and the date the funds were remitted to COLTAF.

NOTE: The gover[illegible]r signed this measure on 5/29/2015.

An Act

HOUSE BILL 15-1371

BY REPRESENTATIVE(S) Pabon and Willett, Coram, Duran, Kagan; also SENATOR(S) Johnston, Roberts, Steadman.

CONCERNING AN EXEMPTION TO THE "UNCLAIMED PROPERTY ACT" FOR FUNDS HELD IN CERTAIN LAWYER TRUST ACCOUNTS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, 38-13-102, **add** (8.1) as follows:

38-13-102. Definitions and use of terms. As used in this article, unless the context otherwise requires:

(8.1) "LAWYER COLTAF TRUST ACCOUNT" MEANS A COLORADO LAWYER TRUST ACCOUNT FOUNDATION TRUST ACCOUNT IN WHICH A LAWYER, IN ACCORDANCE WITH THE LAWYER'S PROFESSIONAL OBLIGATIONS, HOLDS FUNDS OF CLIENTS OR THIRD PERSONS THAT ARE NOMINAL IN AMOUNT OR THAT ARE EXPECTED TO BE HELD FOR A SHORT PERIOD.

SECTION 2. In Colorado Revised Statutes, **add** 38-13-108.3 as follows:

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

38-13-108.3. Funds held in lawyer COLTAF trust accounts - exemption. THIS ARTICLE DOES NOT APPLY TO FUNDS HELD IN LAWYER COLTAF TRUST ACCOUNTS.

SECTION 3. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Dickey Lee Hullinghorst
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Bill L. Cadman
PRESIDENT OF
THE SENATE

Marilyn Eddins
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Cindi L. Markwell
SECRETARY OF
THE SENATE

APPROVED________________________________

John W. Hickenlooper
GOVERNOR OF THE STATE OF COLORADO

RESOLUTION

Approved by the Colorado Bar Association Board of Governors 11/9/13

WHEREAS, the Colorado Bar Association Board of Governors recognizes the significant contributions to the goal of ensuring equal access to the courts in the State of Colorado made by Colorado Legal Services ("CLS") and its predecessors for many years in providing representation to Colorado's indigent citizens in a wide variety of civil matters;

WHEREAS, over the past five years, CLS has experienced significant decreases in funding that have greatly limited its ability to carry out its mission;

WHEREAS, the Colorado Bar Association Board of Governors determines that the continued funding, operation and support of CLS is necessary to protect Colorado's indigent population, further the interests of Colorado attorneys and Colorado Bar Association members in just and efficient courts, and ensure access to equal justice within the Colorado legal system; and

WHEREAS, Colorado Supreme Court recently raised the attorney registration fees, a portion of which, if permanently dedicated to funding CLS, will help alleviate the short- and long-term financial crisis at CLS;

WHEREAS, Colorado Supreme Court has the authority to dedicate a portion of *pro hac vice* fees to funding CLS, thereby helping to alleviate the short- and long-term financial crisis at CLS;

WHEREAS, Colorado Supreme Court has the authority to amend C.R.Civ.P. Rule 23 to require that at least 50% of class action residual funds be disbursed to COLTAF; thereby helping to fund CLS and helping to alleviate the short- and long-term financial crisis at CLS;

WHEREAS, Colorado Supreme Court has the authority to amend Rule 1.15 of the Colorado Rules of Professional Conduct to require attorneys to maintain their COLTAF accounts in financial institutions that pay interest rates on COLTAF accounts that are comparable to other similarly-sized accounts; thereby helping to fund CLS and helping to alleviate the short- and long-term financial crisis at CLS;

WHEREAS, an amendment to Colorado's Unclaimed Property Act requiring that lawyer trust account funds presumed abandoned and subject to custody as unclaimed property under the Act be delivered to COLTAF to support Colorado's civil legal aid delivery system; thereby helping to fund CLS and helping to alleviate the short- and long-term financial crisis at CLS;

WHEREAS, the addition of a small surcharge to the various statutory filing fees for various civil actions will provide the permanent funding necessary to alleviate the short- and long-term financial crisis at CLS;

NOW THEREFORE, the Colorado Bar Association Board of Governors resolves that the Colorado Bar Association President provide a written request on behalf of the Colorado Bar Association that the Colorado Supreme Court:

1. Direct that $20 of the attorney registration fees for attorneys active over three years in practice be dedicated to support access to justice, the proceeds of which are to be delivered to CLS;
2. Direct that $10 of the attorney registration fees for inactive attorneys under age 65 be dedicated to support access to justice, the proceeds of which are to be delivered to CLS;
3. Authorize a $150 surcharge on *pro hac vice* fees, the proceeds of which are to be delivered to CLS;
4. Approve and adopt an amendment to Rule 23 of the Colorado Rules of Civil Procedure to require that at least 50% of class action "residual funds" be disbursed to COLTAF; and
5. Approve and adopt an amendment to Rule 1.15 of the Colorado Rules of Professional Conduct to require attorneys to maintain their COLTAF accounts in financial institutions that pay interest rates on COLTAF accounts that are comparable to other similarly-sized accounts.

BE IT FURTHER RESOLVED, that the Colorado Bar Association President instruct the legislative affairs director of the Colorado Bar Association to lobby the Colorado State Legislature for the enactment of an amendment to Colorado's Unclaimed Property Act requiring that lawyer trust account funds presumed abandoned and subject to custody as unclaimed property under the Act be delivered to COLTAF to support Colorado's civil legal aid delivery system.

BE IT FURTHER RESOLVED, that the Colorado Bar Association leadership shall open a dialogue with the Colorado State Judicial Branch concerning:

1. Enactment of legislation providing for the addition of a surcharge providing permanent funding to CLS as follows:
   a. County Court civil case filings - $10;
   b. County Court answers - $10;
   c. District Court complaints (excluding foreclosures and tax liens) - $20;
   d. District Court answers - $15;
   e. Domestic Relations case filings - $20;
   f. Probate case filings - $20;
   g. Court of Appeals – Appellant/Petitioner - $3;
   h. Supreme Court Petitions in Certiorari and Original Proceedings - $5.
2. The creation of a $75 filing fee for post-decree motions for contempt in domestic relations cases, the proceeds of which are to be delivered to CLS.

State & Type of Bar	Statute or Rule?	Required Holding Time Before Disposition & Recipient	Other Key Provisions
Arkansas Voluntary bar	Draft amendment to Rule 1.15[1]	2 years Arkansas Access to Justice Foundation	▪ Mandatory rule for lawyers, law firms, and estates of deceased lawyers ▪ At the time such funds are remitted, the lawyer or law firm must submit the name and last known address of each person appearing to be entitled to the funds, if known, along with the amount of any unclaimed or unidentified funds to the Foundation and the Office of the Committee on Professional Conduct.
Colorado Voluntary bar	Amended statute[2] & draft amendments to RPC 1.15B (add paragraph k) and RRC 1.15D (add new paragraph (a)(1)(C)).		▪ Amended the Unclaimed Property Act (signed 5/29/2015) to exempt funds held in Lawyer COLTAF Trust Accounts. ▪ Formal Ethics Opinion No. 95 provides that Colorado lawyers may remit nominal unclaimed COLTAF funds to the state pursuant to the Colorado Unclaimed Property Act, C.R.S. §§ 38-13-101*et seq.* or they may hold them indefinitely in their COLTAF account. The Opinion further provides that, with respect to funds that are not nominal, lawyers "may be required" to remit them to the state under the Unclaimed Property Act.

[1] *In re Amendment of Arkansas Rule of Professional Conduct 1.15*,2015 Ark. 297 (June 25, 2015).

[2] http://www.leg.state.co.us/CLICS/CLICS2015A/csl.nsf/fsbillcont3/B4974ACDE6AEFB1087257E14006F49CB?Open&file=1371_enr.pdf. This amendment to the Colorado Unclaimed Property Act defines "Lawyer COLTAF Trust Account" (C.R.S. § 38-13-102(8.1)) and states that the Unclaimed Property Act does not apply to funds held in Lawyer COLTAF Trust Accounts (C.R.S. § 38-13-108.3).

State & Type of Bar	Statute or Rule?	Required Holding Time Before Disposition & Recipient	Other Key Provisions
Hawaii Unified bar	Draft rule	2 years Hawaii Justice Foundation	▪ Mandatory rule for lawyers and for banks participating in IOLTA. ▪ When such funds are remitted to the Foundation, the lawyer or law firm must submit a letter with the name and last known address of each person appearing to be entitled to the funds, if known, and the amount of any unclaimed or unidentified funds. The letter must briefly describe the lawyer's or firm's efforts to locate or identify the owner. ▪ If within two years, the lawyer or law firm identifies and locates the owner, the Foundation must refund the sum to the lawyer or firm, and the lawyer or firm must promptly pay the funds to the owner. ▪ The Foundation must adopt rules; maintain sufficient reserves; and report annually to the Supreme Court. ▪ Provisions governing the disposition of physical property. ▪ Provisions involving the Office of Disciplinary Counsel.
Illinois Voluntary bar	Amended Rule 1.15 (4/7/2015, effective 7/1/2015)[3]	12 months Lawyers Trust Fund of Illinois	▪ Mandatory for all lawyers. ▪ No charge of ethical impropriety or other breach of professional conduct shall attend to a lawyer's exercise of reasonable judgment under this paragraph. ▪ A lawyer who either remits funds in error or later ascertains the ownership of remitted funds may make a claim to the Fund, which after verification of the claim will return the funds to the lawyer. ▪ The Fund will publish instructions for lawyers remitting unidentified funds. ▪ Paragraph (i) relates only to unidentified funds, for which no owner can be ascertained. Unclaimed funds in client trust accounts—funds whose owner is known but have not been claimed—should be handled according to applicable statutes, i.e., the Uniform Distribution of Unclaimed Property Act.

[3] http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm#1.15.

State & Type of Bar	Statute or Rule?	Required Holding Time Before Disposition & Recipient	Other Key Provisions
Maryland Voluntary bar	Statute[4]	N/A Maryland Legal Services Corporation Fund	▪ Provision in the Maryland Disposition of Abandoned Property Act that provides for $1,500,000 to the Maryland Legal Services Corporation Fund. ▪ No specific statute or provisions regarding lawyer trust account funds.
Massachusetts Voluntary bar	Proposed rule submitted to the MA Supreme Court on 1/10/2013[5]	4 months Massachusetts IOLTA Committee	▪ Mandatory for all lawyers. ▪ Separate procedures for funds less than $500 and funds $500 or more. For funds less than $500, the lawyer or law firm must remit the funds directly to the Committee. For funds more than $500, the lawyer or firm must petition the Supreme Judicial Court for leave to pay the funds to the IOLTA Committee, together with a statement of the efforts made to identify and locate the owner or owners. ▪ The lawyer or law firm has a continuing responsibility for returning the funds to the owner or owners, and, if an owner of funds remitted to the IOLTA Committee is identified and located after the funds have been remitted to the Committee, then the lawyer or law firm must notify the Committee; and request, pursuant to procedures adopted by the Committee, a refund of amounts paid to the lawyer or firm.

[4] MD. CODE ANN., Com. Law § 17-317(a)(2).
[5] http://msba.mainebar.org/barjournal/MBJfall2014lr.pdf.

State & Type of Bar	Statute or Rule?	Required Holding Time Before Disposition & Recipient	Other Key Provisions
New Jersey Voluntary bar	Court Rule 1:21-6(j)[6]	1 year + 2 years Clerk of the Superior Court for deposit with the Superior Court Trust Fund	▪ Mandatory for all lawyers. ▪ Lawyers must designate funds contained in a trust account for more than two years that are either unidentifiable, unclaimed, or which are held for missing owners as such. The lawyer must then conduct a reasonable search to determine the beneficial owner or the whereabouts of the missing owners. ▪ Trust funds that remain unidentifiable after one year after being designated as such may be paid to the Clerk of the Superior Court for deposit with the Superior Court Trust Fund. ▪ The Clerk of the Superior Court holds the funds in trust for the beneficial owners or for ultimate disposition as provided by order of the Supreme Court.
Oregon Unified bar	Statute (effective 1/1/2010)[7]	2 years Oregon State Bar, which appropriates money to the Oregon Legal Services Program	▪ Mandatory for all lawyers. ▪ Lawyers must deem whether funds have been abandoned (following a two-year search period) by June 30th each year. Lawyers must report the unclaimed funds to the Oregon Department of State Lands during October of the same year (using specified reporting forms) and then pay the funds to the Oregon State Bar. ▪ Lawyers must retain records of the name and last known address of the owner of the funds as well as any other evidence which would assist in the identification of the owner for three years after the funds have been remitted.
Pennsylvania Voluntary bar	Exploring a court rule[8]	Not listed Pennsylvania IOLTA Board	▪ The Pennsylvania IOLTA Board is exploring the feasibility of a court rule which requires an attorney to remit unclaimed funds in an IOLTA account to the IOLTA Board, rather than escheating those funds to the State Bureau of Unclaimed Property.

[6] https://www.judiciary.state.nj.us/oae/links/rule1216/rule1216.htm.
[7] OR. REV. STAT. §§ 98.302–436; *see also* https://www.osbar.org/resources/abandonedfunds.html.
[8] http://msba.mainebar.org/barjournal/MBJfall2014lr.pdf.

State & Type of Bar	Statute or Rule?	Required Holding Time Before Disposition & Recipient	Other Key Provisions
Utah Unified bar	Draft rule[9]	Not listed Not listed	▪ The Utah Bar Foundation is drafting a rule allowing unidentifiable client funds to be donated to the Foundation. The draft rule will be submitted to the court. ▪ The Utah Supreme Court recommended that the Foundation meet with Utah's Unclaimed Property Division regarding unclaimed client funds.
West Virginia Unified bar	State Bar Administrative Rules 10.09 & 10.10 (eff. 9/29/2014)[10]	4 months West Virginia State Bar, which appropriates the money to several organizations including the WV CASA Network and the WV fund for Law in the Public Interest, Inc.	▪ Mandatory for executors, administrators, personal representatives, administrators c.t.a, curators of estates, administrators de bonis, or ancillary administrators, and lawyers, law firms, and trustees appointed under the Rules of Lawyer Disciplinary Procedure. ▪ Separate procedures for funds less than $500 and funds $500 or more. For funds less than $500, the holder shall pay the funds directly to the West Virginia State Bar. For funds more than $500, the holder must notify the West Virginia State Bar Executive Director of efforts made to locate the owner and then turn over the funds to the West Virginia State Bar. ▪ If the owner of such funds remitted to the West Virginia State Bar is identified and located within two years after the funds have been remitted to the West Virginia State Bar, then the lawyer, law firm, or trustee shall notify the West Virginia State Bar IOLTA Advisory Committee; and request, pursuant to procedures adopted by the West Virginia State Bar IOLTA Advisory Committee for that purpose, a refund of the amounts paid. The lawyer, law firm, or trustee shall be responsible for proper distribution of any funds that are refunded.

[9] http://msba.mainebar.org/barjournal/MBJfall2014lr.pdf.
[10] http://www.wvbar.org/wp-content/uploads/2012/04/SBAR-10-Final-Effective-Sept-29-2014.pdf.

Issues Raised and Resolved in Drafting RPC 1.15B and 1.15D Amendments

1. **Should the rule be mandatory or permissive? Lawyers "shall" remit unclaimed funds to COLTAF or lawyers "may" remit unclaimed funds to COLTAF?**
   Decision: Mandatory. Lawyers shall remit unclaimed funds to COLTAF.
   Rationale: The amendment to the Colorado Unclaimed Property Act exempts the funds held in COLTAF accounts from the Act (C.R.S. § 38-13-108.3). Since lawyers may no longer use the Act to dispose of unclaimed funds, the proposed amendment to Rule 1.15B(k) is necessary to provide direction to lawyers as to the orderly disposition of these funds.
   Other states: The procedures regarding unclaimed and unidentified funds set forth in rules or statutes in Illinois, New Jersey, Oregon, and West Virginia are mandatory for all lawyers.

2. **What should trigger the beginning of the period of reasonable efforts to identify or locate the owner of the funds?**
   Decision: The discovery of funds in a COLTAF account for whom the owner cannot be identified or located.
   Rationale: Once a lawyer discovers unclaimed or unidentified funds in his or her COLTAF account, there is no reason to delay reasonable efforts to identify or locate the owner of the funds. The likelihood of success in identifying or locating the owner of the funds is greater when reasonable efforts begin upon discovery, rather than allowing more time to elapse. Requiring lawyers first to affirmatively designate such funds as unclaimed or unidentified, as New Jersey does (see below), before beginning reasonable efforts, imposes an additional and unnecessary requirement on lawyers that could subject them to discipline if they fail to review and appropriately designate funds in their trust accounts within the required time period.
   Other states: With the exception of New Jersey, all other states with unclaimed or unidentified trust account rules require that discovery triggers the period of reasonable efforts to identify or locate the owner of the funds. New Jersey requires lawyers who are holding unclaimed or unidentified funds to first designate them as such, once they have been held for a period in excess of two years. This mandatory designation then triggers a one-year period of reasonable efforts to identify or locate the owner of the funds.

3. **How long should that period of reasonable efforts be?**
   Decision: Two years.
   Other states: Illinois (1 year), New Jersey (1 year after designation), Oregon (2 years), and West Virginia (4 months); states with draft rules: Arkansas (2 years), Hawaii (2 years), and Massachusetts (4 months).

4. **Should the rule impose some sort of obligation on lawyers to determine affirmatively whether they are holding funds in their COLTAF accounts for whom the owner cannot be identified or located?**
   Decision: No. Lawyers are already required to regularly reconcile their COLTAF accounts.
   Other states: Only New Jersey imposes such a requirement.

5. **Should COLTAF be required to return the funds in perpetuity if and when the owner of the funds is ever identified or located?**
Decision: No.
Rationale: Limiting the period of time during which funds may be returned increases financial certainty for COLTAF, and assures that lawyers will be appropriately diligent in their efforts to identify or locate the owner of funds before remitting those funds to COLTAF.
Other states: West Virginia has a two-year time limit on claims. The proposed Arkansas rule also has a two-year time limit on claims. Illinois and New Jersey do not have a time limit on claims.

6. **Should the rule require that lawyers provide information (amount, client's name and last known address, efforts to identify or locate) to Regulation Counsel at the time unclaimed funds are remitted to COLTAF?**
Decision: No.
Rationale: Lawyers will be held accountable by virtue of the proposed record-keeping requirement (proposed amendment to Rule 1.15D(a)(1)(C)) without being unnecessarily deterred from remitting unclaimed funds to COLTAF by the possibility of attorney discipline consequences for mismanagement of the lawyer's COLTAF account.
Other states: Illinois does not require notification to bar counsel. West Virginia requires notification and the proposed Arkansas rule requires notification.

7. **Should the rule require that lawyers provide information (amount, client's name and last known address, efforts to identify or locate) to COLTAF at the time unclaimed funds are remitted?**
Decision: No.
Rationale: COLTAF is not subject to the Colorado Rules of Professional Conduct and, therefore, is not bound by the same confidentiality requirements as law firms and lawyers. To maintain their obligations under Rule 1.6 and comply with the proposed Rule 1.15B(k), lawyers should maintain the information regarding the client and client funds and should not provide this information to COLTAF. In addition to confidentiality concerns, providing such information to COLTAF may imply that COLTAF has an obligation to determine whether efforts to identify or locate have been reasonable or whether the funds have been properly determined to be "unclaimed." Those decisions should be left to the lawyer's professional judgment.
Other states: New Jersey allows the Clerk of the Superior Court to refuse the funds if due diligence to locate the client appears insufficient. Arkansas's proposed rule requires lawyers to submit this information, along with the remittance of unclaimed funds, to the Arkansas Access to Justice Foundation.

8. **Should the rule provide some sort of immunity for lawyers from any charge of ethical misconduct?**
Decision: No.

Rationale: To ensure that the new rule does not infringe on Regulation Counsel's authority, the rule does not provide immunity for lawyers from any charge of ethical misconduct.
Other states: Illinois does provide some immunity to lawyers who, in the exercise of reasonable judgment, determine that ascertaining the ownership or securing the return of the funds will not succeed: "No charge of ethical impropriety or other breach of professional conduct shall attend to a lawyer's exercise of reasonable judgment under this paragraph (i)." Illinois Rule of Professional Conduct 1.15(i).

9. **Why do we propose to put the new rule at the end of Rule 1.15B?**
Rationale: Rule 1.15B contains the account requirements for COLTAF accounts and the new rule only pertains to COLTAF accounts.

10. **Why do we propose to amend Rule 1.15D?**
Rationale: Rule 1.15D requires lawyers to follow certain recordkeeping procedures. Amending this rule to include a requirement that lawyers retain information about the disposition of unclaimed or unidentified funds in their COLTAF accounts ensures that such information will be available should it be needed to remit the funds to the owner, if located and identified, or if required by Regulation Counsel for an investigation.

EXHIBIT D

MEMORANDUM

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

FROM: Alec Rothrock, Chair
"Orphan Funds" Subcommittee

DATE: April 22, 2016

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

---

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

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

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

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

Tel 303 796 2626
6400 S. Fiddler's Green Circle, Suite 1000
Greenwood Village, CO 80111
www.bfwlaw.com

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

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

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

October 14, 2016

Colorado Supreme Court
c/o Christopher Ryan, Clerk of the Supreme Court
2 East 14th Avenue
Denver, Colorado 80203

Re: Proposed Amendments to Rules 1.15A, 1.15B, and 1.15D of the Colorado Rules of Professional Conduct

Dear Chief Justice Rice and Fellow Justices:

We are writing in support of the proposed amendments to Rules 1.15A, 1.15B, and 1.15D of the Colorado Rules of Professional Conduct. Although we participated in the drafting process for the amendments, this letter reflects only our personal views and recollections.

Background

The proposed amendments address two problems.

First, many Colorado lawyers or their survivors have sought to close COLTAF accounts and discovered that they cannot identify the owner of some of the funds or they are unable to locate one or more clients whose funds remain in the account. These circumstances were often precipitated by, for example, disappearing clients, law firm dissolutions, the death of a solo practitioner, or simple math error. Until it was withdrawn earlier this year, Colorado Bar Association Ethics Committee Formal Opinion 95, "Funds of Missing Clients," adopted November 20, 1993, advised lawyers either to hold the funds indefinitely in their COLTAF accounts or pay them to the Colorado Treasurer pursuant to the Colorado Unclaimed Property Act, C.R.S. § 38-13-101 *et seq.* Judging from the responses of many Colorado lawyers who have inquired of this office over the years about their ethical obligations in these circumstances, Colorado lawyers have not received this advice warmly (especially when the sums involved are small) and many expressed a preference to give the money to COLTAF.

Second, the Unclaimed Property Act is no longer an option for lawyers. On the initiative of the Colorado Bar Association, Colorado Access to Justice Commission, and COLTAF, on May 29, 2015, Governor Hickenlooper signed House Bill 15-1371 into law. It amended the Colorado Unclaimed Property Act to state that it does not apply to funds held in lawyer COLTAF trust accounts. C.R.S. §§ 38-13-102(8.1), 38-13-108.3.

For these reasons, the Colorado Bar Association, Colorado Access to Justice Commission, and COLTAF requested that this Court's Standing Committee on the Rules of Professional Conduct consider amending Colo. RPC 1.15B and 1.15D to enable Colorado lawyers to remit these funds to COLTAF under specific conditions. The committee's research determined that five states have adopted court rules or statutes creating procedures for handling such funds,[1] and similar measures are under consideration in several other states. The proposed Rule amendments represent an attempt to take the best of these other states' efforts to create procedures whereby lawyers can remit unclaimed and unknown funds to COLTAF after reasonable efforts to locate or determine the owner of the funds, and obtain a refund if the lawyer later identifies or locates the owner.

Specific Issues Considered by the Committee

Creating the proposed amendments required a number of substantive, policy-related decisions. It may be helpful to the Court to know how the committee resolved these issues.

- Location of the proposed rules.

  The committee determined that the proper location for the rule regarding unclaimed or unidentified funds is Colo. RPC 1.15B, which sets forth the requirements for managing COLTAF accounts. The proposed amendments apply to COLTAF trust accounts only, not non-COLTAF trust accounts. In addition, since one of the requirements in proposed Colo. RPC 1.15B involves recordkeeping, one proposed amendment would amend the recordkeeping rule—Colo. RPC 1.15D.

- Mandatory or voluntary?

  The committee decided that the decision to remit unclaimed or unidentified funds to COLTAF should be voluntary because some lawyers may prefer to hold such funds in a COLTAF account in the hope that at one point they will be able to locate or identify their owner. In addition, enforcement of a mandatory COLTAF-remission requirement would be procedurally difficult. Only New Jersey requires attorneys to review their trust accounts periodically to determine whether the owner of all funds held can be identified and located.

---

[1] Arkansas Rule of Professional Conduct 1.15(c); Illinois Rule of Professional Conduct 1.15(i); New Jersey Court Rule 1:21-6(j); OR. REV. STAT. §§ 98.302–436; Virginia State Bar Administrative Rules 10.09 & 10.10. *See also* MD. CODE ANN., Com. Law § 17-317(a)(2) (providing funds to the Maryland Legal Services Corporation Fund from the Maryland Disposition of Abandoned Property Act).

- What triggers the proposed amendments?

  The procedure for handling unclaimed or unidentified funds begins with their discovery in a COLTAF account. The proposed amendments would not impose on lawyers any additional accounting or auditing requirements.

- What are reasonable efforts?

  The committee determined that it would be helpful to lawyers to provide guidance in a Comment to describe what constitutes "reasonable efforts" in the different circumstances addressed, namely efforts to locate the owner of COLTAF funds or to determine the ownership of such funds. The committee decided that a general explanation of "reasonable efforts" would be more practical than a mandatory minimum "reasonable efforts" time period. The time required will vary depending on the amount of money involved and the difficulty of the search efforts.

- Should the remitting lawyer or the owner of the funds be required to request a refund if the owner is identified or located?

  For two reasons the committee determined that the lawyer should be required to request a refund. First, the lawyer held and remitted the funds to COLTAF as a fiduciary. That fiduciary duty continues when if the funds or their owner is identified, even if the lawyer-client relationship has terminated. Second, the only information about the funds in the possession of COLTAF comes from the remitting lawyer. It would be practically difficult for COLTAF to deal with anyone else to give a refund.

- What recordkeeping is required?

  The committee determined that it should be the lawyer's responsibility to maintain documentation evidencing their efforts to locate or identify the owner of COLTAF funds. The committee did not want COLTAF to bear any responsibility for determining the reasonableness of those efforts. In addition, the lawyer's confidentiality obligations under Colo. RPC 1.6 may preclude the lawyer from revealing more detailed information to COLTAF, especially if the information is open to public inspection. Therefore, the committee added documentation of "reasonable efforts" in the Rule requiring lawyers to maintain certain financial records for seven years.

- <u>Should the proposed Rules require lawyers to notify the Office of Attorney Regulation Counsel of the remittance of funds to COLTAF?</u>

  The committee opposed such a requirement, including OARC members on the committee. Providing the information to OARC would deter lawyers from remitting funds to COLTAF for fear of revealing facts showing that the lawyer may have violated a Rule of Professional Conduct.

- <u>Should the proposed Rules provide immunity for attorneys from charges of ethical misconduct?</u>

  The discovery of unclaimed or unidentified funds in a COLTAF account could be caused by a variety of issues, including lawyer error or misconduct. One other state (Illinois) provides disciplinary immunity for lawyers who remit under that state's procedures. The committee determined that immunity was neither necessary nor desirable.

- <u>Why does proposed Comment 7 include a reference to deceased lawyers?</u>

  As explained above, one of the ways that unclaimed or unidentified funds can be left in a COLTAF is when a lawyer dies. The problem is usually left to the personal representative of the deceased lawyer's estate, who in most instances will be a nonlawyer. The Colorado Rules of Professional Conduct do not apply to nonlawyers. For this reason the committee simply referred in a Comment to procedures developed by COLTAF. The hope is that nonlawyer personal representatives will be able to follow similar procedures, only outside the context of the Rules of Professional Conduct.

We appreciate your consideration of the proposed amendments. Please let us know if we can be of further assistance or provide you with additional information.

Sincerely,

Alexander R. Rothrock
Courtney M. Shephard

Colorado Access to Justice Commission

October 14, 2016

Colorado Supreme Court
c/o Christopher Ryan, Clerk of the Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Proposed amendments to Colo. RPC 1.15A, 1.15B, and 1.15D

Dear Chief Justice Rice and Members of the Court:

We are writing on behalf of the Colorado Access to Justice Commission (ATJC) to express support for the proposed amendments to Rule 1.15A, 1.15B, and 1.15D of the Colorado Rules of Professional Conduct, which give lawyers and law firms the option of remitting to COLTAF funds in their COLTAF accounts, in the event the owner of the funds cannot be identified or, if identified, cannot be located ("unclaimed COLTAF funds"). The proposed amendments differ in some respects from those that were initially proposed in August 2015 by the ATJC, COLTAF, and the Colorado Bar Association (CBA), but the ATJC fully supports the amendments as now proposed and recommended by the Court's Standing Committee on the Colorado Rules of Professional Conduct.

As you know, COLTAF plays a vital role in providing access to civil justice for low-income Coloradans. It is one of the most important funding sources for Colorado Legal Services (CLS). Prior to this extended period of very low interest rates, COLTAF provided approximately 20% of CLS's annual operating budget, and was second only to funding through the federal Legal Service Corporation in its size and importance. COLTAF also provides funding for local bar-sponsored *pro bono* programs throughout the state and other justice-related organizations.

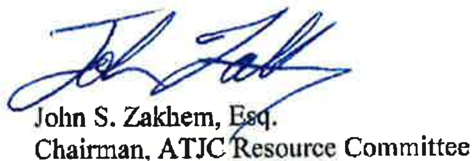
Time will tell whether the proposed amendments will ultimately result in any sort of meaningful increase in the resources available for the civil legal aid delivery system. However, particularly in this time of scarce resources, when COLTAF's regular source of revenue continues to be compromised by near-zero rates, the proposed amendments present an opportunity for potential additional funding. We are aware of four other states that, by rule or by statute, have already moved forward to try to capture unclaimed IOLTA funds for civil legal aid – Arkansas, Illinois, Oregon and West Virginia – and we understand the strategy is under active consideration in a number of other states as well.

As we continue to search for long-term solutions to the chronic underfunding of our civil legal aid delivery system, we urge you to approve the proposed amendments, which hopefully will result in the availability of additional resources in the future, as well as provide necessary and helpful guidance to Colorado lawyers holding unclaimed COLTAF funds.

Thank you for your attention to this important matter. On behalf of the ATJC, we urge you to approve the proposed amendments.

Respectfully,

Frederick J. Baumann, Esq.
Chairman, Colorado ATJC



John S. Zakhem, Esq.
Chairman, ATJC Resource Committee

1900 Grant Street, 9th Floor, Denver CO 80203 • 303-860-1115

Colorado Lawyer Trust Account Foundation

Officers and Board of Directors

Robert W. Brandes Jr.
President

S. Kato Crews
Vice-President

Elsa T. Martinez Tenreiro
Secretary

Jennifer M. Vagher
Treasurer

William D. Alexander
Jonathan D. Asher
Barbara Blumenthal
Winston P. Crowley
Janette L. Ferguson
Mark E. Lacis
Josh W. Mack
Bruce L. Plotkin
Jessica A. Ryan
Mark A. Schmidt
Elizabeth H. Titus
Mary A. Wells

Diana M. Poole
Executive Director

October 14, 2016

Colorado Supreme Court
c/o Christopher Ryan, Clerk of the Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Proposed amendments to Colo. RPC 1.15A, 1.15B, and 1.15D

Dear Chief Justice Rice and Members of the Court:

This letter is written to express COLTAF's support for the proposed amendments to Rule 1.15A, 1.15B, and 1.15D of the Colorado Rules of Professional Conduct. The proposed amendments provide direction to lawyers and law firms regarding the disposition of funds in their COLTAF accounts, in the event the owner of the funds cannot be identified or, if identified, cannot be located ("unclaimed COLTAF funds"). One of the two options presented in the proposed amendments is remittance of unclaimed COLTAF funds to COLTAF.

The proposed amendments differ in some respects from those that were initially proposed in August 2015 by COLTAF, the Colorado Access to Justice Commission (ATJC), and the Colorado Bar Association (CBA). However, COLTAF participated on the Subcommittee of the Court's Standing Committee on the Colorado Rules of Professional Conduct that studied the proposal, and is fully supportive of the amendments as now proposed and recommended by the Court's Standing Committee.

The proposed amendments clearly satisfy the first of COLTAF's objectives in making its proposal, which was to provide necessary direction to lawyers and law firms regarding the disposition of unclaimed COLTAF funds. In the past, when responding to questions concerning unclaimed COLTAF funds, COLTAF directed lawyers to Colorado's Unclaimed Property Act and CBA Ethics Committee Formal Opinion 95. However, last year, with support from COLTAF, the ATJC, and the CBA, a law was passed by the Colorado legislature exempting funds held in COLTAF accounts from the Colorado Unclaimed Property Act. The new law rendered the guidance in Ethics Opinion 95 obsolete, and the Opinion was formally withdrawn by the Ethics Committee in May 2016.

1900 Grant Street, Suite 1112
Denver, Colorado 80203-4309
Phone: 303-863-7221
Fax: 303-863-7226
e-mail: coltaf@legalaidfoundation.org
Web site: www.coltaf.org

The new law was the successful first step in a two-step process to realize COLTAF's second objective, which was and is to serve the administration of justice by providing additional, much-needed resources for Colorado's civil legal aid delivery system. Capturing unclaimed COLTAF funds to support Colorado's chronically under-funded system was one of the proposals that was included in a comprehensive funding plan for civil legal aid, which was prepared by the ATJC, pursuant to instructions in the Court's Order of May 17, 2012, approving two emergency distributions to Colorado Legal Services (CLS) from attorney regulation funds, in the face of unprecedented funding challenges; was approved by the CBA Board of Governors in November 2013; and was submitted to the Court in December 2013.

For reasons that are explained below, it is unclear to what extent the proposed amendments will ultimately achieve the objective of providing additional resources for civil legal aid. Having said that, COLTAF is satisfied that the proposed amendments appropriately balance competing interests and concerns, while also creating a reasonable possibility that unclaimed COLTAF funds will be available in the future to help support access to justice.

The uncertainty as to whether the proposed amendments will ultimately yield additional resources for civil legal aid lies in a lack of information, which will only be available over time, if the proposed amendments are adopted. We simply do not know at the present time (1) the number of lawyers and law firms holding unclaimed COLTAF funds; (2) the size of their respective holdings; (3) how many lawyers and law firms would, under the proposed amendments, choose to remit the unclaimed COLTAF funds to COLTAF, rather than continue to hold them in a COLTAF or other trust account; and (4) to what extent requests for the return of remitted funds will be made.

Recognizing the uncertainties involved and, if the proposed amendments are adopted, COLTAF's obligation to be cautious and responsible stewards of these funds, the COLTAF Board adopted a Resolution in April 2016 which provides that, if the proposed amendments are adopted, (1) COLTAF will hold at interest all unclaimed COLTAF funds remitted; (2) COLTAF will not use any unclaimed COLTAF funds to fulfill its purpose until such time as the COLTAF Board makes an affirmative determination that potential refund requests do not create an unreasonable risk; and (3) the COLTAF Board will review annually the amount of unclaimed COLTAF funds remitted and any refunds made to evaluate the extent of the risk posed by the unclaimed COLTAF funds COLTAF is holding, and to determine what actions, if any, may be taken to ameliorate the risk.

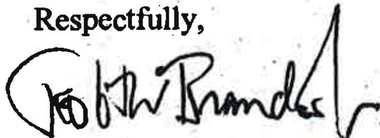
The April 2016 Resolution also includes a refund procedure, as referenced in the proposed amendments, which will be adopted by the COLTAF Board, if the proposed amendments are adopted by the Court. A copy of the Resolution, including the Unclaimed COLTAF Funds Refund Procedure, is attached as Exhibit A.

In order to have the information necessary to evaluate the risk posed by unclaimed COLTAF funds held by COLTAF, COLTAF would adopt a remittance procedure, as referenced in the proposed amendments, which would include completion of an Unclaimed COLTAF Funds Remittance Report by any lawyer or law firm remitting unclaimed COLTAF funds. This Report would require the lawyer or law firm to identify (1) to what extent the unclaimed COLTAF funds remitted include funds with respect to which the owner cannot be identified, and the length of time, if known, that those unidentified funds have been held in the relevant COLTAF account; and (2) to what extent the unclaimed COLTAF funds remitted include funds with respect to which the owner or owners cannot be located, and the amount of such funds belonging to each such owner (identified only by number, not by name) and the date of last contact with each such owner. A copy of the Unclaimed COLTAF Funds Remittance Procedure, including the Unclaimed COLTAF Funds Remittance Report, is attached as Exhibit B.

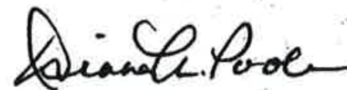
With the remittance and refund procedures in place, COLTAF will, over time, be in a position to assess the risk posed by holding unclaimed COLTAF funds and make a well-informed decision as to the extent to which some portion of the funds may safely be used to support the civil legal aid delivery system. For that reason, COLTAF believes that the proposed amendments provide an appropriate and beneficial resolution to the issue of unclaimed COLTAF funds. The proposed amendments provide a simpler, more streamlined option than was available to lawyers under the Colorado Unclaimed Property Act, while at the same time yielding potential revenue that can reasonably be expected to be put to a productive use at some point in supporting the civil legal aid delivery system.

Thank you for your consideration of the proposed amendments. In the event the Court receives comments opposing the proposed amendments, COLTAF requests that the Court schedule a hearing so that we might have an opportunity to address any concerns raised by those comments.

Respectfully,



Robert W. Brandes, Jr.
Board President



Diana M. Poole
Executive Director

EXHIBIT A

COLTAF Board Resolution re Funds Remitted to COLTAF pursuant to Proposed Colo. Rule of Professional Conduct 1.15B(k)

Adopted April 16, 2016

WHEREAS Article 13 of Title 28 of the Colorado Revised Statutes, the Unclaimed Property Act, was amended in May of 2015 to provide that the Act does not apply to funds held in lawyer COLTAF trust accounts (see Colo.Rev.Stat. 38-13-108.3); and

WHEREAS the Colorado Supreme Court's Standing Committee on the Rules of Professional Conduct is considering amendments to Colorado Rule of Professional Conduct 1.15 which, if adopted by the Court, might result in unclaimed funds held in lawyer COLTAF trust accounts being remitted to COLTAF under certain circumstances; and

WHEREAS the proposed amendments provide that if, after remitting unclaimed funds to COLTAF, the lawyer subsequently determines both the identity and location of the owner of those funds, the lawyer shall request a refund for the benefit of the owner;

WHEREAS some history of unclaimed funds remitted and refunds requested is critical to determine to what extent, if at all, unclaimed funds remitted may be used in fulfilling COLTAF's purpose without exposing COLTAF to an unreasonable risk of refund requests it could not satisfy.

THEREFORE BE IT RESOLVED that, if Proposed Colorado Rule of Professional Conduct 1.15B(k) is adopted by the Colorado Supreme Court:

COLTAF will hold at interest any and all unclaimed funds remitted pursuant to the Rule;

COLTAF will not use any of the unclaimed funds to fulfill its purpose until such time as the COLTAF Board makes an affirmative determination that potential refund requests do not create an unreasonable risk for COLTAF;

The COLTAF Board will review annually the amount of unclaimed funds remitted and any refunds made to evaluate the extent of the risk posed to COLTAF by the unclaimed funds it is holding, and to determine what actions, if any, may be taken to ameliorate the risk; and

The COLTAF Board will adopt the attached refund policy.

Colorado Lawyer Trust Account Foundation
Unclaimed COLTAF Funds Refund Procedure

Refund procedure for unclaimed funds remitted to COLTAF when a lawyer subsequently determines both the identity and the location of the owner:

1. The lawyer or law firm that remitted the unclaimed funds to COLTAF shall send a letter to COLTAF, stating that the owner of the funds has been both identified and located, and providing COLTAF with (a) the amount of the funds; and (b) the date the funds were remitted to COLTAF.

2. COLTAF will verify that a remittance of unclaimed funds was received from the lawyer or law firm on the date specified and in at least the amount specified. If no such remittance was received, COLTAF will notify the lawyer in writing. Otherwise, COLTAF will mail a refund check to the lawyer or law firm.

3. The refund check will be in the amount of the unclaimed funds remitted and will not include interest. Once a lawyer or law firm remits orphaned funds in a COLTAF account to COLTAF, the remitted funds retain their character as COLTAF-appropriate, and thus COLTAF is entitled to the interest earned on those funds, just as it is to the interest earned on funds held in COLTAF accounts.

The following refund procedure, for interest earned when client funds were held in a COLTAF account in error, is already in place, and is provided here simply for purposes of comparison.

1. *The lawyer or law firm shall determine, with the assistance of the bank holding the COLTAF account if necessary, the exact amount of interest that the client's balance earned during the period held in the COLTAF account.*

2. *The lawyer or law firm shall send a letter to COLTAF, signed by the lawyer responsible for the client relationship in question, stating that an error has occurred, and providing COLTAF with (a) the name and number of the COLTAF account, (b) the amount of the account balance(s) on which the client should have earned interest, (c) the date(s) of deposit and withdrawal(s) of the client's balances, and (d) the calculated amount of interest earned by the client's balances, and requesting a refund of the interest remitted to COLTAF that should have been remitted to the client.*

3. *COLTAF will verify that earnings received were sufficient to cover the refund, and that the amount of interest requested to be refunded is accurate. If either the earnings it has received are insufficient, or the calculation cannot be reasonable verified, COLTAF will notify the lawyer in writing. Otherwise, COLTAF will mail a refund check to the lawyer or law firm, with a cover letter reminding the requesting lawyer or law firm of the obligation to file appropriate I.R.S. reports concerning the refund.*

EXHIBIT B

Colorado Lawyer Trust Account Foundation
Procedures re Remittance of Unclaimed COLTAF Funds

Procedures for remittance to COLTAF of unclaimed funds held in a COLTAF account:

1. Complete COLTAF's Unclaimed Funds Remittance Report (attached).

2. Send a check made payable to COLTAF in the amount of the unclaimed funds, together with the completed Unclaimed Funds Remittance Report, to COLTAF, 1900 Grant Street, Suite 1112, Denver, CO 80203.

3. Lawyers remitting unclaimed funds to COLTAF must keep a record of that remittance pursuant to Colorado Rule of Professional Conduct 1.15D(a)(1)(C).

Procedures for the disposition of unclaimed funds held in the COLTAF account of a deceased lawyer:

1. Reasonable efforts should be made to identify and locate the owners of all funds held in the COLTAF account of a deceased lawyer and to return those funds to the owners. Reasonable efforts include an audit of the COLTAF account to determine to whom all funds belong; attempted contact with owners using last known contact information; review of files to identify and contact third parties who may have information regarding the location of owners; and internet searches.

2. If, after reasonable efforts are made, the identity and the location of an owner cannot be determined, funds may be remitted to COLTAF in accordance with the procedures set forth above.

COLTAF
Unclaimed COLTAF Funds Remittance Report

Unclaimed COLTAF Funds are funds held in a COLTAF account with respect to which, after reasonable efforts, the owner cannot be identified and located. See Colorado Rule of Professional Conduct 1.15B(k) and Comment [7].

Date: ________________ Total unclaimed COLTAF funds remitted: __________________
Name of remitting lawyer or law firm: ____
Mailing address: ____
Phone: _________________________ COLTAF Acct. # ________________________
Name of person preparing form: ____
Email address: ____

Portion of funds, if any, with respect to which the owner cannot be identified: _____________
Length of time, if known, that these funds have been held in your COLTAF account: _________

Portion of funds, if any, with respect to which the owner(s) cannot be located: _____________
For the missing owner(s) of all or each portion of the funds, provide the following information:

Owner	Amount belonging to this owner	Date of last contact with this owner
#1		
#2		
#3		
#4		
#5		

Colorado Rule of Professional Conduct 1.15B(k) provides that "[i]f, after remitting unclaimed funds to COLTAF, the lawyer determines both the identity and the location of the owner or the owner's heirs or personal representative, the lawyer shall request a refund for the benefit of the owner or the owner's estate, in accordance with [COLTAF's] written procedures," which are available on the COLTAF website and also upon request.

Colorado Rule of Professional Conduct 1.15D(a)(1)(C) requires a lawyer to maintain the following information with respect to unclaimed funds remitted to COLTAF: the name and last known address of the owner of the funds, if the owner of the funds is known; the date of death of a deceased owner if the owner of the funds is known; the efforts made to identify and locate the owner of the funds or a deceased owner's heirs or personal representative; the amount of the funds remitted; the period of time during which the funds were held in the lawyer's or law firm's COLTAF account; and the date the funds were remitted to COLTAF.

October 13, 2016

Colorado Supreme Court
c/o Christopher Ryan, Clerk of the Supreme Court
2 East 14th Avenue
Denver, CO 80203

Re: Proposed amendments to Colo. RPC 1.15A, 1.15B, and 1.15D

Dear Chief Justice Rice and Members of the Court:

We are writing to express the Colorado Bar Association's (CBA) support for the proposed amendments to Rule 1.15A, 1.15B, and 1.15D of the Colorado Rules of Professional Conduct. The proposed amendments differ in some respects from those that were initially proposed in August 2015 by the CBA, the Colorado Access to Justice Commission, and COLTAF, but the CBA fully supports the amendments as now proposed and recommended by the Court's Standing Committee on the Colorado Rules of Professional Conduct.

The proposed amendments provide necessary direction to lawyers and law firms regarding the disposition of funds in their COLTAF accounts, in the event the owner of the funds cannot be identified or, if identified, cannot be located ("unclaimed COLTAF funds"). Some guidance on this issue was previously available in CBA Ethics Committee Formal Opinion 95, entitled "Funds of Missing Clients," which directed lawyers to the Colorado Unclaimed Property Act. Last year, however, with the support of the CBA, a law was passed exempting funds held in COLTAF accounts from the Unclaimed Property Act, and the Ethics Committee formally withdrew Opinion 95 in May 2016.

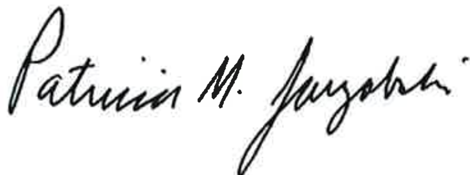
In addition, by designating COLTAF as a proper recipient of the funds (unless the lawyer chooses to continue to hold the unclaimed COLTAF funds in a COLTAF or other trust account), the proposed amendments provide for the possibility of an additional source of funds for Colorado's civil legal aid delivery system. The proposal to try to capture such funds for that purpose was included in a comprehensive Civil Legal Aid Funding Plan, which was presented to and unanimously approved by the CBA Board of Governors at its November 9, 2013 meeting.

As you know, COLTAF provides critical funding for Colorado's civil legal aid delivery system, including both our statewide, staffed program (Colorado Legal Services) and the local bar-sponsored *pro bono* programs. Support for any possible increase in resources for that purpose is particularly important as lawyers and law firms are being asked to do more to help respond to the unmet legal needs of low-income Coloradans.

1900 Grant St., Ste. 900, Denver, CO 80203-4336
303-860-1115 • 800-322-6736 • fax 303-894-0821 • cobar.org

Thank you for your attention to this important matter. We urge you to approve the proposed amendments.

Respectfully,



Patricia M. Jarzobski
President

Patrick Flaherty
Executive Director

(f) Fees are not earned until the lawyer confers a benefit on the client or performs a legal service for the client. Advances of unearned fees are the property of the client and shall be deposited in the lawyer's trust account pursuant to Rule 1.15B(a)(1) until earned. If advances of unearned fees are in the form of property other than funds, then the lawyer shall hold such property separate from the lawyer's own property pursuant to Rule 1.15(A)(a).

(h) **Notwithstanding anything to the contrary in Rule 1.5(b) lawyers may enter into flat fee agreements.**

(1) If a lawyer receives in advance a flat fee or any portion thereof, the lawyer's flat fee agreement shall be in writing and shall contain the following:

(a) A description of the services the lawyer agrees to perform;

(b) A statement of the amount to be paid to the lawyer for the services to be performed;

(c) A description of when or how portions of the flat fee are deemed earned by the lawyer;

(d) The amount, if any, of the fees the lawyer is entitled to keep upon termination of the representation before all of the specified legal services have been performed.

(2) A 'flat fee agreement' refers to an agreement for specific legal services by a lawyer under which the client agrees to pay a fixed amount for the legal service to be performed by the lawyer, regardless of the time or effort involved or the result obtained.

Proposed Alternatives Regarding a Flat Fee Agreement Not in Compliance with Possible New Rule 1.5(h)(1)

[Alternative 1]: - No subparagraph 1.5(h)(1)(e) addressing non-compliance

[Alternative 2]:

1.5(h)(1)(e). If a flat fee agreement is not in substantial compliance this Rule then it is unenforceable.

[Alternative 3]:

1.5(h)(1)(e). If a flat fee agreement is not in substantial compliance with this Rule and the attorney client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in a civil action.

[Alternative 4]:

1.5(h)(1)(e). If a flat fee agreement is not in substantial compliance with the Flat Fee Agreement form [refer to where from is placed] and the attorney client relationship is terminated before the representation is completed, the lawyer must refund all fees to the client upon termination. However, nothing in this rule prohibits the lawyer from pursuing recovery in a civil action.

COMMENT

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

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, the basis or rate of the fee must be promptly communicated in writing to the client. When the lawyer has regularly represented a client, they ordinarily will have reached an understanding concerning the basis or rate of the fee; but, when there has been a change from their previous understanding, the basis or rate of the fee should be promptly communicated in writing. 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. When using a flat fee -a lawyer must provide a written flat fee agreement for all funds received in advance pursuant to paragraph (h). A written communication must disclose the basis or rate of the lawyer's fees, but it 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 take into account in finally fixing the fee, or to furnish the client with a simple memorandum or the lawyer's customary fee schedule. When developments occur during the representation that render an earlier disclosure substantially inaccurate, a revised written disclosure should be provided to the client.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable 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 require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

[3A] Repealed.

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(d). 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). However, a fee paid in property instead of money may 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 whose 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. However, it is proper 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.

[6] No Colorado comment.

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 in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should refer a matter only to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) 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.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Advances of Unearned Fees and Engagement Retainer Fees

[10] The analysis of when a lawyer may treat advances of unearned fees as property of the lawyer must begin with the principle that the lawyer must hold in trust all fees paid by the client until there is a basis on which to conclude that the lawyer has earned the fee; otherwise the funds must remain in the lawyer's trust account because they are not the lawyer's property.

[11] To make a determination of when an advance fee is earned, the written statement

of the basis or rate of the fee, when required by Rule 1.5(b), should include a description of the benefit or service that justifies the lawyer's earning the fee, the amount of the advance unearned fee, as well as a statement describing when the fee is earned. In flat fee agreements, the lawyer must describe when or how portions of the flat fee are earned under paragraph (f)(3) unless none of the fee is earned until all of the services have been provided. Whether a lawyer has conferred a sufficient benefit to earn a portion of the advance fee will depend on the circumstances of the particular case. The circumstances under which a fee is earned should be evaluated under an objective standard of reasonableness. Rule 1.5(a).

Rule 1.5(f) Does Not Prohibit ~~Lump-sum Fees or~~ Flat Fees

[12] Advances of unearned fees~~, including "lump-sum" fees and "flat fees,"~~ are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the written statement of the basis of the fee, if a written statement is required by ~~Rule 1.5~~paragraph (b). Paragraph (f) requires advanced payment under a flat fee agreement to be in writing. See also Restatement (Third) of the Law Governing Lawyers §§ 34, 38 (1998). Rule 1.5(f) does not prevent a lawyer from entering into these types of arrangements.

[13] For example, the lawyer and client may agree that portions of the advance of unearned fees are deemed earned at the lawyer's hourly rate and become the lawyer's property as and when the lawyer provides legal services.

[14] Alternatively, the lawyer and client may agree to an advance ~~lump-sum or~~ flat fee that will be earned in whole or in part based upon the lawyer's completion of specific tasks or the occurrence of specific events, regardless of the precise amount of the lawyer's time involved. For instance, in a criminal defense matter, a lawyer and client may agree that the lawyer earns portions of the advance ~~lump-sum or~~ flat fee upon the lawyer's entry of appearance, initial advisement, review of discovery, preliminary hearing, pretrial conference, disposition hearing, motions hearing, trial, and sentencing. Similarly, in a trusts and estates matter, a lawyer and client may agree that the lawyer earns portions of the ~~lump-sum or~~ flat fee upon client consultation, legal research, completing the initial draft of testamentary documents, further client consultation, and completing the final documents.

[15] The portions of the advanced ~~lump sum or~~ flat fee earned as each such event occurs need not be in equal amounts. However, the fees attributed to each event should reflect a reasonable estimate of the proportionate value of the legal services the lawyer provides in completing each designated event to the anticipated legal services to be provided on the entire matter. ~~See Rule 1.5(a); Feiger, Collison & *Killmer v. Jones, 926 P.2d 1244, 1252-53 (Colo. 1996)* (client's sophistication is relevant factor).~~

[16] " A-n 'engagement retainer fee' is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required. An engagement retainer must be distinguished from a ~~lump-sum~~flat fee constituting the entire payment for a lawyer's service in a matter and from an advance payment from which fees will be subtracted. ~~(see § 38, Comment g).~~ A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed." Restatement (Third) of the Law Governing Lawyers § 34 Comment e. An engagement retainer fee

agreement must comply with Rule 1.5(a), (b), and (g), and should expressly include the amount of the engagement retainer fee, describe the service or benefit that justifies the lawyer's earning the engagement retainer fee, and state that the engagement retainer fee is earned upon receipt. As defined above, an engagement retainer fee will be earned upon receipt because the lawyer provides an immediate benefit to the client, such as forgoing other business opportunities by making the lawyer's services available for a given period of time to the exclusion of other clients or potential clients, or by giving priority to the client's work over other matters.

[17] Because an engagement retainer fee is earned at the time it is received, it must not be commingled with client property. However, it may be subject to refund to the client in the event of changed circumstances.

[18] It is unethical for a lawyer to fail to return unearned fees, to charge an excessive fee, or to characterize any lawyer's fee as nonrefundable. Lawyer's fees are always subject to refund if either excessive or unearned. If all or some portion of a lawyer's fee becomes subject to refund, then the amount to be refunded should be paid directly to the client if there is no further legal work to be performed or if the lawyer's employment is terminated. In the alternative, if there is an ongoing client-lawyer relationship and there is further work to be done, it may be deposited in the lawyer's trust account, to be withdrawn from the trust account as it is earned.

MEMORANDUM

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

FROM: Alec Rothrock, Chair
Parental Conflict Subcommittee

DATE: October 20, 2016

SUBJECT: Report on Proposed amendment to Rule 2.1 and Comment [5]

---

1. At its July 22, 2016 meeting, the Committee formed a subcommittee to consider a request by Joan McWilliams to amend Colo. RPC 2.1 and Comment [5] to that Rule to encourage lawyers in cases involving the allocation of parental responsibilities to advise their clients of the importance of minimizing parental conflict because of its adverse effect on minor children.

2. In addition to the author, the members of the subcommittee are the following individuals: Ruthanne Polidori, Joan McWilliams, David Little, Jamie Sudler, Margaret Funk, Gina Weitzenkorn, Michael DiManna and Angela Arkin.

3. The subcommittee had one meeting on September 15, 2016. All but one member was present. Sue Waters was also in attendance.

4. The subcommittee first considered whether to recommend the adoption of any amendments at all. If it decided to do so, the subcommittee then considered whether to recommend an amendment to the Rules or the Comments or both and what amendment language to recommend. The subcommittee considered language proposed by the Family Law Committee of the Colorado Bar Association as well as alternative language approved by the CBA Ethics Committee.

5. No one on the subcommittee doubted the basic proposition that parental conflict causes harm to minor children. However, there were many arguments raised pro and con about the proposed amendments.

6. Without attempting to chronicle the subcommittee's meeting, suffice it to say that some members expressed doubt about the effectiveness of any language change on lawyers' advice, their clients' behavior, or the behavior of pro se litigants; concern that

lawyers may be subject to discipline if they do not advise their clients about the negative effect of parental conflict; concern over potential intrusion of the Office of Attorney Regulation Counsel in attorney-client relationships in the event of a disciplinary investigation regarding advice given by the lawyer to the client on the subject of parental conflict; concern over creating a standard of care and possible liability for lawyers; and whether directing or encouraging lawyers to give specific substantive advice to clients in specific situations exceeded the scope of the Colorado Rules of Professional Conduct and set a precedent for amendments related to other areas of law.

7. On the other hand, other members expressed the view that adding some version of the proposed amendments would likely alter some client behavior; clients are more inclined to listen to their lawyer on this subject than to a judge; the proposed amendments would not create a "slippery slope" of amendments related to other practice areas; the amendment of Colo. RPC 2.1 to encourage lawyers in litigation matters to advise their clients of alternative forms of dispute resolution is a relevant precedent; Colorado is a strict privity state, and a lawyer's obligation is generally to his or her client and not to a third party; the proposed amendments are discretionary, and disciplinary action should not be taken when the lawyer chooses not to act or acts within the bounds of such discretion; the Rules of Professional Conduct were the only place where the message might have any real effect; and doing something to combat the problem was preferable to doing nothing at all.

8. The subcommittee then took a series of votes. The net result was that, over the objection of two members, the subcommittee decided to recommend to this Committee the addition of a sentence in Comment [5] to Colo. RPC 2.1. Though not all members agreed to recommend such an amendment, the subcommittee was unanimous that if any such language was to be recommended, it would be limited to the following highlighted language in Comment [5] to Colo. RPC 2.1:

> [5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. **In a matter involving the allocation of parental rights and responsibilities, an attorney should consider advising the client that parental conflict can have a significant adverse effect on minor children.** Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

INSTITUTE *for the* ADVANCEMENT *of the* AMERICAN LEGAL SYSTEM | UNIVERSITY *of* DENVER

October 10, 2016

Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct
ATTN: Committee Chair, Marcy G. Glenn
Ralph L. Carr Colorado Judicial Center
2 East 14th Avenue
Denver, CO 80203

Dear Committee Chair:

I am writing in support of amending Comment 5, Rule 2.1 of the Colorado Rules of Professional Conduct ("CRPC") to reflect the following: "In a matter involving the allocation of parental rights and responsibilities, an attorney should consider advising the client that parental conflict can have a significant adverse effect on minor children."

I. Research on Parental Conflict During Divorce / Separation is Established

Decades of research clearly shows that the level of conflict between divorcing or separating parents is one of the most important influences on how well children cope with the challenges of this transition. While experts disagree about the magnitude and long-term effects of divorce on children, all researchers acknowledge that parental conflict is toxic for children.[1] Being caught in the middle of an acrimonious divorce or separation increases children's risk of emotional, behavioral, and psychological problems, including:

- depression and anxiety;
- loss and anger;
- under-achievement at school and in employment;
- social problems;
- higher incidence of drug and alcohol abuse; and
- poor parent-child relationships.[2]

The more pervasive and severe the conflict to which children are exposed, the more negative the effects of family dissolution.

Furthermore, adversarial family court processes can be particularly harmful to divorcing or separating parents and their children, and litigation has been shown to exacerbate stress and increase parental conflict during divorce. Courts were designed for adversarial conflicts with a winner and loser, where the focus is on assessing fault and imposing consequences. Even when divorcing or separating parents intend to support their children through the process, compromise and adjustment of parent-parent and parent-child relationships can be difficult to achieve through this adversarial system.[3]

Many family law attorneys understand that and have witnessed how an adversarial environment exacerbates underlying emotions. For example, results of a high-level IAALS survey of national family law practitioners in November 2014 suggest that the current family justice system is not operating to serve litigants in the best possible manner, and respondents broadly agreed (88%) that a less-adversarial system would better meet the needs of families than the current litigious system.[4]

The proposed amendment to CRPC Rule 2.1, Comment 5 merely recommends that family law professionals consider making these established, widely understood realities known to divorcing or separating clients with minor children. Encouraging attorneys to empower clients with this knowledge should be included within the scope of a responsible attorney's professional duties to clients.

II. Many Attorneys Agree it is Prudent to Educate Clients on Impacts of Parental Conflict on Children during Divorce / Separation

In November 2015, an esteemed, national group of family law practitioners participating in an IAALS Summit acknowledged: "Through a more refined understanding of how parental conflict during separation and divorce affects children, we now better appreciate the need for a stable and supportive environment and a safe relationship with both parents after reorganization—considerations which have increased the desirability of non-adversarial processes for resolving family law disputes."[5]

These practitioners highlighted a fundamental role of the family law attorney: to help clients and their children transition through the divorce or separation process. Within this role and given the unique elements of divorce/separation cases, there is an opportunity for family law attorneys to serve as problem solvers and teachers. As such, where appropriate, a family law attorney should assist his/her client in exploring less-adversarial alternatives to litigation.

Furthermore, many attorneys participating in this discussion suggested that calling attention to client behaviors and goals that may be harmful to the child(ren) involved is merely an extension of representing the client's best interests. This perspective echoes the American Academy of Matrimonial Lawyers *Goals for Family Lawyers* and the language proposed to amend current CRPC Rule 2.1, Comment 5. This proposed amendment merely supplements a family law attorney's understanding of his/her professional obligations to clients.

III. A Less-Adversarial Divorce / Separation Environment Has Been Shown to Positively Affect Parent and Child(ren)

The Resource Center for Separating and Divorcing Families at the University of Denver was an out-of-court alternative for divorcing or separating parents with children.[6] The IAALS model on which the Center was based focuses on educating parents about the effects of parental conflict during divorce and separation. The Center encouraged parents to work together for the benefit of their children, and made therapy, legal education, dispute resolution, and financial counseling

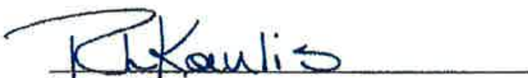
available to participating families. Based on self-reported well-being data from parents over the course of a comprehensive two-year evaluation, IAALS found that, between the time of beginning services and exiting the program, parents showed statistically significant improvements with respect to:

- Lower levels of stress, anxiety, and depression;
- Decreased acrimony between the parents;
- Increased shared decision-making skills;
- Better communication skills, especially with respect to less violent and more collaborative styles of communication;
- Increased confidence in the ability to co-parent;
- Decreased levels of parenting stress in terms of parental distress, dysfunction between parents and children, and difficulties with children; and
- More appropriate emotional expectations for their children.[7]

Empowering Colorado attorneys to discuss the adverse impacts of parental conflict during divorce or separation on client's children could lead to any number of the improvements described, above.

In closing, thank you for considering this comment. Please do not hesitate to contact me with questions or for additional information on this issue: Rebecca.Kourlis@du.edu or (303) 871-6600.

Kind regards,



Hon. Rebecca Love Kourlis
Executive Director, Institute for the Advancement of the American Legal System

Endnotes

[1] ROBERT E. EMERY, RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION 205–15 (1994).
[2] *Id.*; GLENN A. GILMOUR, DEPARTMENT OF JUSTICE CANADA, HIGH-CONFLICT SEPARATION AND DIVORCE: OPTIONS FOR CONSIDERATION INSERT (2004), *available* at http://www.justice.gc.ca/eng/rp-pr/fl-lf/divorce/2004_1/pdf/2004_1.pdf.
[3] *See, e.g.*, Marsha Kline Pruett & Tamara D. Jackson, *The Lawyer's Role During the Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys*, 33 FAM. L.Q. 283, 298 (1999).
[4] The survey asked respondents to react to the following statement: "I think that a less adversarial- type of system would better meet the needs of the parties and their children in most cases." LOGAN CORNETT, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ON CURRENT ISSUES IN FAMILY LAW: AN INFORMAL SURVEY OF ATTORNEYS 4-5 (2016), *available at*

---

http://iaals.du.edu/sites/default/files/documents/publications/on_current_issues_in_family_law_an_informal_survey_of_attorneys.pdf.

[5] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., THE FAMILY LAW BAR: STEWARDS OF THE SYSTEM: LEADERS OF CHANGE 4 (2016), *available* at http://iaals.du.edu/honoring-families/publications/family-law-bar-stewards-system-leaders-change.

[6] The Center recently moved off of the University of Denver campus and into the community. Center for Out-of-Court Divorce, http://centerforoutofcourtdivorce.org/ (last visited Oct. 10, 2016).

[7] LOGAN CORNETT ET AL., INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., OUT-OF-COURT AND IN COLLABORATION: EVALUATING AN INTERDISCIPLINARY MODEL FOR SEPARATION AND DIVORCE IN A UNIVERSITY CAMPUS SETTING 4 (2016), *available* at http://iaals.du.edu/honoring-families/publications/out-court-and-collaboration.

1125 Seventeenth Street, Suite 450
Denver, Colorado 80202
303-515-5000 | Fax 303-299-9554

8310 South Valley Highway, Suite 105
Englewood, Colorado 80112
303-515-5000 | Fax 303-299-9554

THE
Harris Law Firm P.C.

WWW.HARRISFAMILYLAW.COM

32135 Castle Court, Suite 101
Evergreen, Colorado 80439
303-515-5000 | Fax 303-299-9554

1220 South College Avenue, Suite 200
Fort Collins, Colorado 80524
970-472-2008 | Fax 970-682-6460
Toll Free 1-855-752-5509

ANGELA R. ARKIN
DISTRICT COURT JUDGE (RETIRED)
DIRECTOR, SELF-REPRESENTED RESOURCE CENTER
ANGIE@HARRISFAMILYLAW.COM

October 13, 2016

Re: Proposal to Amend Rule 2.1 and Comment 5 thereto in the Colorado Rules of Professional Conduct.

Dear Ethics Committee:

It is widely accepted, and fairly well known, that major parental conflict during a divorce can cause significant harm to children. In fact, studies have shown that this harm may show its impact years, or even decades, after the initial trauma of divorce. Often, it can impede a child's emotional development and relationships throughout adulthood. [1]

Children exposed to high conflict between their parents are at risk for a number of serious problems later in life, which could, at a minimum, be difficulty with future relationships, and at worst be problems with drugs, criminal activity and suicide. Sadly, family law attorneys and judges have seen children suffer all of these effects due to their parents' long-term conflict.

Domestic relations lawyers and judges have seen many parents in court who feel stuck fighting with each other in high-conflict situations they just can't seem to get out of. Instead of the parents working out disagreements themselves, a judge is forced to make parenting decisions for them. Once it begins, conflict between divorcing parents too often does not end once the divorce decree is entered. Some cases go on for years with parents returning to the courtroom so that a judge has to settle disputes and make important decisions about their children. For many broken families, the fighting that continues can plague virtually all aspects of subsequent child rearing. Thus, a highly conflictual parental breakup essentially persists like aftershocks from a terrible earthquake for years to come.

Sadly, for some children of divorce, the conflict between their parents may become the single most pervasive memory of their childhood. Rather than being focused on dealing with the normal stresses and challenges of adolescence, puberty and their teen years, these kids are constantly agonizing over the saga of their parents' ongoing battles.

[1] *See*, e.g., Wallerstein, Judith S., Julia Lewis, and Sandra Blakeslee. *The Unexpected Legacy of Divorce: A 25 Year Landmark Study*. First edition. Hyperion, 2000.

The numbers of kids trapped in this conflict is probably enormous. We don't have an accurate way of measuring the numbers of kids whose parents continue to fight after their divorce, but we know that the divorce rate in Western countries remains very high. It is believed that 40 to 60 percent of all first-time marriages end in divorce. Remarriages fail at an even higher rate. And, perhaps of most concern, the vast majority of couples who divorce have children under the age of 18. [2]

In many cases, competent legal professionals can help mitigate these ongoing problems. Good lawyers attempt to not only settle cases sooner, thereby limiting the conflict during the divorce, but help their high-conflict clients into support mechanisms such as therapy so that their clients can learn behaviors to co-parent effectively after the divorce. Sadly, however, too many attorneys in divorce cases kindle the conflict, and shamefully rack up legal fees based on fomenting litigation to increase their billable hours. This system is inherently perilous to the uninformed consumer, and to the children who ultimately suffer the results.

Joan McWilliams, with significant support from the Family Law Bar and other professionals working in this area, has sought the proposed amendments to the Ethics Rules to address this important reality. Attorneys might say those taking divorce and allocation of parental responsibility cases should not be "singled out" by the rules of ethics, but it is the cases themselves that include these issues. I would argue that if you choose to represent a client in a case that includes child custody conflicts, then the rules of ethics should require you to counsel your client about the unique concerns of these cases: namely the harm caused to children by ongoing parental conflict. I can also confidently say that many judges sitting is the domestic relations docket would be highly supportive of any action that would deter parents from engaging in high conflict over their children.

The bottom line, based on my thirty three years of hearing from families inside and outside the courtroom is this: children will benefit greatly if parents take some time to learn to be the best business partner they can be. Lawyers who take these cases should have a duty to inform their clients of the results of high conflict, and ways to avoid it. Then, of course, the client is able to decide how he or she proceeds, but it will be an informed decision. I urge this committee to adopt the ethics rule and or comment amendments proposed by Joan McWilliams.

Sincerely,

Angela R. Arkin
District Court Judge (Retired)

[2] http://www.apa.org/topics/divorce/, Karen R. Blaisure, Ph.D. and Margie J. Geasler, Ph.D.

Joan McWilliams

From:	Kathleen McNamara <kathleenmcnamaraphd@gmail.com>
Sent:	Thursday, October 13, 2016 10:31 AM
To:	Joan McWilliams
Subject:	Rule 2.1

Dear Joan,

Thank you for your efforts to make changes to the rules of professional conduct in order to ensure that litigating parents are informed of the impact of conflict on their children. I wanted to tell you about something that happened recently in a high conflict co-parenting class that I teach that relates to your efforts.

We were discussing what the attendees had learned during the class. A father spoke up quite passionately and asked why the class had not been ordered *at the beginning* of litigation. He claimed it would have avoided three years of litigation, thousands of dollars, and chronic emotional stress on his children. Others in the class, including his ex-wife, agreed that they wished someone had told them sooner about the opportunities to learn conflict resolution skills and how to avoid the harmful impact of conflict on their children.

I sincerely hope the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct will adopt this proposed change!

Kind Regards,

Kate McNamara

Kathleen McNamara, Ph.D., PLLC
333 W. Drake Rd., Ste 280
Fort Collins. CO 80526
970-207-0278-Office
970-207-9198-Fax
www.KathleenMcNamaraPhD.com

Disclaimer: This e-mail is covered by Electronic Communication Privacy Act, 18 U.S.C. §§ 2510-2521 and is legally privileged. This email message and all attachments are for the sole use of the intended recipient(s) and may contain confidential and privileged information. Any unauthorized review, use, disclosure, or distribution is prohibited. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message. Content cannot be guaranteed to be secure or error-free as information could be intercepted, corrupted, lost, destroyed, arrive late or incomplete, or contain viruses. The sender therefore does not accept liability for any errors or omissions in the contents of this message, which arise as a result of e-mail transmission. If verification is required, please request a hard-copy version.

DAVID LITTMAN, P.C.
Attorneys and Counselors at Law
1772 Emerson Street
Denver, Colorado 80218

David Littman, M.A., J.D.
Ashley Emerson, J.D.
Rebecca Baer, J.D.*
Debra Miller, Senior Paralegal
Melinda Bargas, Paralegal

Telephone (303) 832-400
Facsimile (303) 832-9322
David@LittmanFamilyLaw.com
www.littmanfamilylaw.com
*Also licensed in Minnesota

October 13, 2016

Marcy Glenn, Esq.
Chair of the Colorado Standing Committee
on the Rules of Professional Conduct

RE: Changes to the comments to C.R.P.C. 2.1

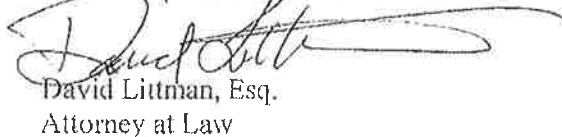
Dear Marcy:

I am writing in support of the changes that have been approved by two organizations of which I am a member. The CBA Ethics Committee voted to support changes to comment 5 to Rule 2.1 which suggest that an attorney in a family law matter may elect to discuss the impact of high conflict on children. The Family Law Section Executive Council of the CBA also voted to support the inclusion of this language, either as an addition to comment 5 or to the rule itself. As a former chair of the Family Law Section and a long time family law attorney, I have personally witnessed the impact of high conflict parenting on children as well as the adults. Vast financial resources are consumed in often meaningless battles. Even worse is the detrimental impact on a child's self-esteem when he or she is caught between two warring parents. That child's opportunities to become a contributing member of our community diminish exponentially in the midst of ongoing and intractable parental conflict.

I wear a number of hats professionally, including advocate, mediator, arbitrator and Child and Family Investigator. I have been able to examine and observe the impact of conflict on children from each different perspective. I believe that the change being proposed is best for Colorado's children and their parents. If attorneys can be encouraged to discuss with clients and advise them about high conflict, perhaps it will make a positive impact. I hope that this committee will support the change being proposed.

Sincerely,

DAVID LITTMAN, P.C.



David Littman, Esq.
Attorney at Law

Association of Family and Conciliation Courts

www.coafcc.org

COAFCC
BOARD OF DIRECTORS

President
Beth Lieberman, LCSW
bethliebhoffo@aol.com
Colorado Springs, CO

Past President
Barbara Pevny, MA, LPC
bpevny@southernute-nsn.gov
Ignacio, CO

Vice President
Frances Fontana, JD
ffontana@fontanafamilylaw.com
Littleton, CO

Secretary
Shelley Bresnick, Psy.D.
sbresnick@mindspring.com
Golden, CO

Treasurer
Barbara Pevny, MA, LPC
bpevny@southernute-nsn.gov
Ignacio, CO

Board Members

Deborah Anderson
Durango, CO

Hon. Angela Arkin
Castle Rock, CO

Bill Fyfe, Ed.D.
Lakewood, CO

Ann Gushurst, JD
Littleton, CO

Laurie MacTavish
Breckenridge, CO

Sarah Quinlen, JD
Littleton, CO

Robert Smith, JD, M.Div.
Windsor, CO

Leonard Tenis, JD
Broomfield, CO

www.coafcc.org

October 8, 2016

The following members of COAFCC want to express their support for a change to Rule 2.1 and/or the comments thereto in the Colorado Rules of Professional Conduct. While our organization cannot adopt an official position, we feel very strongly as individuals that Rule 2.1 and/or its comments should reflect support for attorneys who work with parents to discuss with their clients the concern that the level of conflict in a family law matter impacts both the parents and their children.

Recognizing that attorneys representing parents do not have a direct duty to their clients' children, it is undeniable that the level of conflict in a family law matter can have tremendous implications for the children, whose well-being is an important focus for the parents represented by counsel. Sadly, many parents are unaware of the undeniable link between parental conflict and outcomes for children.

An attorney's duty to counsel a client should include transmitting relevant information about how the client's actions and legal choices may impact their children – both positively and negatively. Attorneys should discuss alternative ways of pursuing client goals in light of the outcomes for their children.

From a statutory perspective, involvement of counsel for both parents can simplify the process by allowing approval of a Parenting Plan without appearance in Court. This statutory scheme implies that representation by an attorney has some positive impact on the situation, both for the client and the children, whose "best interest" is the statutorily mandated focus of the Court process. One would hope that many attorneys encourage their clients to consider factors relating to their children's best interests as it relates to their Parenting Plans. Given this legislative structure, it is logical that the C.R.P.C. encourage such support for clients, with an acknowledgement that the attorney should consider advice to the client regarding the adverse effect of parental conflict on children.

Accordingly, the undersigned professionals support the proposed amendment to Comment 5, Rule 2.1 to state: "In a matter involving the allocation of parental rights and responsibilities, an attorney should consider advising the client that parental conflict can have a significant adverse effect on minor children."

Kimberly Wilson [signature] 10/9/16 #43589

[signature] 10/9/16 25194 (not an AFCC member)

[signature] 10/9/2016 (not an AFCC member)

Margaret [signature] 10/9/2016 #21999

Kathleen [signature], PsyD 10-9-16

Karen Jameson Dorr, PhD 10-9-16

Shelley [signature], PsyD 10-9-16

[signature] PhD 10-9-16

Christopher Jarson MA - PC/DM. 10/9/2016

[signature] MA, LPC 10/9/16

[signature], LCSW 10/9/16

[signature], JD 10/9/16

Armond D. Lebovits, LCSW, 10.09.16

Terry Duffin, M.A. 10/9/16

Bruce [signature], Ph.D. 10/9/2016

[signature] MS 10/9/16

Phillip Hendrix, MA, MBA 10/9/2016

Deborah Anderson, JD 10/9/16

Jeffrey R. Baker, J.D. 10/9/16

M. Jane Cox, J.D 10/9/16

Curtis Kofoed, J.D. #49066

Darryl K James #14140

[signature], L.C.S.W 10-9-16

Kathleen McNamara

[signature] #29187 Ann Gushurst

Joan McWilliams

From: Elysia Adams <elysiafadams@gmail.com>
Sent: Sunday, October 9, 2016 8:50 PM
To: Joan McWilliams
Subject: Marcy Glenn:

Marcy Glenn

Chair: Colorado Supreme Court Stabdinf Committee

Marcy:

My name is Elysia Adams and I am writing in support of the amendment to Comment 5, Rule 21 of the Colorado Rules of Professional Conduct.

Recently, I went through a 2 year high conflict divorce with two children ages 7 and 9. Through the course of the divorce, I engaged 3 family attorneys, 1 criminal attorney, 2 county judges, 1 private judge, 1 arbitrator and 1 business attorney. All of the attorneys had a clear understanding of the circumstances, issues to be resolved and direction of divorce, but little mention of children. There was no focus, guidance or even mention of the critical and intense effect divorce has on children by any of the family attorneys I engaged. The only parties who mentioned and ensured that I understood and heard them regarding children's issues were the business attorney and arbitrator of the case whom had to sift through layers of poor attorneys work to resolve a tough case. Nonetheless- it took nearly until the end of the 2 year period for the issue of the children and effects of parental conflict to be heard, taken in and considered by the judges. Thankfully there were resources in my case to allow for weekly children's therapy, but that wasn't considered again, until late in my case. I feel that had ANY of the family attorneys initially engaged- who in my opinion are in a position of power at a vulnerable time- said, 'do you understand how parental conflict adversely affects children and do you want to consider how we should handle this issue' have been said, my children would be in a wholly different position therapeutically and adjustment wise today. As aforementioned, the children are luckily in therapy, albeit tardy, and healing BUT it is critical at a time of emotional havoc, life altering crossroads and an overflow of change to clearly state how conflict impacts children to the parents divorcing. It could've been the one moment in my divorce that may have stood still and been absorbed. It may have altered things then they are today. It is my firm opinion that attorneys should be mandated to clearly and if possible, slowly clear the whirlwind of divorce to look a client in the eyes and simply say ' parental conflict has a significant adverse effect on minor children- in the midst of this divorce, what have you done to consider this?'. It may have changed the outcome, maybe not in my case- but I believe it would have paused the clock for a moment and brought my attention to not just the responses, the filings, the documents, the payments etc, but to the emotional credibility of the children so perhaps that issue would've been considered first or at a minimum sooner. It is a moral, ethical, social and legal obligation that has the opportunity to bring change to the face of any divorce case for the true and authentic best interests of the children.

Thank you for your time-

Elysia Adams
303.518.8028
www.elysiaadams.com

Sue A. Waters, MA, LPC
950 S. Cherry Street Suite G8
Denver, CO 80246
303-506-3161 fax 303-329-8128
sueawaters@gmail.com

To: Marcy Glenn
Chair of the Colorado Supreme Court's Standing Committee on the Colorado Rules of Professional Conduct

Dear Marcy and the Committee,

First, thank you for all of your hard work concerning the proposed amendment to Comment 5, Rule 2.1 of the Colorado Rules of Professional Conduct.

I am a mental health professional who has worked with divorcing/separating parents for 23 years. I started Parenting After Divorce in 1993 and have taught both Level I and Level II Co-parenting After Divorce classes. In my private practice, I have worked with parents and children in an effort make the transition smoother for everyone. I have served in the roles of: Child and Family Investigator (previously, Special Advocate), Parenting Coordinator, Decision Maker, Parental Responsibilities Evaluator, parenting time consultant, and reunification therapist.

I am writing this letter in support of the proposed amendment which addressed the potential negative effects parental conflict has on children. The research on this topic is indisputable. In my experience, children pay the price for ongoing parental conflict. A few examples:

-A 7-year old boy was playing soccer and saw his parents on opposite sides of the field. Knowing how high conflict their relationship was, he had a full on meltdown. He fell to the ground sobbing; for fear that his parents would get into a disagreement at his soccer game.

-A 15 year old young lady talked about her parents' ongoing high conflict relationship. "I'm Switzerland," she stated. She carefully walked a narrow, neutral path.

-A 35 year old man, when asked how he felt about a situation which occurred in his adolescence, stated, "I don't know how I felt. I was so caught between my parents and their positions; I lost touch with my own feelings."

I understand these are anecdotal. However, parents in high conflict generally don't realize the burden created by their self-indulgent bickering; bad mouthing of the other parent, using children as messengers, and placing children in loyalty binds. This burden is on the backs of children. I understand there is no magic bullet. However, I believe it's our responsibility to educate parents about unintended consequences.

Thank you again.

Sincerely,

Sue A. Waters, MA, LPC

McWilliams Mediation Group LTD

299 Milwaukee Street, 3rd Floor
Denver, CO 80206
Telephone: 303.830.0171
Email: joan@mcwilliamsmediation.com

To: The Members of the Colorado Supreme Court Standing Committee of the Colorado Rules of Professional Conduct
From: Joan McWilliams
Re: Proposed Amendments to Comment [5] of the Colo. RPC 2.1
Date: October 17, 2016

Dear Members:

In his recent letter to the Standing Committee, Alec Rothrock, Chair of the Parental Conflict Subcommittee, reported that the Subcommittee met on September 15, 2016 and recommended the addition of the following language to Comment [5] of Colo. RPC 2.1:

> In a matter involving the allocation of parental rights and responsibilities, an attorney should consider advising the client that parental conflict can have a significant adverse effect on minor children.

As you may recall, we have received the approval of similar proposed amendments from many significant groups. The Executive Council of the CBA Family Law Section unanimously approved amendments to both Colo. RPC 2.1 and Comment [5]. The same amendments were approved by the Colorado Chapter of the American Academy of Matrimonial Attorneys. The CBA Ethics Committee approved an amendment to Comment [5] that is similar to the amendment approved by the Subcommittee. The Institute for the Advancement of the American Legal System ("IAALS") and members of the Colorado Chapter of the Association of Family and Conciliation Courts also approved the amendment.

The following concerns have been raised and may be resolved as follows:

- The Colorado Supreme Court in *Baker v. Wood Ris & Hames,* 13SC554 (Sup.Ct. 2016) reaffirmed the strict privity rule in Colorado. A lawyer does not extend his duty of care nor create a third party beneficiary in the children by advising the client that parental conflict can have a significant adverse effect on the children.

- The proposed amendment is permissive. The lawyer has discretion to exercise professional judgment with regard thereto, and "[n]o disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion." Colo. RPC, Preamble and Scope [14].

- The author and the Subcommittee are not aware of any disciplinary actions based on the similar permissive amendments to Colo. RPC 2.1 and Comment [5] concerning alternative dispute resolution. Those amendments were passed in 2008.

Many letters of support have been submitted to the Standing Committee and are in your materials. These include correspondence from:

1. Hon. Rebecca Love Kourlis: Executive Director, Institute for the Advancement of the American Legal System;
2. Hon. Angela Arkin: District Court Judge (Retired);
3. Kathleen McNamara, PhD., PLLC: Licensed Psychologist who works with high conflict couples and teaches high conflict parenting classes;
4. David Littman: Child Advocate, Mediator, Arbitrator and Child and Family Investigator;
5. Members of the Colorado Association of Family and Conciliation Courts;
6. Elysia Adams: Litigant; and
7. Sue Waters, MA, LPC: Founder of the Parenting After Divorce classes, Child and Family Investigator, Parenting Coordinator, Decision Maker, and Parental Responsibilities Evaluator.

The letters reflect the opinions of a cross-section of professionals in the legal, mental health and consumer communities and support the need for the amendment.

Thank you very much for your dedicated attention to this matter. It is greatly appreciated.

Sincerely,

Joan McWilliams, Esq.

Smith College
School for Social Work
Northampton, Massachusetts 01063
T (413) 585-7952 F (413) 585-4456

September 24, 2016

Dear Joan:

I am writing this letter in support of the proposal to amend the Colorado Rules of Professional Conduct (CRCP) Rule 2.1 and Comment 5 to state that, in cases involving the allocation of parental rights and responsibilities, an attorney should advise the clients of the importance of minimizing the adverse impact that parental conflict can have on the minor children. I am delighted to learn that the proposal was unanimously approved by the Colorado Bar Association Family Law Section and by the local chapter of the American Academy of Matrimonial Lawyers as "being consistent with their Bounds of Advocacy."

I am writing to you in my role as the Maconda Brown O'Connor Chaired Professor in Research at the Smith School of Social Work. My educational credentials include a Master's degree in education from the University of Pennsylvania and a Master's degree in Legal Studies from the Yale School of Law, as well as a Ph.D. in Clinical/Community Psychology from the University of California at Berkeley. Most of my work revolves round the development, implementation, and evaluation of preventive interventions in schools and courts, with a major focus being supporting separating families in alternative dispute resolution. I was a key consultant for the development, training and evaluation of staff and students for The University of Denver's Resource Center for Separating and Divorcing Families and for its transition to the Out of Court Divorce program, as well as the Family Resolutions Specialty Court in Hampshire County, Massachusetts. I am engaged in research in related areas, producing many articles, chapters, parenting education curricula and two co-authored books. My research interests revolve around individuals, couples and families who are in the process of divorcing, remarrying, or figuring out how to co-parent during these life transitions. And through my private practice and consulting, my clinical expertise includes couples counseling and consultation, father involvement consultation, mediation, child custody evaluation, case consultation, expert witness testimony, and collaborative divorce.

In addition, I currently serve as President of the Association of Family and Conciliation Courts (AFCC), an interdisciplinary and international membership association of more than 5,000 judges, lawyers, custody evaluators, mediators, academics, and others dedicated to improving the lives of children and families through the resolution of family conflict. AFCC has been a leader in the development and dissemination of processes such as mediation, parenting coordination, education programs for divorcing parents, and we provide education for professionals to better help them to work effectively with issues related to children of separation and divorce and with the children themselves.

I am writing this letter as an individual; however, the proposed amendment is entirely consistent with the mission, vision and values of AFCC and the efforts we expend to shield children from the impact of family conflict. Moreover, it would serve to heighten awareness of this critical issue, not only among separating and divorcing parents, but among members of the bar.

I want to applaud your efforts and offer you my personal and wholehearted endorsement.

Sincerely,

Marsha Kline Pruett, PhD, MSL, ABPP
Maconda Brown O'Connor Professor
Smith College School for Social Work

Bonnie M. J. Schriner
Attorney and Mediator
777 South Wadsworth Boulevard, Suite 1-102
Lakewood, Colorado 80226-4330
Telephone 303.458.5100
Aspen • Denver • Durango • Glenwood Springs

October 23, 2016

Marcy Glenn, Attorney
Chair, Colo. Supreme Ct. Standing
Committee on Colorado Rules of Professional Conduct
Holland and Hart
PO Box 8749
Denver, CO 80201-8749

Re: Comment to Colorado Rules of Professional Conduct

Dear Ms. Glenn and Committee Members:

This letter is written to encourage your adoption of the proposed amendment to Comment 5 of Rule 2.1 of the Colorado Rules of Professional Conduct, which amendment reads:

> In a matter involving the allocation of parental rights and responsibilities, an attorney should consider advising the client that parental conflict can have a significant adverse effect on minor children.

As a family law attorney, a former social worker, an experienced litigator, and now and arbitrator and mediator, I have witnessed the damage caused to children by parental conflict and find it to be both textbook and pervasive.

The single best predictor of a bad outcome for the children of divorce is exposure to conflict between the parents. When the conflict of a litigated divorce ratchets up, it is incumbent on the lawyer to utilize the "Counselor at Law" appellation on their Colorado license to practice law. The lawyer must advise the warring parents that their conflict will damage their children if the children are exposed to the conflict, even by seemingly remote observations (e.g., telephone calls with friends, extended family conversations). Children know what's going on in their family and it is the adults' responsibility to shield their children from the adversity of adult divorce conflict.

The proposed Comment addition is *the least* an attorney and counselor at law can do to help minimize the preventable damage to children of divorce. Perhaps this Comment will encourage lawyers to similarly distance themselves from gratuitous and vituperative conduct that only stirs the cauldron of conflict which inevitably spills over to the children.

While I wish this advisement would be mandatory for counsel in these cases, this Comment will finally give voice to what psychologists and social scientists have long been telling us – a child's exposure to parental conflict is the single largest predictor of a bad outcome for the child.

Thank you for your consideration and for all the hard work you do.

Sincerely,

Bonnie M. J. Schriner

Bonnie M. J. Schriner
Attorney at Law

cc. J. McWilliams

Marcy Glenn

From: James Coyle <j.coyle@csc.state.co.us>
Sent: Monday, October 17, 2016 2:10 PM
To: Marcy Glenn
Cc: rottman, andrew; John Gleason
Subject: FW: Recently Adopted ABA Revised Resolution 109
Attachments: CO - CJ Rice Revised Resolution 109 Oct 2016 Ltr.pdf

Hi Marcy,

See attached letter. In that letter, the ABA Policy Implementation Committee (PIC) asks that Colorado consider new ABA model rule 8.4(g).

As you know, Colorado is one of the 25 jurisdictions that already has a rule that is similar to this ABA model rule. Our language refers to exhibiting or engendering bias rather than harassment or discrimination.

At the moment, I can think of only one published case in which a Colo. RPC 8.4(g) violation was charged and proven, *People v. Gilbert*, involving comments made against a judge:

http://www.coloradosupremecourt.com/pdj/Decisions/Gilbert,Decision%20and%20Order%20Imposing%20Sanctions,10PDJ067,01-14-11.pdf

I am not certain this office would have charged or proven harassment or discrimination, using the language of the new ABA model rule.

I leave it to the Standing Committee to decide whether or not to consider reviewing the Colorado RPC 8.4(g) in light of the new ABA model rule. An argument in favor of such consideration is uniformity amongst the states.

I can also tell you this office only receives a few RFIs alleging misconduct under Colo. RPC 8.4(g). We do use such rule in our office presentations to the law schools and in continuing legal education programs however. But again, I can only recall *Gilbert* as a case in which we made a formal complaint alleging a violation under our rule.

I am copying in Chief Justice Rice's counsel, Andy Rottman, and ABA PIC Chair John Gleason. John may want to comment.

Please let me know if you have any questions.

Jim

James C. Coyle
Attorney Regulation Counsel
COLORADO SUPREME COURT
1300 Broadway, Suite 500
Denver, CO 80202
303-928-[illegible]80 - Direct line
303-501-1141 - Fax
j.coyle@csc.state.co.us

website | facebook | newsletters

2015 ANNUAL REPORT

From: Grant, Kimley [mailto:Kimley.Grant@americanbar.org]
Sent: Thursday, September 29, 2016 11:12 AM
To: pflaherty@cobar.org; quail@ballardspahr.com; zobski@me.com; rgast@gjmlawfirm.com; James Coyle <j.coyle@csc.state.co.us>
Cc: Holtaway, John <John.Holtaway@americanbar.org>
Subject: Recently Adopted ABA Revised Resolution 109

Dear Bar Association Officers, Bar Admissions Director, ABA State Delegate, and Chief Disciplinary Counsel:

Attached please find a letter sent to Chief Justice Rice regarding recently adopted ABA Revised Resolution 109 that amends Rule 8.4 of the ABA Model Rules of Professional Conduct. Amended Model Rule 8.4 contains new paragraph (g) that establishes a black letter rule prohibiting harassment and discrimination related to the practice of law. It also contains three new Comments related to paragraph (g).

Please let me know if you have any questions. Thank you.

John

John A. Holtaway
Lead Senior Counsel
Client Protection and Policy Implementation
American Bar Association
321 N. Clark Street, 17th Floor
Chicago, IL 60654-7598
(312) 988-5298
Fax: (312) 988-5491
John.Holtaway@americanbar.org
http://www.americanbar.org

Kimley Grant | CPR Paralegal
American Bar Association | Center for Professional Responsibility
321 North Clark | Chicago, IL 60654-7598
T: (312) 988 5319 | F: (312) 988 5491
Kimley.Grant@americanbar.org | http://www.americanbar.org

Join us on Twitter and Facebook!

Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

Center for Professional Responsibility
Policy Implementation Committee
321 N. Clark Street
Chicago, IL 60610
Phone: (312) 988-5298
Fax: (312) 988-5491
John.Holtaway@americanbar.org

2016 – 2017

John S. Gleason, CHAIR
Burns, Figa & Will, P.C.
Greenwood Village, CO

MEMBERS

Lawrence Bloom
D.C. Office of Disciplinary Counsel
Washington, DC

Lawrence Bloom
D.C. Office of Disciplinary Counsel
Washington, DC

Kellie R. Early
National Conference of Bar Examiners
Madison, WI

Carla J. Freudenburg
Regulation Counsel
District of Columbia Bar
Washington, DC

Linda A. Gosnell
Lexington, KY

Helen Hierschbiel
Executive Director
Oregon State Bar
Tigard, OR

Janet Green Marbley
Lawyers' Fund for Client Protection
Columbus, OH

Ronald C. Minkoff
Frankfurt Karnit Klein & Selz
New York, NY

Patricia Sallen
Phoenix, AZ

Professor Victoria Vuletich
Vuletich Law Firm
Grand Rapids, MI

SPECIAL ADVISOR

Mark I. Harrison
Osborn Maledon, P.A.
Phoenix, AZ

STAFF

Art Garwin
Center Director
Chicago, IL

John A. Holtaway
Lead Senior Counsel
Chicago, IL

September 29, 2016

Honorable Nancy E. Rice
Chief Justice
Supreme Court of Colorado
2 East 14th Avenue
Denver, CO 80203

Re: Recent Amendment to Rule 8.4 of the ABA Model Rules of Professional Conduct

Dear Chief Justice Rice:

We take this occasion to report to you the recent amendment of Rule 8.4 of the ABA Model Rules of Professional Conduct with the hope that your Court will undertake a review of the changes and consider integrating them into your state's rules of professional conduct. These revisions and additions were the culmination of two years of work by the ABA Standing Committee on Ethics and Professional Responsibility ("Ethics Committee").
http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct.html

Amended Model Rule 8.4 contains new paragraph (g) that establishes a black letter rule prohibiting harassment and discrimination in the practice of law. It also contains three new Comments related to paragraph (g).

New paragraph (g) to Model Rule 8.4 is a reasonable, limited, and necessary addition to the Model Rules of Professional Conduct. It makes it clear that it is professional misconduct to engage in conduct that a lawyer knows or reasonably should know constitutes harassment or discrimination while engaged in conduct related to the practice of law. And as has already been shown in the jurisdictions that have such a rule, it will not impose an undue burden on lawyers. Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating and managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law. Amended Model Rule 8.4 (g) does not prohibit speech, thought, association, or religious practice. The rule does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with current rules of professional conduct.

Twenty-five jurisdictions have adopted anti-discrimination or anti-harassment provisions in the black letter of their ethics rules. To properly address this issue, the ABA adopted an anti-discrimination and anti-harassment provision in the black letter of the Model Rules. Studies on the perception of the public about the justice system and

lawyers support the need for the amendment to Model Rule 8.4.

Adopted Revised Resolution 109 and its accompanying Report can be found at: http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/final_revised_resolution_and_report_109.authcheckdam.pdf

The Center for Professional Responsibility Policy Implementation Committee has created a Power Point Presentation to assist courts, rules committees, the legal profession, and the public to understand the amendments to Model Rule 8.4.
https://www.dropbox.com/s/6seu8x1i0m41116/Model%20Rules%208_4%20Presentation_Final.wmv?dl=0

We can provide you with electronic copies of Revised Resolution 109 with Report and discussion points if you or the Chair of your state review committee contact John Holtaway, Policy Implementation Counsel, john.holtaway@americanbar.org, (312) 988-5298. We have sent copies of this letter to your State Bar Association President, State Bar Association Executive Director, State Bar Admissions Director, and Chief Disciplinary Counsel, and ABA State Delegate.

The Center for Professional Responsibility Policy Implementation Committee is available to assist states with the review process. Members of the Committee, including members of the Ethics Committee, are available to meet in person or telephonically with review committees.

The work product of the Ethics Committee reflects the ABA's continued leadership in professional responsibility law. The ABA looks forward to assisting you on this important project.

Respectfully,

John S. Gleason, Chair
Center for Professional Responsibility Policy Implementation Committee