

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

AGENDA

November 16, 2012, 9:00 a.m.
OARC Conference Room, 1560 Broadway, 19th Floor
Call-in number: 877-820-7831, then dial Room Number 7413906#

1. Approval of minutes – July 13, 2012 meeting [pages 1-23] [The submitted minutes -- not yet approved by the Committee -- are omitted from this posting.]
2. Draft cover letter to Supreme Court concerning work of Pretexting Subcommittee [Marcy Glenn, pages 24-27]
3. New business:
 - a. Proposed housekeeping amendment to C.R.P.C. 1.13, cmt. [3] [Tony van Westrum, pages 28-40]
 - b. OARC- and COLTAF-proposed amendments to C.R.P.C. 1.15 [John Gleason; Diana Poole, COLTAF Executive Director; and Phil Johnson, COLTAF Board President, pages 41-57]
 - c. August 2012 Amendments to ABA Model Rules [Marcy Glenn, pages 58-85]
4. Administrative matters:
 - a. Select next meeting date
5. Adjournment (before noon)

Chair
Marcy G. Glenn
Holland & Hart LLP
P.O. Box 8749
Denver, Colorado 80201
(303) 295-8320
mglenn@hollandhart.com

DRAFT – FOR CRPC STANDING COMMITTEE REVIEW

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

November __, 2012

The Honorable Nathan B. Coats
Colorado Supreme Court
101 W. Colfax Avenue, Ste. 800
Denver, CO 80202-5315

The Honorable Monica Márquez
Colorado Supreme Court
101 W. Colfax Avenue, Ste. 800
Denver, CO 80202-5315

Re: Considered, But Rejected, Potential Amendments to CRPC 8.4(c), to Facilitate “Pretexting”

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). Enclosed are the following materials, which relate to the Standing Committee’s consideration of potential amendments to the Colorado Rules of Professional Conduct (CRPC), to address the issue of “pretexting” by lawyers:

1. Final Report of the Pretexting Subcommittee (the Subcommittee), distributed for discussion at the Standing Committee’s January 6, 2012 meeting.
2. Supplemental Report of the Pretexting Subcommittee, distributed for discussion at the Standing Committee’s July 13, 2012 meeting.
3. Approved Minutes of the Standing Committee’s January 6, 2012 meeting. *See* pages 4-17.
4. Approved Minutes of the Standing Committee’s July 13, 2012 meeting. *See* pages 3-23.

The Standing Committee voted against recommending any pretexting-related rule changes to the Court. However, in light of (a) the substantial work devoted to potential amendments to CRPC 8.4(c), and (b) the division of strongly held views among members of the Standing Committee on whether to recommend those amendments, the Standing Committee concluded that it would share its work product with the Court, for the Court to review and use as it deems appropriate.

The enclosed materials document the intense study the Subcommittee made before making recommendations to the Standing Committee, and the Standing Committee's prolonged discussions before ultimately voting against recommending any rule changes. Therefore, I will provide only a brief summary of the background to these considered, but rejected, proposed rule amendments.

Background. The Intellectual Property Section of the CBA approached the Standing Committee with concerns that certain CRPC precluding deceptive conduct might limit efforts that attorneys sometimes undertake in civil litigation in order to gain information, and to comply with their obligations under Rule 11 of the Colorado Rules of Civil Procedure, before commencing a civil action. For example, before filing suit to challenge trademark infringement, attorneys may use "testers" to feign interest in the purportedly infringing product. Pretexting also occurs in connection with lawsuits under federal and state statutes that preclude employment, public accommodation, and housing discrimination: before filing suit, attorneys representing the plaintiff might send a tester to attempt to rent an apartment (or apply for a job or rent a hotel room) from the purportedly discriminating defendant. In the criminal context, prosecutors regularly rely on deceptive conduct by law enforcement personnel, including, for example, through the use of undercover informants. These activities could be deemed to violate CRPC 4.1 (prohibiting lawyers, in the course of representing a client, from knowingly making "a false statement of material fact" to a third person); CRPC 8.4(c) (defining as professional misconduct a lawyer's engagement in "conduct involving dishonesty, fraud, deceit or misrepresentation"); and other CRPC.

The Subcommittee examined the issue over eighteen months. The Subcommittee was comprised of both Standing Committee members (both lawyers and judges) and non-members with an interest in the pretexting issue. In addition, the Subcommittee solicited and obtained the views of a wide range of additional attorneys, including the United States Attorney for the District of Colorado, the Federal Public Defender for the District of Colorado, Regional Counsel for Region VIII of the United States Department of Housing and Urban Development, the Colorado Attorney General, the State Public Defender, the Colorado Criminal Defense Bar, the Colorado District Attorney's Council, the CBA Intellectual Property Section, and the International Trademark Association. The Subcommittee studied the issue in depth, including by examining other states' ethics rules that address pretexting issues.

Subcommittee Recommendations. At the Standing Committee's January 6, 2012 meeting, a majority of the Subcommittee initially proposed the following exception (in italics) to CRPC 8.4(c):

It is professional misconduct for a lawyer to:

* * *

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, *except that a lawyer may direct, advise, or supervise others in lawful covert activity that involves misrepresentation or deceit, when either:*

(1)(A) the misrepresentation or deceit is limited to matters of background, identification, purpose, or similar information, and (b) the lawyer reasonably and in good faith believes that (i) a violation of civil or constitutional law has taken place or is likely to take place in the immediate future, and (ii) the cover activity will aid in the investigation of such a violation; or

(2)(A) the lawyer is a government lawyer and the lawyer reasonably and in good faith believes that (i) the action is within the scope of the lawyer's duties in the enforcement of law, and (ii) the purpose of the covert activity is either to gather information related to a suspected violation of civil, criminal, or constitutional law, or to engage in lawful intelligence-gathering.

Two Subcommittee members believed that any exception should be limited to either government attorneys or government attorneys involved in criminal prosecutions that implicate public safety. At the Standing Committee's January 6, 2012 meeting, the Subcommittee's proposal failed to garner the support of a majority of the Standing Committee, which asked the Subcommittee to further study the issue and address particular concerns.

At the Standing Committee's July 13, 2012 meeting, a majority of the Subcommittee proposed the following exception (in italics) to CRPC 8.4(c):

It is professional misconduct for a lawyer to:

* * *

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities;

A two-member minority of the Subcommittee proposed the following narrower exception (in italics) to CRPC 8.4(c):

It is professional misconduct for a lawyer to:

* * *

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, *except that a lawyer representing the government may advise, direct, or supervise others, including clients, law enforcement officers, or investigators, who participate in lawful investigative activities;*

Alternatively, if the exception were not limited to government lawyers engaged in law enforcement activities, the Subcommittee's minority recommended making no rule change.

Standing Committee Action. After lengthy discussion and intense debate at its July 13, 2012 meeting, a majority of the Standing Committee voted against recommending any amendments to the Court. However, as noted above, the Standing Committee voted to provide its work product to the Court. The arguments for and against the various proposed amendments are set forth in detail in the enclosed materials.

The attached documents are lengthy and, for the Court's convenience, I am sending both hard and electronic copies of this letter and attachments.

Sincerely,

Marcy G. Glenn
of Holland & Hart LLP

MGG:dc
Enclosures
cc: Members of the Standing Committee (with enclosures)

COLORADO RULES OF PROFESSIONAL CONDUCT

As adopted by the Colorado Supreme Court on April 12, 2007,
Effective Jan. 1, 2008

RULE 1.13. ORGANIZATION AS CLIENT

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

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

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

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

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

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

(d) Paragraph (c) shall not apply with respect to the information relating to a lawyer's representation of an organization to investigate an alleged violation of

law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

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

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

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

COMMENT

The Entity as the Client

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

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other

constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

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



[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

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

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) – (7). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2), 1.6(b)(3) and 1.6(b)(4) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

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

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

Government Agency

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

Clarifying the Lawyer's Role

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

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

Dual Representation

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

Derivative Actions

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

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

RULE 1.14. CLIENT WITH DIMINISHED CAPACITY

ABA Model Rule

Client-Lawyer Relationship

Rule 1.13 Organization As Client

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

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Client-Lawyer Relationship

Rule 1.13 Organization As Client - Comment

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*

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other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

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In similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

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relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

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Colorado Lawyer Trust Account Foundation

September 5, 2012

Officers and
Board of Directors

Phillip E. Johnson
President

Kalina C. Banks
Vice-President

Mark A. Hermundstad
Secretary

Jay B. Zajicek
Treasurer

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,
Safekeeping Property

Dear Ms. Glenn and Members of the Standing Committee:

The Colorado Lawyer Trust Account Foundation (COLTAF) and the Supreme Court Office of Attorney Regulation Counsel (OARC) are proposing amendments to Colorado Rule of Professional Conduct 1.15 to require lawyers to hold their COLTAF accounts in financial institutions that pay interest or dividend rates on those accounts that are the same as those paid on comparable non-COLTAF accounts. The rule change will ensure the fair treatment of COLTAF accounts, and will help maximize the resources available for Colorado's civil legal aid delivery system.

COLTAF first explored the concept of requiring rate comparability in Colorado back in 2006 and 2007, when only twelve other states had adopted comparability rules. In the fall of 2006, COLTAF hired an experienced IOLTA program consultant (IOLTA, or Interest on Lawyers Trust Accounts, is the generic name for programs like COLTAF) to study the expected revenue impact of a comparability rule in Colorado. That expert found a significant "comparability gap" (the difference between rates paid on large COLTAF accounts as opposed to the rates paid on comparable non-COLTAF accounts), and estimated that a comparability rule would result in a net revenue gain for COLTAF of \$1.78 million per year.

The COLTAF Board, and in particular its Banking Committee, spent many months considering and debating the consultant's report and drafting a proposed rule, with considerable help from experts at the American Bar Association (ABA) and the National Association of IOLTA Programs (NAIP). In April of 2007, the COLTAF Banking Committee decided to defer further consideration of a proposed rule change in Colorado until COLTAF transitioned to a more sophisticated data base that would be required to effectively implement a comparability rule. The Committee concluded that

Jonathan D. Asher
Christopher P. Beall
William A. Bianco
Lisa M. Dalley
Thomas J. Flanagan, Jr.
Susan P. Klopman
Leslie Lawson
Kimberly E. Lord
Victoria E. Lovato
William R. Neff
Kelth Newbold
Jennifer M. Vagher

Diana M. Poole
Executive Director

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



deferral would also allow Colorado to learn more from other states, as more and more were in the process of adopting and implementing their own comparability rules.

Thirty-three states have now adopted comparability, and many of the questions that COLTAF grappled with in 2006 and 2007 have been answered by the experience in other states. The revenue impact has, of course, varied dramatically, depending on whether a particular rule was implemented when prevailing rates were much higher or in the current ultra-low rate environment. A comparability requirement does not ensure higher IOLTA rates; it simply ensures equity between rates paid on IOLTA accounts and those paid on comparable non-IOLTA accounts.

In the fall of 2010, COLTAF hired another IOLTA program consultant, this one with a particular expertise in comparability. This consultant concluded that, although of minimal short-term value given the current rate environment, a comparability rule would make economic sense for Colorado over the longer term. He determined that, under a mid-range of interest rates, comparable COLTAF rates should exceed non-comparable COLTAF rates (based on historical averages) by more than a full percentage point, generating approximately \$800,000 annually in additional interest. In higher rate environments, he concluded, that amount could easily be doubled to over \$1.6 million. He emphasized that a comparability rule is probably more desirable now than it was in 2007, because given the new economic and regulatory environment in which banks are operating, COLTAF is unlikely to experience even as much success as it has in the past asking banks to voluntarily increase the rates paid on their COLTAF accounts. The bankers on COLTAF's Board echo this new reality.


With this new report in hand, with the consultant's continued assistance, and again with significant input from ABA and NAIP experts, the COLTAF Banking Committee revised its earlier draft of a proposed comparability rule to incorporate the wisdom and experience gained by other states during the intervening five years. This revised draft, which has been approved by the COLTAF Board and fully vetted by Regulation Counsel, is attached.


The proposed changes will have little or no impact on lawyers and law firms, as they will not be required to determine whether their banks are paying comparable rates on their COLTAF accounts. COLTAF will have the responsibility of working with financial institutions to verify that the COLTAF accounts they offer are paying comparable rates, and OARC will continue to have the enforcement responsibility if a bank that chooses to offer COLTAF accounts fails to comply with the requirements of Rule 1.15.

In addition to a redlined copy of the proposed rule, we have also enclosed a document entitled "The Case for COLTAF Interest Rate Comparability," which addresses some of the most frequently asked questions about comparability, and a list of the states that have already adopted IOLTA rate comparability.

We respectfully request your prompt consideration and approval of the proposed amendments so that COLTAF and, more importantly, the civil legal aid delivery system, will be in a position to benefit as soon as the interest rate environment begins to improve.

Sincerely,


Philip E. Johnson, Esq.
COLTAF Board President


John S. Gleason, Esq.
Regulation Counsel

**Proposed changes to C.R.P.C. 1.15 to implement comparability:
Draft #9 – Tracking changes from the current rule**

RULE 1.15. SAFEKEEPING PROPERTY

General Duties of Lawyers Regarding Property of Clients and Third Parties

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

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

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

Required Bank Accounts

(d) Every lawyer in private practice in this state shall maintain in a financial institution doing business in Colorado, in the lawyer's own name, or in the name of a partnership of lawyers, or in the name of an entity authorized pursuant to C.R.C.P. 265 of which the lawyer is a member, or in the name of the lawyer or entity by whom the lawyer is employed or with whom the lawyer is associated:

(1) A trust account or accounts, separate from any business and personal accounts and from any fiduciary accounts that the lawyer may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which the lawyer shall deposit funds entrusted to the lawyer's care and any advance payment of fees that has not been earned or advance payment of expenses that have not been incurred. A lawyer shall not be required to maintain a trust account if the lawyer never receives such funds or payments; and,

(2) A business account or accounts into which all funds received for professional services shall be deposited. All business accounts, as well as all deposit slips and

all checks drawn thereon, shall be prominently designated as a "professional account" or an "office account".

(e) With respect to trust accounts established pursuant to this Rule:

(1) One or more of the trust accounts may be a Colorado Lawyer Trust Account Foundation ("COLTAF") account or accounts, as described in Rule 1.15(h)(2). All COLTAF accounts shall be designated "COLTAF Trust Account."

(2) All such trust accounts, whether general or specific, as well as all deposits slips and checks drawn thereon, shall be prominently designated as a "trust account." Nothing herein shall prohibit any additional descriptive designation for a specific trust account.

(3) Trust accounts shall be maintained only in financial institutions doing business in Colorado that are approved by the Regulation Counsel based upon policy guidelines adopted by the Board of Trustees of the Colorado Attorneys' Fund for Client Protection. Regulation Counsel shall annually publish a list of such approved institutions. A financial institution shall be approved if it shall file with the Regulation Counsel an agreement, in a form provided, to report to the Regulation Counsel in the event any properly payable trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored; any such agreement shall apply to all branches of the financial institution and shall not be canceled except on thirty-days notice in writing to the Regulation Counsel. The agreement shall further provide that all reports made by the financial institution shall be in the following format: (1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (2) in the case of an instrument that is presented against insufficient funds but which instrument is honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any; if an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds. In addition, each financial institution approved by the Regulation Counsel must cooperate with the COLTAF program, ~~and must offer a COLTAF account to any lawyer who wishes to open one.~~ In addition to the reports specified above, approved financial institutions shall agree to cooperate fully with the Regulation Counsel and to produce any trust account or business account records on receipt of a subpoena therefore in connection with any proceeding pursuant to C.R.C.P. 251. Nothing herein shall preclude a financial institution from charging a lawyer or law firm for the reasonable cost of producing the reports and records required by this Rule, but such charges shall not be a transaction cost to be charged against funds

payable to the COLTAF program. Every lawyer or law firm maintaining a trust account in this state shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements by financial institutions mandated by this Rule and shall indemnify and hold harmless the financial institution for its compliance with such reporting and production requirement. A financial institution shall be immune from suit arising out of its actions or omissions in reporting overdrafts or insufficient funds or producing documents under this Rule. The agreement entered into by a financial institution with the Regulation Counsel shall not be deemed to create a duty to exercise a standard of care and shall not constitute a contract for the benefit of any third parties that may sustain a loss as a result of lawyers overdrawing lawyer trust accounts.

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

Trust Account Requirements and Management; COLTAF Accounts

(f) All trust accounts shall be maintained in interest or dividend-bearing insured depository accounts; provided, that with the consent of the client or third person whose funds are in the account, an account in which interest is paid to the client or third person need not be an insured depository account. All COLTAF accounts shall be insured depository accounts. For the purpose of this Rule, "insured depository accounts" shall mean government insured accounts at a regulated financial institution, on which withdrawals or transfers can be made on demand, subject only to any notice period which the institution is required to reserve by law or regulation.

g) A lawyer may deposit funds reasonably sufficient to pay anticipated service charges or other fees for maintenance or operation of such account into trust accounts. Such funds shall be clearly identified in the lawyer's records of the account.

(h) COLTAF Accounts

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

(2) If the funds are not held in accounts with the interest or dividends paid to clients or third persons as provided in ~~subparagraph~~section (h)(1) of this Rule, a

lawyer or law firm shall establish a COLTAF account, which is a pooled interest-bearing insured depository account for funds of clients or third persons that are nominal in amount or are expected to be held for a short period of time in compliance with the following provisions:

(a) No interest or dividends from such an account shall be payable to a lawyer or law firm, and no lawyer or law firm shall receive any financial benefit or other economic concession from the financial institution for maintaining such an account.

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

(c) A lawyer or law firm depositing funds in a COLTAF account shall direct the depository institution:

(i) To remit electronically to COLTAF monthly interest or dividends, net of service charges or allowable reasonable COLTAF fees as defined in subparagraph (h)(2)(g) of this Rule, if any are charged, computed in accordance with the institution's standard accounting practice, at least quarterly, to COLTAF; and

(ii) To transmit electronically with each remittance to COLTAF a statement showing as to each COLTAF account: the name of the lawyer or law firm on whose account the remittance is sent; and ; the account number; the remittance period; and the rate of interest or dividends applied; the account balance on which the interest or dividends are calculated; the amount of interest or dividends paid; the amount and type of allowable reasonable COLTAF fees, if any, deducted; the amount of net earnings remitted; and such other information as is reasonably required by COLTAF;

(d) A COLTAF account may be established as:

(i) a checking account paying preferred interest rates, such as market based or indexed rates;

(ii) a public funds interest-bearing checking account such as an account used for other non-profit organizations or government agencies;

(iii) an interest-bearing checking account such as a negotiable order of withdrawal (NOW) account, or business checking account with interest;

(iv) a business checking account with an automated investment feature in overnight daily financial institution repurchase agreements or money market funds. A daily financial institution repurchase agreement shall be fully collateralized by U.S. Government Securities (meaning U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States government), and may be established only with an eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. A "money market fund" is an investment company registered under the Investment Company Act of 1940, as amended, that is qualified to hold itself out to investors as a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act. A money market fund shall be invested solely in U.S. Government Securities, or repurchase agreements fully collateralized by U.S. Government Securities, and, at the time of the investment, shall have total assets of at least two hundred fifty million dollars (\$250,000,000);

~~(v) any other interest or dividend bearing account offered by the eligible institution to its non-COLTAF customers, which is commercially reasonable to use for a pooled account of short term or nominal amount funds.~~

(e) The rate of interest or dividends payable on any COLTAF account shall be no less than (i) the highest interest or dividend rate generally available from the financial institution on non-COLTAF accounts when the account meets the same eligibility requirements, if any, or (ii) the rate set forth in subparagraph (h)(2)(f) of this Rule. In determining the highest interest or dividend rate generally available from the financial institution to its non-COLTAF customers, the institution may consider, in addition to the balance in the COLTAF account, factors customarily considered by the institution when setting interest or dividends rates for its non-COLTAF accounts, provided that such factors do not discriminate between COLTAF accounts and non-COLTAF accounts and that these factors do not include the fact that the account is a COLTAF account. The financial institution may choose simply to pay on a COLTAF account the highest interest or dividend rate generally available on its comparable non-COLTAF accounts

in lieu of actually establishing and maintaining the COLTAF account in the comparable highest interest or dividend rate product.

(f) In lieu of the rate set forth in subpart (i) of subparagraph (h)(2)(e) above, the financial institution may choose to pay on all of its COLTAF deposits a benchmark rate, which COLTAF is authorized to set periodically, but not more frequently than every six months, to reflect an overall comparable rate offered by financial institutions in Colorado net of allowable reasonable COLTAF fees. Election of the benchmark rate is optional and financial institutions may choose to maintain their eligibility by paying the rate set forth in subpart (i) of subparagraph (h)(2)(e) above.

(g) "Allowable reasonable COLTAF fees" are sweep fees in amounts not to exceed those assessed against the comparable non-COLTAF accounts used to satisfy subparagraph (h)(2)(e) of this Rule and a reasonable fee to cover the cost of complying with the remittance and reporting requirements described in subparagraph (h)(2)(c) of this Rule. All other fees are the responsibility of, and may be charged to, the lawyer or law firm maintaining the COLTAF account. Fees in excess of the earnings accrued on one COLTAF account for any period shall not be taken from the principal of any COLTAF account or from earnings accrued on any other COLTAF account.

(h) Nothing contained in this subparagraph (h)(2) shall preclude a financial institution either from paying a higher interest or dividend rate on a COLTAF account than is otherwise required by this Rule or from electing to waive any or all fees associated with COLTAF accounts.

(i) Nothing in this Rule shall be construed to require the Regulation Counsel or any lawyer or law firm to make independent determinations about whether a financial institution's COLTAF account meets the requirements of subparagraph (h)(2) of this Rule. COLTAF shall make all such determinations and shall at least annually publish a list of approved financial institutions that are eligible to establish and maintain COLTAF accounts.

(dj) The provisions of this subparagraph (h)(2) shall not apply in those instances where it is not feasible to establish a trust account for the benefit of COLTAF for reasons beyond the control of the lawyer or law firm, such as the unavailability of a financial institution in the community that offers such an account.

(3) If a lawyer or law firm discovers that funds of any client or third person have mistakenly been held in a trust account for the benefit of COLTAF in a sufficient

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

(4) Information necessary to determine compliance or justifiable reasons for noncompliance with subparagraph (h)(2) shall be included in the annual attorney registration statement. COLTAF shall assist the Colorado Supreme Court in determining whether lawyers or law firms have complied in establishing the trust account required under subparagraph (h)(2). If it appears that a lawyer or law firm has not complied where it is feasible to do so, the matter may be referred to the Regulation Counsel for investigation and proceedings in accordance with C.R.C.P. 251.

(i) Management of Trust Accounts.

(1) ATM or Debit Cards. A lawyer shall not use any debit card or automated teller machine card to withdraw funds from a trust account.

(2) All trust account withdrawals and transfers shall be made only by a lawyer admitted to practice law in this state or by a person supervised by such lawyer and may be made only by authorized bank or wire transfer or by check payable to a named payee.

(3) Cash withdrawals and checks made payable to "Cash" are prohibited.

(4) Cancelled Checks. A lawyer shall request that the lawyer's trust account bank return to the lawyer, photo static or electronic images of cancelled checks written on the trust account. If the bank provides electronic images, the lawyer shall either maintain paper copies of the electronic images or maintain the electronic images in readily obtainable format.

(5) Persons Authorized to Sign. Only a lawyer admitted to practice law in this state or a person supervised by such lawyer shall be an authorized signatory on a trust account.

(6) Reconciliation of Trust Accounts. No less than quarterly, a lawyer shall reconcile the trust account records both as to individual clients and in the aggregate with the lawyer's trust account bank statement(s).

Required Accounting Records; Retention of Records; Availability of Records

(j) A lawyer, whether practicing as a sole practitioner, in a partnership, or through an entity authorized pursuant to C.R.C.P. 265, shall maintain in a current status and retain for a period of seven years after the event that they record:

(1) Appropriate receipt and disbursement records of all deposits in and withdrawals from all trust accounts and any other bank account that concerns the lawyer's practice of law, specifically identifying the date, payor and description of each item deposited as well as the date, payee, and purpose of each disbursement. All trust account monies intended for deposit shall be deposited intact without deductions or "cash out" from the deposit and the duplicate deposit slip that evidences the deposit must be sufficiently detailed to identify each item deposited;

(2) An appropriate record-keeping system identifying each separate person or entity for whom the lawyer holds money or property in trust, for all trust accounts, showing the payor of all funds deposited in such accounts, the names and addresses of all persons for whom the funds are or were held, the amount of such funds, the description and amounts of charges or withdrawals from such accounts, and the names of all persons to whom any such funds were disbursed;

(3) Copies of all retainer and compensation agreements with clients (including written communications setting forth the basis or rate for the fees charged by the lawyer as required by Rule 1.5(b));

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

(5) Copies of all bills issued to clients;

(6) Copies of all records showing payments to any persons, not in the lawyer's regular employ, for services rendered or performed;

(7) All bank statements and photo static copies or electronic copies of all canceled checks; and,

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

(k) The financial books and other records required by this Rule shall be maintained in accordance with one or more of the following recognized accounting methods: the

accrual method, the cash basis method, and the income tax method. All such accounting methods shall be consistently applied. Bookkeeping records may be maintained by computer provided they otherwise comply with this Rule and provided further that printed copies can be made on demand in accordance with this Rule. They shall be located at the principal Colorado office of each lawyer, partnership, professional corporation, or limited liability corporation.

(l) Dissolutions. Upon the dissolution of any partnership of lawyers or of any professional corporation or limited liability corporation, the former partners or shareholders shall make appropriate arrangements for the maintenance by one of them or by a successor firm of the records specified in subsection (j) of this Rule.

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

COMMENT

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

[2] Trust accounts containing funds of clients or third persons held in connection with a representation must be interest or dividend-bearing for the benefit of the client or third person or for the benefit of the Colorado Lawyer Trust Account Foundation where the funds are nominal in amount or expected to be held for a short period of time. A lawyer should exercise good faith judgment in determining initially whether funds are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing account for the benefit of the client or third person. The lawyer should also consider such other factors as (i) the costs of establishing and maintaining the account, service charges, accounting fees, and tax report procedures; (ii) the nature of the transaction(s) involved; and (iii) the likelihood of delay in the relevant proceedings. A lawyer should review at reasonable intervals whether changed circumstances require further action respecting the deposit of such funds, including without limitation the action described in subparagraph 1.15(h)(3).

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

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

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

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

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

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

Proposed Amendments to Colorado Rule of Professional Conduct 1.15

THE CASE FOR COLTAF INTEREST RATE COMPARABILITY

The COLTAF Board is proposing amendments to Colorado Rule of Professional Conduct 1.15 to require lawyers to hold their COLTAF accounts in financial institutions that pay interest or dividend rates on those accounts that are the same as those paid on comparable non-COLTAF accounts.

A comparability rule is necessary to ensure the fair treatment of COLTAF accounts.

- Historically there has been a significant disparity between interest rates paid on COLTAF accounts and those paid on comparable non-COLTAF accounts, most notably with respect to higher-balance COLTAF accounts. This is not the case in the current interest rate environment when virtually all accounts are paying close to zero, but with a comparability rule in place, COLTAF would be in a position to benefit once banks decide to begin increasing their rates and/or re-introducing higher-yielding products to customers with qualifying balances.
- Last year, COLTAF retained an experienced IOLTA program consultant who, after reviewing COLTAF data from 2006-2010, concluded that, although bank products and pricing are currently in flux and may not revert to historic averages or may take an extended time to do so, a rate comparability rule would be advantageous for COLTAF in the long term.
- COLTAF has engaged in time-consuming efforts over the years to get banks to increase their COLTAF rates voluntarily. Even following COLTAF's most recent concerted effort in 2006 and 2007, which was done under very favorable economic conditions and met with considerable success, the difference between the COLTAF rate and the rate paid on the higher-yielding products favored for large balance accounts averaged 165 basis points. In other words, had a comparability rule been in place during this time, COLTAF rates at those financial institutions offering the higher-yielding cash management products would have been approximately 165 basis points higher than it was.
- The bankers who serve on COLTAF's Board think that, because of significant changes in the economic and regulatory environment in which banks operate, it is unlikely that COLTAF will be able to replicate in the foreseeable future the level of success achieved in the past in getting banks to pay more equitable COLTAF rates voluntarily. Furthermore, voluntarily negotiated rates do not automatically keep pace with increases in deposit rates generally, but they are frequently lowered as soon as rates go down, so it is difficult to reach and maintain fair rates at all participating banks for any extended period.
- COLTAF is one of the most important funding sources for Colorado's civil legal aid delivery system. It provides annual grants to Colorado's staffed, statewide legal aid

program (Colorado Legal Services), as well as to all of the bar-sponsored *pro bono* programs around the state and other justice-related projects. When COLTAF accounts are treated unfairly by banks, it diminishes the resources available for these important purposes.

A majority of states have already addressed this basic issue of fairness by adding a comparability rule to their IOLTA requirements.

- To date, IOLTA programs in 33 states have adopted rate comparability (see attached). There is no “model rule” per se, but effective comparability rules include the following components:
 - A requirement that all lawyers maintain their IOLTA accounts in financial institutions that pay comparable rates on those accounts.
 - A provision authorizing the use of higher-yielding products for IOLTA accounts, typically government collateralized repurchase agreements (repos) and government money market funds.
 - A provision limiting the bank service charges that may be charged against an IOLTA account to a discrete list of allowable reasonable fees.
- States that adopted comparability in a more normal interest rate environment experienced dramatic increases in IOLTA revenue. That would obviously not be the case now in this ultra-low interest rate environment, but adoption of a comparability rule would put COLTAF in a better position once rates start to rise.

Although banks may not be happy to pay higher rates on some COLTAF accounts, based on the experience of other IOLTA programs, they will comply.

- Across the country, we are not aware of any financial institution that has stopped offering IOLTA accounts as a result of a standard comparability rule, like the one proposed here and those adopted in 33 other states.
- A comparability rule does not regulate banks; it regulates lawyers by requiring them to maintain their COLTAF accounts in approved financial institutions that meet COLTAF rate comparability requirements. Banks are not required to offer COLTAF accounts under the current rule, and doing so under the revised rule would remain completely voluntary. Banks are not required to offer any product for COLTAF accounts that they do not already offer their other customers. Presumably these products are profitable or they would not be offered.
- A comparability rule does not compare rates among banks, but simply ensures that COLTAF accounts receive the best rate for which they qualify at a particular bank.

- A comparability rule does not set rates. The proposed benchmark rate, which is intended to reflect an overall comparable rate for Colorado, is entirely voluntary, and is included simply as an administrative convenience for banks that would prefer not to evaluate their specific product lines for comparability purposes. Paying the benchmark rate results in a determination of compliance without further review of specific bank products and accounts. Those comparability states that have benchmark rates report that many banks favor this option because of administrative efficiencies and predictability. Inclusion of a benchmark also benefits COLTAF because it simplifies rule implementation and ongoing compliance monitoring.
- Even with a comparability rule in place, COLTAF will continue its ongoing efforts to maintain good relationships with the banks in Colorado. COLTAF will continue to maintain a “Prime Partner” Leadership Program to recognize those banks that waive fees and voluntarily pay more-than-comparable rates on COLTAF accounts.

The higher-yielding products that are authorized under comparability rules (including COLTAF’s proposed rule) secure the highest comparable rates for IOLTA accounts while still ensuring the safety and liquidity of trust account funds.

- The repos are of the highest quality (U.S. government collateralized) and shortest duration (overnight) and thus present little risk of market loss.
- The money market funds are those which invest in the highest quality government securities.
- Because of the overnight nature of the sweep feature, the functionality of a COLTAF account would not change since all funds would be available in the deposit accounts prior to the start of each business day.
- The sweep products are unlikely to be actually used in any event. The states already operating under comparability rules report that the vast majority of financial institutions do not physically sweep IOLTA funds since it is more economical to simply pay the applicable rate (less the sweep fee) and avoid the administrative expenses associated with sweep accounts.
- COLTAF accounts will continue to enjoy unlimited FDIC insurance through December 31, 2012, at which time, if there are no further extensions of the unlimited coverage, they will become subject to the new standard deposit insurance limit of \$250,000 (still significantly more protection than the \$100,000 limit, which was considered an adequate safety parameter for COLTAF accounts in the past).

The impact of the proposed amendments on lawyers and law firms would be minimal.

- Lawyers and law firms would not be required to move their accounts to banks that pay the highest COLTAF rates. (Although COLTAF has always encouraged lawyers to use

financial institutions that offer the most favorable COLTAF rates, this rule does not require them to do so.)

- Lawyers and law firms would not be required to contact their banks to request higher rates. Rather, COLTAF would initiate implementation and compliance on a bank by bank basis and would communicate directly with any affected law firm.
- In the unlikely event that a bank chose to actually establish the higher-yielding sweep product (as opposed to simply mirroring the rate, which has been the experience of other states), the lawyers and law firms affected (i.e., those whose COLTAF accounts have average balances large enough to qualify for the higher-yielding product) would need to complete new bank forms.
- As lawyers and law firms are asked to do more in response to the unfolding civil justice crisis in Colorado, they will presumably favor efforts to maximize the resources made available for that purpose through COLTAF.

IOLTA Rate Comparability

As of 9/1/12, the 33 jurisdictions noted on this list have adopted IOLTA rate comparability. For purposes of this list, IOLTA rate comparability means that the IOLTA legislation, rules, court or legislatively-authorized regulations and/or guidelines, when read as a whole, provide that financial institutions that choose to offer IOLTA accounts must only pay an interest rate or dividend on IOLTA accounts that is no less than the highest interest rate or dividend generally available from that financial institution to its own non-IOLTA customers when the IOLTA account meets the same minimum balance or other eligibility qualifications.

The jurisdictions are:

Alabama
Arkansas
California
Connecticut
Delaware
District of Columbia
Florida
Hawaii
Idaho
Illinois
Indiana
Kentucky
Louisiana
Maine
Maryland
Massachusetts
Michigan
Minnesota
Mississippi
Missouri
New Mexico
New York
North Carolina
Ohio
Pennsylvania
Rhode Island
South Carolina
Tennessee
Texas
Utah
Washington
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Prepared by the ABA Commission on IOLTA/NAIP Joint Technical Assistance Committee

**AUGUST 2012 AMENDMENTS TO
ABA MODEL RULES OF PROFESSIONAL CONDUCT**

Rule 1.0 Terminology

(a) “Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(g) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

(n) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and ~~e-mail~~ electronic communications. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

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Screened

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[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other ~~materials~~ information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other ~~materials~~ information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

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Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[6-8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.4 Communication

(a) A lawyer shall:

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

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

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

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

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

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

Comment

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Communicating with Client

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

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Rule 1.6 Confidentiality of Information

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

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

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

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

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

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

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

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

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment

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Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than

the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

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

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

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to

disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[186] Paragraph (c) requires a lawyer ~~must~~ to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

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

Former Client

[2018] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

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Rule 1.17 Sale of Law Practice

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

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

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

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

(1) the proposed sale;

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

(3) the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

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

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

Comment

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Client Confidences, Consent and Notice

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

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Rule 1.18: Duties to Prospective Client

(a) A person who ~~discusses~~ consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has ~~had discussions with~~ learned information from a prospective client shall not use or reveal that information ~~learned in the consultation~~, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

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

(ii) written notice is promptly given to the prospective client.

Comment

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's ~~discussions~~ consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] ~~Not all persons who communicate information to a lawyer are entitled to protection under this Rule. A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not~~

occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. A person who communicates Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client," ~~within the meaning of paragraph (a).~~ Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

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[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit ~~the initial interview~~ the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition ~~conversations~~ a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

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Rule 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Comment

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[2] Paragraph (b) recognizes that lawyers sometimes receive a documents or electronically stored information that ~~were~~ was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information ~~original document~~, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been ~~wrongfully~~ inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is email or other electronic modes of transmission subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving ~~it the document~~ that it was inadvertently sent ~~to the wrong address~~. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

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Rule 5.3 Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

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

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

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

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

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

Comment

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts ~~to establish internal policies and procedures designed to provide to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters will act in a way compatible with the professional obligations of the lawyer, with the Rules of Professional Conduct. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm).~~ Paragraph (b) applies to lawyers who have supervisory authority over ~~the work of a nonlawyer, such nonlawyers within or outside the firm.~~ Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of ~~a nonlawyer such nonlawyers within or outside the firm~~ that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers Within the Firm

[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm

[3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Rule 5.5 Unauthorized Practice Of Law; Multijurisdictional Practice Of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

Comment

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[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting

another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

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[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. See, e.g., The ABA Model Rule on Practice Pending Admission.

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[21] Paragraphs (c) and (d) do not authorize communications advertising legal services ~~to prospective clients~~ in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services ~~to prospective clients~~ in this jurisdiction is governed by Rules 7.1 to 7.5.

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Rule 7.1 Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

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[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public, ~~a prospective client~~.

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Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal services plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Comment

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are is now ~~one of~~ among the most powerful media for getting information to the public, particularly persons of low and moderate income;

prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule. But see Rule 7.3(a) for the prohibition against the solicitation of a prospective client through a real-time electronic exchange initiated by the lawyer, that is not initiated by the prospective client.

...

Paying Others to Recommend a Lawyer

[5] Except as permitted under paragraphs (b)(1)-(b)(4), lawyers are not permitted to pay others for channeling professional work recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 for the (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another). who prepare marketing materials for them.

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek prospective clients to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public, prospective clients. See, e.g.,

the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public ~~prospective clients~~; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance; (iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals ~~prospective clients~~ to lawyers who own, operate or are employed by the referral service).

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with ~~prospective clients~~ the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public ~~prospective clients~~ to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

...

Rule 7.3 ~~Direct Contact with Prospective~~ Solicitation of Clients

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact, solicit professional employment ~~from a prospective client~~ when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment ~~from a prospective client~~ by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the ~~prospective client~~ target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone ~~a prospective client~~ known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[12] There is a potential for abuse when a solicitation involves inherent-in direct in-person, live telephone or real-time electronic contact by a lawyer with someone ~~a prospective client~~ known to need legal services. These forms of contact ~~between a lawyer and a prospective client~~ subject ~~the lawyer~~ a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person ~~prospective client~~, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence

upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[23] This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation of ~~prospective clients~~ justifies its prohibition, particularly since lawyers have advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. ~~Advertising and written and recorded~~ In particular, communications, can which may be be mailed or autodialed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public ~~a prospective client~~ to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting ~~the prospective client~~ the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm ~~the client's~~ a person's judgment.

[34] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public ~~prospective client~~, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct-in-person, live telephone or real-time electronic ~~conversations between a lawyer and a prospective client~~ contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[45] There is far less likelihood that a lawyer would engage in abusive practices against ~~an individual who is~~ a former client, or a person with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to ~~its~~ their members or beneficiaries.

[56] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with ~~a prospective client~~ someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication ~~to a client~~ as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication ~~prospective client~~ may violate the provisions of

Rule 7.3(b).

[67] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves, a ~~prospective client~~. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[78] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[89] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

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**AUGUST 2012 AMENDMENTS
TO OTHER ABA POLICIES**

ABA Model Rule on Practice Pending Admission [NEW]

- 1. A lawyer currently holding an active license to practice law in another U.S. jurisdiction and who has been engaged in the active practice of law for three of the last five years, may provide legal services in this jurisdiction through an office or other systematic and continuous presence for no more than [365] days, provided that the lawyer:**

 - a. is not disbarred or suspended from practice in any jurisdiction and is not currently subject to discipline or a pending disciplinary matter in any jurisdiction;**
 - b. has not previously been denied admission to practice in this jurisdiction or failed this jurisdiction's bar examination;**
 - c. notifies Disciplinary Counsel and the Admissions Authority in writing prior to initiating practice in this jurisdiction that the lawyer will be doing so pursuant to the authority in this Rule;**
 - d. submits within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction a complete application for admission by motion or by examination;**
 - e. reasonably expects to fulfill all of this jurisdiction's requirements for that form of admission;**
 - f. associates with a lawyer who is admitted to practice in this jurisdiction;**
 - g. complies with Rules 7.1 and 7.5 of the Model Rules of Professional Conduct [or jurisdictional equivalent] in all communications with the public and clients regarding the nature and scope of the lawyer's practice authority in this jurisdiction; and**
 - h. pays any annual client protection fund assessment.**

- 2. A lawyer currently licensed as a foreign legal consultant in another U.S. jurisdiction may provide legal services in this jurisdiction through an office or other systematic and continuous presence for no more than [365] days, provided that the lawyer:**

 - a. provides services that are limited to those that may be provided in this jurisdiction by foreign legal consultants;**
 - b. is a member in good standing of a recognized legal profession in the foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority;**
 - c. submits within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction a complete application for admission to practice as a foreign legal consultant;**

d. reasonably expects to fulfill all of this jurisdiction's requirements for admission as a foreign legal consultant; and

e. meets the requirements of paragraphs 1(a), (b), (c), (f), (g), and (h) of this Rule.

3. Prior to admission by motion, through examination, or as a foreign legal consultant, the lawyer may not appear before a tribunal in this jurisdiction that requires *pro hac vice* admission unless the lawyer is granted such admission.

4. The lawyer must immediately notify Disciplinary Counsel and the Admissions Authority in this jurisdiction if the lawyer becomes subject to a disciplinary matter or disciplinary sanctions in any other jurisdiction at any time during the [365] days of practice authorized by this Rule. The Admissions Authority shall take into account such information in determining whether to grant the lawyer's application for admission to this jurisdiction.

5. The authority in this Rule shall terminate immediately if:

a. the lawyer withdraws the application for admission by motion, by examination, or as a foreign legal consultant, or if such application is denied, prior to the expiration of [365] days;

b. the lawyer fails to file the application for admission within [45] days of first establishing an office or other systematic and continuous presence for the practice of law in this jurisdiction;

c. the lawyer fails to remain in compliance with Paragraph 1 of this Rule;

d. the lawyer is disbarred or suspended in any other jurisdiction in which the lawyer is licensed to practice law; or

e. the lawyer has not complied with the notification requirements of Paragraph 4 of this Rule.

6. Upon the termination of authority pursuant to Paragraph 5, the lawyer, within [30] days, shall:

a. cease to occupy an office or other systematic and continuous presence for the practice of law in this jurisdiction unless authorized to do so pursuant to another Rule;

b. notify all clients being represented in pending matters, and opposing counsel or co-counsel of the termination of the lawyer's authority to practice pursuant to this Rule;

c. not undertake any new representation that would require the lawyer to be admitted to practice law in this jurisdiction; and

d. take all other necessary steps to protect the interests of the lawyer's clients.

7. Upon the denial of the lawyer's application for admission by motion, by examination, or as a foreign legal consultant, the Admissions Authority shall immediately notify Disciplinary Counsel that the authority granted by this Rule has terminated.

8. The Court, in its discretion, may extend the time limits set forth in this Rule for good cause shown.

Comment

[1] This Rule recognizes that a lawyer admitted in another jurisdiction may need to relocate to or commence practice in this jurisdiction, sometimes on short notice. The admissions process can take considerable time, thus placing a lawyer at risk of engaging in the unauthorized practice of law and leaving the lawyer's clients without the benefit of their chosen counsel. This Rule closes this gap by authorizing the lawyer to practice in this jurisdiction for a limited period of time, up to 365 days, subject to restrictions, while the lawyer diligently seeks admission. The practice authority provided pursuant to this Rule commences immediately upon the lawyer's establishment of an office or other systematic and continuous presence for the practice of law.

[2] Paragraph 1(f) requires a lawyer practicing in this jurisdiction pursuant to the authority granted under this Rule to associate with a lawyer who is admitted to practice law in this jurisdiction. The association between the incoming lawyer and the lawyer licensed in this jurisdiction is akin to that between a local lawyer and a lawyer practicing in a jurisdiction on a temporary basis pursuant to Model Rule of Professional Conduct 5.5(c)(1).

[3] While exercising practice authority pursuant to this Rule, a lawyer cannot hold out to the public or otherwise represent that the lawyer is admitted to practice in this jurisdiction. See Model Rule of Professional Conduct 5.5(b)(2). Because such a lawyer will typically be assumed to be admitted to practice in this jurisdiction, that lawyer must disclose the limited practice authority and jurisdiction of licensure in all communications with potential clients, such as on business cards, websites, and letterhead. Further, the lawyer must disclose the limited practice authority to all potential clients before agreeing to represent them. See Model Rules 7.1 and 7.5(b).

[4] The provisions of paragraph 5 (a) through (d) of this Rule are necessary to avoid prejudicing the rights of existing clients or other parties. Thirty days should be sufficient for the lawyer to wind up his or her practice in this jurisdiction in an orderly manner.

ABA Model Rule on Admission by Motion

1. An applicant who meets the requirements of (a) through (g) of this Rule may, upon motion, be admitted to the practice of law in this jurisdiction. The applicant shall:
 - (a) have been admitted to practice law in another state, territory, or the District of Columbia;
 - (b) hold a J.D. or LL.B. degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the applicant matriculated or graduated;
 - (c) have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for ~~five~~ three of the ~~seven~~ five years immediately preceding the date upon which the application is filed;
 - (d) establish that the applicant is currently a member in good standing in all jurisdictions where admitted;
 - (e) establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any jurisdiction;
 - (f) establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and
 - (g) designate the Clerk of the jurisdiction's highest court for service of process.

For purposes of this ~~r~~Rule, the "active practice of law" shall include the following activities, if performed in a jurisdiction in which the applicant is admitted and authorized to practice, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted in that jurisdiction; however, in no event shall any activities that were performed pursuant to the Model Rule on Practice Pending Admission or in advance of bar admission in some state, territory, or the District of Columbia be accepted toward the durational requirement:

- (a) Representation of one or more clients in the private practice of law;
 - (b) Service as a lawyer with a local, state, territorial or federal agency, including military service;
 - (c) Teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;
 - (d) Service as a judge in a federal, state, territorial or local court of record;
 - (e) Service as a judicial law clerk; or
 - (f) Service as in-house counsel provided to the lawyer's employer or its organizational affiliates.
3. For purposes of this ~~r~~Rule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.

4. An applicant who has failed a bar examination administered in this jurisdiction within five years of the date of filing an application under this ~~R~~Rule shall not be eligible for admission on motion.

FURTHER RESOLVED: That the American Bar Association urges jurisdictions that have not adopted the Model Rule on Admission by Motion to do so, and urges jurisdictions that have adopted admission by motion procedures to eliminate any restrictions that do not appear in the Model Rule on Admission by Motion.