***Diversion Agreement:*** As part of the conditions of the one-year Diversion Agreement, respondent agreed to fee arbitration. Respondent must also attend Ethics School.

**April 2015 (Not summarized in Colorado Lawyer)**

5. Between late 2012 and mid-2013, Respondent was retained by Client to provide representation in two separate matters. The first matter involved Client's friend and roommate. Client retained Respondent to represent roommate with respect to his violation of a protection order obtained by Client's ex-wife.

   Respondent charged Client a $5,000 flat fee to represent roommate. In the fee agreement, Respondent erroneously referred to Client as the client, instead of roommate.

   Client's mother paid Respondent his $5,000 fee by credit card in four installments. Respondent did not place the four installment payments into his COLTAF account. Respondent provided evidence to investigators showing that one of the installments was paid on November 8, 2012. He was unable to provide evidence to investigators indicating the dates upon which the remaining charges occurred because he does not have the bookkeeping records required by Colo. RPC 1.15(j).

   Respondent successfully completed his representation of roommate in December 2012, by which time he had fully earned the $5,000 flat fee.

   Also in December 2012, Client retained Respondent to represent him in a modification of child custody matter filed by Client's ex-wife. Again, Respondent charged Client a flat fee of $5,000 for the representation.

   Neither of Respondent's fee agreements contained benchmarks indicating when portions of the flat fee would be earned.

   Client contends that he paid Respondent $2,000 in cash toward the second $5,000 fee; however, he does not have a receipt for the payment, and

Respondent denies receiving such a cash payment. On May 21, 2013, Client's mother paid $2,908.10 on Client's behalf via credit card to Respondent toward the $5,000 fee.

Respondent had not earned the $2,908.10 payment at the time it was made. However, he did not deposit the payment into his COLTAF account, as required by Colo. RPC 1.5(f) and 1.15(a). According to Respondent's handwritten timesheets, he performed 22.1 hours of work in the custody matter on Client's behalf.

Respondent did not enter an appearance in the domestic relations case. He did engage in settlement negotiations on Client's behalf, as well as arranged and participated in mediation in the modification of child custody matter. When the parties were unable to reach an agreement, a hearing was set for August 5, 2013.

Prior to the hearing, Respondent terminated his representation of Client because of Client's continued threats against him and his family. He advised Client to obtain another attorney and said he would work with new counsel.

Client represented himself at the August 5, 2013 hearing. After a portion of the hearing was continued, Client retained other lawyers to represent him going forward. Respondent timely provided Client's file to his new attorneys.

**April 2015**

6. Respondent agreed to represent a client in the client's criminal case through a disposition hearing for a flat fee, plus costs. Upon retention, the client was to pay a portion of the fee as an engagement retainer in light of the significant amount of work immediately required of respondent. Respondent failed to communicate in writing the basis or rate of respondent's fee. Because the basis or rate of the fee was not in writing, no portion of the fee paid by the client was designated as an engagement

retainer. Respondent immediately took and spent the initial portion of the fee paid by the client. Because there was no written fee disclosure, respondent improperly took and spent the client's initial payment. Over the next several months, the client paid various additional increments totaling the balance of the fee that was owed. However, all of the payments were late, and respondent sought to withdraw before disposition of the matter. Shortly after the client made the last payment of the total flat fee, the court granted respondents motion to withdraw. The client hired another lawyer to handle the disposition hearing and trial.

***Rules Implicated:*** Colo. RPC 1.5(b) and (f), and 1.15A(a).

***Diversion Agreement:*** As part of the conditions of the one-year Diversion Agreement, respondent must refund the portion of the fee taken as an engagement retainer and engage in fee arbitration regarding the remaining portion of the flat fee. Respondent must also attend Ethics School and Trust Account School.

**September 2014**

7. Beginning in May 2013, Respondent represented Client in an eviction proceeding against her tenants.

   Respondent had not previously represented Client. He verbally advised her that his fee for "a simple eviction" was $527, which included $400 in attorney's fees, a filing fee of $97, and a process server cost of $30. Respondent did not provide the basis or rate of his fee in writing to Client.

   On May 28, 2013, Client paid Respondent his $527 fee by credit card. Respondent placed Client's funds into his operating account. Respondent should have placed Client's funds into his trust account pursuant to Colo. RPC 1.5(f) because they constituted a flat fee. However, Respondent ultimately earned those funds.

   Client's tenants retained counsel, and the case became contentious. Two days prior to the eviction trial, Respondent asked Client to pay him an additional $500 because of the additional work required on the case. Client agreed, because she was afraid Respondent would withdraw from her case.

Client prevailed at trial and was awarded attorney's fees and costs in the amount of $1,662. Although Respondent initially agreed to a flat fee of $527, he kept track of the hours he worked on Client's case. According to Respondent's records, he incurred $5,566 in fees and costs at his hourly rate of $230. This hourly rate was not communicated to Client, nor did she agree to an hourly fee arrangement. Despite having no hourly fee agreement, Respondent asked Client to pay him the amount of the award, $1,662, and advised her she could recoup those fees and costs from her tenants.

On September 17, 2013, Respondent emailed Client the following:

> I had agreed to reduce my fees to $1,162 and you promised to send that amount right after September 1. Unless the amount is received by Friday Sept 20 my offer to accept the reduced amount will be revoked and the full amount of over $5,500 will be due.

Client paid Respondent an additional $1,662 on September 18, 2013. She has not pursued the tenants for her damages or the attorney's fees and costs.

***Rules Implicated:*** 1.5(a), 1.5(b), and 1.5(f).

***Diversion Agreement:*** As part of the conditions of the one-year diversion agreement, the Respondent must attend Ethics School and pay all costs.

**January 2014**

8. Respondent met with two family members for the purpose of establishing a trust for their incapacitated mother's property. Respondent failed to explain clearly that his only client was the mother's legal representative. Client signed an hourly fee agreement. After the mother passed away, Client and other family members requested that Respondent complete a different kind of trust. Client and other family members orally agreed to pay respondent a flat fee. Respondent failed to provide Client a written statement communicating the basis or rate of the fee. Client paid Respondent for the trust. Respondent placed the fee into his trust account

and then failed to provide Client an accounting before or after he moved the fee into his operating account. Respondent substantially completed the trust, but did not provide it to Client until six months later. Respondent then failed to communicate with Client to assist in making the final changes to the trust.

***Rules Implicated:*** Colo. RPC 1.4(a)(3), 1.5(b) and 1.15(c).

***Diversion Agreement:*** As part of the conditions of the one-year diversion agreement, the Respondent must attend Ethics School and pay all costs.

**October 2013**

9. Respondent was retained to represent Client in a Chapter 13 bankruptcy. Respondent and Client entered into a written fee agreement. The fee agreement provided for a flat fee. However, it also contained provisions that provided that if Respondent was terminated, he could bill the client at an hourly rate and that the total charges may exceed the agreed upon flat fee.

   Respondent did not place the funds into a trust account, but instead placed them in a lockbox in Respondent's office. Respondent believed these funds were "more than billed for" before he left for the day. However, the fee agreement did not contain any milestones or earmarks setting forth when Respondent earned and would therefore pay himself any portion(s) flat fee.

   Client decided not to file for bankruptcy and requested a refund. Respondent did not agree to a refund. Instead, he sent the client a bill. The bill itemized work performed at Respondent's hourly rate, with total charges that exceeded the amount of the flat fee. Respondent did not seek to collect any amounts charged over the flat fee that was paid.

   ***Rules Implicated:*** Colo. RPC 1.5(a), (f) and (g).

   ***Diversion Agreement:*** As part of the conditions of the one-year diversion agreement, the Respondent must attend Trust Account School, Ethics School, either provide client with a refund or submit the

fee dispute to arbitration with the Colorado Bar Association Fee Arbitration Committee, have no further discipline and pay all costs.

**January 2013**

10. Respondent entered into a flat fee agreement for $800.00 to complete Client's Chapter 7 bankruptcy. Respondent's written basis for his fee did not contain earmarks or guideposts stating when Respondent earned the flat fee. Respondent withdrew about half of the flat fee from his COLTAF account as payment for the initial attorney meeting, for pulling Client's credit report, and for administrative fees. Respondent's withdrawal was not in accordance with Respondent's flat fee agreement.

    Client later decided not to file bankruptcy and requested a refund of any unearned funds. Initially, Respondent told Client that he had earned all of the funds. Later, after recognizing the defects in his written basis for his fee, Respondent refunded to Client all benchmarks for earning his fees.

    ***Rules Implicated:*** Colo. RPC 1.3, 1.4(a)(3), 1.5(f), and 7.1.

    ***Diversion Agreement:*** As part of the conditions of the two-year diversion agreement, the Respondent must attend ethics school, trust account school, compliance with the Bankruptcy Court's supervision plan, and pay all costs.

**July 2012**

11. Respondent was paid a fee to handle a bankruptcy matter. Although the respondent worked on the case, the respondent did not file the bankruptcy petition, nor were the fees refunded. Respondent's fee agreement also improperly referred to the fee paid as an engagement fee, as well as a nonrefundable fee and failed to state milestones to reflect when specific fees were earned.

    ***Rules Implicated:*** Colo. RPC 1.5(a), 1.5(g), and 8.4(d).

***Diversion Agreement:*** As part of the conditions of the diversion agreement, the Respondent must attend Ethics School, have a practice monitor, refund monies in the bankruptcy case, and pay all costs associated with the two-year diversion agreement.

**April 2012**

12. In May, 2009, Respondent and Client entered into a written fee agreement for a Chapter 7 bankruptcy. This agreement provided for a flat fee and had guideposts describing when the flat fee was considered earned. However, the fee agreement also provided that it could be converted to an hourly rather than a flat fee at Respondent's discretion.

    In August, 2009, Client had a meeting with Respondent and paid her remaining balance. Thereafter, Client contacted Respondent about the case status in September, October and November of 2009. In December 2009, Client advised Respondent by e-mail that she wanted to meet so they could file her bankruptcy and schedule a court date for the following year. They scheduled a meeting for December 2009. Sometime before this meeting, Respondent advised Client she would have to file for Chapter 13 bankruptcy. Client decided to pursue debt settlement rather than file for Chapter 13 bankruptcy. She decided not to use Respondent to work on her debt settlement.

    ***Rules Implicated:*** Colo. RPC 1.3 and 1.4.

    ***Diversion Agreement:*** As part of the conditions of the diversion agreement, the Respondent must attend Ethics School and remove the provision in fee agreements providing that it may be converted to an hourly rather than a flat fee agreement at Respondent's discretion; have no further rule violations; and pay costs.

13. In May 2011, a secretary from Respondent's firm gave Client a fee agreement to sign with respect to Respondent's firm representing Client in a Chapter 7 bankruptcy. The fee agreement contained a termination provision advising Client how he would be charged if he terminated the firm. Otherwise, the fee agreement did not contain any earmarks, events

and/or tasks which defined when Respondent's firm earned and would therefore pay itself the flat fee.

Also in May 2011, a secretary from Respondent's firm collected a $1,000.00 retainer from Client. Respondent did not place this money into a COLTAF Trust Account. Client terminated Respondent in May, 2011. He demanded a refund of his $1,000.00 retainer. In July 2011, Client received a call from Respondent's office manager stating they would send him a refund check in the amount of $473.75. After Client spoke with Respondent later that day, she agreed to refund all but $300.00. In July, 2011, the client received a $700.00 refund check and a fee itemization.

***Rules Implicated:*** Colo. RPC 1.15(a).

***Diversion Agreement:*** As part of the conditions of the diversion agreement, the Respondent must attend Ethics School, have no further rule violations and pay all costs associated with the one-year diversion agreement.

## C. Cases That Did Not Result in Discipline or Diversion

### 1. 12-14398

Attorney's Fee agreement provided in pertinent part:

**Scope of representation**

I [client] understand that I am authorizing the firm of _____ "the firm" to represent me "the client" in the matter of Sex Assault.

. . .

**Changes in Contract/Scope of Representation**

A new contract must be negotiated if the complexity of the case changes drastically or if the client requires representation in other cases. The representation for this specific case concludes with court

order. The request for revisions, motion for new trial, appeals, new cases, problems with the bondsman, etcetera are not included in this contract.

**Calendar of payments**

Flat fee: $3,000 Trial Costs: (this is blank on copy that was provided)

**While this is a flat fee agreement, in the event that the client decides to terminate the representation before finalization of the contract, they may be charged $250.00/hour for the time that the attorney has dedicated to the case, and $90/hour for the time of the paralegal. In addition the administrative cost will be applied, and the first consultation.** The client will receive an invoice within ten business days detailing all expenses paid and all accrued fees, along with a check for the amount, if any is due to the client. In the event that a balance is due from the client this amount will be applied to the total due, bringing the account to a zero balance immediately.

**2. 14-690**

Complainant was charged with third-degree assault (domestic violence) on in Adams County. The charge arose out of an alleged assault on his former girlfriend. She also filed separately for a civil protective order against Complainant.

Complainant hired Respondent to represent him in the criminal case on October 8, 2013. They entered into a four-sentence fee agreement, which read as follows: "[Respondent] represents [Client] in a third degree assault [sic] for a flat fee of $2500. $2000 is paid today by cash. This agreement is a receipt for the $2000 in cash. Attorney has made no guarantees other than to diligently represent [Client]."

According to Respondent, he had prepared a longer fee agreement that made clear the flat fee would be earned at a rate of $200 per hour, but Client was in a hurry and asked Respondent to prepare something shorter and simpler. Respondent prepared the agreement quoted above, and both he and Client signed it.

Client disputes this claim, and does not recall seeing a longer document or discussing Respondent's hourly rate.

Respondent admits that he should have written his $200 per-hour rate into the shorter fee agreement.

Analysis: Turning to the potential Rule 1.15 violations, our office likely would have gone forward on a case like this before *Gilbert* was decided, because it involves an attorney who agreed to handle a case on a flat fee, without benchmarks, and retained fees after he was terminated.

**3. 12-12910**

Respondent represented a client in a criminal matter for a flat fee. The client terminated his representation before disposition of the case.

Respondent sent email to a friend of the client, who spoke English, representing the fee agreement. He requested a flat fee of $15,000 if disposition before trial, and a trial fee of $10,000. The trial fee was to be paid 30 days prior to trial. At the time the email was sent, the trial was not set. There was no milestones, either hourly or by task to show when fees were deemed earned. There was no *quantum meruit* clause or mention of an alternative hourly rate.

The client requested an accounting and Respondent stated he earned $5,000 based on 16.9 hours of work at $300 an hour.

OARC determined that the fees did not seem excessive. It was determined that this was a fee dispute. Respondent did not provide an explanation to his client about changing the terms of the fee agreement and transfer of funds from the trust account.

Respondent was required to attend trust account school and refund all funds provided by his client.

**4. 14-60 (dismissed with educational language to Respondent)**

Respondent's fee agreement with Client in a criminal matter provides that he would be "...compensated at the flat rate of $3,500.00, plus costs,

through disposition of the matter, whether by dismissal, plea bargain, or otherwise, other than trial." Otherwise, the fee agreement did not include any earmarks, events and/or tasks which defined when Respondent earned and would therefore pay himself his flat fee. Under these circumstances, Respondent should not have withdrawn any funds from his COLTAF Account until disposition of the matter as set forth in his fee agreement.

Next, Respondent asserts he provided four billing statements to Client. Client asserts he only received these billing statements with Respondent's response to the request for investigation. If so, Respondent failed to sever Client's interest in the funds he paid to Respondent when Respondent treated those funds as earned. Even more problematic is the lack of detail about the time spent or the basis of the dollar figure that is attributed to the work performed, especially in light of Respodnent using these billing statements to justify treating client funds as earned.

## D. Pending Cases not yet resolved

### 1. 15-2688

Respondent charged $4,000 capped hourly rate for a criminal defense case on "potentially attempted murder." From February, 2015 until fired on June, 15, 2015. Respondent charged an additional $1,000 for going to trial. Client paid a total of $5,040 (costs ended up being more than $40). There are receipts and it appears to have been deposited in the trust account. Respondent has kept the funds although Respondent did not take the case to trial. Respondent has billing records that appear to show the amounts earned; however, the charged rate was higher than the capped or flat rate.

### 2. 16-446 (recently transferred to Trial Division)

Respondent's fee agreement states:

ATTORNEY FEE:

The cost for legal representation is as follows:

A flat fee of $4000.00

Of this fee, $3000.00 covers my representation at the DMV hearing, if a DMV hearing is held and all pre-trial work done for your criminal case. The fee will not change if no DMV hearing is held.

[Explanation of costs. Omitted here]

Upon execution of this agreement, and no later than the date of filing an entry of appearance, you will provide me a retainer of $3000.00, against which I will charge fees and costs.

An additional retainer of $1,000 will be charged if preparation for trial is necessary, said event to occur when any pretrial motions are filed with the Court on behalf of the client.

The amount of the fee is based upon several factors, the nature and gravity of the offense charged, the complexity of the case, the commitment of the firm to take the case, thus being available to represent you and precluding our acceptance of other employment and the film's best estimate of time which will be expended to represent you.

SERVICES COVERED:

1. Representation in regard to criminal charges of Driving Under the Influence and/or Driving with Excessive Alcohol Content (DUI per se), and/or Careless Driving, and/or leaving the scene of an accident, and/or speeding, and/or no proof of insurance.

2. Representation at a Department of Revenue Hearing in regard to your Colorado driving privileges if such a hearing is held.

**3. 15-2428**

Respondent's fee agreement states:

SCOPE OF REPRESENTATION

This contract pertains only to the following matter: Representation of [client] in criminal action [xxxxx] filed in the [xxxx] County District Court. Representation includes pre-trial matters, negotiations in an attempt to find a satisfactory resolution without trial, preparation of motions, courtroom representation, trial preparation, and trial. It does not include additional representation in any other civil or criminal action, any additional post-trial representation, or appeal. This Agreement does not cover or include any matter other than the matter described in this paragraph.

LEGAL FEES

Fees are based on a rate of $400.00 per hour as quantum meruit against flat fees as provided here:

$5000.00 due July 15, 2015.

$5000.00 due 10 days before the Preliminary hearing date.

$5,000.00 due 20 days following the preliminary hearing date.

Should a trial be required, an additional retainer of $25,000.00 is required. The dates of separate payments cannot be determined, nor are they due in absence of a trial setting at arraignment. Attorney and Client agree for now that the entire $25,000.00 trial preparation fee is due no less than 45 days before trial. Associate lawyer services, law clerks, in-house investigators, paralegals, and any other necessary staff are billed at $100.00 per hour.

On occasion, the novelty or complexity of your matter, uniqueness of the issues, time limitations placed upon my services, financial amount or criminal penalties involved, or other matters, without limitation, may require additional time. To address these issues of my services, those of other lawyers, legal assistants, or investigators may be necessary. Those services are billed at an hourly rate. The rates of the individuals working on this matter multiplied by the hours they or the Attorney work on it ([ATTORNEY'S] time is paid by flat fee as described in the paragraph above), is the basis for determining additional fees. Time is recorded and billed in tenths of an hour. In the event that you terminate my services or other circumstances require adjustment to an hourly rate, you will receive written notice.

BFW ATTORNEYS
BURNS FIGA & WILL

# MEMORANDUM

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

FROM: Alec Rothrock, Chair
"Orphan Funds" Subcommittee

DATE: April 22, 2016

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

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

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

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

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

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

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

Proposed Rule 1.15B(k)

(k) If a lawyer discovers that he or she does not know the identity or the location of the owner of funds held in the lawyer's COLTAF account, the lawyer must make reasonable efforts to identify and locate the owner. If, after making such efforts, the lawyer cannot determine the identity or the location of the owner, the lawyer must either (1) continue to hold the unclaimed funds in a COLTAF or other trust account or (2) remit the unclaimed funds to COLTAF in accordance with written procedures published by COLTAF and available through its website or upon request. A lawyer remitting unclaimed funds to COLTAF must keep a record of the remittance pursuant to Rule 1.15D(a)(1)(C). If, after remitting unclaimed funds to COLTAF, the lawyer determines both the identity and the location of the owner, the lawyer shall request a refund for the benefit of the owner, in accordance with written procedures that COLTAF shall publish and make available through its website and shall provide upon request.

Proposed Comment [7]

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

Proposed Rule 1.15D(a)(1)(C)

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

CYNTHIA H. COFFMAN
Attorney General

DAVID C. BLAKE
Chief Deputy Attorney General

MELANIE J. SNYDER
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Office of the Attorney General



March 15, 2016

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

RE: *Proposal for an amendment to the comments to Colorado Rule of Professional Conduct 1.6*

Dear Ms. Glenn:

I am writing to request that the Supreme Court Rules of Professional Conduct Standing Committee consider an important issue affecting government entities. Specifically, I request that the Committee consider a comment to the Rules of Professional Conduct clarifying whether a public law office may disclose the total amount of fees or costs incurred on a particular legal matter.

The Colorado Attorney General's Office frequently is asked to disclose the amount of time its attorneys have spent on a particular legal matter, as well as the total amount of expenses incurred in particular litigation. We have been asked for this information, for example, in the context of highly-publicized litigation concerning same-sex marriage, gun control, and the environment. Requests for this information typically are posed by members of the media or citizens under the Colorado Open Records Act ("CORA"), or by the General Assembly under its inherent authority to request information in furtherance of its official duties. These requests are common for public agencies and elected officials at all levels of government.

It has been the long-standing policy of this Office to provide this information whenever doing so is consistent with the Rules of Professional Conduct. I, as well as my predecessor, strongly believe that the public should have access to basic information about legal services expenditures by public entities. These services are

provided at taxpayer expense, and although government lawyers owe their clients a duty of confidentiality, aggregate billing information is not the type of confidential information that should be shielded from public view.[1]

The Rules of Professional Conduct, however, can be understood to place limits on the disclosure of even aggregate billing information that does not reveal specific litigation strategy or other privileged information, and the Rules impose these limits regardless of whether billing information concerns a private or public legal expenses. Specifically, Rule 1.6 prohibits attorneys from revealing "information relating to the representation of a client," and this duty of confidentiality is broader than the protections afforded by the attorney-client privilege. *See, e.g.*, Rule 1.6, cmt. 3.[2]

Public law offices face competing concerns in this area. *See, e.g., Gleason v. Judicial Watch, Inc.*, 292 P.3d 1044, 1045 (Colo. App. 2012) (noting that requests for records of public legal agencies involve friction between two important interests – the public's "important interest" in "the openness of its government, in part to find out what the government is doing" and the need for confidentiality of some records). These concerns are not addressed by Rule 1.6's categorical rule of confidentiality.

The tension between the need for confidentiality on the one hand and transparency in public affairs on the other has resulted in recent years in proposed legislation that would subject the Judicial Branch and public law offices to increased disclosure requirements. The proposals vary in their sweep, but do not appear to fully take into account the duty of confidentiality imposed by the Rules of Professional Conduct. I believe that a relatively modest clarification to the Rules of Professional Conduct is preferable to large scale changes to the law governing public entities, many of which may result in unintended consequences.

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[1] I define aggregate billing information as the total number of hours billed plus other outlays on a particular matter, without any granular or detailed information of the work performed or expert consultation or costs and without elucidation of itemized expenditures or expenses.

[2] Although Rule 1.6(b)(7) permits (but does not require) disclosure of confidential information in order to comply with "other law," it is not clear that CORA qualifies as "other law" that would permit disclosure of aggregate fee information. CORA itself provides that inspection of public records should be denied when a rule promulgated by the Supreme Court, such as Rule 1.6, would prohibit disclosure. § 24-72-204(1)(c), C.R.S.

Case law supports a modest change clarifying that aggregate fee information need not be maintained as confidential. *First*, aggregate information about the legal expenses of public agencies is not the type of sensitive information that implicates the justifications for Rule 1.6's categorical rule of confidentiality.[3] Aggregate billing information – particularly after a matter has concluded – does not reveal client confidences or provide access to litigation strategy. *Cf. United States v. Gonzales*, 150 F.3d 1246, 1266 (10th Cir. 1998) (upholding, in the context of the Criminal Justice Act, a trial court's exercise of its discretion to release total amounts spent on a particular defendant's case at the conclusion of a sentencing hearing).

As a result, some courts have recognized that disclosure of aggregate billing information is not prohibited in all circumstances by Rule 1.6. *Harris v. Baltimore Sun Co.*, 625 A.2d 941 (Md. 1993), involved a newspaper's request under a public information statute that a public defender's office disclose total expenses, including expert witness expenses, incurred in the defense of a capital murder trial. Maryland's highest court determined that disclosure of the information was not necessarily barred by Rule 1.6, provided that disclosure would not pose a risk of harm to the client's interests. *Id.* at 947-48 (noting that for the type of information requested, Rule 1.6's "prohibition is not absolute").

*Second*, case law in Colorado and many other jurisdictions holds that basic information relating to an attorney's billing does not implicate client confidences and may be disclosed in litigation in response to a court order.[4] "Fee arrangements

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[3] Colorado formal ethics opinions have not directly addressed this issue. The CBA Ethics Committee has found that billing statements that include detailed or substantive information relating to a representation should be held confidential under Rule 1.6. Colorado Ethics Opinion 107, p. 4-341. That opinion, however, did not consider the disclosure of only aggregate billing information.

[4] Courts generally have found that the attorney-client privilege does not prevent testimony or discovery relating to attorney billing records. *See, e.g., In re Marriage of Schneider*, 831 P.2d 919, 921 (Colo. App. 1992) (finding no error in admission of testimony by attorney about the amount of fees paid by his client); *Roe v. Catholic Health Initiatives Colo.*, 281 F.R.D. 632, 636 (D. Colo. 2102) ("[I]nformation that shows the fee amount, the general nature of the services performed, and the case on which the services were performed is not privileged" provided that the billing entries do not reflect the client's motive in seeking legal advice, litigation, strategy, or the specific nature of the services provided). Courts similarly have permitted the disclosure of billing records under public open records laws over objections that the records are privileged. *See, e.g., Cypress Media v. City of Overland Park*, 997 P.2d 681, 692 (Kan. 2000) ("[F]ee arrangements are viewed as merely incidental to the attorney-client relationship and do not usually involve disclosure of confidential communications arising from the professional relationship."); *Commonwealth v.*

usually fall outside the scope of the [attorney-client] privilege because such information ordinarily reveals no confidential professional communication between attorney and client...." *In re Grand Jury Matter*, 926 F.2d 348, 352 (4th Cir. 1991) (refusing to quash subpoena served on attorneys seeking amounts of fees paid).[5]

*Third*, there are strong public policy arguments for permitting the disclosure of aggregate billing information by public entities. CORA, for example, demonstrates our state's established commitment to public access of government records. *See, e.g,. Benefield v. Colo. Republican Party*, 329 P.3d 262, 264 (Colo. 2014). The presumption in favor of public disclosure is particularly strong when the expenditure of public funds is at issue. *Freedom Newspapers v. Tollefson*, 961 P.2d 1150, 1156 (Colo. App. 1998). These same interests have been recognized in other jurisdictions. "[T]he public has a right to know how the [government] is spending taxpayer money in pending or completed litigation" so that it may "voice its concern or approval" about that spending. *ACLU v. County of L.A. Bd. of Supervisors*, 2014 Cal. Super. LEXIS 339, at *11, 17-18 (Cal. App. Dep't Super. Ct. 2014) (internal citations omitted). And when the billing information "contain[s] information that may provide insight into the attorney's protected litigation strategy, that information can be easily redacted." *Id.*

Public law offices are government entities that should operate with as much transparency and accountability as may be permitted within the bounds of ethical representation. Providing access to aggregate information about the cost of public legal services serves several important interests. It encourages informed debate on

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*Scorsone*, 251 S.W.3d 328, 330 (Ky. App. 2008) (approving of Attorney General Opinion directing that attorney billing records must be disclosed in response to an open records request when the billing records reflect the general nature of legal services rendered, but that substantive matters protected by attorney-client privilege may be redacted); *Tipton v. Barton*, 747 S.W.2d 325, 332 (Mo. Ct. App. 1988) (finding that billing statements were not privileged because they "are extraneous to [the lawyer's] legal advice or work product"); *see also, e.g., Schein v. N. Rio Arriba Elec. Coop., Inc.*, 932 P.2d 490, 495 (N.M. 1997) (permitting disclosure of billing records to a shareholder and noting that "[i]nquiries into the general nature of legal services provided do not violate the attorney-client privilege because they involve no confidential information.").

[5] Additionally, in some analogous settings, billing information is not required to be maintained as confidential. *See* 18 U.S.C. § 3006A(d)(4) (permitting disclosure of fees for appointed counsel in United States district courts under the Criminal Justice Act); *see also United States v. Cal. Rural Legal Assistance, Inc.*, 722 F.3d 424 (D.C. Cir. 2013) (upholding right of federal inspectors to access federal Legal Services Corporation information, including client identity, financial records and time records).