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

AGENDA

October 16, 2015 9:00 a.m.
Colorado Court of Appeals Full Court Conference Room
Ralph Carr Colorado Judicial Center, 3rd Floor
2 East 14th Avenue, Denver
Call-in numbers: 720-625-5050 or 888-604-0017 – Access Code: 57567212#
WiFi Access Code: @cce$$0123

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1. Approval of minutes:

    a. March 14, 2014 meeting [pages 1-15]

    b. June 5, 2015 meeting [pages 16-23]

2. Report on status of proposed changes based on ABA Amendments to Model Rules – [Marcy Glenn]

3. Report from Subcommittee on Recommended Pro Bono Policies for In-House and Governmental Attorneys [Dave Stark, June 5, 2015 packet, pages 107-109]

4. Report from Fee Subcommittee [Nancy Cohen and Jamie Sudler, pages 24-26]

5. Report from *A.L.L.* Subcommittee, regarding potential amendment to Rule 3.1, cmt. [3] [Cindy Covell, page 27]

6. New business:

    a. Amendments proposed by Colorado Access to Justice Commission to Rules 1.15B and 1.15D, regarding "orphaned" funds in COLTAF accounts [Marcy Glenn or proponent, pages 28-43]

    b. Housekeeping changes:

        i. Rule 1.13, cmt. [3], to correct reference to "Paragraph 19" [Marcy Glenn, page 44]

ii. Rule 1.5(f); Rule 1.16, cmt. [9]; Rule 1.16A, cmts. [1] and [3]; and Rule 1.18, cmt. [9], to correct references to "Rule 1.15" [Marcy Glenn, pages 45-46]

iii. Rules 5.5(a)(1); Rule 5.5, cmt. [1]; and Rule 8.5, cmt. [1A], to address new numbering of attorney admission rules [Marcy Glenn, page 47]

iv. Rule 7.2, cmt. [7]; Rule 7.3(a); and Rule 7.3, cmts. [1], [2], [3], and [8], to make consistent the references to "telephone," "telephonic," "electronic," and "real-time electronic" contacts and solicitations [Marcy Glenn, pages 48-50]

7. Food for thought:

a. Association of Professional Responsibility Lawyers (APRL): 2015 Report of the Regulation of Lawyer Advertising Subcommittee [Jim Coyle, pages 51-106]

b. Philip G. Schrag, *The Unethical Ethics Rule: Nine Ways to Fix Model Rule of Professional Conduct 1.8(e)*, 28 GEO. J. LEGAL ETHICS 39 (2015) [Marcy Glenn, pages 107-140]

8. Administrative matters: Select next meeting date

9. Adjournment (before noon)

Chair
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These submitted minutes have not yet been approved by the Committee

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On March 14, 2014
(Thirty-Ninth Meeting of the Full Committee)

The thirty-ninth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:00 a.m. on Friday, March 14, 2014, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Justice Center.

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

Present as guests was Benjamin T. Figa, of the Governor's Office of Legal Counsel.

I. *Meeting Materials; Minutes of Meetings of October 11, 2013, and December 6, 2013.*

The Chair had provided a package of materials to the members prior to the meeting date, including submitted minutes of the thirty-seventh and thirty-eighth meetings of the Committee, held on October 11, 2013, and December 6, 2013, respectively. Those minutes were approved as submitted.

II. *Chair's Report on Supreme Court's Consideration of Rules Relating to Marijuana Commerce.*

The Chair reported to the Committee on the hearing conducted by the Supreme Court on March 6, 2014, to consider the Committee's proposals for, and to adopt, rules governing lawyers' conduct with respect to marijuana use and counseling in light of changes in Colorado law to permit medical and recreational use of marijuana, usage that remains a violation of Federal law. The Committee's proposals had been sent to the Court following the Committee's thirty-seventh meeting, on October 11, 2013.[1]

At the hearing, the Chair made the first presentation to the Court; she was joined by Committee member Judge Michael H. Berger and by Cynthia F. Fleischner, Gerald D. Pratt, and Judge Daniel A. Taubman, each of whom is a member of the Colorado Bar Association Ethics Committee. Following https://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=24

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1. The Chair noted that information concerning the proceedings are available through links on the Committee's page on the Supreme Court's website, at https://www.courts.state.co.us/Courts/Supreme_Court/Committees/Committee.cfm?Committee_ID=24, specifically links found after the heading "2013 RECOMMENDED CHANGES TO COLORADO RULES OF PROFESSIONAL CONDUCT SUBMITTED BY THE COLORADO SUPREME COURT STANDING COMMITTEE ON THE CRPC."

presentations by several private practitioners, Attorney Regulation Counsel James C. Coyle made the final presentation on behalf of the Office of Attorney Regulation Counsel.[2]

The Chair's presentation to the Court included a discussion of changes proposed to the professional conduct rules in Washington State to accommodate that state's legalization of marijuana activities. She said that King County, Washington, had proposed amendments to that state's rules of professional conduct drawn from our Committee's drafts of an added Rule 8.6 and an added Comment [2A] to Rule 8.4. The Ethics Committee of Washington State's integrated bar association had issued an interim opinion that took the position that, under that state's existing Rule 1.2, lawyers may advise clients regarding marijuana activities under Washington law notwithstanding the continued illegality of those activities under Federal law. That approach, the Chair noted, was not within the proposals made by our Committee to the Colorado Supreme Court nor within Opinion 125 issued by the CBA Ethics Committee. The Washington state bar association then proposed to omit the addition of a Rule 8.6, to add a comment to Rule 1.2, and to add a comment to Rule 8.4 equivalent to our Committee's proposed Comment [2A] to Colorado's Rule 8.4. But the Washington approach would remain quite distinct from our Committee's proposals, for it would contain references to Federal enforcement policies and would note that those policies could be changed, thereby instigating changes in Washington's rules; indeed, the Washington proposal would cross-refer to a very detailed state bar association opinion on the topic.

The Chair noted that information about the Washington approach is included as a part of the materials that were provided to members of the CBA Ethics Committee for its March 15, 2014 meeting.

The Chair said she had received nine questions from the justices at the Supreme Court's hearing, with questions also being asked of other presenters.

The Chair reported that Chief Justice Rice had, the day before this thirty-ninth Committee meeting, asked her and Committee members Webb and Coyle to attend a meeting on March 19, 2014; she was not able to make predictions about that meeting.

James Coyle declined the Chair's invitation to give the Committee his own view of the hearing before the Supreme Court.

III. *Subcommittee on ABA Amendments to Model Rules.*

The Chair returned the Committee's attention to the Report and Recommendations of the New American Bar Association Model Rules Subcommittee, which had been included in the meeting materials for the Committee's thirty-seventh meeting, on October 11, 2013, beginning on page 68 of those materials. She invited Berger, chair of that subcommittee, to resume the Committee's consideration of the Report and Recommendations.

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2. The Supreme Court issued an amendment to the Colorado Rules of Professional Conduct regarding marijuana on the date of this Committee meeting. The Court declined to adopt the proposals of the Committee and, instead, added the following as Comment [14] to Rule 1.2:

> A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.

Its order is found at https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/2014/2014%2805%29%20redlined.pdf. —*Secretary*

Berger indicated that, as at the prior meeting, his approach would be to present a summary of each change to rule or comment in the ABA's Model Rules of Professional Conduct that has been proposed by the American Bar Association's Commission on Ethics 20/20 and then seek Committee discussion and vote on the changes as they were taken up. He would use as his guide the Report to which the Chair had referred the members.

A. *Rule 5.5, Unauthorized Practice of Law; Multijurisdictional Practice of Law.*

Berger began by noting that the subcommittee did not recommend acceptance of any of the ABA's proposed changes to Rule 5.5. The Committee did not specifically review any of those changes but accepted the subcommittee's recommendation that they not be adopted.

B. *Rule 7.1, Communications Concerning a Lawyer's Services.*

The ABA proposed the adoption of a new Comment [8] to Rule 7.1 (the existing comment to be renumbered [9]) that discusses advertisements that "truthfully [report] a lawyer's achievements on behalf of clients" but may nevertheless lead a reasonable person to an unjustified expectation that the same results might be obtained in another matter and discusses advertisements that make "unsubstantiated" comparisons of the lawyer's fees or services to those of other lawyers, noting that appropriate disclaimers might avoid those problems The subcommittee recommended that the ABA addition be adopted, and the Committee agreed.[3]

C. *Rule 7.2, Advertising.*

Berger reported that the ABA proposed useful modifications in the terms used in the comments to Rule 7.2 regarding email addresses, websites, and Internet and other forms of electronic communication. More substantively, the ABA proposed changes to Comment [5] to Rule 7.2 regarding lawyers' use of third party services to "generate client leads," establishing guidelines within which such services may be used. Berger commented that, while there are many concerns about lawyer advertising, it is constitutionally protected speech and the advertising rules must by updated to reflect present practices. The subcommittee felt that the ABA's proposals are also appropriate in view of the multi-state aspects of lawyer advertising and the resulting benefit of uniformity in the various states' advertising rules. The Committee approved the subcommittee's recommendation that the ABA's proposed changes to the Rule 7.2 be adopted.

D. *Rule 7.3, Direct Contact with Prospective Clients.*

Berger then turned to the ABA's proposed changes to Rule 7.3, regarding a lawyer's solicitation of clients. He began by noting that the Colorado version of Rule 7.3 is substantively different from the ABA Model Rules, because the Supreme Court has inserted into the Colorado Rule 7.3(c), mandating a thirty-day cooling-off requirement for solicitations in personal injury matters. The subcommittee did not propose that the cooling-off period be deleted, but it did recommend that the other changes proposed by the ABA be adopted—

1. The title of Rule 7.3 would be changed from "Direct Contact with Prospective Clients" to "Solicitation of Clients," reflecting the terminology that is commonly used in practice.

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3. The Chair noted that the Committee had approved the subcommittee's recommendation regarding the addition of the new Comment [8] to Rule 7.1 at its thirty-eighth meeting, on December 6, 2013, but that the approval had not been noted in the minutes of that thirty-eighth meeting. —*Secretary*

2. The term "prospective client" would be dropped at several points within the text of the rule, to be replaced by more general terms such as "the target of the solicitation" or even "anyone." Those changes acknowledge the specific use of the term "prospective client" in Rule 1.18, which prescribes specific duties to "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter" — that is, "a prospective client." The solicitation contemplated by Rule 7.3 may target a broader grouping, as the textual change indicates.

3. Berger noted that the ABA considered further changes to deal with the development of technology that can permit interaction with digital devices that are, in Berger's words, "nearly like a live exchange"; he referred to the movie "Her."[4] But the ABA chose not yet to undertake revisions to Rule 7.3 to deal with those "nearly real personal interactions," and the subcommittee appreciated that restraint; changes can be made when actual abuses of this kind of technology are subsequently developed.

With the retention of Colorado's unique Rule 7.3(c), the subcommittee recommended the adoption of these other changes the ABA proposed to the rule.

A member pointed out that Colorado's existing Rule 7.3(c)(1) — probably erroneously — refers to a petulant lawyer; it reads, "[N]o such communication may be made if the lawyer knows or reasonably should know that the person to whom the communication is directed is represented *resented* by a lawyer in the matter . . . ."

The Committee approved of the subcommittee's recommendations regarding Rule 7.3 and agreed that reference to the lawyer's resentment should be removed from Rule 7.3(c)(1).

E. *Rule 8.5, Disciplinary Authority; Choice of Law.*

Berger reported that the ABA proposed modification of Rule 8.5 to permit a lawyer to contract around the application of the Rules in a limited context, by the addition of text to Comment [5] to Rule 8.5 as follows:

> [5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. ***With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.***

The comment refers to Rule 8.5(b)(2) which specifies that, for conduct that is *not* connected to a matter pending before a tribunal, "the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct." The proposition reflected in the ABA's proposal is that many legal services are now provided by lawyers across jurisdictions and, as an accommodation, a lawyer should be able to contract with the client as to which of the rules within the various jurisdictions covered by the principle expressed in Rule 8.5(b)(2) are to govern the lawyer's conduct.

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4. *See* https://en.wikipedia.org/wiki/Her_%28film%29 —*Secretary*

Berger reported that a majority of the subcommittee did not accept the ABA's addition to the comment. The concern was that no rule should indicate that a lawyer may contract around any of the rules. The question of what rules should control the lawyer's conduct — which is itself a question of law — should be left to resolution under the principles of conflicts of law, as outlined in Rule 8.5(b)(2), and not to the lawyer's and the client's deal. Berger noted that a minority of the subcommittee wanted to expand the ABA's approach, to provide that the lawyer and the client could contract for the application of any of the sets of conflicts-of-interest rules spanned by the possible jurisdictions, rather than state that just those of the jurisdiction "reasonably specified," could be chosen.

A member who had served on the subcommittee noted that she could not recall what her position had been when the subcommittee considered the ABA's addition to Comment [5], but she now was concerned that there might be a negative implication to be drawn from a Colorado rejection of the ABA's addition. Her concern was that one might conclude, by that rejection, that a lawyer and a client may never contract as to the meaning of any of the rules of professional conduct.

Although other members expressed their view that no such negative implication could properly be drawn from a rejection of this addition to this comment, the member expressed her view that the ABA's proposal contained adequate safeguards — the provision applied only to the conflicts-of-interest rules; and the contracted-for choice must be "reasonably specified" and, even if specified with the client's informed consent, nevertheless would be merely a basis for consideration of whether the lawyer's belief that the selected jurisdiction was appropriate for application of Rule 8.5(b)(2) was reasonable — and that the proposal dealt with what can be a significant problem for lawyers practicing in large, multi-state law firms.

A member asked whether the comment could be augmented by a statement indicating no negative implication was to be drawn with respect to other rules and principles; others noted that the negative implication had been claimed to exist only with respect to a Colorado rejection of the ABA proposal. A member suggested that, as the entire matter was found only in a comment, and not in rule text, there was little possibility that a negative implication would be drawn from a Colorado rejection of the addition to the comment; in this member's view, the ABA addition only added confusion.

When another member spoke to support acceptance of the ABA's addition to the comment, yet another member said he felt the subcommittee's rejection of the addition, based on the proposition that a lawyer cannot contract around the Rules, was the better decision.

Berger directed the Committee to the text of the subcommittee's report, as found on page 85 of the materials provided for the thirty-seventh meeting, on October 11, 2013:

> The Subcommittee considered several courses of action with respect to this ABA change. Some members favored expanding the new ABA sentence to eliminate the apparent limitation on the use of such agreements to conflicts issues. A majority of the Subcommittee concluded that such an expanded sentence would be ill-advised because it would invite lawyers to contract around numerous ethical rules. (The ABA Report specifically stated that such agreements would be considered only to resolve conflicts issues, precisely to avoid contracting around other ethics rules.)
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> A majority of the Subcommittee also concluded that the ABA amendment to Comment [5] was improperly underinclusive. There may be situations in which an agreement between a lawyer and a client may be relevant to resolving choice of law issues relating to matters other than conflicts; the Subcommittee was not comfortable absolutely prohibiting (through negative inference) the use of such an agreement in situations addressing ethical issues other than conflicts.

Berger focused the Committee on the second quoted paragraph, noting that a comment that referred only to a client-lawyer contract for purposes of the conflicts-of-interest provisions seemingly precludes such contracts in other circumstances where they may be reasonable and acceptable. While a Colorado omission of the ABA addition may carry a negative implication that even waivers of conflicts are not permitted, as the member who had first raised the matter suggested, Berger felt that inclusion of the ABA addition to Comment [5] would leave the negative implication that the subcommittee had seen. Perhaps, Berger suggested, the solution was to add yet more text that would disclaim that negative implication, that implication that the lawyer could not seek to clarify other issues arising under the Rules by way of contract with the client.

Another member, who had not yet spoken, expressed his general dislike for the idea of contracting around the application of the rules, but he added that this particular provision does not say the contract is binding but only that it may be "considered" in determining the underlying choice of law matter. Maybe that worked, he suggested.

To yet another member's observation that the ABA's proposed addition merely permits the lawyer and the client to enter into a "written agreement" that may be considered by the court in determining what conflicts rules actually to apply — and thus doesn't add anything to the fact that the court could consider such an agreement even in the absence of the added text in the comment — Berger responded that the mere expression, in any fashion in any of the rules or comments, that the lawyer and the client may contract as to their application has significant implications.

At the request of a member who had not spoken on the matter, the Chair called for a vote on the matter. The subcommittee's recommendation was approved, and the ABA addition to Comment [5] of Rule 8.5 was rejected.

F. *Miscellaneous Corrections.*

It was noted that the existing Comment [1] to Colorado Rule 4.3 contains a cross-reference to Rule 1.13(d) that should be to Rule 1.13(f). The Committee approved the correction of that error.

It was also noted that both Comment [7] and Comment [8] to Rule 1.5 erroneously refer to Paragraph (e) of that Rule 1.5; the references should be to Paragraph (d) of the rule. The Committee approved the correction of those errors.

G. *Rule 4.4, Respect for Rights of Third Persons.*

The Chair asked Berger to lead the Committee through a discussion of the New ABA Model Rules changes to Rule 4.4.

Berger began that discussion by commenting that he would not have anticipated that this provision would generate the extensive discussion that it actually caused among the subcommittee members, as is indicated in the subcommittee's report.[5] The approach taken by the ABA is a simple one: If the lawyer receives a document that was inadvertently sent to the lawyer, the lawyer need only give notice of that receipt to the sender. Other, further responses may be required by other law, but the ABA's rule, standing alone, would itself require nothing more. For example, it would not mandate that the lawyer not read or use the received document.

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5. The report of the New ABA Model Rules Subcommittee on the ABA's changes to Rule 4.4 begin on p. 18 of the materials provided to the Committee for this thirty-ninth meeting.

But such a rule would not be consistent with the ethical principles expressed by the CBA Ethics Committee in its published opinions and would be a change from existing Colorado Rule 4.4(c), which provides—

> (c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender's instructions as to its disposition.

Berger recalled that, when the Committee considered Rule 4.4 in its initial review of all the ABA Ethics 2000 Rules for adoption in Colorado,[6] it had a lengthy discussion about the receiving lawyer's duties with respect to a document that had been inadvertently sent to the lawyer. Were there ethical constraints limiting the lawyer's freedom to use the document for the benefit of the lawyer's client? Many on the Committee, as on the CBA Ethics Committee, felt that there should be some constraints. Rule 4.4(c) was the result of that discussion. Berger summarized the provision this way: If, before you start reading, you know the document was not intended for you, you should not read it unless and until a court determines that you may do so.

In their review of the matter, Berger and Judge Ruthann Polidori had felt that the current Colorado version of Rule 4.4 did not sufficiently deal with the ethical dimensions presented by the situation. They would expand the rule's coverage to include a document that the lawyer would know, from the nature of the document and the circumstances and even without notice from the sender, was not intended for the lawyer — "it would be obvious to anyone."

But, Berger noted, one should be careful in what one wishes for. Several subcommittee members responded to Berger's and Polidori's move to expand Rule 4.4(c) by seeking to delete the entire subparagraph, retaining only the ABA version of Rule 4.4. The result was the subcommittee's inability to reach agreement, reporting out, instead, six different alternatives for the full Committee to consider.[7] Berger noted that only one of the alternatives had received support from a majority of the subcommittee's members, a majority that lasted for only an hour. There are many possibilities: Leave Rule 4.4(c) as currently stated in the Colorado Rules; delete it in a reversion to the ABA's approach; strengthen it as Berger and Polidori suggested; or drop both it and Rule 4.4(b)[8] on the theory that the innocent receiving lawyer should have no duty at all to the erring sender, no duty that would prevail over the use of the mistakenly sent document for the benefit of the lawyer's own client, leaving the party that was damaged by the inadvertent transmission with a malpractice claim against the erring lawyer.

As reported out by the subcommittee, Alternative Nº 1 would modify the existing text of Rule 4.4(c) as follows:

> (c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, ~~**before reviewing the document**~~ ***within a reasonable time thereafter also*** receives notice from the sender that the document was inadvertently sent,

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6. *See* Part III.C of the minutes of the Committee's eleventh meeting, on September 27, 2005.

7. *See* beginning on p. 9 of the subcommittee's report, page 26 of the materials provided to the Committee for this thirty-ninth meeting.

8. Rule 4.4(b) reads, "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." It does not itself preclude use of the document.

shall not ~~examine~~ ***make any use of*** the document and shall abide by the sender's ***reasonable*** instructions as to its disposition.

As explained in the subcommittee's report, this alternative would extend the receiving lawyer's duties — to not make use of the document and to abide by the sender's instructions as to its disposition — beyond the circumstance where the receiving lawyer has received notice of the inadvertent transmission before reviewing the document to the circumstance where such notice is received within "a reasonable time" after receipt of the document, even if the lawyer had reviewed the document before receipt of that notice. The purpose of the change is to reduce the perceived perverse incentive for the receiving lawyer to conduct a "review" before notice of the inadvertent transmission arrives. Those opposing this alternative wondered how the lawyer who did review the document within that period of time would purge knowledge of its contents when the notice of inadvertent transmission eventually arrived.

Alternative № 2 would leave Rule 4.4(c) unchanged but add text to Comment [2] to Rule 4.4 to explain that the phrase "reviewing the document" includes "any examination of the document by the [recipient] lawyer," so that even "[opening] an email, or [looking] at the letterhead, address field, or subject line of a document or email" before receiving notice of its inadvertent transmission would thereby eliminate any obligation under Rule 4.4(c). Those opposing this alternative felt that the expanded comment would be inconsistent with the intent of the subparagraph itself, as it would permit use of received information that was obviously intended to be confidential, such as when the email subject line read, "Here is your confidential psychiatric assessment," unless the notice of inadvertence was received before the email was downloaded and its subject line exposed to the recipient's view.

Alternative № 3 would revert the text of Rule 4.4 to that of the ABA model rule, dropping Rule 4.4(c) and reducing the ethical obligation of the lawyer who receives a document that the receiving lawyer knows or should know was sent inadvertently — even if the inadvertence were obvious by the nature of the document — to that expressed in Rule 4.4(b), that is, merely advising the sending party of the receipt of the document. Those who oppose Alternative № 3 note that it was rejected by the whole Committee when it first considered the matter in 2005 and by the Supreme Court when it accepted the recommendation of the whole Committee and adopted Rule 4.4(c).

Alternative № 4 would make the usage prohibition of Rule 4.4(c) apply only to documents that are protected within the statutory attorney-client privilege or as trial-preparation material, recognizing that the Supreme Court has, by its recent amendments to Colorado Rule 45(d)(2)(B), permitted clawback of privileged material that is inadvertently disclosed pursuant to a subpoena.[9] While some members of the subcommittee felt that this approach would at least provide for certainty, Berger believed that no member of the subcommittee now promoted the cumbersome alternative.

Alternative № 5 would extend the reach and requirements of Rule 4.4(c) by prohibiting the receiving lawyer from using a document that the lawyer knows was inadvertently sent, whether or not notice of the inadvertence is ever given; that lawyer must notify the sender of the receipt and abide by

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9. C.R.P.C. 45(d)(2)(B) reads—

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

the sender's instructions regarding return or destruction of the document. The explanation given by the proponents of this alternative is that the use of confidential or privileged information based upon an error made by the sending lawyer before a court has a reasonable opportunity to adjudicate claims of waiver is not right and therefore could not be ethical conduct by the receiving lawyer. But such an approach would entirely protect the inadvertence of the sending party at the expense and burden of the receiving lawyer.

Alternative № 6 would remove all discussion of the inadvertent transmission from the Colorado Rules, the argument being that any such rule distorts the judicial process of examination of facts and requires special conduct of the innocent receiving lawyer that is intended to relieve the erring lawyer of the consequences of the error. Logically, this alternative could also include repeal of Rule 4.4(b), although the lone proponent of this alternative on the subcommittee would retain the notice requirement of Rule 4.4(b).

With that review, Berger concluded his report for the subcommittee.

A member who had been a member of the subcommittee said she did not believe that all is fair in love, war, and litigation. In her view, the subcommittee could write a proper Rule 4.4 if the whole Committee gave guidance on these matters:

1. As now written, both Rule 4.4(b) and Rule 4.4(c) are directed toward information that is inadvertently sent by a lawyer or an opposing party — the first sentence of Comment [2] to Rule 4.4 recognizes "that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers." In recognition of the scope of the title to the rule — "Respect for Rights of Third Persons" — should the comment be clarified to cover information that was inadvertently sent by someone other than an opposing party or her lawyer, such as by an opposing party's doctor or accountant or by some other class of person, professional or otherwise, to protect not only of the opposing party but also of the person who sent it? An example would be that of the wife in a divorce, who has locked her computer, and the husband who, visiting the children, breaks the code, opens the computer, retrieves the wife's private emails and other documents, and provides the information to the lawyer who represents the husband in the divorce. Another example, of which this member was actually familiar, is that of a wife who has received temporary custody of the couple's minor child because of the husband's sexual misconduct, where the husband has recovered the wife's mental health records from her mental health counselor and disclosed those records to his lawyer.

To that second example, another member pointed to C.R.S. 18-4-412, making theft of medical records a Class 6 felony. Subsection (1) of that statute reads—

> (1) Any person who, without proper authorization, knowingly obtains a medical record or medical information with the intent to appropriate the medical record or medical information to his own use or to the use of another, who steals or discloses to an unauthorized person a medical record or medical information, or who, without authority, makes or causes to be made a copy of a medical record or medical information commits theft of a medical record or medical information.

The member who directed the Committee's attention to that section recalled that it was added to the statutes in the 1970s in response to the conduct of some lawyers defending clients against personal injury claims. There was a hew and cry; people care about this kind of conduct, that member noted. The member who was compiling the list of matters on which the Committee might be given guidance for a re-written Rule 4.4 asked whether the rule might also refer to that criminal law provision.

2. As had been noted earlier, C.R.C.P. 45 was amended recently to deal with the inadvertent disclosure of privileged information in response to a subpoena. The member who was compiling the list of matters on which the Committee might be given guidance for a re-written Rule 4.4 asked whether reference should be made to that rule.

Another member reminded the Committee that the first section of the preamble to the Colorado Rules states, "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." He urged the Committee to keep the lawyer's tripartite role, as manifested in that provision, in sight as it modified the Rules, including this one regarding the integrity of the informational process in litigation. This member "did not disagree that not all is fair in litigation" — a field he characterized as nevertheless far from love. We must be aware, he said, that our brothers and sisters who apply the rules governing lawyers' conduct need our guidance.

To the example of the mis-sent email that contains the subject line, "Here is your confidential psychiatric assessment," this member responded that that was an easy one; the lawyer receiving that email should recognize that it was sent inadvertently and should notify the sender of the error. But what about the email that just says, "the attached document kills our case"? What is the receiving lawyer to do in that situation? That lawyer's client is entitled to know that the other side has suddenly seen the weakness of its case, and yet our Rule 4.4(c) would seem to say that information — or at least the document in which it was contained, depending upon the alternative that the Committee now adopts — cannot be used by the receiving lawyer. This member would not oppose an obligation for the receiving lawyer to notify the sender of the receipt of the document but would not want the receiving lawyer to be precluded from using the information contained therein for that lawyer's client's benefit. It would be the sending lawyer who was at fault for the inadvertent transmission, not the recipient; the sending lawyer should not be able to say to Attorney Regulation Counsel, "It was the recipient who had the last best chance to avoid the harm from my error." This member urged the Committee to remember the need for balance; in his view, some version of Rule 4.4(c) is necessary, but the Committee should not shift the burden too dramatically upon the receiving lawyer.

Another member expressed his view that it was not appropriate for the Committee or the courts to assign to the innocent receiving lawyer any responsibility for protecting the interests of the sending lawyer and that lawyer's client. This member had represented lawyers on each side of the problem and found that the erring senders had to live with the consequences of the inadvertent disclosures of information: It was appropriate to assign to the receiving lawyer the duty of notifying the sending lawyer of the mistake, as Rule 4.4(b) does, for that approach affords the erring sending lawyer an opportunity to take some action to protect the client's interest. But there should be no other obligation on the receiving lawyer, such as having to comply with the sending lawyer's instructions. This member felt that, as the member who had just previously spoken had said, the rights of the receiving lawyer's client are at least as strong, in this situation, as those of the sending lawyer's client.

The member continued: Thus, the only obligation of the receiving lawyer should be to give notice of the receipt to the sending lawyer. But that is a different burden than is now mandated by Rule 4.4(c); furthermore, there really is no recognized process, at present, for the receiving lawyer to follow. The member said, as an example, that he had recently received a response to his request for admissions that, somehow, had inadvertently disclosed the instructions that the client had given to the responding lawyer about how to answer the requests. Those instructions from the client, inadvertently sent along with the answers to the requests for admission, disclosed the opponent's entire case. The member had felt it was appropriate for him to give the other lawyer notice that he'd received those instructions, asking what the sending lawyer now wanted him to do with the information and thereby giving that erring lawyer an opportunity to seek the court's protection.

A member who had served on the subcommittee responded to those comments by expressing his discomfort with any rule that required the receiving lawyer to abide by the instructions of the erring sending lawyer. He noted that sometimes the receiving lawyer needs to "push back," and he felt that the better course was for the rule to require a sequestration of the inadvertently sent document until the matter could be resolved by the court. That course, he felt, would be consistent with caselaw and struck the right balance between the interests of the respective parties.

Another member who had served on the subcommittee spoke to Alternative № 3, which would revert Rule 4.4 to the ABA Model Rule, dropping Rule 4.4(c) but retaining Rule 4.4(b) and requiring only that the receiving lawyer — if that lawyer knows or should know the document was inadvertently sent — advise the sending party of the receipt of the document. In this member's view, the foundations of Colorado's Rule 4.4(c) were shaky and the provision was in fact a house of cards. The provision, she noted, had been included in our Committee's initial recommendation to the Supreme Court covering the ABA's Ethics 2000 Rules only because of the existence of the CBA Ethics Committee's Opinion 108, adopted by that committee in May 2000. Yet, although our Committee had cited the Colorado ethics opinion in its recommendation of Rule 4.4(c) to the Supreme Court, its explanation to the Court had erred by stating that the CBA Ethics Committee had relied on existing Rule 4.4 in arriving at that opinion; in fact, the Ethics Committee had not referred to the then-existing rule — which did not then impose any burden on the receiving lawyer — but found, principally by looking at the prohibition against dishonest conduct that is stated in Rule 8.4(c), not only a duty to give notice of the receipt of the inadvertently-sent document but also to abide by the sending lawyer's instructions as to the disposition of the document. In sum, this member said, the proponents for retention of Rule 4.4(c) are wrong to cite adherence to the CBA Ethics Committee's Opinion 108 as a reason for that retention, because the provision does not parallel that opinion.

The member continued by noting that the CBA Ethic Committee's Opinion 108 was itself based in part upon Formal Opinion 92-368 of the ABA Standing Committee on Ethics and Professional Conduct, which opinion has been withdrawn by the ABA committee, with its issuance of Formal Opinion 05-437, in recognition of the fact that the ABA's Model Rule 4.4(b) had only required notice to the sender and did not require non-examination and non-use of the document nor compliance with the sending lawyer's instructions about disposition of the document. In subsequent opinions, the ABA Standing Committee had recognized that the rule should not express "principles involving the protection of confidentiality, the inviolability of the attorney-client privilege, the law governing bailments and missent property, and general considerations of common sense, reciprocity, and professional courtesy," because the application of other law is beyond the scope of the ethics rules and not a proper basis for a formal opinion on professional conduct.[10] In this member's view, if such law is not a proper basis for an ethics opinion, it is not a proper basis for an ethics rule; such law should be left to separate, independent application. This member commented that she was in favor of courtesy but must think about her obligations to her client when she is the lawyer who has received inadvertently-sent material that is relevant to her representation of that client; while she would be subject to a court's instructions, she should not be subject to the instructions of the erring sending lawyer.

The member said the impact of the current rule is to turn a disclosure matter, a matter of court procedure, into a disciplinary matter. The member agreed with the point that Berger had made in his review of the subcommittee's alternatives — that the circumstances covered by the rule are exacerbated by the advent of electronic communication. She felt, however, that this was one more reason for leaving the entire matter to other law, outside the disciplinary context.

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10. *See* the discussion of the history of ABA Formal Opinion 92-368 and its successor, Formal Opinion 05-437, at p. 5 of the subcommittee's report on Rule 4.4, found at p. 22 of the materials provided to the Committee for this thirty-ninth meeting.

The member added that the ABA Standing Committee has devoted much attention and effort to these issues — as is evidenced by the recounting of its various opinions in the subcommittee's report on Rule 4.4 — and has determined only to impose a duty of notice upon the receiving lawyer. Twenty-nine other states have adopted that position. She suggested that the subcommittee could aid the Committee in its consideration of the rule by charting what other states have done, some of which have provided for cooling-off periods, court resolution and the like; although, she added, such a chart might be much like a Chinese restaurant, offering too many choices.

Wherever the Committee came out, this member hoped that it would avoid reference to privileged and confidential material, for the interjection of those specialized concepts would only lead to confusion and unintended consequences by adding to the receiving lawyer burden the need to consider and resolve the application of those concepts when determining what course of action to take in response to the inadvertently received document.

Another member, who had also been a member of the subcommittee, said his concerns with the existing rule and with all of the proposals reflected two dramatically different scenarios. In the first, the sender has hit the wrong button on the email service, or a doctor has misdirected a report. In that scenario, he felt, it was appropriate to put some slight burden on the receiving lawyer. In the second scenario, the document has inadvertently been included in a response to a formal discovery request. In that scenario, if the rule were written as some members proposed then the sending lawyer could take the position that there was no need to exercise care to protect the client's confidential information in the discovery response because inadvertently-disclosed information could be clawed back. In that scenario, this member felt, there should in fact be no ethical imposition on the receiving lawyer.

To those comments, another member said that Rule 1.6 establishes the principle obligation of the erring lawyer: Do not disclose confidential client information unless disclosure is impliedly authorized to carry out the representation. If, by Rule 4.4, we send a second message to lawyers — that breaches of the duty of confidentiality can be mitigated by shifting burdens to receiving lawyers — we have weakened the fundamental mandate of Rule 1.6.

That member continued by suggesting that, outside the litigation context, there is not likely to be a court available to determine the outcome, although, if the mistake is big enough and the stakes high enough, the matter might end up in court. The structure of the rule will determine which lawyer would be obligated to take the matter to court for that resolution, the sender or the recipient. If the sending lawyer rushed to court for protection, that could well spell the spoiling of a pending transaction. This member saw a need for something in the rule to "set the tone" for how the parties might resolve the inadvertent disclosure without having to resort to court; in his view, the rule should be written with more than just the litigation scenario in mind.

Another member responded to several of the comments that others had made by noting that lawyers are not just warriors on a battle field. Referring again to the preamble to the Rules, he pointed out that lawyers have additional responsibilities to the judicial system itself. In his view, the ABA approach is dead wrong; there are ethical implications when a lawyer receives things that should not have been sent; those are not just matters for other law, such as the law governing legal privileges, but are matters that should be dealt with also in the rules of professional conduct.

Whatever restrictions are provided for, this member noted, will merely be temporal, as the rule will spell out procedures to be followed to resolve the situation. None of the proposals is an absolute barrier to use of inadvertently-disclosed information by the receiving lawyer; the proposals just say go to court to see whether there has been a waiver of a privilege or other right to confidentiality existing under law external to the rules of professional conduct. The fact that the receiving lawyer must wait for

a resolution should not control the situation. It may be a very specific situation in which the inadvertently-disclosed information might greatly affect the parties' respective rights and the outcome of the case. Why should the rule not provide for an opportunity for the court to resolve the matter?

This member noted, with respect to the earlier comment that the result might be different in the context of a response to a formal discovery request, that the Supreme Court's Civil Rules Committee would soon be considering a change to C.R.C.P. 26 to adopt the clawback rule found in Federal Rule of Civil Procedure 26. He noted that litigants in the Federal courts have been dealing with that rule for a long time without problem. That provision, he said, requires as a matter of procedure what Alternative Nº 3 would require as an ethical principle. Further, he said, the Colorado Supreme Court, by its adoption of changes to C.R.C.P. 45, has accepted that clawback might be appropriate.

A member spoke in favor of Alternative Nº 2, which would leave Rule 4.4(c) unchanged (but clarify by comment that any observation of the mis-sent document would constitute the receiving lawyer's "review" sufficient to avoid any further obligation to respond to the sending lawyer's instructions regarding use of the document). In addition to the virtue that it would retain the provision that has been in effect since 2008, this alternative has a very narrow scope: When, before "review" of the document, the receiving lawyer is notified that the document was inadvertently sent, the receiving lawyer must not examine the document and must abide by the sender's instructions for disposition. That's a very narrow burden, he felt, to impose on the receiving lawyer in a very narrow circumstance. It is not, in his view, a "balancing act," but, rather, a barrier to examination that can exist only where the receiving lawyer has notice of the inadvertence of the transmission before the lawyer has been exposed to any bit of information contained in the transmission.

That member said he had previously been in favor of the Colorado version of the rule and had played a role in the adoption of CBA Ethics Committee Opinion 108; he remained in favor of them. Both deal only with the situation where notice of the inadvertent transmission is received before the content of the transmission becomes known to the receiving lawyer. He noted that Rule 1.15(a) covers property that belongs to another, requiring the lawyer to hold such property separate from the lawyer's own property and appropriately safeguarding that property until it is returned pursuant to Rule 1.15(b). Existing Rule 4.4 is much narrower, only requiring notice to the sending lawyer and compliance with the sending lawyer's disposition instructions. The opponent's open briefcase in the conference room is not to be examined; it is as appropriate to say the mis-directed Federal Express package is also not to be opened when it arrives tomorrow after today's notice of its inadvertent dispatch.

As to what's fair in litigation — as distinguished from what's fair in love — the rules of professional conduct are the appropriate place to deal with these problems.

In this member's view, all that is needed is the suggested comment, which is a part of Alternative Nº 2, refining the nature of what constitutes a "review" of the mis-sent document sufficient to cut off a duty to comply with the sending lawyer's instructions.

A member pointed out that the rule in question would apply to criminal cases as well as to civil litigation. She directed the Committee's attention to CBA Ethics Committee Opinion 102, which, similarly to Opinion 108, would preclude use of information inadvertently disclosed in response to a subpoena.[11]

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11. The syllabus of CBA Ethics Committee Opinion 102, issued in 1998, expresses the matter as follows:

If information, documents, photographs or other objects are inadvertently received from a witness on whom a subpoena duces tecum has been served that the lawyer knows to be, or that appear on its face to be privileged or

Another member said he supported Alternative № 2 for all the reasons that had been expressed by the member who had just spoken about that alternative before the reference to Opinion 102. In this member's view, Alternative № 2 was right in the middle between the harsh ABA "caveat emptor" rule and, at the other end of the spectrum, the proposals that would impose more significant burdens on the receiving lawyer and that are themselves inconsistent with the changes that are being made to the civil procedure rules.

The Chair spoke to say that it was no more clear now than before about which way the Committee would go. She asked for a straw vote on the matter, noting that there was not a sufficient number of members in attendance to make a final decision about Rule 4.4.

After discussion directed to restating the alternatives, the first vote was on deleting Rule 4.4(c) and adding a comment that referred the duty expressed in Rule 3.4(c) to comply with court rules. That proposal failed, with the result, as the Chair noted, that some version of Rule 4.4(c) would be retained.

After further discussion about approaches that might be taken toward the remaining alternatives, it was decided, by vote, just to leave Rule 4.4(c) as it is currently stated in the existing rules.

H. *Other ABA Changes; Commendation of the Subcommittee Chair.*

Berger reported that New ABA Model Rule 4.4 would add the concept of "electronically stored information" to the concept of a "document" in the context of the inadvertent disclosures that are covered by Rule 4.4. The subcommittee agreed with that addition but felt that the term "document" should be defined in Rule 1.0 to include electronically stored information so that such information would be included in each reference to a "document" within any of the rules.

ABA Model Rule 4.4(b) also now defines "electronically stored information" to include "embedded data (commonly referred to as metadata)," so that the usage principles of Rule 4.4 would apply to metadata as they do to overt information within a "document," precluding usage only if the metadata were inadvertently included in the transmission and were then the subject of a notice given as contemplated by the rule.

These changes were approved by the Committee.

With that action, the Committee concluded its review of the revised ABA Model Rules. The Chair commended Judge Berger for his work, and that of the subcommittee, in guiding the Committee through that review.

IV. *Next Committee Meeting.*

The Chair noted that the Committee's work load was presently pretty light. A subcommittee chaired by David Stark is considering pro bono policies for in-house and governmental attorneys, and

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confidential, then the lawyer receiving such information has an ethical obligation to refrain from reviewing the information after becoming aware of the privileged or confidential nature of the information. The lawyer then has an ethical duty to notify the adverse party, if unrepresented, or the adverse party's lawyer and the producing witness. A lawyer must also take reasonable steps to notify the person entitled to invoke the privilege with respect to the information that the lawyer possesses such information and either follow the instructions of the person who is entitled to invoke the privilege with respect to the information or refrain from reviewing the information until a definitive resolution is obtained from the court or other tribunal.

a subcommittee chaired by Cynthia Covell is considering a revision to Comment [3] to Rule 3.1 to alert lawyers to the decision in *A.L.L. v. People ex rel. C.Z.*, 226 P.3d 1054 (Colo. 2010).

Given that level of workload, the Chair felt that the next meeting could be put off for four months or so, to late July 2014. She said she would check with the Court and advise the members of the actual date of the next meeting.

V. *Adjournment.*

The meeting adjourned at approximately 11:50 a.m. The next meeting of the Committee will be announced at a later date.

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

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

These submitted minutes have not yet been approved by the Committee

COLORADO SUPREME COURT

STANDING COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT

Submitted Minutes of Meeting of the Full Committee
On June 5, 2015
(Fortieth Meeting of the Full Committee)

The fortieth meeting of the Colorado Supreme Court Standing Committee on the Rules of Professional Conduct was convened at 9:15 a.m. on Friday, June 5, 2015, by Chair Marcy G. Glenn. The meeting was held in the Supreme Court Conference Room on the fourth floor of the Ralph L. Carr Colorado Justice Center.

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

I. *Meeting Materials; Minutes of March 14, 2014 Meeting.*

The Chair had provided a package of materials to the members prior to the meeting date. The package did not contain submitted minutes of the last preceding meeting of the Committee, the thirty-ninth, held more than a year previously on March 14, 2014, a lapse for which the secretary apologized to the Committee. The Chair gave cover to the secretary by noting that the topics for this meeting did not carry over from that prior meeting.

II. *Miscellaneous Matters.*

The Chair noted that a long time, nearly fifteen months, had passed since the Committee's last meeting, and she explained that part of the delay in scheduling the current meeting was the time that had been required to put all of the changes that the Committee had proposed to the Supreme Court, based on the Committee's review of the amended ABA Model Rules that had been proposed by the ABA's "20/20 Commission."

The Chair reported that Melissa Meirink has joined as a staff attorney to the Supreme Court, working with Christine Markman, who has been a regular support to the Committee. The Chair expects to rely on both these lawyers as good resources for the Committee.

The Chair also thanked staff attorney Jenny Moore for her assistance in getting into the Court's preferred format and style the Committee's recent proposals for changes in the Colorado Rules of Professional Conduct.

As to the status of the Committee's proposed changes to those Rules,[1] the Chair said that she has been told by the Court that it has not yet taken action on them, although they are proceeding along the Court's internal schedule. It is likely that the Court will not hold hearing on the proposals until after this summer.

III. *Subcommittee on Pro Bono Services by In-House and Government Lawyers.*

The Chair asked David Stark, chair of the Committee's subcommittee formed to consider pro bono services by in-house and government lawyers, to report on the subcommittee's activities.[2]

Stark began by noting that the subject before the subcommittee had a long and twisted history. He recalled that the Committee had previously talked about amendments to the comments to Rule 6.1and had determined that it should establish a subcommittee to work with the Advisory Committee to the Office of Attorney Regulation Counsel on the topic. The participants in the combined effort included, in addition to Stark, Helen Berkman, James Coyle, Marcy Glenn, Carolyn Powell, Richard Reeve, Judge Daniel Taubman, and Mimi Tsankov.

The subcommittee met numerous times and considered numerous proposals; and it ran into lots of resistance, most of which came with respect to the provision of pro bono services by government lawyers, there being little opposition from in-house counsel.

Stark explained that government lawyers had — wrongly — gotten the impression that the subcommittee was seeking to impose a pro bono service requirement upon them, with policies defining how such services were to be rendered. In fact, the subcommittee learned that one size could not fit all agencies and that no single policy could be adopted.

In the midst of the group's effort, Stark received an email from Kristen Burke, counsel to Chief Justice Rice, suggesting the addition of the following as a comment to Rule 6.1:

> Individual government attorneys may provide pro bono legal services in accordance with their respective organization's internal rules and policies. Government organizations may adopt pro bono policies at their discretion.

The materials provided to the Committee for this meeting contain an email chain that began with that email from Burke. The chain includes an email from Stark to Burke that expresses his view that one size of policy cannot fit all needs, so that a short, pithy statement that the adoption of policies by government agencies is a good alternative to promulgation of a model pro bono policy for such agencies. Stark's email also outlines some of the concerns that government lawyers have raised about their providing pro bono legal services, including problems with providing such services on agency time, using agency facilities for those services, and the lack of professional negligence insurance to cover the risk attendant to providing those services.

The outcome of the subcommittee's efforts, then, has been the Court's proposal for the addition of its short comment to Rule 6.1.

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1. The Chair's May 22, 2015 cover letter to the Supreme Court, with the attachments setting forth the Committee's proposals, is included in the materials provided to the Committee for this fortieth meeting.

2. The report of the Subcommittee on Recommended Pro Bono Policies for In-House and Government Attorneys is included in the materials provided to the Committee for this fortieth meeting.

The subcommittee found that the Federal governmental agencies have a good and well-developed pro bono policy; the subcommittee worked with the Department of Justice and other agencies to obtain their inputs.

In Stark's view, the Court's suggested comment, which the subcommittee now proposes be added to Rule 6.1 to deal with pro bono services by in-house and government lawyers, is as much as can be done to establish a workable "rule" on the matter.

A member asked Stark about the word "may" contained in the second sentence of the proposed comment, wondering whether the word should instead be "should": "Individual government attorneys *should* provide pro bono services . . . ." Stark replied that, although the subcommittee certainly wanted to push the point, there was a great deal of push-back, resulting in the subcommittee's decision to use the word "may." He, personally, would be willing to change the word to "should."

A member noted that the comment already also uses the word "discretion," and she asked whether the comment should refer, perhaps by a link, to the policy of the Department of Justice.

In reply, Stark noted that every agency has its own issues and restrictions. For example, a county attorney reported that she must satisfy her county commissioners about any such policy, so the development of such policies would likely require action by numerous county commissions across the state.

The member who had noted the use of the word "discretion" also said that she was concerned generally about the comment. Why, she asked, did it not just say that government agencies are encouraged to adopt pro bono service policies for their lawyers, period?

Another member introduced her comments with the warning that she had lots to say. She noted, first, that this Committee did not develop the Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms that appears at the end of the comments to Colorado Rule 6.1 nor propose it to the Court. Rather, it was promoted by the Access to Justice Commission. Second, she noted, the Rule and its comments do not make any parallel statement that law firms should establish pro bono policies. In her view, the matter of adoption of pro bono policies does not belong within the Rules of Professional Conduct and would better be handled by a Chief Justice Directive. In the absence of a policy statement for law firms, it would be strange to urge government agencies to adopt such a policy.

Further, this member said, the reason for pursuing the matter of pro bono services by in-house and government lawyers was to remedy the fact that the Model Policy currently included at the end of the comments to Rule 6.1, covering only private practitioners and law firms, leaves out a large number of lawyers, those practicing in-house or with governmental agencies. To this member, the subcommittee's proposal seems like a step backwards. Rule 6.1 already says that "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay" A comment that referred only to government lawyers would seem to take the urgency out of the rule. This member was "not keen" on this comment for all the reasons she expressed. She realized that the comment may reflect the views of the Chief Justice; yet, she felt, that should not preclude the Committee from reporting to the Court that it does not feel that addition of the comment is a good idea.

To those comments, another member pointed to the last provision of Rule 6.1 — "Where constitutional, statutory or regulatory restrictions prohibit government and public sector lawyers or judges from performing the pro bono services outlined in paragraphs (a)(1) and (2), those individuals should fulfill their pro bono publico responsibility by performing services or participating in activities outlined in paragraph (b)" — as a provision that recognized that government lawyers are in a special

situation. In this member's view, it is reasonable to encourage government agencies to figure out how their lawyers might provide the contemplated services.

The member who had challenged the special statement of policies for government agencies agreed that the last provision of Rule 6.1, to which her attention had been directed, did alleviate her concern about the special call for such policies for government agencies. She added, however, that, if government agencies are to be encouraged to adopt pro bono policies, then perhaps the comments ought also to encourage law firms to adopt such policies. In reply to a comment by Stark, this member agreed that Rule 6.1 does currently make reference to law firms, but she added that the new comment calls out only government agencies, and not law firms or even in-house legal departments, for their adoption of pro bono policies. When Stark recited the second sentence of the preface to the Model Policy that currently follows the comments to Rule 6.1 — "Adoption of a law firm pro bono policy will commit the firm to this professional value and assure attorneys of the firm that their pro bono work is valued in their advancement within the firm" — the member suggested that the concept that is included in that sentence should perhaps be referred to in an additional sentence conjoined with the suggested new comment about government agencies.

Another member asked whether lawyers within the Department of Justice were actually providing pro bono services, and Stark replied emphatically that they were doing that. The member said she was surprised; she was herself working on a pro bono project at this time but had found that no one in government service seemed to have time to work with her on the project. She wondered whether government lawyers actually work on pro bono matters or just talk about doing that.

Another member observed that, because the project the member had spoken of involved criminal law, it might be that the special ethical issues arising in that field might have precluded assistance by government lawyers.

Another member added that he is aware that many government lawyers are providing pro bono services and often step out of their comfort zones to do so.

The member who questioned the pro bono activity of government lawyers said she was now satisfied that government lawyers do provide pro bono services, adding that the overlay of criminal law in the matter she referred to might explain the unwillingness of government lawyers to assist there.

A member who had not previously spoken said that he saw no harm in adding the proposed comment, just to remind all lawyers of the urgency of the need for pro bono services.

Returning to the question of whether the word "may" that is used in the proposed comment should be changed to "should," a member said she believed that "should" would more directly tell individual government lawyers of the value of pro bono services and perhaps encourage them to encourage their agencies to adopt policies that would facilitate their provision of those services.

Another member approved of that but added that the organization of the two sentences of the proposal could be improved.

The switch from "may" to "should" was approved by the Committee.

The Committee turned back to the question of whether this comment or another one should deal with the adoption of pro bono service policies by law firms or for in-house lawyers, as this comment would do for government lawyers.

To the comment that in-house lawyers may face conflicts of interest, a member noted that it is easy for lawyers to provide non-conflicted services of one kind or another to the indigent. The member was concerned that discussion of alternative services would draw away from the main goal of providing legal services to the indigent.

To the question of policies for law firms, a member suggested this addition: "Law firms and in-house legal departments are encouraged to develop pro bono publico policies to guide their lawyers." That, the member said, would match the subcommittee's provision for government lawyers.

The Chair asked that the Committee first determine what should be said with respect to government lawyers, from which a coherent package could be developed by the subcommittee for all three classifications of lawyers.

To that, a member said he saw no need for a reference to lawyers working in-house or in law firms, because Rule 6.1 is already structured to recognize that every lawyer has the duty to provide pro bono services, while the last provision of the existing rule, as had been noted earlier, already speaks to the special circumstance of lawyers who are employed within government agencies, recognizing that "constitutional, statutory or regulatory restrictions [may] prohibit government and public sector lawyers or judges from performing the pro bono services" that are outlined in the preceding provisions of the rule. The member reiterated that the only thing the additional comment need deal with is that special circumstance of the government lawyer.

Stark asked the Chair whether she was suggesting changes to the subcommittee's proposed comment. She replied that she was not suggesting the adoption, within the comments, of a model pro bono policy. Rather, she said, we are talking about encouraging government agencies to adopt such policies, and she was suggesting the addition of another comment to make the same point for law firms. She agreed with the prior comment that Rule 6.1 already clearly enunciates the duty that is imposed on every lawyer, but she believed it useful to expand the discussion of the adoption of policies to include law firms. That would, in part, connect the concept of a model policy to law firms, and it would be consistent with what is proposed to be said about government lawyers.

To that, another member asked that the Committee restrict its consideration to the matter that had been referred to the subcommittee and developed by it with the assistance of the Advisory Committee to the Office of Attorney Regulation Counsel. That matter is, he noted, the matter of in-house and government lawyers. He asked that the Committee concentrate on that matter; if it found parallels to lawyers in private law firms, it could offer those parallels to the Chief Justice for her further consideration. But the Committee should not delay sending to the Chief Justice its conclusions about in-house and government lawyers while it sorts out its thinking about law firms.

Another member added her concurrence to that position, noting that there was no need to morph the matter from government lawyers to all lawyers as there has never been a concern about lawyers in private practice. She noted that more than 290 law firms and lawyers have committed to fifty hours or more of pro bono service per year. Model policies are already encouraged and being adopted by law firms. There is no need for this discussion to be extended to lawyers in private practice.

The Chair asked for a motion, and a member responded by moving that the Committee adopt the subcommittee's proposal for in-house and government lawyers, but with the word "may" changed to "should" and the two sentences being reversed in order.

A member asked whether the Committee should "retain jurisdiction" to consider further the issue of law firm pro bono policies or should ask the Court whether it would wish us to consider those matters.

To that the Chair noted that the Committee is never limited in the matters it chooses to consider, so that no such retention of jurisdiction need be claimed nor advice need be sought from the Court in this case.

The pending motion was then adopted by the Committee.

The Chair noted that Stark remains chair of the subcommittee, and she requested the subcommittee to look further at the matter of pro bono policies for law firms.

IV. *The Gilbert Case.*

The Committee then turned its attention to the recent discipline case, *Gilbert*,[3] a case which member James Coyle argued as Attorney Regulation Counsel and member Nancy Cohen argued on behalf of the respondent. In the case, Gilbert had engaged to provide three specific tasks for her clients in an immigration matter, for which she would be paid a flat fee of $3,550. The engagement agreement did not identify milestones of performance, state an hourly rate — although the clients had been given a copy of the lawyer's regular hourly fee schedule showing a regular rate of $250 per hour — or disclose that a portion of the fee would be retained if the engagement were terminated before completion of the identified tasks. The clients terminated the engagement before completion of all the identified tasks but after they had paid $2,950 in installments toward the total fee of $3,550.

A majority of the Supreme Court found that the lawyer did not violate Rule 1.16(d) — requiring the refund of "any advance payment of fee . . . that has not been earned" — as charged by Attorney Regulation Counsel when she returned only $1,835.86 of the advanced fees, retaining $1,114.14 for 4.41 hours of work actually spent on the case and $11.64 of incurred expenses. Although the determination of her entitlement was made by the lawyer unilaterally, rather than by a court in an action to recover from the clients the quantum meruit of her services after a full refund of all that the clients had paid toward the full flat fee, the majority of the Court found that she had not violated the refund obligation of Rule 1.16(d) "by failing to return that portion of the fee to which she was entitled in quantum meruit."

A minority of the Court, Chief Justice Rice writing for herself and Justices Coats and Eid, thought the majority misapplied quantum meruit principles, finding that quantum meruit is a remedy to be sought as a claimant before a court in a proceeding in which the claimant must prove the conferring of a benefit at the claimant's expense in circumstances that would make it unjust for the defendant to retain that benefit without payment of the reasonable value of the services rendered by the claimant. In the absence of such process and proof, the lawyer, in this case, could not establish that she had "earned" any part of the fee as contemplated by Rule 1.16(d).

As Committee member Rothrock noted to the Chair in his email of April 7, 2015, included at page 110 of the materials provided to the Committee for this meeting, both the majority and the minority in *Gilbert* referred to the Rules of Professional Conduct and invited a clarifying amendment or comment regarding flat fees. What kind of clarification would that be, the Chair asked. Would the Committee be restricted to established law, including *Gilbert*, in its work?

Contemporaneously, the Chair received an inquiry[4] from Steven Jacobson, chair of the Supreme Court's Attorney Regulation Committee, asking this Committee to consider amendments to the Rules

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3. In re Gilbert, 346 P.3d 1018, decided April 6, 2015. The opinion is found beginning at p. 112 of the material provided to the Committee for this fortieth meeting.

4. The Jacobson letter is found beginning at p. 152 of the material provided to the Committee for this fortieth meeting.

"setting certain minimal standards for written fee agreements in Colorado" and listing aspects of the lawyer's engagement that the Attorney Regulation Committee believes should be addressed in such an amendment.

A member suggested that a subcommittee be formed to address the panoply of issues raised by the *Gilbert* case and the Jacobson letter, commenting that, perhaps, an approach similar to Chapter 23.3 of the Colorado Rules of Civil Procedure, which specifically addresses contingent fee agreements, is needed for flat fee agreements.

Another member emphasized that the majority opinion in Gilbert specifically mentioned amendment of the Rules, and not necessarily just the addition of a comment, as a means by which the needed clarification might be obtained. In answer to another member's question, this member explained that an *ad hoc* committee worked on the development of the contingent fee provisions of Chapter 23, C.R.C.P. and made its resultant proposal to the Civil Rules Committee — an odd procedure at the time, the member noted.

The Chair said that, if a subcommittee is appointed for this purpose, its membership should include a good representation of those who use flat fee agreements, including lawyers engaged in immigration or criminal law fields.

A member noted that, if all of the fee that was actually earned must be returned and a claim then made for recovery in quantum meruit, "We all know that money will not be available and that suing to recover is an invitation to a malpractice lawsuit." Another member pointed to the opposing view expressed in the minority opinion, that "the majority permits Gilbert and similarly situated attorneys to put the cart before the horse and declare fees as earned under quantum meruit when no quantum meruit proceedings have been held."

A member who had relevant experience of her own agreed that a subcommittee should be formed as had been suggested. When she read the *Gilbert* opinion, she sensed that a number of things were "going on" that led to the lawyer's "harsh treatment" but were not apparent on the faces of the opinions. She felt that the case offered many things to be talked about at a continuing legal education seminar for criminal law lawyers.

A member observed that the position of Attorney Regulation Counsel is that, if the lawyer has a flat fee arrangement, the lawyer will violate Rule 1.5(f), Rule 1.16(d), and Rule 8.4, and will commit conversion of client property, if the lawyer retains a portion of the fee in an early termination of the matter, if the engagement agreement has not established benchmarks to identify the portion that has been earned at the time of termination. The question for the subcommittee to consider is whether there should be a rule that spells out what is needed for a flat-fee engagement. The issues are different from those involved in a contingency fee engagement, in part because the lawyer in the latter case is not likely to be holding, in advance, the fee that may eventually be earned upon the contingency, while the lawyer may well be holding, from the beginning of the engagement, some or all of the agreed flat fee in that kind of engagement.

The Chair appointed Cohen and Sudler to co-chair a subcommittee to consider these matters.

V. *Coyle Report.*

James Coyle reported to the Committee that he had attended conferences of the American Bar Association Center for Professional Responsibility in Denver, with about 450 other lawyers, on the topics of professional responsibility and on client protection. At one of the conferences, issues of

multijurisdictional practice were considered with lawyers from the Canadian Bar participating. The topics included "proactive risk-based management regulation" by lawyer regulatory agencies, a concept that Coyle described as agencies going beyond claims-based, proscriptive rules of conduct and becoming "more proactive in the regulation of lawyers." The concept is being implemented in New South Wales, Australia, and in England. Coyle said it included the appointment of "ethics compliance officers" within law firms who would certify to the regulatory agencies their law firms' compliance with applicable conduct rules.

The Colorado Attorney Regulation Advisory Committee, chaired by member David Stark, has formed a subcommittee to consider these issues and what Coyle called "regulatory justice." It is, Coyle said, a different approach, one that is not based on "discipline" but that seeks a better way to regulate lawyers than by disciplining them for breaches of rules of professional conduct.

Coyle also reported that the American Association of Professional Responsibility Lawyers is reviewing the existing lawyer advertising rules, with a view toward consolidating Rule 71 through Rule 7.5 into a single rule.

A member noted that Washington State has recently established a class of "legal technician," authorized to provide some functions that are normally provided only by licensed lawyers. Coyle replied that the Office of Attorney Regulation Counsel is looking at that development, with member Alec Rothrock heading that effort. A presentation on that development was made a couple of weeks before the is meeting, and the Rothrock subcommittee will be meeting at the offices of the Colorado Bar Association on June 26, 2015.

VI. *Adjournment; Next Scheduled Meeting.*

The meeting adjourned at approximately 10:30 p.m. The next scheduled meeting of the Committee will be on Friday, October 16, 2015, beginning at 9:00 a.m., in the Court of Appeals Full Court Conference Room..

RESPECTFULLY SUBMITTED,

Anthony van Westrum, Secretary

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

HOW REGULATORS ARE BLOCKING THE FLAT-FEE REVOLUTION

"While certainly clients deserve consumer protection from unscrupulous lawyers, our struggling profession would better serve clients and ourselves if we aimed to stabilize the market for legal services, rather than seeking to institutionally enforce buyer's remorse."

By Keith Lewis

CLIENTS LOVE FLAT FEES because of the cost certainty that they bring. One of the most common complaints about lawyers is the billable hour and the pervading perception among clients that lawyers are always on the clock. That is why clients are practically begging for flat fees. However, in view of the highly regulated nature of attorney fees, lawyers are discovering that there are huge disincentives for granting clients whatever they want. Perhaps a more predictable, transactional practice lends itself to flat fees. However, flat fees in non-routine litigation do not make economic sense under the current regulatory structure.

When you browse through any of the cutting-edge legal media outlets, such as Lawyerist.com or AboveTheLaw.com, you will find dozens of articles touting the flat-fee revolution that clients are demanding and that many attorneys (and even larger firms) are starting to consider. However, the unintended consequences of ethics rules can thwart the concept of the flat-fee revolution and cost attorneys money when they try to respond to their clients' demands by offering flat fees.

Under the Colorado Rule of Professional Conduct 1.5(g):

"Nonrefundable fees and nonrefundable retainers are prohibited. Any agreement that purports to restrict a client's right to terminate the representation, or that unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees, is prohibited."

Comment 12 to that rule goes on to state:

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

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

In a recent opinion on point, the Colorado Supreme Court recognized that "[t]he flat fee merely established the maximum that the client may owe." *In Matter of Gilbert*, 2015 CO 22 at ¶36 (13SA254) (dated April 6, 2015). Indeed, many have characterized a flat-fee arrangement in Colorado as just an attorney agreeing to cap his hourly fee at a certain amount.

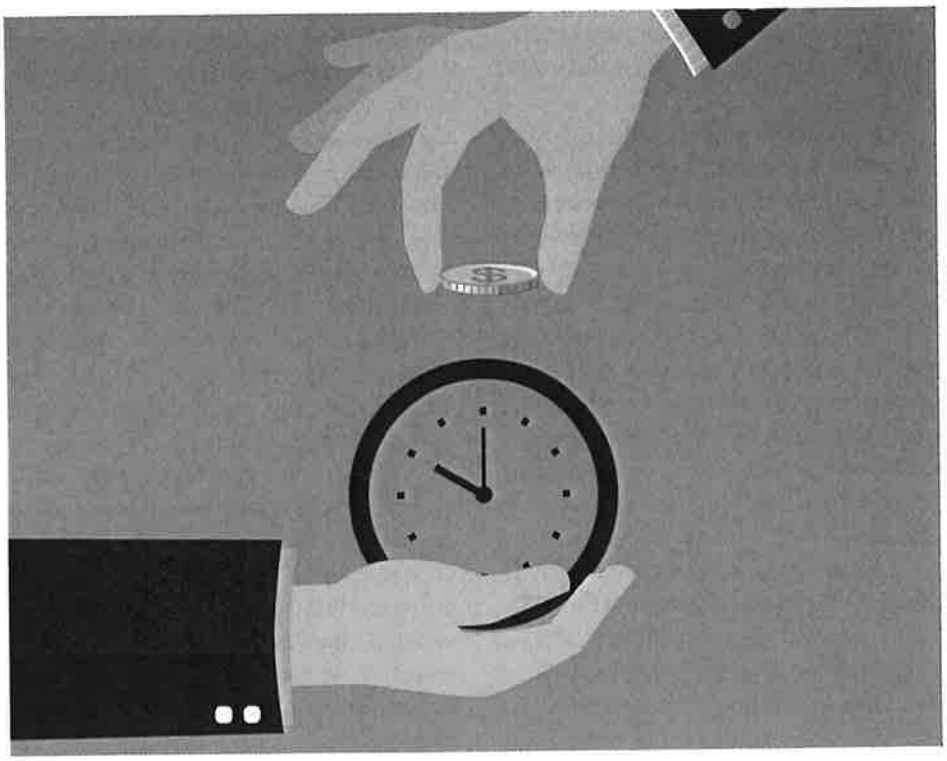
Our profession has long recognized a distinction between earned and unearned fees, as well as the importance of safeguarding the latter in a trust account. The legal system has also long recognized the concept of mutual consideration in contracts. For an attorney to agree to cap his fee at a fixed amount, he must receive something in return, such as the assurance of "nonrefundability." While clients certainly deserve consumer protection from unscrupulous lawyers, they would receive better service if the market for legal services were more consistent.

In states that allow nonrefundable retainers, clients are protected by other mechanisms. An ethics board will still step in if the lawyer simply

Lewis, *continued on page 34*

FLAT FEES: YOU ARE ONLY LIMITED BY YOUR CREATIVITY — AND YOUR OATH

By Chip Mortimer



I RECENTLY FINISHED RENOVATING A HOME. The financial arrangement with my contractor was simple. After paying a deposit for the materials, I paid the contractor fixed amounts at pre-determined intervals upon the work's completion. We even agreed up-front how the cost of unforeseen circumstances would be calculated. This was a classic flat fee arrangement. It provided both of us with the certainty that we needed.

As long as the fee is reasonable, any lawyer could enter into an identical relationship with a client. Nothing could be simpler. Unlike my contractor, few lawyers are willing to wait to be paid until after their work is completed. This is understandable. But let's be clear: When the fee is paid and how it is calculated are two different considerations. A flat fee can be paid at any time.

Lawyers are typically given fees in advance to hold as a fiduciary that can be applied to payments as they come due under the fee arrangement. In some arrangements, the fee is based on the performance of some predetermined task or the passage of some unit of time. A lawyer is not entitled to these funds until they have been earned by performing an agreed-upon service or conferring a benefit. The lawyer owes fiduciary duties to segregate, safeguard and account for client funds. In addition, the lawyer's fee must be reasonable under Colo. RPC 1.5(a).

Keith Lewis suggests that lawyers receive a lump sum in advance with no corresponding duty to refund any portion, regardless of the events of the representation. His complaint is not so much about flat fees as it is about other principles that govern the attorney-client relationship. If a client terminates his or her lawyer before the representation is complete, the lawyer may keep the funds, even if the lawyer made a disaster of the client's case or treated the client unprofessionally. If the client perceives some unfairness in this arrangement, he or she may hire a second lawyer to sue the first, presumably after negotiating a reasonable fee agreement. Mr. Lewis calls this arrangement a "true flat fee." He alleges, without evidence, that lawyers will not offer flat fees if they must return the unearned portion. He won't offer a flat fee unless we reject all regulatory requirements and embrace the freedom of parties to contract for his commercially expedient "no refunds" alternative. However, lawyer and client don't necessarily stand on equal footing, and fiduciary duties aren't for sale.

Mr. Lewis argues that his proposal would "shift the risk of uncertainty" onto the client. It certainly would. Not only would this proposal allow the lawyer to forget his fiduciary duties and take fees before they were earned, it would also eliminate or, at the very least, completely reinterpret the requirement that all fees be reasonable. For instance, I could charge you the same flat fee to represent you, whether the case is dismissed before I answer or the matter leads to a week-long jury trial. But Mr. Lewis' ideal of financial predictability can be achieved without such extreme results.

The current Rules allow considerable flexibility. For instance, engagement retainers, in which an attorney earns a reasonable sum upon receipt for taking the case and foregoing others, or for providing other consideration, are allowed. Mr. Lewis apparently isn't aware of this; he isn't the only one. Many lawyers don't seem to realize that they may charge an engagement retainer as long as the fee statement explains the basis for earning the payment upon receipt. The lawyer must actually provide the consideration so described and keep the engagement retainer distinct from the fee for other services.

Additionally, one can easily divide many types of representation with benchmarks denoting stages where a reasonable portion of the fee has been earned. Granted, flat fees aren't compatible with all types of representation, especially the litigation matter at the center of Mr. Lewis' argument. The unpredictable nature of general civil litigation makes the up-front calculation of a lump-sum flat fee as inadvisable as quoting your client the odds of success. Flat fees work best in repetitive litigation situations and transactional representa-

tion (e.g., DUI defense, estate planning and debtor representation in Chapter 7 bankruptcy). While the time that you spend on any particular matter may vary, that does not mean that charging an identical fee is unreasonable under Colo. RPC 1.5(a).

If you are concerned about losing money by being terminated in-between benchmarks, use more benchmarks and keep them close together so that the amount you earn and therefore risk between them is not as great. *The Matter of Gilbert*, 346 P.3d 1018 (Colo. 2015), provides additional guidance to lawyers by allowing them to retain a portion of an advanced flat fee at termination prior to the completion of the representation based on the fair value of the services provided.

In less repetitive situations, such as the civil litigation matter to which Mr. Lewis alludes, consider the possibility of hybrid fee arrangements that combine flat, hourly and contingent fees in different ways to deliver services in a manner that enhances predictability for lawyer and client. For instance, an hourly agreement could incorporate flat fees for certain foreseeable tasks.

As Mr. Lewis points out, developing alternative fee arrangements is a critical access to justice issue. Contingent fees are the classic example of a fee structure that is intended to assist persons who might not otherwise be able to afford legal counsel. We all know that contingent fees must be reasonable and that compliance with Chapter 23.3, Rules Governing Contingent Fees is imperative if a fee is to be recovered, regardless of the social or commercial benefits of our fee agreement. Our professional responsibilities will not yield to a one-sided deal that is struck by a client who can't afford a lawyer and bargains from a disadvantage.

We can succeed financially while operating within the framework of existing rules. I am not aware of any client who is clamoring for the opportunity to have an attorney keep money that hasn't been earned. Likewise, I really do not understand how simply labeling flat fees "earned upon receipt" would improve access to justice. If access to the legal system for those of modest means were reduced to little more than a game of chance — you won't know until the representation ends whether or not the fee that you are locked into was reasonable — our profession is failing the public. Mr. Lewis cites no evidence to suggest that these are the sort of flat fees that clients are "begging for."

Mr. Lewis' proposal sounds a lot like the credit industry, which shifts the risk of "uncertainty" (a synonym for "loss" in this instance) to those of modest means by charging higher interest rates to those who can afford them the least. The legal profession is a social institution, a cornerstone of our democratic society — not an engine of commerce. Access to justice is not credit: Reasonable fees are not commodities that belong only to those who can afford to bargain for them. **D**

Charles (Chip) E. Mortimer received his undergraduate degree from Tufts University in 1983 and his J.D. from the College of William and Mary in Virginia in 1986. He was licensed to practice law in Colorado in 1986, and spent fourteen years in private practice, focusing on family, commercial and real estate litigation, before joining the Office of Attorney Regulation Counsel. Chip is now Deputy Regulation Counsel. He can be reached at c.mortimer@csc.state.co.us.

Lewis, *continued from page 32*

takes the fee and ignores the client's matter. The term "special retainers" is often used in states where an attorney may classify a retainer as nonrefundable. Special retainers acknowledge the tradeoffs that attorneys face when agreeing to represent a client; they also allow attorneys the freedom to openly contract for their fee. In those states, the Supreme Court seeks to regulate the attorney's attention to the case — not his or her fee agreement. Other states have embraced the flat-fee trend and have created built-in incentives to encourage attorneys to meet the demand for flat-fee legal representation. Colorado, by contrast, prohibits classifying a retainer as nonrefundable. See Colo. RPC 1.5(g); compare State Bar of Georgia Formal Advisory Opinion 03-1 ("Generally, fees paid in advance under a special retainer are earned as the specified services are provided. Some services, for example, the services of the attorney's commitment to the client's case and acceptance of potential disqualification from other representations, are provided as soon as the contract is signed."). The distinction is that other states recognize that an attorney has conferred a benefit to the client by simply agreeing to the representation.

When someone seeks an attorney after having just been served with a summons in a civil trial, one of the first questions that the prospective client will ask will be the cost. Neither attorney nor client can accurately predict the duration or scope of the litigation because the pleadings can be amended, and discovery can often take a winding course. By agreeing to a flat-fee structure, the attorney will take on a significant risk by limiting his or her fee to a particular fixed rate, even though the work to be performed remains uncertain.

Flat fees make no business sense for litigation attorneys under the current regulatory system because the attorney assumes the client's risk of uncertainty in litigation without being offered anything in return. In such a scenario, the attorney would have to (foolishly) agree to perform an indefinite amount of work for a definite price. I am not suggesting that clients should be denied the right to terminate representation; I am arguing that shifting the uncertainty of litigation onto lawyers is not the correct approach.

The frustration is that many ethics bylaws, including those in place in Colorado, prohibit the use of flat fees in any way that would make sense for litigators. Sorry clients: There won't be any flat fees until the rules are reformed. But do not fret: According to the government, it's for your own good. **D**

The author, Keith Lewis, is a Denver-based attorney with his own appellate and trial litigation practice. He can be reached at Keith@LewisLawDenver.com.

PROPOSED AMENDMENT TO COLO.RPC 3.1, CMT. [3], BY *A.L.L.* SUBCOMMITTEE

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule. As to the obligations of court-appointed counsel for a respondent parent in a termination of parental rights appeal, *see A.L.L. v. People ex rel. C.Z.*, 226 P.3d 1054, 1060 (Colo. 2010) ("So long as the attorney does not misstate the facts or controlling law, [the appointed attorney] is free to present her client's arguments to the court as well as her client's desire to prevail. . . . [A]n appointed attorney cannot be held to have violated her ethical duties by presenting apparently meritless claims where her client's right to take the appeal is protected by law.").

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COPY

Marcy Glenn

From: Marcy Glenn
Sent: Thursday, September 17, 2015 4:42 PM
To: 'fbaumann@lrrlaw.com'; 'lorenbrown@colo-law.com'; 'sklopman@hklawllc.com'
Subject: Colorado Access to Justice Commission proposal for amendments to CRPC 1.15B and 1.15D

Dear Fred, Loren, and Susan,

Thank you for your August 7, 2015 letter proposing, on behalf of the Colorado Access to Justice Commission, amendments to the Colorado Rules of Professional Conduct, specifically to CRPC 1.15B and 1.15D concerning disposition of orphaned funds in COLTAF accounts.

This item will be on the agenda for the next meeting of the Standing Committee, on October 16. Our meeting will run from 9:00 until noon. However, I cannot predict when we will get to your proposal, because we generally address old business before turning to new business.

Following our typical protocol for proposed rule amendments, we will form a subcommittee to evaluate your proposal, and you will be invited to serve on that subcommittee. For that reason, it is far from essential for you to attend the October 16 meeting. The Committee will receive your letter and attachments, which explain the proposed amendments and the impetus for them. However, you are welcome to attend, either in person or by phone. We will be meeting in the Colorado Court of Appeals' large Conference Room, and I can provide you with call-in information closer to the meeting date.

Thank you again and I look forward to working with you on this project.
Marcy

Marcy G. Glenn
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Denver, CO 80202
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E-mail: mglenn@hollandhart.com

Colorado Access to Justice Commission

August 7, 2015

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

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

Dear Ms. Glenn and Members of the Standing Committee:

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

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

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

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

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

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

Sincerely,

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

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

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

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

Proposed amendment to CRPC 1.15B (Account Requirements)

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

Proposed amendment to CRPC 1.15D (Required Records)

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

NOTE: The governor signed this measure on 5/29/2015.

An Act

HOUSE BILL 15-1371

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

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

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

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

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

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

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

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

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

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

Dickey Lee Hullinghorst
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Bill L. Cadman
PRESIDENT OF
THE SENATE

Marilyn Eddins
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Cindi L. Markwell
SECRETARY OF
THE SENATE

APPROVED_____

John W. Hickenlooper
GOVERNOR OF THE STATE OF COLORADO

RESOLUTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COLO.RPC 1.13, CMT. [3]

[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)~~(b) 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.

COLO.RPC 1.5(f)

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

COLO.RPC 1.16, CMT. [9]

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule ~~1.15~~1.16(d).

COLO.RPC 1.16A, CMT. [1]

[1] Rule 1.16A is not intended to impose an obligation on a lawyer to preserve documents that the lawyer would not normally preserve, such as multiple copies or drafts of the same document. A client's files, within the meaning of Rule 1.16A, consist of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice. A lawyer's obligations with respect to client "property" are distinct. Those obligations are addressed in Rules 1.15A and 1.16(d)~~, 1.15(a) and 1.15(b)~~. "Property" generally refers to jewelry and other valuables entrusted to the lawyer by the client, as well as documents having intrinsic value or directly affecting valuable rights, such as securities, negotiable instruments, deeds, and wills.

COLO.RPC 1.16A, CMT. [3]

[3] Rule 1.16A does not supersede obligations imposed by other law, court order or rules of a tribunal. The maintenance of law firm financial and accounting records is governed

exclusively by ~~covered by~~ Rules 1.15A and 1.15D~~(j) is governed exclusively by those rules~~. Similarly, Rule 1.16A does not supersede specific retention requirements imposed by other rules, such as Rule 5.5(d)(2) (two-year retention of written notification to client of utilization of services of suspended or disbarred lawyer), Rule 4, Chapter 23.3 C.R.C.P. (six-year retention of contingent fee agreement and proof of mailing following completion or settlement of the case) and C.R.C.P. 121, § 1-26(7) (two year retention of signed originals of e-filed documents). A document may be subject to more than one retention requirement, in which case the lawyer should retain the document for the longest applicable period. Rule 1.16A does not prohibit a lawyer from maintaining a client's files beyond the periods specified in the Rule.

COLO.RPC 1.18 CMT. [9]

[9] For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rules 1.15A and 1.15D.

COLO.RPC 5.5(a)(1)

(a) A lawyer shall not:

(1) practice law in this jurisdiction without a license to practice law issued by the Colorado Supreme Court unless specifically authorized by C.R.C.P. 204 or ~~220, C.R.C.P. 221,~~ C.R.C.P. 205 ~~221.1, C.R.C.P. 222~~ or federal or tribal law;

COLO.RPC 5.5, CMT. [1]

[1] The definition of the practice of law is established by law and varies from one jurisdiction to another. In order to protect the public, persons not admitted to practice law in Colorado cannot hold themselves out as lawyers in Colorado or as authorized to practice law in Colorado. Rule 5.5(a)(1) recognizes that C.R.C.P. 204 and ~~220,~~ C.R.C.P. 205 ~~221, C.R.C.P. 221.1, and C.R.C.P. 222~~ permit lawyers to practice law in accordance with their terms in Colorado without a license from the Colorado Supreme Court. Lawyers may also be permitted to practice law within the physical boundaries of the State, without such a license, where they do so pursuant to Federal or tribal law. Such practice does not constitute a violation of the general proscription of Rule 5.5(a)(1).

COLO.RPC 8.5, CMT [1A]

[1A] The second sentence of Rule 8.5(a) does not preclude prosecution for the unauthorized practice of law of a lawyer who is not admitted in this jurisdiction, and who does not comply with C.R.C.P. 204 or ~~220,~~ C.R.C.P. 205~~221, C.R.C.P. 221.1, or C.R.C.P. 222~~, but who provides or offers to provide any legal services in this jurisdiction.

COLO.RPC 7.2, CMT. [7]

[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, 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 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~~telephone, or real-time electronic contacts that would violate Rule 7.3.

COLO.RPC 7.3(a)

(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: . . .

COLO.RPC 7.3, CMT. [1]

[1] There is a potential for abuse inherent in direct in-person, ~~live~~ telephone, or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The 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.

COLO.RPC 7.3, CMT. [2]

[2] This potential for abuse inherent in direct in-person, ~~live~~ telephone, or real-time electronic solicitation of prospective clients justifies its prohibition, particularly since lawyer 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 communications which may be mailed or autodialed make it possible for 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 to direct in-person, telephone, or real-time electronic persuasion that may overwhelm the client's judgment.

COLO.RPC 7.3, CMT. [3]

[3] The use of general advertising and written, recorded, or electronic communications to transmit information from lawyer to 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 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.

COLO.RPC 7.3, CMT. [8]

[8] Paragraph (e) 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 (e) 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, or real-time electronic 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 Rule 8.4(a).

ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS

2015 REPORT OF THE REGULATION OF LAWYER ADVERTISING COMMITTEE

June 22, 2015

ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS

REGULATION OF LAWYER ADVERTISING COMMITTEE

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Dennis A. Rendleman, Liaison, American Bar Assn. Center for Professional Responsibility

Report of the APRL Regulation of Lawyer Advertising Committee

I. Executive Summary

The rules of professional conduct governing lawyer advertising in effect in most jurisdictions are outdated and unworkable in the current legal environment and fail to achieve their stated objectives. The trend toward greater regulation in response to diverse forms of electronic media advertising too often results in overly restrictive and inconsistent rules that are under-enforced and, in some cases, are constitutionally unsustainable under the Supreme Court's *Central Hudson* test. Moreover, anticompetitive concerns, as well as First Amendment issues, globalization of the practice of law, and rapid technology changes compel a realignment of the balance between the professional responsibility rules and the constitutional right of lawyers to communicate with the public.

In 2013, the Association of Professional Responsibility Lawyers ("APRL")[1] created the Regulation of Lawyer Advertising Committee to analyze and study the ABA Model Rules of Professional Conduct and various state approaches to regulating lawyer advertising and to make recommendations; the goal being to bring rationality and uniformity in the regulation of lawyer advertising and disciplinary enforcement. The Committee consists of both former and current bar regulators, law school professors, authors of treatises on the law of lawyering, and lawyers who are experts in the field of professional responsibility and legal ethics. The Committee also received valuable input from Committee liaisons from the ABA Center for Professional Responsibility and the National Organization of Bar Counsel ("NOBC").[2]

The Committee's fundamental premise is that the proper and constitutional purpose of regulating advertising is to assure that consumers of legal services receive factually accurate, non-misleading information about available services. The Committee obtained, with NOBC's assistance, empirical data derived from a survey sent to bar regulators regarding the enforcement of current advertising rules by state disciplinary authorities. The Committee received survey responses from 34 of 51 jurisdictions. The Committee also considered consumer surveys, state bar reports, and other materials regarding the attitudes of consumers toward lawyer advertising, and the effects of advertising regulations on the public's understanding about legal services. It gave particular attention to the impact of evolving technology and innovations in the marketing of legal services. The Committee considered the constitutional standards for regulating commercial speech, the proliferation of legal ethics opinions, and the paucity of disciplinary decisions on lawyer advertising. The Committee analyzed the legitimate public policies underlying lawyer advertising regulations and the effectiveness of current enforcement efforts in achieving these policy objectives.

Based on the survey results, anecdotal information from regulators, ethics opinions, and case law, the Committee concludes that the practical and constitutional problems with current state regulation of lawyer advertising far exceed any perceived benefits associated with protecting the public or maintaining the integrity of the legal profession, and that a practical solution to these problems is best achieved by having a single rule that prohibits false and misleading communications about a lawyer or the lawyer's services. The Committee

[1] APRL is a national association of lawyers who provide advice and representation in all aspects of legal ethics and professional responsibility. APRL's members include practicing lawyers, academics, judges, corporate counsel, risk management attorneys, and government lawyers. For the past two decades, APRL has taken public positions on the rules governing lawyers, as well as professional discipline regulations, legal malpractice statutes, and other developments in professional responsibility matters, including holding twice yearly conferences on ethics topics, submitting public statements, reports and amicus curiae briefs in pending state and federal litigation and rule amendment proceedings.

[2] Attachment 1 is a brief biographical statement of the members of the Committee and the Committee liaisons.

believes that state regulators should establish procedures for responding to complaints regarding lawyer advertising through non-disciplinary means. Professional discipline should be reserved for violations that constitute misconduct under ABA Model Rule 8.4(c).[3] The Committee recommends that violations of an advertising rule that do not involve dishonesty, fraud, deceit, or misrepresentation under Rule 8.4(c) should be handled in the first instance through non-disciplinary means, including the use of advisories or warnings and the use of civil remedies where there is demonstrable and present harm to consumers.

The Committee decided to focus initially on advertising activities regulated under ABA Model Rules 7.1 ("Communications Concerning a Lawyer's Services"), 7.2 ("Advertising"), 7.4 ("Communications of Fields of Practice and Specialization") and 7.5 ("Firm Names and Letterheads"). The proposed revisions to these rules are set forth in Attachment 2. The proposed revisions to ABA Model Rules 7.1., 7.2, 7.4, and 7.5 retain the standard of prohibiting "false and misleading" communications in Rule 7.1 as the all-encompassing criterion for the regulation of lawyer advertising. Commentary from Rules 7.2, 7.4, and 7.5 has been merged into the Comments in Rule 7.1 to provide additional guidance to practitioners about what types of communications involving advertising, marketing, use of the terms "certified specialist," and firm names do and do not comport with the Rule 7.1 standard. The remainder of Rules 7.2, 7.4, and 7.5 were deleted, given the consensus that Rule 7.1 establishes a sufficient basis for the regulation of legal services advertising. The Committee reserved consideration, for a later time, of issues related to the regulation of direct solicitation of clients (Model Rule 7.3) and communications transmitted in a manner that involves intrusion, coercion, duress, or harassment.[4] The Committee also deferred consideration regarding the effect of certain forms of lawyer advertising and marketing on the regulation of lawyer referral services.[5]

In submitting these recommendations, the Committee is not advocating that states abdicate their regulators' authority over lawyer advertising. Instead, the proposed amendments to the ABA Model Rules on advertising and the proposed enforcement procedures are a common sense response to the major practical and constitutional problems that the Committee has identified with the current approach to regulating lawyer advertising.

II. Identifying the Problem and the Need for Change

[3] ABA Model Rule 8.4(c) provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

[4] The U.S. Supreme Court has identified other considerations related to direct solicitation that are outside the scope of this report. *E.g.* The Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995) (holding that Florida's 30-day ban on direct mail solicitation in accident or disaster cases materially advances, in a manner narrowly tailored to achieve the objectives, the state's substantial interest in protecting the privacy of potential recipients and in preventing the erosion of public confidence in the legal system); Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988) (holding that a state may not totally prohibit targeted direct mail to prospective clients known to face specific legal problems where the state's interest in preventing overreaching or coercion by an attorney using direct mail can be served by restrictions short of a total ban); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (upholding a total ban of in-person solicitation when the primary motivation behind the contact is the attorney's pecuniary gain); *In re* Primus, 436 U.S. 412 (1978) (holding that direct in-person solicitation is entitled to greater constitutional protection against state regulation when the attorney is motivated by the desire to promote political goals rather than pecuniary gain). *See also* The Fla. Bar v. Herrick, 571 So.2d 1303 (1990) (holding that a state can constitutionally regulate and restrict direct-mail solicitations by requiring personalized mail solicitation to be plainly marked as an "Advertisement."); *"Commercial Speech Doctrine,"* THE FLORIDA BAR, https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/3BC6699A524B477B85257283005D415D/$FILE/Information%20on%20the%20Commercial%20Speech%20Doctrine.pdf?OpenElement.

[5] See, e.g., Geeta Kharkar, *Googling for Help: Lawyer Referral Services and the Internet,* 20 GEO. J. LEGAL ETHICS 769 (2007).

Simply stated, current regulations of lawyer advertising are unworkable and fail to achieve their stated objectives. Survey results show that there are too many state deviations from the ABA Model Rules, actual formal lawyer discipline imposed for advertising violations is rare, lawyers are disheartened by the burden of attempting to determine which regulations apply to the ever-changing technological options for advertising, and consumers of legal services want *more*, not less, information about legal services. The basic problem with the current state patchwork of lawyer advertising regulations lies with the increasingly complex array of inconsistent and divergent state rules that fail to deal with evolving technology and innovations in the delivery and marketing of legal services. The state hodge-podge of detailed regulations also present First Amendment and antitrust concerns in restricting the communication of accurate and useful information to consumers of legal services.

Lawyer advertising rules in most jurisdictions are overly restrictive and, in some instances, are incapable of compliance given today's technology and sophisticated methods of marketing and advertising. The jurisdictions do not uniformly enforce many regulations and sometimes do not enforce them at all. This inconsistent or non-existent enforcement gives a competitive disadvantage to law firms that do not violate the rules. Moreover, the rules vary significantly from state to state on both substantive and technical (if not hyper-technical) issues. The ABA Model Rules have not been uniformly adopted and ABA Ethics 20/20's recent effort to modernize the advertising rules has been enacted by only a few states.[6] Conflicting state advertising regulations create a significant barrier to practice and unreasonably impede innovation in marketing and delivering legal services.

The realities of on-line and other forms of electronic media advertising reflect the advent of e-commerce, competition, and changes in market forces. Innovations in technology that enhance the speed of communication, as well as increasing globalization, have resulted in ineffective regulation of lawyer advertising by state regulatory agencies. The legal profession today is an integral part of the Internet-based economy, and advertising regulations should enable lawyers to effectively use new on-line marketing tools and other innovations to inform the public.[7] The sharp increase in mobile technology and Internet marketing options have resulted in borderless forms of marketing and advertising. Virtual law practice and web-based delivery of legal services, as well as the public's increased reliance on and use of the Internet and mobile technology, mandate a reexamination of how the legal profession views lawyer advertising and what can or should be effectively regulated.

A realignment of the balance between the core values of professional responsibility and effective lawyer advertising designed to communicate accurate information about the availability of legal services for consumers in the twenty-first century is essential. In the Committee's view, the overarching goals are two-fold: (1) establishing a uniform and simplified rule that prohibits false and misleading advertisements; and (2) ensuring that consumers have access to accurate information about legal services while not being deceived by members of the Bar.

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[6] Arkansas, Delaware, Idaho, Iowa, Kansas, North Carolina, Pennsylvania, West Virginia and Wyoming have adopted the Ethics 20/20 advertising rule amendments. ABA CPR Policy Implementation Comm.,*Variations of the ABA Model Rules of Prof'l Conduct: Rule 7.1*, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_7_1.authcheckdam.pdf (last updated May 4, 2015).

[7] Statistics and available data indicate that there is a serious disconnect between the way lawyers are expected to communicate with their clients in accordance with existing rules and the way that clients are communicating with everyone else and seeking information about legal services.

III. A Brief History of the Regulation of Lawyer Advertising

A. How We Got to Where We Are

Over the years, the regulation of lawyer advertising has swung from one extreme to another and come to a sudden halt at its current position where it ambivalently hovers between the two. At the one extreme, the regulation once consisted of a longstanding blanket prohibition on *all* lawyer advertising. At the other extreme, and with the blink of an eye, the nationwide ban was lifted and the U.S. Supreme Court expressed its decisive recognition of lawyer advertising as commercial free speech protected under the First Amendment. Nevertheless, the Supreme Court left the authority in the states' hands to continue regulating lawyer advertising, and the state regulators have pursued that mandate without much consistency. With ever-changing technologies, which allow for instantaneous and global communication, regulation has become challenging for regulators and practicing attorneys alike who strive to assure that attorney advertising is compliant under both evolving rules and new technology. Lawyers wanting to embrace these new technologies have been reluctant to do so out of concern that they will not comply with lawyer advertising regulation.

B. Regulation Prior to *Bates v. Arizona*

The regulation of lawyer advertising goes as far back as the nineteenth century in Great Britain, where it was a rule of etiquette, not of ethics, based on the view that law was a form of public service and not a means of earning a living.[8] As such, lawyers looked down on advertising as unseemly.[9] This "rule" was neither enforced nor considered "law" in the general sense of the word; instead, it was merely understood.

In 1908, the American Bar Association (the "ABA") adopted the *Canons of Professional Ethics* (the "Canons") and established a general prohibition of all advertising.[10] The logic behind this categorical ban was that advertising was unprofessional; and therefore, lawyer advertising would threaten the requisite of professionalism in lawyering.[11] As Robert Boden, Dean and Professor of Law at Marquette University states, "[h]igh standards and advertising did not mix."[12] Thus began a half-century-long tradition as three generations of lawyers in the United States deemed advertising to be unprofessional and therefore strictly prohibited.

In 1969, the ABA enacted its 1969 *Code of Professional Responsibility* (the "Code"), which maintained the general prohibition of attorney advertising.[13] However, shortly thereafter the adherence to a blanket ban on advertising began to unravel. In 1975, the U.S. Supreme Court decided *Goldfarb v. Virginia State Bar*, and posited that lawyers provide services in exchange for money and thus engage in "commerce."[14] Though this case did not deal directly with the question of lawyer advertising, it nonetheless suggested that the practice of law is not just a profession—it is also a business. As the Court explained, "[i]t is no disparagement of the

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[8] Bates v. State Bar of Ariz., 433 U.S. 350, 371 (1977).

[9] *Id.*

[10] The general prohibition contained a few limited exceptions called a "laundry list" of permitted advertising activity. Robert F. Boden, *Five Years After* Bates*: Lawyer Advertising in Legal and Ethical Perspective*, 65 MARQ. L. REV. 547, 549 (1982).

[11] *Id.* at 554.

[12] *Id.* at 550.

[13] *Id.*

[14] Goldfarb v. Va. State Bar, 421 U.S. 773, 787-88 (1975).

practice of law as a profession to acknowledge that it has this business aspect, . . . [i]n the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse."[15]

One year later in *Virginia State Pharmacy Board. v. Virginia Citizens Consumer Council*, the U.S. Supreme Court recognized that the First Amendment protects advertising, referred to as "commercial speech," based on the public's right to receive the free flow of commercial information.[16] The Court held that "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another" and, "speech likewise is protected even though it is carried in a form that is 'sold' for profit . . . and even though it may involve a solicitation to purchase or otherwise pay or contribute money."[17]

Finally, in 1977, the U.S. Supreme Court directly upheld the legitimacy of lawyer advertising in *Bates v. State Bar of Arizona.*[18] In this case, two Arizona lawyers, John R. Bates and Van O'Steen, opened a law office with the aim of providing "legal services at modest fees to persons of moderate income who did not qualify for governmental legal aid."[19] After two years of conducting their practice with this goal in mind, the lawyers came to the stark realization that their concept was unattainable unless they did something to attract clients.[20] Accordingly, they placed an advertisement in their local daily newspaper, announcing that they were offering "legal services at very reasonable fees" and listing their fees for certain routine legal services.[21] The State Bar of Arizona found that the advertisement violated the rule in Arizona's Code of Professional Responsibility banning lawyer advertising and, consequently, the Arizona Supreme Court censured the lawyers for their conduct.[22]

On appeal to the U.S. Supreme Court, Justice Blackmun held that lawyer advertising, as a form of commercial speech, could not be subjected to blanket suppression and that the specific advertisement at issue was protected under the First Amendment.[23] The Court carefully considered and dismissed each of the State Bar of Arizona's claims—namely, that (i) advertising will have an adverse effect on the legal profession; (ii) advertising of legal services will be misleading; (iii) advertising will have the undesirable effect of stirring up litigation; (iv) advertising will increase the overhead costs of the profession which will in turn be passed along

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[15] *Id.* at 788.

[16] In this case, there was a challenge against a state statute that prohibited pharmacists from advertising prescription drug prices. Though *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council* did not deal directly with advertising in the professional practice of law, it looked at the state of advertising in the professional practice of pharmacy, where the concern was similarly focused on the preservation of high professional standards in a professional services industry. Va Pharmacy Bd. v. Va Consumer Council, 425 U.S. 748, 765 (1976).

[17] *Id.* at 761 (internal citations omitted). Accordingly, in holding that commercial speech is protected and could not be absolutely prohibited, the Court overturned *Valentine v. Christensen*, 316 U.S. 52, 55 (1942), which was the then-existing precedent holding that commercial speech was *not* constitutionally protected.

[18] *Bates*, 433 U.S. at 384.

[19] *Id.* at 353-54.

[20] *Id.* at 354.

[21] *Id.*

[22] *Id.* at 356-58.

[23] *Id.* at 383. It is interesting to note that Justice Blackmun, the author of *Bates*, later said, "I seriously doubt whether suppression of information concerning the availability and price of a legally offered product is ever a permissible way for the State to 'dampen' demand for or use of the product." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 574 (1980) (Blackmun, J., concurring, joined by Brennan, J.) (citing Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court*, 1976 U. ILL. LAW FORUM 1080, 1080–83 (1976)).

to consumers in the form of increased fees; (v) advertising will lead to poor quality of service; and (vi) the problems of enforcement justify wholesale restrictions.[24] The Court rejected the "highly paternalistic" approach that the state must protect citizens from advertising because it potentially could manipulate them, and concluded that barring lawyer advertising only "serves to inhibit the free flow of commercial information and to keep the public in ignorance."[25] The Court explained that even when advertising communicates only an incomplete version of the relevant facts, the First Amendment presumes that *some* accurate information is better than *no* information at all.[26] Put differently, the Court stated that "the preferred remedy is more disclosure, rather than less."[27] Thus, out of this decision came the birth of a revolutionary concept that lawyers may have a general constitutional right to advertise.

C. Regulation Since *Bates v. Arizona*

Although the *Bates* court invalidated an absolute prohibition on lawyer advertising, it nonetheless left the door open for states to regulate advertising. For example, states retained the authority to prohibit false, deceptive, or misleading advertising, and to place reasonable restrictions on time, place, and manner of advertising.[28] In declining to consider the full range of potential problems for lawyers when advertising, the Court defaulted to the state bars to apply *Bates* and revise existing regulations accordingly.[29] This undefined scope of regulation bolstered the longstanding reluctance to permit lawyer advertising. Most state bars narrowly construed *Bates* and thereby preserved as much of the traditional view of advertising as unprofessional as could withstand constitutional challenge.[30]

Two years after the decision, the state bars' reaction to *Bates* was "hesitant and inconsistent," as fifteen states had not drafted any new lawyer advertising standards.[31] By 1983, however, the ABA adopted its Model Rules of Professional Conduct ("Model Rules" or "RPCs").[32] In the Model Rules, the ABA expressly permitted advertising, as Rule 7.2(a) stated, "subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication."[33] Many states then followed suit, enacting various advertising regulations and attempting to straddle the fine line between advertising as a constitutionally protected speech and misleading advertising.[34]

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[24] *Id.* at 368-79.

[25] *Id.* at 365.

[26] *Id.* at 374-75.

[27] *Id.* at 375.

[28] *Id.* at 383-84.

[29] "Underlying all of the post-*Bates* amendments is the theory that *Bates* declared a general right to advertise, leaving to the states a regulatory power to prescribe the form, content, and forum of lawyer advertising." Boden, *supra* note 10, at 555.

[30] *Id.*; *see also In re* R.M.J., 455 U.S. 191, 200 (1982) ("the decision in *Bates* nevertheless was a narrow one. The Court emphasized that advertising by lawyers still could be regulated.").

[31] Geoffrey C. Hazard, Jr., Russell G. Pearce & Jeffrey W. Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1086.

[32] *Id.* at 1087.

[33] MODEL RULES OF PROF'L CONDUCT R. 7.2 (AM. BAR ASS'N 1983).

[34] Jan L. Jacobowitz & Gayland O. Hethcoat II, *Endless Pursuit: Capturing Technology at the Intersection of the First Amendment and Attorney Advertising*, 17 J. TECH. L. & POL'Y 63, 64 (2012); R. Michael Hoefges, *Regulating Professional Services Advertising: Current Constitutional Parameters and Issues Under the First Amendment Commercial Speech Doctrine*, 24 CARDOZO J.

(footnote continued)

D. The *Central Hudson* Standard and Application to Lawyer Advertising Rules

Though the *Bates* court embraced the importance of the "commercial speech" doctrine— "[commercial] speech should not be withdrawn from protection merely because it proposed a mundane commercial transaction. . . . [S]uch speech serves individual and societal interests in assuring informed and reliable decisionmaking"[35]—it nonetheless failed to establish a clear standard for assessing the constitutionality of a regulation on commercial speech. In 1980, however, the U.S. Supreme Court articulated a clearer standard in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.*[36] The question was whether a regulation of the Public Service Commission of the State of New York violated the First and Fourteenth Amendments because the regulation completely banned promotional advertising by an electrical utility.[37] The Court's test included a four-part analysis: if the first two inquiries yield positive answers, the Court then turns to the third and fourth inquiries:

1. whether the expression is protected by the First Amendment because it concerns lawful activity and is not misleading;

2. whether the asserted governmental interest is substantial;

3. whether the regulation directly advances the governmental interests; and

4. whether it is not more extensive than is necessary to serve that interest.[38]

Following the *Central Hudson* decision, several First Amendment cases dealing with individual lawyer advertising and state regulation were decided based upon the *Central Hudson* test. In each of these cases, the regulations in question failed to satisfy *Central Hudson*'s four-part analysis and thus violated the First Amendment. These cases are considered next.

1. Examples of State Regulations That Do Not Satisfy *Central Hudson*

a. *In re R.M.J.*

In 1982, the U.S. Supreme Court decided *In re R.M.J.*, which involved a lawyer's appeal of a disciplinary reprimand based upon "four separate kinds of violation of Rule 4 [of the Missouri Supreme Court]:

ARTS & ENT. L. J. 953 (2007); Rodney A. Smolla, *Lawyer Advertising and the Dignity of the Profession*, 59 ARK L. REV. 437 (2006). *See also In re* R.M.J., 455 U.S. at 193 ("the Committee . . . revised that court's Rule 4 regulating lawyer advertising. . . . [and] sought to 'strike a midpoint between prohibition and unlimited advertising,' and the revised regulation of advertising, adopted with slight modification by the State Supreme Court, represents a compromise. Lawyer advertising is permitted, but it is restricted to certain categories of information, and in some instances, to certain specified language.").

[35] *Bates*, 433 U.S. at 363-64.

[36] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

[37] *Id.* at 558.

[38] *Id.* at 566. Through application of this four-step analysis for commercial speech to the Commission's arguments supporting its ban on promotional advertising, the Court found that the first three inquiries yielded affirmative answers; turning to the fourth inquiry, however, the Court concluded that the Commission's *complete* suppression of speech was far more extensive than necessary to further the State's interest in energy conservation. As such, the test in its totality could not be satisfied, and the Court held that the Commission's order violated the First and Fourteenth Amendments.

listing the areas of his practice in language or in terms other than that provided by the Rule, failing to include a disclaimer, listing the courts and States in which he had been admitted to practice, and mailing announcement cards to persons other than 'lawyers, clients, former clients, personal friends, and relatives.'"[39] Specifically, the lawyer had listed in his advertisements areas of law not explicitly approved by the Missouri Bar's Advisory Committee, including the words "personal injury" and "real estate" instead of the Bar-approved words, "tort law" and "property law," respectively.[40] He also listed in his advertisements other areas of law, such as "contract" and "zoning & land use" that were not found on the Advisory Committee's list at all.[41] His advertisements in local newspapers and the Yellow Pages also stated that he was licensed in Missouri and Illinois, and contained in large capital letters a statement that he was "Admitted to Practice Before THE UNITED STATES SUPREME COURT."[42]

On the issues of listing the areas of law and licensed jurisdictions, the U.S. Supreme Court found that the lawyer's advertisements were not misleading.[43] The Court also found that the answer to the second inquiry of the *Central Hudson* test—whether the asserted governmental interest was substantial in this case—was no.[44]

The Court determined that the state interest was unclear as to enforcing an absolute prohibition.[45] This led the Court to posit that the fourth factor of the *Central Hudson* test could not be met, as there was room for a "less restrictive path" instead of absolute prohibition.[46] Thus, applying *Central Hudson*, the Court found unconstitutional the Missouri rules that provided an absolute prohibition on the advertising of descriptive practice areas, licensed jurisdictions, and the mailing of announcements to persons other than lawyers, clients, former clients, friends, and relatives.

Notably, in his appeal, the lawyer did not challenge the constitutionality of the rule requiring disclaimers.[47] As such, the Court permitted that requirement to stand and explained that "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception."[48] The Court would consider the issue of when disclaimers are too burdensome in later cases.

b. *Zauderer v. Office of Disciplinary Council*

Zauderer v. Office of Disciplinary Council involved two different local newspaper advertisements: the first advertisement stated that the attorney would represent defendants in drunk driving cases and that his clients' "full legal fee would be refunded if they were convicted of DRUNK DRIVING"; and the second

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[39] *In re* R.M.J., 455 U.S. at 204.

[40] *Id.* at 197.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 205.

[44] *Id.*

[45] "Mailings and handbills may be more difficult to supervise than newspapers. But again we deal with a silent record. There is no indication that an inability to supervise is the reason the State restricts the potential audience of announcement cards." *Id.* at 206.

[46] *Id.*

[47] *Id.* at 204.

[48] *Id.* at 201.

advertisement offered representation to women injured by the Dalkon Shield Intrauterine Device.[49] The Dalkon Shield was depicted in the form of a line drawing and the advertisement included legal advice, general information, and the statement that "[i]f there is no recovery, no legal fees are owed by our clients."[50] The Supreme Court of Ohio found First Amendment protection to be inapplicable and reprimanded the attorney for violating Ohio's Disciplinary Rules.[51]

On appeal, the U.S. Supreme Court, citing *Central Hudson*, found that because the statements regarding the Dalkon Shield were not false or deceptive, it was the State's burden to establish that "prohibiting the use of such statements to solicit or obtain legal business directly advances a substantial governmental interest."[52] The Court also determined that the State's interests—of protecting the public from advertisements that both invade the privacy of the reader and may be subject to claims of overreaching and undue influence, as well as preventing lawyers from stirring up litigation—were not sufficient justifications for the discipline imposed on the lawyer.[53] The Court explained that the State's interest in propounding a prophylactic rule "to ensure that attorneys . . . do not use false or misleading advertising to stir up meritless litigation against innocent defendants"[54] was "in tension with our insistence that restrictions involving commercial speech that is not itself deceptive be narrowly crafted to serve the State's purposes."[55] Thus, the Court concluded that an attorney may not be disciplined for soliciting legal business through printed advertising containing truthful and non-deceptive information and advice regarding the legal rights of potential clients.[56]

Regarding the illustration of the Dalkon Shield, the Court noted that the use of illustrations or pictures in advertisements serves an important communicative function, and "[a]ccordingly, commercial illustrations are entitled to the First Amendment protections afforded verbal commercial speech: restrictions on the use of visual media of expression in advertising must survive scrutiny under the *Central Hudson* test."[57] The Court found that the illustration at issue was an accurate representation of the Dalkon Shield, bearing no features that were likely to deceive, mislead, or confuse the reader.[58] The burden once again shifted to the State to both present a substantial governmental interest justifying the restriction as applied and to demonstrate that the restriction vindicated the state interest through the least restrictive available means.[59] The State was unsuccessful in carrying its burden, as the State's interest—to ensure that attorneys advertise "in a dignified manner," maintain

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[49] Zauderer v. Office of Disciplinary Council, 471 U.S. 626, 629-30 (1985).

[50] *Id.* at 630-31. In full, this advertisement related the following information: "The Dalkon Shield Interuterine [*sic*] Device is alleged to have caused serious pelvic infections resulting in hospitalizations, tubal damage, infertility, and hysterectomies. It is also alleged to have caused unplanned pregnancies ending in abortions, miscarriages, septic abortions, tubal or ectopic pregnancies, and full-term deliveries. If you or a friend have had a similar experience, do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women on such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients."

[51] *Id.* at 636.

[52] *Id.* at 641.

[53] *Id.* at 642-43.

[54] *Id.* at 643.

[55] *Id.* at 644.

[56] *Id.* at 647.

[57] *Id.*

[58] *Id.*

[59] *Id.*

their dignity in their communications with the public, and behave with decorum in the courtroom—was not convincingly "substantial enough to justify the abridgment of [the attorneys'] First Amendment rights."[60] Moreover, the Court opined that the State's restrictions amounted to an impermissibly broad prophylactic rule in the form of a blanket ban on the use of illustrations, especially given that the State could police the use of illustrations in advertisements on a narrower, more tailored, case-by-case basis.[61]

Nonetheless, the Court did uphold Ohio's disclosure requirements relating to the terms of contingent fees. The Court found that the State's interest in preventing deception of consumers was substantial because the attorney's advertisement, which stated, "[i]f there is no recovery, no legal fees are owed by our clients," would mislead and deceive the public and potential clients who do not necessarily understand the distinction between the technical meanings of "legal fees" and "costs."[62] The Court concluded that the disclosure requirements were not more extensive than necessary to serve the state interest where Ohio has "not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present."[63] Accordingly, the attorney's "constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal . . . [as] disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech."[64]

c. *Peel v. Attorney Registration & Disciplinary Commission*

Five years later, in *Peel v. Attorney Registration & Disciplinary Commission*, the U.S. Supreme Court considered whether an Illinois attorney's letterhead, stating that he is a National Board of Trial Advocacy ("NBTA") certified civil trial specialist, was First Amendment protected speech.[65] The Illinois regulations stated that "no lawyer may hold himself out as 'certified' or a 'specialist'" and that "communication shall contain information necessary to make the communication not misleading and shall not contain any false or misleading statement or otherwise operate to deceive."[66] Accordingly, the Attorney Registration and Disciplinary Commission of Illinois ("Commission") and the Illinois Supreme Court deemed the attorney's letterhead— referring to his NBTA certification and his licensure in three jurisdictions— inherently misleading and thus unprotected by the First Amendment.[67]

However, the U.S. Supreme Court held that the contents of the attorney's letterhead were neither misleading nor deceptive because the certification and licensure were both true and verifiable facts.[68] Rejecting the argument that the attorney's listing of certification constituted an implicit assertion as to the quality of his legal services, the Court reasoned that there is no evidence that a claim of NBTA certification suggests any

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[60] *Id.* at 647-48.

[61] *Id.* at 649.

[62] *Id.* at 652.

[63] *Id.* at 650.

[64] *Id.* at 651 (Emphasis Added).

[65] Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91, 93-94 (1990).

[66] *Id.* at 97.

[67] *Id.* at 98-99.

[68] *Id.* at 101.

greater degree of professional qualification than reasonably may be inferred from an evaluation of its rigorous requirements.[69]

Moreover, the Court recognized that information about certification and specialties "facilitates the consumer's access to legal services and thus better serves the administration of justice."[70] Thus, the attorney's statements on his letterhead were protected under the First Amendment.[71] The Court also concluded that the State's concern about the *possibility* of deception was "not sufficient to rebut the constitutional presumption favoring disclosure over concealment . . . [which, in this case] both serves the public interest and encourages the development and utilization of meritorious certification programs for attorneys."[72]

d. Recent Federal Court Cases

Since *Peel*, federal courts have continued to apply the *Central Hudson* test to balance a lawyer's First Amendment rights with the state's interest in regulating lawyer advertising and preventing deception of the public. Five notable cases have been brought in the last decade: *Alexander v. Cahill*,[73] *Public Citizen v. Louisiana Attorney Disciplinary Board*,[74] *Harrell v. The Florida Bar*,[75] *Searcy et al. v. The Florida Bar*,[76] and *Rubenstein v. The Florida Bar*.[77]

In *Alexander v. Cahill*, the advertisements at issue were those of a personal injury firm that contained dramatizations, comical scenes, jingles, special effects like wisps of smoke and blue electrical currents

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[69] *Id.* at 102.

[70] *Id.* at 110.

[71] The Court limited this holding by stating: "A lawyer's truthful statement that 'XYZ Board' has 'certified' him as a 'specialist in admiralty law' would not necessarily be entitled to First Amendment protection if the certification was a sham." *Id.* at 109. In 1990, the Florida Supreme Court addressed unsolicited letters in *The Florida Bar v. Herrick*, where an attorney mailed an unsolicited letter to a couple upon learning that the couple had an interest in a vessel that had been seized by customs and, in the letter, stated: "Our law firm *specializes in* Customs laws relating to vessel seizures. If you have any questions, please call." 571 So.2d 1303, 1304 (1990) (emphasis added). In *Herrick*, the attorney was not certified or designated in any area of law, let alone Customs Law as the advertisement stated because it was not even an area recognized under the Florida Certification Plan or the Florida Designation Plan. The Supreme Court of Florida ruled that permitting Herrick to state that he is a specialist in Customs law "runs the risk of misleading the public into believing that he has been qualified under the Bar's designation or certification program. The state's interest here in preventing the public from being misled is strong and the regulation is narrowly drawn. This is not a case where the attorney truthfully advertises that he has been certified as having met the standards of a recognized organization which tests the proficiency of lawyers in certain areas of the law." *Id.* at 1307 (citing *Peel*).

[72] *Peel*, 496 U.S. at 111. The Court also stated that even if it assumed for the sake of argument that the attorney's letterhead was *potentially* misleading to some consumers, "that potential does not satisfy the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public." *Id.* at 109. The Court pointed out that the State's complete ban on statements that are not actually or inherently misleading, such as certification as a specialist by bona fide organizations such as NBTA, were far too extensive, and therefore, did not meet the *Central Hudson* test, where the State could have imposed lesser restrictions such as "screening certifying organizations or requiring a disclaimer about the certifying organization or the standards of a specialty." *Id.* at 110.

[73] 598 F.3d 79 (2d Cir. 2010) (New York Bar Rules).

[74] 632 F.3d 212 (5th Cir. 2011) (Louisiana Bar Rules).

[75] 915 F. Supp. 2d 1285, 1311 (M.D. Fla. 2011) (Florida Bar Rules).

[76] Complaint, No. 4:13CV00664, 2013 WL 6493683 (N.D. Fla. Dec. 11, 2013). (Florida Bar Rules). *See also Florida Law Firm Challenges Bar's New Advertising Restrictions*, 23 NO. 8 WL J. PROF'L LIAB. 4 (Jan. 23, 2014).

[77] No. 14-CIV-20786, 2014 WL 6979574 (S.D. Fla. Dec. 9, 2014) (Florida Bar Rules).

surrounding the firm's name, and slogans such as "heavy hitters" and "think big," among other gimmicks.[78] After New York's Appellate Division adopted "content-based" lawyer advertising rules to regulate *potentially* misleading advertisements consisting of "irrelevant, unverifiable, and non-informational" statements and portrayals, the attorney filed a complaint, contending that the new rules infringed upon his First Amendment rights because the rules prohibited "truthful, nonmisleading communications that the state ha[d] no legitimate interest in regulating."[79]

The Second Circuit agreed after scrutinizing the regulation's categorical bans on (i) the endorsement of or testimonial about a lawyer or law firm from a client regarding a matter that is still pending, (ii) the portrayal of a judge, (iii) the irrelevant "attention-getting techniques unrelated to attorney competence,"[80] such as style and advertising gimmicks, puffery, wisps of smoke, blue electrical currents, and special effects, and (iv) the use of nicknames, monikers, mottos, or trade names implying an ability to obtain results in a matter. The court found that this type of information is not inherently misleading or even likely to be misleading.[81] Therefore, this kind of advertising did not warrant the State's general sweeping prohibition contained in the new rules and so the regulations failed the *Central Hudson* test and were adjudged unconstitutional.[82]

Public Citizen v. Louisiana Attorney Disciplinary Board presented the Fifth Circuit with issues similar to those decided upon in *Alexander v. Cahill*. Here, six subparts of the Louisiana Supreme Court's new attorney advertising Rule 7.2(c) faced constitutional attack: (i) the prohibition of communications that contain references or testimonials to past successes or results obtained; (ii) the prohibition of communications that promise results; (iii) the prohibition of communications that include a portrayal of a client by a non-client, or the depiction of any events or scenes or pictures that are not actual or authentic, without disclaimers; (iv) the prohibition of communications that include the portrayal of a judge or a jury; (v) the prohibition of communications that employ a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter; and (vi) the requirement of disclosures and disclaimers that are clear and conspicuous and of a certain format, size, and visual/auditory display.[83] The Fifth Circuit found that these subparts of the rule, with the exception of

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[78] *Alexander*, 598 F.3d at 84.

[79] *Id.* at 84-86.

[80] *Id.* at 93. This categorical ban was similar in substance to several of the Florida Bar's advertising rules at issue in *Harrell v. The Florida Bar*: Rule 4-7.1, which was a "general prefatory rule, the comment to which limits permissible advertising content to 'only useful, factual information presented in a nonsensational manner,'" Rule 4-7.2(c)(3), which prohibited the use of '"visual and verbal descriptions, depictions, illustrations, or portrayals of persons, things, or events' that are 'manipulative, or likely to confuse the viewer,'" and Rule 4-7.5(b)(1)(A), which similarly prohibited "any television or radio advertisement that was '"deceptive, misleading, manipulative, or that is likely to confuse the viewer."' *Harrell v. Fla. Bar*, 608 F.3d 1241, 1250 (11th Cir. 2010). There, on remand, the district court struck down these rules on the ground that they were impermissibly vague, indeterminate, and exerted a chilling effect on a lawyer's proposed commercial speech that had a right to constitutional protection. *Harrell*, 915 F. Supp. 2d 1285, 1311 (M.D. Fla. 2011). *See also* Jacobowitz & Hethcoat, *supra*, note 34, at 72-73.

[81] *Alexander*, 598 F.3d at 96.

[82] *Id.*

[83] This subpart of the rule provided:

> "Any words or statements required by these Rules to appear in an advertisement or unsolicited written communication must be clearly legible if written or intelligible if spoken aloud. All disclosures and disclaimers required by these Rules shall be clear and conspicuous. Written disclosures and disclaimers shall use a print size at least as large as the largest print size used in the advertisement or unsolicited written communication, and, if televised or displayed electronically, shall be displayed for a sufficient time to enable the viewer to easily see and read the disclosure or disclaimer. Spoken disclosures and disclaimers shall be plainly audible and spoken at the same or slower rate of speed as the other spoken

(footnote continued)

the prohibition of communications that promise results,[84] were capable of being communicated in a non-deceptive and non-misleading way and were therefore not *inherently* likely to deceive.[85]

Applying the *Central Hudson* analysis, the court found that the Louisiana Attorney Disciplinary Board had at least two substantial government interests: protecting the public from unethical and potentially misleading lawyer advertising and preserving the ethical integrity of the legal profession.[86] The Fifth Circuit then aligned with the Second Circuit and found that the categorical prohibitions of communications that contain references or testimonials to past successes or results obtained, or that include the portrayal of a judge or a jury, were not directly advancing or reasonably related to the State's interests, and were more extensive than was reasonably necessary.[87]

On the other hand, the Fifth Circuit departed from the Second Circuit precedent by finding that the prohibition of communications that employ a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter, was materially advancing the State's interests and narrowly tailored to meet those ends.[88] It distinguished *Alexander v. Cahill* because, in that case, this same rule was struck down due to "'a dearth of evidence in the present record' to support a 'prohibition on names that imply an ability to get results.'"[89] Here, the court held, the State "provided the necessary evidence . . . that the Second Circuit found to be absent from *Alexander*."[90]

The court applied the lower standard of rational basis review upon the requirement for disclaimers when communications include a portrayal of a client by a non-client, or depict any events, scenes, or pictures that are not actual or authentic.[91] It concluded that the requirement was reasonably related to the substantial governmental interests and thus, constitutional.[92] Upon considering the requirement for disclosures of a certain format and style, however, the court again applied the lower standard of rational basis review, but held that this requirement was overly burdensome and therefore violated the First Amendment.[93]

> content of the advertisement. All disclosures and disclaimers used in advertisements that are televised or displayed electronically shall be both spoken aloud and written legibly."

Pub. Citizen, Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212, 228 (5th Cir. 2011).

[84] The court explained that "[a] promise that a party will prevail in a future case is necessarily false and deceptive. No attorney can guarantee future results. Because these communications are necessarily misleading, LADB may freely regulate them and [this] Rule . . . is not an unconstitutional restriction on commercial speech." *Id.* at 218-19. *See also Harrell*, 915 F. Supp. 2d at 1299 (prohibiting statements that "promise results" is facially valid because it is not impermissibly vague).

[85] *Pub. Citizen, Inc.*, 632 F.3d at 19.

[86] *Id.* at 220.

[87] *Id.* at 224.

[88] *Id.* 225-26.

[89] *Id.* at 226.

[90] *Id.*

[91] *Id.* at 227.

[92] *Id.* at 228.

[93] *Id.* at 229.

In *Harrell v. The Florida Bar*, the United States District Court for the Middle District of Florida examined "as-applied" First Amendment challenges to an attorney's marketing campaign featuring the slogan, "Don't settle for less than you deserve." [94] The Bar initially advised him to change the slogan to, "don't settle for anything less," explaining that his slogan would create unjustified expectations.[95] The Bar, however, later revoked acceptance of any version of the new slogan, finding that it improperly characterized his services in violation Rule 4-7.2(c)(2), which bans all "statements describing or characterizing the quality of the lawyer's services."[96] The attorney then filed suit challenging this rule, as well as other Florida advertising rules that allegedly prohibited various marketing strategies and chilled commercial speech in violation of his First and Fourteenth Amendment rights.[97] Specifically under review, in addition to Rule 4-7.2(c)(2), was Rule 4-7.5(b)(1)(C), which contained the Florida Bar's categorical ban on all background sounds.[98] The prohibition included all background sounds in television and radio advertisements except instrumental music: such as the background noises caused by the attorney-plaintiff's dogs, gym equipment, and other activities in his law firm that were part of his proposed advertisements.[99]

Applying the *Central Hudson* test, the district court concluded that the two advertising rules impermissibly restricted the attorney's First Amendment rights.[100] First, the court found that both the slogan and intended use of background sounds were neither actually nor inherently misleading.[101] Next, the court concluded that the State had two substantial interests: first, an interest in "ensuring that the public has access to information that is not misleading to assist the public in the comparison and selection of attorneys," and second, an interest in "preventing the erosion of the public's confidence and trust in the judicial system and curbing activities that negatively affect the administration of justice."[102]

Finally, upon applying the third prong of *Central Hudson*, the court found that neither rule directly or materially advanced the Bar's asserted interests.[103] In particular, the court found that there was insufficient concrete evidence to justify the Bar's categorical ban on background sounds, stating that "[i]n the absence of any evidence that prohibiting the type of innocuous non-instrumental background sounds as those proposed by Harrell here will protect the public from being misled or prevent the denigration of the legal profession, the Bar has failed to satisfy the third prong of the *Central Hudson* test."[104] Thus, the regulations as applied to Harrell were deemed unconstitutional.

Florida's amended regulations are currently facing another First Amendment challenge under the *Central Hudson* test. In *Searcy et al. v. The Florida Bar*, a personal injury law firm filed a lawsuit against the Florida Bar, attacking regulations that prohibit statements of quality and past results unless such statements are

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[94] Harrell v. Fla. Bar, 915 F. Supp. 2d 1285, 1289 (M.D. Fla. 2011).

[95] Harrell v. Fla. Bar, 608 F.3d 1241, 1249 (11th Cir. 2010)..

[96] *Id.*

[97] *Id.* at 1250.

[98] *Id.*

[99] *Id.* at 1251.

[100] *Harrell*, 915 F. Supp. 2d at 1309-10.

[101] *Id.*

[102] *Id.* at 1302.

[103] *Id.* 1308-10.

[104] *Id.* at 1310.

"objectively verifiable."[105] Searcy Denney Scarola Barnhart & Shipley PA ("Searcy Denney") had advertisements on its website, blog, and social media accounts containing statements of opinion, such as "the days when we could trust big corporations . . . are over," and truthful but subjective descriptions of the firm's services and record, such as, "we have 32 years of experience resulting in justice for clients . . ."[106] The Bar held that these statements and descriptions violated the "objectively verifiable" requirement in Florida's lawyer advertising rules.[107] Searcy Denney then challenged the rules in federal court, claiming that the "objectively verifiable" requirement violates the First Amendment because the requirement prohibits commercial speech for which there is no evidence that it is misleading or harmful to consumers, and Florida has no legitimate interest in prohibiting the speech.[108] The firm further asserted that the rules do not directly advance, and are far more extensive than necessary to serve, any interest Florida might claim.[109]

Finally, *Rubenstein v. The Florida Bar* involved yet another personal injury law firm that similarly confronted the "objectively verifiable" requirement in Florida's lawyer advertising rules;[110] but Rubenstein distinguished itself by focusing on the requirement as applied to past results, and the Florida Bar's Guidelines interpreting the requirement. At the time, the lawyer advertising rules permitted attorney advertisement of past results where "objectively verifiable," but the Bar had interpreted and enforced the rules, as stated in its Guidelines, to prohibit all reference to past results on indoor and outdoor display, television and radio media, because these "specific media . . . present too high a risk of being misleading."[111] On the plaintiff's motion for summary judgment, the court found that the plaintiff was challenging "only that narrow and specific blanket prohibition" as violating its First Amendment rights.[112] Applying *Central Hudson*, the court first found that the State had three substantial governmental interests in promulgating the Rules and Guidelines: (i) to protect the public from misleading or deceptive attorney advertising, (ii) to promote attorney advertising that is positively informative to potential clients, and (iii) to prevent attorney advertising that contributes to disrespect for the legal system and thereby degrades the administration of justice.[113] The court then stated, however, that the Bar had presented "no evidence to demonstrate that the restrictions it has imposed on the use of past results in attorney advertisement support the interests its Rules were designed to promote."[114] The court concluded its *Central Hudson* analysis by expressing that the Bar additionally failed to demonstrate how the restrictions on attorney speech, which amounted to a blanket restriction on the use of past results in attorney advertising in certain mediums, were no broader than necessary to serve the interests they purported to advance.[115] The court emphasized that the Bar never demonstrated that "lesser restrictions—e.g., including a disclaimer, or required

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[105] Complaint, *Searcy v. Fla. Bar*, No. 4:13CV00664, 2013 WL 6493683, at *12 (N.D. Fla. Dec. 11, 2013), *available at* http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/D0EE8F4E3167003D85257C58005BDD01/$FILE/131211%20Complaint%20-%20Orig.pdf?OpenElement.

[106] *Id.* at *17.

[107] *Id.*

[108] *Id.* at *20.

[109] *Id.*

[110] No. 14-CIV-20786, 2014 WL 6979574, at *2 (S.D. Fla. Dec. 14, 2014).

[111] *Id.* at *20.

[112] *Id.* at *23.

[113] *Id.* at *23-24.

[114] *Id.* at *25.

[115] *Id.* at *29.

language—would not have been sufficient."[116] Thus, Rubenstein succeeded on the merits of its First Amendment challenge.

The clear direction in which the United States Supreme Court has taken the regulation of commercial speech emphasizes that government must prove that the regulation it is defending does in fact advance an important regulatory interest, refusing to accept mere "common sense" or speculation as a sufficient basis for restrictions on advertising.[117] In other words, the government must present objective evidence to support a ban or restriction on truthful commercial speech and cannot simply ban or restrict speech by fiat grounded in subjective intuition that the advertising is "potentially misleading." For example, in *Florida Bar v. Went For It, Inc.*,[118] the Court went out of its way to compare the empirical evidence presented to support a thirty-day ban on targeted direct mail solicitation of accident victims to the lack of similar data in *Edenfield v. Fane*,[119] in which the Court invalidated a Florida ban on in person solicitation by certified public accountants.

In sum, there is no shortage of cases in which lawyer advertising regulations has failed the *Central Hudson* test, leading the Committee to conclude that attorney advertising regulations are, in many cases, unconstitutional and unsustainable.

IV. The Diverse Forms of Electronic Communication &The Explosion of Social Media

According to a Pew Research Center 2014 Social Media Update, for the 81% of American Adults who use the Internet:

- 52% of online adults now use two or more social media sites;
- 71% are on Facebook;
- 70% engage in daily use;
- 56% of all online adults 65 and older use Facebook;
- 23% use Twitter;
- 26% use Instagram;
- 49% engage in daily use;

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[116] *Id.* at *30.

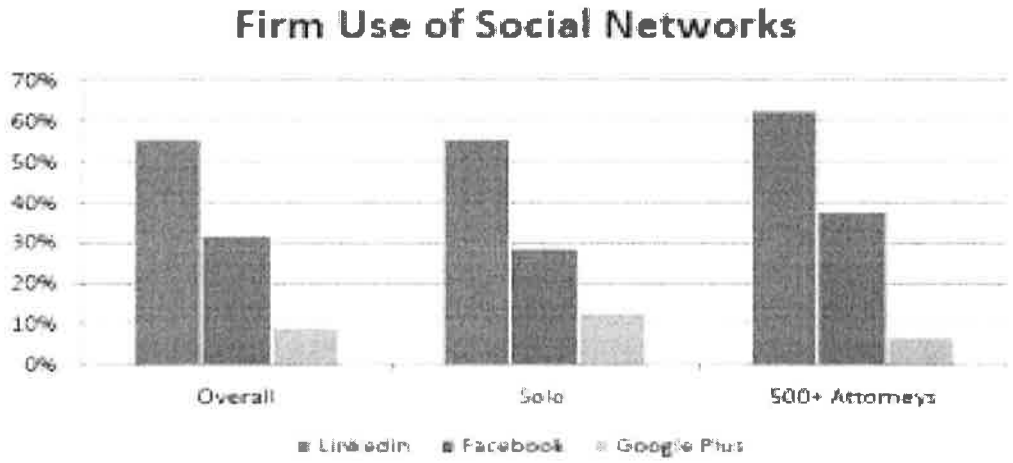
[117] *See, e.g., 44 Liquormart, Inc. v. R.I.*, 517 U.S. 484, 503 (1996) ("Precisely because bans against truthful, nonmisleading commercial speech rarely seek to protect consumers from either deception or overreaching, they usually rest solely on the offensive assumption that the public will respond 'irrationally' to the truth."); *Ibanez v. Fla. Dep't of Bus. and Prof'l Regulation*, 512 U.S. 136, 147 (1994) (striking down requirement of a disclaimer because the state failed "to back up its alleged concern that the [speech] would mislead rather than inform."); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (rejecting state's asserted harm because the state had presented no studies nor even anecdotal evidence to support its position); *Peel v Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 108 (1990) (rejecting a claim that lawyer's truthful claim of specialization certification was potentially misleading for lack of empirical evidence); and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-49 (1985) (striking down restrictions on attorney advertising where "[t]he State's arguments amount to little more than unsupported assertions.").

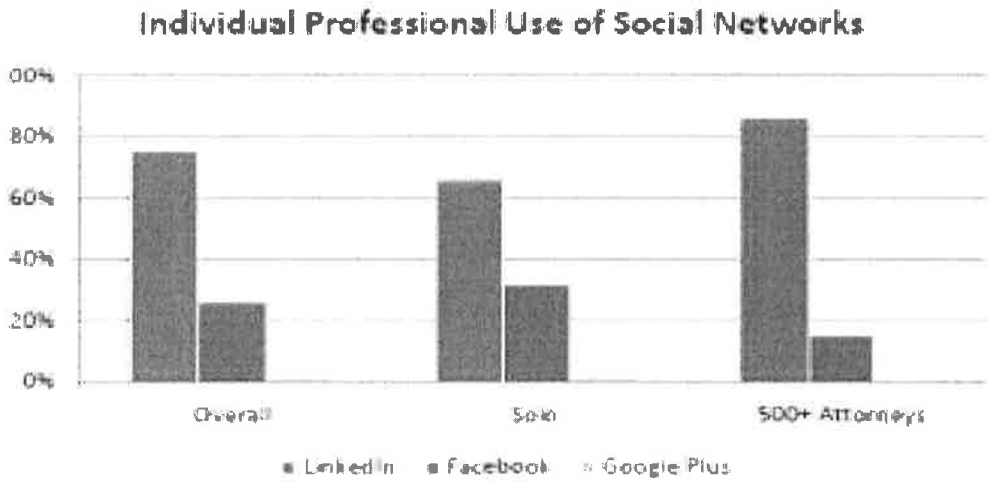
[118] 515 U.S. 618 (1994).

[119] 507 U.S. 761 (1993).

- 53% of online young adults (18-29) use Instagram; and
- 28% use LinkedIn.

Given these statistics that reflect the general population's use of social media, it is not surprising that in recent years there has been a vast increase in diverse forms of communication regarding lawyers and lawyer services. These include websites, attorney blogs, microblogs (such as Twitter), YouTube® infomercials, webinars, postings on social media such as Facebook and LinkedIn, online review sites, text messaging, the use of smart phones, "apps", links, video technology and tag lines. The graphs below illustrate the increasing use of LinkedIn and Facebook by lawyers and law firms.[120]





[120] Images supplied by Allison Shields, *Blogging and Social Media*, ABA TECHREPORT 2014, *available at* http://www.americanbar.org/publications/techreport/2014/blogging-and-social-media.html.