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SUPREME COURT OF COLORADO  
101 West Colfax Avenue, Suite 800  
Denver, Colorado 80203

Certiorari to the District Court, Boulder County,  
Honorable Lael Montgomery, Case No. 09CV623

Petitioner/Cross-Respondent:

**MERCANTILE ADJUSTMENT BUREAU, LLC,**

v.

Respondent/Cross-Petitioner:

**ELIZABETH FLOOD.**

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Case Number: 10SC852

**AMICUS BRIEF OF THE COLORADO BAR ASSOCIATION**

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with all applicable requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in those rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g) and 57. The brief does not exceed thirty pages.



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Pursuant to leave granted, the Colorado Bar Association (CBA) respectfully files this amicus curiae brief in support of Respondent Elizabeth Flood on the following issue:

Whether an arrangement in which trial counsel goes beyond advancing court costs and expenses of litigation by personally paying the attorney fees for appellate counsel violates Rule 1.8(e) of the Colorado Rules of Professional Conduct.

The CBA adopts Ms. Flood's Statement of the Case.

#### SUMMARY OF ARGUMENT

1. The Court should reject MAB's challenge to the attorneys' fee provision of the Colorado Fair Debt Collection Practices Act, C.R.S. § 12-14-101, *et seq.* (CFDCPA), under the guise of a purported violation of Rule 1.8(e) of the Colorado Rules of Professional Conduct (Colorado Rules) because (a) the Court must apply the CFDCPA as written, (b) the Court did not agree to review the reasonableness of the attorneys' fees awarded to Ms. Flood, and (c) the Court should not use the Colorado Rules to address supposed problems that, if they exist at all, arise wholly from an unrelated law, in this case, the CFDCPA.

2. MAB lacks standing to challenge the right of Ms. Flood's trial counsel, Gary E. Merenstein (Attorney Merenstein), to pay associated counsel in two law firms (jointly, Associated Counsel) their attorneys' fees for assisting in

the prosecution of this case. MAB has suffered no injury to a legally protected interest that might confer standing. This case is distinguishable from *City of Wheat Ridge v. Cerveney*, 913 P.2d 1110 (Colo. 1996), because here, unlike that case, there is no suggestion that Attorney Merenstein's alleged violation of the Colorado Rules reflected adversely on his representation of Ms. Flood.

3. Colorado Rule 1.8(e) does not apply at all to attorneys' fees paid to associated counsel in the matter in which the lawyer represents the client. Such attorneys' fees are directly analogous to contingent fees paid to the lawyer representing the client, which MAB agrees are not subject to Colorado Rule 1.8(e).

4. Alternatively, Colorado Rule 1.8(e) does not apply to attorneys' fees paid to associated counsel because those fees fall within the rule's exception for "costs and expense of litigation." An expenditure that furthers a practical or tactical objective in a lawyer's handling of a case should be treated as a cost of litigation. The fees that Attorney Merenstein paid to Associated Counsel furthered the tactical objective of providing Ms. Flood with competent appellate counsel and, therefore, Colorado Rule 1.8(e) permitted that payment of fees.

5. The Court should decline to adopt MAB's expansive fee forfeiture arguments. As a third-party liable for fees under a mandatory statutory provision,

and absent any evidence that Attorney Merenstein breached any duty owed to Ms. Flood, MAB is without standing to assert forfeiture. Moreover, the facts of this case do not satisfy any of the factors for fee forfeiture established under the Restatement of the Law Governing Lawyers (the Restatement) or case law. Permitting an outsider to the attorney-client relationship to obtain fee forfeiture – where the attorney breached no duty to the client and where the forfeiture would result in an undeserved windfall to the third-party – would be unfair, unwise, and untrue to the General Assembly’s clearly stated intent in the CFDCPA.

#### **ARGUMENT**

**I. THIS COURT SHOULD NOT ADOPT AN OVERLY EXPANSIVE INTERPRETATION OF COLORADO RULE 1.8(e) TO ADDRESS POTENTIAL ISSUES THAT ACTUALLY ARISE FROM THE PROVISIONS OF THE CFDCPA.**

MAB’s opening brief is telling. MAB’s real complaint is with the CFDCPA and, in particular, that statute’s provision for the recovery of attorneys’ fees by a successful plaintiff, even if the fee award dwarfs the plaintiff’s actual damages or the \$1,000 maximum statutory damages award.

Thus, for example, MAB argues that “[t]he threshold issue in this case is whether Merenstein’s ethical machinations justify the award of some \$200,000 in attorney fees and costs as a result of a single violation of the FDCPA against a single consumer[,]” MAB Opening Brief (OB) at 13, and that “given the technical

violation of the FDCPA, the question now before this Court is whether Flood's attorney Gary Merenstein should be able to recover some \$200,000 or more for the years of litigation that Merenstein undertook to obtain this technical violation ruling and \$1,000 statutory damage award." *Id.* at 14-15. MAB also asserts that "[a] fee forfeiture is the appropriate remedy for this extreme ethics rule violation – especially in this FDCPA context, where lawsuits are always about recovering fees," *id.* at 13, and that, "as a rule, in FDCPA cases attorney fees will almost certainly be larger than the amount of the underlying claim." *Id.* at 16 (emphasis omitted). *See also id.* at 17-18 ("The ability of counsel to file and sometimes win FDCPA lawsuits and thereby collect attorney fees has given rise to a 'cottage industry' of FDCPA lawsuits.") (citing federal cases that discuss claimed abuses in federal FDCPA litigation); 19-20 & Tab 5 (citing and attaching newspaper articles that discuss claimed abuses in federal FDCPA litigation); 33 ("Attorney fees . . . are not the sort of ordinary litigation expenses that counsel may ethically front and cover under Rule of Professional Conduct 1.8(e) because those fees may be disproportionate to the value of the underlying claim. Especially in an FDCPA case like this one, where it is fairly guaranteed that attorney fees will be more than the near-nominal value of the underlying claim.").

In short, MAB does not like the CFDCPA, specifically, a defendant's exposure under that statute for attorneys' fees that may substantially exceed a successful plaintiff's damages. That gripe, however, is misplaced in this appeal for several independent reasons. *First*, this Court must apply the CFDCPA as written, including its attorneys' fee provisions. *See, e.g., In re Marriage of Chalot*, 112 P.3d 47, 54 (Colo. 2005) ("If the statute is clear and unambiguous on its face, then we will apply the statute as written because it may be presumed that the General Assembly meant what it clearly said.") (internal quotation marks and citations omitted). "Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement." *Bardaracco v. Comm'r*, 464 U.S. 386, 398 (1984) (citation omitted). If MAB wishes to question the wisdom of the statutory scheme, it should make those arguments to the General Assembly.

*Second*, MAB's attack on the relative amount of damages and attorneys' fees is really a challenge to the reasonableness of the fee award, but MAB did not seek, and the Court did not grant, certiorari review of that question. The sole issue before the Court in MAB's appeal is whether Attorney Merenstein's payment of Associated Counsel's fees violated Colorado Rule 1.8(e). Therefore, the Court should not consider MAB's stealth reasonableness arguments. *See, e.g., NBC Subsidiary (KCNC-TV), Inc. v. Living Will Ctr.*, 879 P.2d 6, 7 n.2 (Colo. 1994)

(declining to reach questions that “were never presented to us for certiorari review and we did not grant certiorari to review”).

*Third*, and of particular concern to the CBA, as a matter of sound jurisprudence and fair regulation of attorneys, the ethics rules should not be used to address perceived problems caused wholly by some unrelated law, in this case, the CFDCPA. If this Court may not rewrite state legislation, it also should not override legislative prerogative under the guise of enforcing the Colorado Rules. *Cf., Matoush v. Lovingood*, 177 P.3d 1262, 1276-77 (Colo. 2008) (the Court should not “develop new exceptions to accepted common law doctrines, any more than legislative provisions, under the guise of announcing evidentiary guidelines”) (Coats, J., dissenting)

This case illustrates why acceptance of MAB’s arguments would be unwise as a matter of policy. The Colorado Rules apply to all Colorado-admitted attorneys and can be the basis for discipline, including disbarment. If the Court were to accept MAB’s argument, then no Colorado lawyer could ever pay the fees of another lawyer in order to obtain the second lawyer’s assistance – regardless of how great the client’s damages, how small the amount of the fee, how great the need for associated counsel with specialized expertise, or any other circumstance. This outcome would undermine Colorado Rule 1.1, which requires a lawyer to

render competent representation, including, where necessary, “through the association of a lawyer of established competence in the field in question.” Colo.RPC 1.1, cmt. [2]. In those circumstances, if the client were unwilling or unable to pay the second attorney’s fees, and if obtaining the services of the second lawyer on a contingent fee basis were not possible, the first lawyer could satisfy his or her Colorado Rule 1.1 duty of competence only by risking discipline for a Colorado Rule 1.8(e) violation – an illogical result but one that MAB’s arguments would necessarily dictate.

Equally important, the Colorado Rules “are not designed to be a basis for civil liability.” Colo.RPC, Scope. “Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process[,]” *id.*, but it should not be an excuse for addressing an independent issue having nothing to do with the Colorado Rules. *See, e.g., Norton Frickey, P.C. v. James B. Turner, P.C.*, 94 P.3d 1266, 1270 (Colo. App. 2004) (declining to invalidate fee allocation contract based on purported violation of Colorado Rule 1.5(d)).

In the end, MAB is asking the Court to contort Colorado Rule 1.8(e) to apply to the facts of this case, but only to resolve MBA’s real complaint – with the CFDCPA. But the truism “bad facts make bad law” is . . . true. And the CBA believes it would make bad law to expand the scope of Colorado Rule 1.8(e)

beyond recognition for the sole purpose of relieving MAB from fees that the General Assembly prescribed under the CFDCPA.

**II. A THIRD-PARTY LIKE MAB LACKS STANDING TO ASSERT A COLORADO RULE 1.8(e) VIOLATION.**

This is not a dispute between a client and a lawyer concerning the reasonableness of a fee charged by the lawyer. Nor has the client (or anyone else other than MAB) raised any questions regarding the propriety of Attorney Merenstein's payment of Associated Counsel's fees. In this factual context, the CBA perceives a fundamental question: Whether MAB has standing to challenge Attorney Merenstein's hiring of Associated Counsel.

A person has standing only when (1) he or she was injured in fact and (2) the injury was to a legally protected interest. *Bd. of Adams Cty. Comm'rs v. Colo. Dep't of Public Health & Env't*, 218 P.3d 336 (Colo. 2009). MAB may claim to be injured in fact if it has to pay the attorneys' fees awarded by the courts below. However, MAB's injury was not to a legally protected interest.

The attorneys' fee award against MAB results inexorably from this Court's earlier decision, in *Flood v. Mercantile Adjustment Bureau, LLC*, 176 P.3d 769

(Colo. 2008) (*Flood I*), that MAB violated the CFDCPA.<sup>1</sup> Because the CFDCPA mandates an award of attorneys fees' in the event of a statutory violation, MAB has no legally protected interest in freedom from liability for attorneys' fees.

In *City of Wheat Ridge v. Cervený*, the Court addressed when a non-client has standing to raise alleged defects in a fee agreement between the client and the lawyer in the course of proceedings to determine whether an attorneys' fee award should be made, and if, so, the amount of such fee. MAB relies heavily on *Cervený* but that case involved wholly different circumstances and, therefore, does not support MAB's arguments.

First, in *Cervený*, the Court considered whether to require a third-party to pay attorneys' fees under the Taxpayer's Bill of Rights, which included a *discretionary* attorneys' fee provision. Here, by contrast, the county court had no discretion whether to award a fee; once that court awarded Ms. Flood statutory damages – consistent with the decision in *Flood I* – the CFDCPA made a fee award *mandatory*.

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<sup>1</sup> MAB repeatedly suggests that because three Justices dissented from this Court's decision in *Flood I*, the Court's judgment in that appeal is not entitled to respect. See, e.g., OB at 13, 14. It also suggests that *Flood I* was wrongly decided. *Id.* The CBA disagrees with these suggestions. A decision of this Court, whether rendered unanimously or by a four-Justice majority, is binding authority and entitled to respect by litigants and their counsel alike.

*Second*, in *Cerveney*, the Court held that the county court had discretion with respect to the amount of the fee in narrow circumstances that do not exist here:

Further, in the event the court decides to grant attorney fees, it can consider the deficiencies of the agreement in determining the amount of the award. Therefore, while Wheat Ridge has no standing to challenge the arrangement on the respondents' behalf, it has standing to raise perceived improprieties with the contingent fee agreement for the purpose of disputing an award of attorney fees. A finding of deviation from rule requirements and/or professional standards on the part of the attorney, who stands to reap the benefits of an award, *reflects adversely on the quality of the representation.*

913 P.2d at 1119 (emphasis added). In this case, there is no colorable argument that the asserted Colorado Rule 1.8(e) violation “reflect[ed] adversely on the quality of [the] representation” of Ms. Flood. There is no evidence that Attorney Merenstein’s representation of his client suffered because he chose to pay Associated Counsel from his own pocket – the county court made no such findings and MAB makes no such argument. To the contrary, Attorney Merenstein’s decision to personally pay for Associated Counsel, consistent with Colorado Rule 1.1, enhanced the quality of the representation of Ms. Flood.<sup>2</sup>

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<sup>2</sup> Even if Attorney Merenstein had violated a duty to Ms. Flood, the CBA would question MAB’s standing: “The fact that a Rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a

MAB's true argument appears to be that if Attorney Merenstein had not engaged and paid for Associated Counsel, then Ms. Flood would not have appealed the original judgment in favor of MAB, and this Court would not have reversed and remanded for entry of judgment in Ms. Flood's favor and an award of damages, attorneys' fees, and costs. The CBA does not believe that MAB has a legally protected interest in precluding this Court's review of judgments of lower Colorado courts. Accordingly, MAB lacks standing to challenge Attorney Merenstein's payment of Associated Counsel's fees as a purported violation of Colorado Rule 1.8(e).

**III. COLORADO RULE 1.8(e) DOES NOT APPLY TO ATTORNEYS' FEES IN THE MATTER IN WHICH THE LAWYER REPRESENTS THE CLIENT.**

MAB assumes that attorneys' fees constitute "financial assistance to the lawyer's client" under Colorado Rule 1.8(e), and that the primary question under that rule is whether an advancement of fees is permitted under the exception for "expenses of litigation." *See* OB at 23-28. The CBA questions the first assumption. Based on the Colorado Rules and other law, the CBA believes that

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disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rules." Colo.RPC, Scope.

“financial assistance to the lawyer’s client” under Colorado Rule 1.8(e) *excludes* attorneys’ fees in the matter in which the lawyer represents the client.

The principal basis for the CBA’s view is that, if Colorado Rule 1.8(e) applies to attorneys’ fees in the matter in question, every contingent fee arrangement would violate the rule. Under a contingent fee agreement, a lawyer invariably provides financial assistance to the client through the provision of legal services without payment from the client. If the lawsuit is unsuccessful, the lawyer might never be reimbursed for that financial assistance. If the suit is successful, the lawyer will eventually obtain partial or complete reimbursement, but even in that event, the lawyer will have advanced financial assistance for the duration of the litigation.

Yet it is beyond dispute that contingent fee agreements do *not* violate Colorado Rule 1.8(e) despite the fact that the lawyer necessarily provides temporary or permanent financial assistance to clients. Colorado Rule 1.8 itself expressly provides that a lawyer may “contract with a client for a reasonable contingent fee in a civil case.” Colo.RPC 1.8(i)(2). *See also* Colo.RPC 1.5(c) (“A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is otherwise prohibited.”);

C.R.C.P. ch. 23.3 (Rules Governing Contingent Fees, generally permitting contingent fee agreements that comply with those rules).

Comment [10] to Colorado Rule 1.8, which pertains specifically to subsection (e), reconfirms that contingent fees are a permitted form of financial assistance. The comment explains that advances of litigation expenses are allowed “because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts.” Implicit in this statement is that contingent fees are outside the scope of Colorado Rule 1.8(e).

The exclusion of contingent fee agreements from Colorado Rule 1.8(e)’s general prohibition on financial assistance to clients is consistent with the overall structure of the Colorado Rules, which generally address fee-related issues in Colorado Rule 1.5 rather than in other rules that could conceivably apply to fees. Thus, for example, although a fee agreement is an undeniable business transaction between a lawyer and a client, Colorado Rule 1.8(a) – governing other types of business transactions – “does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5[.]” Colo.RPC 1.8, cmt. [1].

MAB might argue that contingent fees are the only fees to which Colorado Rule 1.8(e) does not apply, but that argument would be wrong. Pro bono representation – where the lawyer charges the client no fees at all – is another

example of fees to which Rule 1.8(e) does not apply. *See* James E. Moliterno, “Broad Prohibition, Thin Rationale: The ‘Acquisition of an Interest and Financial Assistance in Litigation’ Rules,” 16 *Geo.J.L.Ethics* 223, 247 (Winter 2003). *See also* Colo.RPC 6.1 (recognizing “[e]very lawyer[‘s] . . . professional responsibility to provide legal services to those unable to pay”).

Comment [10] to Colorado Rule 1.8(e) refers specifically to contingent fee agreements for an obvious reason: Because they represent the most common circumstances in which attorneys provide financial assistance through the advancement of attorneys’ fees. But there is no reason to distinguish the financial assistance a lawyer provides under a contingent fee agreement or in a pro bono representation from the assistance provided when the lawyer associates with and pays the fees of co-counsel. *All* types of attorney advancement of attorneys’ fees in the matter in question “help ensure access to the courts,” Colo.RPC 1.8(e), cmt. [10], which is the policy reason for excluding such forms of financial assistance from the proscriptions of Colorado Rule 1.8(e).

MAB concedes that contingent fees are not subject to Colorado Rule 1.8(e). OB at 26-27, 30-32. According to MAB, “[i]f Merenstein’s stake in this case had been limited to his investment of time (*i.e.*, if he had handled the extensive appellate litigation himself, on contingency), then this may have remained an

ordinary contingency case that comported with Rules 1.5 and 1.8.” *Id.* at 31.

However, again according to MAB, when Attorney Merenstein made a “personal cash investment” to pay Associated Counsel’s bills, he crossed a line. “This reality,” MAB argues, “is precisely why R.P.C. 1.8(e) draws a line between an attorney covering a contingency client’s ordinary litigation expenses and an attorney incurring a large direct financial stake in a case that he is litigating.”

The CBA believes that the line MAB advocates ignores the *real* reality of contingent fee practice and, therefore, is illusory. When a lawyer puts significant time into a contingent fee case, the lawyer is indeed “incurring a large direct financial stake” in the case. The lawyer, with only so many hours in a day, is foregoing other work – including work that would pay fees on an hourly basis – in order to prosecute the contingent fee case. As one commentator has noted:

[T]he genuine conflicts of interest harm that comes from violations of Model Rule 1.8(e) or (i) are not different in kind from those that inhere in acceptable contingent fee arrangements. The acquisition rule has in its text an exception for reasonable contingent fees. In a contingent fee matter, the lawyer buys a stake in the client's claim with the lawyer's otherwise uncompensated time and effort. . . . In most financial assistance matters, the magnitude of the lawyer's interest attributable to the financial assistance will be far less than that attributable to the contingent fee contract.

Moliterno, 16 Geo.J.L.Ethics at 245-46. (Professor Moliterno advocates the abandonment of the prohibition on many forms of financial assistance to clients, as an outdated and unwarranted ethics rule.) Indeed, a lawyer providing services under a contingent fee agreement might even have to obtain a residential mortgage or loans against credit cards – the very acts MAB faults Attorney Merenstein for doing – in order to survive financially while undertaking the representation. Nothing in the Colorado Rules or otherwise prohibits a lawyer from financing a case in that manner. Given *that* reality, there is no internal logic to MAB’s insistence that the payment of Associate Counsel’s fees is somehow different from a permissible advancement of financial assistance under a contingent fee agreement.

For the reasons stated above, the CBA urges the Court to hold that Colorado Rule 1.8(e) does not apply at all to financial assistance in the form of advancement or payment of attorneys’ fees in the matter in which the lawyer represents the client.<sup>3</sup>

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<sup>3</sup> The CBA takes no position on whether Colorado Rule 1.8(e) would apply to a lawyer’s payment of attorneys’ fees in a matter other than the matter in which the lawyer is representing the client, since this case does not present that issue.

**IV. ATTORNEYS' FEES OF ASSOCIATED COUNSEL ARE "COURT COSTS AND EXPENSES OF LITIGATION" THAT MAY BE ADVANCED UNDER COLO.RPC 1.8(e).**

As an alternative basis for holding that Colorado Rule 1.8(e) does not apply to Attorney Merenstein's payment of his Associated Counsel's fees, the Court should clarify that such fees constitute a "cost[ ] and expense[ ] of litigation," which Colorado Rule 1.8(e) permits a lawyer to advance.

The CBA believes that the appropriate dividing line between permissible and precluded advances under Colorado Rule 1.8(e) is the *purpose* of the expenditure. If the expense is related to the conduct of the litigation, it should be allowed under Colorado Rule 1.8(e)'s exception for "costs and expenses of *litigation.*" (Emphasis added.) Thus, as Comment [10] to Rule 1.8 confirms, the expenses of medical examination and the costs of obtaining and presenting evidence" are permissible. By contrast, if the expense is related to the client's personal needs but not to the conduct of the litigation, it should not be allowed under the rule. Thus, Comment [10] precludes advances to clients "for living expenses," which do not relate to the conduct of the litigation.

The CBA has found no legal authority on this precise issue.<sup>4</sup> However, several ethics opinions considering analogous facts support the CBA's position. The Alaska Bar Association Ethics Committee opined that a lawyer may contingently agree to pay attorneys' fees assessed against a client if the client loses the appeal being handled by the lawyer. Alaska Ethics Op. 2004-2 (April 27, 2004), 2004 WL 1853007. In reaching that opinion, the Committee construed the term "expense of litigation" which is contained in Alaska Rule of Professional Conduct Rule 1.8(e), to include "costs and attorneys fees awarded against a client." *Id.* at \*1.

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<sup>4</sup> The absence of legal authority supporting MAB's position is a further reason to reject its arguments. If Rule 1.8(e) were a criminal statute, any ambiguities would be construed in favor of the lawyer under the rule of lenity. *Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004). The CBA recognizes that this Court has restricted the rule of lenity to criminal cases. *People v. Swain*, 959 P.2d 426, 432 (Colo. 1998) (rule of lenity applies only to "an ambiguous statute concerning a criminal offense"). *But see, e.g., In re McBride*, 602 A.2d 626, 640 (D.C. App. 1992) (applying rule of lenity to statute governing attorney disbarment because of "the serious deprivation of the right to earn a particular livelihood caused by disbarment"). Irrespective of whether the rule of lenity applies, a statute that compels a standard of conduct must give fair notice to those it seeks to regulate, as a matter of due process of law. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *People v. Shell*, 148 P.3d 162, 173 (Colo. 2006). Construing Colorado Rule 1.8(e) as MAB advocates and imposing the punishment that MAB proposes – Attorney Merenstein's forfeiture of roughly \$200,000 in attorneys' fees – does not comport with principles of basic fairness or the mandates of the Due Process Clause.

The American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility, applying ABA Model Rule 1.8(e) – identical to the Colorado Rule – has opined that Rule 1.8(e) may permit a lawyer to post a bail bond for a client. ABA Formal Ethics Op. 04-432 (Jan. 14, 2004). After addressing potential conflicts of interest under ABA Model Rule 1.7(a), the ABA Committee turned to issues under Rule 1.8(e):

The Committee also considers here whether a lawyer's advancing funds or subjecting assets to risk to secure the release of a client constitutes inappropriate provision of financial assistance to the client in connection with pending or contemplated litigation, which is prohibited by Model Rule 1.8(e). Some state and local ethics opinions have categorically determined that the payment of a defendant client's bond is not a "court cost or expense of litigation." The Committee believes, however, as do a substantial number of other committees, that circumstances may exist that clearly justify the opposite conclusion. *For example, the release of a defendant from incarceration may constitute a practical or tactical objective in a lawyer's handling of a defendant's case, in which case the advancement of the cost of the client's bail or bond may be legitimately viewed as a cost of litigation.*

*Id.* at 2 (emphasis added). The question under the ABA opinion is whether the advance of funds will provide a "practical or tactical objective in a lawyer's handling of a . . . case[.]" If it will, then the advance "may be legitimately viewed

as a cost of litigation.” *Id.* The ABA’s analysis is persuasive and this Court should adopt it.

The CBA views Attorney Merenstein’s payment of Associated Counsel’s fees as just such a permissible advancement of a cost of litigation. The money was spent to associate with experienced appellate counsel, in order to heighten Ms. Flood’s chance of prevailing in *Flood I* and, later, in proceedings on remand after *Flood I*. Significantly, MAB fails to cite a single case or any other authority that holds otherwise, and the CBA’s independent research has not discovered a decision in any jurisdiction where attorneys’ fees paid by the client’s contingent fee lawyer to associated counsel were held to constitute prohibited financial assistance to a client.

The Colorado Rules Governing Contingent Fees further support this conclusion. Those rules requires the lawyer to disclose “[w]hat is meant by ‘associated counsel.’” C.R.C.P. ch. 23.3, Rule 4(5). The disclosure statement appended to the Contingent Fee Rules contains the following disclosure:

I have been informed and understand that my attorney may sometimes hire another attorney to assist in the handling of a case. The other attorney is called an “associated counsel.” I understand that the attorney fee agreement should tell me how the fees of associated counsel will be handled.

Nothing in the Contingent Fee Rules prohibits the contingent fee lawyer from paying, on an out-of-pocket basis, the fees of associated counsel. If this Court intended to prohibit such an arrangement, it could have done so. Perhaps the Court did *not* prohibit such conduct because it would be unusual and unfair for a lawyer who has agreed to handle a matter on a contingent fee basis to turn around and attempt to bill the client, on a non-contingent basis, for the associated counsel's hourly fees.

MAB suggests that Attorney Merenstein's payment of Associated Counsel's fees cannot be a permitted cost or expense of litigation because the fees were sizable and, as a result, Attorney Merenstein became too invested in the case. *See* OB at 28-30. That argument is unpersuasive for several reasons. *First*, as observed above, it is impossible to meaningfully distinguish a lawyer's investment of hundreds of thousands of dollars of his or her time in a contingent fee case, from a lawyer's payment of the "costs" of the suit. *Second*, contrary to MAB's assumption, *see* OB at 31, in many types of lawsuits, including mass tort, medical malpractice, and class action litigation, expenses that MAB concedes a lawyer may advance can run into the hundreds of thousands, or even millions, of dollars. Yet no authorities hold that because a lawyer paid large sums of money for

litigation expenses (and expended even larger amounts of time), the lawyer was too invested in the litigation and thereby violated Rule 1.8(e).

**V. MAB LACKS STANDING TO ASSERT FORFEITURE AND THE CIRCUMSTANCES IN THIS CASE DO NOT WARRANT A FORFEITURE.**

If the Court concludes that Attorney Merenstein violated Colorado Rule 1.8(e), the CBA urges the Court to reject MBA's expansive assumptions on when a third-party may seek forfeiture of fees and when a forfeiture is warranted.

MAB invokes Section 37 of the Restatement (Third) of the Law Governing Lawyers (Restatement) and several cases as authority for ordering the forfeiture of fees in this case. OB at 22, 34. But the facts of this case do not approach the circumstances contemplated by the Restatement or addressed in those cases.

Restatement Section 37 reads:

A lawyer engaging in clear and serious violation of a duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter. Considerations relevant to the question of forfeiture include the gravity and timing of the violation, its willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.

At the outset, and critically, fee forfeiture under Section 37 requires "a violation of a duty to a client." *See also* Rest. § 37, cmt. [b] ("The remedy of fee forfeiture presupposes that a lawyer's clear and serious violation of a duty to a client

destroys or severely impairs the client-lawyer relationship and thereby the justification of the lawyer's claim to compensation." ).<sup>5</sup> In this case, MAB does not even try to show how the supposed Colorado Rule 1.8(e) violation breached a duty to Ms. Flood, much less a duty to MAB itself. Therefore, MAB has no standing to seek a fee forfeiture.

Separate from MAB's lack of standing, the facts of this case do not support a finding of a "clear and serious violation" of Attorney Merenstein's duty to Ms. Flood. The Restatement sheds important light on the requirement of a "clear" violation:

A violation is clear if a reasonable lawyer, knowing the relevant facts *and law reasonably accessible to the lawyer*, would have known that the conduct was wrongful. The sanction of forfeiture should not be applied to a lawyer who could not have been expected to know that conduct was forbidden.

Rest. § 37, cmt. [d] (emphasis added). *See also supra* n.4. MAB does not explain how the claimed Colorado Rule 1.8(e) violation in this case would justify

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<sup>5</sup> Under Restatement Section 37, forfeiture "is not justified in each instance in which a lawyer violates a legal duty, nor is total forfeiture always appropriate. Some violations are inadvertent or do not significantly harm the client." Rest. § 37, cmt. [b]. Importantly, but disregarded by MAB, the comment emphasizes that the remedy of forfeiture "should . . . be applied with discretion."

forfeiture under this stringent test. It does not contend that the violation was “clear” – and *cannot* make that claim given that no court to undersigned counsel’s knowledge has ever deemed a lawyer’s payment of associated counsel’s fees to be an impermissible advancement of costs.<sup>6</sup>

As for seriousness, the Restatement makes clear that “[m]inor violations do not justify leaving the lawyer entirely unpaid for valuable services rendered to a client[.]” Rest. § 37, cmt. [d], and that forfeiture may be justified only where the ethical violation “destroys or severely impairs the client-lawyer relationship.” *Id.*, cmt. [b]. Again, those circumstances did not exist here. Ignoring MAB’s hyperbole about the harms attendant upon a lawyer’s advancement of costs, MAB never explains why the supposed ethical violation is serious enough to warrant forfeiture. On this issue, MAB’s reliance on *Mullens v. Hansel-Henderson*, 65 P.3d 992, 999 n.12 (Colo. 2002), *cited in* OB at 34, is particularly misplaced. MAB is correct that *Mullens* cited Restatement Section 37, but MAB ignores the

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<sup>6</sup> By contrast, the actual or alleged ethics violations in some of the cases cited by MAB were far clearer. *See, e.g., In re W. Office Partners, Ltd.*, 105 B.R. 631, 637 (Bankr. D. Colo. 1989) (attorneys for debtor failed to disclose significant conflicts that multiple judges had identified in related proceedings and, therefore, “it was virtually impossible for counsel to not know that disclosure was important and necessary”).

Court's conclusion that there was no "clear and serious violation of duty to a client" in that case, where the client had never alleged "any misconduct on the part of [the attorney] other than failing to put the agreement in writing." 65 P.3d at 999 n.12 (quoting Rest. § 37). In other words, a technical violation of the Colorado Rules does not rise to the level of a "serious violation of a duty to a client" that might justify fee forfeiture.<sup>7</sup>

Ironically, MAB characterizes its own adjudicated violation of the CFDCPA as a mere "technical" violation of the statute, OB at 14, but insists that Attorney Merenstein's payment of Associated Counsel's fees was an "extreme ethics rule violation." *Id.* at 13. In fact, as noted above, Attorney Merenstein's payment of Associated Counsel's fees benefited his client by enabling Ms. Flood

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<sup>7</sup> Other cases that MAB cites are distinguishable because they involve undeniably serious breaches of lawyers' ethical duties to their clients. *E.g.*, *Weil v. Neary*, 278 U.S. 160, 167-72 (1929) (attorney represented bankruptcy trustee in direct conflict with his creditor clients; signed contract providing for him to control another lawyer's independent professional judgment; and agreed to improper division of fees – all without disclosure to the court supervising the bankruptcy proceeding); *In re Marriage of Redmond*, 131 P.3d 1167, 1171-72 (Colo. App. 2005) (attorney special advocate admitted having altered dates on medical releases, in potential violation of Colorado Rule 8.4(c), which prohibits a lawyer from engaging in obviously serious acts "involving dishonesty, fraud, deceit, or misrepresentation"). Still other cited cases did not involve challenges to attorney conduct at all, much less ethics violations or questions of fee forfeiture. *E.g.*, *Salzman v. Bachrach*, 996 P.2d 1263 (Colo. 2000).

to obtain a reversal of the judgment against her. Attorney Merenstein's monetary contribution to her case furthered, not harmed, his client's interests and the attorney-client relationship. *Norton Frickey*, cited by MAB, OB at 22, is instructive. There the Court of Appeals rejected the argument that a contract allocating attorneys' fees violated Colorado Rule 1.5(d) and, therefore, was void as against public policy. Significantly, the court held: "Most importantly, in our view, the clients here benefited from the agreement." 94 P.3d at 1269. *See also id.* (explaining benefits to the affected clients).

The attorney's state of mind is also a critical factor in the forfeiture analysis. Forfeiture may be warranted where "the breach involved knowing violation or conscious disloyalty to a client," but not "when the lawyer has not done anything willfully blameworthy[.]" Rest. § 37, cmt. [d]. Here there is no evidence of a willful ethical lapse. *See, e.g., In re Austrian & German Bank Holocaust Litig.*, 317 F.3d 91, 105 (2d Cir. 2003) (rejecting fee forfeiture request despite counsel's potential conflict of interest because, among other factors, "[t]here is not the slightest indication that any of the Class Counsel . . . acted with anything less than the utmost good faith"), *cited in* OB at 34.

"[T]he adequacy of other remedies" is another important factor under Restatement Section 37. Here, if Attorney Merenstein did violate Colorado Rule

1.8(e), the Court's system for the prosecution and discipline of errant lawyers provides more than adequate remedies for such a violation. *See* C.R.C.P. 251.1, *et seq.*

Finally, MAB never persuasively justifies the forfeiture of *all* of Attorney Merenstein's fees beyond asserting that "[s]uch an order [of total forfeiture] will send a strong and plainly needed message" to lawyers. OB at 35. It would indeed send a message – the wrong message.

In sum, while the CBA believes that there was no ethical violation and, therefore, that no forfeiture is warranted, if the Court disagrees, it should clarify that fee forfeiture is an extreme outcome, reserved for the extreme case. It should reject MAB's broad-brush arguments, which seek a draconian punishment without any analysis, much less meaningful analysis, of the factors relevant to forfeiture.

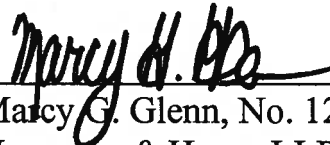
#### CONCLUSION

For the reasons stated above, the CBA supports affirmance of the award of attorneys' fees to Ms. Flood.

Dated: July 1, 2011.

Respectfully submitted,

COLORADO BAR ASSOCIATION,  
Through its President, David L. Masters



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**CERTIFICATE OF SERVICE**

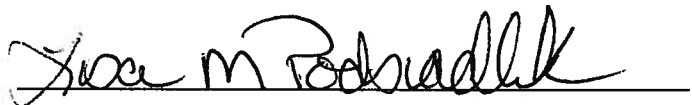
I certify that on July 1, 2010, I served a true and accurate copy of the foregoing **AMICUS BRIEF OF COLORADO BAR ASSOCIATION** via United States first-class mail, postage prepaid, addressed to the following:

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