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A Lawyer's Duty to Maintain an Appropriate Workload

I. Introduction and Scope

Colorado's Rules of Professional Conduct (the Rules or Colo. RPCs) impose the duties of competence, diligence, communication, and appropriate supervision. These duties affirmatively require lawyers to manage their workload to ensure proper client representation. Lawyers who manage or supervise lawyers – whether in a private law firm or other comparable setting[1] – are also obligated to make reasonable efforts to ensure that subordinates' workloads are suitably controlled.

This opinion addresses this duty from both the supervised attorney's and supervising attorney's perspective. Determining when a workload is excessive under the rules of professional conduct is necessarily fact specific. This opinion discusses some considerations relevant to that inquiry but does not attempt to draw, nor should it be understood to offer, any bright-line rules. This opinion also presents opinions from other jurisdictions and the American Bar Association (ABA) addressing the risks of excessive workloads for public defenders, prosecutors, legal aid lawyers, and private practitioners. Those authorities uniformly agree that a lawyer's workload must be such that the lawyer can competently and diligently handle the matters assigned and recognize the supervising lawyer's concomitant obligations in this regard.

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[1] "Law firm" as used in the Rules "denotes a partnership, professional company, or other entity or a sole proprietorship through which a lawyer or lawyers render legal services; *or lawyers employed in a legal services organization* or the legal department of a corporation or other organization." Colo. RPC 1.0(c) (emphasis added). It also includes the law department of a government organization. *See* Colo. RPC 1.0, cmt. [3].

II. Syllabus

The Rules create a series of obligations to ensure clients receive competent, diligent, and zealous representation. The keystone of these obligations is the principle that clients are entitled to sufficient attention to their legal matters, as well as sufficient access to their lawyers. These obligations establish a framework for assessing—and managing—the volume of workload a lawyer may carry without violating the ethical duties of competence and diligence. Although other Rules may be implicated in a particular context, ad discussed in the illustrations below, several critical Rules always are involved in assessing and managing the volume of workload a lawyer may carry in compliance with her professional obligations under the Rules. Those Rules are Colo. RPCs 1.1, 1.3, 1.4, 1.4, and 1.7(a)(2). Additionally, as explained more fully below, Colo. RPCs 5.1, 5.2 and 5.3 provide the framework for assessing a lawyer's responsibilities as a supervisor of other lawyers or nonlawyer staff and a supervised lawyer's responsibilities in assessing and managing the volume of her workload.

III. Analysis of A Lawyer's Duty To Maintain an Appropriate Workload

The framework assessing and managing the volume of workload a lawyer may carry begins with the duty of competence a lawyer owes each client. *See* Colo. RPC 1.1. This duty demands a lawyer have the requisite legal knowledge and skill necessary to handle a matter, as well as the "thoroughness and preparation reasonably necessary for the representation," including appropriate communication and prompt and diligent representation. *Id.*; *see also* Colo. RPC Preamble [4] ("In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation."). Competence encompasses the "preparation and study" necessary "to give to the matter," and it may also require a lawyer to consult with or refer the matter to another lawyer with the requisite competence. Colo. RPC 1.1,

cmt. [1]. Competence "includes adequate preparation" and sufficient "inquiry into and analysis of the factual and legal elements of the problem[.]" Colo. RPC 1.1, cmt. [5]. The nature of the particular matter is part of what defines adequate preparation, and lawyers always must use "methods and procedures meeting the standards of competent practitioners[.]" *Id.*

The second part of this framework is a lawyer's responsibility to give clients diligent representation. *See* Colo. RPC 1.3. That duty includes acting with reasonable promptness because "procrastination and the passage of time" often harm a client's interests. Colo. RPC 1.3, cmt. [3].

Third, as a client's advisor, a lawyer is expected to "provide[] a client with an informed understanding of the client's legal rights and obligations and explain their practical implications." Colo. RPC Preamble [2]. To ensure this, Rule 1.4 imposes a duty of communication on all lawyers. That duty requires that any "decision or circumstance" needing a client's informed consent be promptly communicated to the client. Colo. RPC 1.4(a)(1). Similarly, a lawyer must keep each client reasonably informed about a matter's status and "promptly comply with [a client's] reasonable requests for information[.]" Colo. RPC 1.4(a)(3) & (4). Timely communication is an obligation "central to the lawyer-client relationship[.]" *People v. Fagan*, 423 P.3d 412, 415 (Colo. O.P.D.J. 2018).

An unmanageable workload may create a concurrent conflict of interest under Colo. RPC 1.7(a)(2) ("A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one of more clients will be materially limited by the lawyer's responsibilities to another client[.]"); *see also In re Edward S.,* 173 Cal. App. 4th 387, 414 (Cal. App. 2009) ("[A] conflict of interest is inevitably created when [a lawyer's excessive workload forces the lawyer] to choose between the rights of the various [clients] he or she is defending."). Whether such a "significant risk" is created by a lawyer's workload necessarily requires assessing not just how

many matters for which a lawyer is responsible, but also the complexity of those matters, whether the lawyer is handling the representation solely or jointly, the lawyer's familiarity with the area of the law, any limitations discussed with the client, any prior representation of the client by the lawyer, and any other factors relevant to determining whether each client is being represented competently and diligently.

Many opinions from other jurisdictions, as well as the ABA, have specifically addressed these duties as they apply to lawyers in the public sector. These opinions uniformly agree that public sector lawyers have the same duty to control workloads as their private sector counterparts. *Cf. Attorney Grievance Comm'n of Maryland v. Ficker*, 706 A.2d 1045, 1051–52 (Md. Ct. App. 1998) (generally recognizing duty of appropriate workload for private lawyers); *accord* ABA Comm. on Ethics and Prof. Resp., Formal Op. 06-441, "Ethical Obligations of Lawyers who Represent indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation" (2006), p. 3 (hereinafter ABA Opinion 06-441). These opinions are discussed below.

IV. Illustrations from Other Opinions

A. Public Defenders

Public defenders must maintain their workloads at a level that ensures competent, diligent representation for each client. "[F]or purposes of the Model Rules, a public defender's office, much like a legal services office, is considered to be the equivalent of a law firm." ABA Opinion 06-441, p. 5, n.17 (citing ABA Model Rule 1.0(c)).

As the ABA Committee on Ethics and Professional Responsibility has explained, "[i]f a lawyer's workload is such that the lawyer is unable to provide competent and diligent representation to existing or potential clients, the lawyer should not accept new clients." ABA Opinion 06-441, p. 9. ABA Opinion 06-441 further explains that the ABA Model Rules of

Professional Conduct 1.1, 1.2(a), 1.3, and 1.4 collectively require competence, diligence, appropriate communication, and "control[ling] workload so each matter can be handled competently." *Id*. at 1.[2] The ABA Opinion's reasoning emphasizes that a lawyer's "primary ethical duty is owed to existing clients" and thus a lawyer should decline to accept new matters where "acceptance of a new case will result in [the lawyer's] workload becoming excessive." *Id*. at 2 (citation omitted); *see also In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1135 (Fla. 1990) (a conflict of interest is inevitably created when a public defender's excessive workload compels the lawyer to choose between the rights of various clients).

The South Carolina Ethics Committee similarly explains that public defenders have an ethical obligation to carry an appropriate workload to avoid violations of the rules of professional conduct and that determining "maximum caseload standards" requires consulting the ABA and the National Advisory Commission on Criminal Justice."[3] South Carolina Bar Ethics Adv. Op. 04-12, p. 5 (Nov. 12, 2004) (hereinafter S.C. Ethics Opinion 04-12). Further, a division of the California Court of Appeals observed that deputy public defenders who carry excessive workloads jeopardize their ability to effectively assist clients and that they should work with supervisors to reduce their workload. *See In re Edward S.*, 173 Cal. App. 4th at 413–14 (vacating conviction because deputy public defender and supervisor were or should have been aware that deputy's

[2] Colorado's rules impose identical duties.

[3] The South Carolina ethics committee suggests assessing maximum workload by asking whether the extent of the workload substantially interferes with basic functions required of attorneys, including communication with clients, fact investigation, legal research, supervision of nonlawyer assistants, preparation for hearings and trials, and maintenance of files. *See* S.C. Ethics Opinion 04-12, p. 5; *Cf.* Colo. Colo. RPC 1.1 & cmts. [4]–[5].

excessive workload jeopardized client's right to effective assistance and "failure to take reasonable steps to avoid reasonably foreseeable prejudice" to client).[4]

B. Prosecutors

Prosecutors also must control their workloads. *See* Va. Legal Ethics Op. 1798 (2004) (addressing excessive workload questions for a prosecutor who was "assigned far more cases than the state standards suggest [the prosecutor] should be handling"). Notably, the rules require individual lawyers to ensure their workloads enable each matter to be handled competently and diligently and there are "no exceptions . . . creating a different standard for prosecutors." *Id*. at 2.

C. Legal Aid Lawyers

Likewise, legal aid lawyers must maintain appropriate workloads. *See* Mich. Bar Comm. on Prof. & Jud. Eth. Op. RI-252 (Mar. 1, 1996) (recognizing that civil legal services agency lawyers may be subject to excessive workloads and providing potential avenues to reduce workloads and avoid violating ethics rules, including duty of competence and diligence).

D. Private Practitioners

Private practitioners have the same duty to manage workloads as their public sector counterparts. As discussed above, the ABA and the Rules explicitly equate the law firm setting to public sector practice. *See* ABA Opinion 06-441, p. 5, n.17 (citing ABA Model Rule 1.0(c)); *see also* Colo. RPC 1.0(c). Further, Colorado's Rules 1.1, 1.3, and 1.4 collectively require

[4] C.R.S. § 21-2-103(1.5)(c) (2021) provides that "[c]ase overload, lack of resources, and other similar circumstances shall not constitute a 'conflict of interest'" permitting a court to appoint Alternate Defense Counsel in place of a deputy Colorado State Public Defender. The statute appears to conflict directly with the preceding rules and authorities, as well as with Rules 1.7 and 1.8 (collectively addressing conflicts of interest). *See State ex rel. Public Defender Comm'n v. Waters*, 370 S.W.3d 592, 608 (Mo. 2012) ("[A] judge may not appoint counsel when the judge is aware that, for whatever reason, counsel is unable to provide effective representation to a defendant," including giving consideration to the lawyer's workload).

competence, diligence, and appropriate communication, irrespective of a lawyer's employment in the private or public sector. *Cf. Attorney Grievance Comm'n of Maryland v. Ficker*, 706 A.2d 1045, 1051–52 (Md. Ct. App 1998) (generally recognizing private lawyer's duty to maintain an appropriate workload); *accord* Opinion 06-441, p. 3.

As discussed more fully below, subordinate lawyers are "not relieved of responsibility for a violation" of the Rules solely because they "acted at the direction of a supervisor," although such direction may be relevant in assessing the subordinate lawyer's conduct. Colo. RPC 5.2, cmt. [1]. Because a lawyer's personal obligation of proper workload management is unlikely to be "an arguable question of professional duty[,]" a supervisor's failure to establish safeguards or policies to maintain individual workloads may not be a defense for an individual lawyer. Colo. RPC 5.2(b); *see also* Colo. RPC 5.2, cmt. [2] (If a question concerning an ethical duty "can reasonably be answered only one way," the subordinate and supervising lawyer are "equally responsible for fulfilling it.").

However, supervising attorneys in both private law firms and the public sector have a separate ethical duty to ensure subordinates' workloads permit competent, diligent representation, as discussed below.

V. A Supervisor's Duty To Ensure Subordinates Maintain an Appropriate Workload

A. Subordinate Lawyers

The Rules recognize that supervisory lawyers have their own responsibility to ensure that subordinate lawyers' workloads are adequately regulated so that each client receives competent and diligent legal representation.[5] *See* Colo. RPC 5.1(a)–(b); Colo. RPC 1.3, cmt. [2]. Interpreted

[5] Both Colo. RPC 1.1 and 1.3 establish "reasonableness" as the measure of a lawyer's competence and diligence. *Cf. Rompilla v. Beard*, 545 U.S. 374, 389 (2005) (acknowledging, for purposes of the Sixth Amendment's guarantee of effective assistance of counsel, that a lawyer does not need

together, these rules create a baseline requirement to monitor both the complexity and the number of matters handled by those the lawyer supervises to ensure that each client receives competent and diligent representation. *See* Colo. RPC 1.3, cmt. [2].

Partners in a law firm or other lawyers with comparable managerial or supervisory authority (including supervisory authority over specific legal work in a particular matter) must "make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance" that subordinate lawyers conform to the Rules, which necessarily means ensuring that those lawyers provide competent and diligent representation under Rules 1.1 and 1.3 for each client. Colo. RPC 5.1(a)–(b) & cmt. [5]. This includes reasonable efforts to establish necessary internal policies and procedures to ensure subordinates conforms to the Rules, including docket management and being properly supervised. Colo. RPC 5.1, cmt. [2]. Supervising lawyers must also make reasonable efforts to establish internal policies and procedures related to lawyers' workloads and to ensure proper control and oversight over volume and complexity. Colo. RPC 5.1, cmt. [1]; Colo. RPC 1.3, cmt. [2].

When a "supervised lawyer's workload is excessive . . . it is obviously incumbent upon the supervisor to assign no additional cases to the lawyer." ABA Opinion 06-441, p. 3. In "dealing with workload issues, supervisors frequently must balance competing demands for scarce resources" and if a "supervisor knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take reasonable remedial action" then the supervisor "is responsible for the subordinate's violation of" the rules. *Id.* at 3–4; *see generally In re Anonymous Member of South Carolina Bar*, 553 S.E.2d 10, 13–14 (S.C.

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to "go looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there" at all).

2001) ("Rule 5.1 does not require that an attorney be the day-to-day supervisor of the attorney committing the misconduct to create liability. The key to liability is whether there was *authority* over the violating attorney.") (emphasis in original)).

Several opinions recognize that a supervisor in private practice who fails to make reasonable efforts to ensure that subordinates' workloads allow them to provide competent and diligent representation violates the Rules. *E.g.*, *Ficker*, 706 A.2d at 1051–52 (private defense attorney who assigned too many matters to too few lawyers and assigned overly complex matters to inexperienced lawyers indefinitely suspended for violating Maryland's Rule of Professional Conduct 5.1 concerning supervision of subordinate lawyers); *Attorney Grievance Com'n of Maryland v. Kimmel*, 955 A.2d 269, 288–89 (Md. Ct. App. 2008) (law firm culture that "strongly emphasized the number of filings, case turnaround, and revenue generated as the significant measure of associate success" obligated supervisors to assist new associates to ensure "that ethics and professionalism are not lost in the focus on income and profit goals.").

Likewise, in a disciplinary opinion for a law firm associate who failed to complete adequate discovery or trial preparation and who falsified billing records, the New Mexico Supreme Court noted that "law firms would be well advised to have in place a procedure by which associates can alert their supervisors when they are feeling overloaded or overburdened" and that doing so may not only "save a young lawyer's career but also may save the firm from facing liability issues stemming from those matters assigned to a new associate." *Matter of Hyde*, 950 P.2d 806, 809 (N.M. 1997). The New Jersey Supreme Court similarly found a violation where a law firm failed to provide "the collegial support and guidance expected of supervising attorneys" to a young lawyer; it cautioned that "this attitude of leaving new lawyers to 'sink or swim' will not be tolerated." *Matter of Yacavino*, 494 A.2d 801, 803 (N.J. 1985).

Additionally, a Kansas lawyer who rapidly expanded his practice by opening satellite offices throughout the state while failing to train his administrative assistants and train or supervise the inexperienced lawyers on his payroll was indefinitely suspended because his lack of supervision violated the ethical commands of competence, diligence, and communication with clients. *Matter of Farmer*, 950 P.2d 713, 714–16 (Kan. 1997) (rejecting recommended two-year suspension by disciplinary panel). The *Farmer* court explained that "the responsibility for supervising, training, educating, reviewing and otherwise mentoring inexperienced attorneys rested with Respondent. Respondent did not use reasonable efforts to adequately ensure that they complied with the [ethical rules] and were knowledgeable about the court rules." *Id.* at 718.

While a law firm's size will inform the nature of the measures required to control workloads, those in management positions "may not assume that all lawyers associated with the firm will inevitably conform to the rules." Colo. RPC 5.1, cmt. [3]. "Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter." Colo. RPC 5.1, cmt. [5].

Further, a partner or other lawyer with supervisory or managerial authority "shall be responsible" for any subordinate lawyer's violation of the Rules if the supervising lawyer orders, knows of, or ratifies the subordinate lawyer's conduct; or learns of the subordinate lawyer's conduct at a time when any shortcoming can be avoided or mitigated but "fails to take reasonable remedial action." Colo. RPC 5.1(c). A supervising lawyer cannot "merely assume…competence" from subordinate lawyers new to the firm. *Ficker*, 706 A.2d at 1052. A supervisor "assigning cases at the last minute to a novice attorney" or "assigning too many cases to too few lawyers, mostly at the last minute" may violate RPC 5.1(b). *Id.* at 1054 ("However bright and experienced

the [subordinate] lawyer may be, that kind of system is not conducive to providing competent representation. When imposing it on young, inexperienced lawyers, the problem becomes exponentially worse.").

Nevertheless, the duties imposed on a managerial or supervising lawyer by Rule 5.1 "do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct." *See* Colo. RPC 5.1 cmt. [8]. Thus, subordinate lawyers may be required to alert their supervisor or managing lawyer if their workload is such that they are unable to handle the matters assigned with competence before Colo. RPC 5.1(c) is implicated.

B. Non-lawyer Assistants

Rule 5.3(b) additionally provides that a lawyer with "direct supervisory authority" over a nonlawyer assistant must make reasonable efforts to ensure the nonlawyer assistant's conduct is compatible with the lawyer's professional obligations. Rule 5.3(c) also states that the lawyer shall be responsible for the conduct of the nonlawyer assistant, including any conduct that the lawyer orders, knows of or ratifies, that may violate the rules of professional conduct if engaged in by the lawyer. Likewise, if the lawyer has managerial or direct supervisory authority over the nonlawyer and knows of the conduct in time to avoid its consequences but fails to take remedial action, the supervising lawyer may be responsible. *Id.*

VI. Conclusion

All lawyers "have an ethical obligation to control their workloads so that every matter they undertake will be handled competently and diligently." ABA Opinion 06-441, p. 4; *see also* Colo. RPC 1.3, cmt. [2]. This duty extends beyond the individual lawyer to supervisory and managerial lawyers within the firm. This duty applies equally to private and public sector lawyers. In Colorado, this obligation is underpinned by the requirements of competence, diligence, proper

communication and (where applicable) sufficient supervision of subordinate lawyers and non-lawyer assistants as part of every lawyer's ethical duties.