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LET THEM HELP

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To become registered attorneys, lawyers in Colorado must first recite an oath promising to use their legal knowledge for good, to provide legal services for the less fortunate, and to abide at all times by the rules of professional conduct.[2] However, for a certain percentage of newly minted lawyers, adhering to that oath is nearly impossible. That group is law clerks, who are prohibited from practicing law and forced to forgo their oath (with the exception of providing limited help to family members).[3] And so, lawyers beginning their legal careers as law clerks are almost immediately forced to break two parts of their oath: providing legal services for the less fortunate and abiding by the rules of professional conduct.

This article briefly examines the applicable provisions of both the Rules of Professional Conduct (the "Rules") and the Code of Judicial Conduct (the "Code") and discusses the inherent conflict between the two. It also addresses why this conflict is so troubling and ultimately suggests potential ways of solving the conflict.

THE RULES OF PROFESSIONAL CONDUCT V. THE CODE OF JUDICIAL CONDUCT.

Like the Oath of Admission, the Rules contain broad language about a lawyer's responsibility to provide legal service to the less fortunate. For instance, the preamble to the Rules states that among a lawyer's professional responsibilities, are the following: (1) "seek[ing] improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession";[4] (2) "cultivat[ing] knowledge of the law beyond its use for clients, employ[ing] that knowledge in reform of the law and work[ing] to strengthen legal education";[5] and (3) "devot[ing] professional time and resources

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2.   *See Colorado Attorney Oath of Admission,* COLORADO BAR ASSOCIATION, http://www.cobar.org/index.cfm/ID/1653/CLPE (last visited Feb. 9, 2012) ("I will use my knowledge of the law for the betterment of society and the improvement of the legal system; I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed; I will at all times faithfully and diligently adhere to the Colorado Rules of Professional Conduct.").

3.   *See* COLORADO CODE OF JUDICIAL CONDUCT R. 2.12, 3.1, 3.10 (2010) (discussing the obligations of judges and the court staff).

4.   COLORADO RULES OF PROF'L CONDUCT pmbl. para. 6 (2007).

5.   *Id.*

and us[ing] civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel."[6]

Additionally, Rule 6.1 states, "Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least fifty hours of pro bono publico legal services per year."[7] Rule 6.1 then sets forth two categories of pro bono services that a lawyer should provide.[8] The first category of services, which should constitute "a substantial majority of the fifty hours of legal services [provided] without fee or expectation of fee" should be provided to "(1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means."[9] In the second category, a lawyer should:

> [P]rovide any additional legal or public services through: (1) delivery of legal services at no fee or a substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate; (2) delivery of legal services at a substantially reduced fee to persons of limited means; or (3) participation in activities for improving the law, the legal system or the legal profession.[10]

While the Rules encourage lawyers to provide free or substantially reduced legal services to persons or organizations of limited means, the Code precludes judges and their staff from doing so. Rule 2.12 of the Code requires a judge to ensure that "court staff, court officials, and others subject to the judge's direction and control . . . act in a manner consistent with the judge's obligations under th[e] Code."[11] This means that a law clerk cannot do anything that a judge cannot do, and judges are subject to several restrictions. For instance, a judge "shall not practice law except as permitted by law or this Code. A judge may act pro se but should not defend himself or herself when sued in an official capacity. The judge may, without compensation, give legal advice to and draft or review documents for a member of the judge's family, but is prohibited from serving as the family member's lawyer in any forum."[12]

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6. *Id.*
7. *Id.* R. 6.1.
8. *See id.*
9. *Id.*
10. *Id.*
11. COLORADO CODE OF JUDICIAL CONDUCT R. 2.12 (2010).
12. *Id.* R. 3.10.

THE PROBLEM

Comparing the Rules with the Code, it is clear that the two are incompatible when it comes to law clerks providing pro bono legal services. On the one hand, the Rules state "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay."[13] On the other hand, the Code prohibits judges and their staff from practicing law.[14] While it makes sense that judges—for whom the rules of judicial conduct are largely intended—should be precluded from providing legal advice, it makes little sense to preclude law clerks from doing the same. And this is especially true regarding pro bono legal services.

Certainly, law clerks should be precluded from giving legal advice to those in the cases before the court. However, there is no reason to preclude clerks from giving legal advice in a pro bono matter that is unlikely to come before the court. Indeed, it does a great disservice for at least three reasons. First, prohibiting law clerks from providing pro bono legal services shrinks the number of attorneys available to provide much needed pro bono services at a time when budgets for legal aid centers are shrinking,[15] and commentators on all sides are recognizing that access to justice is a major issue facing the judicial system as a whole.[16] Second, it prevents law clerks from establishing pro bono habits early in their careers, an essential step to long-term pro bono service. Moreover, clerks are not subject to billable hours and therefore often have more available time to provide pro bono services than do recent graduates working at firms. And, clerks tend to be public service minded (as evidenced by their willingness to make significantly less in their clerkship than they would otherwise make in private practice). Finally, preventing law clerks from providing pro bono legal services inhibits law clerks' professional development. To be sure, clerkships provide a great educational experience and carry some level of prestige; however, while law clerks observe a lot of lawyering, their position does not provide them with any opportunities to apply the knowledge that comes with that observation. Permitting law clerks to apply their knowledge by providing pro bono services would make clerkships significantly more rewarding from a professional development perspective.

Accordingly, all parties (including the justice system, the recipients of pro bono services, and law clerks) would be better served if the Code exempted law clerks from the prohibition of legal services and allowed them to meet their professional responsibilities under the Rules.

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13. COLORADO RULES OF PROF'L CONDUCT R. 6.1 (2007).

14. COLORADO CODE OF JUDICIAL CONDUCT R. 2.12, 3.10 (2010).

15. *See* Steven Seidenberg, *Unequal Justice*, 98–Jun A.B.A. J. 56 (2012).

16. *See generally* INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM, 2011 ANNUAL REPORT (2011), *available at* http://iaals.du.edu/images/wygwam/documents/publications/12-IAALS-100_AnnualReport_FINAL_lowres.pdf (discussing the research center's accomplishments at improving accessibility to the judicial system).

A FEW POTENTIAL SOLUTIONS.

The Rules apparently recognize this conflict, as Rule 6.1 states, "[w]here constitutional, statutory or regulatory restrictions prohibit government and public sector lawyers or judges from performing the[ir] pro bono services" by providing low or no cost legal services to persons of limited means or non-profits, "those individuals should fulfill their pro bono publico responsibility by performing services or participating in activities" that provide assistance to groups dedicated to securing civil rights and other similar causes and improving the legal system.[17] While this is a serviceable workaround for most circumstances, better solutions exist when it comes to allowing law clerks to meet their professional responsibilities as attorneys. What follows are a few suggestions for improving the Code to allow law clerks to meet the professional responsibilities.

Assuming the Code prohibits law clerks from practicing law in order to prevent them from giving legal advice to a person whose case is likely to be presented to their judge, there are several ways to avoid this concern. The easiest solution would be to prohibit a law clerk from discussing with the judge the details of any pro bono cases with which the law clerk is involved. Furthermore, the Code could require a law clerk's recusal from any such matter that appears on that court's docket, and if the clerk is actually representing the client in court, then it could require the judge's recusal.

If the concern is to prevent the mere appearance of impropriety, then broader restrictions could be instituted. For instance, the Code could permit law clerks to provide pro bono legal services, but limit that ability by either practice area or geography. That is, the Code could prohibit a law clerk working on a civil docket from giving advice on civil matters. Similarly, the Code could prohibit a judicial staff member from providing pro bono legal services within the same judicial district in which that law clerk serves.

Regardless of the concern, the Code should be rewritten to permit judicial staff members who possess an active attorney registration number from the Supreme Court of the State of Colorado to provide up to fifty hours of legal services per year to those unable to pay. Any concern could then be inserted as a limitation to this new rule.

CONCLUSION.

Having attorneys provide pro bono legal services is a critical component of our judicial system, ensuring that all people (at least in theory) have access to justice. The importance of pro bono work is confirmed by

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17.   COLORADO RULES OF PROF'L CONDUCT R. 6.1 (2007).

its inclusion in the attorneys' oath of admission and its repeated emphasis in the Rules. Precluding law clerks from meeting this essential responsibility does a huge disservice to (a) our system of justice, (b) those in need of legal service, and (c) the law clerks individually. Fortunately, as demonstrated above, this problem can be easily remedied with a few tweaks to the Code.