DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO City and County Building 1437 Bannock, Denver, CO 80202	▲ COURT USE ONLY ▲
Plaintiffs: DONALD DREW MOORE, ESQ., LAWRENCE W. WILLIAMSON, JR., ESQ., and MORGAN DREXEN, INC., a California corporation **v.** **Defendants/Counterclaimants:** JOHN W. SUTHERS, in his capacity as Attorney General of the State of Colorado; and LAURA E. UDIS, in her capacity as the Administrator, Uniform Debt-Management Services Act v. **Additional Defendant on Counterclaim:** WALTER JOSEPH LEDDA	Case Number: 11CV7027 Courtroom: 259
ORDER	

THIS MATTER is before the Court on Cross Motions for Determination of Questions of Law Pursuant to C.R.C.P. 56(h). Defendants/Counterclaimants John W. Suthers ("Suthers") and Laura E. Udis ("Administrator Udis") (collectively the "State") filed their Motion for Determination of Questions of Law Pursuant to C.R.C.P. 56(h) on January 18, 2012. Plaintiff/Counterclaim Defendant Morgan Drexen ("Morgan Drexen") filed its Response on February 22, 2012. The State filed its Reply on March 30, 2012.

The pleadings in this case have been extensive and continuous. Plaintiffs Donald Drew Moore ("Moore") and Lawrence W. Williamson, Jr. ("Williamson") (collectively the "Attorney Plaintiffs") filed their Cross Motion for Determination of Questions of Law Pursuant to C.R.C.P. 56(h) on February 22, 2012. The State filed its Response on April 13, 2012. The Attorney

Plaintiffs filed their Reply on April 20, 2012. On June 19, 2012, the Court ordered the parties to fully brief the United States constitutional issues raised in the Attorney Plaintiffs' Cross Motion. The State filed its Response on July 3, 2012. The Attorney Plaintiffs filed their Reply on July 10, 2012.

The State subsequently filed a Notice of Supplemental Authority in support of its Motion for Determination of Questions of Law on August 22, 2012 and Morgan Drexen filed its Response on September 5, 2012. The parties' Cross Motions for Determination of Questions of Law have now been fully briefed and are now ripe for the Court's review.

The Court has reviewed the Motions, the pleadings, the case file, and the relevant authority, and being fully informed finds and orders as follows:

BACKGROUND & UNDISPUTED FACTS

A. Identification of Parties

Morgan Drexen is a legal support and software company that provides paraprofessional and administrative support services to attorneys. Moore is an attorney who is licensed to practice law in Colorado, and who has a principal office in Grand Junction, Colorado. Williamson is an attorney who is domiciled in Kansas and who practices law in Colorado as an out-of-state attorney under C.R.C.P 220. Both Moore and Williamson have engaged Morgan Drexen as a non-lawyer assistant. Suthers is the Attorney General for the State of Colorado. Administrator Udis is the current Administrator of Colorado's Debt-Management Services Act, C.R.S. § 12-14.5-201 *et seq*. (the "DMSA").

B. Morgan Drexen's Business

Many of the attorneys with whom Morgan Drexen contracts, including the Attorney Plaintiffs, represent clients attempting to resolve unsecured debts. For these attorneys, Morgan

Drexen employees act as non-lawyer assistants, acquiring and screening prospective clients, and conducting initial intake to determine if prospective clients meet a particular attorney's predetermined criteria. If the prospective client meets the criteria, the intake information is forwarded to the attorney for approval. If the attorney determines that representation is appropriate, the attorney and client enter into a fee agreement, which provides that the client is engaging the attorney for representation and will pay all fees to the attorney. Further, the fee agreement grants the attorney certain settlement authority. The fee agreement mentions Morgan Drexen, but only to acknowledge that the attorney may use the services of Morgan Drexen, an outside company. Morgan Drexen is not a party to the fee agreement, and does not enter into any contracts with the clients it screens for the attorney, or any other Colorado consumers.

After representation has commenced, Morgan Drexen collects information about clients, and enters the information into a database. Throughout the representation, Morgan Drexen acts as the first line of communication with clients and client creditors. Morgan Drexen notifies the clients' creditors of the attorneys' representation, and initiates monthly automatic check handling between clients' bank accounts and attorneys' trust accounts. After sufficient funds have been deposited into an attorney's trust account on behalf of a particular client, Morgan Drexen solicits settlement offers from that client's creditors on behalf of the attorney. If a creditor makes an offer of settlement, the offer is forwarded to the attorney for approval. The attorney then reviews the offer and decides whether to accept or reject the offer on behalf of the client. If the attorney accepts the offer, Morgan Drexen processes the settlement by sending a check to the creditor along with an acceptance letter on a form, pre-approved by the attorney. No settlements occur without the attorney's approval.

C. General Overview of The DMSA

In 2008, Colorado enacted its Debt-Management Services Act (the "Original DMSA"). The Original DMSA was modeled after the Uniform Debt-Management Services Act (the "Uniform DMSA") developed by the National Conference of Commissioners on Uniform State Laws. The DMSA regulates all debt-management services in Colorado, and subjects providers of debt-management services to extensive regulatory oversight. Under the act, prospective debt-management services providers must apply for registration with the Administrator created by the DMSA (the "Administrator"). As part of the application process, prospective providers must answer several questions, and provide financial statements, templates for evaluating clients, copies of form agreements, and a schedule of fees and charges. Additionally, providers must submit a fee, a bond, an identification of trust accounts, an irrevocable consent authorizing the Administrator to examine the provider's trust accounts, evidence of insurance, and proof of compliance with Colorado statutory business requirements. Under the DMSA, the Administrator has discretion to accept or deny the application. If providers are approved, they are subjected to numerous rules under the DMSA that control nearly every aspect of the debt-management services relationship, including the fees to be charged by providers and circumstances under which a provider may terminate representation of a client. Finally, the DMSA provides the Administrator with extensive regulatory oversight, rights, and remedies, including the right to examine accounts and books, the right to suspend, revoke or refuse to renew a registration, and the right to impose fees against providers who violate the DMSA.

D. The Legal Services Exception

The DMSA contains an exception for legal services, which exempts attorneys practicing debt-management law from regulation under the DMSA. The Original DMSA's Legal Services

Exemption stated that "Debt-management services . . . do[] not include . . . legal services provided in an attorney-client relationship by an attorney licensed or otherwise authorized to practice law in [Colorado]." In 2011, the DMSA was amended (the "Amended DMSA"), to limit the Legal Services Exemption to apply to services "provided in an attorney-client relationship by an attorney licensed in Colorado," excluding out-of-state attorneys who are "otherwise authorized to practice" in Colorado. Further, the amended exemption does "not apply to any person who directly or indirectly provides any debt-management services on behalf of a licensed attorney . . . if that person is not an employee of the licensed attorney." The 2011 Amendment has two main effects that are salient in this case. First, debt-management services performed by independent non-lawyer assistants like Morgan Drexen, on behalf of Colorado attorneys, like Moore, are now subject to the DMSA, while similar services performed by in-house paraprofessionals employed by Colorado law firms are exempt from the act. Second, debt-management services provided by out-of-state attorneys who are licensed in another state, but who are authorized to practice law in Colorado, like Williamson, are now subject to the DMSA, while debt-management services provided by attorneys who are licensed to practice law in Colorado are exempt from the act.

STANDARD OF REVIEW

Under C.R.C.P. 56(h), at any time after the last required pleading, with or without supporting affidavits, a party may move for determination of a question of law. If there is no genuine issue of any material fact necessary for the determination of the question of law, a court may enter an order deciding the question. *See id.* Based upon the undisputed facts above, the question before the Court is ripe for determination.

ANALYSIS

Because the Cross Motions for Determination of Questions of Law are similar in both law and fact, the Court now addresses each, in turn, below.

I. The State's Motion for Determination of Questions of Law

The State seeks this Court's determination that: (1) Morgan Drexen was a provider of debt-management services, and thus not exempt, under the Original DMSA because it was not explicitly excluded by the language of the Original DMSA; and, (2) the Amended DMSA does not violate the separation-of-powers doctrine by requiring non-lawyers, who are not employees of attorneys, along with, lawyers not licensed to practice law in Colorado, to comply with its provisions.

Conversely, Morgan Drexen asserts that it was exempt from regulation under the Original DMSA pursuant to the Original DMSA's Legal Services Exemption. Additionally, Morgan Drexen asserts that the Amended DMSA violates the separation-of-powers provision of Article III of the Colorado Constitution.

A. Morgan Drexen's Status as a Debt-Management Services Provider Under The Original DMSA

The first issue for the Court's consideration is whether Morgan Drexen was a provider of debt-management services under the Original DMSA.

Pursuant to both the Original and Amended DMSA "provider" is defined as "a person that provides, offers to provide, or agrees to provide debt-management services directly or through others." C.R.S. § 12-14.5-202(16). The Original DMSA defined "debt-management services" as "service as an intermediary between an individual and one or more creditors of the individual for the purpose of obtaining concessions." C.R.S. § 12-14.5-202(10) (2010).

Morgan Drexen asserts that it is not a provider of debt-management services because it merely negotiates with creditors to settle debt on behalf of attorneys, rather than directly on behalf of debtors. Specifically, Morgan Drexen alleges that because the debtors in question are the attorneys' clients, the attorneys are providing the debt-management services on their clients' behalf.

Here, it is uncontested that Morgan Drexen acts as an intermediary between creditors and attorneys through solicitation of settlement offers. Further, the services provided by Morgan Drexen are on behalf of the attorneys' clients, as expressly authorized in the attorney-client agreement. As such, Morgan Drexen cannot avail itself of "provider" status on the basis that the debtors are clients of the attorneys, rather than the direct clients of Morgan Drexen.

Therefore, the Court concludes that, based on the plain language of the Original DMSA, Morgan Drexen was a provider of debt-management services.

B. Morgan Drexen Was Not Exempt From Regulation Under the Original DMSA pursuant to C.R.S. § 12-14.5-203(b)(2).

The next issue for the Court's consideration is whether Morgan Drexen was exempt from regulation under the Original DMSA pursuant to C.R.S. § 12-14.5-203(b)(2).

Morgan Drexen asserts that even if it is a provider of debt-management services under the DMSA, it is exempt from DMSA regulation pursuant to § 12-14.5-203(b)(2). Specifically, Morgan Drexen asserts that because it does not receive compensation from the individual debtors or creditors, but rather only from the debtors' attorneys, it is exempt from DMSA regulation pursuant to § 12-14.5-203(b)(2).

The DMSA "does not apply to a provider to the extent that the provider . . . [r]eceives no compensation for debt-management services from or on behalf of the individuals to whom it provides the services or from their creditors." § 12-14.5-203(b)(2). However, pursuant to

Section 3 of the Uniform DMSA, which mirrors § 12-14.5-203(b)(2) of Colorado's DMSA, § 12-14.5-203(b)(2), merely exempts:

> those persons, e.g., social workers, who may provide debt-management services *at no cost* as part of their overall services to clients. It also exempts individuals who assist family members or friends if they do not receive compensation for helping their relatives or friends to manage their money. It does not, however, exempt a provider that recovers its operating expenses from creditors, even if the provider does not impose any cost on the individuals it serves.

(emphasis added).

Here, Morgan Drexen's interpretation of § 12-14.5-203(b)(2) is inconsistent with the Colorado General Assembly's demonstrated legislative intent in exempting those who offer debt-management assistance "at no cost." While Morgan Drexen does not receive compensation from individual creditors, it does receive compensation from the attorneys in both hourly rates and per-transaction rates for the services it provides on behalf of the attorneys' clients. Therefore, Morgan Drexen's compensation for its services must be construed as deriving "from or on behalf" of debtors receiving debt-management services.

Accordingly, because Morgan Drexen's services are provided on behalf of debtors and because its services are not provided "at no cost," as contemplated by the General Assembly when providing DMSA exemption under § 12-14.5-203(b)(2), Morgan Drexen cannot be exempt from DMSA regulation pursuant to § 12-14.5-203(b)(2).

C. Morgan Drexen Was Exempt from DMSA Regulation Prior to the 2011 Amendment Pursuant to the Language of the Original DMSA's Legal Services Exemption.

The next issue for the Court's consideration is whether Morgan Drexen was exempt from DMSA regulation prior to the 2011 Amendment pursuant to the Original DMSA's Legal Services Exemption.

Morgan Drexen contends that it is expressly covered by the language of the Original DMSA's Legal Services Exemption.

Under the Original DMSA, "[l]egal services provided in an attorney-client relationship by an attorney licensed or otherwise authorized to practice in [Colorado]" were excluded from the definition of debt-management services. C.R.S. § 12-14.5-202(10)(2010). In order to fall within the Legal Services Exemption, Morgan Drexen's services rendered must have qualified as: (1) legal services; (2) provided in an attorney-client relationship; and, (3) provided by an attorney, licensed or otherwise authorized to practice law in Colorado. *Id.*

1. The Services Provided by Morgan Drexen Were Legal Services Under the Original DMSA.

First, the Court must determine whether the services rendered by Morgan Drexen constitute legal services pursuant to the Original DMSA.

When performed by attorneys, the negotiation of settlements and resolution of claims on behalf of clients constitutes the practice of law, and therefore constitutes legal services. *See In re Boyer*, 988 P.2d 625, 627 (Colo. 1999) (citing *In re Petition for Disciplinary Action Against Ray,* 452 N.W.2d 689, 693 (Minn. 1990)). Further, the Colorado Rules of Professional conduct explicitly permit attorneys to contract with nonemployee non-lawyer assistants to assist them in providing legal services and such assistants may act for the lawyer in rendition of the lawyer's professional services. *See* Colo. R. Prof'l Conduct 5.3. In fact, the use of these assistants is encouraged to effectuate cost-effective delivery of legal services. *See Cf. Missouri v. Jenkins by Agyei*, 491 U.S. 274, 288, n. 10 (1989).

Here, Morgan Drexen is a nonemployee non-lawyer assistant retained by attorneys to aid in providing legal services to the attorneys' debtor clients. Further, Morgan Drexen solicits

settlement offers on behalf of its partner attorneys and their clients, while also performing other administrative tasks and accounting.

Accordingly, because Morgan Drexen is soliciting settlement offers on behalf of attorneys' clients in rendition of the attorneys' services, and in conformity with the Colorado Rules of Professional Conduct, the Court concludes that the services provided by Morgan Drexen constitute "legal services" within the meaning of the DMSA.

2. The Services Are Provided in an Attorney-Client Relationship

Next, the Court must assess whether Morgan Drexen's services were provided in an attorney-client relationship.

The attorney-client relationship forms when a client "employs or retains an attorney" and "seeks and receives the advice of the lawyer on the legal consequences of the client's [] actions." *People v. Gabriesheski*, 262 P.3d 653, 659 (Colo. 2011).

Here, the uncontroverted evidence is that the attorneys enter into fee agreements with their debtor clients, and the fee agreements specifically reference Morgan Drexen as an intermediary and that Morgan Drexen performs services on behalf of those attorneys and their clients.

Accordingly, the Court concludes that the legal services provided by Morgan Drexen are within the attorney-client relationship between the attorneys and their clients.

3. The Services Are Provided by an Attorney Licensed or Otherwise Authorized to Practice Law in Colorado.

The Court must also determine whether Morgan Drexen's services are provided by an attorney, licensed or otherwise authorized to practice law in Colorado.

While, it is undisputed that Morgan Drexen is not providing services as "an attorney, licensed or otherwise authorized to practice law in Colorado," Morgan Drexen asserts that

because it provides services as a "non-lawyer assistant" under the supervision of attorneys, its services are necessarily provided in rendition of the attorneys' services and are therefore excluded from regulation pursuant to the Legal Services Exemption.

As stated above, the Colorado Rules of Professional Conduct permit attorneys to associate with and retain nonemployee non-lawyer assistants to "act for the lawyer in rendition of the lawyer's professional services." Colo. R. Prof'l Conduct 5.3, cmt. 1. Further, a lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, and should be responsible for their work product. *Id*; *see also People v. Smith*, P.3d 566, 572 (Colo. OPDJ 2003) (providing that "[t]he work of lay personnel is done by them as agents of the lawyer employing them . . . [and][t]he lawyer must supervise that work and stand responsible for its product").

Morgan Drexen is an independent contractor acting as an intermediary between creditors and the attorneys providing legal services to their debtor clients. So long as Morgan Drexen is acting under the supervision of attorneys, as contemplated by the Colorado Rules of Professional Conduct, it is providing legal services in rendition of the attorneys' professional services. *See* Colo. R. Prof'l Conduct 5.3.

Here, Morgan Drexen has provided sufficient evidence, as supported by affidavits, that the attorneys provide Morgan Drexen with adequate supervision to ensure that their services comport with the legal and ethical standards to which the attorneys are held. For example, Williamson's affidavit establishes that he supervises and directs all of the actions taken by Morgan Drexen, including communications with creditors. Additionally, Williamson reviews and either approves or rejects all offers of settlement on his clients' behalf. Further, Williamson states that he retains ultimate responsibility and liability for representing his clients. The State

has presented no evidence refuting or contradicting Williamson's affidavit. On this record, the Court concludes that the attorneys adequately supervise Morgan Drexen as contemplated by the Colorado Rules of Professional Conduct. Therefore, Morgan Drexen's services on behalf of the attorneys' clients constitute services performed by an attorney licensed or otherwise authorized to practice law in Colorado.

Accordingly, because Morgan Drexen provides legal services in support of its partner attorneys who have established attorney-client relationships with their clients, Morgan Drexen is expressly covered by the Original DMSA's Legal Services Exemption.

4. The DMSA's Legal Service Exemption Is Distinguishable from the FDCPA's Government Officers Exemption

The State asserts that because the Original DMSA did not explicitly exclude companies that were contracting with licensed attorneys to provide debt-management services on their behalf, Morgan Drexen was not covered under the Legal Services Exemption. In support of its claim, the State directs the Court to a similar provision (the "Government Officers Exemption"), exempting government officers from debt collection regulation under the Fair Debt Collection Practices Act (the "FDCPA").

Conversely, Morgan Drexen asserts that the Legal Services Exemption in the DMSA is factually dissimilar to the Government Officer Exemption in the FDCPA. Specifically, Morgan Drexen asserts that the language of the Original DMSA is distinguishable from the FDCPA because the FDCPA's Government Officer Exemption is framed solely by the identity of the individuals performing the acts, while the Original DMSA defines the exemption in terms of the services being provided. As such, Morgan Drexen asserts that because it is providing legal services on behalf of its partner attorneys, it is a constitutional necessity that Morgan Drexen be exempt from regulation under the Original DMSA.

The FDCPA imposes various requirements on individuals and entities who are "debt collectors" as provided in 15 U.S.C. § 1692a(6). Akin to the Legal Services Exemption provided in the Original DMSA, the FDCPA's Governmental Officers Exemption excludes "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties." 15 U.S.C. § 1692a(6)(C). The State provides the Court with a litany of cases from other jurisdictions, interpreting the FDCPA's Government Officer Exemption to exclude those debt collection services not explicitly named in the plain language of the FDCPA. *See e.g. Brannan v. United Student Aid Funds, Inc.*, 94 F.3d 1260, 1263 (9th Cir. 1996) (holding that U.S.A. Funds was not exempt from coverage under the FDCPA, holding "where a statute names parties which come within its provisions, other unnamed parties are excluded")(citing *Foxgorg v. Hischemoeller*, 820 F.2d 1030 (9th Cir. 1987)); *see also Pollice v. Nat'l Tax Funding*, 225 F.3d 379, 406 (3rd Cir. 2000) (holding that the Government Officer Exemption applies only to governmental officers or employees and "does not extend to those who are merely in a contractual relationship with the government"); *Albanese v. Portnoff Law Assocs.*, 301 F. Supp. 2d 389,399 (E.D. Pa. 2004); *Piper v. Portnoff Law Assocs.*, 274 F. Supp. 2d 681, 688 (E.D. Pa. 2003) (holding that a law firm, contractually bound to collect debts on behalf of the governmental municipality did not fall within the FDCPA's Governmental Officers Exemption); *Gradisher v. Check Enforcement Unit, Inc.*, 113 F. Supp. 2d 988, 992 (W.D. Mich. 2001) (following the holdings in *Brannan* and *Pollice* to hold that an independent contractor is not covered under the FDCPA's Government Officer Exemption); *Knight v. Schulman*, 102 F. Supp. 2d 867, 876 (S.D. Ohio 1999) (holding that "[s]ince the Defendant was an attorney in private practice, rather than an officer or employee of the United

States, he is not excluded from the definition of debt collector, regardless of whether the Defendant was acting as an agent of the United States at the time the letters . . . were written").

Here, however, unlike those independent contractors acting on behalf of the government in the aforementioned cases, Morgan Drexen is acting on behalf of the attorneys with whom it contracts, as explicitly contemplated by Rule 5.3 of the Colorado Rule of Professional Conduct. Further, those attorneys who contract with Morgan Drexen and other nonemployee non-lawyer assistants are professionally responsible for the services provided by those non-lawyer assistants pursuant to the Colorado Rules of Professional Conduct. The legal and professional implications surrounding the relationships between attorneys and their non-lawyer assistants, as contemplated by the Colorado Rules of Professional Conduct, are simply not present in the relationships between the government and its independent contractors as described in the cases cited by the State.

Accordingly, because of the nature of the relationship between attorneys and their non-lawyer assistants, the Legal Services Exception of the Original DMSA necessarily applies to Morgan Drexen. Therefore, the Court concludes that the circumstances implicating the FDCPA's Government Employee Exemption, as described in the cases cited by the State, are factually and legally dissimilar from the circumstances prevalent in the DMSA's Legal Services Exemption.

5. The State's Interpretation of the Original DMSA is Inconsistent with the Legislative Intent Surrounding the 2011 Amendment.

Finally, Morgan Drexen asserts that the State's interpretation of the Original DMSA as excluding Morgan Drexen from the Legal Services Exemption is inconsistent with the purpose of the 2011 Amendment, which expressly made non-lawyer assistants who are "not an employee of the licensed attorney " subject to regulation under the DMSA. Specifically, Morgan Drexen

asserts that the purpose of the 2011 Amendment was to change the DMSA by narrowing the DMSA's Legal Services Exemption, not to clarify law.

In support of its position, Morgan Drexen directs the Court to the February 17, 2011 House Committee Hearing on the 2011 Amendment, where Administrator Udis stated that the "goal [of the 2011 Amendment] was to try to *narrow* that attorney and accountant exception so that it applies only to licensed attorneys and certified CPAs that are really truly providing attorney's services . . . ." DMSA: Hearings on HB11-1206 before the H.R. Comm. on Econ. and Bus. Dev., February 17, 2011 at 15:8-12 (emphasis added).

Conversely, the State directs the Court to the March 21, 2011 Senate Committee Hearing, where Administrator Udis stated that an "important part" of the 2011 Amendment was to "tighten up the exemption . . . to make it very clear that the exemption applies only to attorneys . . . but not to third parties that may be involved in the process but are not themselves attorneys . . . ." DMSA: Hearings on HB11-1206 before the Sen. Judiciary Comm., March 21, 2011 at 7:4-11. In further support of its assertion that the General Assembly intended the Original DMSA's Legal Services Exemption to apply only to attorneys and their employees, the State directs the Court to lawsuits brought by the State against independent companies, like Morgan Drexen, contracting with attorneys to provide debt-management services without registering under the DMSA prior to the 2011 Amendment.

Here, as discussed above, due to Morgan Drexen's status as a non-lawyer assistant, and because the Colorado Rules of Professional Conduct explicitly allow attorneys to contract with non-lawyer assistants to act on behalf of the attorney providing legal services, Colo. R. Prof'l Conduct 5.3, Morgan Drexen was necessarily covered by the Original DMSA's Legal Services Exemption. The State misses the critical distinction that Morgan Drexen and other non-lawyer

assistants are not mere "third parties," but rather are extensions of the attorneys and the services the attorneys offer. So long as it is a qualified non-lawyer assistant acting in rendition of the attorneys' services, the fact that Morgan Drexen it is not classified as an attorney does not subject it to DMSA regulation.

Further, the Court concludes that Administrator Udis' comments at both the February 17, 2011 House Committee Hearing and the March 21, 2011 Senate Committee Hearing evince the Legislature's intent to narrow the scope of the exemption rather than to simply clarify the law. Had the Legislature intended to exclude independent contractors in 2008, when the Original DMSA was enacted, it could have. However, it did not, and as a result, attorneys and their nonemployee non-lawyer assistants, relying on the Rules of Professional Conduct, entered into agreements to provide legal and debt-management services to debtors.

Accordingly, the Court concludes that the State's construction of the Original DMSA, as excluding independent contractors from the Legal Services Exemption, is inconsistent with the General Assembly's purpose in enacting the 2011 Amendment to the DMSA.

D. The Separation-of-Powers Doctrine

The Court next considers whether the Amended DMSA violates the separation-of-powers doctrine, as described in Article III of the Colorado Constitution.

The 2011 Amendment limits the Legal Services Exemption to apply to services "provided in an attorney-client relationship by an attorney licensed in Colorado," excluding those who are "otherwise authorized to practice" in Colorado. C.R.S. § 12-14.5-202(10)(A)(i). Further, the amended exemption does "not apply to any person who directly or indirectly provides any debt-management services on behalf of a licensed attorney . . . if that person is not an employee of the licensed attorney." C.R.S. § 12-14.5-202(10)(B).

The State urges the Court to find, as a matter of law, that the Amended DMSA does not violate the separation-of-powers doctrine even though it requires nonemployee non-lawyer assistants, as well as out-of-state attorney, not licensed, but otherwise authorized to practice law in Colorado, to comply with its provisions. Conversely, Morgan Drexen asserts that applying the Amended DMSA to attorneys' non-lawyer assistants, as well as out-of-state attorneys, disrupts the Colorado Supreme Court's exclusive authority to regulate the practice of law and creates inconsistencies with attorneys' professional responsibilities.[1]

Article III of the Colorado Constitution provides that "no person . . . charged with the exercise of power belonging to one of [the legislative, executive, or judicial branch] shall exercise any power properly belonging to either of the others . . . ." Colo. Const. art. III. The separation-of-powers doctrine prevents one branch of government from exercising any power that is constitutionally in the exclusive domain of another branch. *Crowe v. Tull*, 126 P.3d 196, 205-06 (Colo. 2006); *Firelock Inc. v. Dist. Court*, 776 P.2d 1090, 1094 (Colo. 1989). In Colorado, "[t]he judicial power of the state shall be vested in a supreme court . . . and such other courts . . . as the general assembly may, from time to time establish." Colo. Const. art. IV, Section 1. The Colorado Supreme Court has exclusive jurisdiction over attorneys and the authority to regulate, govern, and supervise the practice of law in Colorado in order to protect the public and "there is no authority in these respects in the legislative or executive departments." *Denver Bar Ass'n v. Pub. Utils.* Comm'n, 391 P.2d 467, 470 (Colo. 1964). Generally, "[l]egislation tending to limit the scope of that which constitutes the practice of law [is] abortive." *Id.*

[1] On August 22, 2012, the State filed a Notice of Supplemental Authority with the Court, to which, Morgan Drexen filed its Response on September 5, 2012. However, having reviewed the supplemental authority, the Court concludes that the cases provided by the State are factually distinguishable to the scope of the issues before the Court today.

The Colorado Supreme Court has recognized that some overlap between judicial rulemaking and legislative policy is constitutionally permissible. However, such overlap is impermissible where it creates a "substantial conflict" or where there is a "manifest inconsistency" between two statutes attempting to regulate the same conduct. *Crowe*, 123 P.3d at 206. In determining whether there is such a substantial conflict, the Court's role is to attempt to construe the statutes harmoniously, giving effect to all of their parts. *Id*.

1. The Amended DMSA's Regulation of Nonemployee Non-lawyer Assistants Implicates the Separation-of-Powers Doctrine

First, the Court must determine whether the Amended DMSA as applied to nonemployee non-lawyer assistants implicates the separation-of-powers doctrine.

The State maintains that the Amended DMSA's regulation of nonemployee non-lawyer assistants does not implicate the separation-of-powers doctrine because non-lawyer assistants are not attorneys, and thus are not subject to the Rules of Professional Conduct.

However, as discussed above, pursuant to the Colorado Supreme Court's regulation of attorneys under the Rules of Professional Conduct, attorneys are expressly permitted to employ or retain non-lawyer assistants, including independent contractors, and "must give [non-lawyer] assistants appropriate instruction and supervision concerning the ethical aspects of their employment . . . and should be responsible for their work product." Colo. R. Prof'l Conduct 5.3, cmt. 1.

Accordingly, because of the nature of the relationship between attorneys and their non-lawyer assistants, where attorneys can be held professionally responsible for their assistants' actions, the Court concludes that regulation of an attorney's non-lawyer assistant has direct implications on the attorney and therefore implicates the separation-of-powers doctrine.

2. The Amended DMSA's Regulation of Nonemployee Non-lawyer Assistants Violates the Separation-of-Powers Doctrine

Having concluded that the Amended DMSA's application to nonemployee non-lawyer assistants implicates the separation-of-powers doctrine, the Court now turns to the question of whether the Amended DMSA's regulation of such non-lawyer assistants violates the separation-of-powers doctrine.

Morgan Drexen claims that under the Amended DMSA, attorneys practicing debt-management law are no longer free to associate with nonemployee non-lawyer assistants because the DMSA's regulation of nonemployee non-lawyer assistants creates manifest inconsistencies in attorneys' compliance with the Colorado Rules of Professional Conduct. Conversely, the State maintains that any such regulation is not manifestly inconsistent with the Colorado Rules of Professional Conduct, and therefore not in violation of the separation-of-powers doctrine, as described in Article III of the Colorado Constitution.

a. C.R.S. §§ 12-14.5-204 – 209's Regulation of Nonemployee Non-lawyer Assistants is Manifestly Inconsistent with the Colorado Rules of Professional Conduct.

C.R.S. §§ 12-14.5-204 – 209 require that any provider under the DMSA register with the state and places the issuance or denial of any certificate of registration in the complete discretion of the Administrator.

However, if an attorney's nonemployee non-lawyer assistant is subject to regulation and denied a certificate of registration under the DMSA, it necessarily follows that the attorney will no longer be able to associate with that non-lawyer assistant to provide debt-management services. The natural result is a direct limitation on the attorney's right to associate with

nonemployee non-lawyer assistants, even though the Colorado Rules of Professional Conduct explicitly permit such an association.[2]

Accordingly, the Court concludes that the DMSA's registration requirement for nonemployee non-lawyer assistants, coupled with the Administrator's discretion to deny such non-lawyer assistants the ability to provide debt-management services on behalf of attorneys, necessarily conflicts with attorneys' right to freely associate with nonemployee non-lawyer assistants pursuant to Colo. R. Prof'l Conduct 5.3. Therefore, the Court finds manifest inconsistencies in the Colorado Rules of Professional Conduct and the application of §§ 12-14.5-204 – 209 to attorneys' nonemployee non-lawyer assistants, in violation of the separation-of-powers doctrine.

b. C.R.S. §§ 12-14.5-233 – 234's Regulation of Nonemployee Non-lawyer Assistants is Manifestly Inconsistent with the Colorado Rules of Professional Conduct

Similarly, C.R.S. §§ 12-14.5-233 – 234 give the Administrator the authority to revoke a provider's registration for violating the DMSA.

However, if nonemployee non-lawyer assistants are subject to the DMSA and have their certification revoked by the Administrator, attorneys would not only face the unavoidable limitations on their right to freely associate with such non-lawyer assistants, but also would necessarily be hindered in their ability to provide adequate debt-management services all together, due to the abrupt termination of their non-lawyer assistants' ability to assist them. Just as the Administrator's discretion to issue or deny certificates of registration to providers necessarily limits an attorney's ability to freely contract with nonemployee non-lawyer

[2] Colo. R. Prof'l Conduct 5.3, cmt. 1, expressly provides that "[l]awyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, *whether employees or independent contractors*, act for the lawyer in rendition of the lawyer's professional services." (emphasis added).

assistants, the Administrator's ability to revoke registration for providers would create the same limitations in direct conflict with Colo. R. Prof'l Conduct 5.3.

Accordingly, the Court finds that the Administrator's authority to revoke registration from an attorney's nonemployee non-lawyer assistants pursuant to §§ 12-14.5-233 – 234, creates manifest inconsistencies with the Colorado Rules of Professional Conduct in violation the separation-of-powers doctrine.

c. C.R.S. § 12-14.5-226's Regulation of Nonemployee Non-lawyer Assistants is Manifestly Inconsistent with the Colorado Rules of Professional Conduct.

Pursuant to C.R.S. § 12-14.5-226 a provider may terminate an agreement if "an individual . . . fails for sixty days to make payments required by the agreement." The statute makes no reference to any other circumstances under which a provider may terminate representation of a client. Conversely, Colo. R. Prof'l Conduct 1.16 provides a number of circumstances, beyond nonpayment, that permit and in some instances require an attorney, including the attorney's non-lawyer assistants, to terminate client representation. For example, under the Colorado Rules of Professional Conduct, an attorney must terminate representation of a client where the representation would result in a violation of the law or Rules of Professional Conduct. Colo. R. Prof'l Conduct 1.16(a). Further, an attorney is expressly permitted to terminate representation of a client where the client secures the attorney's services to perpetuate a fraud, where the client and attorney have a fundamental disagreement, or where other good cause exists. *Id*. at 1.16(b).

Because the DMSA only permits termination of representation in the limited circumstance of a debtor's failure to make payments pursuant to a fee agreement, the DMSA's application to an attorney's nonemployee non-lawyer assistants creates the untenable scenario

where attorneys, through their non-lawyer assistants, are either required to continue representing a client in violation of the Rules of Professional Conduct or are prevented from terminating representation of a client as permitted by the Rules of Professional Conduct.

For the reasons stated above, the Court concludes that § 12-14.5-226, as applied to attorneys through their nonemployee non-lawyer assistants, creates manifest inconsistencies with the Colorado Rules of Professional Conduct by placing unconstitutional limitations on an attorney's ability to terminate representation of a client as provided in Colo. R. Prof'l Conduct 1.16.[3]

d. C.R.S. § 12-14.5-232(b) is not Manifestly Inconsistent with the Colorado Rules of Professional Conduct

Pursuant to C.R.S. § 12-14.5-232(b) the Administrator may require providers, including an attorney's nonemployee non-lawyer assistants, to produce client records for review. Conversely, Colo. R. Prof'l Conduct 6.1 provides that attorneys must keep communications with it clients confidential. Further, "[a] lawyer must give [non-lawyer] assistants appropriate instruction and supervision concerning the ethical aspects of their employment, *particularly regarding the obligation not to disclose information relating to representation of the client*" Colo. R. Prof'l Conduct 5.3, cmt. 1 (emphasis added). As such, the Administrator's review of client records in the hands of an attorney's nonemployee non-lawyer assistant would seemingly bring about direct conflicts and manifest inconsistencies with the Colorado Rules of Professional Conduct.

However, there are certain situations in which a lawyer may be allowed or even required to produce confidential communications without violating the duty of confidentiality. For

[3] The Court also concludes that C.R.S. § 12-14.5-226 is inconsistent with the Rules of Professional Conduct as applied to attorneys not licensed, but otherwise authorized to practice law in Colorado, for the same reasons as stated above, as such attorneys are governed by the Colorado rules of Professional Conduct when practicing in Colorado, which is discussed in greater detail below.

example, Colo. R. Prof'l Conduct 5.7(a)(2) provides that the protections of the attorney-client relationship do not extend to "law related services" being provided by non-lawyer entities where the attorney makes it clear to the client that the law related services are not legal services and that the protections of the attorney-client relationship do not exist. However, in this case while the fee agreement includes a statement that Morgan Drexen will be providing "non-legal services," it does not clearly convey to prospective clients that the protections of the attorney-client relationship would not extend to Morgan Drexen. To the contrary, the agreement explicitly states that Morgan Drexen will necessarily be privy to such confidential communications.[4] Thus, it is foreseeable that client files in Morgan Drexen's possession will contain confidential communications between the attorney and the client. Further, because of the nature of the assistance provided by Morgan Drexen on behalf of the attorneys' clients and the relationship between attorneys and their non-lawyer assistants, the Court concludes that the services are sufficiently entwined to require attorneys to take responsibility to ensure that Morgan Drexen complies with the Rules of Professional Conduct, or potentially be subject to professional discipline. *See* Colo. R. Prof'l Conduct 5.7, cmt. 8.

Additionally, the State contends that even if such confidential communications are within the non-lawyer assistants' files, attorneys would nonetheless not be required to violate their duty of confidentiality. In support of its contention, the State directs the Court to Colo. R. Prof'l. Conduct 1.6(b)(7) which recognizes that attorneys may reveal confidential information without violating their duty of confidentiality when ordered by the court or to comply with other law. To that end, the State asserts that, should the Administrator request information pursuant to the

[4] The fee agreement provides: "[y]ou understand and agree that Attorneys may utilize the services of Morgan Drexen, Inc., an outside company, to assist Attorneys in performing non-legal services under this Agreement, including communication with your creditors. Although Morgan Drexen Inc. is not a party to this contract, you hereby consent to Our utilization of its services including any necessary disclosure of confidential information to Morgan Drexen, Inc."

DMSA, an attorney should assert, on behalf of its client, that the information is protected by the attorney-client privilege.

Morgan Drexen maintains that requiring attorneys to challenge the Administrator's request that their non-lawyer assistants produce clients' records would inherently create a substantial increase in time and expense for the attorney and client. However, this increased burden to the attorney-client relationship is not insurmountable. The Colorado Rules of Professional Conduct explicitly provide that an attorney may be required to submit to such request in order to comply with another law, such as the DMSA, and explicitly urge such attorneys to assert protections for their clients' records when such occasion arises. *See* Colo. R. Prof'l Conduct 6.1, cmt. 13.

Accordingly, given its obligation to construe the statutes harmoniously whenever possible, *Crowe*, 123 P.3d at 206, the Court finds that the DMSA's production of records requirement, while burdensome, is neither in direct conflict nor manifestly inconsistent with the Colorado Rules of Professional Conduct.

e. C.R.S. § 12-14.5-202(21)(B)(ii) is not Manifestly Inconsistent with the Colorado Rules of Professional Conduct

C.R.S. § 12-14.5-202(21)(B)(ii) provides that individual debtors under the DMSA own the funds held in the providers trust account and that debtor clients must be "paid accrued interest on the account, if any." Similarly, Colo. R. Prof'l Conduct 1.15(h)(1) provides that "interest earned on accounts in which the funds are deposited . . . shall belong to the clients . . . ." However, Morgan Drexen maintains that § 12-14.5-202(21)(B)(ii) violates the separation-of-powers doctrine because Colo. R. Prof'l Conduct 1.15(e)(1) provides that attorneys may establish a Colorado Lawyer Trust Account Foundation ("COLTAF") account and may remit nominal interest gained in trust accounts to that account. Colo. R. Prof'l Conduct 1.15(h)(2).

Here, while Colo. R. Prof'l Conduct 1.15(h)(2) permits an attorney to remit nominal interest to a COLTAF account, the rule does not require it. As such, a provider working for an attorney can remit all interest gained on a client's trust account back to the client, as required by the DMSA, and still be in compliance with the Rules of Professional Conduct.

Accordingly, the Court concludes that § 12-14.5-202(21)(B)(ii) neither directly conflicts with nor creates manifest inconsistencies with the Colorado Rules of Professional Conduct.

In conclusion, due to the relationship between attorneys and their nonemployee non-lawyer assistants, as contemplated in the Colorado Rules of Professional Conduct, the Court finds that regulation of those assistants as "providers of debt-management services" implicates the separation-of-powers doctrine. The Court further finds that portions of the DMSA as applied to nonemployee non-lawyer assistants, as discussed above, are inconsistent with the Colorado Rules of Professional Conduct and are therefore contrary to Colorado constitutional law. Because "[l]egislation tending to limit the scope of that which constitutes the practice of law [is] abortive," *Denver Bar Ass'n*, 391 P.2d at 470, the Amended DMSA's regulation of nonemployee non-lawyer assistants, limiting an attorney's ability to associate with such assistants when engaging in the practice of debt-management law, cannot stand, as it is unconstitutional pursuant to the separation-of-powers doctrine.

3. The Amended DMSA's Regulation of Attorneys Who Are Not Licensed, but otherwise authorized to Practice Law in the State of Colorado Violates the Separation of Powers Doctrine.

The Court next resolves the question of whether the Amended DMSA's regulation of attorneys, not licensed, but otherwise authorized to practice law in Colorado, violates the separation-of-powers doctrine.

Morgan Drexen claims that the Amended DMSA's regulation of attorneys who are not licensed, but otherwise authorized to practice law in Colorado, violates the separation-of-powers doctrine because out-of-state attorneys are explicitly permitted to practice law in Colorado and are subject to the Colorado Rules of Professional Conduct.

The Original DMSA's Legal Service Exemption provided that any attorney "licensed or otherwise authorized to practice law" in Colorado was exempt from the DMSA. However, the 2011 Amendment removed the phrase "or otherwise authorized" from the Original DMSA's Legal Services Exemption, thereby allowing the legislature to regulate out-of-state attorneys.

The Colorado Supreme Court has exclusive jurisdiction over attorneys and the authority to regulate, govern, and supervise the practice of law in Colorado. *Crowe*, 123 P.3d at 205-06. This exclusive authority is not limited to in-state attorneys, but rather extends to all attorneys practicing law in Colorado. *See People v. Fain*, 229 P.3d 302, 305 (Colo. O.P.D.J. 2010) ("out-of-state attorney[s] who practice law in the state of Colorado [are] subject to the Colorado Rules of Professional Conduct and rules of procedure regarding attorney discipline"). Lawyers cannot practice law in Colorado unless they are licensed in Colorado or "unless specifically authorized by C.R.C.P. 220, C.R.C.P. 221, C.R.C.P. 221.1, C.R.C.P. 222 or federal or tribal law." Colo. R. Prof'l Conduct 5.5. Pursuant to C.R.C.P. 220, attorneys may practice law in Colorado if they are licensed and actively practicing law in another jurisdiction, in good standing in all jurisdictions to which they are admitted, have not established domicile in Colorado, and do not solicit or accept Colorado clients or hold themselves out to the general public as practicing Colorado law. Further, C.R.C.P. 221 expressly permits an out-of-state attorney to appear in a Colorado state court by applying for *pro hac vice* status.

a. The DMSA's Application to Attorneys Violates the Separation-of-Powers Doctrine.

The State conclusively asserts that because there are "no manifest inconsistencies" between the DMSA and the Rules of Professional Conduct, the General Assembly is free to repeal the attorney exemption all together, thereby making the DMSA applicable to all attorneys.

However, this assertion fails on multiple grounds. First, it is inconsistent with the legislative history of the implementation of the Original DMSA and the 2011 Amendment. Specifically, Administrator Udis testified:

> [t]he main reason the attorneys are carved out of [the DMSA] is because, frankly [the General Assembly] is not allowed to regulate the attorneys. That is a separation of powers issue. They are regulated by the Supreme Court and the Supreme Court is the only one that can actually regulate attorneys as attorneys.

DMSA: Hearings on HB11-1206 before the H.R. Comm. on Econ. and Bus. Dev., February 17, 2011 at 10:13-20.

As additional support for its contention that the DMSA may regulate attorneys, the State directs the Court to the FDCPA and the Colorado Consumer Protection Act ("CCPA"), which the State maintains are analogous to the DMSA. The Colorado Supreme Court has upheld the FDCPA and CCPA as applying to attorneys because the conduct regulated by those acts mirrors the Colorado Rules of Professional Conduct. *See Crowe*, 126 P.3d at 207; *Shapiro and Meinhold v. Zartman*, 823 P.2d 120, 124 (Colo. 1992). However, as discussed throughout this Order, the Court concludes that there are numerous conflicts between the DMSA and the Rules of Professional Conduct, beyond the conduct regulated by the DMSA.

Accordingly, because of these manifest inconsistencies between the DMSA and the Rules of Professional Conduct, the DMSA is not analogous with the FDCPA or the CCPA. The

DMSA's application to attorneys therefore violates the separation of powers doctrine and cannot stand.

b. The State's Assertion that the DMSA Merely Regulates Debt-Management Services and not Legal Services is Not Persuasive.

The State next contends that the DMSA merely regulates those who provide debt-management services rather than regulating legal services. However, as discussed above, when attorneys, including out-of-state attorneys, negotiate settlement offers under the DMSA, they are practicing law. *See In re Boyer*, 988 P.2d at 627. As such, the State's contention that the DMSA merely regulates debt-management services rather than legal services is unpersuasive.

c. C.R.S. §§ 12-14.5-204 – 209 are in Direct Conflict with the Separation-of-Powers Doctrine, as Applied to Attorneys Otherwise Authorized to Practice in the State.

As discussed above, C.R.S. §§ 12-14.5-204 – 209 require providers under the DMSA to register with the state and that any certificate of registration is subject to issuance or denial by the Administrator. Conversely, the Colorado Supreme Court has the sole authority to determine who may be admitted to practice law in Colorado, including those who are not licensed, but are otherwise authorized to practice. *See e.g. Fain*, 229 P.3d at 305; *Denver Bar Ass'n*, 391 P.2d at 470; C.R.C.P. 201.1.

Here, requiring out-of-state attorneys to register with the Administrator in order to practice debt-management law in Colorado is wholly inconsistent with the Colorado Supreme Court's exclusive jurisdiction over the admission of attorneys to practice law in Colorado.

Accordingly, the Court concludes that the DMSA registration provisions, §§ 12-14.5-204 – 209, as applied to out-of-state attorneys otherwise authorized to practice in Colorado, are manifestly inconsistent with Colorado case law and C.R.C.P. 201.1 and therefore, are in direct conflict with the separation-of-powers doctrine.

d. C.R.S. §§ 12-14.5-233 – 234 are in Direct Conflict with the Separation-of-Powers Doctrine, as Applied to Attorneys Otherwise Authorized to Practice in the State.

Similarly, as discussed above, C.R.S. §§ 12-14.5-233 – 234 give the Administrator the ability to revoke a providers registration for violation of the DMSA. However, as applied to out-of-state attorneys authorized to practice law in Colorado, §§ 12-14.5-233 – 23 effectively allow the Administrator to prevent those attorneys from practicing law in Colorado in the area of consumer debt settlement and in essence constitute a partial revocation of an out-of-state attorney's authorization to practice. In Colorado, the Colorado Supreme Court, not the Legislature, has exclusive authority to discipline attorneys, including suspending or revoking an attorney's license or authorization. *See Denver Bar Ass'n*, 391 P.2d at 470; C.R.C.P. 241.1, *et seq*. Accordingly, the Court concludes that the Administrator's ability to revoke a provider's registration, as applied to out-of-state attorneys, is in direct conflict with the separation-of-powers doctrine and cannot stand.

e. C.R.S. § 12-14.5-223 is Manifestly Inconsistent with the Colorado Rules of Professional Conduct, as Applied to Out-of-State Attorneys Otherwise Authorized to Practice in the State.

Morgan Drexen also asserts that C.R.S. § 12-14.5-223 conflicts with the Colorado Rules of Professional Conduct by placing limitations on the fees a provider may charge to clients, while the Rules of Professional Conduct provide only that a fee may not be unreasonable, based a number of different factors. *See* Colo. R. Prof'l Conduct 1.5.

The State asserts that with the amendment of the DMSA in 2011, the Legislature eliminated the DMSA's restrictions on fees a provider may charge. However, § 12-14.5-223 as presented in the Amended DMSA still provides certain limitations on the fees a provider can charge. For example, § 12-14.5-223(d)(1)(A) requires that a provider's fees "not [] exceed[]

fifty dollars for consultation, obtaining a credit report, and setting up an account." Further, § 12-14.5-223(d)(1)(B) provides that a providers monthly service fee may not exceed "ten dollars times the numbers of creditors, remaining in the plan at the time the fee is assessed, but not more than fifty dollars in any month."

While the Court is not charged, today, with determining the reasonableness of the fees charged to clients for debt-management services or the reasonableness of the fees allowed under the DMSA, such a restriction on attorneys, including out-of-state attorneys, creates manifest inconsistencies between the DMSA and the Colorado Rules of Professional Conduct. Specifically, where effective representation requires a higher fee than what is statutorily allowed under the DMSA, attorneys are precluded from charging that higher fee to their clients, even if it is reasonable and necessary pursuant to Colo. R. Prof'l Conduct 1.5. This is particularly concerning when considering the State's contention with respect to § 12-14.5-232(b), that attorneys should simply assert protective orders when the Administrator seeks review of a provider's records in order to keep client communications confidential, which will inevitably increase the costs of representation.

Accordingly, the Court concludes that § 12-14.5-223, placing limits on a provider's fees, when applied to out-of-state attorneys, directly conflicts with the Colorado Rules of Professional Conduct.

f. C.R.S. § 12-14.5-228 is Manifestly Inconsistent with the Colorado Rules of Professional Conduct, as Applied to Attorneys Otherwise Authorized to Practice in the State.

Morgan Drexen further asserts that C.R.S. § 12-14.5-228 directly conflicts with the Colorado Rules of Professional Conduct by prohibiting providers, including out-of-state attorneys, from offering certain recommendations or advice to their clients.

Colo. R. Prof'l Conduct 1.4(b) requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Conversely, § 12-14.5-228 provides, in pertinent part, that a provider may not "[m]ake a representation [to a debtor] that participation in a plan will or may prevent litigation, collection activity, garnishment, attachment, repossession, foreclosure, eviction, or loss of employment." § 12-14.5-228(a)(12)(C). Further, a provider may not "[a]dvise, encourage, or suggest to the individual not to make a payment to creditors under the plan." *Id*. at 228(a)(17).

While the State maintains that nothing in the language of the Amended DMSA prevents an attorney from complying with his or her ethical obligation to sufficiently explain matters to a client to allow the client to make an informed decision, the Court concludes otherwise. In providing a client with sufficient information, attorneys must necessarily inform their clients of the potential legal effects of the actions a client wishes to pursue. The potential legal effects of entering into a settlement, including the prohibited communications in § 12-14.5-228(a)(12)(C), agreement are no exception. Further, attorneys are charged with representing the best interest of their clients, and in some instances, continued payments to the creditor under the plan may not represent the client's best interest. As such, the prohibited communications in § 12-14.5-228(a)(17) may also prevent an attorney from providing sufficient legal advice to fulfill his or her ethical obligations.

Accordingly, the Court concludes that § 12-14.5-228, as applied to out-of-state attorneys, authorized to practice law in Colorado, prevents such attorneys from providing meaningful legal advice to their clients in violation of the Colorado Rules of Professional Conduct.

In conclusion, because out-of-state attorneys, licensed and in good standing in other states, are explicitly permitted to practice law in Colorado without being licensed in Colorado,

C.R.C.P. 220(2); Colo. R. Prof'l Conduct 5.5(a)(1), and because the Colorado Supreme Court has exclusive authority to regulate such out-of-state attorneys pursuant to the Colorado Rules of Professional Conduct, *Crowe*, 123 P.3d at 205-06, the Court finds that the Amended DMSA creates manifest inconsistencies with Colorado Law and the Colorado Rules of Professional Conduct. Accordingly, the DMSA's application to out-of-state attorneys is unconstitutional pursuant to the separation-of-powers doctrine.

II. The Attorney Plaintiffs' Motion for Determination of Questions of Law

Like Morgan Drexen, the Attorney Plaintiffs assert that the Amended DMSA violates the separation-of-powers provision of Article III of the Colorado Constitution by requiring nonemployee non-lawyer assistants and out-of-state attorneys to comply with its provisions.

Having determined that the Amended DMSA is unconstitutional pursuant to the separation-of-powers doctrine, the Court restricts its analysis of the Attorney Plaintiffs' Motion to their additional constitutional claims regarding the Amended DMSA.

In addition to their claim that the Amended DMSA violates the Colorado Constitution, the Attorney Plaintiffs also assert that: (1) the Amended DMSA violates the Privileges and Immunities Clause of Article IV of the United States Constitution by discriminating against lawyers not licensed to practice in the Colorado; and, (2) the Amended DMSA unlawfully burdens interstate commerce, in violation of the Commerce Clause of the United States Constitution.

In its initial Response to the Attorney Plaintiffs' Cross Motion, the State did not address the Attorney Plaintiffs' United States constitutional claims, asserting that because the Attorney Plaintiffs had not moved to amend their Complaint, nor demonstrated "lack of knowledge, mistake, inadvertence, or other reason," for failing to raise these claims in their Amended

Complaint, *see Polk v. Denver Dist. Court*, 849 P.2d 23, 25 (Colo. 1993), the claims are not proper for the Court's consideration. However, because the United States constitutional issues raised by the Attorney Plaintiffs are related and pertinent to the issues already raised by the parties in this litigation, the Court, on June 16, 2012, ordered the parties to fully brief the United States constitutional issues to best serve the interests of judicial efficiency.

In its supplemental Response, as ordered by the Court, the State argues that the Amended DMSA does not discriminate on the basis of residency, and thus, neither the Privileges and Immunities Clause nor the Commerce Clause are implicated. Conversely, the Attorney Plaintiffs contend that the Amended DMSA does discriminate on the basis of residency, and that it unjustly interferes with interstate commerce.

A. The Amended DMSA Violates the Privileges and Immunities Clause of Article IV of the United States Constitution

United States Constitution requires that "[c]itizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2. Stated differently, states "must accord residents and nonresidents equal treatment . . . with respect to those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity." *Supreme Court of N.H. v. Piper,* 470 U.S. 274, 279 (1985). A statute that deprives non-residents of a protected privilege violates the Privileges and Immunities Clause, unless "there is a substantial reason for the difference in treatment; and . . . the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Id.* at 284.

Pursuant to C.R.C.P. 220, attorneys who are licensed to practice law in other states may practice law in Colorado. In order to appear before a state court in Colorado, out-of-state attorneys must apply for admission to the Colorado Bar *pro hac vice* under C.R.C.P. 221.

Further, C.R.C.P. 220(1)(c) provides that in order to practice law in Colorado as out-of-state attorneys, the applicant must not have established domicile in Colorado.

Here, while the State concedes that the Amended DMSA treats in-state and out-of-state attorneys differently, it asserts that the Amended DMSA does not implicate the Privileges and Immunities Clause because the DMSA's exemption for "an attorney licensed to practice in this state" does not discriminate on the basis of residency. However, out-of-state attorneys practicing under C.R.C.P. 220 must, by definition, be non-residents of Colorado. If out-of-state attorneys establish residency in Colorado, they can no longer practice under C.R.C.P. 220. As such, because C.R.C.P. 220 requires that out-of-state attorneys must be non-residents of Colorado, the residency of out-of-state attorneys is necessarily at issue in the determination of whether an attorney will be subjected to the requirements of the Amended DMSA. Therefore, the Court concludes that the Amended DMSA's scheme of exempting services performed by attorneys licensed to practice in Colorado, while not exempting services performed by equally qualified out-of-state attorneys, treats in-state and out-of-state attorneys differently on the basis of their residency.

However, the Court's inquiry does not end there. While the Amended DMSA discriminates against out-of-state attorneys on the basis of residency, such discrimination will be permitted if "there is a substantial reason for the difference in treatment; and . . . the discrimination . . . bears a substantial relationship to the State's objective." *Piper*, 470 U.S. at 284. In its original Response, the State declined to address the Privileges and Immunities issue. In its supplemental Response, the State focused its argument on the fact that the statute does not discriminate on the basis of residency. As the records stands, the State has advanced no

substantial reason for the difference in treatment or a substantial relationship to the State's objective.

At most, the Court may infer from the entirety of the record that the State's objective through the Amended DMSA is the protection of consumers through oversight and regulation of debt collection. Here, with the exception of the inconsistencies in the Amended DMSA and the Rules of Professional Conduct, as discussed above with respect to the separation-of-powers issue, the DMSA's objective of protecting consumers is encompassed by the regulation of attorneys pursuant to the Rules of Professional Conduct. Under C.R.C.P. 220, any misconduct by out-of-state attorneys would be punished in the same manner as misconduct by in-state attorneys pursuant to the Colorado Rules of Professional Conduct. Therefore, the Court finds no substantial reason for the difference in treatment. Additionally, because the conduct of out-of-state attorneys is already controlled by the Colorado Rules of Professional Conduct, the Court finds no substantial relationship between the Amended DMSA's discrimination against out-of-state attorneys and the DMSA's objective of protecting consumers.

Accordingly, because the Amended DMSA discriminates against out-of-state attorneys on the basis of residency, and because there is no substantial reason for the discrimination, nor is there a substantial relationship between the discrimination and the State's objective, the Court concludes that the Amended DMSA violates the Privileges and Immunities Clause of the United States Constitution.

B. The Amended DMSA Violates the Commerce Clause of the United States Constitution

The United States Constitution also provides that "Congress shall have the power . . .[t]o regulate Commerce . . . among the several states." U.S. Const. art. I, § 8. The Commerce Clause has been interpreted to contain "an implied limitation on the power of the states to interfere with

or impose burdens on interstate commerce." *Western & Southern Life Ins. CO. v. State Bd. Of Equalization of California*, 451 U.S. 648, 652 (1981). Additionally, the Commerce Clause "invalidate[s] local laws that impose commercial barriers or discriminate against an article of commerce by reason of its origin or destination out of State." *C & A Carbone v. Town of Clarkstown,* 511 U.S. 383, 390 (1994). Stated differently, the Commerce Clause "prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988). Discrimination against out-of-state commerce in favor of in-state commerce is invalid, except for "a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *Id.* at 392. The practice of law is undoubtedly commerce. *Goldfarb v. Va. State Bar,* 421 U.S. 773, 785-86 (1975).

Here, the Court has already concluded that the Amended DMSA unlawfully discriminates against out-of-state attorneys. In addition to violating the Privileges & Immunities Clause, the discrimination of out-of-state attorneys also improperly burdens interstate commerce. For example, under the Amended DMSA, out-of-state attorneys are subjected to a registration process and a myriad of other requirements, while in-state attorneys are exempted from those requirements. The results of this distinction are that in-state attorneys are effectively insulated from DMSA regulated competition, while out-of-state attorneys are burdened by the additional regulatory requirements of the Amended DMSA. Furthermore, the Amended DMSA's distinction places the out-of-state attorneys at a competitive disadvantage to in-state attorneys practicing in the field of debt collection because the Amended DMSA imposes additional fees on out-of-state attorneys that are not assessed to their in-state counterparts. Thus, out-of-state

attorneys are unfairly burdened by the Amended DMSA, as they are prevented from engaging in interstate commerce in the same fashion as in-state attorneys engaging in similar intrastate commerce.

As previously noted, the disparate registration and regulatory requirements applied to out of state attorneys under the Amended DMSA are not *per se* invalid. If the State can demonstrate that it has no other means to advance a legitimate local interest, the State's burden on interstate commerce will not be unconstitutional. *New Energy*, 468 U.S. at 392.

However, the State again advances no evidence or argument confirming a legitimate local interest to refute the Attorney Plaintiffs' argument that the Amended DMSA violates the Commerce Clause. The State also has not addressed whether it has "no other means" to advance the interest at issue here. Consequently, the Court is left to infer that the State's local interest is the protection of consumers through oversight and regulation of debt collection. As discussed above, out-of-state attorneys practicing in Colorado pursuant to C.R.C.P. 220 are subject to the same Rules of Professional Conduct and subject to the same discipline as in-state, licensed attorneys practicing in Colorado. Therefore, the State's interest of oversight and regulation of attorneys who practice debt collection is already protected by the Colorado Rules of Professional Conduct, by which all attorneys practicing in Colorado must abide. Stated differently, the State has other means to advance the interest at issue here because the interest is already protected by the disciplinary scheme currently in place in the Colorado Supreme Court, which regulates and oversees all attorney conduct in the State of Colorado.

Accordingly, because the Amended DMSA improperly burdens interstate commerce in favor of intrastate commerce, and because the State has not demonstrated that there are "no other

means" to advance its legitimate local interest, the Court concludes that the Amended DMSA violates the Commerce Clause of the United States Constitution.

CONCLUSION

WHEREFORE, based on the foregoing, the Court determines, as a matter of law, that: (1) Morgan Drexen was covered under the Original DMSA's Legal Services Exemption; (2) the Amended DMSA violates Article III of the Colorado Constitution, pursuant to the separation-of-powers doctrine; (3) the Amended DMSA improperly discriminates on out-of-state attorneys in violation of Article IV, Section 2 of the United States Constitution; and, (4) the Amended DMSA improperly burdens interstate commerce in violation of Article I, Section 8 of the United States Constitution.

DONE this 12th day of September, 2012.

BY THE COURT:

MICHAEL A. MARTINEZ
District Court Judge