

# 129 ETHICAL DUTIES OF LAWYER PAID BY ONE OTHER THAN THE CLIENT

Adopted March 18, 2017

## *Introduction and Scope*

It is not uncommon for some or all of a client's cost of legal representation to be paid by a person or entity other than the client – a third-party payer. When a third party agrees to pay a client's legal fees, tensions can arise between the lawyer's duties to the client and the third-party payer's expectations. The Colorado Bar Association Ethics Committee (Committee), in its Formal Opinion 91, "Ethical Duties of Attorney Selected by Insurer to Represent Its Insured," has addressed issues that can occur when an insurance company pays its insured client's legal bills. This opinion more broadly addresses the ethical questions that can arise in third-party payer situations that do not involve insurance as a source of payment. This Opinion strives to provide practical guidance to the lawyer whose legal fees, or some portion of them, are to be paid by a source other than the client and to suggest matters for the lawyer to consider in structuring that arrangement in compliance with the lawyer's ethical responsibilities.

## *Syllabus*

The Colorado Rules of Professional Conduct (Colo. RPC or the Rules) allow a lawyer to provide legal services to a client and to accept payment for those services from a third party, as long as the requirements of Colo. RPC 1.8(f) are satisfied: The client must give informed consent, there must be no interference with the lawyer's independence of professional judgment

or with the client-lawyer relationship, and the confidentiality of information related to the representation must be maintained. The lawyer must understand the primacy of the lawyer's duties to the client and may need to manage the expectations of the third-party payer with respect to involvement in the representation. Discussing and defining the relationships among the client, the lawyer, and the payer in a written agreement among them at the outset of the representation can avoid or mitigate issues throughout the course of the representation.

### *Analysis*

There are many situations, apart from insurance coverage, in which a third party undertakes to pay the client's cost of legal representation. A family member or friend may pay the defense costs of someone charged with a crime. In the domestic relations field, a parent or prospective new partner of the client may pay the costs to dissolve the client's marriage. A corporation may pay the legal fees of an officer or employee concerning a matter arising in the course of the office or employment. Family members, including potential beneficiaries of a will, often pay a lawyer's fees to draft testamentary documents for the lawyer's client, their relative. A contractual indemnitor may pay the legal fees incurred by an indemnitee. A principal may pay the legal fees of an entity filing bankruptcy. The parents of a newlywed couple might assist with the purchase of a new home and include payment of the couple's legal fees in the financial assistance provided. Legal services programs or other similar non-profit providers of legal services may receive funding to provide legal representation to employees or indigent individuals.<sup>1</sup> Even pro bono or reduced-rate legal services programs may invite some application

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<sup>1</sup> Legal services programs and other non-profit providers of legal services typically receive funding from Federal, state, local and private entities, not for the purpose of representing specifically identified

of the rules relating to third-party payers, as when, for instance, a legal assistance organization pays the client's litigation expenses. The principles of Rules 1.7, 1.8(f) and 5.4(c) apply to each circumstance in which a lawyer accepts compensation for representing a client from a source other than the client.

### **I. Obligations Imposed by Rules of Professional Conduct in Third-Party Payment Arrangements**

“Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.” Colo. RPC 1.7, cmt. [1]. Rule 1.7 provides the general rules for addressing conflicts of interest involving current clients; Rule 1.8 provides additional rules regarding certain specific concurrent conflicts of interest that can arise from, among other things, the lawyer's responsibilities to another client or a third person. Colo. RPC 1.7, cmt. [1].

Rule 1.8(f) permits a lawyer to accept compensation for representing a client from a source other than the client only if three requirements are met: (1) the client gives informed consent; (2) there is no interference with the lawyer's independent judgment or the client-lawyer relationship; and (3) information relating to the representation is protected from disclosure. These requirements are defined in Colo. RPC 1.0(e) (informed consent) and established by Colo. RPC 5.4(c) (independent judgment) and Colo. RPC 1.6 (confidentiality).

A third party's involvement in payment for the lawyer's services to a client implicates several additional principles that, although elementary, are not so conspicuous. The first is the need to unequivocally and plainly identify, preferably in writing, who the client is and who the third-party payer is. The second is the need to express, again preferably in writing, the scope of

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individuals, but to represent particular types of clients who are eligible for representation under grants from or contracts with those providers.

the duties owed and the services to be provided to the client, the absence of professional duties owed to the third party, and the terms of the fee arrangement with the third party.

### **A. Informed Consent**

In all situations, the client must give informed consent to the third-party payer arrangement. Colo. RPC 1.8(f)(1).<sup>2</sup> A client’s “informed consent” is the client’s agreement to a proposed course of conduct after the lawyer has communicated and explained to the client sufficient information about the risks of and available alternatives to that course of conduct for the client to make an adequately informed decision. Colo. RPC 1.0, cmt. [6]. The lawyer should discuss with the client the details of the third-party payment arrangement so that the client understands the circumstances and conditions under which the payment is to be provided. Colo. RPC 1.8, cmt. [12] (referencing client’s informed consent regarding the fact of the payment and the identity of the third-party payer); Colo. RPC 5.4, cmt. [1] (the lawyer should “make full disclosure” of third-party payment arrangements to the client); Restatement (Third) of the Law Governing Lawyers (Rest.), § 134(1) (2000) (“A lawyer may not represent a client if someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents . . . and knows of the circumstances and conditions of the payment.”).

The communication necessary to obtain informed consent will vary according to the circumstances. Colo. RPC 1.0, cmt. [6]. It may be presumed that the client has received

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<sup>2</sup> Many third-party payer situations arise when the client’s capacity to make adequately considered decisions is diminished, whether because of minority, mental impairment, or other reason. In such situations, a lawyer should maintain a normal client-lawyer relationship with the client to the extent possible but also may need to take reasonable necessary action to protect the client. Colo. RPC 1.14; *also see* CBA Formal Op. 126 (“Representing the Adult Client with Diminished Capacity”) (2015).

adequate communication to give an informed consent under Rule 1.8(f)(1) when the court has appointed counsel in response to the client's application for appointment of counsel and in other situations in which a statute or court order authorizes the representation. *See, e.g.*, C.R.S. § 21-1-103 (representation by public defender); C.R.S. § 19-2-706 (appointment of counsel in juvenile delinquency proceedings); C.R.S. § 19-2-508(2.5) (public defender representation of juveniles in detention hearings); C.R.S. 19-1-111 (appointment of guardian *ad litem*); C.R.S. 14-10-116 (appointment of Child's Legal Representative); Colorado Supreme Court Chief Justice Directive 04-06(2004) ("Court Appointments Through the Office of the Child's Representative") (Chief Justice Directive 04-06); Colorado Supreme Court Chief Justice Directive 04-04 ("Appointment of State-Funded Counsel in Criminal Cases and for Contempt of Court") (2004).

Rule 1.5(b) provides, however, that when the lawyer has not regularly represented the client, the basis or rate of the fee and expenses must be communicated to the client in writing before or within a reasonable time after commencing the representation. This Committee has opined that under Rule 1.5(b), court-appointed lawyers must assure that there is a written communication to each new client for whom the attorney has been appointed to provide representation without cost to the client. *See* CBA Formal Op. 114 ("Responsibilities of Respondent Parents' Attorneys in Dependency and Neglect Proceedings") ("There is nothing in the rule or its comments that excludes from this requirement either a pro bono fee agreement or payment by the state or other third party on behalf of the client.") (2006). Because this writing will be required in most cases in which a third party is paying for the client's legal representation, it is a logical place also to disclose any other information of which the client should be aware with respect to the third-party payer arrangement.

The client's expression of consent to the third-party payment arrangement will usually require an affirmative response. In general, a lawyer should not assume consent from the client's silence or tacit acquiescence. Colo. RPC 1.0, cmt. [7]. CBA Formal Opinion 114 recognizes, however, that in the case of a client with an appointed attorney paid by the state, "the circumstances of the unique court-appointed, third-party-paid representation generally assure the client's implicit agreement." Such consent would also be implied where the court on its own motion appoints counsel and the client does not affirmatively reject such counsel, or where representation is otherwise directed by statute or court order.<sup>3</sup> In addition, contractual indemnification provisions that give the indemnitor the right to select counsel and control the representation may constitute the required agreement of the client as an indemnitee.

The Rules do not require that the client provide written consent to the third-party payment arrangement, but written consent is the better practice in most circumstances. *See* Am. Bar Ass'n (ABA) Comm. on Ethics and Prof. Resp. Formal Op 02-428, "Drafting Will on Recommendation of Potential Beneficiary Who Also is Client" (2002), at n.6. If the third-party payment arrangement is in effect at the outset of the engagement, information advising the client of its ramifications, together with the client's expression of consent to the arrangement, can readily be included in a written fee agreement.

If the third-party payment arrangement presents a concurrent conflict of interest as defined by Rule 1.7(a), the lawyer must take additional steps. As explained in comment [13] to Rule 1.7:

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<sup>3</sup> In the case of appointed counsel in criminal or juvenile delinquency cases, the fact that the client refuses to consent to representation by appointed counsel may result in the client forgoing the right to appointed counsel or, in some narrow circumstances, in counsel being appointed without the client's consent.

If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of [Rule 1.7(b)] before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

As the comment indicates, a concurrent conflict of interest may readily develop when the third-party payer is also a client of the lawyer involved in the same matter. For example, a concurrent conflict of interest may arise when a corporation retains its lawyer to represent one of its employees in litigation in which the corporation is also a party and the lawyer's co-client. Under these circumstances, the lawyer must analyze the situation and determine whether the payment, coupled with the lawyer's professional duties to the co-client paying the bill, present a significant risk that the lawyer's representation of the client may be materially limited. Colo. RPC 1.7(a)(2); Colo. RPC 1.8(f), cmt. [12]. So too, the lawyer must analyze whether the lawyer's responsibilities to the client benefiting from the payment arrangement will impact the lawyer's ability to discharge duties owed to the co-client/payer. The lawyer must determine whether both co-clients can waive all resulting conflicts and also must comply with the requirements of Rule 1.7(b), including written confirmation of client consent. Colo. RPC 1.7(b)(4).

If the conflict is consentable under Rule 1.7(b), if the clients have received adequate information about the material risks of the dual representation, and if the informed consent of both clients is confirmed in writing, then the lawyer may represent both clients and accept payment for the representation from one of them. Colo. RPC 1.7(b); Colo. RPC 1.8(f), cmt. [12].

Even with such informed consent, however, the lawyer should consider carefully whether the dual representation is advisable given the potential for later and non-waivable conflicts of interest.

## **B. Avoiding Interference with Lawyer's Professional Judgment and Independence**

Under Colo. RPC 1.8(f)(2), the second requirement for accepting third-party compensation is that there be no interference with the lawyer's independent professional judgment or with the client-lawyer relationship. Regardless of who is paying the fees, the lawyer's professional duties are owed to the client. Rule 5.4(c) directly addresses the lawyer's duty to maintain independent professional judgment: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." If the lawyer or the client believes that the lawyer's representation has been or will be impaired by the third-party payment arrangement, the lawyer must decline or withdraw from the representation. Colo. RPC 5.4(c), cmt. [1]; *see also* Colo. RPC 1.8, cmt. [11].

### **1. Client's Right to Make Decisions About Representation**

Rule 1.8(f)(2) reinforces the need to maintain the primacy of the client-lawyer relationship, as stated in Rule 1.2(a): "a lawyer shall abide by a client's decisions concerning the objectives of representation" and "shall consult with the client as to the means by which they are to be pursued." Examples of decisions to be made by the client include whether to settle a civil case, whether to enter a plea in a criminal case, whether to waive a jury trial, and whether the client should testify. *Id.*



A third-party payer is not entitled to make these kinds of decisions about the representation or even to have the payer's desires considered by the client and the lawyer. For example, parents paying for the representation of a son or daughter in a divorce proceeding may believe that they are entitled to make decisions about legal strategy, including whether parenting time includes them as grandparents. However, under Rules 1.2(a), 1.8(f)(2), and 5.4(c), the lawyer's duty is to consult with and honor the decision of the client—not the client's parents—as to parenting time.

Chief Justice Directive 04-06 defines a unique client relationship applicable to guardians *ad litem* and to a child's legal representatives. For a lawyer serving in one of those roles, the lawyer's client is the "best interests of the child." *Id.*, § V(B); *accord*, *L.A.N. v. L.M.B.*, 292 P.3d 942, 949 (Colo. 2013); C.R.S. § 19-2-203(3). While the lawyer cannot actually consult with "the best interests of the child" in making decisions about the representation, the lawyer's duty of loyalty nevertheless runs to those best interests and not to the parents or the governmental entity providing the funding. In this situation, Colo. RPC 1.2(a) authorizes the lawyer to take such action on behalf of the child as Chief Justice Directive 04-06 impliedly authorizes to carry out the representation.

The third-party payer may designate the matter or type of matter for which its funds will or will not be used.<sup>4</sup> The third-party payer also may limit the amount of funds given to the

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<sup>4</sup> For example, the legislation that funds the Legal Services Corporation, which provides significant funding for Colorado Legal Services, limits the types of matters for which funds may be used and limits the means that lawyers may use to pursue those matters. For a discussion of lawyers' ethical obligations and the disclosures that may need to be made to clients in those circumstances, *see* ABA Formal Opinion 96-399, "Ethical Obligations of Lawyers Whose Employers Receive Funds from the Legal Services Corporation to their Existing and Future Clients when Such Funding Is Reduced and when Remaining Funding Is Subject to Restrictive Conditions" (1996).

lawyer for a particular representation, but it may not control the legal decisions made in that representation. Similarly, a third-party payer may designate its payment or a portion thereof for a particular aspect of the representation, such as payment for a deposition or an expert's fees, but it may not direct that aspect of the representation in any way.

Because the third-party payer may not interfere with the client-lawyer relationship, the payer ordinarily may not fire the lawyer unilaterally.<sup>5</sup> However, the lawyer may limit the scope of the representation in accordance with what the third party is willing to fund if the limitation is reasonable under the circumstances and the client gives informed consent. Colo. RPC 1.2(c).

## **2. Client Communication**

Even when a third party is paying the lawyer's fees, the lawyer must communicate with the client as required by Rule 1.4. The lawyer must, among other things, keep the client reasonably informed about the status of the matter, promptly comply with reasonable requests for information, and explain matters to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Rule 1.4(a)(1) requires the lawyer to inform the client of any decision or circumstance with respect to which the client's informed consent is required. The lawyer owes these obligations to the client, not to the third-party payer.

### **C. Protecting Confidential Information**

The third requirement imposed by Colo. RPC 1.8(f) is that information relating to representation must be protected as required by Rule 1.6 (Confidentiality of Information). Under Rule 1.6, a lawyer generally may not reveal information related to the representation – regardless

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<sup>5</sup> Notably, oversight agencies such as the Colorado Office of the Child's Representative can remove a guardian *ad litem* or child's legal representative from an existing appointment under extenuating circumstances pursuant to Chief Justice Directive 04-06, § VII (B).

of whether the information is confidential – unless the client gives informed consent as defined by Rule 1.0(e). This prohibition includes revealing information to third-party payers. The requirement of the client’s informed consent to the release of information to the third-party payer is separate from the client’s informed consent to the third-party arrangement itself. Rest. § 134, cmt. e.

During the course of the representation, questions may arise as to whether the lawyer may provide information requested by the third-party payer and protected from disclosure by Rule 1.6. Providing such information requires the client’s informed consent and the Rules make no distinction between detrimental and non-detrimental information. The requirement that the client give informed consent before the lawyer gives information about the representation to the third-party payer suggests the need for thorough communication between the lawyer and the client, explaining why particular information or kinds of information should or should not be disclosed to the payer, the purpose and objectives to be achieved by giving the information, the attendant risks, and alternatives to disclosure. Colo. RPC 1.0(e). Under these circumstances, the lawyer should be wary about presuming consent.

The obligation to preserve confidentiality means that timesheets, billing statements, and other such documentation containing information about the representation – other than the bare totals of accrued fees and incurred expenses that are to be paid under the payment arrangement – may not be shared with the third-party payer unless the client has given informed consent to the sharing of such information or as otherwise permitted by Rule 1.6.<sup>6</sup> Certain payers, such as

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<sup>6</sup> For instance, Colo. RPC 1.6(b)(7) permits disclosure that the lawyer reasonably believes necessary to comply with law. Laws that provide public funding of legal service programs may require that governmental auditors be given access to lawyer timesheets and other records of legal representation.

parents paying for the representation of an adult son or daughter charged in a criminal matter, may naturally be curious about what the payment is buying and what progress is being made, but the lawyer may not provide information to the parents as the case progresses absent compliance with Rule 1.6 . *See* Colo. RPC 1.6(a); Colo. RPC 1.8(f)(3).

Among the risks that should be explained to the client in seeking the client’s informed consent to share information with the third-party payer is the impact on attorney-client privilege. Depending on the circumstances, including the third-party payer in discussions with the client, sending copies of client-lawyer communications to the third-party payer, or otherwise providing privileged information to the third-party payer may waive the privilege. *See, e.g., Wesp v. Everson*, 33 P.3d 191, 197 & n.9 (Colo. 2001); M. Berger, “The Ethical Preparation of Witnesses,” 42 *The Colorado Lawyer* 51 (May 2013); M. Berger, “Preservation of the Attorney-Client Privilege: Using Agents and Intermediaries to Obtain Legal Advice,” 30 *The Colorado Lawyer* 51 (May 2001). In addition, the lawyer may need to discuss with the client the risks that sharing information with the third-party payer may make the shared information discoverable, may result in the third-party payer being called as a witness, or may have other consequences adverse to the client’s interests.

## **II. Practical Considerations –Discussions with the Third-Party Payer**

In third-party payer situations, the lawyer should take precautions at the outset to prevent misunderstanding as to the rights and obligations of the client, the lawyer, and the third-party

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State agencies statutorily required to oversee the payment of lawyer services may require submission of detailed billing records to carry out their statutory responsibilities. Similarly, guardians *ad litem* may need to reveal information relating to the representation if necessary to ensure the child’s best interests. Chief Justice Directive 04-06, § V(B). Disclosure of records reasonably necessary to comply with such legal requirements would be consistent with Rule 1.6(b)(7).

payer. As noted above, the disclosures to the client about the risks and benefits of the third-party payment arrangement must be sufficient to obtain the client's informed consent. In addition to a candid discussion with the client about the conditions of – and risks inherent in – a third-party payment arrangement, the lawyer should consider having a candid discussion with the third-party payer so that the payer understands the limitations on the kind and scope of information that the lawyer will be able to provide to the payer as the representation progresses.<sup>7</sup>

The lawyer's discussion with the third-party payer should confirm that the lawyer owes no professional duty to the third party, that the lawyer will maintain confidentiality with the client, and that the lawyer must and will exercise independent professional judgment and give independent advice only to the client. This is so even if the third party would not agree with or appreciate the advice and service. Because periodic communications with the third-party payer during the progress of the matter may be limited, the lawyer is advised to directly communicate these limitations to the third party before the payment arrangement is implemented. The clearest way to confirm these expectations may be to include them in a fee agreement signed by both the client and the third-party payer.

To minimize later controversy, the lawyer should consider including the following topics in the explanatory discussions with the third-party payer and in documentation for the third-party payment arrangement:

1. *Clear and unequivocal identification of the client to whom the lawyer's professional duties are owed.* The lawyer should ask

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<sup>7</sup> The contours of the conversation with the third-party payer will vary with the particular circumstances. For example, although Rules 1.8(f) and 5.4(c) apply to publicly-funded legal organizations and governmental agencies that provide representation to individuals, a separate conversation with the third-party payer each time a new client is represented under these arrangements probably would not be necessary or appropriate.

the payer to acknowledge that the agreement to pay for the client's legal services does not establish a client-lawyer relationship between the lawyer and the payer. The lawyer should explain that the lawyer's undivided duty of loyalty is owed to the client and will not be limited by the third party's payment of legal fees.

For example, in the case of estate planning, all involved should understand that the client will be the testator even if another family member is paying the lawyer to prepare the will. The lawyer should tell the family member that the lawyer is not representing the family member, but instead owes a full professional responsibility to the testator. Thus the lawyer will be expressing the directions of the testator—not the family member—in the preparation of testamentary documents.

Additionally, the lawyer should consider explicitly discussing with the third-party payer that information received from the payer may be used in the representation in a way that may not further the payer's interests. In the example of a family member's payment for preparation of a will, any information received from that paying family member can be used in the representation of the testator, perhaps to the detriment of the paying family member.

2. *The limitations on the rights of the third-party payer.* The lawyer should make it clear to the third-party payer that all communications between the lawyer and the client will remain confidential and that the lawyer will have no obligation to inform the third-party payer about the representation, the status of any investigation undertaken in connection with the representation, or any information obtained during the course of the representation. The lawyer should explain that only limited information will be provided to the third-party payer in the billing statements that are provided to the payer and should outline the parameters for future communications among the client, the lawyer, and the payer during the course of the representation

The discussion with the payer also should explain that the payer may not influence the decisions to be made by the client and the lawyer in the course of the representation.<sup>8</sup>

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<sup>8</sup> Notwithstanding Colo. RPC 1.8(f) and 5.4(c), the client may, by agreement and with informed consent, provide the payer with rights not otherwise permissible in the absence of such agreement. An example would be a contractual indemnification arrangement in which the

3. *The third party's payment obligations and the consequences of non-payment.* Because these provisions directly impact both the client and the third-party payer, the third party's payment obligations should be discussed and agreed upon with the payer, preferably in writing, and also put in the fee agreement with the client. The agreements should specify that the third party has the primary payment obligation (if that is the case) and should state any limitations on the third-party's obligation to pay. The lawyer also should consider expressly addressing what happens if the third party fails to pay, including the potential termination of the representation. In these circumstances, the lawyer may consider having the client guaranty to pay the legal fees, or at least have the right to make payment if the third-party payer defaults, so that the client may maintain the representation if the third party stops paying the legal bills. The fee agreement may provide, consistent with Colo. RPC 1.16(a)(5) and under the caution of Colo. RPC 1.5, cmt. [5], that the lawyer may seek to withdraw from the representation upon nonpayment. The lawyer also should consider having the agreement or agreements address who will receive any advanced fees remaining on deposit at the conclusion of the engagement, who is responsible for payment of any fees or sanctions awarded against the client, and who is entitled to any fees or sanctions awarded to the client.

### ***Conclusion***

A lawyer may accept payment from a third party for all or part of the costs of a client's legal representation if the lawyer complies with the Rules of Professional Conduct, most particularly Rule 1.8(f), which specifically addresses third-party payment, and Rule 1.7, which concerns conflicts of interest more generally. Clear discussions with the client and the payer at the beginning of the representation can help ensure that all involved understand the arrangement. Documentation of the rights and obligations of the lawyer, the client, and the third-party payer in a fee agreement or other writing will serve to minimize later disputes.

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indemnitee gives the indemnitor the right to fully control the representation in exchange for the indemnitor's assumption of the indemnitee's liability.