

colorado bar association ethics committee calling subcommittee handbook 2006--2007

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Fine Print. This summary has been prepared by the Ethics Committee of the Colorado Bar Association to provide information on ethical issues of interest to the practicing bar. It is not intended to provide legal or ethical advice for a specific situation or to create an attorney-client relationship. This summary is issued for advisory purposes only. This summary is not in any way binding on

the Colorado Supreme Court or the Office of the Attorney Regulation Counsel.
This summary should not be interpreted to create a standard of care.

Summary Rules Summary

A handy and dandy summary (*and annotation*) of the Colorado Rules of Professional Conduct.

Part 1—Client-Lawyer Relationship

1.1 Competence: Don't be **incompetent**. Have the “knowledge, skill, thoroughness, and preparation reasonably necessary.”

1.2 Scope and Objectives: (a) We must abide by the client's **scope and objectives**. We must **consult** as to the means. (b) Our representation, including appointments, is not an **endorsement**. (c) We can **limit** representation after consulting. (*Federal Rules contra.—see C.R.C.P. 11(b) and 311(b)*) (d) Don't help clients **plan crimes or fraud**, but we may counsel them as to consequences. (e) Tell our clients about ethical limitations. (f) Don't **discriminate**.

1.3 Diligence: Be **diligent** and prompt. Don't neglect.

1.4 Communication: (a) Reasonably inform; “promptly comply with reasonable requests.” (b) Explain to the client “to the extent reasonably necessary.”

1.5 Fees: (a) Fees must be **reasonable**. Consider (1) the time and labor required, novelty and difficulty, and skill, and (2) if the client understands, the likelihood that the work will limit our other work, (3) the local customary fee, (4) the amount involved and the results (5) the time limitations, (6) the client relationship, (7) the lawyer's experience, reputation, and ability, and (8) if the fee is contingent or fixed. (b) We must send a **writing** to **new clients** about the fee. (c) Contingent fees are okay unless they aren't. (*Chapter 23.3*) (d) Except in a rule 1.17 law-practice sale, we can't **split** a fee with a non-firm attorney, unless the split is proportional, the client consents after disclosure, the total fee is reasonable, and it's in writing signed by all. (e) **Referral fees** are prohibited. (f) Fees must be **earned** and we must “confer a benefit” or perform a service. Unearned, advance fees are client property and must be in a trust account, or non-cash property held separately. (*Rule 1.15(a) COLTAF*). (g) **Nonrefundable** fees and retainers are prohibited. (*Sather case*) We can't restrict a client's right to terminate, and can't unreasonably restrict a refund.

1.6 Confidentiality: (a) We **shall not** reveal information **relating to representation**, unless the client **consents**, or the disclosure is implicit. (b) We **may**

disclose if the client is gonna commit a **crime**. (c) We **may** disclose to **protect ourselves**. (d) Don't let a **paralegal** disclose either.

1.7 Conflicts—General Rule: (a) We can't represent **adverse clients**, unless (1) we **reasonably** think it's okay, and (2) each **consulted client consents**. (b) We can't represent if representation is "materially limited" by other-client, third-party, or our own interests, unless (1) we **reasonably** think it's okay, and (2) each **consulted client consents**. We must disclose the implications of multiple representations. (c) There can be no client consent if a "disinterested lawyer would conclude" the client shouldn't consent.

1.8 Conflicts of Interest—Prohibited Transactions: (a) We can't have client **business partners** unless (1) it's fair, disclosed in writing, (2) the client can talk to another attorney, and (3) the client signs a consent. (b) We can't use client information to their disadvantage. (Rule 1.6 Confidentiality and 3.3 Candor) (c) We can't draft a non-related **client will** or gift agreement to our substantial benefit. (d) We can't negotiate **media rights** for ourselves during employment. (e) We can't give **up-front money** (*champerty*) except for some costs. (f) If we are **paid by a third party**, the client must consent, there can be no conflict, and we can't reveal confidences. (g) Settling one claim for **two clients** requires consent with much disclosure. (*Cf. Rule 1.7.*) (h) Don't **prospectively limit malpractice** unless the client has a new attorney. Don't **settle a claim** without written notice about consulting another attorney. (i) We can't represent clients against our **attorney relatives** without consultation and consent. (j) Don't take a **proprietary interest** in the lawsuit, except for a fee-lien or a contingency agreement.

1.9 Conflict of Interest—Former Client: (a) Don't represent a new client against an old client in a **substantially related** matter in which the parties are **materially adverse**, without old client consultation and consent. (b) Don't **switch firms** and then knowingly represent a **materially-adverse** new client if you acquired from the old-firm client **material 1.6 information**, unless you get old-firm client consent. (*See 1.10(b)*) (c) Don't use prior-client representation-related information against the client, unless it becomes public. Don't reveal any information about the prior-client except as Rules 1.6 or 3.3 would require.

1.10 Imputed Disqualification: General Rule: (a) If we can't represent, **our partner can't knowingly represent** either. This rule is **limited** to Rules 1.7, 1.8(c) (wills), 1.9, and 2.2. (b) If we **leave the firm, the firm may then represent** adverse clients unless the matter is (1) substantially related and (2) the firm has material 1.6 (*confidentiality*) or 1.9(c) (*former client*) information.

1.11 Successive Government and Private Employment: (*Revolving door*). (a) A government attorney who participated **personally and substantially**, can't go private and switch sides, without **government consent**. Our **new partners** can't continue to be adverse, (1) unless there's an **ethical wall** and **no fee** to us, (2) and there is **prompt notice** to the government. (b) If we have **confidential government information** from government employment about a person, we can't use it against them for our private client. Our **partners can't represent** that private client unless there's an ethical wall and no fee to us. (c) As **public attorneys** we can't (1) participate in a matter where we had **substantial, personal, private participation** unless nobody else can do it. (2) We can't **negotiate** for private work with a party or party attorney if we have **substantial, personal participation** in their case, unless we are a law clerk or fit under Rule 1.12. (*Former judge*)

1.12 Former Judge or Arbitrator: (a) If we are **personally and substantially the judge** we can't become the same-case attorney, without all-party, **disclosed consent**, and (b) can't ask parties for a **job**. **Law clerks** can if the judge knows. (c) The **judge's law partners** may also not **knowingly** represent unless (1) there's an **ethical wall and no fee** to the judge, and (2) prompt written **notice to the tribunal**. (d) A multi-member arbitration panel member representing the client, can later represent the client in unrelated matters.

1.13 Organization as Client: a) If we work for the company our **allegiance** is to the company, not the officers, shareholders, and etc. (b) If we catch an officer, shareholder, or etc. **substantially injuring** the organization, we shall proceed as **reasonably necessary** in the best interest of the organization. (detailed suggestions) (c) If the problem is not resolved, we may ultimately **quit**. (d) We shall **disclose** to adverse interests **who the client is**. (e) We may **represent an officer**, shareholder, etc. in other matters but see Rule 1.7.

1.14 Client under a Disability: (a) If our client's impairment affects our case we shall, **as far as is reasonably possible**, act as usual. (b) We may have **extra responsibilities**. We still need to gather information. (c) We may ask for a **guardian ad litem** or etc. only if we reasonably believe the client can't act in the client's own interest.

1.15 COLTAF Rule—Long title abbreviated: We shall hold clients' and 3rd parties' property separately. Funds must be held in Colorado unless we have consent. Records must be preserved 7 years. If we hold client funds claimed by the client or another, we will disburse them and if requested, do an accounting, or keep

them separate if there is a contest. Interest belongs to the client or third party unless it's in a COLTAF account. Every private attorney shall have a COLTAF account and a business account. Very detailed rule.

1.16 Declining or Terminating Representation: (a)(1) We must not represent a client, or continue to represent, if that **breaks a rule or the law**, or (2) if our health **materiality** affects the representation, or (3) if we are **fired**. (b) The **only** reasons we may request to withdraw from the court, or withdraw, is if (1) the client (A) insists on an **unwarranted defense** etc., or (B) the client's **breaking the law**, or (C) insists we break a rule or the law, (D) makes the employment **unreasonably difficult**, (E) deliberately won't **follow advice** in a non-court matter, (E) **doesn't pay**, (2) we can't work with **co-counsel**, (3) the **client knowingly, freely agrees** to termination, (4) or in a court case, for other **good faith** reasons the court would accept. (c) We can't withdraw if the judge says no. (d) **After termination** protect the client's interests, surrendering papers and refund unearned fees. The **attorney's lien** is okay.

1.17 Sale of Law Practice: We may sell our practice to **attorneys**, (a) if it's all to one firm, (b) the sale doesn't increase fees and good will isn't charged to clients. Under certain circumstances the purchaser may refuse new work. (c) Clients get **60 days notice**. The seller shall send by certified mail (1) **notice of the sale**, (2) the **buyer**, (3) terms of **fee** changes, (4) notice of the client's ability to **hire other counsel** or take the file, and (5) notice that no action implies agreement. If there's an **unwaivable conflict** the notice must say to get new counsel. (d) The notice may puff the buyer, including the **seller's opinion** about the buyer if she's made reasonable efforts to check up. (e) If certified mail won't work, the seller, or buyer if the seller is dead or disabled, will **reasonably give clients actual notice**. If there's no response in 60 days, the buyer may act for the client until client notice. (f) Sale of the **goodwill is okay**, and **non-compete** agreements are okay with limits. (g) The buyer must **promptly substitute** in court cases. (h) It's not a Rule 1.17 sale/purchase if attorneys are just quitting or being hired, or just the firm assets are sold. (i) This is an exception to **1.5(d) fee splitting**.

Part 2--Counselor

2.1 Advisor: We shall use **independent judgment** and be **candid**. We may express **moral**, etc. considerations. We should advise about **ADR**.

2.2 Intermediary: (a) We may be intermediaries if (1) we **consult and fully disclose in writing** to both sides, with **written consent**, and (2) reasonably believe it's fair and **resolvable**, the clients' can decide, there is little risk of prejudice, partiality, or conflict, and (3) we can be impartial, and the work won't interfere with other client work. (b) We must consult with both sides. (c) We gotta **withdraw when asked by either**, and **not later represent** either in the matter.

2.3 Evaluation for Use by Third Persons: (Opinion Letter) (a) We may do such an evaluation if (1) there's reasonably **no conflict with the client relationship**, and (2) the client is **consulted and consents**. (b) Except for disclosure in the report, we must otherwise protect **confidentiality**. (*Rule 1.6.*)

Part 3--Advocate

3.1 Meritorious Claims and Contentions: We shall not bring or defend, assert or controvert, **proceedings or issues** without a **non-frivolous basis**, unless we have a good faith argument for extension, modification, or reversal. In a **criminal or incarceration** case, we may defend to make the elements be proven.

3.2 Expediting Litigation: But only consistently with our **client's interests**.

3.3 Candor Toward the Tribunal: (a) We shall not **knowingly to a tribunal**, (1) falsely state material facts or law, (2) assist our client's fraud or crime by not disclosing a material fact, (3) fail to **disclose directly adverse, local legal authority**, (4) offer false evidence or **fail to reasonably remediate**, (b) and these duties continue to **proceeding's conclusion** regardless of **Rule 1.6. (Confidentiality)** (c) We may refuse to offer evidence we **reasonably believe** is false. (d) In an *ex parte* **hearing**, we shall disclose all material facts to the court.

3.4 Fairness to Opposing Party and Counsel: We shall not (a) **unlawfully obstruct** a party's access to evidence or **alter, conceal, or destroy** evidence, (b) falsify evidence, **counsel or assist** witness perjury, or bribe a witness.

3.5 Impartiality and Decorum of the Tribunal: We shall not (a)(b) **illegally** seek to **influence** or **communicate ex parte** with judges, jurors, prospective jurors, or officials, nor (c) **disrupt a tribunal**.

3.6 Trial Publicity: (a) We and our **associates** can't talk outside of court to the **media** if we know or **reasonably should know** that talking will **very likely materially prejudice** an adjudicative proceeding. (b) There are many specific exceptions. (not listed) (c) We may reasonably speak to protect our client against publicity we didn't cause, but no more than that.

3.7 Lawyer as Witness: (a) We can't be trial **advocates** if we are a likely, necessary **witness**, unless (1) the testimony is **uncontested**, (2) is about **billing**, or (3) is necessary to avoid disqualification that is a **substantial hardship** to the client. (b) Our **firm** attorneys can't advocate either, unless there's Rule 1.7 (*current client loyalty*) or 1.9 (*former client loyalty*) compliance.

3.8 Special Responsibilities of a Prosecutor: Prosecutors shall (a) require **probable cause** and (b) reasonably assure the defendant's been advised of

procedures for and has had time to **obtain counsel**. (c) A prosecutor may negotiate with a *pro se*-by-court-approval defendant and **lawfully question a defendant** who has waived counsel and silence, but a prosecutor shall not otherwise obtain waiver of **important pretrial rights** from a *pro se* defendant. (d) The prosecutor shall timely disclose offense-**adverse or mitigating**, and sentence-**mitigating** evidence unless there's a protective order and (e) require employees to follow Rule 3.6. (*trial publicity*) (f) The prosecutor shall not **subpoena an attorney** to disclose confidential client information in a grand jury or criminal proceeding unless (1) with reasonable belief, (i) the information is not privileged, (ii) is essential to prosecution or investigation, **and** (iii) there's no feasible alternative. (2) (*deleted-1997*)

3.9 Advocate in Nonadjudicative Proceedings: In legislative or administrative tribunals we must **disclose** our role as advocate. We must have candor toward the tribunal (3.3(a)-(c)), treat parties fairly (3.4(a)-(c)), and not disrupt the tribunal (3.5).

Part 4--Transactions With Persons Other Than Clients

4.1 Truthfulness in Statements to Others: When representing clients (a) we shan't knowingly **lie to or mislead** a third party about facts or law. (b) We must **disclose material facts to third persons** so as to not assist our **client's crime or fraud**, unless the facts are confidential under **Rule 1.6**. (*c.f. Rule 3.3. which does not except out Rule 1.6 confidentiality for candor to the court.*)

4.2 Communication with Person Represented by Counsel: Without consent or legal authority, and during representation, **we can't talk to other-side clients** if they are attorney-represented in the matter. (*Opinion 69— The other side's employees*)

4.3 Dealing with Unrepresented Persons: In dealing on behalf of a client, we must tell *pro se* persons about our client, we can't imply we are disinterested, we must reasonably correct the person's misunderstanding of our role, and we may not give them legal advice except "get an attorney."

4.4 Respect for Rights of Third Persons: In representation, we may not act merely to **embarrass, delay, burden, or violate** the legal rights of third persons, without **substantial purpose**.

4.5 Threatening Prosecution: (a) In **civil matters**, we can't **threaten or present** criminal, administrative, or disciplinary charges **solely** to gain an advantage. (b) It's

okay to tell the other side that their behavior violates rules or statutes. (*safe harbor added 1997*)

Part 5—Law Firms and Associations

5.1 Responsibilities of a Partner of Supervisory Lawyer: (a) **Partners** and (b) **direct supervisors** must reasonably ensure ethical conformance in the firm. (c) The lawyer is responsible if he or she **orders or knowingly ratifies** the unethical conduct or is a partner or supervisor and **doesn't mitigate**.

5.2 Responsibilities of a Subordinate Lawyer: (a) The subordinate is bound by the rules anyway. (*No "just following orders" defense.*) (b) but it's okay if he or she relies on a supervisor's **reasonable resolution** of an **arguable question**.

5.3 Responsibilities Regarding Nonlawyer Assistants: (a) A partner or (b) a supervisor shall reasonably ensure employees conform to ethical obligations. (c) The lawyer is responsible if he or she **orders or knowingly ratifies** the unethical conduct or is a partner or supervisor and **doesn't mitigate**.

5.4 Professional Independence of a Lawyer: (a) We can't **split fees with non-lawyers** except (1)(2)(3) to a partner or associate or attorney-seller's estate or (4) toward **employees' retirement**. (b) We can't **practice law with non-attorneys**. (c) **Referring persons** can't direct our work. (d) **Professional corporations** must comply with Rule 265.

5.5 Unauthorized Practice of Law: (a) We can't practice law in a jurisdiction, without a license in that jurisdiction or (b) aid or abet someone who does.

5.6 Restrictions on Right to Practice: (a) We can't restrict an **attorney's right to practice** or allow someone to restrict ourselves, or (b) **settle a case** that restricts our practice.

Part 6—Voluntary Pro Bono Public Service

6.1 Voluntary Pro Bono Practice: We should do **50 hours pro bono** annually, (a) doing a **substantial majority without a fee**, for poor folks and charities, and (b) the rest at low or no fee for organizations that need help or poor folks, or by

participating in pro-law activities. We also should **send money to legal services**. If our jobs won't allow free legal work, then we should do the services or pro-law activities.

6.2 Accepting Appointments: Don't try to duck **court appointments** unless (a) it would **break the Rules**, or (b) be **oppressive**, or (c) is **repugnant**.

6.3 Membership in Legal Services Organization: A lawyer may serve in a legal services organization even if it serves people's interests that are **adverse to clients**. But the lawyer can't participate in decisions or actions if (a) it breaks **Rule 1.7** or (b) it would materially cause the **staff attorney** to break Rule 1.7.

6.4 Law Reform Activities Affecting Client Interests: We may serve in a reform organization despite **negative client effects**. If there are **positive client effects**, we have to **disclose** to the organization but don't have to identify the client.

Part 7—Information About Legal Services

7.1 Communications Concerning a Lawyer's Services: (a) We may not make **false or misleading** statements about ourselves or our services. (1) No **material misrepresentation** of fact or law. No **leaving out important stuff**. (2) Don't create an **unjustifiable expectation**. Don't **imply we break the Rules** or the law. (3) Don't **compare ourselves to other attorneys**, unless we can prove it. (b) We can't pay anything for **another non-firm attorney's advertising** unless we disclose our relationship. (c) Don't send **registered mail** to new clients. (d) Don't tout **contingent fees** without mentioning costs. It's okay to just say contingent fees are available, or that the first meeting is free. (e) We may not knowingly get **someone else** to break this rule. (*See Rule 8.4(a)*) (f) We may sometimes tout the **attorney buying our practice**. (*Rule 1.17*)

7.2 Advertising: We may **advertise in any media** to prospective clients, consumers, or the public at large. (b) We must keep copies and use-records for **four years**. (c) We **can't pay others** to recommend us except for the (1) reasonable costs of advertisements, (2) the usual non-profit referral services, and (3) buying a law practice (Rule 1.17). (d) The ad must contain a **responsible attorney's name**. (e) We must comply with Rule 7.1 (False Communications) and 7.4. (Field of Practice.)

7.3 Direct Contact with Prospective Clients: (a) We shall not in person or by phone **solicit new clients** with profit as our significant motive. (b) We shall not solicit if (1) they've told us not to, or (2) our solicitation involves coercion, duress or harassment. (c) We shall not solicit **new personal injury or wrongful death work** in the first **30 days** after the injury or death, nor (1) if we know or reasonably should know an attorney is representing, (2) and we must disclose if a different attorney or firm will handle the case, (3) the solicitation shall not look like legal pleadings or (4) disclose the legal problem on the outside of any mailing or brochure, and (5) copies shall be kept for 4 years. (d) Every solicitation shall clearly and conspicuously state **"This is an advertisement"** on the outside and at the beginning and end of the communication.

7.4 Communication of Field of Practice: (a) We may say we are **specialists** and that we do or don't practice in specific fields. (b)(c) We may say we are **Patent Attorneys** or **Admiralty** if it's true, (d) may appear on referral services in **specific areas** of practice, (e) may announce to attorneys or in **legal journals** that we are **specialists, consultants,** or will **associate** on cases. (f) If we say we are **certified** we must also say Colorado doesn't certify in specific areas. (g) We may allow the new **Rule 1.17 buyer** of our law practice to describe our credentials.

7.5 Firm Name and Letterhead: (a) In firm names, letterheads, or **lawyers' lists,** we may not violate or participate in violating Rule 7.1. (Communications) (b) We can't use **trade names** or **names that mislead** as to who the attorneys actually are. A **professional corporation** may include the letters "P.C." or other letters, and a real **legal clinic** may include the words "legal clinic." (c) A **multi-jurisdictional firm** may use the same name everywhere, but must disclose those not locally licensed. (d) We may continue to include **retired or deceased attorneys'** names, (e) but not attorneys in **public office,** during the period of the office.

Part 8—Maintaining the Integrity of the Profession

8.1 Bar Admission and Disciplinary Matters: If we apply to the bar or reapply for reinstatement, or make statements concerning an application, we can't (a) knowingly make a **false statement of material fact** (b) or fail to correct a **known misapprehension** or **fail to respond** to lawful admission or regulatory authority, except to protect Rule 1.6 (Confidentiality) information or to raise a good-faith objection.

8.2 Judicial and Legal Officials: (a) We shall not make **false statements** or statements with **reckless disregard** about its truth or falsity **about judges, adjudicatory officers, public legal officers, or candidates for judicial or legal-office appointment or retention** or make . (b) A lawyer who is a candidate for judicial retention shall comply with the judicial conduct rules.

8.3 Reporting Professional Misconduct: (a) If we have knowledge of a Rules violation that raises **substantial question** as to an attorney's **honesty, trustworthiness, or fitness to practice** we shall inform the **appropriate authority** or, (b) if we have knowledge of a Judicial Rules violation that raises a substantial question as to a **judge's fitness for office**, we shall notify the appropriate authority, (c) unless disclosure would violate **Rule 1.6 (Confidentiality)** or the information came from a **peer assistance program**. (*Including our Hotline.*)

8.4 Misconduct: We can't (a) get some one else to do what we can't do, (b) commit a crime that reflects adversely on our **honesty, trustworthiness, or fitness to practice**, (c) engage in conduct involving **dishonesty, fraud, deceit, or misrepresentation**, (d) prejudice **administration of justice**, (e), state or imply an ability to **improperly influence a judicial officer** or government agency, (f) **knowingly** assist a judicial officer to **break the Judicial Rules** or the law, (g) engage in conduct that violates **accepted standards of legal ethics**, or (h) engage in **any other conduct** that adversely reflects on the lawyer's fitness to practice law.

8.5 Jurisdiction: If we are licensed here, we are subject to discipline even if we are working in Tuscaloosa. Or Slippery Rock.

9.0 How Known and Cited. You didn't know there was a **Rule 9**, did you? Don't worry. It has no substance.

very summary ethics 2000 summary
probably indirectly stolen from Michael Berger at some point...

Preamble—Rejects ABA's **zealous** language.

Scope—Removes public attorney's special powers—allows **ethical violations** to sometimes be used as **evidence in civil cases**.

1.0 New terminology section—many changes—raises the issue of equating **reckless** behavior with **knowing** behavior.

1.1 Competence: Minor comment changes

- 1.2 **Scope and Objectives:** Recognizes expanded **implied authority**—retains **unbundling**—moves (e) to new 1.4(a)(5), moves (f) to 8.4.
- 1.3 **Diligence:** Deletes 2nd sentence as repetitive.
- 1.4 **Communication:** Adds five specific communications: **informed consent, objectives, status of matter, answer information requests, limitations of representation.**
- 1.5 **Fees:** Retains Colorado-specific parts; i.e., fee writing required and *Sather*. Material fee changes are (somehow) related to 1.8 (doing business with clients). Non-firm fee sharing is expanded.
- 1.6 **Confidentiality:** “Protected information” is defined as broader than confidential or privileged information. The exceptions to 1.6 are **expanded**. (Part A) We **may** (1) reveal reasonably **certain death or serious bodily harm**; crime or **not**, and (2) to the extent necessary, we **may** reveal information to **prevent** a crime or fraud reasonably certain to cause **substantially financial harm**, (client has used or is using our services), and (3) to prevent, mitigate, or **rectify** crime or fraud reasonably certain to cause substantial financial harm, when the client has used our services. (2 and 3 seem to have substantial overlap.) The exceptions to 1.6 are **limited** by striking out minor crimes. (There’s a new Comment saying that 1.6 disclosures are all **permissive**, but 1.2(d), 4.1(b), 8.1, and 8.3, and more strongly 3.3, may require disclosure anyway.) (Part B) We may reveal protected information to get a **second opinion** from another attorney on **ethics** or the **standard of care, before** or after a controversy with the client arises. (Part C) A new **Comment** states we may reveal protected information when we **change firms**, to perform a conflicts check. This generally includes the **identity** of the client and the **nature of the representation**. The new firm must consent to confidentiality. (Part D) We **may** reveal protected information not only when **court ordered** by a judicial officer, but also when **subpoenaed**.
- 1.7 **Conflicts—General Rule:** The language changes are only for **clarification**, but may somewhat expand the class of cases in which possible conflicts are waivable. 1.7’s **concurrent conflicts** language distinguishes **direct adversity** from **material limitation** conflicts. Some conflicts continue to be **non-consentable** but now **all** consents must be **confirmed in writing**.
- 1.8 **Conflicts of Interest—Prohibited Transactions:** The new rule is substantially similar, but (finally) **prohibits most sexual** relationships. The new rule **imputes** most 1.8 conflicts to associated attorneys, except sexual and business relationships, which the associated attorneys may not know about. **Related attorneys conflicts** moves from (i) to a 1.7 Comment. Rule

- 1.8 Comments are helpfully expanded. We would now be able to advance appropriate costs in contingency fee cases without qualifications.
- 1.9 **Conflict of Interest—Former Client:** The new rule is substantially the same but requires **informed consent** to be **confirmed in writing**. The Comments define substantially-related as a not-rigid concept, with relevant factors of the **character** of the proposed action and prior confidential information that might **substantially advance** the new client’s cause. Discusses ending representation of one client of a group, and changing firms.
- 1.10 **Imputed Disqualification: General Rule:** Creates an exception to 1.7 and 1.9-type vicarious conflicts, that an attorney’s 1.7(a)(2) **personal interest conflict** is not imputed. (See similar 1.8 change.). On the volatile **ethical wall/unilateral screening** (without prior-client consent) issue, the new rule would for the **first time** allow **some unilateral screening** of the firm-moved attorney even if that attorney had acquired material 1.6 information (see Rule 1.9) but did not previously, **substantially participate** with the old-firm client, but further requires **written disclosure** to (not consent from) the old-firm client and his attorneys, and the screen has **gotta be real**. No screening is possible if the moving attorney **substantially participated**.
- 1.11 **Successive Government and Private Employment:** The proposed rule continues **liberal unilateral screening** of an attorney moved from public to private. 1.9(a) and (b) don’t apply but (c) does. Colorado would add 1.10 (see above) **disclosure** and **real-screening** to the Model Rule. The Comments make clear 1.10 situations don’t apply to 1.11 situations.
- 1.12 **Former Judge or Arbitrator:** The rule would now include protection of **third party neutrals**. Colorado would add 1.10 (see above) **disclosure** and **real-screening** to the Model Rule.
- 1.13 **Organization as Client:** The rule continues **up-the-ladder reporting** of proposed or on-going, **substantial-injury**, **law violations**, unless we reasonably believe it’s not in the organization’s **best interest**. The new rule would require **noisy withdrawals** and **noisy firings**. If the organizational head won’t abate the problem, withdrawal is still mandatory but noisy withdrawal is **permissive** if the **organization** (not third parties) will be substantially injured. The Comments say a governmental attorney’s client may be the whole government, or may only be a part. (This rule and final-draft Sarbanes-Oxley are consistent in not requiring mandatory whistleblowing.) 1.13 does not supplant or trump 3.3 or 4.1.
- 1.14 **Client under a Disability:** The rule is substantially the same though more detailed. It continues 1.6 protection of **protected information**, with **implicit authorization** to release information to protect **client interests**. The Comments “capture the essence” of current (b).

- 1.15 **COLTAF Rule** We will keep our rule but an addition to the Comments addresses third-party claims. The new rule will incorporate legal changes and be rewritten for clarity.
- 1.16 **Declining or Terminating Representation:** The new rule will adopt the Model rule, disposing of the prior Colorado rule's specific (and helpful) list of reasons for permissive withdrawal. New language is "withdrawal can be accomplished without material adverse affect on the interests of the client."
- 1.17 **Sale of Law Practice:** The rule will allow sale of an "area of law practice" of the law firm, rather than only the whole practice. The Colorado rule would reject requiring the buying attorney getting a court order to obtain a non-notified client file.
- 1.18 **Brand new rule** that prospective clients get Rule 1.6 protection except as excepted in Rule 1.9 and may allow screening to prevent prospective clients from intentionally disqualifying their firm.

- 2.1 **Advisor:** The rule continues the language that attorneys "should" advise as to ADR.
- 2.2 **Intermediary:** The Intermediaries rule is confusing and is rescinded. See 1.7 and the new 2.4
- 2.3 **Evaluation for Use by Third Persons:** The rule is substantially similar. The Comments limit when the attorney must get informed consent to reveal confidences to when the evaluation is likely to materially and adversely affect the client.
- 2.4 This **new rule** on third-party neutrals requires disclosure of non-representation. The Comments suggest sometimes explaining privilege. The Rules Committee recommends changing C.R.C.P. 265 to allow attorneys in law firms to practice the non-law roles of arbitrator, mediator, and expert witness.

- 3.1 **Meritorious Claims and Contentions:** The rule makes explicit that a lawyer's position must have both a **legal and factual basis**. The Comments say rule 3.1 is **subordinate to federal or state constitutional law** that allows assistance of counsel that might be inconsistent with the limits of the rule.
- 3.2 **Expediting Litigation:** The rule allows an attorney to seek a **postponement for personal reasons**.
- 3.3 **Candor Toward the Tribunal:** The rule **rejects** a change from **material** false statements of fact and law to **any** misstatement of fact and law. This rule's final form, like the new 1.0(k), may hinge on whether **reckless behavior** equates with knowledge. The Comments are expanded and useful.

- 3.4 **Fairness to Opposing Party and Counsel:** The rule **rejects** Model Rule 3.4(f)(1) that would have permitted **defense counsel** to request the **client’s relatives, employees and agents** to not give relevant information to other parties, as it does not comply with other Colorado rules. The Comments would permit attorneys to **reimburse non-contingent lay witness** expenses, including **trial preparation and testifying time**, as permitted by law.
- 3.5 **Impartiality and Decorum of the Tribunal:** The rule narrows prohibition of **ex parte communications** to “**during the proceeding.**” It also allows certain communications by court order and expands certain “**disrupting a tribunal**” behavior to **depositions**. We may not **communicate post-trial with jurors** if our communication is intended to or is reasonably likely to **demean, embarrass, or criticize a juror or his verdict.**
- 3.6 **Trial Publicity:** The rule now says that the likelihood that a statement will be disseminated by means of public communication is to be judged as a **reasonable lawyer**, not as a reasonable person.
- 3.7 **Lawyer as Witness:** The rule reverses the **presumption** related to **imputation of lawyer-witness conflicts**, though the change will not be especially significant.
- 3.8 **Special Responsibilities of a Prosecutor:** The rule is substantially similar.
- 3.9 **Advocate in Nonadjudicative Proceedings:** The rule is substantially similar, but deletes the requirement to disclose adverse, controlling authority, which doesn’t make sense here.
- 4.1 **Truthfulness in Statements to Others:** The rule changes prohibiting false or misleading statements to prohibiting **materially** false or misleading statements, and makes parallelism changes to the Comments.
- 4.2 **Communication with Person Represented by Counsel:** The rule is substantially similar, with useful expanded Comments, including one that reflects **Opinion 69.** (former employees).
- 4.3 **Dealing with Unrepresented Persons:** The rule will now permit **giving legal advice to an involved pro se person** if he or she is not **adverse**. The Comments retain unbundling language.
- 4.4 **Respect for Rights of Third Persons:** New 4.4(b) requires the attorney receiving a miss-sent document (e.g. email) to give prompt notice. Our rule further adopts as 4.4(c) **Opinion 108’s** requirement that **unexamined documents continue to be unexamined.** The Comments contain parallel language, and new **safe-harbor** language if the attorney returns the document.
- 4.5 **Threatening Prosecution:** This **Colorado–unique** rule remains, with one stylistic change.

- 5.1 **Responsibilities of a Partner of Supervisory Lawyer:** The supervisory attorney is expanded from **partner** to include “a lawyer who individually or together with other lawyers possesses **comparable managerial authority** in a law firm.” The Comments clarify policies.
- 5.2 **Responsibilities of a Subordinate Lawyer:** No changes.
- 5.3 **Responsibilities Regarding Nonlawyer Assistants:** The supervisory attorney is expanded from **partner** to include “a lawyer who individually or together with other lawyers possesses **comparable managerial authority** in a law firm.” The Comments now say a lawyer **must** (not should) give appropriate instruction and supervision.
- 5.4 **Professional Independence of a Lawyer:** The rule adds a new exception allowing sharing of **court-awarded legal fees** with a **non-profit**.
- 5.5 **Unauthorized Practice of Law:** The rule addresses **multi-jurisdictional practice**. The rule incorporates the exceptions in our current rules 220, 221, 221.1, and 222, and federal or tribal law, resulting in no Colorado change. The rule adds significant restrictions on the employment of **disbarred/suspended lawyers**.
- 5.6 **Restrictions on Right to Practice:** The rule and Comments add exception language referring to 1.17 sale of a law practice.
- 5.7 The long-debated, substantially-burdensome 5.7 is added as a **new rule: Responsibilities Regarding Law-Related Services**. In short, ethics rule apply to practice in law-related services. “Reasonably **performed in conjunction with...**” “**In substance are related to...**”
- 6.1 **Voluntary Pro Bono Practice:** Stronger language; still **aspirational**.
- 6.2 **Accepting Appointments:** The rule continues Colorado’s language of “unreasonable financial or **otherwise oppressive burden**” as a reason to avoid appointment. The Colorado-specific Comments are gone, however.
- 6.3 **Membership in Legal Services Organization:** The rule is substantially similar.
- 6.4 **Law Reform Activities Affecting Client Interests:** The rule reverts to the ABA rule by taking out Colorado-specific “reasonably should know” language that has no good policy reason.
- 6.5 This new rule **Nonprofit and Court-Annexed Limited Legal Services Programs** encourages “**short-term, limited legal services**” such on a hotline or pro-se clinic.
- 7.1 **Communications Concerning a Lawyer’s Services:** The rule is unchanged (still very different from the ABA Model Rule) but removes language that

- prohibits any implication that we can achieve results by breaking the rules or law, as it duplicates 8.4. The prohibition of advertisements that resemble legal pleadings and documents is moved to a new location inside rule 7.1.
- 7.2 **Advertising:** The rule **deletes** the specific **public-media** list, finally includes **electronic communications**, takes out the **4-year** specific period we must keep advertisement copies, changes the definition of legal services plans and qualified referral services whom we may pay, and permits certain **non-exclusive, reciprocal referrals**.
- 7.3 **Direct Contact with Prospective Clients:** The rule retains **personal injury solicitation restrictions**, expands from personal injury solicitations to **all solicitations** the outside-envelope restrictions and **4-year retention**, and moves the “no legal-pleading-like solicitations” to Rule 7.1.
- 7.4 **Communication of Field of Practice:** The rule adds **specific certifying organizations**, but retains permitting Colorado-specific, Rule 7.1-compliant field of law **specialties**, with disclosure that **Colorado certifies no specialists**.
- 7.5 **Firm Name and Letterhead:** The rule **repeals the Colorado-specific prohibition of trade names**, so as to permit large firms to include dead lawyers, and relying on Rule 7.1 to dissuade “We-Always-Win Law Firm.”
- 7.6 The salutary new rule **Political Contributions to Obtain Legal Engagements or Appointments by Judges** prohibits the practice of “pay to play”, and may come in handy in a few years.
- 8.1 **Bar Admission and Disciplinary Matters:** A lawyer’s right to make a **good faith challenge** to an admission or disciplinary **demand for information**, is moved from the rule to the Comments.
- 8.2 **Judicial and Legal Officials:** The rule retains the Colorado-specific language about “**retention in judicial office**.”
- 8.3 **Reporting Professional Misconduct:** The rule rejects the ABA’s broadening of lawyers-assistance program **confidentiality**, by retaining 8.3(c) and especially its “**to the extent...**” language.
- 8.4 **Misconduct:** The rule moves language **prohibiting bias and prejudice** from 1.2(f) to 8.4(g), moves from 7.1 to 8.4(e) the prohibition against saying we can get results by **breaking the rules** or the law, and adds a small **safe harbor** to the Comments. The rule removes the 8.4(g) language about “violates accepted standards of legal ethics” for being either superfluous or vague. Taking from Colorado precedent, the rule changes Colorado-specific prohibition of behavior that “adversely reflects on the lawyer’s fitness to practice law” as being too broad, to “**engage in any conduct that intentional, directly, and**

wrongfully harms others and adversely reflects on the lawyer's fitness to practice law".

8.5 Jurisdiction: The rule adds that there won't be discipline if the lawyer's conduct is ethical in the jurisdiction "the lawyer reasonably believes the **predominant effect**" will occur. A **non-admitted lawyer** who doesn't follow rules 220 through 222 may be prosecuted.

9.0 How Known and Cited. You didn't know there was a **Rule 9**, did you? No changes. No substance.

formal opinions of the cba ethics committee in *the colorado lawyer*

Few attorneys have immediate access to the purple loose-leaf COLORADO ETHICS HANDBOOK volume published by Continuing Legal Education in Colorado, Inc. and the CBA Ethics Committee, but many can dig up back issues of the *Colorado Lawyer*. Below is a list of the places to find each opinion in the *Colorado Lawyer*, for the last ten years. The Committee's formal opinions, as well as published abstracts, are now available to all CBA members through the Ethics Portal page of the CBA's website at www.CoBar.org.

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79	June 1989, p. 1149: Use of Legal Assistants in Client Representation.
80	June 1989, p. 1151: Lawyer's Duty to Disclose Mistakes in Commercial Closing.
81	June 1989, p. 1156: Lawyer's Participation in Prepaid Legal Services Plans.
82	June 1989, p. 1160: Assertion of Attorney's Retaining Lien on Clients' Papers.
83	January 1990, p. 25: Lawyer Advertising , Solicitation and Publicity. (Part E. --Group Advertising).
84	April 1990, p. 629: Listing of Support Personnel Names on Letterhead and Business Cards.
85	August 1990, p. 1553: Release and Settlement of Legal Malpractice Claims . Addendum February 1999, p. 36
86	August 1990, p. 1556: Use of Subpoenas in Civil Proceedings .
87	September 1990, p. 1793, revised February 1992, p. 219: Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents.
88	July 1991, p. 1371: Use and Misuse of " Confidentiality Walls ." Revised, June 1992, p. 1150.
89	December 1991, p. 2493: Office Sharing -- Conflicts, Confidentiality, Letterheads and Names.
90	January 1993, p. 21: Preservation of Client Confidences in View of Modern Communications Technology. (Cordless Phones .)

- 91 March 1993, p.497: Ethical Duties of Attorney Selected by Insurer to Represent the Insured. (**Insurance Attorney.**)
- 92 August 1993, p. 1673, Practice Restrictions in **Settlement Agreements.**
- 93 Feb. 1994, p. 329, *Ex Parte* Contacts with **Government Officials.**
- 94 March 1994, p. 549, Ethical Duties Relating to a **Client's Property** Held by a Lawyer in Which a Third Party has an Interest.
- 95 March 1994, p. 553, Funds of **Missing Clients.**
- 96 October 1994, p. 2297, *Ex Parte* Communications with **Represented Persons** During Criminal and Civil Regulatory/Investigations and Proceedings.
- 97 September 1995, p. 2143, Ethical Considerations Where an Attorney or the Attorney's Partner Serves on the **Board of a Public Entity.**
- 98 April 1997, p. 21, **Dual Practice** (Ancillary Businesses.)
- 99 August 1997, p. 29, Use of **Credit Cards** to Pay for Legal Services.
- 100 September 1997, p. 47, Use of Conversion Clauses in **Contingent Fee Agreements.**
- 101 April 1998, p. 21, **Unbundled Legal Services.**
- 102 June 1998, p. 96, Use of **Subpoenas in Criminal Proceedings.**
- 103 February 1999, p. 33, Propriety of **Compensating Non-Expert Witnesses** in a Civil Action.
- 104 July, 1999, p. 53, **Surrender of Papers to the Client** Upon Termination of the Representation.
- 105 August, 1999, p. 31 **Temporary Lawyers**
- 106 October, 1999, p. 67 **Referral Fees and Networking Organizations**
- 107 Nov., 1999, p. 51 **Third-Party Auditors**
- 108 Sept. 2000, p. 205 **Inadvertent Disclosure of Privileged or Confidential Documents.**
- 109 August 2001, p. 63 **Acquiring an Ownership Interest in a Client.**

- 110 April 2002, p. 27 Assertion of **Attorney's Charging Lien** and Taking Security
Interest in Client Property to Protect Fees.
 May 2002, p. 130 Addendum.
- 111 April 2002, p. 29 **Communicating with Represented Person** for the Purpose of
 Providing a "Second Opinion"
- 112 Nov. 2003, p. 55 **Surreptitious Recording** of Conversation or Statements.
- 113 Jan. 2006, p. 13 Ethical Duty of Attorney to **Disclose Errors** to Client

abstracts of letter opinions of the cba ethics committee in *the colorado lawyer*

The Colorado Lawyer Citation Abstracts of Responses to Letter Inquiries.

The Colorado Lawyer, April 1995, pp. 755-6.

- First Inquiry: Rule 4.2 and **Corporate Officers Communications** with Other Corporations.
- Second Inquiry: **Referral Fees** from Out-of-State.
- Third Inquiry: Part-time **Municipal Attorneys** Defending Criminal Violations.
- Fourth Inquiry: Fee Agreements Requiring **Splitting Fees** with Non-Profit Organizations.

The Colorado Lawyer, September 1995, pp. 2145-6.

- First Inquiry: Duty to Provide **Competent Representation** Overrides Client's Instructions Not to Prepare.
- Second Inquiry: **Public Defender** Married to Police Officer. (The Hill Street Blues Opinion.)
- Third Inquiry: Attorney's Responsibility for the Actions of **Foreign-Country Partners**. (Rule 5.1)

The Colorado Lawyer, October 1995, pp. 2321-2.

- First Inquiry: Advertising ABA **Specialty** Certifications. (It's Okay.)
- Second Inquiry: **Providing Legal Research** to other Firms and Rule 1.5.
- Third Inquiry: Can a Worker's Compensation **Contingent Fee** be the
Higher? Maximum and the Fee in the Related Civil Suit be
(Yup.)

The Colorado Lawyer, July 1997, pp. 69-70.

- First Inquiry: **Clients'** Demand for Inactive **Files**. (Which files to be turned over not clear. Clients pay for copying in this *specific* situation.)
96/97-01
- Second Inquiry: **Marketing Service Newsletter**, fee paid by attorney. (Is really a for-profit referral service so not permitted.) 96/97-02
- Third Inquiry: Parent of Client Misappropriates Proceeds; **Duty to Tell Probate Court**. (Yes indeed.) 96/97-04
- Fourth Inquiry: Legal Representation of **Employer Corporation's Clients** on the Side. (NOT as part of her employment, obviously. Possible if done separately but be very cautious.)
96/97-05

The Colorado Lawyer, Oct. 1997, pp. 77-78.

- First Inquiry: Colo. R.P.C. 1.6 impliedly authorizes an attorney to disclose information in the best interest of a **disabled client**. R.P.C. 1.14(b) 96/97-07
- Second Inquiry: Counseling attorneys in approved lawyer assistance programs don't have the **obligation to report violations** of the R.P.C., except to the extent they would have to report a client. (For instance regarding future criminal behavior.) R.P.C. 8.3(c).
96/97-08
- Third Inquiry: An attorney may advise a client how to proceed *pro se* in a **traffic or small claims action**. R.P.C. 1.2(c). 96/97-09
- Fourth Inquiry. That mere fact that payment of the attorney's **fee is guaranteed by a third party** does not violate R.P.C. 1.8(f), if the client agrees after disclosure, the attorney remains independent,

and the attorney keeps confidentiality. R.P.C. 5.4(c), R.P.C. 1.7(b) 96/97-10

The Colorado Lawyer, Nov. 1997, pp. 51-52.

- First Inquiry: Attorney must disclose **work-product** to a client, even if the disclosure adversely affects another client. R.P.C. 1.4. 96/97-11
- Second Inquiry: Attorney representing collection agency may sign pleadings produced by the collection agency's non-attorney staff, if he reviews them. He may, however, be aiding the **unauthorized practice of law**. R.P.C. 5.4. 96/97-12
- Third Inquiry: An attorney may not be paid a **fee for referring a client** to an investment advisor. R.P.C. 1.5(e). 96/97-13
- Fourth Inquiry. Internal company policies do not overrule an **attorney's duty to report** other attorney's misbehavior. R.P.C. 8.3(a). 96/97-14

The Colorado Lawyer, Dec. 1997, pp. 13-14.

- First Inquiry: a. **Guardian ad Litem** filing a third-person's report with the court, with copies to all parties, is not an *ex parte* communication with the court. R.P.C. 3.5(b).
b. **Guardian ad Litem** must report to the Disciplinary Committee actual knowledge of another attorney's threat to file a grievance. R.P.C. 4.5 96/97-03
- Second Inquiry: Attorney may not participate in his company's attempt to **hide a business relationship** with an arbiter. R.P.C. 8.4. 96/97-06
- Third Inquiry: **Hourly payment to a temporary attorney** does not require R.P.C. 1.5(d) disclosure to the client because it is not contingent on collection of the fee. 96/97-15

The Colorado Lawyer, Jan. 1998, pp. 29-30.

- First Inquiry: **50% Contingency Fee** may be reasonable under appropriate circumstances. 96/97-16
- Second Inquiry: Attorney must carefully examine client's **pre-judgment sale** of a portion of **client's personal injury claim**. 96/97-17

Third Inquiry: Attorney may notify opposing counsel about **R.P.C. 4.2 forbidding contact with attorney's client** without necessarily violating R.P.C. 4.5 prohibition of threats of disciplinary charges. The attorney should not opine on whether opposing counsel has violated 4.2. Also see RPC 4.5(b) as now modified. **96/97-18**

The Colorado Lawyer, Nov. 1998, pp. 43-45.

First Inquiry: **Fee agreement** converting client's late cash payment to credit card charge raises several concerns. **97/98-01**

Second Inquiry: **Paralegal** may be paid a **percentage of hours billed**. **97/98-02**

Third Inquiry: Office-owning attorneys may not charge **office-sharing attorneys** a percentage of their gross receipts. **97/98-03**

Fourth Inquiry: An **association's attorney** may represent the association's members under certain circumstances. **97/98-04**

Fifth Inquiry: An **insurance-defense attorney** may help the court clerk report unsatisfied judgments to the DMV. **97/98-05**

The Colorado Lawyer, Sept. 1999, pp. 41-42.

First Inquiry: **Advancing funds to client through a trust bank account**. (Don't do that, it's commingling.) **98/99-01**

Second Inquiry: **Letter accompanying subpoena *duces tecum* to a non-party**. What must be disclosed. **98/99-02**

Third Inquiry: An attorney must not **report another attorney's bad acts** under R.P.C. 8.3 if reporting violates **client confidentiality**. **98/99-03**

Fourth Inquiry: **Client threatening suicide**. There is no exception to the duty of client confidentiality but R.P.C. 1.14(c) might apply. **98/99-04**

Fifth Inquiry: **Investigator surreptitiously tape-records a conversation**. Attorney should take possession of but not listen to or use the tape. **98/99-05**

The Colorado Lawyer, Nov. 2000, pp. 53-56.

- First Inquiry: Attorney may collect a reasonable fee from opposing parties, even though she is charging no fee to her client. *In re Marriage of Swink*, 807 P.2d 1245 (Colo. App. 1991) **98/99-06**
- Second Inquiry : If the contingent fee agreement doesn't say you can assert a charging lien when the client discharges you, then you can't. **98/99/07**
- Third Inquiry: If partner A is a municipal judge, associate B may prosecute in County Court. **98/99-08**
- Fourth Inquiry: Trust and estate attorneys' ancillary business of acting as a fiduciary for estates is probably not permissible because it is too closely related to the practice of law. **98/99-09**
- Fifth Inquiry: Attorneys may not provide anything of value to a for-profit organization in exchange for referrals. R.P.C. 7.2. (another scheme.) **98/99-10**
- Sixth Inquiry: An attorney purchasing a law practice may pay the prior owner future fees from existing clients. **98/99-11**

The Colorado Lawyer, Nov. 2002, pp. 39-42.

- First Inquiry: A "Legal Services Organization" may provide legal and non-legal services. See Opinion 106. But the managing attorney should not practice a separate, legal practice out of the same building. **99/00-01**
- Second Inquiry: A municipal **public defender's** policy is to meet very briefly with indigent clients. Even a brief meeting establishes a client/attorney relationship. The PD may limit the scope of representation. The PD should warn the client that the implicit immigration advice may not be adequate. **00/01-01**
- Third Inquiry: An attorney may not **pay staff a bonus** based on generation of income in a specific case. Other firm income-based fees are possible. **00/01-02**
- Fourth Inquiry: Attorney's **overhead expenses may be billed** as a percentage of billing, if it is previously agreed to by the client, but must be reasonable and should be specifically disclosed. **00/01-03**

- Fifth Inquiry: **Inside counsel** at times giving legal advice to his company's customer raises issues of unauthorized practice of law, conflicts of interest, and disclosure. 00/01-04
- Sixth Inquiry: If an attorney marries and **changes her name**, her firm may still use her former name in the firm name. 01/02-01
- Seventh Inquiry: Even with **very old, inactive client files**, there is no cutoff period ending the attorney's responsibility to preserve important documents. 01/02-02
- Eighth Inquiry: An attorney, part of a **for-profit advertising organization** advertising legal and non-legal services, violates Colo. R.P.C. 1.5(e), 7.2(c), 5.4 (a) & (b). Selling insurance from a law firm premises implicates the issues discussed in Opinion 98. **(Dual Practice)** 01/02-03

The Colorado Lawyer, April 2004, p. 35.

- First Inquiry: When a client denies employment for the purposes of a worker's compensation case and child support modification case, but counsel learns that **denial is false**, counsel must counsel the client to correct the false statement and of the attorney's discretion to disclose. If the client doesn't, counsel must take remedial measures and withdraw. 02/03-01
- Second Inquiry : An attorney may **not loan a client money** or guarantee a client loan, except to cover litigation expenses. 02/03-02

The Colorado Lawyer, December 2004, p. 19.

- First Inquiry: Insurance attorney can prepare a **probate settlement petition**. 05-01

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Colo. RPC 4.5: The Ethical Prohibition Against Threatening Prosecution, May 2006, p. 99, Musselman, E. and Bryan, C.

ethical homilies and phrases you should know

1. **Violation of a Rule should not of itself give rise to a cause of action** nor should it create any presumption that a legal duty has been breached. **Preamble to R.P.C., Scope**, 6th paragraph. *But see Olsen And Brown v. City of Englewood*, 889 P.2d 673 (Colo. 1995)(“we must be mindful of these rules”)
2. For-profit **lawyer referral services** are unethical. *People v. Carpenter*, 893 P. 2d 777 (Colo. 1995)(Misleading advertising too.) *People v. Zimmerman*, 938 P.2d 131, Colo. 1997; Opinion 83(e), January 1990, *The Colorado Lawyer*, p. 25.
3. Attorneys may be disciplined for behavior that does not **directly** implicate the practice of law. (But see comment to R.P.C. 8.4.)
 - a) **Serious illegal behavior**, see *People v. Brailsford*, 933 P.2d 592, (Colo. 1997)(Sexual assault).
 - b) **Less -serious illegal behavior**; Private Discipline B, Jan. 1997, *The Colorado Lawyer*, p. 103-4. (Shoplifting, failure to self-report, failure to respond).
 - c) **Rude behavior**. Private Discipline C, Nov. 1996, *The Colorado Lawyer*, p. 144, (In part, a loud, confrontational, and unprofessional telephone conversation with another attorney.).
 - d) Contemptuous failure to pay **child support**. *People v. Hanks*, 967 P.2d. 144 (Colo. 1998)(Suspension.); *People v. McDermott*, 05PDJ56 (10/12/05)(Suspension)
 - e) Attorney as **arbitrator**—Delay in ruling on arbitration; Diversion Matters, *The Colorado Lawyer*, October 2001, p. 189, or improper behavior; *People v. Ayd*, 01PDJ040, *The Colorado Lawyer*,, May 2002, p. 131, may trigger discipline.
 - f) The **actual nature of the conduct** is more important than the statutory label put on it. *Id.*, *Brailsford*, at 595.
4. The Interprofessional Rules may trigger discipline. Private Discipline C, April 1997, *The Colorado Lawyer*, p. 105. (**Lawyer failed to pay expert**.) See also Interprofessional Committee Hypothetical Case Report, *The Colorado Lawyer*, July 2004, p. 65.
5. A **non-refundable fee** is prohibited under R.P.C. 1.5(g). See Private Disciplines A and B, *The Colorado Lawyer*, June 1997, p. 202; Diversion Matters-Fraud, *The Colorado Lawyer*, October 2001, p. 189.
6. We can't sue the guy who **filed the grievance** against us. C.R.C.P 251.32(e). **Trying to prevent or have a grievance withdrawn** is a violation of the old C.R.C.P. 241.6. *People v. Moffitt*, 801 P.2d 1197 (Colo. 1990)
7. We can't **record conversations** with others without disclosure. Opinion 22, Jan. 26, 1962. See also Private Discipline E, April 1997, *The Colorado Lawyer*, p. 106; *People v. Selby*, 606 P.2d 45 (Colo. 1979); *People v. Wallin*, 621 P.2d 330 (Colo. 1981). *But see*

CBA Ethics Opinion 112, November 2003, *The Colorado Lawyer*, p. 55. (Criminal and private exceptions.)

8. We can't write our **friend's will** and include ourselves as beneficiaries. R.P.C. 1.8(c). This includes gifting. This is a little different from the current ABA model rule.
9. We may not present perjured testimony. R.P.C. 3.3 & 3.4(b). A significant Colorado Supreme Court case that places the **attorney's duty to the tribunal** above duty to the criminal client is *People v. Schultheis*, 638 P.2d 8 (Colo. 1981). (Defendant desires to call perjuring witnesses.) Note there is no constitutional right to testify falsely. *Nix v. Whiteside*, 474 U.S. 157, 106 S.Ct. 988, 89 L.Ed. 2d 123 (1966). *People v. Casey*, 948 P.2d 1014 (Colo. 1997)(Failure to reveal client's true identity.) See Nancy Cohen's article in *The Colorado Lawyer*, Oct. 2003, p. 53.
10. We can't have **someone else do** what we can't do. R.P.C. 8.4(a) and 5.3(c).
11. The seminal case for conflicts concerning **judges and their significant others** is *Smith v. Beckman*, 683 P.2d 1214 (Colo. App. 1984).
12. We may **sell the goodwill** in our law practices. R.P.C. 1.17. Amended again 2001.
13. In trial we may not **assert personal knowledge of facts in issue** or **state our personal opinion**. R.P.C. 3.4(e).
14. Prosecutors may **trade plea bargains for civil releases** on a case-by-case basis; *Town of Newton v. Rumery*, 480 US 386 (1987), but only under circumstances that are not coercive. Opinion 62. (Prosecutor's scrutiny is substantial.)
15. The old Code and Canon 9's "**appearance of impropriety**" is a decade gone. While *Food Brokers*, 680 P.2d 857, 859 (Colo. App. 1984) seems to say that for there to be an appearance of impropriety there must be evidence of an actual impropriety, one witty Colorado case says other jurisdictions find the appearance of impropriety persists in the penumbra of the preamble to the present Rules. *P. v. Witty*, 36 P.3d 69, 73 (Colo. App. 2000). *But see Cleary v. District Court*, 704 P.2d 866, 872 (Colo. 1985)(as to a government attorney)
16. We can't take money out of our COLTAF account till it's earned. Generally Colo. R.P.C. 1.15. We may keep a bit of our own money in the account for services charges. Colo. R.P.C. 1.15(7). But a **cushion is commingling**. See *People v. Goldberg*, 770 P.2d 408, 410 (Colo. 1989).

helpful committee phrases you should know

17. Ethically Transmitted Disease (E.T.A.)

Rule 1.10 Imputed Disqualification problems transmitted from firm to firm by unprotected hiring practices. (Phrase first attributed to Alec Rothrock--1998)

18. Motion for Less Specific Statement.

Movant objects that the letter requestor will perceive a technically accurate statement in a letter opinion in the wrong way, e.g., "...though it is possible in rare circumstances to represent both parties..." or "...while an intimate relationship with your client is not always *per se* unethical..." (Phrase first attributed to Stewart Kritzer—1998)

what's this about? calling subcommittee

This pamphlet is for new members of the calling subcommittee for orientation and old members for quick reference. It is based on the theory that our duties form a pattern, given a long enough time, so that what older members have advised callers in the past will be relevant to the calls that you get now. That's only a theory, of course...

The calls initiate at the Colorado Bar Association office. CBA Staff get about one thousand ethics calls a year, have a list of subcommittee members, and give the caller the numbers of two members in the venue of the caller. You will get calls frequently; perhaps as

“The average is about
one every ten days.”

often as once a week. The average is about one every ten days, though they seem to come in bunches.

The Bar Association tries to screen out non-attorneys but can't screen out all inappropriate calls. You will get calls that you probably won't want to answer. See "Abstentions" on the following pages.

Calls last from 10 to 20 minutes. If the caller calls when you are busy or out, try to get back to the caller quickly. Or call with the number of another person on

the list if you are just too absorbed in work.

For new, or old, subcommittee members, if you finish with the caller and want to check what you told them, call an older or other member. They'll be glad to talk to you. Prior Committee Chairpersons are especially fair game for this kind of checking.

We include a checklist for your use. Seeing as how you are not getting paid, don't make a big deal out of using the exact checklist or filling it out rigorously.

“While a lawsuit from a
call is unlikely”

While a lawsuit from a call is unlikely and would likely be frivolous, to protect yourself and the Committee, do make a record of **every** call, who called, and of disclaimers similar to those on the checklist. Every once in a while the chair of the subcommittee may ask you to use the checklist rigorously, and mail in copies, for a couple of months, for a statistics purpose. That's only happened once, but who knows...

The Ethics of the Ethics Hotline

On March 31, 2004, the Supreme Court Advisory Committee approved and referred to the Supreme Court a recommendation for the Ethics Committee to become a peer assistance program under CRCP 251.34(9.5), allowing us to possess the exception to reporting recognized

under Colo. RPC 8.3(c). The Ethics Committee must reapply biannually or we lose that status.

Similarly to the sentiment in the Preamble of Colorado's Rules of Professional Conduct, these materials are suggestions and ideas for how to respond to attorney's questions about ethics, but are not in any sense designed to create a standard of care in that pursuit.

ABA Formal Ethics Opinion 98-411 on Lawyer-to-Lawyer Consultation, August 30, 1998, states that similar lawyer-to-lawyer consultation does not create an attorney-client relationship, it goes on to say:

"This is not to suggest, however, that the consulted lawyer never will be found to have duties with respect to a consultation. A consulting lawyer may request and obtain the consulted lawyer's express agreement to keep confidential the information disclosed in the consultation. There also may be situations in which an agreement to preserve confidentiality can or should be inferred from the circumstances of the consultation."

We believe that the circumstances surrounding the operation of our Hotline always imply confidentiality, and we urge you to respect confidentiality up to the issuance of a court order. No one on the Hotline has ever been ordered to testify as to what our inquirers have revealed. Rather, occasionally inquirers have called to verify that they had previously solicited our advice, so as to present that as mitigation to the Attorney Regulation Counsel.

We cannot think of any theory that would create a privilege.

abstentions

- A. It is outside the Committee's scope to answer requests concerning **complaints against practicing attorneys or judges** (Bylaws A-1).
- B. The Ethics Committee shall not be obliged to answer requests about **completed conduct** (F-3b);
- C. nor requests about some **other attorney's conduct** (F-3d);
- D. nor requests about **law** rather than ethics (F-3e);
- E. nor requests about **matters in litigation** (F-3f).

We suggest that calling subcommittee members generally do the same. On the phone you have a better opportunity to explain why we abstain and who the caller can turn to, such as:

1. **Grievances** go to the Office of the Attorney Regulation Counsel of the

"Grievances go to... Attorney Regulation..."

Colorado Supreme Court. (303-893-8121). You might also refer the caller to the article regarding the function and process of the Attorney Regulation System in the *Colorado Lawyer*, February 1999, p. 57. Also there is the CBA Grievance Policy Committee's Grievance Calling Line for grieved attorneys at the DBA at 303-860-1115.

2. Questions about **unauthorized practice of law** go to the Supreme Court Office of Attorney Regulation Counsel (303-893-8121).
3. **Fee disputes** go back to the Bar Association at 303-860-1115 for referral to the CBA Fee Dispute Committee. You might also refer the caller to the Fee Arbitration Committee article in the *The Colorado Lawyer*, December 1987, p. 2151.
4. If two attorneys have a **professionalism** problem that is not really an ethics problem, refer them to the “Professionalism Conciliation Panel Program” of the DBA at 303-860-1115.
5. Any time you or your firm has an **interest in** or connection with the caller's request you must abstain (c.f., Bylaw F-4), so refer the caller again to the Bar Association for another subcommittee member.

Other times that you will probably wish to abstain include:

1. When the Bar Association staff slips in a call from a non-attorney. (Bylaw F-1).
2. When an attorney has a legal assistant call. You might give an overview of your answer but then ask the attorney call back to go over the specific details. It is often difficult to accurately discuss the issues with a non-attorney.
3. When the caller will not identify him or herself. (See generally Bylaw F-3g).

We suggest that you treat law students and out-of-state attorneys just like licensed Colorado Attorneys. (Bylaw F-1).

tips & tricks

In a survey of 21 calls from 8/03 through 8/04 four areas came up repeatedly (and have for over 18 years):

1. **Conflicts of Interest** generally: Rules 1.7-1.9. (Client "loyalty" problems.) Here are three common scenarios:

- a. An opposing attorney is trying to **force your caller's withdrawal** because the caller or his/her partner formerly

“These calls often concern litigation”

represented the opposing client. These calls often concern litigation and involve completed conduct and therefore may require abstention or deferring to the court. The Rules of Professional Conduct most relevant are Rules 1.6 and 1.9. A relevant Colorado case is *Osborn v. District Court*, 619 P.2d 41 (Colo. 1980) which states, in criminal cases, that if there is an attorney/client relationship, confidences are presumed to have been reposed, but that the attorney can only be disqualified in the present case if the matters are "substantially related." See *Food Brokers, Inc. v. Great Western Sugar Company*, 680 P.2d 857 (Colo. App. 1984) (Same rule for civil cases) and see *Rodriguez v. District Court*, 719 P.2d 699 (Colo. 1986).

In circumstances where the caller's problem will come up again, you might discuss Confidentiality Walls and Formal Opinion 88, *Colorado Lawyer*, July 1991, p. 1371.

For a summary of Colorado law on Rule 1.10(a) vicarious disqualification and a recent case on “substantial relationship” see

People v. District Court of Arapahoe, 951 P2d 926 (Colo. 1998).

b. Your caller wants to perform multiple representation of clients with potentially opposing interests. Refer to Rules of Professional Conduct 1.7 and Formal Opinion 68. The focus of the opinion is that it is almost always a bad idea. Also see Formal Opinion 88 and the article Use and Misuse of "Confidentiality Walls," *The Colorado Lawyer*, July 1991, p. 1371.

c. The attorney caller is involved in a case and the opposing counsel employs the attorney's **spouse, parent or child**. Refer the caller to Formal Opinion 75, Spousal Conflicts, in *The Colorado Lawyer*, August 1987, p. 1429.

A commonsense article about conflicts of interest to which you may refer callers is Scotty Krob's article in *The Colorado Lawyer*, Sept. 97, p. 87.

2. **Client Confidences:**

The general rule is, of course, the attorney shall not reveal information relating to the representation of the client. Rule 1.6. The Rule sets out 3 exceptions. Confidences may be breached: 1. When the client is going to break the law. 2. When the attorney is defending his or her own behavior. 3. When the client gives permission.

An example of the "law-breaking" exception above is when the client perjures him or herself. Rule 3.3(a)(4).

Often questions involve attorneys' duty to the tribunal and third parties. Over and above Rules 1.6 and 4.1(b), an attorney is required to speak up to correct misapprehensions of non-clients or disclose information to non-clients in certain circumstances. The Ethics Committee has

determined (Opinion 80) that an attorney who discovers a dollar error, to his client's advantage in a real estate closing, must disclose the error to the other parties, regardless of his client's wishes. The Appeals Court affirmed imposition of attorney's fees against an attorney who did not timely tell opponents of his client's bankruptcy filing. *Parker v. Davis*, 888 P.2d 324, (Colo. App. 1994.)

3. **Advertising:** Refer the caller generally to Rules 7.1 to 7.5 and Paula Ray and Steve Masciocchi's article in *The Colorado Lawyer*, Oct. 2003, p. 27. Resist calls to "get an okay on an ad."

Remind the caller that you don't stand between him/her and the Supreme Court.

One of the purposes of Formal Opinion 83, Lawyer Advertising, in *The Colorado Lawyer*, January 1990, p. 25, was to avert such requests. This Opinion is as extensive as possible and says about as much as the Committee can easily say on the subject, though it's getting kind of old.

An important change from the Code to the Rules is that Rule 7.4 allows attorneys to refer to themselves as specialists.

“Remind the caller you can't ‘okay’ an ad”

Some calls also come in on group advertising. Refer the caller to part E. of Formal Opinion 83, which is the result of the efforts of a separate subcommittee. See also Rules 7.2(c) and 5.4(c).

5. **Fee Splitting:**

a. with a **non-lawyer**: Rule 5.4. Attorney's can't do that. Really. This was a hot area few years ago because of lawyers and non-lawyers with merchandising ideas.

“Often the ideas are unethical.”

Often the ideas are unethical. For calls like this regarding Estate Planning, refer the caller to Formal Opinion 87 in *The Colorado Lawyer*, September 1990, p. 1793; K. G. Christianssen's article in *The Colorado Lawyer*, February 1988, p. 241; and the Supreme Court Disciplinary actions in *People v. Volk*, 805 P.2d 1116 (Colo. 1991), *People v. Cassidy*, 884 P.2d 309 (Colo. 1994) and *People v. Laden*, 893 P.2d 771 (Colo. 1995).

b. with an **attorney**: Rule 1.5(d) & (e). The share of each attorney must have been earned by that attorney and the fee split must be disclosed to and approved by the client. No referral fees are allowed.

Other areas that have historically come up include:

5. **Withdrawal from Employment**: This question is presented in various forms. The relevant Rule of Professional Conduct is Rule 1.16. The attorney must decide between mandatory or permissive withdrawal

“The attorney must decide”

and, of course, get the court's permission if the case is in litigation. Many attorneys don't understand that they may not violate Rule 1.6 (Confidences) during the withdrawal process. See Julie Walker's *The Colorado Lawyer* article in Oct. 2003, p. 59.

6. **Grieving Other Attorneys**: Rule 8.3. Refer the caller to Revised Formal Opinion 64 on that subject in *The Colorado Lawyer*, June 1997, pp. 180-1. The suggestion is that "knowledge" means the complaining lawyer has no substantial doubt. The standard is apparently higher than "mere suspicion" or "probable cause." This will probably require first-hand knowledge. The Rules of Professional Conduct move the focus to the seriousness of the purported behavior rather than to the strength of the proof. You may want to suggest the caller wait to report until the case, if any, is over, unless there is a reasonable risk that the other attorney will harm someone in the meantime. Regulation counsel very rarely prosecutes failure to report

7. **Attorney as witness**: Refer the caller to Rule 3.7 and Formal Opinion 78, as amended, and Nancy Cohen's article in *The Colorado Lawyer*, Oct. 2003, p. 53. The public policy against being a witness in one's own or one's partner's case is to protect the other side from the attorney testifying and then arguing the persuasiveness of her own testimony. The duty under this rule runs not only to your client but also to the opposing side. Good cases are *Wesp v. Everson*, 33 P.3 191, 201-2 (Colo. 2001)(Criteria for opposing side to call attorney as witness.) and *In re Fognani v. Young*, 04SA303 (Colo. 2005)(criteria for opposing that attorney's testimony is necessary.) The essential case for guardians ad litem is *J.E.B.* 854 P.2d 1372 (Colo. App. 1993).

8. **Threatening Criminal Prosecution or Grievance**: Rule 4.5, Formal Opinion 56 and *P. v. Barnthouse*, 775 P.2d 545 (Colo. 1989). These, of course, are not allowed. Note that Rule 4.5 now forbids threatening administrative charges and has been amended to add a safe harbor. *The Colorado Lawyer*, August 1997, p. 118. It's okay for an attorney to say "you may be violating a rule." See

Abstract 96/97-18, *The Colorado Lawyer*, January, 1998, p. 30. It is interesting to note that Rule 4.5 is a Colorado rule and was not generally adopted in other states.

9. **Limiting Professional Liability:** Though generally prohibited, there are two exceptions.

Limiting liability sometimes arises when an attorney is **settling a claim** against him/her for malpractice. Refer the caller to Rule 1.8(h), and Formal Opinion 85, Release and Settlement of Legal Malpractice Claims, in the *Colorado Lawyer*, August 1990, p. 1553. The lawyer may negotiate and enter into such an arrangement only under specific circumstances, and rarely prospectively.

The new rules on **providing limited representation** are set out in pp. 97-100 of *The Colorado Lawyer*, August 1999.

10. **Feeder Operations:** A feeder operation is where an attorney uses another business or organization, owned by the attorney or the spouse or a friend, to feed business to the attorney's law business. This is bad.

As to ancillary businesses, where the attorney owns an interest in a business that is closely or distantly related to the law practice, see Opinion 98, **Dual Practice**.

As to fee splitting and referral services, attorneys may not pay or give a *quid pro quo* to anyone to recommend his/her services, except for the reasonable costs of advertising permitted by Rule 7.2, or the usual charges of a non-profit referral service or other legal services organization. Rule 7.2(c). See also Private Discipline, *The Colorado Lawyer*, Dec. 1994, p. 2785-6. (For-profit lawyer-referral by zip-code business forbidden.), *People v. Zimmerman*, July 1997 *The Colorado Lawyer*, p. 211, and Rule 5.4 generally.

11. **Self-Reporting:** CRCP 251.20. An attorney must report his/her conviction of

any crime, including DUI's but excepting minor misdemeanor traffic offenses, to the Office of Attorney Regulation Counsel. "Conviction" includes no-contest pleas and suspended and deferred sentences. See *P. v. Barnthouse*, 948 P.2d 534 (Colo. 1997). For a perspective, usually a self-reported, no-accident, first-time DUI with no other prior discipline will trigger a C.R.C.P. 251.13 diversion, with conditions.

12. **Federal government attorneys** are subject to Colorado Rules of Professional conduct. McDade Act, 28 U.S.C. §530B; *US v. Colorado Supreme Court*, 189 F.3d 1281, (10th Cir. 1999), September, 1999.

If you find errors, wish to suggest additions, or have questions about the above, please call Phil James at 303-756-5424 or email Phil@msn.com, and set him straight

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