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ETHICS UPDATE
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Selected Topics

After several years of work and waiting, significant amendments to the Colorado Rules of Professional Conduct became effective January 1, 2008. In proposing amendments to the Colorado Rules of Professional Conduct, the Standing Committee on the Rules of Professional Conduct made a conscious decision to conform the Colorado Rules of the Professional Conduct to the ABA's model rules except where Colorado precedent suggested otherwise. The Committee expressed its belief that this would allow the ABA's model rules to provide meaningful precedent in interpreting the Colorado rules and would also avoid inconsistent interpretations to ease multi-jurisdictional practices. The committee expressed its presumption as follows:

> "Unless existing Colorado law or public policy justified a departure from a new Model Rule, the Committee would recommend adoption of the Model Rule."[1]

The preamble to the new rules provides that violation of a rule should not itself give rise to a cause of action against a lawyer. The preamble also states that a violation of the rules should not create a presumption that a duty has been breached. The preamble goes on to state:

> "Nevertheless, since the Rules do establish standards of conduct by lawyers, in appropriate cases, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct."[2]

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[1] *See* the Committee's report on the proposed Colorado Rules of Professional Conduct available at http://www.courts.state.co.us/supct/committees/profconductdocs/changes.htm (Dec. 30, 2005) at page 5.

[2] Preamble, ¶[20].

Rule 1.0(e)
Informed Consent

Many of the new rules require the client's "informed consent" before the lawyer can take any action.[3] In some cases the rules require the client's "informed consent confirmed in writing." The new rule defines "informed consent" as follows:

> "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

Comment [6] to Rule 1.0 explains "informed consent" further by saying: "[o]rdinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel." Comment [7] goes on to say that a lawyer may not assume consent by the client's silence; "[o]btaining informed consent will usually require an affirmative response by the client or other person."

Where the informed consent must be "confirmed in writing," Rule 1.0(b) provides that the writing may be signed by the client, or may be a letter from the lawyer to the client confirming an oral informed consent given by the client. In some situations, the rules require the informed consent to be signed by the client, *e.g.* when engaging in a business transaction with a current client under Rule 1.8.

Rule 1.4 (Communication) requires that the lawyer, as a part of his or her duty to communicate with the client, fully inform the client about matters requiring the client's "informed consent."

Rule 1.13 and Rule 1.6
Representation of Organizations and Confidentiality

Colorado substantially revised its rules regarding confidentiality (Rule 1.6) and representation of entities (Rule 1.13) effective January 1, 2008. These new rules are similar to the rules proposed by the Kutak Commission in 1982 which were rejected by the ABA's

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[3] *See, specifically,* Rules 1.2(c) (limitation of the scope of representation), 1.6(a) (maintaining the confidentiality of information), 1.7(b) (conflicts of interest), 1.8(a) (business transactions with a client), 1.9 (duties to former clients), 1.18(c) (duties to prospective clients after receiving disqualifying information) and 2.3 (evaluations for the use of third parties).

House of Delegates when considering revisions to the Model Rules of Professional Conduct. Similar proposals were rejected by the House in 1991 and again when proposed by ABA's Ethics 2000 Commission in August 2001.[4] Thereafter significant events in the corporate governance landscape occurred. These events were named Enron, Worldcom, HealthSouth, Tyco CEO Dennis Kozlowski, and many others. Senators and the public were shouting "where were the lawyers?"[5] As a result a committee of the ABA reconsidered the proposals received a year previously from the Ethics 2000 Commission, proposed them again to the ABA's House of Delegates, which adopted them in August 2002.

Among the more significant changes proposed in the new rules effective January 1, 2008 are the changes to Rules 1.13 and 1.6. Rule 1.13 makes it clear that where the client is an entity, the attorney must always be aware that the entity is a collection of individuals. As stated in Rule 1.13 (both before and after amendment), where the entity is the client, the attorney for an entity "owes allegiance to the organization itself and not [to] its individual stockholders, directors, officers, employees, representatives or other persons connected with the entity." During the entity's operations over a period of time, the attorney will unquestionably develop close relationships with the individuals associated with the entity with whom the attorney is working. That relationship, no matter how friendly, cannot affect the attorney's representation of the entity or further corporate scandals are likely to occur.

One of the new provisions of the Sarbanes-Oxley Act was § 307 which required the SEC to "issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers."[6] The SEC adopted its attorney conduct rules, which became effective in August 2003.[7] Most financing and merger and acquisition transactions involve the offer, purchase, or sale of securities and, consequently, the SEC's attorney conduct rules will likely apply. Even where the SEC's attorney conduct rules do not apply, Rule 1.13 imposes obligations on attorneys representing entities. Rule 1.13 was amended by the Colorado Supreme Court in 2007 (effective January 1, 2008) and, as a result of such amendments, is similar to Rule 1.13 of the ABA's Model Rules of Professional Conduct as amended in 2002.

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4 *See* Stephen Gillers and Roy D. Simon, *Regulation of Lawyers: Statutes and Standards* 69-71 (2005 ed.) cited in *Report of the Task Force on the Lawyer's Role in Corporate Governance* at 77 (November 2006) by the Association of the Bar of the City of New York.

5 *See, e.g.,* Remarks of Senator John Edwards, 148 Cong. Rec. S6552 (daily ed. July 10, 2002) and Remarks of Senator Michael Enzi, 148 Cong. Rec. S6576 (daily ed. July 10, 2002). These remarks were made during the debate surrounding the adoption of the Sarbanes-Oxley Act of 2002, and specifically § 307 thereof.

6 15 U.S.C. § 7245.

7 17 C.F.R. § 205.1. Note that the term "appearing and practicing before the SEC" is interpreted very broadly and includes attorneys representing private issuers in transactions involving the issuance or transfer of securities. *See* Lidstone, THE SECURITIES LAW DESKBOOK (Bradford Publishing Co. 2007) at § 13.6 and § 13.7; Lidstone, "Sarbanes-Oxley Act of 2002: Impact on Private Companies and their Attorneys," 33 *The Colorado Lawyer*, no. 7 at 73 (July 2004).

Under Colorado Rule 1.13, where counsel to an entity knows that a person associated with that entity:

1. is engaged, intends to act or refuses to act in a manner;

2. related to the representation;

3. that is a violation of a legal obligation to the entity or a violation of law which might reasonably be imputed to the entity; and

4. is likely to result in substantial injury to the entity,

the attorney must proceed as reasonably necessary in the best interests of the entity, giving consideration to:

a) the seriousness of the violation and its consequences;

b) the scope and nature of the lawyer's representation;

c) the responsibility and the motivation of the person involved; and

d) other relevant considerations.

Where the attorney has concerns in this regard, there are many actions the attorney can take to fulfill his or her legal duties. These include:

- Asking for reconsideration of the matter;

- Seeking a separate legal opinion;

- Referring the matter to a higher authority at the entity; or

Where the entity continues to act in the objectionable manner which the lawyer determines is a violation of law and is likely to result in substantial injury to the entity, the lawyer may resign.[8] Under 2008 changes, attorney's duty to report within the organization continues:

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[8] The duties of attorneys representing entities that file reports under the Securities Exchange Act of 1934 or which have filed registration statements under the Securities Act of 1933 have enhanced duties imposed by §307 of the Sarbanes-Oxley Act of 2002 and the rules the SEC has adopted thereunder. *See* Lidstone, *Am I My Brother's Keeper? Redefining the Attorney-Client Relationship*, 32 THE COLO. LAW. NO. 4, 11 (Apr. 2003).

– if the lawyer reasonably believes that he was discharged by the client because of his compliance with Rule 1.13, or

– if the lawyer withdrew under circumstances that required the lawyer to report corporate wrongdoing.

Colorado Rule 1.13(c) permits the lawyer to reveal information related to the representation of the entity to third parties irrespective of whether such disclosure would violate Rule 1.6. Disclosure under Rule 1.13(c) is only permitted when, in the lawyer's judgment, disclosure is necessary to prevent substantial injury to the organization. Note that Rule 1.13 focuses the emphasis of the disclosure on injury to the organization.

Colorado Rule 1.6 was also amended significantly. Amended Rule 1.6(b) permits (but does not require) disclosure by an attorney of the confidences of a client, when the attorney believes it necessary:

- To prevent reasonably certain death or substantial bodily harm;

- To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another **and** in furtherance of which the client used or is using the lawyer's services; or

- To prevent, mitigate or rectify substantial injury to the financial interests or property of another" resulting from a crime or fraud "in furtherance of which the client has used the lawyer's services"

The focus of the new Rule 1.6(b) is not the attorney's client. The focus of the new Rule 1.6(b) is to protect third parties. Notably the rules do not require attorney disclosure in these circumstances; disclosure is instead permissible. Where the attorney becomes aware of one of the matters that may be subject to disclosure under Rule 1.6(b), the attorney's interests may diverge from the client as the attorney considers how to address the issues to his or her client and whether to make disclosure under Rule 1.6. One of the concerns an attorney in such a position may have is potential aiding and abetting liability if the attorney is publicly silent in the face of such knowledge.[9] Even though the rules state that violation "should not itself give rise to a cause of action against a lawyer nor should it create any

[9] Consider the case where an attorney finds out about events in which a client participated which ultimately prove to have been fraudulent (although the attorney and the client may disagree with that characterization at the time). The attorney considers his or her Rule 1.6 obligations and determines not to make the permissive disclosure but simply resigns. Even though that failure to make permissive disclosure cannot be subject to a disciplinary proceeding, might it be sufficient for the attorney to be held responsible for aiding and abetting the client's fraud?

presumption in such a case that a legal duty has been breached,"[10] it is likely that plaintiffs will argue that the rules reflect the standard of care in the community. Recently the Colorado Court of Appeals determined that attorneys could be held liable for aiding and abetting the breach of fiduciary duties. The Colorado Supreme Court overturned the appellate court's decision on other grounds, but specifically left open the issue of whether an attorney can be held liable for an aiding and abetting the breach of fiduciary duties.[11] Regardless of civil liability, however, there is clear precedent that a lawyer may be disciplined for aiding and abetting a client's financial crimes.[12]

The amendments to Rules 1.13 and 1.6 make representation of organizations more difficult. When the impact of these new rules is fully understood, individuals associated with organizations may be less forthcoming with their legal counsel, concerned about the attorney's duties to make disclosure, even when voluntary.

In 2003 the Securities and Exchange Commission (the "SEC") proposed a requirement that attorneys, in circumstances similar to new Rule 1.6(b), make a 'noisy withdrawal' when the situation is such that the attorney can no longer represent the client.[13] Similarly, the Department of Justice revised its guidelines for deciding when to seek an indictment of a corporation following the corporate scandals of the early 2000's, culminating in the McNulty Memorandum[14], which became effective in 2006. The McNulty Memorandum provided that waivers of attorney-client privilege would be viewed favorably by prosecutors, and a failure to waive corporate attorney-client privilege would be viewed negatively in making decisions whether to charge a corporation or in determining the terms of a settlement.

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[10] Colo. RPC Preamble and Scope, Comment [20].

[11] *Alexander v. Anstine*, 152 P.3d 497 (Colo. 2007).

[12] *In re DeRose*, 55 P.3d 126 (Colo. 2002) (Attorney was convicted of a felony charge of aiding and abetting when, on behalf of his clients, he engaged in eleven separate financial transactions structured to avoid federal financial reporting requirements. Through his criminal conduct, the attorney violated C.R.C.P. 251.(b) and Rule 8.4(b), and was therefore disbarred.)

[13] The Commission proposed rules under § 307 of the Sarbanes-Oxley Act of 2002 on November 6, 2002. SEC Rel. 33-8150, 34-46868, IC-25829, and adopted final rules on January 29, 2003 (effective August 5, 2003). SEC Rel. 33-8185, 34-47276, IC-25929. Although the rules as proposed included the provision for a "noisy withdrawal," the Commission deferred consideration of those rules. SEC Rel. 33-8186, 34-47282, IC-25920 In that release, the Commission itself acknowledges that the "noisy withdrawal" proposal went beyond the requirements of Sarbanes-Oxley. Both Senators Edwards and Enzi made it clear in their remarks that § 307 "would not require the attorneys to report violations to the [Commission], only to corporate legal counsel or the CEO, and ultimately to the board of directors." 148 Cong. Rec. S6555 (Daily ed., July 10, 2002). Nevertheless, the proposed rules have not been withdrawn. *See* Lidstone, "Am I My Brother's Keeper? Redefining the Attorney-Client Relationship," 32 *The Colorado Lawyer*, no. 4 at 11 (April 2003).

[14] Memorandum dated December 12, 2006, from Paul J. McNulty, Deputy Attorney General, U.S. Department of Justice, available at www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.

The pendulum recently appears to be swinging back toward the protection of attorney-client privilege for corporations. After significant Congressional pressure, the Justice Department determined it may have gone too far in essentially forcing corporations to waive attorney-client privilege or work-product as a condition to cooperation credit. In a speech by Deputy Attorney General Mark R. Filip,[15] the Department announced significant changes in its policies defining cooperation in the Department's corporate charging policy:

- Credit for cooperation will not depend on whether a corporation has waived attorney-client privilege or work product. Prosecutors will provide credit based on the corporation's disclosure of relevant facts.

- Prosecutors are forbidden from asking for non-factual attorney-client privileged communications and work-product, such as legal advice.

- In assessing credit for cooperation, prosecutors may not consider whether the corporation advanced or paid attorneys' fees for employees, officers, or directors unless the payment "would rise to the level of criminal obstruction of justice" which would not generally be the case.

- In assessing credit for cooperation, prosecutors may not consider whether the corporation disciplined or terminated employees considered to be at fault for the alleged violations.

Deputy Attorney General Filip added that, "[n]o corporation is obligated to cooperate or to seek cooperation credit by disclosing information to the government. Refusal by a corporation to cooperate, just like refusal by an individual to cooperate, is not evidence of guilt… It simply means that the corporation will not be entitled to mitigating credit for cooperation…." These principles are now included in the United States Attorneys' Manual at Chapter 9-28.000. In step with the Justice Department, the SEC revised its Enforcement Manual in October 2008. The new SEC guidance directs staff to consider that "[a] party's decision to assert a legitimate privilege will not negatively affect their claim to credit for cooperation."[16] These moves by federal enforcement agencies may eventually lead to further changes in the Rules of Professional Conduct to strengthen the attorney-client privilege which was weakened by the 2008 version of the Rules.

Rule 1.6 and Formal Opinion 119
Confidentiality in the Electronic World

The advent of the electronic age has generated a number of new issues to be addressed by the Colorado Rules of Professional Conduct. In 1992, the Ethics Committee

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15 Aug. 28, 2008, avail. at www.usdoj.gov/dag/speeches/2008/dag-speech-0808284.html.

16 SEC Enforcement Manual, §4.3, revised October 6, 2008.

published Formal Opinion 90, entitled "*Preservation of Client Confidences In View Of Modern Communications Technology*."[17] What was a modern form of communication in 1992 included cordless telephones (which could be intercepted by AM radios), analog cell phones and facsimile transmissions (which could also be intercepted) and voice mail (accidentally left for the wrong person) – by no means modern in the 21st Century. Nevertheless, the summary of Opinion 90 is *apropos* today as it was in 1992:

> A lawyer must exercise reasonable care when selecting and using communications devices in order to protect the client's confidences or secrets from unintended disclosure.

Today our means of communication far surpasses that imagined by all but the most far-sighted 1992 techno-geeks.[18] Today, a Blackberry, iPhone, or Treo has far more power, memory and capabilities than the most sophisticated desktop computer in 1992. Microsoft Outlook is the ubiquitous e-mail program that has replaced courier service, messenger service, even the U.S. mail, and even the telephone in a number of circumstances. While providing convenience and utility to attorneys and others who use them, they also provide significant risk.

Accidental or inadvertent transmissions is a significant issue. The Outlook toolbar automatically completes names of addresses it has seen before or are included in the Outlook contacts file. Type a "be" in the address line, and a number of alternatives will likely occur as happened for an attorney in Los Angeles who was providing information about a possible settlement of a billion dollar investigation by the FDA. Unfortunately the "be" that Outlook automatically completed for the attorney was not his colleague, but a reporter for the *New York Times*. Without noticing the difference, the attorney pushed "send." A significant breach of confidentiality.[19] Had the transmission occurred between attorneys, perhaps Rule 4.4(b) (discussed further below) would have saved the day. The reporter was not an attorney, was not bound by the Rules of Professional Conduct, and made use of the information he received.

There are a number of safeguards that an attorney can install in Microsoft Outlook to make it less likely to make such a significant error:

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[17] Ethics Committee, Colorado Bar Association, Formal Opinion 90 (Nov. 14, 1992) available at http://www.cobar.org/index.cfm/ID/386/subID/23920/CETH//.

[18] According to *PC Magazine*, IBM introduced the *Thinkpad* in the summer of 1992 and reinvented mobile computing with a 1200 baud internal modem. In February 1992, William Zachmann, a *PC Magazine* columnist noted that Windows 3.0 was attractive, but stated "I still think OS/2 is the odds-on favorite to replace DOS as the dominant desktop operating system," he wrote. "I see a big change toward OS/2 and away from Windows over the next year." See http://www.pcmag.com/article2/0,2817,2124406,00.asp.

[19] "*Did Lawyer's E-Mail Goof Land $1B Settlement on NYT's Front Page?*", posted Feb. 6, 2008 in ABA Journal Law News Now, avail. at http://abajournal.com/news/lawyers_e_mail_goof_lands_on_nyts_front_page/.

- You can eliminate the name suggestion feature of Outlook in *Tools:Options: Preferences: E-mail Options: Advanced E-Mail Options*; simply uncheck "*suggest names while completing To, Cc, and Bcc fields*." That means that you have to type in each e-mail address, but you are less likely to choose the wrong address.

- You can provide for a delay in your outbox – so that messages are not sent when you push "send." A ten minute delay can be quite useful when you are writing an e-mail in haste, you think of additional information to include, or you want to delete or add an addressee after sending. You can set a delay from the time you push "send/receive" and the time the message is actually sent from the outbox at *Tools:Options:Mail Setup*. Uncheck "*send immediately when connected*." Proceed to "*send/receive*" and under "settings for group 'All Accounts'," check "*schedule an automatic send/receive every ___ minutes*" and set the desired number of minutes. If you want to send something immediately, you can still easily do so even after setting up a delay – by clicking "send/receive" on the outlook tool bar. If you want to correct a message you have sent before it has left the outbox, simply go to the outbox and retrieve the message.

- You can include an automatic signature that includes your name, address, confidentiality disclosure, and tax (Circular 230) disclosure.[20] You can automatically add that signature to replies and forwards as well at *Tools:Options: Mail Format: Signatures*. You will have to type or copy your signature and disclaimers, but once added they are added to each e-mail you write and (if you select) reply to or forward.

- Each e-mail should be written carefully and formally – including a greeting to the intended addressee. That, itself, would be notice to a person other than the intended addressee that the message may have been inadvertently sent. Additionally, on confidential and privileged documents, a special notation in a different color could be included before the greeting: "Attorney-Client Privileged and Confidential Information."

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[20] Typical disclosure is as follows: **CONFIDENTIALITY NOTICE:** This message, the attachments, and any metadata contained in any attachments may be confidential and may be privileged. Do not review any metadata contained herein or in any attachments. If you believe that this email has been sent to you in error, please reply to the sender that you received the message in error; then please delete this e-mail. Thank you. **IRS CIRCULAR 230 DISCLOSURE:** This e-mail and any attached documents may contain provisions concerning a federal tax issue or issues. This e-mail and any attached documents are not intended or written to be used, and cannot be used, by any taxpayer for the purpose of avoiding penalties that may be imposed on any taxpayer by the Internal Revenue Service.

PDAs, the personal digital assistant such as the Blackberry, iPhone, or Treo, are also capable of causing problems for attorneys – and the problems can be as significant as the benefits they provide. Among the problems, of course, is 24 hour accessibility for the person carrying the PDA. That is not, however, an ethical problem (except, of course, in a conjugal relationship). The ethical problems result from the information the PDA contains and the ability to send e-mails.

- Many PDA's send e-mails, and lawyers who are very conscious of including a signature, confidentiality notice, and Circular 230 notice in their Outlook files do not do so in their PDA. The message from most PDA's simply says, "sent from my Goodlink server," "Sent from Don's iPhone," or "Sent from my Blackberry." Each of the Blackberry, iPhone, and Treo can be set up to include a signature and disclaimers – and should be. If it is important enough for Outlook, it is important enough to do so in your PDA.

- Loss of the PDA may compromise client information. All of us can misplace a PDA as we occasionally do our wallet and keys. Were a PDA to be lost, confidential client e-mail communications and attachments, personal names, addresses, and telephone numbers, and other confidential information could be subject to inadvertent disclosure to whomever finds the PDA. This could subject an attorney to sanctions for violation of Rule 1.6, and could mean that the attorney would be forced to admit the loss of information to his or her clients under Opinion 113, *Ethical Duty of Attorney to Disclose Errors to Client*.[21] This can be easily be protected by using a password with the PDA. While inconvenient because we are mostly accustomed to instant gratification, it can be a great protection. Admittedly most people finding a cell phone or PDA will try to return it to the owner rather than retrieve and use confidential information. The PDA owner can simply add a name-address-telephone label on the back of the PDA to aid the person finding the PDA to return it to the rightful owner.

Finally, think about the flash drive or disks that you are bringing with you that include your material client files. Would a loss of the flash drive or disks risk violating client confidentiality? MS Word allows an easy method to pass-word protect your MS Word files that you carry with you or that you send by e-mail. In Word, go to *Tools: Options:Security* and then include a *password to open*. Of course, do not include the password to open in the same e-mail in which you send the file.

Metadata is also a problem created by the digital age. Metadata are hidden files embedded in a document and can include such information as the dates and times that the document was created, modified, and accessed, and the names of the persons who created

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[21] Ethics Committee, Colorado Bar Association, Formal Opinion 119 (May 17, 2008) available at http://www.cobar.org/index.cfm/ID/386/subID/23920/CETH//.

the document and who last edited the document. Metadata can also include embedded user comments or the edit history of a document, including redlined changes showing additions and deletions of text. Metadata in spreadsheets include the formulas used to arrive at the numbers displayed in a table. Metadata is generally invisible to the casual user, but can easily be retrieved if sought. Formal Opinion 119, *Disclosure, Review, and Use of Metadata*,[22] addresses the ethical obligations of the "sending lawyer" who transmits electronic documents containing metadata to a third party, including the lawyer for an adverse party. Opinion 119 also addresses the ethical obligations of the "receiving lawyer" who receives electronic documents containing metadata from a third party, including the lawyer for an adverse party or a non-lawyer third party.

According to Opinion 119, any lawyer (or staff person) who transmits electronic documents or files has a duty to use reasonable care to guard against the disclosure of metadata containing confidential information. The definition of reasonable care will depend on the facts and circumstances of each case. Opinion 119 makes it clear that the duty under Rule 1.1 to provide competent representation requires each lawyer sending electronic information "to ensure that he or she is reasonably informed about the types of metadata that may be included in an electronic document or file and the steps that can be taken to remove metadata if necessary." Within a law firm, a supervising lawyer has a duty to ensure that appropriate systems are in place so that the supervising lawyer, any subordinate lawyers, and any non-lawyer assistants are able to control the transmission of metadata. These systems include metadata scrubbers that are commercially available, but also include simple settings on your MS Word and MS Outlook programs:

- In MS Word, you can remove personal information from your file. Under *Tools: Options:Security*, turn on "*Remove personal information from file properties on save*."

- In MS Word, you can also minimize the risk of sending a marked-up document thinking it is a clean document. Under *Tools:Options:Security*, turn on "*make hidden markup visible when opening or saving*."

- In MS Outlook, do not enable "reply with changes." Under *Tools:Options:E-mail Options: Advanced E-mail Options*, uncheck "*Add Properties to Attachments to Enable Reply With Changes*."

Another method of removing metadata is to save documents for transmission as .RTF (rich text format) documents or .PDF (adobe acrobat) documents. Even then, you should review documents before sending to ensure that only the desired information is being transmitted.

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[22] Ethics Committee, Colorado Bar Association, Formal Opinion 120 (May 17, 2008) available at http://www.cobar.org/index.cfm/ID/386/subID/23920/CETH//.

Any lawyer who receives electronic documents or files generally may search for and review metadata. However, if the lawyer receiving the electronic files "knows or reasonably should know that the metadata" may contain or constitute confidential information, the receiving lawyer should assume that the confidential information was transmitted inadvertently, unless he or she knows that confidentiality has been waived. When in receipt of confidential information, Rule 4.4(b) (discussed below) makes it clear that the lawyer receiving the confidential information must promptly notify the sending lawyer.[23] Once the receiving lawyer has notified the sending lawyer, the lawyers may, as a matter of professionalism, discuss whether a waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the sending lawyer or the receiving lawyer may seek a determination from a court or other tribunal as to the proper disposition of the electronic documents or files, based on the substantive law of waiver. Where a lawyer has sent metadata that contains confidential information, however, the provisions of Opinion 113 may require the lawyer to admit the mistaken transmission to his or her client.[24]

The metadata issue raises a number of other problems for the attorney. First of course is the proper configuration of the Outlook program. Second is the installation of a metadata scrubber that removes metadata from all outgoing files. Even the installation of a metadata scrubber does not resolve all issues, however. A metadata scrubber will not remove metadata from files that are sent through other servers – such as the lawyer's PDA or home computer.

The good news is that, if "before examining metadata in an electronic document or file, the [r]eceiving [l]awyer receives notice from the sender that Confidential Information was inadvertently included in metadata in that electronic document or file, the [r]eceiving [l]awyer must not examine the metadata and must abide by the sender's instructions regarding the disposition of the metadata." This may be accomplished by a general warning,

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[23] *See also* Ethics Committee, Colorado Bar Association, Formal Opinion 108, "*Inadvertent Disclosure of Privileged or Confidential Documents*" (May 20, 2000), available at http://www.cobar.org/index.cfm/ID/386/subID/23920/CETH//.

[24] Luce, "*What's the Matter With Metadata*," 36 The Colo. L. (CBA) No. 11 at pg. 113 (Nov. 2007). Mr. Luce also concluded that metadata mining (adverse counsel retrieving and using metadata from sent documents) is permissible under the Colorado Rules of Professional Conduct. The District of Columbia Bar Association Legal Ethics Committee addressed this issue in its Ethics Opinion 341. The Committee noted that lawyers who send electronic documents outside of discovery or subpoena have a duty under Rule 1.6 to take reasonable steps to maintain the confidentiality of the documents, including removing potentially harmful metadata before sending the documents. This requires that the lawyers understand the software they use or they have employees who can safeguard against unintended disclosures. However, there is also a duty upon receiving lawyers who actually know that a sender has inadvertently included metadata along with a document. The opinion held that lawyer should not review the metadata without contacting the sending lawyer and abiding by the sender's instruction. This gives the sender the opportunity to determine if the metadata includes work product or confidential information of the sender's client. In all other circumstances, however, the receiving lawyer is free to review the metadata contained in electronic files provided by an adversary.

such as the following "confidential information" warning attached to many e-mails (emphasis provided):

> **CONFIDENTIALITY NOTICE:** This message, the attachments, ***and any metadata contained in any attachments*** may be confidential and may be privileged. ***Do not review any metadata contained herein or in any attachments.*** If you believe that this email has been sent to you in error, please reply to the sender that you received the message in error; then please delete this e-mail.

Where an attorney has specific knowledge that confidential metadata (or other confidential information) has been sent, the sending attorney should immediately send notification to the recipients.

Rule 1.13 and Formal Opinion 120
Identifying the Client

Another aspect of Rule 1.13 was addressed by Formal Opinion 120, *Representing an Organization as a Party in a Dispute*.[25] As Rule 1.13, Opinion 120 starts off acknowledging that the lawyer for an organization owes duties to the organization and not to its constituents. In an investigation or a dispute, it is improper for an attorney for an organization to advise others that the attorney also represents some or all of the constituents (employees, for example) unless the attorney has a reasonable basis to believe that he or she has been retained to represent the constituents.

> This situation may arise when opposing counsel or the government wants to interview employees. The attorney for the organization cannot prevent or manipulate that interview unless he or she really is counsel for the employee and accepts all of the ethical implications of that representation.
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> This situation may also arise when the attorney for the organization is conducting an investigation of possible wrongdoing for the organization. In many cases, the employee (officer, director, or employee) may have confidence in the attorney – but they must recognize that the attorney represents the organization, not the individual.[26]

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[25] Ethics Committee, Colorado Bar Association, Formal Opinion 120 (May 17, 2008) available at http://www.cobar.org/index.cfm/ID/386/subID/23920/CETH//.

[26] Rule 1.13(f) requires that, "In dealing with an organization's directors, officers, employees, members, shareholders and other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Before the attorney can be counsel to the employee, the attorney must review whether the interests of the employee and the organization are in line or whether there are possible conflicts of interest. Where the attorney identifies a possibly conflicting interest, Opinion 120 advises the attorney that he or she must notify the constituent that the attorney does not and cannot represent him (or her), and that the constituent (officer, director or employee) should consider obtaining independent counsel. Where a constituent is represented by counsel (either the organization's lawyer or independent counsel), opposing counsel may not, under Rule 4.2, speak to the constituent directly but most work through counsel.[27]

Where the lawyer believes or knows that the constituent may have relevant information about the case, the lawyer cannot event request that constituent refrain from providing that information for the opposing party or the government, "unless (1) the person is a relative or employee or other agent of a client and the lawyer is not prohibited by other law from making such request and (2) the lawyer reasonably believes the person's interest will not be adversely affected by refraining from giving such information." In any event, the lawyer for the organization cannot prevent the constituent from providing the requested information.

Opinion 120 underscores the proposition of Rule 1.13 that the lawyer for the organization does not represent individuals, and serves to remind an attorney for an organization that conflicts can develop when the organization's lawyer is asked to provide advice to individuals or direct the organization's individuals' responses to requests for information.

Rule 1.8
Conflicts of Interest: Current Clients

Rule 1.8 sets forth specific prohibitions for situations that can commonly arise during the attorney-client relationship. Of most interest to transactional attorneys is 1.8(a) regarding entering into a business transaction with a client. Rule 1.8(a) now requires the lawyer to provide full disclosure in writing to the client that the terms of the transaction are fair and reasonable to the client; disclosure that the client should seek independent counsel to review the transaction, which includes giving the client reasonable time to obtain the independent advice; and requires the lawyer to obtain, in a writing signed by the client, informed consent to the essential terms of the agreement.

[27] A lawyer who knowingly asserts that he or she represents current or former constituents of an organization automatically or unilaterally, without having a reasonable belief that he or she has in fact been engaged by the constituents, may violate at least two separate Rules. First, a lawyer knowingly making such an assertion without having such a belief would violate Rule 4.1 on truthfulness in statements to others. Second, that lawyer may violate Rule 3.4(a) which prohibits a lawyer from "unlawfully obstruct[ing] another party's actions as to evidence. . . ."

Rule 1.16
Declining or Terminating Representation

Rule 1.16 discusses when and how a lawyer may decline or terminate a representation, and what obligations flow from the termination. Rule 1.16(b)(1) is a significant, positive, change for lawyers, and is equivalent to a "no fault divorce" between the lawyer and client. Former Rule 1.16 did not permit a lawyer to withdraw solely on the grounds that "withdrawal can be accomplished without material adverse effect on the interests of the client." Under new Rule 1.16, no other reason is necessary.

Rule 1.16(d) requires that, upon termination of representation, the lawyer must take steps "to the extent reasonably practicable" to protect a client's interests. These steps may include "allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred." Recently the Colorado Bar Association Ethics Committee issued letter opinion 2007-2[28] which addressed the obligation of an attorney surrendering paper and property to the client. An estate planning attorney asked whether the obligation included an obligation to surrender digital files "in accessible electronic format, if so maintained," so that the client could "save . . . money during the revision process" by new counsel. The Ethics Committee concluded that delivering electronic files "is a reasonably practical step that [the attorney] should take to enable the continued protection of your former client's interests within the meaning of C.R.P.C. 1.16(d).

The letter opinion leaves a number of questions unaddressed. For example, the letter opinion does not address whether an attorney can claim a lien on the client's digital files as the attorney can on paper files. To the extent that an attorney has the right to retain paper files pursuant to an attorney's lien for unpaid fees, the attorney should have the same right to retain digital files.[29] However, although an attorney may have a legal right to assert a lien on the client's files, the practice is risky. If the client's matter is ongoing, a lawyer's refusal to turn over the files can damage the client's case and expose the lawyer to a grievance or malpractice claim in retaliation. Just as it is usually inadvisable to sue your former client for unpaid bills, it is also generally inadvisable to hold the client's files hostage for unpaid bills.

The letter opinion also does not address whether any portion of the digital files may be considered to be "work product" which, under Formal Opinion 104, attorneys are not obligated to turn over to clients.[30] Formal Opinion 104 does not address whether (for

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[28] Abstract available at 36 The Colo. L. (CBA) No. 11 at pg. 17 (Nov. 2007).

[29] See Formal Opinion 82, CBA Ethics Committee, April 15, 1989, addendum issued 1995, available at http://www.cobar.org/index.cfm/ID/386/CETH/Formal-Ethics-Opinions-Index/.

[30] See Formal Opinion 104, CBA Ethics Committee, April 17, 1999, available at http://www.cobar.org/index.cfm/ID/386/CETH/Formal-Ethics-Opinions-Index/.

example) special formatting of a document for printing that may have been accomplished by the attorney or his or her staff is "work product" or client's property.[31] Can an attorney deliver a text-readable version of the document in Adobe Acrobat format to meet the Rule 1.16(d) requirement? While all of the words are generally available in such a format, transforming the document into a word processing accessible document loses all formatting codes and requires a significant amount of "clean up" work by the successor attorney or his or her staff.

Formal Opinion 104 provides that, to the extent the attorney retains drafts in the client file, the client is entitled to receive those drafts. The same should apply to digital drafts of documents.

Another question for which answers are yet to be given are the ability of an attorney, before turning over documents, to scrub metadata from the documents. This would include things like revision schedules, authors working on the document, redline-strikeout codes, and other hidden information. What if the client specifically requests the attorney to leave metadata in the document? This question is not addressed by letter opinion 2007-2 or by Formal Opinions 104 or 119.

Rule 1.18
Prospective Clients

Rule 1.18 is a new rule with no counterpart in existing rules. This new rule prohibits an attorney using information gained from dealing with a prospective client against that person's interests – whether or not the prospective client becomes an actual client. The new rule provides an exception to the prohibition when, during the course of the interview, "the lawyer who received the information took reasonable steps to avoid disclosure to more disqualifying information." This protects the situation where the lawyer, in a client intake interview, realizes that there may be conflicts with existing clients or other interests of the attorney or the law firm. The rule goes on to require that, for the exception to be applicable, the lawyer receiving the information from the prospective client must be "screened from further participation in the matter and is apportioned no part of the fee therefrom."[32] Additionally, written noticed must be given to the prospective client.

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[31] Formal Opinion 104 provides the following as an example of attorney work product which may be withheld from a client when turning over records: "Certain documents may be withheld: for example, internal memoranda concerning the client file, conflicts checks, personnel assignments, and lawyer notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney-work product that is not needed to protect the client's interests, and does not constitute papers and property to which the client is entitled." The Formal Opinion concludes with the statement that "The lawyer should err on the side of production."

[32] Similarly, under Rule 1.10(e), when an attorney moves laterally to a new firm, circumstances exist where the firm can represent a client adverse to a client of the former firm even where the new lawyer had minimal involvement in the representation. This requires that the new firm take appropriate screening measures and again ensures that the new lawyer "is apportioned no part of the fee therefrom."

Most requirements of this rule are achievable. However, given the compensation structure of most law firms, it is likely not possible to avoid apportioning a portion of the fee from any specific representation to any specific attorney.[33] Thus the effect of this new rule is that a prospective client can effectively disqualify an unsuspecting law firm should the prospective client desire to do so. Attorneys must be alert to potential conflicts of interest very early in the intake process. Otherwise, this may give less reputable plaintiffs or defendants the opportunity to go "attorney shopping," provide disqualifying information during the initial interview, and thereby prevent an attorney or firm from representing even a long-term client in adverse litigation.

Rule 2.3
Evaluation for Use by Third Parties (e.g., Legal Opinions)

Colorado Rule 2.3 has generally been interpreted to allow attorneys for clients to issue legal opinions to third parties in connection with the closing of a transaction or in other circumstances. A legal opinion places the lawyer in the odd position of issuing legal advice to a person not his or her client and generally disclosing confidences about the client. The principal change between the current Colorado rule and the new Rule is that, under new Rule 2.3(b), the client's "informed consent" is required only when the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely. As described in Paragraph [5] of the Comment to this Rule:

> When a client requests a lawyer to provide an opinion for the benefit of third parties and the opinion is consistent with the client's interests, there is no good reason to require the client's consent.

Rendering a legal opinion to third parties also invokes other Rules of Professional Conduct:

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[33] One ethics opinion has been found under Rule 1.10 that discusses this "no apportionment requirement. State of Washington Informal Opinion 1498 (1992) distinguishes between a partner and an associate moving laterally and dealing with the 1.10 consequences:

> "The Committee was of the opinion that a personally disqualified associate may be paid a regular salary, but may not share in any bonus or any other additional payment based upon the fee received in the case from which he or she is screened."

> "The Committee was of the opinion that in the case of a personally disqualified partner, the law firm must put into place an accounting practice to ensure that the gross income received from the case is handled in such a way that the personally disqualified partner does not share in it in any way. The Committee was further of the opinion that the law firm must document that accounting because the rule places the burden of proof of compliance upon the law firm."

Surprisingly, this point, and the mechanics of accomplishing this "non-apportionment" requirement is not discussed in the comments to Rule 1.10 or Rule 1.18.

- The lawyer must be competent to render the opinion (Rule 1.1);
- The lawyer must preserve the confidentiality of client information (Rule 1.6); and
- The lawyer's conduct must conform to the requirements of the law and must be characterized by independent judgment and truthfulness (Rules 1.2, 2.1 and 4.1).
- The lawyer must avoid conflicts of interest (Rules 1.7 and 1.9)

Rule 4.3
Dealing with Unrepresented Persons

Rule 4.3 permits a lawyer to give legal advice to an unrepresented person so long as the lawyer does not know (and has no reason to know) of a conflict between the interests of the lawyer's client and the unrepresented person. Paragraph [2] of the Comment explains the reasons for this expansion of the lawyer's permissible communications with unrepresented persons:

> [2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel.

This protects a lawyer when, for example, the lawyer is meeting with several individuals about the formation of a new business. Depending on the identification of the lawyer's client in such a circumstance, all of the other parties at the meeting are technically unrepresented. However, where the parties are all pursuing the same goal on an amicable basis, little purpose can be served by advising everyone else at the table to "obtain your own counsel." This is a benefit obtained under the new rule.

Rule 4.4
Respect for Rights of Third Persons

Colorado Rule 4.4(b) and associated Paragraphs [2] and [3] of its Comment wade into one of the more vexing problems facing lawyers and the courts. Modern technologies, such as email, facilitate both the communication of information and the erroneous transmission of confidential information to those who should not have access to that information. Inevitably, the question arises as to the lawyer's ethical and legal duties upon receipt of information that was transmitted by mistake to the lawyer.

Colorado Rule 4.4(b) addresses this issue by requiring prompt notice to the sender if a lawyer receives a document, which the lawyer knows or reasonably should know was inadvertently sent, relating to the representation of the lawyer's client. Model Rule 4.4 imposes no further ethical duties. However, a majority of the Standing Committee believes that the ABA has not addressed this problem satisfactorily.

The Colorado rule incorporates the requirements of Formal Opinion 108 that when a lawyer actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents, including when the sender notifies the recipient of the erroneous transmission, the lawyer should not examine the documents and to abide by the sending lawyer's instructions as to their disposition. The Colorado Rule added section (c) to the Model Rules which reads as follows:

> (c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender's instructions as to its disposition.

Rule 7.2 - Advertising
Rule 7.3 – Direct Contact with Prospective Clients
Participating in Charity Auctions

Colorado Rule 7.2(b) prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services except in very limited circumstances.[34]

Colorado Rule 7.3 prohibits direct solicitation from potential clients with whom the lawyer has no family or prior professional relationship, prohibits direct solicitation even where such a family or professional relationship exists, if the prospective client has made known to the lawyer a desire not to be solicited or if the solicitation involves coercion, duress or harassment, and requires identification of covered communications as advertising materials.

These rules directly impact the question whether a lawyer can offer legal services as a prize in a charity's auction. Can a lawyer offer to prepare a simple will or accomplish a simple incorporation for the highest bidder? This precise question has not been addressed in Colorado, but it has in other states with two conclusions: "yes, with conditions" and "no."

The opinions that have addressed this issue have typically analyzed it under their state's version of Rules 1.1 (competence), 1.7 (conflicts of interest: current clients), 5.4 (professional independence of a lawyer), Rule 7.2 (advertising) and Rule 7.3 (direct contact

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[34] Similarly, Rule 1.5(e) prohibits lawyers paying referral fees.

with prospective clients). Alabama,[35] California,[36] Nebraska,[37] Hawaii,[38] Pennsylvania,[39] and South Carolina[40] have each provided a qualified "yes. The Nebraska opinion states:

> …[A]n attorney may donate legal services to a charitable organization if all of the following requirements are met:
>
> 1. Services only in the lawyer's area of competence are donated;
>
> 2. The specific service and identity of the lawyer are disclosed;
>
> 3. The lawyer retains the right to decline for conflicts of interest or other ethical reasons the representation in which case the lawyer will refund in full the auction price paid by the client; and
>
> 4. All communications regarding the auction comply with the above requirements and are not false or misleading.

Some of the State Bar opinions that do not approve of lawyers making services available as an auction item argue that it violates the prohibition found in Rule 7.2(b) against giving something of value to a person for recommending a lawyer's services and that purchasers of the auction item may be misled about the qualifications of the lawyer providing the services. The Nebraska opinion refutes these concerns stating:

> [A prior opinion] determined that the issue of a referral fee seemed to apply more appropriately to a lawyer paying a fee to a third party to recommend that lawyer to a paying client. Here, the client pays something of value to the charity and the lawyer receives nothing other than the satisfaction of doing a good deed. It further determined that the possibility of misleading information being communicated to the bidders could be adequately protected against by the attorney in the wording of the auction item that the services would only be in the lawyer's area of competence, that the attorney retains the right to decline the service for conflicts or other ethical

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[35] Alabama Opinion 90-51 (1990).

[36] California State Bar Opinion 1982-65 (1982).

[37] Nebraska State Bar Opinion 06-11 (2007) that withdrew an earlier Nebraska Formal Opinion 92-4 (1992).

[38] Hawaii Opinion 31 (1992).

[39] Philadelphia Opinion 80-35 (undated).

[40] South Carolina Opinion 91-35 (1991).

problems in which case the price would be refunded by the attorney, and that communications regarding the auction not be false and misleading.

Although permitting legal services in a charity auction, the Alabama opinion concludes that "It would be inappropriate, and ethically impermissible for [the lawyer] to limit the gift to a 'simple will' when the purchaser might need something altogether different. Accordingly, such a gift is fraught with danger for the attorney and we would suggest, as an alternative, that a cash donation of comparable value be made."

Kentucky,[41] Maryland,[42] New Hampshire,[43] New York[44] and Ohio,[45] have opined that charitable gifts of legal services are inconsistent with the ethical rules governing attorneys in those jurisdictions. The Ohio opinion stated:

> A lawyer should not donate legal services to be auctioned or used as a prize drawing at a fund raiser for a charitable organization. Under DR 2-103(B), a lawyer's donation of legal services to be auctioned or used as a prize drawing at a fund raiser for a charitable organization is a giving of a thing of value which secures employment of the lawyer. Under DR 5-107(B), a lawyer's agreement with a charitable organization to provide legal services to an unknown silent auction bidder or an unknown winning ticket holder may improperly limit the exercise of the attorney's independent professional judgment as to whom to accept as clients and what services to provide. Further, under DR 2-101(A)(1), it is misleading for a lawyer to donate legal services that he or she may not be able to provide because of other disciplinary rules, such as 6-101(A)(1), DR 5-101(A)(1), DR 5-105, and DR 2-101(F)(1), governing competence, conflicts of interest, and solicitation.

There is an earlier 1972 ABA informal opinion[46] which stated that a lawyer may not participate in a charity auction because to do so would violate the applicable advertising and solicitation provisions (DR 2-101 Publicity in General and DR 2-103 Recommendations of Professional Employment) of the then-effective ABA Model Code of Professional

[41] Kentucky Opinion E-239 (1981).

[42] Maryland Opinion 80-43 (undated).

[43] New Hampshire Opinion 1990-91/2 (1991).

[44] New York State Bar Opinion 524 (1980), Bar of the City of New York Opinion 81-22 (undated), Monroe County, NY Opinion 1 (undated), and Nassau County Opinion 97-11 (12/17/98).

[45] Ohio Supreme Court Opinion 2002-5 (6/14/02).

[46] ABA Informal Opinion 1250 (1972).

Responsibility. Since then, however, the world of attorney advertising has changed significantly and the reasoning in the ABA Informal Opinion is no longer appropriate.[47]

Colorado has not ruled on the issue, but the concerns expressed in the states finding that such a practice is permissible are applicable under the Colorado Rules of Professional Conduct.

Rule 8.4 and 4.1
Private Conduct Not Related to the Practice of Law:
Convictions, Child Support, and Dishonest Conduct

Conduct outside the practice of law may subject an attorney to discipline. Attorneys are required to report any criminal conviction to Attorney Regulation within 10 days of their conviction.[48] This includes convictions for substance abuse, including driving under the influence, and domestic violence. Driving under the influence convictions can result in the suspension of the attorney's license to practice law.[49] If a grievance is filed against an attorney that provides the facts to support the conviction for a crime, an attorney can be disciplined even though not convicted of the alleged crime.[50]

Dishonest conduct while not practicing law can also lead to discipline. Attorneys have been disciplined for lying on their personal credit applications, bankruptcy schedules, and about whether they held auto insurance.[51] Theft, whether from a client or a third party, is also serious misconduct. Attorneys have been disciplined for shoplifting, as well as for taking funds from their buddies which were supposed to be used for purchasing baseball season tickets.[52]

Attorneys are required to report on their annual registration statements whether they have any child support obligations and whether they are current on those obligations.

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[47] *See*, C.R.P.C. Rules 7.1 and 7.2

[48] C.R.C.P. 251.20(b). The self-reporting requirement does not include traffic offenses where drugs or alcohol are not present.

[49] *See, e.g., People v. Hendrick*. No. 08PDJ072, in which the attorney was suspended for thirty days after a conviction for driving under the influence. Substance abuse issues are surprisingly common among attorneys, and can result in the attorney being placed on disability inactive status and/or facing disciplinary charges.

[50] C.R.C.P. 251.5(b).

[51] *People v. Kiely*, 968 P.2d 110 (Colo 1998) (credit application); *People v. Kolbjornsen,* 35 P.3d 181 (Colo. O.P.D.J. 1999) (bankruptcy); *People v. Small*, 962 P.2d 258 (Colo. 1998) (insurance).

[52] *People v. Barnthouse*, 948 P.2d 534 (Colo. 1997) (shoplifting); *People v. Rishel*, 50 P.3d 938 (Colo. O.P.D.J. 2002).

Failure to pay child support will also lead to discipline and can result in the lawyer's license to practice law being summarily suspended.[53]

Under Rule 8.4(h), an attorney can be disciplined when he or she engages "in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law." The comment goes on to state that lawyers "should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category."[54] The language in Rule 8.4(h) is quite broad since there are many kinds of conduct can be argued to reflect on a lawyer's fitness to practice law. This broad definition of personal conduct for which lawyers can be disciplined indicates that lawyers, as officers of the court, are held to a higher standard than the general public even when they are not actively engaged in the practice of law.

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[53] *E.g., In re Green*, 982 P.2d 838 (Colo. 1999) (attorney failed to make child and spousal support payments, eventually becoming over $30,000 in arrears, then failed to file his annual registration statement. The court found the attorney had violated Rules 8.4(d) and (h) and suspended the lawyer for one year and one day). An attorney behind on child support payments can also be immediately suspended from the practice of law, pursuant to C.R.C.P. 251.8.5.

[54] Comment [2] to Rule 8.4.

CERTAIN OF THE COLORADO RULES OF PROFESSIONAL CONDUCT

EFFECTIVE JANUARY 1, 2008

RULE 1.0. TERMINOLOGY

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

RULE 1.6. CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) To prevent reasonably certain death or substantial bodily harm;

(2) To reveal the client's intention to commit a crime and the information necessary to prevent the crime;

(3) To prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(4) To prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(5) To secure legal advice about the lawyer's compliance with these Rules, other law or a court order;

(6) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(7) To comply with other law or a court order.

RULE 1.8. CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (b) through (i) that applies to any one of them shall apply to all of them.

RULE 1.13. ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) Despite the lawyer’s efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) The lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to the information relating to a lawyer’s representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer’s actions taken pursuant to paragraph (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization’s highest authority is informed of the lawyer’s discharge or withdrawal.

(f) In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

RULE 1.16. DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) The representation will result in violation of the Rules of Professional Conduct or other law;

(2) The lawyer’s physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) The lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) Withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) The client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(3) The client has used the lawyer’s services to perpetrate a crime or fraud;

(4) The client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) Other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

RULE 1.18. DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to the prospective client, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) Both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) The lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) The disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) Written notice is promptly given to the prospective client.

RULE 2.3. EVALUATION FOR USE BY THIRD PERSONS

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

RULE 4.3. DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

RULE 7.2. ADVERTISING

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of communications permitted by this Rule;

(2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization.

(3) pay for a law practice in accordance with Rule 1.17; and

(4) refer clients to another lawyer or a nonlawyer pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if

(i) the reciprocal referral agreement is not exclusive, and

(ii) the client is informed of the existence and nature of the agreement.

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

RULE 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) Is a lawyer; or

(2) Has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or realtime electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) The prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) The solicitation involves coercion, duress or harassment.

(c) A lawyer shall not solicit professional employment from a prospective client believed to be in need of legal services which arise out of the personal injury or death of any person by written, recorded, or electronic communication. This Rule 7.3(c) shall not apply if the lawyer has a family or prior professional relationship with the prospective client or if the communication is issued more than 30 days after the occurrence of the event for which the legal representation is being solicited. Any such communication must comply with the following:

(1) No such communication may be made if the lawyer knows or reasonably should know that the person to whom the communication is directed is represented resented by a lawyer in the matter; and

(2) If a lawyer other than the lawyer whose name or signature is contained in the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any such communication shall include a statement so advising the prospective client.

(d) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall:

(1) Include the words “Advertising Material” on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2);

(2) Not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the nature of the prospective client's legal problem.

A copy of or recording of each such communication and a sample of the envelopes, if any, in which the communications are enclosed shall be kept for a period of four years from the date of dissemination of the communication.

(e) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

RULE 8.4. MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process; or

(h) engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law.