

**Colorado Bar Association  
Combined Meeting of the  
Tax, Business, Real Estate, and Trust and Estates Sections**

**ETHICS UPDATE  
December 2, 2009  
By Herrick K. Lidstone, Jr.<sup>1</sup>**

**Selected Topics**

**Introduction**

The practice of tax law, securities law, and business transactional law, as the practice of law in general, is tied to ethical conduct. Even more so, as seen in recent years, financial markets, capital raising, corporate governance, and many other aspects of our nation's economic performance are directly or indirectly in the hands of lawyers. Lawyers have unfortunately been at the forefront of too many news stories:

In SEC Litigation Release 21024,<sup>2</sup> the Securities and Exchange Commission charged two California-based attorneys [and the Company involved – Mobile Ready Entertainment Corp. – and its principal] for preparing and issuing at least 24 fraudulent legal opinions under Rule 144 involving unregistered stock that enabled promoters and others to sell shares into the public market in an illegal pump-and-dump scheme. This resulted in consent orders issued against both attorneys in August 2009.<sup>3</sup>

March 12, 2009: “Attorney Pleads Guilty to Conspiracy to Violate Securities Laws” – Arizona securities lawyer David Stocker plead guilty to participating in a pump-and-dump scheme involving 19 publicly-traded companies in an effort to manipulate trading prices and volume by making materially false and misleading statements in press releases and spam e-mail. In a companion case, Dallas attorney Phillip Offill

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<sup>1</sup> I would like to thank Julie M. Behrman, Esq., an associate with Burns, Figa & Will, P.C., for her assistance in updating this paper.

<sup>2</sup> Announced in SEC Press Release 2009-103, May 5, 2009.

<sup>3</sup> *Albert J. Rasch, Jr.*, SEC Rel. 34-60557, Admin. Proc. 3-13595 (Aug. 21, 2009); *Kathleen R. Novinger*, SEC Rel. 34-60558, Admin. Proc. 3-13596 (Aug. 21, 2009).

was also indicted for participating in the same acts.<sup>4</sup> Both also had civil judgments<sup>5</sup> against them (*SEC v. Peter W. Fisher, et al.*, Civil Action No. 07-cv-12552 GER PJK (E.D. Mich. May 18, 2009); *SEC v. Phillip P. Offill, Jr., et al.*, Civil Action No. 07-cv-1643-D (N.D. Tex. May 7, 2009); and *SEC v. David B. Stocker, et al.*, Civil Action No. CIV-08-1475-PHX-FJM (D. Ariz. May 12, 2009)), including an injunction, more than \$1,000,000 in fines and penalties. Stocker (in June 2009) and Offill (in July 2008) each consented to a bar from practicing before the SEC pursuant to SEC Rule 102(e).<sup>6</sup>

December 11, 2008: “Lawyer Charged With Huge Fraud Is Denied Bail” – about Harvard and Yale-educated Marc Dreier, head of a 280 lawyer firm, Dreier LLP, who allegedly “used guile, a box of cellphones and a series of phony Web sites and e-mail addresses to steal more than \$380 million” from hedge funds and other investors.<sup>7</sup> On May 11, 2009, Dreier pleaded guilty to eight charges in the United States District Court for the Southern District of New York,<sup>8</sup> including one count of conspiracy to commit securities fraud and wire fraud, one count of money laundering, one count of securities fraud and five counts of wire fraud. On July 13, 2009, Dreier was sentenced to 20 years in federal prison.<sup>9</sup>

November 7, 2008: 69 year-old San Diego, California, securities attorney, Carmine J. Bua, consented to action by the SEC under Rule 102(e) as a result of which he may no longer practice securities law because he “drafted numerous legal documents in furtherance of a fraudulent scheme to illegally issue free-trading shares of Global Development & Environmental Resources, Inc. (“Global”), including an attorney opinion letter that directed Global’s transfer agent to improperly issue nearly 2.7 million shares to three foreign entities that sold their shares to the investing public during a fraudulent promotional campaign.”<sup>10</sup> In a related civil action in the middle district of Florida, Mr. Bua “consented to the entry of a final judgment permanently enjoining him from violating Section 5 of the Securities Act and Section 10(b) of the

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<sup>4</sup> *U.S. v. Offill*, E.D.Va. No. 1:09-CR-134 (3/12/09).

<sup>5</sup> News release issued by the Securities and Exchange Commission on March 12, 2009, SEC News Digest Issue 2009-47, available at [www.sec.gov/news/digest/2009/dig031209.htm](http://www.sec.gov/news/digest/2009/dig031209.htm).

<sup>6</sup> *David B. Stocker*, SEC Enforcement Rel. 34-60016, Administrative Proc. 3-13499 (June 1, 2009); *Philip W. Offill, Jr.*, SEC Enforcement Rel. 34-58105, Administrative Proc. 3-13087 (July 7, 2008).

<sup>7</sup> <http://www.nytimes.com/2008/12/12/nyregion/12lawyer.html?scp=1&sq=dreier&st=nyt>.

<sup>8</sup> <http://www.usdoj.gov/usao/nys/pressreleases/May09/Dreier.%20Marc%20Plea%20PR.pdf>. At his plea hearing on May 11, 2009, Judge Rakoff said, “He has disgraced the honorable profession of law.” <http://www.nytimes.com/2009/05/12/nyregion/12dreier.html?em>.

<sup>9</sup> <http://www.nytimes.com/2009/07/14/nyregion/14dreier.html>.

<sup>10</sup> SEC Rel. 34-58919 (Nov. 7, 2008).

Exchange Act and Rule 10b-5 thereunder and to a penny stock bar.” Mr. Bua also agreed to pay disgorgement and civil penalties in an amount to be determined at a later date.<sup>11</sup>

August 14, 2008: “The former top lawyer at Apple Inc. on Thursday agreed to pay \$2.2 million to settle federal regulators’ charges that she altered company records to conceal improper backdating of stock options for senior managers, including the chief executive, Steven P. Jobs.”<sup>12</sup> On December 22, 2008, SEC settled charges against former UnitedHealth General Counsel David J. Lubben relating to his participation in the stock option backdating scheme. Lubben consented to, among other things, an antifraud injunction, a \$575,000 penalty, and a five-year officer and director bar for backdating activities that went on from 1994 until 2005.<sup>13</sup>

June 17, 2008: “The best-known shareholder law firm in the country agreed on Monday to pay \$75 million to dodge a criminal trial, ending a seven-year investigation that tarnished the profession’s image.”<sup>14</sup> As the article goes on to say, “One of its most famous partners, William S. Lerach, is in prison, and the other, Melvyn I. Weiss, is headed there under previously announced guilty pleas.”

In 2006, *Business Week* magazine<sup>15</sup> reported that court-appointed bankruptcy examiner, Neal Batson, said that opinion letters from Enron’s counsel, Vinson & Elkins, LLP, were “crucial to Enron’s ability to complete” complex “total return swaps” where Enron, in reality, retained control of the assets. At the time, some Vinson & Elkins lawyers expressed concern about the opinions, stating in one memo, “We [are] unsure of how [the] opinion rendered satisfies the requirements of FASB.” Vinson & Elkins partners knew that Enron’s CFO, Andrew Fastow, controlled some of the purchasers. In his Final Report, to the Bankruptcy Court, Mr.

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<sup>11</sup> SEC Litig. Rel. 20598 (May 23, 2008) regarding *SEC v. Global Development & Environmental Resources, Inc.*, (U.S. District Court for the Middle District of Florida, Civil Action No.8:08-CV-993-T-27-MAP filed May 22, 2008).

<sup>12</sup> <http://www.nytimes.com/2008/08/15/technology/15options.html?scp=1&sq=backdating&st=nyt>.

<sup>13</sup> *SEC v. David J. Lubben*, Case No. 08-CV-6454 PJS/FLN (D. Minn. filed Dec. 22, 2008), SEC Litigation Release 20836. On February 19, 2009, the SEC suspended Mr. Lubben from practice before the SEC for three years, and on January 23, 2009, Mr. Lubben consented to an injunction by which he agreed to refrain from violating the securities laws. <http://www.sec.gov/news/digest/2009/dig022009.htm>.

<sup>14</sup> <http://www.nytimes.com/2008/06/17/business/17legal.html?scp=2&sq=lerach&st=nyt>.

<sup>15</sup> “Enron’s Last Mystery,” available at [http://www.businessweek.com/magazine/content/06\\_24/b3988056.htm](http://www.businessweek.com/magazine/content/06_24/b3988056.htm). The subtitle to this article describes the content: “Was Enron’s law firm, Vinson & Elkins, as blind to the company’s shenanigans as it maintains? Internal messages reviewed by *BusinessWeek* suggest the firm doubted the legitimacy of some of Enron’s business practices.”

Batson criticized Vinson & Elkins for “a true sale” opinion delivered in connection with a transaction for which a valid business purpose was essential, even though Vinson & Elkins allegedly knew that there was no valid business purpose for the transaction.<sup>16</sup> Ultimately Vinson & Elkins settled related litigation, agreeing in June 2006 to pay \$30 million to Enron’s bankruptcy estate.<sup>17</sup>

Lawyers have an important role to play in business and securities transactions. As stated in an article published in *The Colorado Lawyer*:<sup>18</sup>

In July 2002, as a result of numerous corporate and accounting scandals that have plagued the public market commencing in the summer of 2001, Congress adopted the Sarbanes-Oxley Act (“Sarbanes-Oxley” or “the Act”) in an effort to legislate morality and honesty in the financial markets. Although much of Sarbanes-Oxley imposes additional regulation on auditors, public companies and their directors and executive officers, and securities analysts, § 307 of the Act also requires the Securities and Exchange Commission (“Commission” or “SEC”) to define “minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers.” In § 307, Congress required that, not later than January 26, 2003, the Commission adopt a rule:

- 1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
- 2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

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<sup>16</sup> *In re Enron Corp.*, report of Neal Batson, Court-appointed examiner in the United States Bankruptcy Court for the Southern District of New York (Case no. 01-16034 (AJG)) Final Report (Nov. 4, 2003) at pages 48-55, summary available at [http://www.calbar.ca.gov/calbar/pdfs/sections/buslaw/opinions/2005\\_opinions-law-developments\\_report.pdf](http://www.calbar.ca.gov/calbar/pdfs/sections/buslaw/opinions/2005_opinions-law-developments_report.pdf).

<sup>17</sup> Reported in *The Houston Chronicle*, June 2, 2006. See Roper, “Vinson & Elkins Settles with Enron for \$30 million,” available at <http://www.chron.com/disp/story.mpl/special/enron/3921779.html>.

<sup>18</sup> Lidstone, *Am I My Brother’s Keeper? Redefining the Attorney-Client Relationship*, 32 THE COLO. L. No. 4 at 11 (April 2003) [citations omitted].

Senator John Edwards (D-NC), himself an attorney, offered § 307 by amendment on the Senate floor “to protect investors from unprofessional conduct by lawyers, conduct that violates the legal standards of the profession.” Discussing the amendment on the Senate floor, co-sponsor Senator Michael Enzi (R-WY), an accountant, explained:

[P]robably in almost every transaction there was a lawyer who drew up the documents involved in that procedure. . . . [T]here ought to be some kind of an ethical standard put in place for the attorneys as well. . . . Maybe it could be called the ‘smell test.’ If something smells wrong, somebody who can do something to fix it ought to be told.

In other words, “where were the lawyers” when the clients were completing their misdeeds, their accounting violations, their securities fraud? As a result, Congress adopted § 307 of the Sarbanes-Oxley Act<sup>19</sup> and the SEC went on to adopt its attorney conduct rules.<sup>20</sup> One of the rule proposals included a requirement that attorneys make a “noisy withdrawal” in certain circumstances. While not adopting that rule, the SEC repropose the noisy withdrawal rule and has not subsequently withdrawn it.<sup>21</sup> Several high profile securities lawyers and law professors have expressed their belief that the SEC has taken the

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<sup>19</sup> Sarbanes-Oxley, Section 307 states: “Not later than 180 days after the date of enactment of this Act, the Commission shall 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, including a rule--

1. requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
2. if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.”

<sup>20</sup> 17 C.F.R. § 205.1 *et seq.* For a more detailed discussion of the Attorney Conduct Rules as adopted by the SEC, see Lidstone, *The Securities Law Deskbook* ([www.bradfordpublishing.com](http://www.bradfordpublishing.com)) at §§ 13.6 – 13.7, Lidstone, *Am I My Brother’s Keeper? Redefining the Attorney-Client Relationship*, 32 THE COLO. L. (CBA) No. 4 at 11 (April 2003) and Lidstone, *Sarbanes-Oxley Act of 2002: Impact on Private Companies and their Attorneys*, 33 THE COLO. L. (CBA), no. 7 at 73 (July 2004).

<sup>21</sup> SEC Rel. 33-8186, 34-47282, IC-25920. This so-called Noisy Withdrawal Release would have required an attorney who was not satisfied with the client’s action to correct a material violation to announce to the Commission his or her resignation “for professional reasons.” The Commission itself acknowledges that the noisy withdrawal proposal went beyond the requirements of Sarbanes-Oxley. Senator Enzi made it clear in his remarks that § 307 “would not require the attorneys to report violations to the [SEC], only to corporate legal counsel or the CEO, and ultimately to the board of directors.” 148 Cong. Rec. S6555 (Daily ed., July 10, 2002).

§ 307 mandate to extremes in the SEC's actions against lawyers – with the SEC not “evaluating, interpreting or considering the obligations of the attorneys involved to the clients represented,” in the SEC's enforcement zeal.<sup>22</sup>

Attorneys can use the new rules as a protective mechanism, too. As reported in the *Wall Street Journal* on February 19, 2009 and discussed in the *Law Blog*,<sup>23</sup> following the disclosure of the Ponzi scheme operated by Allen Stanford, his former attorneys effected a noisy withdrawal – something that would not have been permitted under the pre-January 1, 2008 Rules of Professional Conduct as in effect in Colorado. In their withdrawal on February 14, 2009, Thomas Sjoblom of the Proskauer Rose law firm advised the SEC in writing that:

“I disaffirm all prior oral and written representations made by me and my associates to the SEC staff regarding Stanford Financial Group and its affiliates.”<sup>24</sup>

In making the noisy withdrawal, Mr. Sjoblom referenced SEC Rule 205.3<sup>25</sup> that had been adopted by the SEC under the mandate of § 307 of the Sarbanes-Oxley Act of 2002.<sup>26</sup>

In one case where the attorneys were caught up in a client's fraud, a law firm, Mayer Brown & Rove, was granted summary judgment in a civil suit brought by investors. Summary judgment was granted despite the fact that one of their partners had been indicted for his role in the fraud to cover up the true financial condition of Refco, Inc., an international brokerage firm that collapsed in October 2005 when it was discovered that its chief executive officer had hidden \$430 million in bad debts from Refco's auditors and investors. In the civil case against Mayer Brown and its partner, Joseph P. Collins,<sup>27</sup> the federal district court felt obligated to dismiss the civil suit based on *Central Bank of Denver*<sup>28</sup> and *Stoneridge*,<sup>29</sup> but offered its commentary in its footnote 15:

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<sup>22</sup> Lowenfels, *et al.*, *SEC Actions Against Lawyers Post Sarbanes-Oxley: A Reasoned Approach or an Assault on the Practicing Securities Bar?*, 41 Sec. Reg. & L. Rep (BNA) at 1739 (9-21-09).

<sup>23</sup> See discussion in The Conglomerate, <http://www.theconglomerate.org/2009/02/page/2/>, a blog published by professors associated with the University of Illinois School of Law.

<sup>24</sup> For an interesting discussion of the fall-out from this action by the former chief investment officer for Steinford Financial Group, Lauren Pendegast-Holt, see “*Corporate Miranda*,” 19 Business Law Today (ABA) at 51 (Sept. - Oct. 2009). Ms. Holt filed a \$20,000,000 legal malpractice claim against Sjoblom and the Proskauer firm.

<sup>25</sup> 17 C.F.R. §205.3.

<sup>26</sup> Pub. L. No. 107-204, 116 Stat. 745, codified at 15 U.S.C. § 7245.

<sup>27</sup> *In re Refco, Inc. Securities Litigation*, 609 F. Supp. 2d 304, 319 (S.D.N.Y. 2009).

<sup>28</sup> *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994).

It is perhaps dismaying that participants in a fraudulent scheme who may even have committed criminal acts are not answerable in damages to the victims of the fraud. However, as the Court noted in *Stoneridge*, the fact that the plaintiff-investors have no claim is the result of a policy choice by Congress. 128 S.Ct. at 769. In 1995, in reaction to the Supreme Court's decision in *Central Bank*, Congress authorized the SEC-but not private parties-to bring enforcement actions against those who "knowingly provide [ ] substantial assistance to another person" in violation of the federal securities laws. See PSLRA, Pub.L. No. 104-67, § 104, 109 Stat. 737, 757, codified in 15 U.S.C. § 78t(f). This choice may be ripe for legislative re examination. While the impulse to protect professionals and other marginal actors who may too easily be drawn into securities litigation may well be sound, a bright line between principals and accomplices may not be appropriate. There are accomplices and there are accomplices: after all, in the criminal context when the Godfather orders a hit, he is only an accomplice to murder-one who "counsels, commands, induces or procures" but he is nonetheless liable as a principal for the commission of the crime. 18 U.S.C. § 2(a). Likewise, some civil accomplices are deeply and indispensably implicated in wrongful conduct. Perhaps a provision authorizing the SEC not only to bring actions in its own right but also to permit private plaintiffs to proceed against accomplices after some form of agency review would provide the necessary flexibility without involving the courts in standardless and difficult-to-administer line-drawing exercises.<sup>30</sup>

Any attorney assisting his or her public or private company client in business transactions or in day-to-day representation must consider whether they are "appearing and practicing before the Commission" pursuant to the expansive definition found in the Attorney Conduct Rules.<sup>31</sup> Whether or not appearing and practicing before the SEC, each attorney licensed in Colorado is subject to the Rules of Professional Conduct. The Rules of Professional Conduct are discussed below from the perspective of the transactional lawyer. Copies of many of the rules discussed are included as exhibits hereto.

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<sup>29</sup> *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 522 U.S. 148 (2008).

<sup>30</sup> On July 30, 2009, Sen. Arlen Specter introduced S. 1551 to amend §20 of the 1934 Act to allow for a private civil action against a person providing substantial assistance to a Rule 10b-5 violation – a bill which, if enacted, would overrule *Stoneridge* and *Central Bank of Denver*.

<sup>31</sup> 17 C.F.R. § 205.2(a),

### **Rule 1.0(e) Informed Consent**

Many of the Rules of Professional Conduct require the client's "informed consent" before the lawyer can take any action.<sup>32</sup> In some cases the rules require the client's "informed consent confirmed in writing." Rule 1.0(e) 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." A failure to communicate is one of the leading causes for clients filing grievances against their attorney. The Colorado Supreme Court Attorney Regulation Counsel reports that out of 4,119 complaints filed against attorneys in 2008, approximately 8% (more than 320) involved claims of failure to communicate. Sanctions against attorneys for a failure to communicate can be severe.<sup>33</sup>

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<sup>32</sup> 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).

<sup>33</sup> See Wald, *Attorney-Client Communications in Colorado*, 38 THE COLO. L. (CBA) No. 4 at 59 (Apr. 2009). The statistics were derived from note 4 to that article.

### **The Attorney/Client Relationship**

Whether an attorney-client relationship exists is a question of fact, and the attorney-client relationship, itself, has a number of issues that must be considered. The client must be identified, and the identification of the client has certain complexities when an attorney is dealing with an organization, or individuals who want to form an entity. There are times when a person other than the client will be paying fees on behalf of the client, and those issues must be addressed. All attorneys owe their clients a specific fiduciary duty of care, and this duty even includes prospective clients in certain circumstances. Finally, attorneys must be aware of the proper procedure for declining or terminating representation. These topics are addressed individually below.

***The Attorney-Client Relationship, In General.*** First, it is important to note that no formal engagement letter or writing is necessary to create an attorney-client relationship.<sup>34</sup> A putative client's reasonable, subjective belief that he is being represented by an attorney may be sufficient to give rise to the attorney-client relationship and the duties imposed by law on the lawyer in such a relationship. In *People v. Bennett*,<sup>35</sup> The Colorado Supreme Court held:

“An attorney-client relationship is ‘established when it is shown that the client seeks and receives the advice of the lawyer on the legal consequences of the client’s past or contemplated actions.’ The relationship may be inferred from the conduct of the parties. The proper test is a subjective one, and an important factor is whether the client believes that the relationship existed. Further, ‘[t]he attorney-client relationship is an ongoing relationship giving rise to a continuing duty to the client unless and until the client clearly understands, or reasonably should understand, that the relationship is no longer to be depended on.’” [Citations omitted]

As stated in § 14 of The Restatement of the Law Governing Lawyers, when a putative client manifests to a lawyer the person's interest that the lawyer provide legal services to the person and the lawyer fails to manifest lack of consent to do so, the lawyer-client relationship may arise.

This goes even further in the opinion of one panel of the Colorado court of appeals, applying the tort of negligent misrepresentation in a case where there was admittedly no attorney-client relationship. In *Steele v. Allen*,<sup>36</sup> an injured motorist consulted an attorney

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<sup>34</sup> If the attorney expects to be paid for his or her services, Rule 1.5(b) requires that the basis for compensation be communicated to the client in writing, when the attorney has not previously regularly represented the prospective client.

<sup>35</sup> 810 P.2d 661 (Colo. 1991).

<sup>36</sup> \_\_\_ P.3d \_\_\_, 2009 WL 399992 (Colo. App. 2009), *cert filed* April 2009.

regarding legal options against the other driver. During the initial consultation, plaintiff claimed that the attorney advised him of an erroneous statute of limitations. The plaintiff (Steele) never retained the attorney and did not allege that an attorney-client relationship was ever established. When Steele sought advice from another attorney, the statute of limitations had expired and he lost his claim. He then sued the attorney for professional negligence and negligent misrepresentation. The district court dismissed the case on motion, but the Court of Appeals reversed, relying in part on *Mehaffy, Rider Windholz & Wilson v. Central Bank of Denver, N.A.*,<sup>37</sup> affirming a Court of Appeals ruling finding that attorneys could be liable to non-clients for negligent misrepresentation.<sup>38</sup> The Court of Appeals went on to say:

We note that the specter of potential liability to an unlimited number of third parties, which concerned the court in *Mehaffy* is alleviated by the requirement in a claim for negligent misrepresentation that the plaintiff show that the defendant supplied false information in the context of a business transaction regarding the representation of a potential client. However, informal statements by an attorney in a social setting would generally not result in a viable claim against the attorney.<sup>39</sup>

In a 2009 case, a prominent Denver law firm sought a motion to dismiss a suit brought against it in a case where there allegedly existed conflicts of interest in its representation of both a lender and a borrower.<sup>40</sup> As alleged in the complaint, Dury loaned funds to a group of businesses (the “Trinity Entities”) which then failed to repay Dury the monies borrowed. After Dury filed an action against the Trinity Entities, they filed for bankruptcy protection. Dury retained the law firm and attorney Miller (a partner of the firm) to draft the promissory notes and other documents. At the time, the firm was also representing the Trinity Entities and two of their founders. During the course of representing Dury, the complaint alleges that the defendant firm and attorney took positions contrary to Dury’s interests and disclosed privileged information to at least one of the founders. Dury alleged that the attorney and the firm failed to disclose the conflicts of

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<sup>37</sup> 892 P.2d 230 (Colo. 1995); the Court of Appeals decision is at 865 P.2d 862 (Colo. App. 1993).

<sup>38</sup> 865 P.2d at 865. The Court of Appeals also cited Section 15 of the Restatement (Third) of the Law Governing Lawyers and Colo. R.P.C. 1.18 which impose certain obligations on lawyers deal with prospective clients. As stated in a commentary by Anthony Davis, the court could have reached a similar conclusion if it had reviewed the facts and concluded that the lawyer had established an attorney-client relationship and gave the client (allegedly) bad advice knowing that the client would rely on it. Compensation to the lawyer is not material to the establishment of the attorney-client relationship. Davis, *Duties to Prospective and Pro Bono Clients*, 242 N.Y. Law J. (Jul. 6, 2009) at col. 1 (© The New York Law Pub. Co.).

<sup>39</sup> The Court of Appeals went on to cite Restatement (Second) of Torts §552 cmt. d, and concluded, “Thus, whether statements are made during an initial consultation for legal services or in a casual manner in a social setting may ultimately be determinative of whether a lawyer is liable for negligent misrepresentation.”

<sup>40</sup> *Dury v. Ireland, Stapleton, Pryor & Pascoe, P.C.*, 2009 WL 2139856 (D. Colo., 7-14-2009).

interest to him and that, if the attorney and the firm were not acting as counsel to Dury (because they were acting as counsel to their other clients instead), they had “tortiously failed to disclose this fact to [Dury].” In denying the attorneys’ motion for dismissal the District Court said (in part):

“[A]n attorney can be liable for negligent nondisclosure when he fails to exercise reasonable care or competence in communicating materially incomplete information to a non-client regarding a matter in which the attorney should reasonably foresee the non-client will rely on the incomplete information.”<sup>41</sup>

As indicated in the *Bennett* case, once the attorney-client relationship has commenced, the question of whether the attorney-client relationship has concluded can be difficult. As quoted above, *Bennett* says clearly:

‘The attorney-client relationship is an ongoing relationship giving rise to a continuing duty to the client unless and until the client clearly understands, or reasonably should understand, that the relationship is no longer to be depended on.’

***Declining and Terminating Representation; Prospective Clients.*** *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. Generally the 2008 rule is similar to the former rule. 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. The right to withdraw may be limited if the attorney’s withdrawal may materially adversely affect the client.

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.” The Colorado Bar Association Ethics Committee issued letter opinion 2007-2<sup>42</sup> 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

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<sup>41</sup> Citing *Smith v. Boyett*, 908 P.2d 508, 513-14 (Colo. 1995) and *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.*, 892 P.2d 230, 236-37 (Colo. 1995).

<sup>42</sup> Abstract available at 36 THE COLO. L. (CBA) No. 11 at 17 (Nov. 2007).

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.<sup>43</sup>

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.<sup>44</sup> Formal Opinion 104 does not address whether (for 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.<sup>45</sup> 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 is 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. Metadata<sup>46</sup> is a known feature of MS Word, and can only be

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<sup>43</sup> 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/>.

<sup>44</sup> 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/>.

<sup>45</sup> 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."

<sup>46</sup> The Southern District of New York engaged in an in depth discussion of metadata in the context of litigation in *Aguilar v. Immigration and Customs Enforcement*, 255 F.R.D. 350 (SDNY 2008). It identified three types of metadata: substantive, system and embedded:

removed by special metadata scrubbers or by converting the document to a read-only format such as Adobe. In an article addressing metadata, the author concluded that when sending documents to third parties on behalf of the client, metadata scrubbing is consistent with the attorney's duty of confidentiality under C.R.P.C. Rule 1.6(a).<sup>47</sup> 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 Opinion 104.

Colorado Rule 1.16(d) requires that, when terminating the representation of a client, a lawyer take steps necessary to protect the client's interests including (without limitation) "giving reasonable notice to the client" of the termination. Comment [1] to Rule 1.16 provides that "[o]rdinarily, representation in a matter is completed when the agreed-upon assistance has been concluded." Even then, notification under Rule 1.16(d) is required unless the termination of the representation upon conclusion of the matter at hand was

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Substantive metadata was identified as data "created as a function of the application software used to create the document or file," such as prior edits or editorial comments.

System metadata was defined as data that "reflects information created by the user or by the organization's information management system," such as data concerning author, date and time of creation and modification.

Embedded metadata was defined as consisting of "text, numbers, content, data or other information that is directly or indirectly inputted into a [n]ative [f]ile by a user and which is not typically visible to the user viewing the output display," such as spreadsheet formulae.

In *Dahl v. Bain Capital Partners, LLC*, 2009 WL 1748526 (D.Mass.,2009), the court denied plaintiffs' motion requesting the production of all metadata associated with emails and MS Word documents produced by the defendants. The court advised the plaintiffs that, instead of making "sweeping requests for metadata," such requests should be tailored to specific documents which would in turn reduce the costs and burdens associated with electronic discovery. The court denied the defendant's request to shift the costs of discovery to the plaintiffs, but said that if the plaintiffs wanted to change the data into a format other than the form maintained by the defendants, the plaintiffs would have to bear the burden of that cost.

<sup>47</sup> Luce, "What's the Matter With Metadata," 36 THE COLO. L. (CBA) No. 11 at 113 (Nov. 2007). Mr. Luce also concluded that metadata mining (adverse counsel retrieving and using metadata from sent documents) is permissible under the pre-2008 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. See, also, Colorado Ethics Committee Formal Opinion 119 (May 17, 2008) published at 37 THE COLO. L. (CBA) No. 8 at 59 (Aug. 2008).

clearly set forth in the engagement letter. As stated in a 1994 article<sup>48</sup> which is still good guidance:

“Due to the discrepancies and different standards being applied by the courts today in the determination of when the attorney-client relationship terminates, attorneys should take extra precautions to make sure that there is a clear, unambiguous end to the attorney-client relationship. Attorneys should make sure that the relationship’s termination is evidenced in writing and in such a manner that neither the client nor a tribunal can question the relationship’s termination.”

*Rule 1.18 – Prospective Clients.* Rule 1.18 has no counterpart in the pre-2008 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.”<sup>49</sup> Additionally, written notice must be given to the prospective client.

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.<sup>50</sup> Thus the effect of this new rule

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<sup>48</sup> Sutton, *How Long Does an Attorney-Client Relationship Last?*, Journal of the Legal Profession (1994) 277, at 287.

<sup>49</sup> 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.”

<sup>50</sup> 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

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.

***Who Is the Client?*** When an attorney represents a legal entity such as a corporation, limited liability company, or other entity, the attorney must identify the client at the inception of the representation. It is frequently important to reconsider the issue from time-to-time during the representation because, as noted above in *Bennett*, the attorney-client relationship can evolve and take different forms.

An entity is a legal fiction – it is a ‘person’ for legal purposes, but it cannot take any action except through the efforts of its managers, officers, members, directors, or other human beings. Frequently representation of an entity over time results in a close relationship between the attorney and certain of these human beings. The attorney must always remember that, when representing the organization these individuals are not the attorney’s client – the client is the organization.

Colo. RPC Rule 1.13 makes it clear that that 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.” Rule 1.13 of the ABA’s Model Rules of Professional Conduct is identical.

While Rule 1.13 makes it clear that the attorney must recognize the entity as his or her client, Rule 1.13 does not prevent the attorney-client relationship from evolving to include constituents, as well. This can happen when the attorney is not careful, or intentionally. During the representation, the relationship may evolve and the entity’s constituent (officer, director, or other) may “seek[] and receive[] the advice of the lawyer on the legal consequences of the client’s past or contemplated actions.” As the court in *Bennett* said, this is a subjective analysis and depends in large part upon the belief of the putative client.

The client may intentionally evolve. For example, during a merger or acquisition transaction, an attorney for the target may also be representing the officers in negotiating employment contracts. Conflicts of interest rules under Colo. RPC 1.7 must be considered, but this may be a waivable conflict. Of course, the tougher the attorney is in negotiating the

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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 are not discussed in the comments to Rule 1.10 or Rule 1.18.

employment contract (or other economic terms outside of the target's interest), the less value may remain for the target and its equity holders. Thus, depending on the facts and circumstances, the conflict may not be waivable.

Thus, the attorney must make clear to all relevant parties, not only at the commencement of the representation but during the progress of the representation, where the attorney-client relationship lies.

When a dispute develops that involves the entity and certain of its constituents, the attorney for the entity must be on a heightened awareness. Formal Opinion 120<sup>51</sup> reiterates Rule 1.13 that the attorney representing the organization owes his or her duties to the organization. The Formal Opinion goes on to provide that representing the organization does not necessarily mean that the attorney is also representing any of the constituents (stockholders, members, officer, directors, or managers). Consequently, the attorney representing the organization cannot assert that he or she is also representing any constituent unless the attorney reasonably believes that he or she has been retained to represent the constituent. "Knowingly making such an assertion without having [such] a reasonable belief . . . would violate Rule 4.1 on truthfulness in statements to others.

Formal Opinion 120 goes on to discuss the situation where the interests of the organization are potentially adverse to the interests of its constituents. In that case, the attorney must clarify his or her role and advise the constituents that the attorney-client relationship flows to the organization and that the constituent may want to obtain independent representation. The other consequence is that there would not be confidentiality or attorney-client privilege in communications between the attorney and the constituent.

Finally, Formal Opinion 120 reminds attorneys that, under Rule 3.4(f), an attorney is prohibited from requesting that a person (other than a client) refrain from providing non-privileged information to another party except where both: (1) the person is a relative or employee or other agent of the client and the lawyer is not prohibited by other law from making the request **and** (2) the lawyer reasonably believes the person's interest will not be adversely affected by refraining from giving such information.

***Forming an Entity – Who Is the Client?*** During the pre-formation period, the attorney is working with individuals to form an entity. If the entity will be the ultimate client, the lawyer must recognize that the entity does not yet exist. But the lawyer must make it clear to the individuals that none of them is individually, his client. The Colorado rules do contemplate this representation, but the attorney must recognize, and must advise his or her clients, that there are significant potential conflicts of interest in almost any entity formation. As only a single example, when the clients are valuing their respective

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<sup>51</sup> Colorado Bar Association Ethics Committee, adopted May 17, 2008 (published at 37 THE COLO. L. (CBA) No 8 at 62 (Aug. 2008)).

contributions to the entity, each time a share or percentage is issued to one person, that share or percentage is not available to another. There are many more subtle decisions that must be made in the formation of an entity, the drafting of a buy-sell or other agreement among the equity holders, and in the continuing representation where one decision may favor one of the constituents and disadvantage another. Thus the issues discussed below surrounding 1.7 (conflicts of interest) and 4.3 (dealing with unrepresented persons) must be considered (among others). In considering these issues, note Comments [8] and [28] to Rule 1.7:

“[8] . . . For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer’s ability to recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the others. The conflict in effect forecloses alternative that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of [one of the clients].”

“[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties’ mutual interests. Otherwise each party might have to obtain separate representation, with the possibility of incurring additional cost, complication, or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.”

While it may be the clients’ preference that the lawyer acts for all of them, the lawyer would frequently be better served by identifying and acting for a single client, even if it may be the entity that does not yet exist. In any event, the attorney must advise the individuals involved as to the attorney-client relationship with the recommendation (in writing) that each of the individuals consult with their own attorney if they determine it to be necessary or appropriate in the circumstances.<sup>52</sup>

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<sup>52</sup> See Colo. RPC 4.3, Dealing with Unrepresented Persons.

The Arizona State Bar has expressed the opinion that it is permissible for a lawyer to represent an entity that does not yet exist:

As long as the incorporators understand that they are retaining counsel on behalf of the yet-to-be-formed entity and will need to ratify this corporate action, *nunc pro tunc*, once the entity is formed.<sup>53</sup>

The Arizona Opinion goes on to say that it is the lawyer's duty to clarify at the outset whom the lawyer represents.

Colo. RPC 4.3 (effective January 1, 2008) introduces a new concept by permitting 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. New 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 beneficial clarification under the 2008 rules. Other states have reached a similar conclusion, although in some cases using a retroactive application of the entity rule<sup>54</sup> to do so.

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<sup>53</sup> Ariz. Opinion No. 02-06 at 3 (Sept. 2003).

<sup>54</sup> The entity rule, which derives from CRPC Rule 1.13, holds that the lawyer represents the entity, not the individual constituents. *See, for example, Jesse v. Danforth*, 485 N.W.2d 63 (Wis. 1992), which offered the following guideline:

[W]here (1) a person retains a lawyer for the purpose of organizing an entity and (2) the lawyer's involvement with that person is directly related to that incorporation and (3) such entity is eventually incorporated, the entity rule applies retroactively such that the lawyer's pre-incorporation involvement with the person is deemed to be representation of the entity, not the person.

*See also Manion v. Nagin*, 394 F.3d 1062 (8<sup>th</sup> Cir. 2005). *See also McKinney v. McMeans*, 147 F.Supp.2d 898 (W.D. Tenn. 2001) (following *Jesse*, denying motion to disqualify plaintiff's attorney, who prepared shareholder agreement, represented the corporation, then filed suit on behalf of one shareholder against the other); *In re Ireland*, 706 P.2d 352 (Ariz. 1985) (disciplining lawyer for conflict of interest for failing to

The engagement letter for the representation is usually the first time the attorney has to clarification the focus of the representation and to identify the client. When drafting any further agreement that defines the relationship among the unrepresented persons and the represented entity it is important to be clear that each unrepresented person should consult with his or her own legal advisors if they determine it to be necessary. It is not the attorney's choice whether such consultation is necessary – it is a decision that should be made by the unrepresented person, whether a member or manager of the LLC, partner of a partnership, or an officer, shareholder, or director of a corporation.<sup>55</sup>

***Who Is Paying the Fees?*** In some cases, a person other than the named client may be paying the client's fees – such as when a promoter is paying the legal fees of a corporation or when the acquirer is paying the fees of the target who may not otherwise be able to afford the necessary legal representation. In any case where a person other than the client is paying legal fees, the attorney must consider the requirements of Rule 1.8(f) of the Colorado and Model Rules of Professional Conduct:

A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consents after consultation; (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.

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disclose to corporation one incorporator's improper use of funds, where evidence showed that lawyer represented corporation in formation and operation); B. Wunnicke, *Ethics Compliance for Business Lawyers* §§ 8.4 and 8.5 (1987) ("The appealing reality is that often the lawyer who is organizing a corporation is representing the group.") (*quoted with approval in Meyer v. Mulligan*, 889 P.2d 509, 514 (Wyo. 1995)); "An Expectations Approach to Client Identity," 106 *Harv. L. Rev.* 687, 691, 696 (Jan. 1993) (*Jesse* comports with the "reasonable constituent's expectation approach"; "Treating pre-incorporation individual representation, absent evidence to the contrary, as entity representation accords with an organizer's reasonable expectations during the incorporation phase of the company's existence."); T. Thompson, "What is an Entity? – Entity-in-Formation," 6 *Ariz. Prac. Corporate Practice* § 2.5 (2004 ed.) (*citing Jesse* for proposition that treatment of entity-in-formation as person capable of being a client has become "well settled").

<sup>55</sup> For example, see the following disclaimer published in Lidstone, "*Form of Stock Redemption and Cross Purchase Agreement*" (ch. 23) in Rozansky and Reichert, PRACTITIONER'S GUIDE TO COLORADO BUSINESS ORGANIZATIONS (Colorado Bar Assn. 2007)

**Section 15.6. Professional Advisors.** The Parties understand, acknowledge, and agree that the law firm of \_\_\_\_\_, P.C. represents only the Company with respect to this Agreement and has offered no legal, tax, or other advice to any Stockholder. The Stockholders further acknowledge and agree that: They have been advised to retain independent legal, tax, and accounting advice of their own choosing for purposes of representing their individual interests with respect to the subject matter hereof; They have been given reasonable time and opportunity to obtain such advice; and They have obtained such independent advice as they have deemed necessary and appropriate in the circumstances.

Once again, it is advisable for the attorney to make all necessary disclosures in writing and obtain the client's informed consent.<sup>56</sup>

**Duty of Care.** An attorney owes a duty of care to each client.<sup>57</sup> Colorado courts have held that attorneys also owe a fiduciary duty to their clients.<sup>58</sup> The duty of care requires that an attorney act with reasonable diligence and promptness in attending to the client's needs.<sup>59</sup> An attorney must employ that degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession at the time the task is undertaken.<sup>60</sup> If a dispute arises, the trier of fact determines whether the attorney has breached any duty.<sup>61</sup>

The duty of care requires an attorney to "protect a client in every possible way."<sup>62</sup> In *O'Melveny*, the court denied summary judgment in favor of a law firm because a triable issue of fact existed as to why the law firm failed to provide accurate opinion letters for two private offerings. The court explained that within the context of the private offerings, the law firm had a duty to make a "reasonable, independent investigation." The court also noted an expert witness' testimony arguing that the law firm's failure to contact their client's

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<sup>56</sup> Colo. RPC 1.0(e) defines informed consent to be the person's "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." The attorney may confirm the consent in a letter to the person, or may obtain the person's signature on a communication, such as an engagement letter. 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."

<sup>57</sup> Restatement of the Law Governing Lawyers § 483, cmt. e.

<sup>58</sup> *Miller v. Byrne*, 916 P.2d 566, 579 (Colo. Ct.App. 1995). Generally, a fiduciary duty arises between individuals through a relationship where one party is empowered with a high level of control, trust, confidence or reliance. *Bailey v. Allstate Ins. Co.*, 844 P.2d 1336, 1339 (Colo. Ct.App. 1992). Certain relationships give rise to fiduciary duties as a matter of law. *Id.* Due to the high degree of control, level of trust and level of confidence empowered to an attorney, the attorney-client relationship gives rise to fiduciary obligations as a matter of law. *See Id.*; Restatement of the Law Governing Lawyers § 49. Legal malpractice actions based on breach of fiduciary duty involve violations of standards of conduct. *Smith v. Mehaffy*, 30 P.3d 727 (Colo. Ct.App. 2000). In order to establish a breach of a fiduciary duty, the plaintiff must demonstrate "that [1] the plaintiff incurred damages, and [2] that the [attorney's] breach of fiduciary duty was the cause of the damages sustained." *Miller*, 916 P.2d at 575.

<sup>59</sup> Colo. RPC 1.3 (noting that an attorney cannot neglect legal matters entrusted to the attorney).

<sup>60</sup> *McCafferty v. Musat*, 817 P.2d 1039, 1043-44 (Colo. App. 1990) (finding professional negligence where an attorney recommended settling a case before performing any discovery); *See also* Restatement of the Law Governing Lawyers § 52.

<sup>61</sup> *McCafferty*, 817 P.2d at 1044.

<sup>62</sup> *FDIC v. O'Melveny & Meyers*, 969 F.2d 744, 748 (9<sup>th</sup> Cir. 1992), rev'd on other grounds *O'Melveny & Myers v. FDIC*, 114 S.Ct. 2048 (1994) (quoting *Day v. Rosenthal*, 170 Cal App. 3d 1125, 1143 (1985)).

former counsel and accountants was a breach of the duty of due care. The plaintiff, the Federal Deposit Insurance Corporation, did not allege that the law firm had been aware of the fraud nor did the court's conclusion rest on the law firm's awareness of the fraud. The court in *O'Melveny* set forth that an attorney fulfills the duty of due care by performing with "such skill, prudence, and diligence as attorneys of ordinary skill and capacity commonly possess."<sup>63</sup>

An important aspect of the Rules of Professional Conduct is their availability to private litigants. The Rules of Professional Conduct are primarily directed toward attorney conduct and disciplinary matters before the state organization (Supreme Court or other appropriate body) that regulates discipline of lawyers.<sup>64</sup> The Colorado commentary states that "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."<sup>65</sup> However, most courts permit the use of the applicable rules of professional conduct as evidence of the lawyer's standard of care in cases involving malpractice and breach of fiduciary duty.<sup>66</sup> The Colorado commentary goes on to say that, "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."<sup>67</sup>

### Rule 1.1 Competence

As should be obvious to all practicing lawyers, competence in the practice of law flows through all of the other rules.

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<sup>63</sup> *Id.* at 748 (quoting *Lucas v. Harem*, 15 Cal.2d 583, 591 (1961)). *Temple Hoyne Buell Foundation v. Holland & Hart*, 851 P.2d 192, 198 (Colo. Ct. App. 1992).

<sup>64</sup> *See Astarte, Inc. v. Pac. Indus. Sys., Inc.*, 865 F. Supp. 693 (D. Colo. 1994) stating that under Colorado law, ethics codes for lawyers neither prescribe civil liability standards nor create private causes of action. *See* other cases cited in the *Annotated Model Rules of Professional Conduct* (Fifth Ed.) (Center for Professional Responsibility, American Bar Association, at pages 6-7).

<sup>65</sup> Preamble and Scope to the Colorado Rules of Professional Conduct, Comment [20], first sentence.

<sup>66</sup> *See* cases cited in the *Annotated Model Rules of Professional Conduct* (Fifth Ed.) (Center for Professional Responsibility, American Bar Association, at pages 7-8).

<sup>67</sup> Preamble and Scope to the Colorado Rules of Professional Conduct, Comment [20], last sentence. Some courts take a more cautious approach, permitting ethics rules to be considered in cases to the extent an expert witness has used them in reaching a conclusion in the case regarding legal malpractice, and a small number of courts do not permit the use of the rules to show evidence of malpractice. *See Annotated Model Rules of Professional Conduct* (Fifth Ed.) (Center for Professional Responsibility, American Bar Association, and cases cited therein at page 8-9).

Rule 1.1 is specifically mentioned in Formal Opinion 119, *Disclosure, Review, and Use of Metadata*,<sup>68</sup> which 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. 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.”

Rule 2.3 permits a lawyer for a client to provide an evaluation for the use of a third party. As discussed below, this is usually the situation with legal opinions. In order to competently render a legal opinion for the benefit of a client, the opining lawyer must be familiar with customary practice as defined in the literature and elsewhere.<sup>69</sup>

#### **Rule 1.2(d) and Rule 4.1 Truthfulness in Statements to Others**

Rule 4.1 requires that lawyers be truthful in their statements to others. Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Rule 4.1(b) addresses the situation where a client’s crime or fraud takes the form of a lie or misrepresentation. These rules have significant potential applicability to lawyers practicing transactional law.

According to the commentary to Rule 4.1, a lawyer can ordinarily avoid assisting a client’s crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to

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<sup>68</sup> Ethics Committee, Colorado Bar Association, Formal Opinion 120 (May 17, 2008) available at <http://www.cobar.org/index.cfm/ID/386/subID/23920/CETH/>.

<sup>69</sup> This literature is easily available and much of it can be found in the ABA’s legal opinion resource center. <http://www.abanet.org/buslaw/tribar/home.shtml>. The website of the American College of Real Estate Lawyers ([www.acrel.org](http://www.acrel.org)) includes valuable information for persons writing legal opinions in real estate transactions. Of these, the ABA’s “Guidelines for the Preparation of Legal Opinions,” 57 The Bus. L. (ABA) 875 (2002) and “Legal Opinion Principles,” 53 The Bus. L. (ABA) 831 (1998), are among the most significant, as are the reports prepared by the TriBar Opinion Committee. There are also numerous treatises available, including contributions from a number of Colorado lawyers in Holderness and Wunnicke, *Legal Opinion Letters Form Book* (Aspen Law Business, 2<sup>nd</sup> Ed. 2003). Chapter 1B of the 2008 Supplement is a primer for lawyers not experienced in opinion practice. *Glazer and Fitzgibbon on Legal Opinions: Drafting, Interpreting, and Supporting Closing Opinions in business Transactions* (Aspen Law & Business, 3<sup>rd</sup> Ed.) is another valuable resource for legal opinion preparers.

disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under Rule 4.1(b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

Consider the lawyers described in the opening paragraphs above who cooperated with the backdating of option grants so that the executives obtained options with a lower strike price – and therefore a higher profit potential. Consider further the lawyers at Milberg, Weiss who wrongfully solicited and compensated class action representatives, or Mr. Dreier who conducted the \$380,000,000 fraud; or Messrs. Bua, Stocker, Offill, Rasch or Ms. Novinger who, after a lifetime of practicing securities law facilitated a client's scheme to defraud investors; or the lawyers at Vinson and Elkins who tendered the true sale opinions even though they knew that Enron's CFO, Andrew Fastow, controlled some of the purchasers and they expressed the concern in writing: "We [are] unsure of how [the] opinion rendered satisfies the requirements of FASB." Have these attorneys met their ethical obligations as defined by the Rules of Professional Conduct?

Even apart from ethical obligations, assisting client's misdeeds may lead to civil, criminal, or administrative liability to attorneys. In *Thompson v. Paul*,<sup>70</sup> the Ninth Circuit surveyed case law from the Third, Fifth, Sixth, and Seventh Circuits seeking to hold attorneys liable for actions of their client in the context of securities representation. The Ninth Circuit found that a clear rule emerges:

An attorney who undertakes to make representations to prospective purchasers of securities is under an obligation, imposed by Section 10(b), to tell the truth about those securities. That he or she may have an attorney-client relationship with the seller of the securities is irrelevant under Section 10(b).<sup>71</sup>

The *Thompson v. Paul* case posits liability for the attorneys as a primary participant in the fraud, as required by the U.S. Supreme Court in its *Stoneridge* decision.<sup>72</sup> According

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<sup>70</sup> 547 F.3d 1005 (9th Cir. 2008).

<sup>71</sup> Notably it is also irrelevant under the Rules of Professional Conduct that governs lawyers in all 50 states. Rule 2.3 of the ABA's Model Rules (adopted in most states) is entitled "Truthfulness in Statements to Others." An attorney assisting a client in a crime or fraud, including a violation of SEC Rule 10b-5, is also breaching his or her ethical obligations. When the attorney speaks to third parties, the attorney has a duty to speak truthfully. It is preferable not to speak at all when there is any doubt.

<sup>72</sup> During 2007, there were three similar cases pending before the Supreme Court which again rose the question of potential liability for secondary actors under Rule 10b-5. This was initially resolved in 1994 in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), but resuscitated in the early 21<sup>st</sup> century in the cases of *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 443 F.3d 987 (8<sup>th</sup> Cir. 2006), *cert. granted*; *Regents of the University of California, et al. v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5<sup>th</sup> Cir. 2007), *cert. granted* and *Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040, 1048 (9<sup>th</sup> Cir. 2006), *cert. granted*. In each of those three cases, third parties assisted public companies

to the pleadings in *Stoneridge*, in 2000 Charter Communications, Inc., was facing a significant revenue and cash flow shortfall as compared to Wall Street expectations. Charter allegedly agreed to overpay Scientific-Atlanta, Inc. and Motorola, Inc. by a total of \$17 million for set-top boxes that Charter had already agreed to purchase from them at lower prices. Allegedly, *quid-pro-quo* for the overpayment, Scientific-Atlanta and Motorola agreed to use those additional funds to purchase unwanted advertising from Charter. To create an appearance that these transactions were legitimate, Scientific-Atlanta and Motorola each allegedly: (i) issued documentation stating that they demanded the price increases because of higher costs; (ii) backdated contracts; and (iii) agreed to “purchase” advertising at four to five times regular rates using Charter’s overpayment. The factual allegations in *Credit Suisse* and *Simpson* were equally egregious. Documents were presented in each of the cases that indicated that the secondary actors (Scientific Atlanta and Motorola in the *Stoneridge* case) knew that their transactions would be used by the primary actor (Charter in the *Stoneridge* case) to inflate their financial statements. Thus, in none of these cases were the secondary actors innocent dupes.

However, in no case did the secondary actors make any public disclosures or representations that were then included in public disclosures. In no case were the secondary actors involved in the offer, purchase, or sale of securities as required in *Blue Chip Stamps v. Manor Drug Stores*.<sup>73</sup> And in no case did the secondary actors have a legal duty to speak. As the Supreme Court said in *Chiarella v. United States*,<sup>74</sup> “When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak.” The Supreme Court issued its *Stoneridge* decision on January 15, 2008,<sup>75</sup> holding:

Here respondents were acting in concert with Charter in the ordinary course as suppliers and, as matters then evolved in the not so ordinary course, as customers. Unconventional as the arrangement was, it took place in the marketplace for goods and services, not in the investment sphere. Charter was free to do as it chose in preparing its books, conferring with its auditor, and preparing and then issuing its financial statements. In these circumstances the investors cannot be said to have relied upon any of respondents’ deceptive acts in the decision to purchase or sell securities; and as the requisite reliance cannot be shown, respondents have no liability to petitioner under the implied right of action. This conclusion is consistent with the narrow dimensions we must give to a right of action Congress did not

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in inflating revenue and profits by engaging in the “round-trip transactions” similar to the *Stoneridge* transaction described in the text.

<sup>73</sup> 421 U.S. 723 (1975). See Lidstone, *Securities Law Deskbook* ([www.bradfordpublishing.com](http://www.bradfordpublishing.com)) at § 16.4.1.

<sup>74</sup> 445 U.S. 222, 234 (1980).

<sup>75</sup> *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 128 S.Ct. 761 (2008).

authorize when it first enacted the statute and did not expand when it revisited the law.

The Supreme Court went on to say that, in the *Stoneridge* case, “any deceptive statement or act respondents made was not actionable because it did not have the requisite proximate relation to the investors' harm. That conclusion is consistent with our own determination that respondents' acts or statements were not relied upon by the investors and that, as a result, liability cannot be imposed upon respondents.” Falsifying documents and other actions can be deceptive. In the future and similar to the cases (such as *Thompson v. Paul*<sup>76</sup>) holding attorneys civilly liable for their client's misrepresentations, cases will instead turn on whether the deceptive act was somehow communicated to the investing public and whether proximate cause exists.<sup>77</sup>

Importantly, the limitations imposed by *Central Bank* and *Stoneridge* on liability for aiding and abetting securities fraud do not apply to enforcement actions brought by the SEC or actions for criminal violations brought by the United States Attorneys under § 17(a) of the Securities Act of 1933 or under Rule 10b-5 adopted under the Securities Exchange Act of 1934. As the U.S. Supreme Court stated in the *Stoneridge* case:<sup>78</sup>

Secondary actors are subject to criminal penalties, see, e.g., [15 U. S. C. §78ff](#), and civil enforcement by the SEC, see, e.g., §78t(e). The enforcement power is not toothless. Since September 30, 2002, SEC enforcement actions have collected over \$10 billion in disgorgement and penalties, much of it for distribution to injured investors. .... And in this case both parties agree that criminal penalties are a strong deterrent. .... In addition some state securities laws permit state authorities to seek fines and restitution from aiders and abettors. .... All secondary actors, furthermore, are not necessarily immune from private suit. The securities statutes provide an express private right of action against accountants and underwriters in certain circumstances, see [15 U. S. C. §77k](#), and the implied right of action in §10(b) continues to cover secondary actors who commit primary violations.

The conclusion must be that lawyers may be liable to third parties as a result of their client's actions. This liability may be civil, to third parties, where the third parties can show that the lawyer's actions rose to that of a primary participant in the matter. The lawyer may be liable for aiding and abetting a client's actions in enforcement or criminal actions brought to enforce the securities laws. A lawyer who follows his or her obligations under the Rules

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<sup>76</sup> 547 F.3d 1055, (9th Cir. 2008).

<sup>77</sup> For a more detailed discussion, see Lidstone, *The Securities Law Deskbook* ([www.bradfordpublishing.com](http://www.bradfordpublishing.com)) at § 16.11.

<sup>78</sup> *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) at Part IV, 128 S.Ct. at 773-4.

of Professional Conduct not only acts ethically, but is most likely to avoid additional liability as well.

**Rule 1.5**  
**Fees and Fee Agreements**  
**Can an Attorney Take Equity as an Investment or for Fees**

***Fees and Fee Agreements.*** Colorado Rule 1.5 governs fees and retainer agreements.<sup>79</sup> Fees must be reasonable (Rule 1.5(a)) and, except where the attorney has

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<sup>79</sup> The following sets forth Rule 1.5 in its entirety.

*Rule 1.5 Fees*

*(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:*

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;*
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;*
- (3) the fee customarily charged in the locality for similar legal services;*
- (4) the amount involved and the results obtained;*
- (5) the time limitations imposed by the client or by the circumstances;*
- (6) the nature and length of the professional relationship with the client;*
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and*
- (8) whether the fee is fixed or contingent.*

*(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation.*

*(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is otherwise prohibited. A contingent fee shall meet all of the requirements of Chapter 23.3 of the Colorado Rules of Civil Procedure, "Rules Governing Contingent Fees."*

*(d) Other than in connection with the sale of a law practice pursuant to Rule 1.17, a division of a fee between lawyers who are not in the same firm may be made only if:*

- (1) the division is in proportion to the services performed and responsibility assumed by each lawyer;*
- (2) the client consents to the employment of an additional lawyer after a full disclosure of the division of fees to be made;*
- (3) the total fee is reasonable; and*
- (4) the division is set forth in writing signed by the lawyers and by the client with informed consent.*

*(e) Referral fees are prohibited.*

*(f) Fees are not earned until the lawyer confers a benefit on the client or performs a legal service for the client. Advances of unearned fees are the property of the client and shall be deposited in the lawyer's trust account pursuant to Rule 1.15(f)(1) until earned. If advances of unearned fees are in the form of property other than*

regularly represented the client, the fees must be communicated to the client in writing (Rule 1.5(b)). “Attorney fees are always subject to refund if they are excessive or unearned.”<sup>80</sup>

Referral fees (Rule 1.5(e)) are prohibited; a division of fees among or between lawyers is permitted only to the extent permitted in Rule 1.5(d) that:

- (i) the lawyers among whom the fees are to be divided actually performed work or each of the lawyers assume the obligations of joint representation,
- (ii) the client agrees to the arrangement, including the basis on which fees are to be divided,
- (iii) the overall fee is reasonable.

The division of fees among lawyers is another case where the rules specifically require the client’s consent to be in writing.

Rule 1.5(f) is extremely important – fees are not earned until the work has been performed. By the same token, non-refundable fees are prohibited in Rule 1.5(g). After the completion of the work, a lawyer is required to return any unearned fee to the client. (Rule 1.16(d).)<sup>81</sup> All unearned fees must be maintained in a COLTAF account meeting the requirements of Rule 1.15, or in a separate account where the interest on funds deposited accrues for the benefit of the client.

While the rules only mandate a written fee agreement in certain circumstances (such as with a new client (Rule 1.5(b)), a contingent fee arrangement (Rule 1.5(c)), and where there will be a division of fees (Rule 1.5(d)), the commentary states the following:

“In a new client-lawyer relationship, the basis or rate of the fee must be promptly communicated in writing to the client. When the lawyer has regularly represented a client, they ordinarily will have reached an understanding concerning the basis or rate of the fee; but, when there has been a change from their previous understanding, the basis or rate of the fee should be promptly communicated in writing. All contingent fee arrangements must be in writing, regardless of whether the client-lawyer relationship is new or established. See C.R.C.P., Ch. 23.3, Rule 1. A written

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*funds, then the lawyer shall hold such property separate from the lawyer’s own property pursuant to Rule 1.15(a).*

*(g) Nonrefundable fees and nonrefundable retainers are prohibited. Any agreement that purports to restrict a client’s right to terminate the representation, or that unreasonably restricts a client’s right to obtain a refund of unearned or unreasonable fees, is prohibited.*

<sup>80</sup> *In the Matter of Larry D. Sather*, 3 P.3d 403 at 413 (Colo. 2000).

<sup>81</sup> *See In the Matter of Larry D. Sather*, 3 P.3d 403 at 413 (Colo. 2000).

communication must disclose the basis or rate of the lawyer's fees, but it need not take the form of a formal engagement letter or agreement, and it need not be signed by the client. Moreover, it is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, to identify the factors that may be taken into account in finally fixing the fee, or to furnish the client with a simple memorandum or the lawyer's customary fee schedule. When developments occur during the representation that render an earlier disclosure substantially inaccurate, a revised written disclosure should be provided to the client.

"A written statement concerning the fee reduces the possibility of misunderstanding. Lawyers are well-advised to use written disclosures even when they are not required. Moreover, it is preferable, although not mandatory, to obtain the client's signature acknowledging the basis or rate of the fee."

Interest on amounts that are past-due can only be assessed if the client has agreed to interest in writing. The failure to have a fee agreement in place to define the relationship between the attorney and his or her client has resulted in disciplinary actions against the attorney. In *People v. Ungar*,<sup>82</sup> the presiding disciplinary judge described the matter that led to a conditional admission of misconduct and a 90-day suspension as follows:

"Respondent performed securities work on behalf of his client, an investment company, in connection with the acquisition of controlling interests in shell companies that were to become the subject of reverse mergers. However, Respondent failed to communicate the basis of his fee in writing to his client and never explicitly agreed on the contingencies of the fee agreement. A dispute as to the funds held by the Respondent in escrow later arose when he failed to keep all of the funds subject to this transaction in trust [as required by C.R.P.C. Rule 1.15]."

A carefully-worded fee agreement would have resolved that issue and many other similar disputes that arise with clients.

***Can an Attorney Take Equity in a Client as an Investment or as Payment of Fees?***

Under the Rule 1.5(a) of the Colorado Rules of Professional Conduct, attorney's fees must be reasonable. Where the fees are negotiated between sophisticated business people and their counsel in a normal business representation, the fees are generally presumed to be reasonable.

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<sup>82</sup> 05PDJ076 (Colo. PDJ, Jun. 8, 2006) available at <http://www.coloradosupremecourt.com/PDJ/ConditionalAdmissions/Ungar.Conditional%20Admission,05PDJ076,%2006-08-06.pdf>.

In many cases, clients ask attorneys to invest in a corporate or partnership entity. This is specifically contemplated and permitted in the comment to Rule 1.5, as follows:

“A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer’s special knowledge of the value of the property.”

There are many reasons a client may request the attorney to accept payment of fees, at least in part by accepting an ownership interest –

- perhaps as a method of reducing fees payable to the attorney, or
- perhaps as a method of having the attorney show confidence in the client and his or her business.

Many attorneys have accepted investment opportunities in clients. One of the principal limitations is found in malpractice insurance policies maintained by attorneys. Generally these policies contain limitations on the percentage investment an attorney can make, or at least require disclosure of instances where the covered attorney has invested in a client. The 1998 report of the ABA’s Business Law Section’s Committee on Business Ethics warns that:

“even when precautions are taken, lawyers still risk accusations of self-dealing. The lawyer who goes into business with a client faces a heavy burden of establishing both informed consent and transactional fairness.”

A commentator suggests that attorneys who invest in clients “not only have the opportunity to become a multi-millionaire, you have the opportunity to get sued.”<sup>83</sup> The ethical rules do not prohibit an attorney from investing in a client or from taking an equity interest in the client in lieu of, or in addition to, fees. For example, ABA Formal Opinion 00-418 states in pertinent part:

“The Model Rules of Professional Conduct do not prohibit a lawyer from acquiring an ownership interest in a client, (i) either in lieu of a cash fee for providing legal services or (ii) as an investment opportunity in connection with such services, as long as the lawyer complies with Rule 1.8(a) governing business transactions with clients.”<sup>84</sup>

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<sup>83</sup> Debra Baker, *Who Wants to be a Millionaire?*, 86 A.B.A.J. 36, 38 (Feb. 2000).

<sup>84</sup> *Accord* Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2000-3.

Colorado has issued a formal opinion on the subject – Formal Opinion 109.<sup>85</sup> The Formal Opinion warns (with citations included):

“The circumstances of each case should be judged under an objective standard of reasonableness. *See* Colo. RPC 1.5(a); *Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244, 1252 (Colo. 1996) (client’s sophistication a factor); *Beeson v. Industrial Claim Appeals Office of the State of Colorado*, 942 P.2d 1314, 1316 (Colo. App. 1997) (various factors should be employed to measure the reasonableness of the attorney fee, and the weight given to any factor depends on the circumstances of each case.) A lawyer taking equity in lieu of fees would be well advised to obtain, if possible, an objective valuation of the equity interest at the time it is received to demonstrate that the fee is reasonable in light of the benefit conferred or services rendered or to be rendered to the client in return.”

The Formal Opinion goes on to note that the receipt of an ownership interest in a client in lieu of fees is (when paid at the commencement of the representation) equivalent to an advance against fees. The requirements of Rule 1.15 (for holding advance fees in a COLTAF account) and 1.16(d) (for the returning of fees) must be considered when accepting an ownership interest in lieu of cash payment of fees.

Issues arise under the rules even where an attorney invests in a client rather than accepting an ownership interest in lieu of cash payment of fees. In either case, it is considered to be a “business transaction with a client,” and must comply with the requirements of Rule 1.8(a) discussed below. In considering taking equity for fees or investing in a client, it is important to note that, “although it has been said that ‘there are no transactions that courts will scrutinize with more jealousy than dealings between and attorney and his client,’<sup>86</sup> neither the common law nor rules of professional ethics prohibit such transactions outright.”<sup>87</sup> Where the attorney is receiving equity as a portion of the fee being charged for the legal services in question, the attorney must evaluate whether the fee is excessive. This must be evaluated as of the time the transaction is negotiated.

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<sup>85</sup> “Acquiring an Ownership Interest in a Client,” May 19, 2001.

<sup>86</sup> *Quoting Spilker v. Hankin*, 88 F.2d 35 (D.C. Cir. 1951) and *citing Stockton v. Ford*, 52 U.S. (11 How.) 232 (1850) and *Cupeiro v. Baron*, 555 So.2d 370 (Fla. Dist. Ct. App. 1989).

<sup>87</sup> *The Law of Lawyering*, §12.4 at page 12-11. Section 126 of the *Restatement* addresses business transactions with clients in a manner that is consistent with the requirements of Colo. RPC 1.8(a).

In providing legal services to the client's business while owning its stock, an attorney must be cognizant of the limitations under various other Rules of Professional Conduct:

- Rule 1.7(b) provides that a lawyer may not represent a client if the representation of that client may be materially limited by, among other things, "the lawyer's own interests";<sup>88</sup> and
- Rule 2.1 requires that, in representing a client, a lawyer shall exercise "independent professional judgment and render candid advice."<sup>89</sup>

It is always possible that an exchange of securities for fees reasonably may affect an attorney's professional judgment on behalf of a client. In order to avoid impacting his or her professional judgment, the amount involved should be nominal from both the attorney's perspective and the perspective of the client organization, and the attorney should place any stock certificates in the office safe and forget that they are there for as long as the representation is ongoing. This is difficult, to say the least.

Thus, while there is no prohibition against an attorney accepting stock for fees, or in making an investment in a client, the attorney would be well advised to include the disclosures required under Rule 1.8(a) in an appropriate engagement letter or other writing – as required by Rule 1.8(a)(3).

### **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 published Formal Opinion 90, entitled "*Preservation of Client Confidences In View Of Modern Communications Technology.*"<sup>90</sup> 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 21<sup>st</sup> Century. Nevertheless, the summary of Opinion 90 is *apropos* today as it was in 1992:

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<sup>88</sup> Colo. RPC, Rule 1.7(b) (1997).

<sup>89</sup> Colo. RPC, Rule 2.1 (1997).

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

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.<sup>91</sup> 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.<sup>92</sup> 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:

- 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

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<sup>91</sup> 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>.

<sup>92</sup> "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/](http://abajournal.com/news/lawyers_e_mail_goof_lands_on_nyts_front_page/).

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.<sup>93</sup> 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.”

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

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<sup>93</sup> 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.

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*.<sup>94</sup> 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 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*,<sup>95</sup> 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"

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<sup>94</sup> Ethics Committee, Colorado Bar Association, Formal Opinion 119 (May 17, 2008) available at <http://www.cobar.org/index.cfm/ID/386/subID/23920/CETH/>.

<sup>95</sup> Ethics Committee, Colorado Bar Association, Formal Opinion 120 (May 17, 2008) available at <http://www.cobar.org/index.cfm/ID/386/subID/23920/CETH/>.

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 (as required by Rule 1.1) 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.

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.<sup>96</sup> 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.<sup>97</sup>

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, 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

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<sup>96</sup> 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/>.

<sup>97</sup> 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 pre-2008 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.

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 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 rules are similar to the rules proposed by the Kutak Commission in 1982 which were rejected by the ABA's 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.<sup>98</sup> Thereafter significant events in the corporate governance landscape occurred. These events were named Enron, Worldcom, HealthSouth, Tyco CEO Dennis Kozlowski, and too many others. Senators and the public were shouting "where were the lawyers?"<sup>99</sup> 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.

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.

As discussed above, one of the 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

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<sup>98</sup> 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.

<sup>99</sup> 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. See text at notes 8-9, above.

and practicing before the Commission in any way in the representation of issuers.”<sup>100</sup> The SEC adopted its attorney conduct rules effective in August 2003.<sup>101</sup> 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.

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;

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<sup>100</sup> 15 U.S.C. § 7245.

<sup>101</sup> 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 COLO. L. (CBA)*, no. 7 at 73 (July 2004).

- 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.<sup>102</sup> Under 2008 changes, attorney's duty to report within the organization continues:

- 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.

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 Rule 1.6(b) is not the attorney's client. The focus of Rule 1.6(b) is to protect third parties. Notably the rules do not require attorney disclosure in the circumstances outlined in the rule 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

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<sup>102</sup> 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. L. (CBA) No. 4, 11 (Apr. 2003).

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.<sup>103</sup> 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 presumption in such a case that a legal duty has been breached,”<sup>104</sup> 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.<sup>105</sup> Regardless of civil liability, however, there is clear precedent that a lawyer may be disciplined for aiding and abetting a client’s financial crimes.<sup>106</sup>

The 2008 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 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.<sup>107</sup> As described above,<sup>108</sup> following the disclosure of the

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<sup>103</sup> 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?

<sup>104</sup> Colo. RPC Preamble and Scope, Comment [20].

<sup>105</sup> *Alexander v. Anstine*, 152 P.3d 497 (Colo. 2007).

<sup>106</sup> *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. 251.1(b) and Rule 8.4(b), and was therefore disbarred.)

<sup>107</sup> 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 COLO. L. (CBA), no. 4 at 11 (April 2003).

<sup>108</sup> See text at notes 23-26.

Ponzi scheme operated by Allen Stanford, his former attorneys effected a noisy withdrawal, advising the SEC in writing that:

“I disaffirm all prior oral and written representations made by me and my associates to the SEC staff regarding Stanford Financial Group and its affiliates.”

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,<sup>109</sup> 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.

In 2008 (before the economic crisis that hit in September 2008), the pendulum swung 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,<sup>110</sup> 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.

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<sup>109</sup> 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](http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf).

<sup>110</sup> Aug. 28, 2008, avail. at [www.usdoj.gov/dag/speeches/2008/dag-speech-0808284.html](http://www.usdoj.gov/dag/speeches/2008/dag-speech-0808284.html).

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.”<sup>111</sup> 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 1.8 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 Rule 1.8(a) regarding entering into a business transaction with a client. To comply with Rule 1.8(a), the transaction by which the lawyer acquires the interest and its terms must be:

- fair and reasonable to the client; and
- fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client.

Rule 1.8(a) also requires the lawyer advise the client that he or she should seek independent counsel to review the transaction and give the client reasonable time to do so. Finally, Rule 1.8(a) requires the lawyer to obtain, in a writing signed by the client, informed consent to the essential terms of the agreement.<sup>112</sup>

The Rule 1.8(a) requirements apply not only to direct attorney-client transactions, but also indirect transactions in which the attorney may have an interest. For example, in 2009, the Presiding Disciplinary Judge publicly censured an attorney who failed to withdraw from representing a client when he learned that his wife was in a business transaction with the client.<sup>113</sup> The PDJ attributed her actions to the attorney. In issuing the censure, the PDJ

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<sup>111</sup> SEC Enforcement Manual, §4.3, revised October 6, 2008.

<sup>112</sup> In *People v. Sanford*, 2009 WL 1397226 (Colo. OPDJ, Apr. 22, 2009), the attorney was suspended from the practice of law for 60 days for entering into “numerous business transactions with his client” and failing to comply with the obligations of Rule 1.8(a).

<sup>113</sup> *People v. Montoya*, 2009 WL 1037714 (Colo. OPDJ Apr. 17, 2009).

also found that the attorney failed to make appropriate disclosures to the client and failed to ensure that his wife's conduct was compatible with his ethical obligations.

**Rule 2.3**  
**Evaluation for Use by Third Parties (e.g., Legal Opinions)<sup>114</sup>**

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:

- The lawyer must be competent to render the opinion (Rule 1.1), which includes an understanding of customary practice as defined by the literature and elsewhere;<sup>115</sup>
- The lawyer must preserve the confidentiality of client information (Rule 1.6);

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<sup>114</sup> For a discussion of Colorado legal opinion practice within the national scope, see Lidstone and Belak, *Danger Ahead! Legal Opinions for Colorado Lawyers*, 38 THE COLO. L. (CBA) No. 4 at 25 (Apr. 2009).

<sup>115</sup> This literature is easily available and much of it can be found in the ABA's legal opinion resource center. <http://www.abanet.org/buslaw/tribar/home.shtml>. The website of the American College of Real Estate Lawyers ([www.acrel.org](http://www.acrel.org)) includes valuable information for persons writing legal opinions in real estate transactions. Of these, the ABA's "Guidelines for the Preparation of Legal Opinions," 57 The Bus. L. (ABA) 875 (2002) and "Legal Opinion Principles," 53 The Bus. L. (ABA) 831 (1998), are among the most significant, as are the reports prepared by the TriBar Opinion Committee. There are also numerous treatises available, including contributions from a number of Colorado lawyers in Holderness and Wunnicke, *Legal Opinion Letters Form Book* (Aspen Law Business, 2<sup>nd</sup> Ed. 2003). Chapter 1B of the 2008 Supplement is a primer for lawyers not experienced in opinion practice. *Glazer and Fitzgibbon on Legal Opinions: Drafting, Interpreting, and Supporting Closing Opinions in business Transactions* (Aspen Law & Business, 3<sup>rd</sup> Ed.) is another valuable resource for legal opinion preparers.

- 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); and
- The lawyer must avoid conflicts of interest (Rules 1.7 and 1.9).

#### **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 believed that the ABA had 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 must 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.

Formal Opinion 119, *Disclosure, Review, and Use of Metadata*,<sup>116</sup> 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. It also addresses the ethical obligations of the lawyer who receives electronic documents that contain confidential metadata. As noted, Rule 4.4(b) makes it clear that the lawyer receiving the confidential

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<sup>116</sup> Ethics Committee, Colorado Bar Association, Formal Opinion 120 (May 17, 2008) available at <http://www.cobar.org/index.cfm/ID/386/subID/23920/CETH/>.

information must promptly notify the sending lawyer.<sup>117</sup> 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.<sup>118</sup>

### **Formal Opinion 113 Ethical Duties to Disclose Errors to the Client**

Ethics Opinion 113 issued on November 19, 2005 by the Ethics Committee of the Colorado Bar Association reminds lawyers that it is their duty under Rule 1.4 to inform clients about material developments in the subject matter of the representation.<sup>119</sup> Opinion 113 states that this includes “material adverse developments . . . resulting from the lawyer’s own errors.” The lawyer is not obligated to disclose all errors – only errors that clearly prejudice a client’s claim or rights must be disclosed under Opinion 113. Where the lawyer is in doubt about the obligation to disclose, it would be prudent for the lawyer to seek outside counsel. Consulting with lawyers in the same firm may not be appropriate because they each have the same problem vicariously.

Where the lawyer can fix the error without (or prior to) disclosure, then the Opinion provides that disclosure is not necessary. The cure, however, cannot lead to any further

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<sup>117</sup> 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/>.

<sup>118</sup> Luce, “*What’s the Matter With Metadata*,” 36 THE COLO. L. (CBA) No. 11 at 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.

<sup>119</sup> See Houghtaling, *Disclosing Mistakes in Light of Ethics Opinion 113*, 35 THE COLO. L. No. 4 at 89 (Apr. 2006) for a good discussion of Opinion 113.

prejudice to the client.

After the lawyer has disclosed the error, the lawyer “may continue to represent the client in . . . compliance with Colo. RPC 1.7(b).” The opinion goes on to acknowledge that “in many if not most circumstances, the interest of the attorney in avoiding liability will be consistent with the interest of the client in a successful representation.” There are potentially cases where the lawyer’s interest in avoiding liability might influence his or her willingness to pursue a strategy that would avoid the attorney’s liability at the expense of the success of the representation – in that case, continued representation by the lawyer would be improper under Rule 1.7(b).

Ethics opinion 113 goes on to state that, when admitting an error to a client, the attorney should also give consideration to notifying the attorney’s malpractice insurance carrier. Finally, the opinion notes that it does not consider whether an attorney’s failure to notify a client of an error gives rise to a cause of action against the lawyer, separate and apart from any cause of action arising from the error itself. Paragraph [20] of the scope of the Rules of Professional Conduct does state:

“Violation of a Rule should not give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.”

In attempting to rectify the results of the error, an attorney may not obtain a release of liability from the client except in compliance with Rule 1.8(h).

**Rule 8.4**  
**Private Conduct Not Related to the Practice of Law:**  
**Convictions, Child Support, and Dishonest Conduct and**  
**Discipline in Other Jurisdictions**

Conduct outside the practice of law and conduct as an attorney in other jurisdictions may subject an attorney to discipline. Attorneys are required to report any criminal conviction to Attorney Regulation within ten days of their conviction.<sup>120</sup> Similarly, any attorney who has been disciplined by any other jurisdiction must notify Attorney Regulation within ten days of such action.<sup>121</sup>

The reporting requirement under C.R.C.P. Rule 251.20 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

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<sup>120</sup> C.R.C.P. 251.20(b). The self-reporting requirement does not include traffic offenses where drugs or alcohol are not present.

<sup>121</sup> C.R.C.P. 251.21(b).

practice law.<sup>122</sup> The Colorado Supreme Court's Presiding Disciplinary Judge disbarred an attorney for creating and promoting what was found to be an illegal tax shelter after he was convicted for tax fraud.<sup>123</sup> 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.<sup>124</sup>

The reporting requirement under C.R.C.P. Rule 251.21 includes all other jurisdictions including other state and federal bars and "a federal agency, such as the United States Patent and Trademark Office" ("USPTO").<sup>125</sup> Although the Colorado courts have only dealt with this issue regarding the USPTO, the ruling and the requirements of C.R.C.P. Rule 251.21 most likely extends to discipline by other federal agencies, such as the Internal Revenue Service<sup>126</sup> and the Securities and Exchange Commission.<sup>127</sup>

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.<sup>128</sup> Theft, whether from a client or a third party, is also serious misconduct. Attorneys have been disciplined for shoplifting, as well as for

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<sup>122</sup> 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; *People v. Coulter*, No. 08PDJ078 (8-22-2008), in which the attorney received a public censure after pleading guilty to two DUI's within a week; and *People v. Horwath*, No. 08PDJ081 (9-3-2008), in which the attorney received a six month suspension and a requirement of reinstatement following pleading guilty to third-degree assault following an arrest for DUI (which charge was dismissed in the plea bargain) and violation of a protection order. 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.

<sup>123</sup> *People v. Evanson*, 2009 WL 2994546 (Colo. OPDJ, Aug. 4, 2009).

<sup>124</sup> C.R.C.P. 251.5(b).

<sup>125</sup> *People v. Bode*, 119 P.3d 1098 (Colo. OPDJ, Jul. 21, 2005). Respondent in this case did not participate in the hearing. See, also, *People v. Isaac*, 2009 WL 725567 (Colo. OPDJ, Mar. 20, 2009).

<sup>126</sup> Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, and Appraisers before the Internal Revenue Service, 31 C.F.R. Part 10, available at <http://www.irs.gov/pub/irs-pdf/pcir230.pdf>.

<sup>127</sup> The SEC has the authority to discipline attorneys and other professionals appearing and practicing before the SEC under its Rule of Practice, Rule 102(e), 17 CFR § 201.102(e). See Lidstone, *The Securities Law Deskbook* ([www.bradfordpublishing.com](http://www.bradfordpublishing.com)) at § 13.2.

<sup>128</sup> *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).

taking funds from their buddies which were supposed to be used for purchasing baseball season tickets.<sup>129</sup>

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. Failure to pay child support will also lead to discipline and can result in the lawyer's license to practice law being summarily suspended.<sup>130</sup>

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 to the rule 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."<sup>131</sup> 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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<sup>129</sup> *People v. Barnthouse*, 948 P.2d 534 (Colo. 1997) (shoplifting); *People v. Rishel*, 50 P.3d 938 (Colo. O.P.D.J. 2002).

<sup>130</sup> *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.

<sup>131</sup> Comment [2] to Rule 8.4.

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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 1.1. COMPETENCE**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

**RULE 1.2. SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER**

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b).

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

## **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 4.1. TRUTHFULNESS IN STATEMENTS TO OTHERS**

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited 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.

**Colorado Rules of Civil Procedure**  
**RULE 251.20. ATTORNEY CONVICTED OF A CRIME**

**(a) Proof of Conviction.** Except as otherwise provided by these Rules, a certified copy of the judgment of conviction from the clerk of any court of criminal jurisdiction indicating that an attorney has been convicted of a crime in that court shall conclusively establish the existence of such conviction for purposes of disciplinary proceedings in this state and shall be conclusive proof of the commission of that crime by the respondent.

**(b) Duty to Report Conviction.** Every attorney subject to these Rules, upon being convicted of a crime, except those misdemeanor traffic offenses or traffic ordinance violations, not including the use of alcohol or drugs, shall notify the Regulation Counsel in writing of such conviction within ten days after the date of the conviction. In addition, the clerk of any court in this state in which the conviction was entered shall transmit to the Regulation Counsel within ten days after the date of the conviction a certificate thereof.

**(c) Commencement of Disciplinary Proceedings Upon Notice of Conviction.** Upon receiving notice that an attorney subject to these Rules has been convicted of a crime, other than a serious crime as hereinafter defined, the Regulation Counsel shall, following an investigation as provided in these Rules, make a determination as provided in C.R.C.P. 251.11 or refer the matter to the committee for further proceedings consistent with C.R.C.P. 251.12.

If the conviction is for a serious crime as hereinafter defined, the Regulation Counsel shall obtain the record of conviction and prepare and file a complaint against the respondent as provided in C.R.C.P. 251.14.

If a complaint is filed against a respondent pursuant to the provisions of this Rule, the Regulation Counsel shall present proof of the criminal conviction and may present any other evidence which the Regulation Counsel deems appropriate. If the respondent's criminal conviction is either proved or admitted, the respondent shall have the right to be heard by the Hearing Board only on matters of rebuttal of any evidence presented by the Regulation Counsel other than proof of the conviction.

**(d) Conviction of a Serious Crime -- Immediate Suspension.** The Regulation Counsel shall report to the Supreme Court the name of any attorney who has been convicted of a serious crime, as hereinafter defined. The Supreme Court shall thereupon issue a citation directing the convicted attorney to show cause why the attorney's license to practice law should not be immediately suspended pursuant to C.R.C.P. 251.8. Upon full consideration of the matter, the Supreme Court may either impose immediate suspension for a definite or indefinite period or may discharge the rule to show cause. The fact that a convicted attorney is seeking appellate review of the conviction shall not limit the power of the Supreme Court to impose immediate suspension.

**(e) Serious Crime Defined.** The term serious crime as used in these Rules shall include:

- (1) Any felony; and
- (2) Any lesser crime a necessary element of which, as determined by its statutory or common law definition, involves interference with the administration of justice, false swearing, misrepresentation, fraud, willful extortion, misappropriation, or theft; or an attempt or conspiracy to commit such crime; or solicitation of another to commit such crime.

**Rule 251.21. Discipline Imposed by Foreign Jurisdiction**

**(a) Proof of Discipline Imposed.** Except as otherwise provided by these Rules, a final adjudication in another jurisdiction of misconduct constituting grounds for discipline of an attorney shall, for purposes of proceedings pursuant to these Rules, conclusively establish such misconduct.

**(b) Duty to Report Discipline Imposed.** Any attorney subject to these Rules against whom any form of public discipline has been imposed by the authorities of another jurisdiction, or who voluntarily surrenders the attorney's license to practice law in connection with disciplinary proceedings in another jurisdiction, shall notify the Regulation Counsel of such action in writing within ten days thereof.

\* \* \*

**(d) Commencement of Proceedings Upon Notice of Discipline Imposed.** Upon receiving notice that an attorney subject to these Rules has been publicly disciplined in another jurisdiction, the Regulation Counsel shall obtain the disciplinary order and prepare and file a complaint against the attorney as provided in C.R.C.P. 251.14. If the Regulation Counsel intends either to claim that substantially different discipline is warranted or to present additional evidence, notice of that intent shall be given in the complaint.

\* \* \*