REPLACE ALL

Colorado Ethics Handbook

Sixth Edition



A joint project of
The Colorado Bar Association Ethics Committee
and
Continuing Legal Education in Colorado, Inc.

Supplemented
• July 2018 •

Formal Ethics Opinions are current through Opinion 135.
Reflects updates received through July 2018.

Continuing Legal Education in Colorado, Inc.
The nonprofit educational arm of the Colorado and Denver Bar Associations

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Colorado Ethics Handbook

Sixth Edition

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PUBLISHER'S NOTE

The *Colorado Ethics Handbook*, Sixth Edition, is the result of the dedication and commitment of the Colorado Bar Association Ethics Committee members in providing guidance to the legal profession. They spend a tremendous amount of time on the issues presented to them and approach their task in a perspicacious manner. This supplement features new CBA Ethics Committee Formal Opinions 129 through 135, as well as revisions to Opinions 66, 69, 89, 90, and 101.

For those unfamiliar with the CBA Ethics Committee, it is a standing committee of the Colorado Bar Association staffed by approximately 90 Colorado attorneys, existing for the purpose of giving ethics advice to Colorado attorneys, educating Colorado attorneys through CLE programs and articles, and recommending and reviewing proposed rules related to legal ethics. The Committee issues Formal Opinions concerning topics of general interest. For more immediate advice, Colorado attorneys may call members of the HotLine subcommittee for a brief discussion of ethics issues.

The CBA Ethics Committee is *not* associated with the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel. The informal written opinions and published Formal Opinions are issued for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel, and do not provide protection against disciplinary actions. Pursuant to its bylaws, the Committee is not obligated to respond to questions about completed conduct, another attorney's conduct, law rather than ethics, or matters in litigation, nor questions from a non-attorney or when the inquirer or caller will not identify himself or herself. Further information about the CBA Ethics Committee and its HotLine appear elsewhere in the front matter of this *Handbook*.

We hope that this compendium is useful to Colorado attorneys and the judiciary, and we welcome your comments and critique. Please contact us by phone at (303) 860-0608 or via e-mail at clebooks@cba-cle.org.

Ellen Buckley, Esq.
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CLE IN COLORADO, INC.

CLE in Colorado, Inc. (d/b/a Colorado Bar Association CLE (CBA-CLE)) is a nonprofit educational organization created by the Colorado and Denver Bar Associations. We strive to produce high-quality CLE programs and legal publications at competitive prices, with substantial member discounts. However, we are also financially independent from the Bar Associations and self-supporting. We receive *no membership dues* or other unearned revenue from the CBA or DBA. Nearly all of our income derives from program registration fees and from sales of books, homestudy courses, and course manuals. Every year, hundreds of Colorado lawyers and judges volunteer their time and expertise to help us produce these educational resources for our members. Without this generous contribution of talent, CBA-CLE could not fulfill its mission.

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ETHICS HOTLINE — A SERVICE FOR ATTORNEYS

Certain members of the Ethics Committee are available for *brief* discussion of attorneys' own immediate ethical dilemmas or questions. Attorneys are asked to do their own research prior to calling the HotLine. HotLine inquiries are handled by individual members of the Committee to help identify ethical issues and do not necessarily reflect the thinking of the Committee as a whole. Please remember these practicing attorneys are doing this for free and cannot spend more than about 10 minutes per call and are not there to do research for you.

To contact the HotLine Members, please call the Colorado Bar Association office at (303) 860-1115, or 1-800-332-6736 (in-state only).

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Colorado Ethics Handbook, *supra* n. ___, at ___.

CBA ETHICS COMMITTEE: AN OVERVIEW

by Douglas D. Foote, Marcy G. Glenn, John M. Lebsack, and Alec Rothrock

This article provides an overview of the Colorado Bar Association Ethics Committee, including a discussion of how the Committee provides guidance to Colorado lawyers and how to request the assistance of the Committee.

The Ethics Committee is a standing committee of the Colorado Bar Association (CBA).[1] There are several ways the Ethics Committee assists Colorado lawyers to interpret the law of ethics and in their efforts to act in an ethical manner. The Ethics Committee provides:

1) immediate responses to telephone calls placed to the Ethics Hotline at the CBA[2] and directed to a member of the Committee who has volunteered to answer such calls;
2) more thoroughly researched and discussed (within the Committee as a whole) responses to letters of inquiry sent to the Committee;[3] and
3) formal opinions on ethical issues of widespread interest or concern to Colorado lawyers, which are researched, discussed, prepared, and published by the Committee.

Regardless of the method of inquiry, the Ethics Committee does not intend to form an attorney-client relationship between the inquirer and the Committee or its members. Some members of the Ethics Committee are available to be formally retained as counsel to provide ethics advice outside the context of the Committee.

This article provides a summary of the three ways the Ethics Committee provides guidance on ethical issues. It also discusses the procedure Colorado lawyers can use to request that guidance.

Confidentiality of Inquiries

The CBA Ethics Committee maintains as confidential within the Committee all inquiries and Committee deliberations. Also, the Colorado Supreme Court has approved the CBA Ethics Committee as a "lawyers' peer assistance program" pursuant to Colorado Rules of Professional Conduct (Rules or Colo. RPC) Rule 8.3(c).[4] Therefore, in responding to inquiries, the Committee and its members are not obligated to report misconduct that otherwise would have to be reported in accordance with Colo. RPC 8.3(a).

Advice and Opinions Are Advisory Only

All advice and opinions of the Ethics Committee, whether formal, informal, letter, abstract, or by telephone, are advisory only and are not binding on the Colorado Supreme Court or its disciplinary bodies, or any other courts or disciplinary bodies. However, other courts and disciplinary bodies often cite and rely on Ethics Committee opinions as persuasive authority.

Requesting a Letter Opinion

There are several ways a Colorado lawyer may obtain the advice of the Ethics Committee. One way is to submit an inquiry in writing to the Chair of the Ethics Committee.[5]

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Preparing the Letter Inquiry

The Committee cannot investigate the facts relevant to a written inquiry; it responds based on the information provided in the inquiry letter. Therefore, before writing to the Committee, an attorney should gather all relevant facts. These facts should be fully set forth in the letter, and the attorney should keep in mind that the Committee will have no prior knowledge of the facts. Complete and accurate factual information is essential to enable the Ethics Committee to prepare a meaningful opinion. Inquiries should be posed in a hypothetical format,[6] using representational names, such as "Lawyer A."

The attorney should undertake appropriate legal research relevant to the Rules before requesting information from the Committee (*see* the accompanying sidebar entitled "Ethics Materials Available in Print and Online"). This research should be included with the letter to help the Committee respond to the inquiry quickly and effectively; attorneys should be aware that the Committee relies on the volunteered time of its members to research and draft opinions.

Committee Response to Letter Inquiries

Ordinarily, the Chair of the Ethics Committee assigns a written inquiry to a Committee member. That member will conduct any necessary research and prepare a preliminary response for discussion at the next regularly scheduled monthly meeting of the Committee. If additional factual information is needed, the chair or the assigned member of the Committee may contact the inquirer.

At the Committee meeting, the inquiry and proposed response are distributed to all Committee members. The full Committee discusses and debates the issues presented. Typically, all Committee members vote on whether to approve and issue the response, amend it, or return the response to the Committee member who drafted it for further research and revision. A response to a letter inquiry often is the subject of much debate, and the extent of discussion on an inquiry may require more than one meeting before the necessary majority approval is obtained.

Confidentiality of Letter Inquiries

When the Ethics Committee adopts and issues a letter opinion, it sends the response only to the inquiring lawyer. The Committee may publish an abstract of the response in *The Colorado Lawyer*, and also may post the abstract on the "Ethics" portion of the CBA website.[7] The abstract of the response will not include any information that would identify the inquirer.

Letter Opinion Limitations

Letter opinions are intended to provide advice or guidance only on the inquiring lawyer's own conduct. The Ethics Committee usually declines to comment on the conduct of lawyers other than the inquirer and certain other matters (*see* the section *below* entitled "What Does the Ethics Committee Not Do?").

Immediate Advice From The Calling Subcommittee

A Colorado lawyer in need of immediate ethical advice may contact the Ethics Hotline to get a referral to a member of the Ethics Committee's Calling Subcommittee. The Calling Subcommittee consists of experienced members of the Ethics Committee who have volunteered to answer telephone ethics inquiries of an immediate and pressing nature. Before using this service, inquiring attorneys should study applicable provisions of the Rules and attempt to answer their questions using other available ethics sources, including those accessible through the CBA website.

A caller to the Ethics Hotline should expect to provide his or her name and telephone number. The caller may receive a disclaimer advising that the Committee member and the Committee itself do not give legal advice, that neither is a safe harbor regarding ethics, and that reliance on the Ethics Committee's advice is not a defense to a violation of the Rules.

Calling Subcommittee Limitations

Opinions and advice of Calling Subcommittee members do not necessarily reflect the opinions of the CBA Ethics Committee and commonly are offered within the span of one telephone call. However, members of the Calling Subcommittee, at their discretion, sometimes engage in additional research and follow-up with the caller. An inquiring attorney also may write a letter to the Ethics Committee for a more complete and considered response, as described above.

Formal Opinions and Where They Can be Found

The CBA Ethics Committee publishes formal opinions on subjects of widespread ethical concern or importance to Colorado attorneys. The Committee determines the subjects of formal opinions based on issues raised in letter inquiries, calls to the Ethics Hotline, suggestions of Committee members, other CBA members, or members of the judiciary. Proposed formal opinions are carefully researched by a subcommittee appointed by the Chair of the Ethics Committee. Before being adopted and issued, formal opinions are thoroughly discussed and debated by the full Committee, a process that normally takes several months.

Publication

The formal opinions of the CBA Ethics Committee are published in *The Colorado Lawyer*. They also are published jointly by the CBA and Continuing Legal Education in Colorado, Inc. in the *Colorado Ethics Opinions Handbook*. CBA members can access the formal opinions on the CBA website, http://www.cobar.org.

Withdrawal or Revision of Formal Opinions

The Ethics Committee occasionally withdraws or revises formal opinions, such as when a change in the Rules or cases interpreting the Rules affects the analysis or result in an opinion. The Committee does not undertake to issue revised informal letter opinions to individual inquirers, unless an additional inquiry is made.

What Does the Ethics Committee Not Do?

The Ethics Committee does not address complaints of professional misconduct against other lawyers (except when lawyers inquire whether they have a duty to report another lawyer under the ethics rules). That function remains within the exclusive jurisdiction of the Colorado Supreme Court through its Attorney Regulation Counsel. Similarly, the Ethics Committee does not accept complaints regarding the unauthorized practice of law by non-lawyers—another matter exclusively controlled by the Court, through its Unauthorized Practice of Law Committee.

In addition, the Ethics Committee generally declines to respond to inquiries concerning the following:

- past or completed conduct of a lawyer
- conduct of a person other than the inquiring lawyer
- issues that are the subject of pending litigation
- questions of law, rather than of ethics
- the ethical propriety of specific advertising material
- judicial conduct
- the conduct of persons who are not admitted to the Colorado Bar.

Committee Members And Meetings

The Ethics Committee comprises approximately eighty-five lawyers from across Colorado, with diverse backgrounds, practice areas, and experience. Members of the Committee include public and private practitioners, corporate counsel, law school professors, judges at both the trial and appellate levels, and large- and small-firm attorneys (including solo practitioners), and includes active and retired attorneys. CBA

members who wish to join the Ethics Committee should request appointment at the yearly CBA canvass of committee preferences or by writing to the Committee Chair. Ethics Committee members for the coming year are appointed after consultation among the Committee Chair, Vice-Chair, and CBA leaders. All members serve on a voluntary basis and, although some serve for many years, new members join the Committee each year. The Ethics Committee is based in Denver and always seeks new members from outside the Denver metropolitan area.

Ethics Committee meetings are held one Saturday morning every month except August, from 9:00 A.M. to NOON. Most meetings are held at the CBA offices in Denver. The Committee endeavors to hold three meetings per year outside Denver—typically in southern, northern, and western Colorado locations, and occasionally at the University of Colorado and the University of Denver law schools.

The time that members devote to Ethics Committee activities far exceeds the time spent attending regular meetings, and includes time spent researching and drafting opinions and other Committee activities. Lawyers who apply for membership on the Committee should expect that, if appointed, they will devote substantial time to their Ethics Committee service, well beyond attendance at monthly meetings.

Conclusion

For fifty years, the CBA Ethics Committee has offered guidance on how to apply the ethical rules to the ever-changing practical problems faced by members of the Colorado Bar. The Committee recognizes that lawyers often confront difficult ethical problems. To help solve those problems, lawyers can receive immediate help by calling the Ethics Hotline. If the issues are more complex and there is time for thorough study, the Committee urges lawyers to submit their questions as letter inquiries. The Committee will continue to monitor developments in the practice of law, as well as the ethics rules, to identify worthwhile topics for its formal opinions.

Notes

1. Much of the information contained in this article on the Ethics Committee originally was published in 1992 and 1999. *See* Allott, Jr. *et al.*, "An Introduction to the CBA Ethics Committee," 21 *The Colorado Lawyer* 20 (Jan. 1992); Foote, Glenn, and Rothrock, "An Introduction to the CBA Ethics Committee," 26 *The Colorado Lawyer* 21 (June 1999).

2. The Ethics Hotline can be reached by calling the Colorado Bar Association (CBA) at (303) 860-1115 or (800) 332-6736.

3. The Ethics Committee may prepare an abstract of a letter response, with identifying information removed, for publication in *The Colorado Lawyer.* A list of abstracts can be found at the "Abstracts of Responses to Letter Inquiries" page, available at http://www.cobar.org/group/index.cfm?category=393&EntityID=CETH.

4. Order May 31, 2006, *nunc pro tunc* April 14, 2006.

5. Letters should be addressed to:

Chair, CBA Ethics Committee
Colorado Bar Association
1900 Grant Street, Ste. 900
Denver, CO 80203-4336.

6. *See* American Bar Association Opinion 98-411, "Ethical Issues in Lawyer-to-Lawyer Consultation" (Aug. 30, 1998).

7. "Abstracts of Responses to Letter Inquires," *supra* note 3.

Ethics Materials Available in Print and Online

The Ethics Committee makes available ethics resources on the CBA website at www.cobar.org/ethics. The "ETHICS" link on the CBA page includes the Colorado Rules of Professional Conduct (Rules), the formal opinions issued by the Committee, and abstracts of letter opinions. Access to this portion of the website may be limited to CBA members. Contact the CBA office for access information.

The law libraries at the Colorado Supreme Court, University of Denver Sturm College of Law, University of Colorado School of Law, and many private firms have collections of ethics materials. In addition, the following resources are available for attorneys interested in researching ethics issues.

- The ABA/BNA *Lawyer's Manual on Professional Conduct* contains substantive text on ethics issues, ABA opinions, and opinions from various state bar ethics committees. For information about purchasing or accessing, visit www.americanbar.org.

- *The Annotated Model Rules of Professional Conduct*, 8th ed. (Chicago, IL: ABA, 2015).

- *Lawyers' Professional Liability in Colorado* (CLE in Colorado, Inc., 2017 ed.). See cle.cobar.org to order.

- Mallen and Smith, *Legal Malpractice* (Eagan, MN: West Publishing Co., 2016 ed.).

- Hazard and Hodes, *Law of Lawyering: A Handbook of the Modern Rules of Professional Conduct* (Gaithersburg, MD: Aspen Publishers, 3rd ed., 2001).

- Legalethics.com, at www.legalethics.com. This website is one of the most complete online resources available for legal ethics opinions, discussion, news, and links to other sites.

- The ABA Center for Professional Responsibility website can be found at www.americanbar.org/groups/professional_responsibility.html. It includes extensive background and historical materials for all ABA Model Rules related to ethics, as well as links to other sites.

- ETHICSearch can be accessed at (800) 285-2221, option 7, or online through the ABA Center for Professional Responsibility at www.americanbar.org/groups/professional_responsibility/services/ethicsearch.html.

COMMITTEE ON THE COLORADO RULES OF PROFESSIONAL CONDUCT

The Committee on the Colorado Rules of Professional Conduct is a Standing Committee established by the Colorado Supreme Court in 2003. The Committee is charged with the responsibility of periodic review, correcting, updating and improvement of the Colorado Rules of Professional Conduct. Before the formation of the Committee, a number of different Court-appointed and bar association committees and task forces, as well as other groups and individuals, made requests and recommendations directly to the Court concerning possible rule changes. The Court continues to welcome suggested changes to the Rules of Professional Conduct by any entity or person; however, the Court expects the Standing Committee to consider those recommendations in the first instance.

The Supreme Court Liaisons to the Committee are Justices Nathan B. Coats and Justice Monica Márquez. The Committee Chair is Marcy G. Glenn. The Committee is comprised of members of varying backgrounds, including trial-level judges, appellate judges, law school professors, disciplinary prosecutors, and attorneys in private practice in a broad range of practice areas.

The Committee as a whole will meet approximately four times per year. A variety of subcommittees will meet at other times to discuss changes to particular rules or around specific topics.

The Supreme Court has repealed and reenacted the Colorado Rules of Professional Conduct, effective January 1, 2008. The reenacted rules differ in many respects from the prior rules, and also differ in some respects from the proposal made by the Standing Committee on December 27, 2005 . . . . Additional proposed and adopted changes to the Colorado Rules of Professional Conduct are available on the Supreme Court's website at http://www.courts.state.co.us/Courts/Supreme_Court/Rule_Changes.cfm.

OATH OF ADMISSION

In The Supreme Court of the State of Colorado

I DO SOLEMNLY SWEAR by the Everliving God: that,

I will support the Constitution of the United States and the Constitution of the State of Colorado;

I will maintain the respect due to Courts of Justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be without merit or to be unjust; I will not assert any defense except such as I honestly believe to be debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor; I will never seek to mislead the Judge or jury by any misstatement or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client; I will accept no compensation in connection with my client's business except from my client or with my client's knowledge and approval;

I will abstain from all offensive conduct; I will not advance any fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, nor will I delay any person's cause for greed or malice.

I will at all times faithfully and diligently adhere to the Colorado Rules of Professional Conduct.

_____

Signature

Please PRINT your name as you want it to appear on your law license:

_____

Sworn to before me this ___ day of _____A.D., 20_____.

_____

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TABLE B Table B shows the previous Colorado Rules of Professional Conduct effective January 1, 1993, and as amended up to 2007 on the left-hand column and correlates to its counterpart in the new Colorado Rules of Professional Conduct effective January 1, 2008.

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23 Representation of guardian for minor in personal injury settlement, 7/20/62; addendum issued 1995

24 Offices on client's property, 7/20/62; addendum issued 1995

25 Use of attorney's signature on collection case summons, 8/25/62; addendum issued 1995

26 *Real estate commission for attorney-executor, 9/28/62; addendum issued 1995; withdrawn 10/17/2015*

27 *Attorney's partner as witness in lawsuit, 3/16/1963; withdrawn 1/25/1997*

28 Letterhead; revised 4/28/73; revised 7/24/93

29 Representation of seller, buyer or borrower by lawyer for financial institution, 1/18/64

30 *Soliciting funds on letterheads, 6/6/1964; withdrawn 7/24/1993*

31 Publications, pending litigation, 6/6/64

32 *Advertising candidacy for office, revised 3/11/1972; withdrawn 7/24/1993*

33 Contributions, judicial campaign, 6/6/64

34 Advancement of living expenses for personal injury client, 3/27/65; addendum issued 1995

35 *Advertising, use of signs, 6/19/1965; withdrawn 7/24/1993*

36 *Advertising for title insurance business from law office, 6/19/1965; addendum issued 1995; withdrawn 12/14/1996; see Formal Opinion 98*

37 *Announcements, transition from government service to private practice, 11/13/1965; withdrawn 7/24/1993*

38 Referral fees, 6/4/66; addendum issued 1995

39 *Brokerage from law office, 7/15/1967; withdrawn 12/14/1996; see Formal Opinion 98*

40 Accepting case handled by another lawyer, 2/3/68; addendum issued 1995

41 *Practice of law and accounting, 2/3/1968; withdrawn 12/14/1996; see Formal Opinion 98*

42 *Client newsletters, 5/10/1968; withdrawn 6/1987*

43 Duty to insured, 12/13/69; addendum issued 1995

44 *Lay witness fees, 2/14/1970; withdrawn 12/19/1998; see Formal Opinion 103*

45 Representation of client by part-time judge; revised 6/16/84; addendum issued 1996

46 Municipal attorney, representation of defendants, 2/20/71; revised 5/18/96

47 Attorney representation in dissolution of marriage, 2/26/72; addendum issued 1995

48 Representation of public body, conflict of interest, 6/3/72; revised 5/18/97

49 *Announcement of lawyers' withdrawals or firm dissolution, 6/3/1972; withdrawn 7/24/1993*

50 Definition of associates as applied to lawyers, 11/29/72; addendum issued 1995

51 *Announcements concerning qualifications, 11/29/1972; withdrawn 7/24/1993*

52 *Spouse-attorneys representing clients, conflicts of interest, revised 12/13/75; addendum issued 1995; withdrawn 3/16/13*

53 *Successor lawyers and law firms, sale of practice, 6/29/1974; withdrawn 10/18/1997*

54 Fees charged in foreclosure or redemption, undated; addendum issued 1995

55 Partnership which includes professional corporation, undated; addendum issued 1995

56 Settlement of lawyer malpractice, withdrawal of grievance complaint, 3/22/80; addenda issued 1995 and 1998

57 Conflicts of interest, 3/21/81; addendum issued 1995

58 Water rights, representation of multiple clients, 3/21/81; revised 10/14/95

59 Legal services programs, 1/23/82; addendum issued 1995

60 Duty with respect to client's incriminating physical evidence, 7/24/82

61 Legal assistants, 10/23/82; addendum issued 1995

62 Duties of public prosecutor, release of defendant's civil claims, 11/20/82; revised 11/19/88; addendum issued 1995

63 Lawyer's relationship with a traffic clinic, 2/19/83; addendum issued 1995

64 Duty of attorney to report an ethical violation, 4/23/83; amended 6/15/96

65 Guidelines for opposing counsel contacting witnesses, 3/17/84

66 Imposition of interest or finance charges on client accounts, 10/20/84; revised 10/5/16

67 Contingent fee arrangement in child support and spousal maintenance cases, 3/16/85; addendum issued 1995

68 Conflicts of interest: propriety of multiple representation, 4/20/85; amended 12/9/11

69 Propriety of communicating with employee or former employee of an adverse party organization; 2010 revision; revised 11/18/17

70 Juror communications, 9/21/85; addendum issued 1995

71 *Ex parte* communications with treating physicians; revised 9/21/85; addendum issued 4/18/92

72 Recovery of attorney fee by lender using in-house counsel, 4/19/86; revised 1/19/91; addendum issued 1995

73 Contact with insurance adjuster, 5/17/86

74 Lawyer newsletters, 7/26/86; addendum issued 1995

75 *Spousal conflicts, 6/20/87; addendum issued 1995; withdrawn 3/16/13*

76 Lawyer advertising guidelines, 10/17/87; addendum issued 1995

77 Participation with medical-legal consulting firm: contingent fee, 3/19/88

78 Disqualification of the advocate/witness, 6/18/88; revised 6/18/94, 5/10/97, 10/20/12, and 2/20/13

79 Use of legal assistants in client representation, 2/18/89; addendum issued 1995

80 Lawyer's duty to disclose mistakes in commercial closing, 2/18/89; addendum issued 1995

81 Lawyer's participation in prepaid legal service plans, 3/18/89

82 Assertion of attorney's retaining lien on client's papers, 4/15/89; addendum issued 1995

83 *Lawyer advertising, solicitation and publicity, 11/18/89; addendum issued 7/24/93; withdrawn 9/21/13*

84 Listing of support personnel names on letterhead and business cards, 2/26/90; addendum issued 1995

85 Release and settlement of legal malpractice claims, 5/19/90; addenda issued 1995 and 1998

86 *Use of subpoenas in civil actions and proceedings, 1/17/98; withdrawn 3/16/13*

87 Collaboration with non-lawyers in preparation and marketing of estate planning documents, 7/14/90; revised 12/14/91; addendum issued 1995

88 *Use and misuse of "confidentiality walls," 5/18/91; amended 4/18/92; withdrawn 7/08*

89 Office sharing and virtual offices, 9/21/91; revised and reissued 3/12/18

90 Preservation of client confidences in view of modern communications technology, 11/14/92; revised 7/12/18

91 Ethical duties of attorney selected by insurer to represent its insured, 1/16/93; revised 2/23/13

92 Practice restrictions in settlement agreements, 6/19/93

93 *Ex parte* contacts with government officials, 10/16/93; amended 02/16

94 Ethical duties relating to a client's property held by a lawyer in which a third party has an interest, 11/20/93; addendum issued 2006

95 Funds of missing clients, 11/20/93; withdrawn 5/21/16

96 *Ex parte* communications with represented persons during criminal and civil regulatory/investigations and proceedings, 7/15/94; amended 3/17/12

97 Ethical considerations where an attorney or the attorney's partner serves on the board of a public entity, 6/17/95

98 Ethical responsibilities of lawyers who engage in other businesses, adopted 01/17/15, superseding opinion 98 12/14/96

99 Use of credit cards to pay for legal services, 5/10/97

100 Use of conversion clauses in contingent fee agreements, 6/21/97

101 Unbundled/limited scope representation, 1/17/98; addendum issued 2006; approved 5/21/16

102 Use of subpoenas in criminal proceedings, 3/21/98

103 Propriety of compensating a non-expert witness in a civil action, 12/19/98

104 Surrender of papers to the client upon termination of the representation, 4/17/99

105 Opinion on temporary lawyers, 5/22/99

106 Referral fees and networking organizations, 6/19/99; revised 10/21/13

107 Third-party auditors, 9/18/99

108 Inadvertent disclosure of privileged or confidential documents, 5/20/00

109 Acquiring an ownership interest in a client, 5/19/01; annotated 6/20/09 and 8/6/15

110 Assertion of attorney's charging lien/security interest in property, 1/19/02; amended 5/19/02

111 Communicating with represented person for the purpose of providing a "second opinion," 1/19/02

112 Surreptitious recording of conversations or statements, 7/19/03

113 Ethical duty of attorney to disclose errors to client, 11/19/05; modified 7/18/15 solely to reflect 1/1/08 changes in the Rules of Professional Conduct

114 Responsibilities of respondent parents' attorneys in dependency and neglect proceedings, 10/14/06; revised 6/19/10

115 Ethical considerations in the collaborative and cooperative law contexts, 2/24/07

116 Ethical considerations in the dissolution of a law firm or a lawyer's departure from a law firm, 3/17/07

117 Ethical responsibilities of attorneys in legal services and pro bono programs concerning prospective clients, 6/16/07

118 Handling of funds disputed after proper withdrawal from trust account, 2/12/08

119 Disclosure, review, and use of metadata, 5/17/08

120 Representing an organization as a party in a dispute, 5/17/08

121 Use of temporary lawyers and other professionals not admitted to practice in Colorado ("outsourcing"), 6/16/09

122 The applicability of Colo. RPC 7.2 to internet-based lawyer marketing programs, 3/20/10; amended 10/16/10

123 Candor to the tribunal and remedial measures in civil proceedings, 6/18/11

124 A lawyer's medical use of marijuana, 4/23/12; addendum issued 12/10/12; revised 10/19/15

125 *The extent to which lawyers may represent clients regarding marijuana-related activities, 10/21/13; addendum issued 10/21/13; withdrawn 5/17/14*

126 Representing the adult client with diminished capacity, 5/6/15

127 Use of social media for investigative purposes, 9/15

128 Ethical duties of lawyer who cannot contact client, 10/17/15

129 Ethical duties of lawyer paid by one other than the client, 3/18/17

130 Online posting and sharing of materials related to the representation of a client, 4/3/17

131 Representing clients with diminished capacity where the subject of the representation is the client's diminished capacity, 9/13/17

132 Duties of confidentiality of will drafter upon death of testator, 9/26/17

133 Ethical duties of a lawyer who is a party to a matter speaking with a represented party, 10/27/17

134 Ethics of preparing agreements for jointly-represented clients in litigation to make collective settlement decisions, 1/4/18

135 Ethical considerations in the joint representation of clients in the same matter or proceeding, 2/20/18

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T Collection of attorney fees; withdrawal; attorneys' lien — 11/17/73; 3 *Colo. Law.* 45 (February 1974)

U Receipt of attorney fees from lending institutions — Undated; 3 *Colo. Law.* 17 (March 1974)

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W Part-time deputy district attorneys and county attorneys; location of private practice — 5/18/74; 3 *Colo. Law.* 354 (August 1974)

Chapter 5 ABSTRACTS OF RESPONSES TO LETTER INQUIRIES

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Chapter 1

TABLES A AND B: CROSS-REFERENCES OF THE COLORADO RULES OF PROFESSIONAL CONDUCT BEFORE AND AFTER THEIR REPEAL AND REENACTMENT

SYNOPSIS

The Colorado Supreme Court Office of Attorney Regulation Counsel prepared these tables at the request of the CBA Ethics Committee.

Table A

Shows the Colorado Rules of Professional Conduct effective January 1, 2008, on the left-hand column and correlates to its counterpart in the previous Colorado Rules of Professional Conduct effective January 1, 1993, and as amended up to 2007.

Table B

Shows the previous Colorado Rules of Professional Conduct effective January 1, 1993, and as amended up to 2007 on the left-hand column and correlates to its counterpart in the new Colorado Rules of Professional Conduct effective January 1, 2008.

How to Use These Tables

These tables were created with the purpose of highlighting changes in the new Rules as compared to the previous Rules of Professional Conduct. As such, the tables drill down only to the sublevels that are capable of differentiation and reference only those changes that are applicable to its function: Table A highlights changes made to the new Rules and does not identify sections or subsections that have been eliminated; Table B highlights changes from the old Rules and does not identify new rules or subsections. Tables A and B should be read together to fully understand all changes made to the Rules.

When changes have been made to the requirements under a previously existing Rule, the term "revised requirement" is used. In some cases, the term "revised requirement" indicates a clarification of the previously existing Rule that does not change the Rule's substantive requirements. When minor wording changes have been made, the term "revised language" is used. When no changes have been made, a direct cross-reference is made with no additional comment. When an entirely new Rule or subsection of a Rule has been added, the term "no counterpart" is used.

The preparers of the tables have attempted to do so with care and believe they are accurate. Judgment calls were required in cross-referencing parts of the new Colorado Rules to and from the former Rules. The preparers acknowledge that there might be differences of opinion in regard to some of the cross-references. It is also possible that additional cross-references could be made depending on one's interpretation of the different parts of the Rules. Nevertheless, the preparers hope that this work product will be helpful to Colorado lawyers in moving back and forth between the old and new Rules of Professional Conduct.

Dated: October 10, 2007

Table A

These cross-references are intended only as a reference tool. They are not to be relied upon as a substitute for careful reading of the Rules of Professional Conduct.

Colo. RPC (Effective January 1, 2008)	**Colo. RPC (Repealed 2007)**
Terminology	
Rule 1.0	Preamble, Scope and Terminology rev. req.
CLIENT-LAWYER RELATIONSHIP	
Competence	
Rule 1.1	Rule 1.1
Scope of Representation and Allocation of Authority Between Client and Lawyer	
Rule 1.2	Rule 1.2 revised language
Diligence	
Rule 1.3	Rule 1.3 partially eliminated
Communication	
Rule 1.4(a)(1) new	no counterpart
Rule 1.4(a)(2) new	no counterpart
Rule 1.4(a)(3)	Rule 1.4(a)
Rule 1.4(a)(4)	Rule 1.4(a)
Rule 1.4(a)(5)	Rule 1.2(e)
Rule 1.4(b)	Rule 1.4(b)
Fees	
Rule 1.5(a)	Rule 1.5(a) revised language
Rule 1.5(b)	Rule 1.5(b) revised language
Rule 1.5(c)	Rule 1.5(c)
Rule 1.5(d)(1)	Rule 1.5(d)(1) revised language
Rule 1.5(d)(2)	Rule 1.5(d)(2), Rule 1.5(d)(4) rev. language
Rule 1.5(d)(3)	Rule 1.5(d)(3)
Rule 1.5(e)	Rule 1.5(e)
Rule 1.5(f)	Rule 1.5(f)
Rule 1.5(g)	Rule 1.5(g)
Confidentiality of Information	
Rule 1.6(a)	Rule 1.6(a) revised language
Rule 1.6(b)(1) new	no counterpart
Rule 1.6(b)(2)	Rule 1.6(b) revised language
Rule 1.6(b)(3) new	no counterpart
Rule 1.6(b)(4) new	no counterpart
Rule 1.6(b)(5) new	no counterpart
Rule 1.6(b)(6)	Rule 1.6(c)
Rule 1.6(b)(7) new	no counterpart

Colo. RPC (Effective January 1, 2008)	**Colo. RPC (Repealed 2007)**
Conflict of Interest: Current Clients	
Rule 1.7(a)	Rule 1.7(a) revised language
Rule 1.7(a)(1)	Rule 1.7(a)(1) revised language
Rule 1.7(a)(2)	Rule 1.7(b) revised requirement
Rule 1.7(b)	Rule 1.7(a)(2) revised requirement
Rule 1.7(b)(1)	Rule 1.7(b)(1) revised requirement
Rule 1.7(b)(2) new	no counterpart
Rule 1.7(b)(3) new	no counterpart
Rule 1.7(b)(4)	Rule 1.7(b)(2) partially eliminated
Conflict of Interest: Current Clients: Specific Rules	
Rule 1.8(a)	Rule 1.8(a)
Rule 1.8(a)(1)	Rule 1.8(a)(1)
Rule 1.8(a)(2)	Rule 1.8(a)(2) revised requirement
Rule 1.8(a)(3)	Rule 1.8(a)(3) revised requirement
Rule 1.8(b)	Rule 1.8(b) revised language
Rule 1.8(c)	Rule 1.8(c) revised requirement
Rule 1.8(d)	Rule 1.8(d)
Rule 1.8(e)	Rule 1.8(e) revised requirement
Rule 1.8(f)	Rule 1.8(f) revised language
Rule 1.8(g)	Rule 1.8(g) revised requirement
Rule 1.8(h)	Rule 1.8(h) revised language
Rule 1.8(i)	Rule 1.8(j)
Rule 1.8(j) new	no counterpart, case law under Rule 1.7(b)
Rule 1.8(k) new	no counterpart, case law under Rule 1.10
Duties to Former Clients	
Rule 1.9(a)	Rule 1.9(a) revised requirement
Rule 1.9(b)	Rule 1.9(b)
Rule 1.9(b)(1)	Rule 1.9(b)(1)
Rule 1.9(b)(2)	Rule 1.9(b)(2) revised requirement
Rule 1.9(c)	Rule 1.9(c) revised language
Rule 1.9(c)(1)	Rule 1.9(c)(1) revised requirement
Rule 1.9(c)(2)	Rule 1.9(c)(2) revised requirement
Imputation of Conflicts of Interest: General Rule	
Rule 1.10(a)	Rule 1.10(a) revised requirement
Rule 1.10(b)	Rule 1.10(b)
Rule 1.10(c)	Rule 1.10(c)
Rule 1.10(d) new	no counterpart
Rule 1.10(e) new	no counterpart

Colo. RPC (Effective January 1, 2008)	**Colo. RPC (Repealed 2007)**
Special Conflicts of Interest for Former and Current Government Officers and Employees	
Rule 1.11(a)	Rule 1.11(a) revised language
Rule 1.11(a)(1) new	no counterpart
Rule 1.11(a)(2)	Rule 1.11(a) revised requirement
Rule 1.11(b)	Rule 1.11(a) revised language
Rule 1.11(b)(1)	Rule 1.11(a)(1) revised language
Rule 1.11(b)(2)	Rule 1.11(a)(2) revised language
Rule 1.11(b)(3)	no counterpart
Rule 1.11(c)	Rule 1.11(b) and 1.11(e) revised language
Rule 1.11(d)	Rule 1.11(c) revised requirement
Rule 1.11(d)(1) new	no counterpart
Rule 1.11(d)(2)	Rule 1.11(c)(1) and (2) revised requirement
Rule 1.11(e)	Rule 1.11(d)
Former Judge, Arbitrator, Mediator or Other Third Party Neutral	
Rule 1.12(a)	Rule 1.12(a) revised requirement
Rule 1.12(b)	Rule 1.12(b) revised language
Rule 1.12(c)	Rule 1.12(c)
Rule 1.12(c)(1)	Rule 1.12(c)(1) revised language
Rule 1.12(c)(2)	Rule 1.12(c)(2) revised requirement
Rule 1.12(c)(3) new	no counterpart
Rule 1.12(d)	Rule 1.12(d) revised language
Organization as Client	
Rule 1.13(a)	Rule 1.13(a)
Rule 1.13(b)	Rule 1.13(b) revised requirement
Rule 1.13(c)	Rule 1.13(c) revised requirement
Rule 1.13(d) new	no counterpart
Rule 1.13(e) new	no counterpart
Rule 1.13(f)	Rule 1.13(d) revised language
Rule 1.13(g)	Rule 1.13(e) revised language
Client with Diminished Capacity	
Rule 1.14(a)	Rule 1.14(a) revised language
Rule 1.14(b)	Rule 1.14(c) revised requirement
Rule 1.14(c) new	no counterpart
Safekeeping Property	
Rule 1.15(a)	Rule 1.15(a) revised language
Rule 1.15(b)	Rule 1.15(b) revised requirement
Rule 1.15(c)	Rule 1.15(c) revised requirement
Rule 1.15(d)	Rule 1.15(f) revised requirement
Rule 1.15(d)(1)	Rule 1.15(f)(1) revised language
Rule 1.15(d)(2)	Rule 1.15(f)(2) revised language
Rule 1.15(e)	Rule 1.15(f) revised language

Colo. RPC (Effective January 1, 2008)	**Colo. RPC (Repealed 2007)**
Safekeeping Property, cont.	
Rule 1.15(e)(1)	Rule 1.15(f)(3) revised requirement
Rule 1.15(e)(2)	Rule 1.15(f)(4) revised requirement
Rule 1.15(e)(3)	Rule 1.15(f)(6) revised requirement
Rule 1.15(e)(4)	Rule 1.15(f)(5) revised language
Rule 1.15(f)	Rule 1.15(d) revised requirement
Rule 1.15(g)	Rule 1.15(f)(7) revised language
Rule 1.15(h)(1)	Rule 1.15(e)(1)
Rule 1.15(h)(2)	Rule 1.15(e)(2) revised language
Rule 1.15(h)(2)(a)	Rule 1.15(e)(2)(a) revised requirement
Rule 1.15(h)(2)(b)	Rule 1.15(e)(2)(b) revised requirement
Rule 1.15(h)(2)(c)	Rule 1.15(e)(2)(c) revised language
Rule 1.15(h)(2)(d)	Rule 1.15(e)(2)(c) revised language
Rule 1.15(h)(3) new	no counterpart
Rule 1.15(h)(4)	Rule 1.15(e)(3) revised language
Rule 1.15(i)(1) new	no counterpart
Rule 1.15(i)(2)	Rule 1.15(g)(1) revised requirement
Rule 1.15(i)(3) new	no counterpart
Rule 1.15(i)(4)	Rule 1.15(g)(7) revised requirement
Rule 1.15(i)(5)	Rule 1.15(g)(1) revised language
Rule 1.15(i)(6)	Rule 1.15(g)(2) revised requirement
Rule 1.15(j)	Rule 1.15(g) revised requirement
Rule 1.15(j)(1)	Rule 1.15(g)(1) revised requirement
Rule 1.15(j)(2)	Rule 1.15(g)(2) revised requirement
Rule 1.15(j)(3)	Rule 1.15(g)(3) revised requirement
Rule 1.15(j)(4)	Rule 1.15(g)(4)
Rule 1.15(j)(5)	Rule 1.15(g)(5)
Rule 1.15(j)(6)	Rule 1.15(g)(6) revised language
Rule 1.15(j)(7)	Rule 1.15(g)(7) revised requirement
Rule 1.15(j)(8)	Rule 1.15(g)(8)
Rule 1.15(k)	Rule 1.15(h) revised requirement
Rule 1.15(l)	Rule 1.15(i) revised language
Rule 1.15(m)	Rule 1.15(j) revised language
Declining or Terminating Representation	
Rule 1.16(a)	Rule 1.16(a)
Rule 1.16(b)	Rule 1.16(b) revised language
Rule 1.16(b)(1) new	no counterpart
Rule 1.16(b)(2)	Rule 1.16(b)(1)(B) and (C) rev. req.
Rule 1.16(b)(3)	Rule 1.16(b)(1)(B) and (C) rev. req.
Rule 1.16(b)(4)	Rule 1.16(b)(1)(E) revised requirement
Rule 1.16(b)(5)	Rule 1.16(b)(1)(F) revised requirement
Rule 1.16(b)(6)	Rule 1.16(b)(1)(D) revised requirement
Rule 1.16(b)(7)	Rule 1.16(b)(4) revised requirement
Rule 1.16(c)	Rule 1.16(c) revised language
Rule 1.16(d)	Rule 1.16(d) revised language

Colo. RPC (Effective January 1, 2008)	**Colo. RPC (Repealed 2007)**
Sale of Law Practice	
Rule 1.17(a) new	no counterpart
Rule 1.17(b)	Rule 1.17(a) eliminated
Rule 1.17(c)	Rule 1.17(c) revised requirement
Rule 1.17(c)(1)	Rule 1.17(c)(1) revised language
Rule 1.17(c)(2)	Rule 1.17(c)(4)
Rule 1.17(c)(3)	Rule 1.17(c)(5) revised requirement
Rule 1.17(d)	Rule 1.17(b) revised requirement
Duties to Prospective Client	
Rule 1.18 new	no counterpart
COUNSELOR	
Advisor	
Rule 2.1	Rule 2.1
Intermediary	
Rule 2.2 repealed	
Evaluation for Use by Third Persons	
Rule 2.3(a)	Rule 2.3(a) and (a)(1) revised language
Rule 2.3(b)	Rule 2.3(a)(2) revised requirement
Rule 2.3(c)	Rule 2.3(b)
Lawyer Serving as Third-Party Neutral	
Rule 2.4 new	no counterpart
ADVOCATE	
Meritorious Claims and Contentions	
Rule 3.1	Rule 3.1
Expediting Litigation	
Rule 3.2	Rule 3.2
Candor Toward the Tribunal	
Rule 3.3(a)	Rule 3.3(a)
Rule 3.3(a)(1)	Rule 3.3(a)(1) and (2) revised requirement
Rule 3.3(a)(2)	Rule 3.3(a)(3)
Rule 3.3(a)(3)	Rule 3.3(a)(4) and 3.3(c) rev. requirement
Rule 3.3(b) new	no counterpart
Rule 3.3(c)	Rule 3.3(b)
Rule 3.3(d)	Rule 3.3(d)

Colo. RPC (Effective January 1, 2008)	**Colo. RPC (Repealed 2007)**
Fairness to Opposing Party and Counsel	
Rule 3.4	Rule 3.4 revised language
Impartiality and Decorum of the Tribunal	
Rule 3.5(a)	Rule 3.5(a)
Rule 3.5(b)	Rule 3.5(b) revised requirement
Rule 3.5(c) new	no counterpart
Rule 3.5(d)	Rule 3.5(c)
Trial Publicity	
Rule 3.6	Rule 3.6 revised language
Lawyer as Witness	
Rule 3.7	Rule 3.7 revised language
Special Responsibilities of a Prosecutor	
Rule 3.8(a)	Rule 3.8(a)
Rule 3.8(b)	Rule 3.8(b)
Rule 3.8(c)	Rule 3.8(c) revised requirement
Rule 3.8(d)	Rule 3.8(d)
Rule 3.8(e)	Rule 3.8(f)
Rule 3.8(e)(1)	Rule 3.8(f)(1)(i)
Rule 3.8(e)(2)	Rule 3.8(f)(1)(ii) revised language
Rule 3.8(e)(3)	Rule 3.8(f)(1)(iii) revised language
Rule 3.8(f)	Rule 3.8(e) revised requirement
Advocate in Nonadjudicative Proceedings	
Rule 3.9(a)	Rule 3.9 revised requirement
Rule 3.9(b) new	no counterpart
Rule 3.9(c) new	no counterpart
TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS	
Truthfulness in Statements to Others	
Rule 4.1	Rule 4.1 revised language
Communication with Person Represented by Counsel	
Rule 4.2	Rule 4.2 revised language
Dealing with Unrepresented Person	
Rule 4.3	Rule 4.3 revised requirement
Respect for Rights of Third Persons	
Rule 4.4(a)	Rule 4.4 revised requirement
Rule 4.4(b) new	no counterpart
Rule 4.4(c) new	no counterpart

Colo. RPC (Effective January 1, 2008)	**Colo. RPC (Repealed 2007)**
Threatening Prosecution	
Rule 4.5	Rule 4.5 revised language
LAW FIRMS AND ASSOCIATIONS	
Responsibilities of a Partner or Supervisory Lawyer	
Rule 5.1(a)	Rule 5.1(a) revised requirement
Rule 5.1(b)	Rule 5.1(b)
Rule 5.1(c)	Rule 5.1(c)
Rule 5.1(c)(1)	Rule 5.1(c)(1)
Rule 5.1(c)(2)	Rule 5.1(c)(2) revised requirement
Responsibilities of a Subordinate Lawyer	
Rule 5.2	Rule 5.2
Responsibilities Regarding Nonlawyer Assistants	
Rule 5.3(a)	Rule 5.3(a) revised requirement
Rule 5.3(b)	Rule 5.3(b)
Rule 5.3(c)	Rule 5.3(c)
Rule 5.3(c)(1)	Rule 5.3(c)(1)
Rule 5.3(c)(2)	Rule 5.3(c)(2) revised requirement
Professional Independence of a Lawyer	
Rule 5.4(a)	Rule 5.4(a) revised requirement
Rule 5.4(a)(1)	Rule 5.4(a)(1)
Rule 5.4(a)(2)	Rule 5.4(a)(2)
Rule 5.4(a)(3)	Rule 5.4(a)(3) revised requirement
Rule 5.4(a)(4)	Rule 5.4(a)(4)
Rule 5.4(a)(5) new	no counterpart
Rule 5.4(b)	Rule 5.4(b)
Rule 5.4(c)	Rule 5.4(c)
Rule 5.4(d)	Rule 5.4(d)
Unauthorized Practice of Law; Multijurisdictional Practice of Law	
Rule 5.5(a)	Rule 5.5
Rule 5.5(a)(1) new	no counterpart
Rule 5.5(a)(2)	Rule 5.5(a)
Rule 5.5(a)(3)	Rule 5.5(b) revised requirement
Rule 5.5(a)(4) new	no counterpart
Rule 5.5(b) new	no counterpart
Rule 5.5(c) new	no counterpart
Rule 5.5(d) new	no counterpart
Rule 5.5(e) new	no counterpart

Colo. RPC (Effective January 1, 2008)	**Colo. RPC (Repealed 2007)**
Restrictions on Right to Practice	
Rule 5.6(a)	Rule 5.6(a) revised requirement
Rule 5.6(b)	Rule 5.6(b) revised language
Responsibilities Regarding Law-Related Services	
Rule 5.7 new	no counterpart
PUBLIC SERVICE	
Voluntary Pro Bono Publico Service	
Rule 6.1	Rule 6.1 revised language
Accepting Appointments	
Rule 6.2(a)	Rule 6.2(a)
Rule 6.2(b)	Rule 6.2(b) revised requirement
Rule 6.2(c)	Rule 6.2(c)
Membership in Legal Services Organization	
Rule 6.3	Rule 6.3 revised language
Law Reform Activities Affecting Client Interest	
Rule 6.4	Rule 6.4 revised requirement
Nonprofit and Court-Annexed Limited Legal Services Programs	
Rule 6.5 new	no counterpart
INFORMATION ABOUT LEGAL SERVICES	
Communications Concerning a Lawyer's Services	
Rule 7.1(a)	Rule 7.1(a)
Rule 7.1(a)(1)	Rule 7.1(a)(1)
Rule 7.1(a)(2)	Rule 7.1(a)(3) partially eliminated
Rule 7.1(a)(3)	Rule 7.1(a)(2) revised requirement
Rule 7.1(b)	Rule 7.1(b)
Rule 7.1(c)	Rule 7.1(c) revised requirement
Rule 7.1(d)	Rule 7.1(d)
Rule 7.1(e)	Rule 7.1(e)
Rule 7.1(f)	Rule 7.1(f)
Advertising	
Rule 7.2(a)	Rule 7.2(a) revised requirement
Rule 7.2(b)	Rule 7.2(c) revised requirement
Rule 7.2(b)(1)	Rule 7.2(c)(1) revised requirement
Rule 7.2(b)(2)	Rule 7.2(c)(2)
Rule 7.2(b)(3)	Rule 7.2(c)(3)
Rule 7.2(b)(4) new	no counterpart
Rule 7.2(c)	Rule 7.2(d) revised requirement

Colo. RPC (Effective January 1, 2008)	**Colo. RPC (Repealed 2007)**
Direct Contact with Prospective Clients	
Rule 7.3(a)	Rule 7.3(a) revised requirement
Rule 7.3(b)	Rule 7.3(b) revised requirement
Rule 7.3(c)	Rule 7.3(c) revised requirement
Rule 7.3(c)(1)	Rule 7.3(c)(1)
Rule 7.3(c)(2)	Rule 7.3(c)(2)
Rule 7.3(d)	Rule 7.3(c) and (d) revised requirement
Rule 7.3(d)(1)	Rule 7.3(d) revised requirement
Rule 7.3(d)(2)	Rule 7.3(c)(4) revised requirement
Rule 7.3(e) new	no counterpart
Communication of Fields of Practice	
Rule 7.4(a)	Rule 7.4(a) revised requirement
Rule 7.4(b)	Rule 7.4(b)
Rule 7.4(c)	Rule 7.4(c)
Rule 7.4(d) new	no counterpart
Rule 7.4(e)	Rule 7.4(f)
Firm Names and Letterheads	
Rule 7.5(a)	Rule 7.5(a) revised requirement
Rule 7.5(b)	Rule 7.5(c) revised requirement
Rule 7.5(c)	Rule 7.5(e)
Rule 7.5(d)	Rule 7.5(f)
Political Contributions to Obtain Legal Engagements or Appointments by Judges	
Rule 7.6 new	no counterpart
MAINTAINING THE INTEGRITY OF THE PROFESSION	
Bar Admission and Disciplinary Matters	
Rule 8.1	Rule 8.1 revised language
Rule 8.1(a)	Rule 8.1(a)
Rule 8.1(b)	Rule 8.1(b) revised requirement
Judicial and Legal Officials	
Rule 8.2	Rule 8.2
Reporting Professional Misconduct	
Rule 8.3	Rule 8.3 revised language
Misconduct	
Rule 8.4(a)	Rule 8.4(a)
Rule 8.4(b)	Rule 8.4(b)
Rule 8.4(c)	Rule 8.4(c)
Rule 8.4(d)	Rule 8.4(d)

Colo. RPC (Effective January 1, 2008)	**Colo. RPC (Repealed 2007)**
Misconduct, cont.	
Rule 8.4(e)	Rule 8.4(e) revised requirement
Rule 8.4(f)	Rule 8.4(f)
Rule 8.4(g)	Rule 1.2(f)
Rule 8.4(h)	Rule 8.4(h) revised requirement
Disciplinary Authority; Choice of Law	
Rule 8.5(a)	Rule 8.5 revised requirement
Rule 8.5(b) new	no counterpart
Title — How Known and Cited	
Rule 9	Rule 9

Table B

These cross-references are intended only as a reference tool. They are not to be relied upon as a substitute for careful reading of the Rules of Professional Conduct.

Colo. RPC (Repealed 2007)	**Colo. RPC (Effective January 1, 2008)**
Preamble, Scope and Terminology	Preamble and Scope, Rule 1.0 rev. req.
CLIENT-LAWYER RELATIONSHIP	
Competence	
Rule 1.1	Rule 1.1
Scope and Objectives of Representation	
Rule 1.2(a)	Rule 1.2(a) revised language
Rule 1.2(b)	Rule 1.2(b)
Rule 1.2(c)	Rule 1.2(c) revised language
Rule 1.2(d)	Rule 1.2(d)
Rule 1.2(e)	Rule 1.4(a)(5) revised language
Rule 1.2(f)	Rule 8.4(g)
Diligence	
Rule 1.3	Rule 1.3 partially eliminated
Communication	
Rule 1.4(a)	Rule 1.4(a)(3) and Rule 1.4(a)(4)
Rule 1.4(b)	Rule 1.4(b)
Fees	
Rule 1.5(a)	Rule 1.5(a) revised language
Rule 1.5(b)	Rule 1.5(b) revised language
Rule 1.5(c)	Rule 1.5(c)
Rule 1.5(d)(1)	Rule 1.5(d)(1) revised language
Rule 1.5(d)(2)	Rule 1.5(d)(2) revised language
Rule 1.5(d)(3)	Rule 1.5(d)(3)
Rule 1.5(d)(4)	Rule 1.5(d)(2) revised language
Rule 1.5(e)	Rule 1.5(e)
Rule 1.5(f)	Rule 1.5(f)
Rule 1.5(g)	Rule 1.5(g)
Confidentiality of Information	
Rule 1.6(a)	Rule 1.6(a) revised language
Rule 1.6(b)	Rule 1.6(b)(2) revised language
Rule 1.6(c)	Rule 1.6(b)(6)
Rule 1.6(d)	eliminated

Colo. RPC (Repealed 2007)	**Colo. RPC (Effective January 1, 2008)**
Conflict of Interest: General Rule	
Rule 1.7(a)	Rule 1.7(a) and Rule 1.7(a)(1) rev. lang.
Rule 1.7(a)(1)	Rule 1.7(b)(1) revised requirement
Rule 1.7(a)(2)	Rule 1.7(b)(4) revised requirement
Rule 1.7(b)	Rule 1.7(a)(2) revised requirement
Rule 1.7(b)(1)	Rule 1.7(b)(1) revised requirement
Rule 1.7(b)(2)	Rule 1.7(b)(4) partially eliminated
Rule 1.7(c)	eliminated
Conflict of Interest: Prohibited Transactions	
Rule 1.8(a)	Rule 1.8(a)
Rule 1.8(a)(1)	Rule 1.8(a)(1)
Rule 1.8(a)(2)	Rule 1.8(a)(2) revised requirement
Rule 1.8(a)(3)	Rule 1.8(a)(3) revised requirement
Rule 1.8(b)	Rule 1.8(b) revised language
Rule 1.8(c)	Rule 1.8(c) revised requirement
Rule 1.8(d)	Rule 1.8(d)
Rule 1.8(e)	Rule 1.8(e) revised requirement
Rule 1.8(f)	Rule 1.8(f) revised language
Rule 1.8(g)	Rule 1.8(g) revised requirement
Rule 1.8(h)	Rule 1.8(h) revised language
Rule 1.8(i)	eliminated
Rule 1.8(j)	Rule 1.8(i)
Conflict of Interest: Former Client	
Rule 1.9(a)	Rule 1.9(a) revised requirement
Rule 1.9(b)	Rule 1.9(b)
Rule 1.9(b)(1)	Rule 1.9(b)(1)
Rule 1.9(b)(2)	Rule 1.9(b)(2) revised requirement
Rule 1.9(c)	Rule 1.9(c) revised language
Rule 1.9(c)(1)	Rule 1.9(c)(1) revised requirement
Rule 1.9(c)(2)	Rule 1.9(c)(2) revised requirement
Imputed Disqualification: General Rule	
Rule 1.10(a)	Rule 1.10(a) revised requirement
Rule 1.10(b)	Rule 1.10(b)
Rule 1.10(c)	Rule 1.10(c)
Successive Government and Private Employment	
Rule 1.11(a)	Rule 1.11(a) revised language
Rule 1.11(a)(1)	Rule 1.11(a)(1) revised requirement
Rule 1.11(a)(2)	Rule 1.11(a) revised requirement
Rule 1.11(b)	Rule 1.11(c) revised language
Rule 1.11(c)	Rule 1.11(d) revised requirement
Rule 1.11(c)(1)	Rule 1.11(d)(2)(i) revised requirement

Colo. RPC (Repealed 2007)	**Colo. RPC (Effective January 1, 2008)**
Successive Government and Private Employment, cont.	
Rule 1.11(c)(2)	Rule 1.11(d)(2)(ii) revised language
Rule 1.11(d)	Rule 1.11(e)
Rule 1.11(e)	Rule 1.11(c)
Former Judge or Arbitrator	
Rule 1.12(a)	Rule 1.12(a) revised requirement
Rule 1.12(b)	Rule 1.12(b) revised language
Rule 1.12(c)	Rule 1.12(c)
Rule 1.12(c)(1)	Rule 1.12(c)(1) revised language
Rule 1.12(c)(2)	Rule 1.12(c)(2) revised requirement
Rule 1.12(d)	Rule 1.12(d) revised language
Organization as Client	
Rule 1.13(a)	Rule 1.13(a)
Rule 1.13(b)	Rule 1.13(b) revised requirement
Rule 1.13(b)(1)	eliminated
Rule 1.13(b)(2)	eliminated
Rule 1.13(b)(3)	Rule 1.13(b) revised requirement
Rule 1.13(c)	Rule 1.13(c) revised requirement
Rule 1.13(d)	Rule 1.13(f) revised language
Rule 1.13(e)	Rule 1.13(g) revised language
Client under a Disability	
Rule 1.14(a)	Rule 1.14(a) revised language
Rule 1.14(b)	eliminated
Rule 1.14(c)	Rule 1.14(b) revised requirement
Safekeeping Property; Interest Bearing Accounts to be Established for the Benefit of the Client or Third Persons or the Colorado Lawyer Trust Account Foundation; Notice of Overdrafts; Record Keeping	
Rule 1.15(a)	Rule 1.15(a) revised language
Rule 1.15(b)	Rule 1.15(b) revised requirement
Rule 1.15(c)	Rule 1.15(c) revised requirement
Rule 1.15(d)	Rule 1.15(f) revised requirement
Rule 1.15(e)(1)	Rule 1.15(h)(1)
Rule 1.15(e)(2)	Rule 1.15(h)(2) revised language
Rule 1.15(e)(2)(a)	Rule 1.15(h)(2)(a) revised requirement
Rule 1.15(e)(2)(b)	Rule 1.15(h)(2)(b) revised requirement
Rule 1.15(e)(2)(c)	Rule 1.15(h)(2)(c) and (d) revised language
Rule 1.15(e)(3)	Rule 1.15(h)(4) revised language
Rule 1.15(f)	Rule 1.15(d) revised requirement
Rule 1.15(f)(1)	Rule 1.15(d)(1) revised language
Rule 1.15(f)(2)	Rule 1.15(d)(2) revised language
Rule 1.15(f)(3)	Rule 1.15(e)(1) revised requirement
Rule 1.15(f)(4)	Rule 1.15(e)(2) revised requirement

Colo. RPC (Repealed 2007)	Colo. RPC (Effective January 1, 2008)
Safekeeping Property; Interest Bearing Accounts to be Established for the Benefit of the Client or Third Persons or the Colorado Lawyer Trust Account Foundation; Notice of Overdrafts; Record Keeping, cont.	
Rule 1.15(f)(5)	Rule 1.15(e)(4) revised language
Rule 1.15(f)(6)	Rule 1.15(e)(3) revised language
Rule 1.15(f)(7)	Rule 1.15(g) revised language
Rule 1.15(g)	Rule 1.15(j) revised requirement
Rule 1.15(g)(1)	Rule 1.15(i)(2), (i)(5) and 1.15(j)(1) rev. req.
Rule 1.15(g)(2)	Rule 1.15(i)(6) and 1.15(j)(2) rev. req.
Rule 1.15(g)(3)	Rule 1.15(j)(3) revised requirement
Rule 1.15(g)(4)	Rule 1.15(j)(4)
Rule 1.15(g)(5)	Rule 1.15(j)(5)
Rule 1.15(g)(6)	Rule 1.15(j)(6) revised language
Rule 1.15(g)(7)	Rule 1.15(j)(7) revised requirement
Rule 1.15(g)(8)	Rule 1.15(j)(8)
Rule 1.15(h)	Rule 1.15(k) revised requirement
Rule 1.15(i)	Rule 1.15(l) revised language
Rule 1.15(j)	Rule 1.15(m) revised language
Declining or Terminating Representation	
Rule 1.16(a)	Rule 1.16(a)
Rule 1.16(b)	Rule 1.16(b) revised language
Rule 1.16(b)(1)(A)	eliminated
Rule 1.16(b)(1)(B)	Rule 1.16(b)(2) and (3) rev. requirement
Rule 1.16(b)(1)(C)	Rule 1.16(b)(2) and (3) rev. requirement
Rule 1.16(b)(1)(D)	Rule 1.16(b)(6) revised requirement
Rule 1.16(b)(1)(E)	Rule 1.16(b)(4) revised requirement
Rule 1.16(b)(1)(F)	Rule 1.16(b)(5) revised requirement
Rule 1.16(b)(2)	eliminated
Rule 1.16(b)(3)	eliminated
Rule 1.16(b)(4)	Rule 1.16(b)(7) revised language
Rule 1.16(c)	Rule 1.16(c) revised language
Rule 1.16(d)	Rule 1.16(d) revised language
Sale of Law Practice	
Rule 1.17(a)	eliminated
Rule 1.17(b)	Rule 1.17(d) revised requirement
Rule 1.17(c)	Rule 1.17(c) revised requirement
Rule 1.17(c)(1)	Rule 1.17(c)(1) revised language
Rule 1.17(c)(2)	eliminated
Rule 1.17(c)(3)	eliminated
Rule 1.17(c)(4)	Rule 1.17(c)(2)
Rule 1.17(c)(5)	Rule 1.17(c)(3) revised requirement
Rule 1.17(d)	eliminated
Rule 1.17(e)	eliminated
Rule 1.17(f)	eliminated

Colo. RPC (Repealed 2007)	Colo. RPC (Effective January 1, 2008)
Sale of Law Practice, cont.	
Rule 1.17(g)	eliminated
Rule 1.17(h)	eliminated
Rule 1.17(i)	eliminated
COUNSELOR	
Advisor	
Rule 2.1	Rule 2.1
Intermediary	
Rule 2.2	eliminated
Evaluation for Use by Third Persons	
Rule 2.3(a)	Rule 2.3(a) revised language
Rule 2.3(a)(1)	Rule 2.3(a) revised language
Rule 2.3(a)(2)	Rule 2.3(b) revised requirement
Rule 2.3(b)	Rule 2.3(c)
ADVOCATE	
Meritorious Claims and Contentions	
Rule 3.1	Rule 3.1
Expediting Litigation	
Rule 3.2	Rule 3.2
Candor Toward the Tribunal	
Rule 3.3(a)	Rule 3.3(a)
Rule 3.3(a)(1)	Rule 3.3(a)(1) revised requirement
Rule 3.3(a)(2)	Rule 3.3(a)(1) revised requirement
Rule 3.3(a)(3)	Rule 3.3(a)(2)
Rule 3.3(a)(4)	Rule 3.3(a)(3) revised language
Rule 3.3(b)	Rule 3.3(c)
Rule 3.3(c)	Rule 3.3(a)(3) revised requirement
Rule 3.3(d)	Rule 3.3(d)
Fairness to Opposing Party and Counsel	
Rule 3.4	Rule 3.4 revised language
Impartiality and Decorum of the Tribunal	
Rule 3.5(a)	Rule 3.5(a)
Rule 3.5(b)	Rule 3.5(b) revised requirement
Rule 3.5(c)	Rule 3.5(d)

Colo. RPC (Repealed 2007)	Colo. RPC (Effective January 1, 2008)
Trial Publicity	
Rule 3.6	Rule 3.6 revised language
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Rule 3.7	Rule 3.7 revised language
Special Responsibilities of a Prosecutor	
Rule 3.8(a)	Rule 3.8(a)
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Rule 3.8(e)	Rule 3.8(f) revised requirement
Rule 3.8(f)(1)(i)	Rule 3.8(e)(1)
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Responsibilities of a Partner or Supervisory Lawyer	
Rule 5.1(a)	Rule 5.1(a) revised requirement
Rule 5.1(b)	Rule 5.1(b)
Rule 5.1(c)	Rule 5.1(c)
Rule 5.1(c)(1)	Rule 5.1(c)(1)
Rule 5.1(c)(2)	Rule 5.1(c)(2) revised requirement

Colo. RPC (Repealed 2007)	Colo. RPC (Effective January 1, 2008)
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Rule 5.3(a)	Rule 5.3(a) revised requirement
Rule 5.3(b)	Rule 5.3(b)
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Rule 5.3(c)(1)	Rule 5.3(c)(1)
Rule 5.3(c)(2)	Rule 5.3(c)(2) revised requirement
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Rule 5.4(a)	Rule 5.4(a) revised requirement
Rule 5.4(a)(1)	Rule 5.4(a)(1)
Rule 5.4(a)(2)	Rule 5.4(a)(2)
Rule 5.4(a)(3)	Rule 5.4(a)(3) revised requirement
Rule 5.4(a)(4)	Rule 5.4(a)(4)
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Rule 5.5(a)	Rule 5.5(a)(2)
Rule 5.5(b)	Rule 5.5(a)(3) revised language
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Rule 5.6(a)	Rule 5.6(a) revised requirement
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Voluntary Pro Bono Publico Service	
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Colo. RPC (Repealed 2007)	**Colo. RPC (Effective January 1, 2008)**
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Rule 7.1(a)(3)	Rule 7.1(a)(2)
Rule 7.1(b)	Rule 7.1(b)
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Rule 7.1(d)	Rule 7.1(d)
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Rule 7.2(a)	Rule 7.2(a) revised requirement
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Rule 7.2(e)	eliminated
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Rule 7.3(b)	Rule 7.3(b) revised requirement
Rule 7.3(c)	Rule 7.3(c) revised requirement
Rule 7.3(c)(1)	Rule 7.3(c)(1)
Rule 7.3(c)(2)	Rule 7.3(c)(2)
Rule 7.3(c)(3)	eliminated
Rule 7.3(c)(4)	Rule 7.3(d)(2)
Rule 7.3(c)(5)	Rule 7.3(d) revised requirement
Rule 7.3(d)	Rule 7.3(d)(1) revised requirement
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Rule 7.4(a)	Rule 7.4(a) revised requirement
Rule 7.4(b)	Rule 7.4(b)
Rule 7.4(c)	Rule 7.4(c)
Rule 7.4(d)	eliminated
Rule 7.4(e)	eliminated
Rule 7.4(f)	Rule 7.4(e)
Rule 7.4(g)	eliminated

Colo. RPC (Repealed 2007)	Colo. RPC (Effective January 1, 2008)
Firm Names and Letterheads	
Rule 7.5(a)	Rule 7.5(a) revised requirement
Rule 7.5(b)	eliminated
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Rule 8.4(c)	Rule 8.4(c)
Rule 8.4(d)	Rule 8.4(d)
Rule 8.4(e)	Rule 8.4(e) revised requirement
Rule 8.4(f)	Rule 8.4(f)
Rule 8.4(g)	eliminated
Rule 8.4(h)	Rule 8.4(h) revised requirement
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Title — How Known and Cited	
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NO CHANGES

Chapter 2

1993 COLORADO RULES OF PROFESSIONAL CONDUCT, AS AMENDED

As adopted by the Colorado Supreme Court
on May 7, 1992,
effective January 1, 1993

CLE Editor's note: Effective Jan. 1, 2008, these Rules were revised and replaced by the 2008 Rules of Professional Conduct.

REPEALED

SYNOPSIS

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COLORADO MODEL RULES COMMITTEE

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Scope
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Rule 5.3 Responsibilities Regarding Nonlawyer Assistants
Rule 5.4 Professional Independence of a Lawyer
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1993 COLORADO RULES OF PROFESSIONAL CONDUCT SUBJECT INDEX

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PREFACE

In the light of the history of the Common Law as we know it, codified standards of professional conduct are of very recent origin. The Canons of Professional Ethics were adopted by the American Bar Association in 1908, only slightly more than four score years ago. Indeed, the Canons were the controlling tenets when some of the members of the present Model Rules Committee started to practice law. In the early 1960s, the ABA commenced a study intended to determine the need for change. The Code of Professional Responsibility was the product of the work of the ABA Special Committee on Evaluation of Ethical Standards. It was adopted by the ABA in 1969. The Code was a bold step into the present; however, because it reflected compromises and because of the difficulty that some experienced with its format, agitation for change started when the Code was very young. In 1977, the President of the ABA appointed a special committee to review "all facets of legal ethics."[1] The ABA's production of the Model Rules of Professional Conduct was an extravaganza. It amounted to the most sustained debate about Professional ethics in the history of the American Bar. Two published drafts — the Discussion Draft[2] — and the Proposed Final Draft[3] triggered hundreds of written comments and scores of law review, bar journal and newspaper articles. The Association of Trial Lawyers of America (ATLA) and the National Association of Bar Counsel (NABC) prepared full-blown codes of their own as rivals to the Model Rules.

During this period of time, Colorado took an active role in the deliberative process. A committee, comprised in large part of members of the present Model Rules Committee, met regularly for over two years, prepared numerous responses to proposals by the Kutak Commission and drafted amendments to proposed rules and comments upon the several drafts presented to the House of Delegates.

Colorado's Committee opposed adoption of the Model Rules format. Many significant suggestions made by the Colorado Committee appeared in the final draft adopted by the House of Delegates. A summary of the work of the Committee and the views of its members appears in the Symposium on Professional Responsibility, authored by members of the Committee, published in the December 1980 issue of *The Colorado Lawyer*. The House of Delegates adopted the Model Rules on August 2, 1983. Colorado took no action to adopt the Model Rules until the present Committee was appointed.

In September of 1987 the Colorado Supreme Court and the Colorado Bar Association jointly appointed this Committee to study the Model Rules of Professional Conduct (hereinafter Model Rules) and to make a recommendation regarding whether Colorado should adopt, reject or modify the Model Rules.

The Committee was comprised of members who had extensive experience with the intent and purpose of the Model Rules, the history of their development, Colorado's experience with attorney discipline, the precedential value of the Code of Professional Responsibility, the desirability of change or modernization of rules governing attorney conduct and knowledge of the development of professional responsibility standards governing the conduct of attorneys. As a group the Committee reflected the viewpoint of large firm practice, industry, small firm and individual practice, the teaching profession, public sector practice, the judiciary and attorney discipline.

The Committee examined all of the Rules and compared them with the Code of Professional Responsibility before addressing the issue of which format to recommend. The purpose was to adequately evaluate the Model Rules and to compare them with the Code of Professional Responsibility in order to determine which set of governing principles best expresses the guidelines society and principled attorneys would find most properly designed to guide attorneys in the performance of their professional responsibilities to clients, the public, the bench and the bar.

The Committee studied each Rule, compared it with existing Code provisions, analyzed the historical background of the Code and the Model Rules as they were developed and discussed the changes made to the rules by each state which had adopted them. This painstaking analysis resulted in an ultimate consensus that the Model Rules do a better job of stating the principles upon which appropriate attorney conduct is based than does the Code. No purpose would be served by attempting to outline the many arguments for retention of the Code, the differences in substance and innuendo between the two approaches

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or the specific provisions ultimately recommended. Suffice it to say that the entire legislative history, intent and purpose of each and every provision of the Model Rules and the Comments thereto have been analyzed and debated. Amendments were adopted and deletions made.

The proposed Rules were presented to the Colorado Supreme Court and the Colorado Bar Association on March 15, 1990. The Rules as presented are not identical to the Model Rules as adopted by the ABA, nor are they identical to the Rules adopted by any particular jurisdiction. They are similar in many respects to each. They also contain portions of the aspirational aspects of the Ethical Considerations to the Code, incorporated into the Rules or Comments where deemed appropriate for emphasis or guidance.

Presentation of the Rules to the Colorado Bar Association prompted immediate reaction from members of the bar and from specific interest groups such as criminal defense lawyers and organizations of prosecutors. Certain Amendments were made in response to the suggestions received and an additional draft was prepared bearing the date of January 1, 1991. This draft was published in *The Colorado Lawyer* in April 1991. A public hearing was held in the Supreme Court on June 26, 1991. Again, some amendments and corrections were made by the Committee and some were made by the Court. The final, corrected version was adopted by the Supreme Court on May 7, 1992, effective January 1, 19[illegible], and is published in the October 1992 issue of *The Colorado Lawyer*, together with the feature article which highlights the changes in substance or emphasis found in the Rules as compared to the Code. The article also addresses areas of continuing concern and will underscore principles which have been retained. The difference in format and approach between the Code and the Rules and the benefits derived therefrom is an additional focus.

The Model Rules Committee: Gary B. Blum, Rebecca [illegible] Bradley, James T. Bunch, Nancy L. Cohen, Kenneth Covell, Laurence W. DeMuth, Jr., Phillip S. Figa, Richard P. Hennessey, James P. Hollaway, William T. Pizzi, Don W. Sears, James E. W[illegible] Kenneth E. Barnhill, Chairman.

Kenneth E. Barnhill
July 1992
Denver, Colorado

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ENDNOTES

1. William B. Spann, Jr., "The Legal Profession Needs A New Code of Ethics," *Bar Leader*, Nov.-Dec. 1977, p. 2.
2. Model Rules Discussion Draft, Jan. 30, 1980.
3. Model Rules Proposed Final Draft, May 30, 1981.

PREAMBLE, SCOPE, AND TERMINOLOGY

Preamble: A Lawyer's Responsibilities

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and each person's capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling their professional responsibilities, lawyers necessarily assume various roles that require the performance of many difficult tasks.

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibilities for the quality of justice.

As a representative of clients, a lawyer performs various functions. As adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can

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be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important factor in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

Scope

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperative, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

The Rules presuppose a large legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws, defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the

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duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

Violation of a Rule should not in and of itself give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purposes of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

Moreover, the Rules are not intended to govern or affect judicial application of either the attorney-client privilege or work product privilege. Those privileges were developed to promote compliance with law and fairness in litigation. In reliance on the attorney-client privilege, clients are entitled to expect that communications within the scope of the privilege will be protected against compelled disclosure. The attorney-client privilege is that of the client and not of the lawyer. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

The lawyer's exercise of discretion not to disclose information under Rule 1.6 should not be subject to reexamination. Permitting such reexamination would be incompatible with the general policy of promoting compliance with law through assurances that communications will be protected against disclosure.

The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

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Terminology

"Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Firm" or "law firm" denotes a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10.

"Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Legal clinic" means a law firm which meets all of the following criteria:

a) It involves a group practice of two or more attorneys practicing law in conjunction with law clerks and / or legal assistants that is structured to handle a high volume of cases.

b) It employs efficient, time saving systems and standardized procedures and forms.

c) It is organized and operated to provide legal services primarily to a moderate income clientele.

d) It charges no more than a minimum initial consultation fee.

e) It assigns work in a manner which enables attorneys in the legal clinic to concentrate in particular areas of law in order to maximize the efficiency and competence.

f) It employs the use of fixed fees for routine legal services and makes available to its clientele a printed fee schedule upon request.

g) It charges fees that are demonstrably lower than the prevailing fees in the legal community in which it is situated.

h) It is organized and operated in a manner to assure that in addition to the responsibilities which each individual attorney has pursuant to Rule 1.1 and Rule 1.3, all attorneys in the legal clinic does not undertake any matter beyond its competence and in the event that the clinic is not competent to handle a particular matter, the client shall associate itself with a lawyer or lawyers who are competent to handle the matter or refer the client to another lawyer or lawyers who are competent to handle the matter, in which event the consulting attorney shall assume primary responsibility for that matter; in addition, the legal clinic shall be organized and operated so that in the event a consulting attorney is retained, the clinic shall provide full and immediate disclosure to the client of such a departure from the clinical norm in the handling of the clients case, which disclosure must contain advice that the client is free to select new counsel.

"Partner" denotes a member of a partnership or limited liability partnership, a shareholder in a law firm organized as a professional corporation, or a member of a limited liability company.

"Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonably prudence and competence would ascertain the matter in question.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

Source: Amended October 17, 1996, effective January 1, 1997.

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CLIENT-LAWYER RELATIONSHIP

Law reviews: For article, "Colorado's New Rules of Professional Conduct: A More Comprehensive and Useful Guide for Lawyers," see 21 Colo. Law. 2101 (1992); for article, "Colorado's Rules of Professional Conduct: Implications for Criminal Lawyers," see 21 Colo. Law. 2559 (1992); for article, "So You Want to Be a 'Temp': Ethics and Temporary Attorney Relationships", see 24 Colo. Law. 805 (1995).

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.

Comment

Legal knowledge and skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

While the licensing of a lawyer is evidence that the lawyer has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which the lawyer is not qualified. However, a lawyer may accept such employment if in good faith the lawyer expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to clients. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which the lawyer is not and does not expect to become so qualified should either decline the employment or, with the consent of the client, accept the employment and associate with a lawyer who is competent in the matter.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed counsel for an unrepresented person.

Thoroughness and Preparation

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

Because of a lawyer's vital role in the legal process, a lawyer should act with competence and proper care in representing clients. The lawyer should strive to become and remain proficient in law practice and should accept employment only in matters in which the lawyer is or intends to become competent to handle.

Maintaining Competence

To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education. If a system of peer review has been established, the lawyer should use it in appropriate circumstances.

A lawyer is aided in attaining and maintaining competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs, concentrating in particular areas of the law, and by

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utilizing other available means. A lawyer has the additional ethical obligation to assist in improving the legal profession, and may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of younger associates and giving sound guidance to all lawyers who consult the lawyer. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to personally meet those standards.

Having undertaken representation, a lawyer should use proper care to safeguard the interests of the client. If a lawyer has accepted employment in a matter beyond the lawyer's competence but in which the lawyer is expected to become competent, the lawyer should diligently undertake the work and study necessary to qualify. In addition to being qualified to handle a particular matter, the lawyer's obligation to the client requires the lawyer to prepare adequately for and give appropriate attention to all legal work.

Lawyers should have pride in their professional endeavors. The lawyer's obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

Committee Comment

Canon 6 of the Code of Professional Responsibility deals with competent representation but defines competence negatively. Model Rule 1.1 more fully particularizes the elements of competence and does so affirmatively by requiring that the lawyer be competent.

The Committee integrated salutary provisions of the Ethical Considerations found in the Code into the Comments to Rule 1.1.

Annotation

Law reviews. For article, "Representing the Debtor: Counsel Beware!" see 23 Colo. Law. 539 (1994). For article, "Enforcing Civility: The Rules of Professional Conduct in Deposition Setting," see 33 Colo. Law. 75 (March 2004). For article, "The Duty of Loyalty and Preparations to Compete," see 34 Colo. Law. 67 (November 2005).

Annotator's note. Rule 1.1 is similar to DR 6-101 as it existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing that provision have been included in the annotations to this rule.

Disbarment was appropriate discipline for attorney who borrowed or otherwise obtained money from elderly and vulnerable client where attorney failed (a) to disclose that the likelihood of repayment was remote and the inadequacy of security purportedly given to secure loans; (b) to provide client with adequate legal documentation to ensure repayment; and (c) to obtain client consent to possible conflicts of interest. People v. Schindelar, 845 P.2d 1146 (Colo. 1993).

One-year and one-day suspension warranted where respondent failed to serve a cross-claim, failed to respond to several motions, failed to keep client informed, advanced defense that was not warranted by the facts and existing law, and misrepresented to client the basis for the judgment in favor of the opposing party. People v. Genchi, 849 P.2d 28 (Colo. 1993).

Attorney conduct violating this rule, in conjunction with other rules, sufficient to justify suspension when violation did not arise from neglect or willingness to take advantage of client's vulnerability and is mitigated by her inexperience in the practice of law, her lack of any prior disciplinary record, the fact that she had already been held in contempt and punished by the district court, and the fact that there is no suggestion of selfish motivation. Attorney's failure to appreciate the serious nature of conduct and the jurisdiction of the hearing board to discipline her is a serious matter meriting a period of suspension and a redetermination of her fitness before being permitted to practice law again. In re Roose, 69 P.3d 43 (Colo.), cert. denied, 540 U.S. 1053, 124 S. Ct. 815, 157 L.Ed.2d 705 (2003).

Forty-five-day suspension warranted where respondent neglected child custody matter and had a prior public censure, a prior admonishment, and prior suspensions, but where the respondent did not demonstrate a dishonest or selfish motive and exhibited a cooperative attitude and expressions of remorse. People v. Dowhan, 951 P.2d 905 (Colo. 1998).

Attorney's neglect resulting in an untimely filing of an inadequate certificate of review and dismissal of his client's case, combined with fact that certificate contained false statements of material fact that attorney later repeated to an investigative counsel with the office of disciplinary counsel warranted a 45-day suspension, despite mitigating factors. People v. Porter, 980 P.2d 536 (Colo. 1999).

Neglecting to file response to motion for summary judgment and to return client files upon request was sufficient to result in one-year and one-day suspension. People v. Honaker, 847 P.2d 640 (Colo. 1993).

Thirty-day suspension warranted where attorney, with previous history of discipline and experience in practicing law, neglected a civil rights suit by failing to provide an accounting with respect to fees charged and by failing to return unearned fees. People v. Fritsche, 849 P.2d 31 (Colo. 1993).

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Stipulated agreement and recommendation of suspension for 30 days based upon conditional admission of misconduct were warranted for attorney who committed unfair insurance claim settlement practices and tortious conduct in handling insurance investigation of fire claim that he was not competent to handle. People v. McClung, 953 P.2d 1282 (Colo. 1998).

Attorney's inaction over a period of more than two years and other disciplinary violations warrant suspension for thirty days where there are mitigating factors. People v. LaSalle, 848 P.2d 348 (Colo. 1993).

Thirty-day suspension was appropriate discipline where attorney advised client to take action in violation of child custody order but failed to warn her of criminal consequences of such action. People v. Aron, 962 P.2d 261 (Colo. 1998).

Public censure warranted where respondent negligently filed an involuntary bankruptcy petition that was ill-advised and without factual or legal basis. Mitigating factors included the fact that respondent's mental state was one of negligence rather than knowing misconduct, respondent had not been disciplined before, and respondent cooperated in the discipline action. People v. Moskowitz, 944 P.2d 76 (Colo. 1997).

Public censure appropriate where harm suffered by attorney's client was speculative, attorney retracted his misrepresentations and admitted to his client before the institution of disciplinary proceedings that he had done nothing on the client's appeal, attorney had no prior discipline, he made full and free disclosure of his misconduct to the grievance committee, and he expressed remorse for his misconduct. People v. Nelson, 848 P.2d [illegible] (Colo. 1993).

Public censure appropriate where attorney failed to review district attorney's file and the transcript of the preliminary hearing before trial. People v. Bonner, 927 P.2d 836 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Doherty, 908 P.2d 1120 (Colo. 1996); People v. Doherty, 9[illegible] P.2d [illegible]0 (Colo. 1997); People v. Kolko, 962 P.2d 979 (Colo. 1998).

Conduct violating this rule sufficient to justify public censure. People v. Sm[illegible], 847 P.2d 1154 (Colo. 1993).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Hohertz, 926 P.2d 560 (Colo. 1996); P[illegible] Dieter[illegible] P.2d 1 (Colo. 1997); People v. Primavera, 942 P.2d 496 (Colo. 1997); In re Tolley, 975 P.2d [illegible]5 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Roybal, 949 P.2d 993 (Colo. 1997).

Cases Decided Under Former DR 6-1[illegible]

Analysis

I. General Considerations.
II. Disciplinary Actions.
A. Public Censure.
B. Suspension.
C. Disbarment.

I. GENERAL CONSIDERATION.

Law review. For article, "Criminal Procedure", which discusses recent Tenth Circuit decisions dealing with effective assistance of counsel, see 61 Den. L.J. 303 (1984). For article, "Third-Party Malpractice Claims Against Real Estate Lawyers", see 13 Colo. Law. 996 (1984).

License to practice law assures public that the lawyer who holds the license will perform basic legal tasks honestly and without undue delay, in accordance with the highest standards of professional conduct. People v. Witt, 200 Colo. 522, 616 P.2d 139 (1980); People v. Dixon, 621 P.2d 322 (Colo. 1981).

Attorney has burden of proving his own incompetence. Attorney who is appointed to represent criminal defendant and who believes he is incompetent to handle case has burden of proving his incompetence to the court and if attorney carries the burden, the trial court must decide whether attorney is capable of becoming competent on his own or whether appointment of co-counsel is necessary until attorney becomes competent. Stern v. County Court, 773 P.2d 1074 (Colo. 1989).

Claim of ineffective assistance of counsel by court-appointed attorney is premature before representation has occurred and, therefore, attorney was not entitled to withdraw from case. Stern v. County Court, 773 P.2d 1074 (Colo. 1989).

Public expects appropriate discipline for misconduct. The public has a right to expect that one who engages in professional misconduct will be disciplined appropriately. People v. Witt, 200 Colo. 522, 616 P.2d 139 (1980); People v. Dixon, 621 P.2d 322 (Colo. 1981).

REPEALED

An attorney's personal problems cannot excuse his negligence or professional misconduct, for discipline is required not only to punish the attorney but also to protect the public. People v. Morgan, 194 Colo. 260, 574 P.2d 79 (1977); People v. Belina, 765 P.2d 121 (Colo. 1988).

The right to effective assistance of counsel is not a right to acquittal. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

When cross-examination is permitted by defense counsel on previous felony convictions that the defendant has suffered without a prior foundation which establishes that defendant had counsel at the time he was convicted, counsel's representation is competent when the defendant brought his prior convictions to the jury's attention and made no claim that he was not represented by counsel. Steward v. People, 179 Colo. 31, 498 P.2d 933 (1972).

Agreeing to have depositions read at trial, rather than to have forceful live testimony, is a trial strategy decision for counsel. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

Clients' business simply must be processed in apt time. People v. Bailey, 180 Colo. 211, 503 P.2d 1023 (1972).

Lawyer owes obligation to client to act with diligence in handling his client's legal work and in his representation of his client in court. People v. Bugg, 200 Colo. 512, 616 P.2d 133 (1980); People v. Pooley, 774 P.2d 239 (Colo. 1989).

An attorney violates his obligations to his client in not filing suit until almost fo[illegible] after retained, in not proceeding with the lawsuit during the period thereafter, in not procuring the client's [illegible]mission[illegible] transfer the case to another attorney, and in not supervising its handling by that attorney, all of which [illegible]tion[illegible] onstitut[illegible] gross negligence and unprofessional conduct. People v. Zelinger, 179 Colo. 379, 504 P.2d 668 (197[illegible]).

A lawyer's failure to prepare a will for at least eight months afte[illegible]eing [illegible]ployed to do so, especially where client is aged person, is grossly negligent and shows total lack of responsi[illegible]y. People v. James, 180 Colo. 133, 502 P.2d 1105 (1972).

Attorney's only preparation for hearing in dissolution of [illegible]arriage actio[illegible] occurring in car on way to courthouse constituted handling a legal matter without adequate prepara[illegible]n in v[illegible]ation of this rule. People v. Felker, 770 P.2d 402 (Colo. 1989).

Attorney violated this rule and C.R.P.C. 8 4(d) w[illegible]n he [illegible]ared and filed child support worksheets that failed to properly reflect the new stipulation concer[illegible]g custod[illegible] People v. Davies, 926 P.2d 572 (Colo. 1996).

Suspension for one year and one da[illegible]as wa[illegible]ante[illegible]for attorney who violated this rule and C.R.P.C. 8.4(d) by preparing and filing child support work[illegible] that faile[illegible] to properly reflect the new stipulation concerning custody and where aggravating factors i[illegible] a p[illegible]ious [illegible]ciplinary history and failure to appear in the grievance proceedings. People v. Davies, 926 P[illegible]572 ([illegible]lo. 19[illegible]

Attorney violated this [illegible]le b[illegible]g no action on client's tort claim and by failing to file client's workers' compensation claim until July [illegible]985, alth[illegible]h retained in 1984 to do so. People v. Felker, 770 P.2d 402 (Colo. 1989).

Attorney neglec[illegible]legal matter e[illegible]rusted to her by taking no action on client's claim which resulted in claim being barred by the sta[illegible]of limit[illegible]ons. People v. Felker, 770 P.2d 402 (Colo. 1989).

Hindsigh[illegible]an[illegible]t rep[illegible]e[illegible]ecision which counsel makes in the heat of trial. Morse v. People, 180 Colo. 49, 501 P.2d 13[illegible]1972).

There w[illegible]sufficie[illegible]evidence to establish incompetence of defense counsel. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1[illegible]).

Conduct foun[illegible]to violate disciplinary rules. People v. Bugg, 635 P.2d 881 (Colo. 1981); People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L.Ed.2d 639 (1982); People v. Goss, 646 P.2d 334 (Colo. 1982); People v. Ross, 810 P.2d 659 (Colo. 1991).

Applied in People v. Leader, 193 Colo. 402, 567 P.2d 800 (1977); People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978); People v. McMichael, 196 Colo. 128, 586 P.2d 1 (1978); People v. Susman, 196 Colo. 458, 587 P.2d 782 (1978); People v. Cameron, 197 Colo. 330, 595 P.2d 677 (1979); People v. Pacheco, 198 Colo. 455, 608 P.2d 333 (1979); People v. Pacheco, 199 Colo. 108, 608 P.2d 334 (1979); People ex rel. Silverman v. Anderson, 200 Colo. 76, 612 P.2d 94 (1980); People v. Barbour, 199 Colo. 126, 612 P.2d 1082 (1980); People v. Hilgers, 200 Colo. 211, 612 P.2d 1134 (1980); People v. Haddock, 200 Colo. 218, 613 P.2d 335 (1980); People v. Lanza, 200 Colo. 241, 613 P.2d 337 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Dixon, 200 Colo. 520, 616 P.2d 103 (1980); People ex rel. Cortez v. Calvert, 200 Colo. 157, 617 P.2d 797 (1980); People v. Hurst, 200 Colo. 537, 618 P.2d 1113 (1980); People v. Gottsegen, 623 P.2d 878 (Colo. 1981); People v. Dutton, 629 P.2d 103 (Colo. 1981); People v. Wright, 638 P.2d 251 (Colo. 1981); People v. Hebeler, 638 P.2d 254 (Colo. 1981); People v. Archuleta, 638 P.2d 255 (Colo. 1981); People v. Gellenthien, 638 P.2d 295 (Colo. 1981); People v. Barbour, 639 P.2d 1065 (Colo. 1982); People v. Whitcomb, 676 P.2d 11 (Colo. 1983); People v. Bollinger, 681 P.2d 950 (Colo. 1984); People v. Underhill, 683 P.2d 349 (Colo. 1984); People v. Simon, 698 P.2d 228 (Colo. 1985); People v. Blanck, 700 P.2d 560 (Colo. 1985); People v. Gerdes, 782 P.2d 2 (Colo. 1989).

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II. DISCIPLINARY ACTIONS.

A. Public Censure.

When a lawyer is negligent in handling estates, a public reprimand is warranted for his dereliction of duty. People v. Bailey, 180 Colo. 211, 503 P.2d 1023 (1972).

Attorney was negligent in closing two different estates in an untimely manner. Public censure is an appropriate sanction when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client. People v. Gebauer, 821 P.2d 782 (Colo. 1991).

Undertaking to provide services to clients in areas in which one lacks experience, which would ordinarily result in a reprimand, warrants a 30-day suspension when coupled with continued neglect after private censure. People v. Frank, 752 P.2d 539 (Colo. 1988).

Delay in handling and closing decedents' estates and failure to properly prepare inheritance tax returns, following prior letters of admonition, justify public censure. People v. Clark, 681 P.2d 482 (Colo. 1984).

An attorney's neglect and delay in handling an adoption proceeding, considered with other circumstances, justified public censure. People v. Moore, 681 P.2d 480 (Colo. 1984).

Neglect of a legal matter ordinarily warranting a letter of admonition by way of reprimand requires the imposition of public censure when such conduct is repeated after three letters of admonition [illegible] v. Goodwin, 782 P.2d 1 (Colo. 1989).

Evidence sufficient to warrant public reprimand for dereliction of duty. People v. Aten[illegible], 177 Colo. 439, 494 P.2d 837 (1972); People v. Zelinger, 179 Colo. 379, 504 P.2d 668 (1972).

Failure to obtain an order for service by publication, failing to return client's phone calls, and failure to set a case for trial justify public censure. People v. Barr, 805 P.2d 440 (Colo. 19[illegible].

Public censure for failure to promptly distribute proceeds of a settlement is warranted since respondent's negligence did little or no actual or potential injury to client. People v. [illegible]nchi, 824 P.2d 815 (Colo. 1992).

Public censure appropriate where attorney delayed hiring experts for case, neglected to familiarize himself and comply with the criminal discovery rules, inadequately prepared for trial and proceeded to trial without knowing whether his own experts' testimony would support his client's defense. People v. Silvola, 888 P.2d 244 (Colo. 1995).

Public censure was appropriate where attorney's failure to appear at three hearings and to timely return a stipulation violated DR 1-102(A)(5) and, in aggravation, there was a pattern of misconduct. People v. Cabral, 888 P.2d 245 (Colo. 1995).

Public censure justified where attorney failed to attend to bankruptcy proceeding and scheduled meetings, failed to timely file pleadings and responses, and allowed his paralegal to engage in unauthorized practice of law. People v. Fry, 875 P.2d 222 (Colo. 1994).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Ashley, [illegible] P.2d 52 (Colo. 1990); People v. Nichols, 796 P.2d 966 (Colo. 1990); People v. Taylor, 799 P.2d 930 (Colo. 1990); People v. Smith, 819 P.2d 497 (Colo. 1991); People v. Odom, 829 P.2d 855 (Colo. 1992); People v. Sadler, 83[illegible] P.2d 87 (Colo. 1992); People v. Fry, 875 P.2d 222 (Colo. 1994); People v. O'Donnell, 955 P.2d 53 (Colo. 1998).

Conduct violating this rule sufficient to justify public censure. People v. Driscoll, 716 P.2d 1086 (Colo. 1986); People v. May, 716 P.2d 1094 (Colo. 1986); People v. Carpenter, 731 P.2d 726 (Colo. 1987); People v. Wilson, 745 P.2d 248 (Colo. 1987); People v. Smith, 757 P.2d 628 (Colo. 1988); People v. Dowhan, 759 P.2d 4 (Colo. 1988); People v. Smith, 769 P.2d 1078 (Colo. 1989); People v. Baird, 772 P.2d 110 (Colo. 1989); People v. Fieman, 788 P.2d 830 (Colo. 1990); People v. Good, 790 P.2d 331 (Colo. 1990); People v. Brinn, 801 P.2d 1195 (Colo. 1990); People v. Moffitt, 801 P.2d 1197 (Colo. 1990); People v. Richardson, 820 P.2d 1120 (Colo. 1991); People v. Odom, 829 P.2d 855 (Colo. 1992).

B. Suspension.

The failure for more than five years to record a deed and to return it and the abstract constitutes gross professional negligence and carelessness warranting a suspension of one year from the practice of law. People v. James, 176 Colo. 299, 490 P.2d 291 (1971).

Where an attorney misrepresents to a client that he has filed a case, fails for two years to take action on behalf of another client, and, knowing that a hearing had been set on charges against him, deliberately leaves the jurisdiction of the court without making any arrangements with the grievance committee and without arranging for representation, his conduct warrants suspension from the bar. People v. Kane, 177 Colo. 378, 494 P.2d 96 (1972).

Where counsel appears to be totally oblivious to obligations to render the services for which he is paid, this crass irresponsibility or callous indifference in the handling of a client's affairs is inexcusable under any circumstances and warrants indefinite suspension from the bar. People v. Van Nocker, 176 Colo. 354, 490 P.2d 697 (1971).

REPEALED

Attorney suspended for three years for repeated neglect and delay in handling legal matters, failure to comply with the directions contained in a letter of admonition, and failure to answer letter of complaint from the grievance committee constitute a violation of this rule, and, with other offenses of the code of professional responsibility. People v. Hebenstreit, 764 P.2d 51 (Colo. 1988).

Suspension of lawyer for three years, which is the longest possible period for suspension, is appropriate where there was extensive pattern of client neglect and intentional deception in client matters over a period of years. Anything less would be too lenient. People v. Hellewell, 811 P.2d 386 (Colo. 1991).

Suspension for three years is appropriate where lawyer failed to respond to motions or appear at hearing, resulting in dismissal of clients' bankruptcy proceeding, thereby increasing clients' debts tenfold. The hearing board further found that the attorney engaged in bad faith obstruction of the disciplinary proceedings and refused to acknowledge the wrongful nature of his conduct or the vulnerability of his clients. People v. Farrant, 883 P.2d 1 (Colo. 1994).

Suspension for one year and one day warranted for attorney who "represented" client for a period of 19 months without that person's knowledge or consent, even asserting a counterclaim on his behalf without talking to him; who did not communicate with him in any manner for an extended period of time and then did not withdraw within a reasonable time after being unable to contact him; and who failed to answer discovery requests, resulting in the entries of default and then a default judgment against him. People v. Silvola, 915 P.2d 1[illegible]lo. 1996).

Disbarment not warranted where there was mitigating evidence concerning [illegible]rney's [illegible]tal and physical disabilities. Instead, the board imposed a three-year suspension with a condition for reinstatement that professional medical evidence be presented that the disabilities do not interfere with the attorney's ability to practice law. People v. Stewart, 892 P.2d 875 (Colo. 1995).

Suspension for three years, the longest period available, was appropriate in case where violation of this rule and others would otherwise have justified disbarment but mitigating factors included personal and emotional problems, interim rehabilitation, and remorse. People v. McCaffrey, 925 P.2d 26[illegible]Colo. 1996).

Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. People v. Henderson, 967 P.2d 1038 (Colo. 1998).

Eighteen-month suspension warranted where attorney failed to notify client of an actual conflict of interest and subsequently neglected a matter, but did so without dishonest or selfish motive. People v. Watson, 833 P.2d 50 (Colo. 1992).

Failure to appear after accepting retainer justifies suspension. Where, after accepting a retainer for the defense of an action, an attorney failed to appear or advise his client of the fact that he was not going to appear and thereby prejudiced his client's case, the attorney's conduct violated the code of professional responsibility and C.R.C.P. 241.6. People v. Southern, [illegible] P.2d [illegible]7 (Co[illegible]1982).

Failure to respond to repeated inquiries from client and client's parents, failure to monitor client's case in the court system, in addition failure to respond to calls from the court clerk, and failure to return client's urgent calls after client was arrested and jailed constitutes a pattern of neglect and warrants 30 day suspension. People v. O'Leary, 752 P.2d 530 (Colo. 1988).

Suspension is fitting sanction when lawyer knowingly fails to perform services for a client and thereby causes injury to such client. People v. Masson, 782 P.2d 335 (Colo. 1988).

Initiation of unnecessary proceeding and legal incompetence warrant suspension. Where lawyer initiates unnecessary probate proceeding, as well as fails to meet minimum standards of legal competence for corporate and mining law problems which he has undertaken, his professional misconduct warrants suspension from the bar. People ex rel. Goldberg v. Gordon, 199 Colo. 296, 607 P.2d 995 (1980).

Failure to designate record on appeal, causing nine-month delay in criminal appeal, considered with other violations, justifies suspension. People v. May, 745 P.2d 218 (Colo. 1987).

Suspension is appropriate discipline given number and severity of instances of misconduct, including pattern of neglect over clients' affairs over lengthy period and in variety of circumstance and misrepresentation in dissolution case to client who wished to remarry concerning the filing of a dissolution petition. Considering misconduct in light of proper mitigating factors, suspension was appropriate. People v. Griffin, 764 P.2d 1166 (Colo. 1988).

There is evidence to warrant indefinite suspension. People v. Stewart, 178 Colo. 352, 497 P.2d 1003 (1972).

More severe sanction of 90-day suspension rather than public censure appropriate discipline for attorney who neglected client matter, caused potential injury to client, and engaged in conduct prejudicial to the administration of justice when aggravated by a history of five prior instances of disciplinary offenses for neglect, pattern of misconduct, refusal to acknowledge wrongful nature of conduct, vulnerability of victim, and substantial experience in the practice of law. People v. Dolan, 813 P.2d 733 (Colo. 1991).

REPEALED

Pattern of inaction, including failure to perform adequate research on statute of limitations problem, violated sections (A)(2) and (A)(3) and other disciplinary rules, justifying six-month suspension. People v. Barber, 799 P.2d 936 (Colo. 1990).

Failing to resolve an inability to proceed on behalf of a client, neglecting to respond to communications from the grievance committee, failing to fulfill commitments made to the investigator for the disciplinary counsel, and misrepresenting to such investigator the status of the case under investigation is conduct warranting suspension. People v. Chappell, 783 P.2d 838 (Colo. 1989).

Failing to obtain substitute counsel after accepting a retainer while under suspension constitutes neglect of a legal matter. People v. Redman, 819 P.2d 495 (Colo. 1991).

Failure to file bankruptcy petition warrants suspension from the practice of law for a period of 90 days. The respondent's misconduct was compounded by his prolonged refusal to respond to his client's inquiries and his failure to inform his client of domicile issues bearing on her desire to obtain a discharge in bankruptcy in Colorado. People v. Cain, 791 P.2d 1133 (Colo. 1990).

Delay in filing bankruptcy petition and failing to file complaint or return retainer warrants six-month suspension. People v. Archuleta, 898 P.2d 1064 (Colo. 1995).

Suspension for one year and one day warranted where attorney misrepresented to client that a trial had been scheduled, that continuances and new trial settings had been made, that a settlement had been reached, and where the attorney's previous, similar discipline, was a significant aggravating factor. People v. Smith, 884 P.2d 248 (Colo. 1995).

Suspension for one year and one day warranted for attorney who "represented" client for a period of 19 months without that person's knowledge or consent, even asserting a counterclaim on his behalf without talking to him; who did not communicate with him in any manner for an extended period of time and then did not withdraw within a reasonable time after being unable to contact him; and who failed to answer discovery requests, resulting in the entries of default and then a default judgment against him. People v. Silvola, 915 P.2d 1281 (Colo. 1996).

Failure to communicate with clients, court, and opposing counsel, misrepresentation of the status of the proceedings to client, failure to investigate clients' case, failure to attend one hearing and being late for another hearing, and refusing client an accounting and a refund of the unused portion of attorney fee, justifies three-year suspension. People v. Wilson, 814 P.2d 791 (Colo. 1991).

Ninety-day suspension warranted where attorney neglected client's legal matter, failed to pay for court reporting services, and showed complete disregard for grievance proceedings. People v. Whitaker, 814 P.2d 812 (Colo. 1991).

Suspension for 90 days is warranted for attorney's continued practice of law during a period of suspension in view of prior record and substantial experience in practice of law even if attorney incorrectly believed that he had been reinstated. People v. Dieu, 883 P.2d 1050 (Colo. 1994).

Suspension of one year and one day warranted for attorney whose misconduct included neglect of legal matter, failure to seek lawful objectives of client, intentional failure to carry out employment contract resulting in intentional prejudice or damage to client, and who also pled guilty to class 5 felony of failure to pay employee income tax withheld. People v. Franks, 866 P.2d 1375 (Colo. 1994).

Absent mitigating or aggravating factors, suspension appropriate when a lawyer knowingly fails to perform services for a client or engages in a pattern of neglect and causes injury or potential injury to a client. People v. Glaess, 884 P.2d 722 (Colo. 1994).

It was appropriate to require an attorney to petition for reinstatement under C.R.C.P. 241.22 (b) to (d), even though his period of suspension for violating section (A)(3) did not exceed one year, where the extraordinary number of previous matters in which the attorney was cited for neglect showed the need for a demonstration that he had been rehabilitated. People v. C De Baca, 862 P.2d 273 (Colo. 1993).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Moya, 793 P.2d 1154 (Colo. 1990); People v. Creasey, 793 P.2d 1159 (Colo. 1990); People v. Schmad, 793 P.2d 1162 (Colo. 1990); People v. Baptie, 796 P.2d 978 (Colo. 1990); People v. Garrett, 802 P.2d 1082 (Colo. 1990); People v. Rhodes, 803 P.2d 514 (Colo. 1991); People v. Flores, 804 P.2d 192 (Colo. 1991); People v. Crimaldi, 804 P.2d 863 (Colo. 1991), 854 P.2d 782 (Colo. 1993); People v. Dunsmoor, 807 P.2d 561 (Colo. 1991); People v. Hall, 810 P.2d 1069 (Colo. 1991); People v. Koeberle, 810 P.2d 1072 (Colo. 1991); People v. Gaimara, 810 P.2d 1076 (Colo. 1991); People v. Dash, 811 P.2d 36 (Colo. 1991); People v. Honaker, 814 P.2d 785 (Colo. 1991); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991); People v. Anderson, 817 P.2d 1035 (Colo. 1991); People v. Redman, 819 P.2d 495 (Colo. 1991); People v. Smith, 828 P.2d 249 (Colo. 1992); People v. Hyland, 830 P.2d 1000 (Colo. 1992); People v. Smith, 830 P.2d 1003 (Colo. 1992); People v. Raubolt, 831 P.2d 462 (Colo. 1992); People v. Regan, 831 P.2d 893 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. Denton, 839 P.2d 6 (Colo. 1992); People v. Hindorff, 860 P.2d 526 (Colo. 1993); People v. Stevens, 866 P.2d 1378 (Colo. 1994); People v. Butler, 875 P.2d 219

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(Colo. 1994); People v. Cole, 880 P.2d 158 (Colo. 1994); People v. Smith, 880 P.2d 763 (Colo. 1994); People v. Kardokus, 881 P.2d 1202 (Colo. 1994); People v. Johnson, 881 P.2d 1205 (Colo. 1994); People v. Pittam, 889 P.2d 678 (Colo. 1995); People v. Swan, 893 P.2d 769 (Colo. 1995); People v. Banman, 901 P.2d 469 (Colo. 1995); People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Dickinson, 903 P.2d 1132 (Colo. 1995); People v. Davis, 911 P.2d 45 (Colo. 1996); People v. Calvert, 915 P.2d 1310 (Colo. 1996).

Conduct violating this rule sufficient to justify suspension. People v. Yaklich, 646 P.2d 938 (Colo. 1982); People v. Pilgrim, 698 P.2d 1322 (Colo. 1985); People v. Convery, 704 P.2d 296 (Colo. 1985); People v. Foster, 716 P.2d 1069 (Colo. 1986); People v. Barnett, 716 P.2d 1076 (Colo. 1986); People v. Fleming, 716 P.2d 1090 (Colo. 1986); People v. Larson, 716 P.2d 1093 (Colo. 1986); People v. McDowell, 718 P.2d 541 (Colo. 1986); People v. Yost, 729 P.2d 348 (Colo. 1986); People v. Holmes, 731 P.2d 677 (Colo. 1987); People v. Turner, 746 P.2d 49 (Colo. 1987); People v. Yost, 752 P.2d 542 (Colo. 1988); People v. Convery, 758 P.2d 1338 (Colo. 1988); People v. Lustig, 758 P.2d 1342 (Colo. 1988); People v. Goens, 770 P.2d 1218 (Colo. 1989); People v. Dolan, 771 P.2d 505 (Colo. 1989); People v. Flores, 772 P.2d 610 (Colo. App. 1989); People v. Emeson, 775 P.2d 1166 (Colo. 1989); People v. Hodge, 782 P.2d 25 (Colo. 1989); People v. Fahrney, 782 P.2d 743 (Colo. 1989); People v. Gregory, 788 P.2d 823 (Colo. 1990); People v. Bergmann, 790 P.2d 840 (Colo. 1990); People v. Hensley-Martin, 795 P.2d 262 (Colo. 1990); People v. Stayton, 798 P.2d 903 (Colo. 1990); People v. Grossenbach, 803 P.2d 961 (Colo. 1990); People v. Creasey, 811 P.2d 40 (Colo. 1991); People v. Rhodes, 814 P.2d 787 (Colo. 1991); People v. Williams, 824 P.2d 813 (Colo. 1992); People v. Watson, 833 P.2d 50 (Colo. 1992); People v. Farrant, 883 P.2d 1 (Colo. 1994); People v. Singer, 897 P.2d 798 (Colo. 1995); People v. Williams, 915 P.2d 669 (Colo. 1996).

C. Disbarment.

Attorney disbarred for continued pattern of conduct involving neglect and misrepresentation and for failure to cooperate in investigation by grievance committee. People v. Young, 673 P.2d 993 (Colo. 1984); People v. Johnston, 759 P.2d 10 (Colo. 1988).

Failure to file bankruptcy petition for eight months justified disbarment. When a lawyer, after being paid for his services, neglects to file a bankruptcy petition for his client for a period of approximately eight months, during which time the client is sued and his wages attached on several occasions, the lawyer's gross neglect and failure to carry out a contract of employment justify disbarment. People v. McMichael, 199 Colo. 433, 609 P.2d 633 (1980).

Failure to timely file estate tax returns on behalf of personal representative of estate, failure to be adequately prepared for argument at scheduled hearing, failure to file timely notice of alibi, and failure to notify opposing counsel constitutes continuing pattern of neglect and risk of serious injury to clients and justifies disbarment. People v. Stewart, 752 P.2d 528 (Colo. 1987).

Failing to commence any action on behalf of a client, exploiting a client's friendship and trust to extort funds for one's personal use, and failing to cooperate with the grievance committee in its investigation of complaints with respect to such matters constitute conduct warranting disbarment. People v. McMahill, 782 P.2d 336 (Colo. 1989).

Where an attorney demonstrates an extreme indifference to the welfare of his clients and the status of their cases and an apparent insensitivity to his professional duties in the face of adverse judgments due to neglect, client complaints, and repeated disciplinary proceedings, disbarment is the appropriate sanction. People v. Wyman, 782 P.2d 339 (Colo. 1989).

Conduct which causes a client serious or potentially serious injury and demonstrates a complete lack of concern for a client's interests and welfare warrants disbarment. People v. Lyons, 762 P.2d 143 (Colo. 1988).

Continuing to practice law while suspended is conduct justifying disbarment. People v. James, 731 P.2d 698 (Colo. 1987).

Facts sufficient to justify disbarment of attorney for failure to comply with registration requirements of C.R.C.P. 227, misappropriation of funds, and improper withdrawal from employment. People v. Scudder, 197 Colo. 99, 590 P.2d 493 (1979).

Total disregard of obligation to protect a client's rights and interests over an extended period of time in conjunction with the violation of a number of disciplinary rules and an extended prior record of discipline requires most severe sanction of disbarment. People v. O'Leary, 783 P.2d 843 (Colo. 1989).

Attorney's continued practice of law while under an order of suspension, with no efforts to wind up the legal practice, and the failure to take action to protect the legal interests of the attorney's clients, warrants disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

Disbarment was the proper remedy where the attorney was afforded multiple opportunities including two suspensions and court ordered rehabilitation and where attorney's conduct demonstrated (a) neglect of legal matters entrusted to him; (b) misrepresentation to the client and the grievance committee; and (c) a pattern of neglect followed by the respondent that had the potential of causing serious injury to his clients. People v. Susman, 787 P.2d 1119 (Colo. 1990).

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Disbarment proper remedy for lawyer who, shortly after admission to bar and continuing for two years, embarked on a course of conduct resulting in ten separate instances of professional misconduct, some of which presented the potential for serious harm to clients and to the administration of justice. People v. Murray, 887 P.2d 1016 (Colo. 1994).

A lawyer's continued practice of law while under an order of suspension, with no efforts to wind up the legal practice, and failure to take action to protect the legal interests of the lawyer's clients, warrants disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

Pattern of misconduct involving failure to render services, multiple offenses, and conversion of clients' property sufficient to warrant disbarrment. People v. Vermillion, 814 P.2d 795 (Colo. 1991).

Disbarment appropriate where attorney converted client funds, neglected a legal matter entrusted to him, and had a history of discipline. People v. Grossenbach, 814 P.2d 810 (Colo. 1991).

Disbarment appropriate when attorney neglected numerous legal matters and engaged in other conduct prejudicial to client and the administration of justice. People v. Theodore, 926 P.2d 1237 (Colo. 1996).

Failure to respond to discovery and motions, failure to attend case management hearing, and failure to inform client of progress of a civil case is grounds for disbarment. People v. Hebenstreit, 823 P.2d 125 (Colo. 1992).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Ashley, 817 P.2d 965 (Colo. 1991); People v. Rouse, 817 P.2d 967 (Colo. 1991); People v. Margolin, 820 P.2d 347 (Colo. 1991); People v. Koransky, 824 P.2d 819 (Colo. 1992); People v. Bradley, 825 P.2d 475 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. McGrath, 832 P.2d 1 (Colo. 1992); People v. Singer, 955 P.2d 1005 (Colo. 1998).

Conduct violating this rule sufficient to justify disbarment. People v. Kerlick, 647 P.2d 337 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Craig, 653 P.2d 1 (Colo. 1982); People v. Golden, 654 P.2d 853 (Colo. 1982); People v. Coca, 716 P.2d 1073 (Colo. 1986); People v. Quick, 716 P.2d 1082 (Colo. 1986); People v. Quintana, 752 P.2d 1059 (Colo. 1988); People v. Lovett, 753 P.2d 205 (Colo. 1988); People v. Brooks, 753 P.2d 208 (Colo. 1988); People v. Turner, 758 P.2d 1335 (Colo. 1988); People v. Decker, 759 P.2d 14 (Colo. 1988); People v. Score, 760 P.2d 1111 (Colo. 1988); People v. Keng, 776 P.2d 60 (Colo. 1989); People v. Murphy, 778 P.2d 658 (Colo. 1989); People v. Frank, 782 P.2d 769 (Colo. 1989); People v. Johnston, 782 P.2d 1195 (Colo. 1989); People v. Dulaney, 785 P.2d 1302 (Colo. 1990); People v. Franks, 791 P.2d 1 (Colo. 1990); People v. Gregory, 797 P.2d 42 (Colo. 1990); People v. Mullison, 829 P.2d 382 (Colo. 1992); People v. Hyland, 830 P.2d 1000 (Colo. 1992).

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RULE 1.2 — SCOPE AND OBJECTIVES OF REPRESENTATION

(a) A lawyer shall abide by a client's decisions concerning the scope and objectives of representation, subject to paragraphs (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of 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 client consents after consultation. 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.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

(f) In representing a client, a lawyer shall not engage in conduct 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.

Source: (a), (c), and comment amended and adopted June 17, 1999, effective July 1, 1999.

Comment

Scope and Objectives of Representation

The scope or objectives, or both, of the lawyer's representation of the client may be limited if the client consents after consultation with the lawyer.

In litigation matters on behalf of a pro se party, limitation of the scope or objectives of the representation is subject to C.R.C.P. 11(b) or 311 (b) and C.R.C.P. 121, section 1-1, and, therefore, involves not only the client and the lawyer but also the court. When a lawyer is providing limited representation to a pro se party as permitted by C.R.C.P. 11(b) or 311(b), the consultation with the client shall include an explanation of the risks and benefits of such limited. representation. A lawyer must provide meaningful legal advice consistent with the limited scope of the lawyer's representation, but a lawyer's advice may be based upon the pro se party's representation of the facts and the scope of representaton agreed upon by the lawyer and the pro se party.

A lawyer remains liable for the consequences of any negligent legal advice. Nothing in this rule is intended to expand or restrict, in any manner, the laws governing civil liability of lawyers.

Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has the ultimate authority to determine the purposes to be served by the legal representation, within the limits imposed by the law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions.

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Political Activities

Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's political activities.

Services Limited in Objectives or Means

The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.

An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate Rule 1.1, or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

Criminal, Fraudulent and Prohibited Transactions

A lawyer is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. However, a lawyer may not knowingly assist a client in criminal or

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fraudulent conduct. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6. However, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate the criminal or fraudulent escape of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

Committee Comment

Rule 1.2 has no direct counterpart in the Disciplinary Rules of the Code of Professional Responsibility. The provisions of several Disciplinary Rules and Ethical Considerations are included in this Rule.

Annotation

Law reviews. For formal opinion of the Colorado Bar Association on Ethical Duties of Attorney Selected by Insurer to Represent Its Insured, see 22 Colo. Law. 497 (1993). For article, "Discrete Task Representation a/k/a Unbundled Legal Services", see 29 Colo. Law. 5 (January 2000). For article, "Limited Representation in Criminal Defense Cases", see 29 Colo. Law. 77 (October 2000). For article, "Ethical Considerations and Client Identity", see 30 Colo. Law. 51 (April 2001). For article, "Settlement Ethics", see 30 Colo. Law. 93 (December 2001). For comment, "Increasing Access to Justice: Expanding the Role of Nonlawyers in the Delivery of Legal Services to Low-Income Coloradans", see 72 U. Colo. L. Rev. 459 (2001). For article, "Ethical Guidelines for Settlement Negotiations", see 34 Colo. Law. 11 (February 2005). For article, "Ethical Concerns When Dealing With the Elder Client", see 34 Colo. Law. 27 (October 2005). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005).

Annotator's note. Since Rule 1.2 is similar to DR 7-101, DR 7-102, DR 2-110, and DR 9-101 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility, relevant cases construing those provisions have been included in the annotations to this rule.

Even though section (c) of this rule allows unbundling of legal services, an attorney remains obligated to comply with C.R.C.P. 11(In re Markham, 250 Bankr. 724 (Bankr. D. Colo. 2000).

Having a litigant appear to be pro se when in truth an attorney is authoring pleadings and necessarily guiding the course of the litigation with an unseen hand is disingenuous and far below the level of candor that must be met by members of the bar. Such conduct is contrary to paragraph (d) of this rule. Johnson v. Bd. of County Comm'rs of Fremont, 868 F. Supp. 1226 (D. Colo. 1994).

Any provision in an agreement to provide legal services that would deprive a client of the right to control settlement is unenforceable as against public policy, including a provision that purports to prohibit the client from unreasonably refusing to settle. A client's right to reject settlement is absolute and unqualified; parties to litigation have the right to control their own cases. Jones v. Feiger, Collison & Killmer, 903 P.2d 27 (Colo. App. 1994), rev'd on other grounds, 926 P.2d 1244 (Colo. 1996).

Aiding client to violate custody order sufficient to justify disbarment. People v. Chappell, 927 P.2d 829 (Colo. 1996).

Suspension for three years, the longest period available, was appropriate in case where violation of this rule and others would otherwise have justified disbarment but mitigating factors included personal and emotional problems, interim rehabilitation, and remorse. People v. McCaffrey, 925 P.2d 269 (Colo. 1996).

Suspension for one year and one day appropriate when attorney neglected to file response to motion for summary judgment and to return client files upon request. People v. Honaker, 847 P.2d 640 (Colo. 1993).

Public censure appropriate where harm suffered by attorney's client was speculative, attorney retracted his misrepresentations and admitted to his client before the institution of disciplinary proceedings that he had done nothing on the client's appeal, attorney had no prior discipline, he made full and free disclosure of his misconduct to the grievance committee, and he expressed remorse for his misconduct. People v. Nelson, 848 P.2d 351 (Colo. 1993).

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If prosecution witness advises the prosecutor that he or she knows or recognizes one of the jurors, the prosecutor has an affirmative duty immediately to notify the court and opposing counsel of the witness' statement. People v. Drake, 841 P.2d 364 (Colo. App. 1992).

When a lawyer accepts fees from clients and then abandons those clients while keeping their money and causing serious harm, disbarment is appropriate. People v. Steinman, 930 P.2d 596 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Steinman, 930 P.2d 596 (Colo. 1997); In re Bilderback, 971 P.2d 1061 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Sousa, 943 P.2d 448 (Colo. 1997).

Cases Decided Under Former DR 2-110.

Law reviews. For article, "Coping with the Paper Avalanche: A Survey on the Disposition of Client Files", see 16 Colo. Law. 1787 (1987).

Suspension for one year and one day warranted for attorney who "represented" client for a period of 19 months without that person's knowledge or consent, even asserting a counterclaim on his behalf without talking to him; who did not communicate with him in any manner for an extended period of time and then did not withdraw within a reasonable time after being unable to contact him; and who failed to answer discovery requests, resulting in the entries of default and then a default judgment against him. People v. Silvola, 915 P.2d 1281 (Colo. 1996).

Attorney who undertakes to conduct action impliedly agrees that he will pursue it to some conclusion; and he is not free to abandon it without reasonable cause. Sobol v. District Court, 619 P.2d 765 (Colo. 1980); Anderson, Calder & Lembke v. District Court, 629 P.2d 603 (Colo. 1981).

Even where cause may exist, attorney's withdrawal must be undertaken in proper manner, duly protective of his client's rights and liabilities. Sobol v. District Court, 619 P.2d 765 (Colo. 1980).

Attorney's withdrawal from employment was improper where attorney gave clients insufficient notice of her intention to withdraw, failed to return the file of one client, and took no steps to avoid foreseeable injury to the clients' interests. People v. Felker, 770 P.2d 402 (Colo. 1989).

Trial dates accepted shall be honored before withdrawal from employment. When public defender or a busy defense lawyer finds that his representation of one client is inimical to his representation of another client and he must make an election as to the client he will represent, he has a heavy duty to the court to see that he honors dates that he has agreed to for the trial of a case. Watson v. District Court, 199 Colo. 76, 604 P.2d 1165 (1980).

Attorney's withdrawal is within trial court's discretion. The question of whether an attorney should be permitted to withdraw his general appearance on behalf of a litigant in a civil case is, under ordinary circumstances, within the discretion of the trial court; and its decision will not be reversed unless this discretion has been demonstrably abused. Sobol v. District Court, 619 P.2d 765 (Colo. 1980).

Motions for withdrawal of counsel are addressed to the discretion of the court and will not be reversed unless clear error or abuse is shown. Anderson, Calder & Lembke v. District Court, 629 P.2d 603 (Colo. 1981).

A decision as to whether counsel should be permitted to withdraw must lie within the sound discretion of the trial judge. As long as the trial court has a reasonable basis for believing that the lawyer-client relation has not deteriorated to the point where counsel is unable to give effective aid in the fair presentation of a defense, the court is justified in refusing to appoint new counsel. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

The question of whether a lawyer may withdraw during course of trial due to the client's conduct is within the trial court's discretion and court must balance need for orderly administration of justice with facts underlying request for withdrawal. People v. Rubanowitz, 688 P.2d 231 (Colo. 1984).

The trial court's decision will not be disturbed on review absent abuse. The decision of the trial court to deny a motion to withdraw will not be disturbed on review absent a clear abuse of discretion. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

Disagreement concerning counsel's refusal to call witnesses is insufficient grounds. A disagreement between defense counsel and the accused concerning counsel's refusal to call certain witnesses is not sufficient to require the trial judge to grant the motion to withdraw and replace defense counsel. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

Filing of a grievance because of disagreement as to trial tactics is insufficient grounds. Mere filing of grievance concerning counsel's refusal to file certain motions and refusal to file a civil action is not sufficient to require trial judge to grant the motion to withdraw and replace defense counsel. People v. Martinez, 722 P.2d 445 (Colo. App. 1986).

Counsel should request permission to withdraw where client insists on presenting perjured testimony. When a serious disagreement arises between the defense counsel and the accused, and counsel is unable to dissuade his client from insisting that fabricated testimony be presented by a witness, counsel should request permission to

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withdraw from the case in accordance with the procedures set forth in this opinion. If the motion to withdraw is denied, however, he must continue to serve as defense counsel. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

When confronted with a client who insists upon presenting perjured testimony as to an alibi, counsel may only state, in the motion to withdraw, that he has an irreconcilable conflict with his client. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

Failure and refusal to refund unearned portions of fees collected from two clients constituted violations of C.R.C.P. 241(B), DR 9-102, and this rule. People v. Gellenthien, 621 P.2d 328 (Colo. 1981).

Failure to withdraw for over a year after being discharged by client, accompanied by protracted failure to return client's file, justifies suspension. People v. Hodge, 752 P.2d 533 (Colo. 1988).

Conduct violating this rule in conjunction with other disciplinary rules sufficient to justify public censure. People v. Vsetecka, 893 P.2d 1309 (Colo. 1995).

Failing to return the file of a client while at the same time neglecting to make further filings in such client's case during a period of suspension for similar acts of misconduct warrants further suspension from the practice of law. People v. Hodge, 782 P.2d 25 (Colo. 1989).

Suspended attorney must demonstrate rehabilitation. The actions of a suspended attorney who took part in a complex real estate transaction and engaged in the practice of law by representing, counseling, advising, and assisting a former client warrant suspension until he demonstrates by clear and convincing evidence that (1) he has been rehabilitated; (2) he has complied with and will continue to comply with all applicable disciplinary orders and rules; and (3) he is competent and fit to practice law. People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Moya, 793 P.2d 1154 (Colo. 1990); People v. Creasey, 794 P.2d 1159 (Colo. 1990); People v. Wilson, 814 P.2d 791 (Colo. 1991); People v. Whitaker, 814 P.2d 812 (Colo. 1991); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991); People v. Anderson, 817 P.2d 1035 (Colo. 1991); People v. Hyland, 826 P.2d 1000 (Colo. 1992); People v. Raubolt, 831 P.2d 462 (Colo. 1992); People v. Southern, 832 P.2d 9[illegible] (Colo. 1992); People v. Regan, 871 P.2d 1184 (Colo. 1994); People v. Cole, 880 P.2d 158 (Colo. 1994).

Conduct violating this rule sufficient to justify suspension. People v. Geller, 753 P.2d 235 (Colo. 1988).

Facts sufficient to justify disbarment of attorney for failure to comply with registration requirements of C.R.C.P. 227, misappropriation of funds, and improper withdrawal from employment. People v. Scudder, 197 Colo. 99, 590 P.2d 493 (1979).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Southern, 832 P.2d [illegible] (Colo. 1992); People v. McGrath, 833 P.2d 731 (Colo. 1992); People v. Fritsche, 897 P.2d 805 (Colo. 1995).

Conduct violating this rule sufficient to justify disbarment. People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Kengle, 772 P.2d 60[illegible] (Colo. 1989); People v. Franks, 791 P.2d 1 (Colo. 1990); People v. Vermillion, 814 P.2d 795 (Colo. 1991); People v. Sullivan, 829 P.2d 382 (Colo. 1992); People v. McGrath, 833 P.2d 731 (Colo. 1992).

Applied in People ex rel. MacFarlane v. Harthun, 195 Colo. 38, 581 P.2d 716 (1978); People v. Pacheco, 198 Colo. 455, 608 P.2d 833 (1979); [illegible] v. Pacheco, 199 Colo. 108, 608 P.2d 334 (1979); People v. Johnson, 199 Colo. 248, 612 P.2d 1[illegible] (1980); People v. Lanza, 200 Colo. 241, 613 P.2d 337 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Schuleta, 638 P.2d 255 (Colo. 1981).

Cases Decided Under Former DR 7-101.

Law reviews. For article, "The Ethical Aspects of Compromise, Settlement and Arbitration", see 25 Rocky Mt. L. Rev. 454 (1953). For article, "Incriminating Evidence: What to Do With a Hot Potato", see 11 Colo. Law. 880 (1982). For article, "Third-Party Malpractice Claims against Real Estate Lawyers", see 13 Colo. Law. 996 (1984). For article, "The Role of Parents' Counsel in Dependency and Neglect Proceedings — Part I", see 14 Colo. Law. 568 (1985). For article, "The Ethical Duty to Consider Alternatives to Litigation", see 19 Colo. Law. 249 (1990).

Lawyers are required by the obligations of their office to act with diligence in the affairs of their clients and in judicial proceedings. People v. Heyer, 176 Colo. 188, 489 P.2d 1042 (1971).

Failure to take any action on behalf of his client after he was retained and entrusted with work and after making representations to his client which were false, an attorney violates the code of professional responsibility and C.R.C.P. 241.6. People v. Southern, 638 P.2d 787 (Colo. 1982).

Trial court may explore adequacy of trial counsel's representations regarding grounds for withdrawal, but in the course of this inquiry, the court may not compel the attorney to disclose any confidential communications. People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

Attorney may not breach his duty of maintaining his client's confidences even when he knows his client has previously perjured himself. People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

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Attorney shall not use testimony that he knows is perjured. People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

Defense counsel may waive right to confront witnesses. The right to confront witnesses is a fundamental right and waiver of such a right is not to be lightly found, but this decision is properly the responsibility of defense counsel, and therefore, the decision of defense counsel to allow the prosecution to use depositions of witnesses in court is an effective waiver. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

Matters of trial conduct and strategy are the responsibility of defense counsel. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

Defendant cannot complain when it falls short of accomplishing an acquittal. It is not error to deny a motion for a new trial based on incompetence of trial counsel where the incompetence claimed arises out of defense counsel's failure to call certain witnesses that the defendant suggested, because defense counsel is responsible for trial strategy, and the defendant will not be heard to complain when trial strategy falls short of accomplishing an acquittal. People v. Moreno, 181 Colo. 106, 507 P.2d 857 (1973).

If every decision in a contested trial had to be made by the accused, he would be denied effective assistance and the judgment of his trial counsel; the defendant's attorney is the expert at trial, not the defendant. Morse v. People, 180 Colo. 49, 501 P.2d 1328 (1972).

Continued and chronic neglect over a period of two years must be considered wi[illegible] supports finding of intentional prejudice or damage to clients. People v. Barber, 799 P.2d 936 (Colo. 199[illegible]

Trial court did not abuse its discretion by imposing sanctions on attorney w[illegible]at direc[illegible]n of clients, failed to advise opposing party of clients' bankruptcy and automatic stay in adva[illegible] of trial. [illegible]der [illegible]ch circumstances the attorney was faced with an irreconcilable conflict between his duty to his c[illegible]nts a[illegible]his pro[illegible]sional obligations to opposing counsel and would have been justified in requesting permission to with[illegible]v. Park[illegible]v. Davis, 888 P.2d 324 (Colo. App. 1994).

Inappropriate personal relationship with a client may pr[illegible]dice or dam[illegible]ge client under this rule. People v. Gibbons, 685 P.2d 168 (Colo. 1984).

Where an attorney requests, on the day of trial, [illegible]al of [illegible]h court proceedings because of lack of jurisdictional amount while representing plaintiff, fails [illegible]app[illegible]court when scheduled, shows gross indifference and disregard toward the court, the jur[illegible], and opp[illegible]g counsel, and fails to keep appointments with the grievance committee assigned to investigate cha[illegible]es agai[illegible]t hi[illegible]a public reprimand for dereliction of duty is called for. People v. Heyer, 176 Colo. 188, 489 P.2d 10[illegible]1[illegible]1).

Public censure was appropri[illegible]re a[illegible]ney's [illegible]ailure to appear at three hearings and to timely return a stipulation violated DR 1-102(A)(5) [illegible], in a[illegible]avatio[illegible]here was a pattern of misconduct. People v. Cabral, 888 P.2d 245 (Colo. 1995).

Conduct of attorn[illegible]warrante[illegible]ublic censure under paragraph (A)(1). People v. Stayton, 798 P.2d 903 (Colo. 1990); People v. Sm[illegible]819[illegible]2d 497[illegible]olo. 1991).

Conduct of attorn[illegible]arrant[illegible]public reprimand under paragraph (A)(2). People v. Atencio, 177 Colo. 439, 494 P.2d 837 (1972).

Cond[illegible]viola[illegible]g this r[illegible]e in conjunction with other disciplinary rules is sufficient to justify public censure. People v.[illegible]ley, [illegible].2d 962 (Colo. 1990); People v. Fitzgibbons, 909 P.2d 1098 (Colo. 1996).

Conduct v[illegible]ting this rule sufficient to justify public censure. People v. Mayer, 716 P.2d 1094 (Colo. 1986); People v. Wilson, 745 P.2d 248 (Colo. 1987); People v. Wyman, 769 P.2d 1076 (Colo. 1989); People v. Baird, 772 P.2d 110 (Colo. 1989); People v. Fieman, 788 P.2d 830 (Colo. 1990); People v. Good, 790 P.2d 331 (Colo. 1990).

Where an attorney misrepresents to a client that he has filed a case, fails for two years to take action on behalf of another client, and, knowing that a hearing had been set on charges against him, deliberately leaves the jurisdiction of the court without making any arrangements with the grievance committee and without arranging for representation, his conduct warrants suspension from the bar. People v. Kane, 177 Colo. 378, 494 P.2d 96 (1972).

Suspension is fitting sanction when lawyer knowingly fails to perform services for a client and thereby causes injury to such client. People v. Masson, 782 P.2d 335 (Colo. 1989).

Failing to resolve an inability to proceed on behalf of a client, neglecting to respond to communications from the grievance committee, failing to fulfill commitments made to the investigator for the disciplinary counsel, and misrepresenting to such investigator the status of the case under investigation is conduct warranting suspension. People v. Chappell, 783 P.2d 838 (Colo. 1989).

Suspension of lawyer for three years which is the longest possible period for suspension, is appropriate where there was extensive pattern of client neglect and intentional deception in client matters over a period of years. Anything less would be too lenient. People v. Hellewell, 811 P.2d 386 (Colo. 1991).

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Failure to communicate with clients, court, and opposing counsel, misrepresentation of the status of the proceedings to the client, and failure to investigate clients' case justifies three-year suspension. People v. Wilson, 814 P.2d 791 (Colo. 1991).

Knowing failure to prosecute client's claim or to obtain client's informed consent to abandon the claim and neglecting to pursue settlement negotiations damaged client and constitutes intentional failure to carry out contract of employment sufficient to justify suspension. People v. Honaker, 814 P.2d 785 (Colo. 1991).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to warrant suspension. People v. Creasey, 793 P.2d 1159 (Colo. 1990); People v. Schmad, 793 P.2d 1162 (Colo. 1990); People v. Wilbur, 796 P.2d 976 (Colo. 1990); People v. Baptie, 796 P.2d 978 (Colo. 1990); People v. Taylor, 799 P.2d 930 (Colo. 1990); People v. Garrett, 802 P.2d 1082 (Colo. 1990); People v. Rhodes, 803 P.2d 514 (Colo. 1991); People v. Flores, 804 P.2d 192 (Colo. 1991); People v. Dunsmoor, 807 P.2d 561 (Colo. 1991); People v. Hall, 810 P.2d 1069 (Colo. 1991); People v. Koeberle, 810 P.2d 1072 (Colo. 1991); People v. Dash, 811 P.2d 36 (Colo. 1991); People v. Creasey, 811 P.2d 40 (Colo. 1991); People v. Whitaker, 814 P.2d 812 (Colo. 1991); People v. Hansen, 814 P.2d 816 (Colo. 1991); People v. Hyland, 830 P.2d 1000 (Colo. 1992); People v. Raubolt, 831 P.2d 462 (Colo. 1992); People v. Regan, 831 P.2d 893 (Colo. 1992); People v. Denton, 839 P.2d 6 (Colo. 1992); People v. Hindorff, 860 P.2d 526 (Colo. 1993); People v. Cole, 880 P.2d 158 (Colo. 1994); People v. Smith, 880 P.2d 763 (Colo. 1994); People v. Schaefer, 938 P.2d 147 (Colo. 1997).

Conduct violating this rule sufficient to justify suspension. People v. Yaklich, 646 P.2d 918 (Colo. 1982); People v. Brackett, 667 P.2d 1357 (Colo. 1983); People v. Pilgrim, 698 P.2d 1322 (Colo. 1985); People v. Convery, 704 P.2d 296 (Colo. 1985); People v. Foster, 716 P.2d 1069 (Colo. 1986); People v. Cisneros, 716 P.2d 1073 (Colo. 1986); People v. Barnett, 716 P.2d 1076 (Colo. 1986); People v. Fleming, 716 P.2d 1077 (Colo. 1986); People v. Larson, 716 P.2d 1093 (Colo. 1986); People v. Richards, 748 P.2d 341 (Colo. 1987); People v. Convery, 748 P.2d 1338 (Colo. 1988); People v. Griffin, 764 P.2d 1166 (Colo. 1988); People v. Goens, 770 P.2d 1211 (Colo. 1989); People v. Flores, 772 P.2d 610 (Colo. 1989); People v. Pooley, 774 P.2d 239 (Colo. 1989); People v. Fahney, 782 P.2d 743 (Colo. 1989); People v. Gregory, 788 P.2d 823 (Colo. 1990); People v. Bergmann, 790 P.2d 840 (Colo. 1990).

Failure to file bankruptcy petition for eight months justifies disbarment. When a lawyer, after being paid for his services, neglects to file a bankruptcy petition for his client for a period of approximately eight months, during which time the client is sued and his wages attached on several occasions, the lawyer's gross neglect and failure to carry out a contract of employment justify disbarment. People v. McMichael, 199 Colo. 433, 609 P.2d 633 (1980).

Converting estate or trust funds for one's personal use, overcharging for services rendered, neglecting to return inquiries relating to client matters, failure to make candid disclosures to grievance committee, and attempting to conceal wrongdoing during disciplinary proceedings warrants the severe sanction of disbarment. People v. Gerdes, 782 P.2d 2 (Colo. 1989).

Disbarment was the proper remedy where attorney's conduct demonstrated (a) neglect of legal matters entrusted to him; (b) misrepresentation to the client and the grievance committee; and (c) a pattern of neglect followed by the respondent that had the potential of causing serious injury to his clients, and the attorney was afforded multiple opportunities including two suspensions and court ordered rehabilitation. People v. Susman, 787 P.2d 1119 (Colo. 1990).

Converting trust funds to one's own use in the amount of $13,100 and refusing to make payments on a promissory note taken in restitution was conduct intentionally prejudicial to the client sufficient to justify disbarment. People v. Whitcomb, 814 P.2d 493 (Colo. 1991).

Converting trust funds, along with other misconduct, sufficient to justify disbarment. Where attorney withdraws $62,550 from trust without beneficiaries' knowledge or permission, fails to repay a $5,000 loan from the trustee, prepares fictional quarterly trust reports, disburses principal to beneficiaries in lieu of interest and lies regarding the amount of principal remaining in the trust, there is conduct sufficiently prejudicial to the client to justify disbarment. People v. Tanquary, 831 P.2d 889 (Colo. 1992).

When attorney converted client's funds, named himself trustee, misrepresented to banks that the funds were his own, engaged in self-dealing, and maintained custody of the client's investment accounts, disbarment was warranted. There were no mitigating factors. People v. Warner, 8873 P.2d 724 (Colo. 1994).

Misrepresenting the status of a dissolution of marriage action with knowledge of impending remarriage and then forging the purported decree of dissolution is conduct involving moral turpitude deserving of disbarment. People v. Belina, 782 P.2d 26 (Colo. 1989).

Conduct which causes a client serious or potentially serious injury and demonstrates a complete lack of concern for a client's interests and welfare warrants disbarment. People v. Lyons, 762 P.2d 143 (Colo. 1988).

Where an attorney demonstrates an extreme indifference to the welfare of his clients and the status of their cases and an extreme insensitivity to his professional duties in the face of adverse judgments due to neglect, client

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complaints, and repeated disciplinary proceedings, disbarment is the appropriate sanction. People v. Wyman, 782 P.2d 339 (Colo. 1989).

Facts sufficient to justify disbarment of attorney for failure to comply with registration requirements of C.R.C.P. 227, misappropriation of funds, and improper withdrawal from employment. People v. Scudder, 197 Colo. 99, 590 P.2d 493 (1979).

Failure to respond to discovery and motions, failure to attend case management hearing, and failure to inform client of progress of a civil case is grounds for disbarment. People v. Hebenstreit, 823 P.2d 125 (Colo. 1992).

Disbarment is appropriate sanction where attorney knowingly converts client property and causes injury or potential injury to a client. People v. Bowman, 887 P.2d 18 (Colo. 1994).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Nichols, 796 P.2d 966 (Colo. 1990); People v. Ashley, 817 P.2d 965 (Colo. 1991); People v. Rouse, 817 P.2d 967 (Colo. 1991); People v. Crimaldi, 804 P.2d 863 (Colo. 1991); People v. Bergmann, 807 P.2d 568 (Colo. 1991); People v. Rhodes, 814 P.2d 787 (Colo. 1991); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991); People v. Whitcomb, 819 P.2d 493 (Colo. 1991); People v. Koransky, 824 P.2d 819 (Colo. 1992); People v. Bradley, 825 P.2d 475 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. Schindelar, 845 P.2d 1146 (Colo. 1993); People v. Schaefer, 944 P.2d 78 (Colo. 1997); People v. Skaalerud, 963 P.2d 341 (Colo. 1998).

Conduct violating this rule sufficient to justify disbarment. People v. Kendrick, [illegible]2d 337 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Golden, 654 P.2d 853 (Colo. 1982), People v. Bealmear, 655 P.2d 402 (Colo. 1982); People v. Gibu[illegible], 685 P.2d 168 (Colo. 1984); People v. Quick, 716 P.2d 1082 (Colo. 1986); People v. James, 731 P.2d 6[illegible] (Colo. 1[illegible]); People v. Carpenter, 731 P.2d 726 (Colo. 1987); People v. Coca, 732 P.2d 640 (Colo. 1987); People v. Stev[illegible], 752 P.2d 528 (Colo. 1987); People v. Quintana, 752 P.2d 1059 (Colo. 1988); People v. Lovett, 753 P.2d 205 (Colo. 1988); People v. Brooks, 753 P.2d 208 (Colo. 1988); People v. Turner, 758 P.2d 1335 (Colo. 1988); People v. Dan[illegible] P.2d 14 (Colo. 1988); People v. Costello, 781 P.2d 85 (Colo. 1989); People v. Frank, 782 P.2d 769 (Colo. 1989); People v. Johnston, 782 P.2d 1195 (Colo. 1989).

Conduct violating this rule sufficient to justify d[illegible]ent. People v. Dulaney, 785 P.2d 1302 (Colo. 1990); People v. Franks, 791 P.2d 1 (Colo. 1990); People v. Gregory, [illegible] P.2d 43 (Colo. 1990); People v. Vermillion, 814 P.2d 795 (Colo. 1991).

Conduct found to violate disciplinar[illegible]ules. People v. Bugg, 635 P.2d 881 (Colo. 1981); People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 45[illegible]30, 102 S. Ct. 1415, 71 L. Ed. 2d 639 (1982); People v. Ross, 810 P.2d 659 (Colo. 1991).

Applied in People ex rel. M[illegible]arlan[illegible]v. Ha[illegible], 195 Colo. 38, 581 P.2d 716 (1978); People v. McMichael, 196 Colo. 128, 586 P.2d 1 (1978); Peop[illegible]arthun, 197 Colo. 1, 593 P.2d 324 (1979); People v. Pacheco, 199 Colo. 108, 608 P.2d 334 (1979); People v. Belfo[illegible]00 Colo. 44, 611 P.2d 979 (1980); People ex rel. Silverman, v. Anderson, 200 Colo. 76, 612 P.2d 94 (1980); People v. [illegible]rbour, 199 Colo. 126, 612 P.2d 1082 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29[illegible] (1980); People v. Dixon, 200 Colo. 520, 616 P.2d 103 (1980); People v. Gottsegen, 623 P.2d 878 (Colo. 1981); People v. Dut[illegible]6 P.2d 103 (Colo. 1981); People v. Hebeler, 638 P.2d 254 (Colo. 1981); People v. Archuleta, 638 P.2d 255 (Colo. 1981); People v. Gellenthien, 638 P.2d 295 (Colo. 1981); People v. Barbour, 639 P.2d 1065 (Colo. 1982); People v. [illegible]stro, 657 P.2d 932 (Colo. 1982); People v. Emmert, 676 P.2d 672 (Colo. 1983); People v. Simon, 698 P.2d 2[illegible] (Colo. 1985).

Cases Decided Under Former DR 7-102.

Law reviews. For article, "The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client", see 59 Den. L.J. 75 (1981). For article, "Incriminating Evidence: What to do With a Hot Potato", see 11 Colo. Law. 880 (1982). For article, "Ethics, Tax Fraud and the General Practitioner", see 11 Colo. Law. 939 (1982). For article, "The Search for Truth Continued: More Disclosure, Less Privilege", see 54 U. Colo. L. Rev. 51 (1982). For article, "The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel", see 54 U. Colo. L. Rev. 67 (1982). For casenote, "Caldwell v. District Court: Colorado Looks at the Crime and Fraud Exception to the Attorney-Client Privilege", see 55 U. Colo. L. Rev. 319 (1984). For article, "Defending the Federal Drug or Racketeering Charge", see 16 Colo. Law. 605 (1987). For article, "A Proposal on Opinion Letters in Colorado Real Estate Mortgage Loan Transactions Parts I and II", see 18 Colo. Law. 2283 (1989) and 19 Colo. Law. 1 (1990). For comment, "Attorney-Client Confidences: Punishing the Innocent", see 61 U. Colo. L. Rev. 185 (1990).

Attorney-client relationship required. Rule requires the existence of an attorney-client relationship as an essential element of the proscribed professional misconduct. People v. Morley, 725 P.2d 510 (Colo. 1986).

A client is a person who employs or retains an attorney for advice or assistance on a matter relating to legal business. People v. Morley, 725 P.2d 510 (Colo. 1986).

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The relationship of an attorney and client can be inferred from the conduct of the parties. People v. Morley, 725 P.2d 510 (Colo. 1986).

The relationship is sufficiently 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. People v. Morley, 725 P.2d 510 (Colo. 1986).

Attorney shall not use testimony that he knows is perjured. People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

If he does so, he commits subornation of perjury. A lawyer who presents a witness knowing that the witness intends to commit perjury thereby engages in the subornation of perjury. People v. Schultheis, 638 P.2d 8 (Colo. 1981).

Trial court may explore adequacy of trial counsel's representations regarding grounds for withdrawal, but in the course of this inquiry, the court may not compel the attorney to disclose any confidential communications. People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

Attorney may not breach his duty of maintaining his client's confidences even when he knows his client has previously perjured himself. People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980), rev'd on other grounds, 638 P.2d 8 (Colo. 1981).

Unauthorized recordation of telephone conversation establishes unethical con[illegible] telephone conversation, which attorney initiated and recorded without the permission of other party to conversation, established unethical conduct on attorney's part. People v. Wallin, 621 P.2d 330 (Colo. 1981).

Planned course of conduct which is unresponsive to civil discovery constitutes intent to deceive, and such conduct is prejudicial to the administration of justice. People v. Haase, 7[illegible] P.2d [illegible] (Colo. [illegible]9).

In fulfilling the duty under Canon 7 of the Code of Professional Responsibility to zealously represent a client, a lawyer may advance a claim or defense not recognized under existing law that can be supported by a good faith argument for an extension, modification, or reversal of existing law. Sullivan v. Diaz, 827 P.2d 626 (Colo. App. 1992).

Unsuccessful appeal is not necessarily frivolous. [illegible]e a lawyer may present a supportable argument which is extremely unlikely to prevail on appeal, it cannot be said that an unsuccessful appeal is necessarily frivolous. Mission Denver Co. v. Pierson, 674 P.2d 363 (Colo. [illegible]84).

An attorney should not pursue frivolous appeals. An attorney's decision not to pursue a frivolous appeal complies with his ethical responsibilities to his client. Hodges v. Barry, 701 P.2d 1240 (Colo. 1985).

Failure to inform arbitrators [illegible]rs [illegible]xpert witness' testimony constituted violation of DR 7-102 warranting public censure because attorney did not disclose that expert had informed attorney of mistakes in writing, and ttorney made closing argume[illegible]s ba[illegible] uncorrected expert conclusions. People v. Bertagnolli, 861 P.2d 717 (Colo. 1993).

Actions taken by attorney contrary to court order violate this rule and justify suspension. People v. Awenius, 653 P.2d 740 (Colo. [illegible]2).

False testimony and counseling such conduct warrant disbarment. When a lawyer counsels his client to testify falsely at a hearing on a bankruptcy petition and the client does so, and the lawyer gives a false answer to a question asked of him by the bankruptcy judge, his misconduct warrants disbarment. People v. McMichael, 199 Colo. 433, 609 P.2d 633 (19[illegible]).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Smith, 830 P.2d 1003 (Colo. 1992).

Conduct violating this rule sufficient to justify suspension. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979); People v. Barnthouse, 775 P.2d 545 (Colo. 1989), cert. denied, 493 U.S. 1026, 110 S. Ct. 734, 107 L.Ed.2d 752 (1990); People v. Bergmann, 790 P.2d 840 (Colo. 1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Hansen, 814 P.2d 816 (Colo. 1991); People v. Calt, 817 P.2d 969 (Colo. 1991); People v. Whitcomb, 819 P.2d 493 (Colo. 1991); People v. Smith, 830 P.2d 1003 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. Marmon, 903 P.2d 651 (Colo. 1995).

Conduct violating this rule sufficient to justify disbarment. People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Morley, 725 P.2d 510 (Colo. 1986); People v. Turner, 758 P.2d 1335 (Colo. 1988); People v. Franks, 791 P.2d 1 (Colo. 1990); People v. Mullison, 829 P.2d 382 (Colo. 1992); People v. Sims, 913 P.2d 526 (Colo. 1996).

Conduct held to violate this rule. People v. Goss, 646 P.2d 334 (Colo. 1982).

Applied in People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Rotenberg, 635 P.2d 220 (Colo. 1981); Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215 (Colo. 1982); People v. Simon, 698 P.2d 228 (Colo. 1985); People v. Hebenstreit, 764 P.2d 51 (Colo. 1988).

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Cases Decided Under Former DR 9-101.

Law reviews. For article, "The Conflicted Attorney", see 11 Colo. Law. 2589 (1982). For article, "Access and Friendship with Local Decision-makers — May a Lawyer Exploit", see 16 Colo. Law. 482 (1987). For article, "Coping with the Paper Avalanche: A Survey on the Disposition of Client Files", see 16 Colo. Law. 1787 (1987).

Since employment in a public defender's office is not the type of public employment contemplated in paragraph (B) of this rule, no conflict of interest can be perceived in the representation of a defendant by a deputy public defender and the subsequent representation by the same attorney in a private capacity of the defendant in the same case. Coles, Manter & Watson v. Denver Dist. Court, 177 Colo. 210, 493 P.2d 374 (1972).

Disqualification of former district attorney and his firm was appropriate. Disqualification of former district attorney and his firm from representing client in case in which former district attorney had done investigation under this canon was clearly appropriate. Osburn v. District Court, 619 P.2d 41 (Colo. 1980).

Disqualification of district attorney's office required where two former district attorneys are witnesses on contested issues in case. Pease v. District Court, 708 P.2d 800 (Colo. 1985).

Where a lawyer knows or should know that he is dealing improperly with a client's property and causes potential injury to the client, a suspension from the practice of law, at the very least, is an appropriate sanction. People v. McGrath, 780 P.2d 492 (Colo. 1989).

Where there is no evidence of a specific identifiable impropriety, there is no ba[illegible]isqualification under this canon. Food Brokers, Inc. v. Great Western Sugar, 680 P.2d 857 (Colo. App. 1[illegible]4).

Factors for determining "an appearance of impropriety" discussed in C[illegible]eary v. District [illegible]ourt, 704 P.2d 866 (Colo. 1985).

"Substantial responsibility" requirement of paragraph (B) of this [illegible]le ar[illegible]ed in C[illegible]ry v. District Court, 704 P.2d 866 (Colo. 1985); People v. Anaya, 732 P.2d 1241 (Colo. App. 1986), re[illegible]n othe[illegible]rounds, 764 P.2d 779 (Colo. 1988).

Conduct violating this rule sufficient to justify disbarme[illegible] People v. Du[illegible]ley, 785 P.2d 1302 (Colo. 1990).

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A Lawyer shall act with[illegible]reason[illegible]le di[illegible]nce and promptness in representing a client. A lawyer shall not neglect a le[illegible]l ma[illegible]entrusted to that lawyer.

Comment

A lawyer sh[illegible]l pur[illegible]a matt[illegible]on behalf of a client despite opposition, obstruction or personal inconvenience to [illegible] law[illegible], and [illegible]ake whatever lawful and ethical measures are required to vindicate a client's cause or endeave[illegible]A la[illegible]r should act with commitment and dedication to the interests of the client and with zeal in advocacy on the cl[illegible]s behalf. However, a lawyer is not bound to press for every advantage that might be realized for a client. A lawyer's w[illegible]load should be controlled so that each matter can be handled adequately.

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests can often be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Committee Comment

The Committee added the second sentence to Rule 1.3 in order to establish an enforceable standard as well as an affirmative obligation to act with reasonable diligence and promptness. The second sentence restates DR 6-101(A)(3).

Annotation

Law reviews. For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005).

Annotator's note. Rule 1.3 is similar to DR 6-101 and DR 7-101 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 6-101 have been included under Rule 1.1 and cases construing DR 7-101 have been included under Rule 1.2.

Public censure appropriate where harm suffered by attorney's client was speculative, attorney retracted his misrepresentations and admitted to his client before the institution of disciplinary proceedings that he had done nothing on the client's appeal, attorney had no prior discipline, he made full and free disclosure of his misconduct to the grievance committee, and he expressed remorse for his misconduct. People v. Nelson, 848 P.2d 351 (Colo. 1993).

Public censure appropriate where attorney failed to review district attorney's file and the transcript of the preliminary hearing before trial. People v. Bonner, 927 P.2d 836 (Colo. 1996).

More severe sanction of public censure rather than private censure warranted where attorney continued to rely on methods of communication which had previously failed even after it became evident that the settlement agreement would be withdrawn and the client's interests would be harmed. People v. Podoll, 865 P.2d 1389 (Colo. 1993).

Public censure instead of private censure was appropriate where attorney failed to respond to discovery requests and motions for summary judgment and the findings of the board did not support the applicability of ABA Standard 9.32(i) as a mitigating factor since there was no medical evidence that attorney was affected by chemical dependency or that alcohol contributed to or caused the misconduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Public censure and monitoring conditions for one year rather than private censure, were appropriate where attorney had a history of private sanctions indicating a pattern of misconduct. The attorney had also had a six-month suspension entered against him during the same time period in which the acts giving rise to censure occurred. Had the acts occurred following the suspension, public censure would be too lenient. People v. Field, 967 P.2d 1035 (Colo. 1998).

Aggravating and mitigating factors. The following factors are considered aggravating when deciding the appropriate level of discipline: (1) Prior discipline, (2) a pattern of misconduct, and (3) bad faith obstruction of the disciplinary process through total non-cooperation with the disciplinary authorities. Failure to appear before the disciplinary board will cause one to lose the ability to present evidence of mitigating factors. People v. Stevenson, 980 P.2d 504 (Colo. 1999).

Attorney's restitution agreement was neither an aggravating nor mitigating factor since the attorney did not propose or attempt any informal restitution until after a request for investigation had been filed with the office of disciplinary counsel. People v. Brady, 923 P.2d 887 (Colo. 1996).

Attorney's argument that public discipline is not appropriate because it would stigmatize a recovering alcoholic was rejected since overriding concern in discipline proceedings is to protect the public through the enforcement of professional standards of conduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Public censure appropriate where attorney allowed the statute of limitations to run before filing a complaint on the client's personal injury claim. People v. Hockley, 968 P.2d 109 (Colo. 1998).

Public censure appropriate where neglect extended over a long period of time, respondent had no prior history of discipline, and the actual harm caused by the misconduct was slight. People v. Berkley, 858 P.2d 699 (Colo. 1993).

Public censure appropriate for failure to submit settlement papers to client and to take any further action in the matter, in addition to other conduct violating rules. People v. Berkley, 858 P.2d 699 (Colo. 1993).

Public censure appropriate where attorney neglected and made misrepresentations in two separate legal matters. People v. Eagan, 902 P.2d 841 (Colo. 1995).

Public censure with additional conditions imposed on lawyer who neglected client's matter and then misinformed client of its status. People v. Kram, 966 P.2d 1065 (Colo. 1998).

Public censure warranted where, although respondent did not notify his clients and opposing counsel of his suspension, he did notify the court early in proceedings, did not go forward with court proceedings while on suspension and no actual harm was demonstrated to any of his clients. People v. Dover, 944 P.2d 80 (Colo. 1997).

Forty-five-day suspension warranted where respondent neglected child custody matter and had a prior public censure, a prior admonishment, and prior suspensions, but where the respondent did not demonstrate a dishonest

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or selfish motive and exhibited a cooperative attitude and expressions of remorse. People v. Dowhan, 951 P.2d 905 (Colo. 1998).

Attorney's inaction over a period of more than two years and other disciplinary violations warrant suspension for 30 days where there are mitigating factors. People v. LaSalle, 848 P.2d 348 (Colo. 1993).

Neglecting to file response to motion for summary judgment and to return client files upon request was sufficient to result in one-year and one-day suspension. People v. Honaker, 847 P.2d 640 (Colo. 1993).

Suspension for one year and one day appropriate when attorney neglected to file response to motion for summary judgment and to return client files upon request. People v. Honaker, 847 P.2d 640 (Colo. 1993).

Suspension for one year and one day appropriate when lawyer neglects matters of multiple clients and charges unreasonable fees. People v. Reedy, 966 P.2d 1057 (Colo. 1998).

Suspension for three years, the longest period available, was appropriate in case where violation of this rule and others would otherwise have justified disbarment but mitigating factors included personal and emotional problems, interim rehabilitation, and remorse. People v. McCaffrey, 925 P.2d 269 (Colo. 1996).

Suspension for three years was appropriate in case involving violation of this rule and others, together with attorney's breach of his duty as client's trustee to protect his client, who was a particularly vulnerable victim that was recuperating from a serious head injury. People v. DeRose, 945 P.2d 412 (Colo. 1997).

Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. People v. Henderson, 967 P.2d 1038 (Colo. 1998).

Three-year suspension warranted for attorney who effectively abandoned and failed to communicate with clients. People v. Shock, 970 P.2d 966 (Colo. 1999).

Conduct warranted one-year extension of attorney's suspension. People v. Arvola, 933 P.2d 1308 (Colo. 1997).

Disbarment appropriate remedy for attorney who neglected client's legal matter, failed to return retainer after being requested to do so, abandoned law practice, evaded process, and failed to respond to request of grievance committee. People v. Williams, 845 P.2d 1150 (Colo. 1993).

Attorney who failed to make sufficient efforts to ensure that his client received timely payments from the trust for which he was the trustee violated this rule. People v. DeRose, 945 P.2d 412 (Colo. 1997).

When a lawyer accepts fees from clients and then abandons those clients while keeping their money and causing serious harm, disbarment is appropriate. People v. Steinman, 930 P.2d 596 (Colo. 1997).

Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 942 P.2d 1385 (Colo. 1997).

Conduct violating this rule, in conjunction with other disciplinary rules, sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Titon, 893 P.2d 322 (Colo. 1995); People v. Doherty, 908 P.2d 1120 (Colo. 1996); People v. Woodrum, 911 P.2d 659 (Colo. 1996); People v. Murray, 912 P.2d 554 (Colo. 1996); People v. Barbieri, 935 P.2d 12 (Colo. 1997); People v. Williams, 936 P.2d 1289 (Colo. 1997); People v. Buckingham, 938 P.2d 1157 (Colo. 1997); People v. Todd, 938 P.2d 1160 (Colo. 1997); People v. Doherty, 945 P.2d 1380 (Colo. 1997); People v. Yates, 952 P.2d 340 (Colo. 1998); People v. Barr, 957 P.2d 1379 (Colo. 1998); People v. Kolko, 962 P.2d 979 (Colo. 1998).

Conduct violating this rule sufficient to justify public censure. People v. Smith, 847 P.2d 1154 (Colo. 1993); People v. Podoll, 855 P.2d 1389 (Colo. 1993); People v. Essling, 893 P.2d 1308 (Colo. 1995); People v. Belsches, 918 P.2d 559 (Colo. 1996); People v. Gonzalez, 933 P.2d 1306 (Colo. 1997); People v. Mohar, 935 P.2d 19 (Colo. 1997); People v. White, 951 P.2d 483 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Farrant, 852 P.2d 452 (Colo. 1993); People v. Barr, 855 P.2d 1386 (Colo. 1993); People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Kuntz, 908 P.2d 1110 (Colo. 1996); People v. Fager, 925 P.2d 280 (Colo. 1996); People v. Hohertz, 926 P.2d 560 (Colo. 1996); People v. Paulson, 930 P.2d 582 (Colo. 1997); People v. Bates, 930 P.2d 600 (Colo. 1997); People v. Reynolds, 933 P.2d 1295 (Colo. 1997); People v. White, 935 P.2d 20 (Colo. 1997); People v. Scott, 936 P.2d 573 (Colo. 1997); People v. Harding, 937 P.2d 393 (Colo. 1997); People v. Primavera, 942 P.2d 496 (Colo. 1997); People v. Field, 944 P.2d 1252 (Colo. 1997); People v. Wotan, 944 P.2d 1257 (Colo. 1997); People v. Johnson, 946 P.2d 469 (Colo. 1997); People v. Wright, 947 P.2d 941 (Colo. 1997); People v. de Baca, 948 P.2d 1 (Colo. 1997); People v. Babinski, 951 P.2d 1240 (Colo. 1998); People v. Rishel, 956 P.2d 542 (Colo. 1998); In re Corbin, 973 P.2d 1273 (Colo. 1999); In re Bobbitt, 980 P.2d 538 (Colo. 1999); In re Demaray, 8 P.3d 427 (Colo. 1999).

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Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Marsh, 908 P.2d 1115 (Colo. 1996); People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Jamrozek, 921 P.2d 725 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997); People v. Townshend, 933 P.2d 1327 (Colo. 1997); People v. Madigan, 938 P.2d 1162 (Colo. 1997); People v. Swan, 938 P.2d 1164 (Colo. 1997); People v. Sousa, 943 P.2d 448 (Colo. 1997); People v. Schaefer, 944 P.2d 78 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Crist, 948 P.2d 1020 (Colo. 1997); People v. Roybal, 949 P.2d 993 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Hindman, 958 P.2d 463 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Skaalerud, 963 P.2d 341 (Colo. 1998); People v. Gonzalez, 967 P.2d 156 (Colo. 1998); In re Bilderback, 971 P.2d 1061 (Colo. 1999); In re Hugen, 973 P.2d 1267 (Colo. 1999); In re Tolley, 975 P.2d 1115 (Colo. 1999); In re Stevenson, 979 P.2d 1043 (Colo. 1999).

RULE 1.4 — COMMUNICATION

REPEALED

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Source: Comment amended April 20, 2000, effective July 1, 2000.

Comment

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. In order to avoid misunderstandings and hence to maintain public confidence in law and lawyers, a lawyer should fully and promptly inform the client of material developments in the matters being handled for the client. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer ought to initiate this decision-making process if the client does not do so. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rule 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter. A lawyer should exert best efforts to insure that decisions of the client are made only after the client has been informed of relevant considerations.

Adequacy of communication depends in part on the kind of advice or assistance involved. A lawyer should advise the client of the possible legal effect of each alternative course of action. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer would fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest, and the client's overall requirements as to the character of representation.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Information Pertaining to Fees Charged, Costs, Expenses, and Disbursements

Information provided to the client under Rule 1.4(a) should include information concerning fees charged, costs, expenses, and disbursements with regard to the client's matter. Additionally, the lawyer should promptly respond

to the client's reasonable requests concerning such matters. It is strongly recommended that all these communications be in writing. As to the basis or rate of the fee, see Rule 1.5.

Withholding Information

In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Committee Comment

Twenty-eight (28) of 39 States which have adopted some form of the Model Rules have adopted or recommended adoption of Rule 1.4 without substantive change. This Committee views it as a necessary recognition of a lawyer's obligation to the client.

The Rule states a lawyer's obligation in an affirmative way. Although there is no direct counterpart to Rule 1.4 in the Code the subject matter is covered in several provisions of the Code. The Committee finds no substantive change from the provisions of the Code of Professional Responsibility.

Annotation

Law reviews. For article, "The Evolving Doctrine of Informed Consent in Colorado", see 23 Colo. Law. 591 (1994). For article, "Confirm Attorney Fees in Writing: Court Changes Colo. RPC 1.4, 1.5", see 29 Colo. Law. 27 (June 2000). For article, "Ethical Concerns When Dealing With the Elder Client", see 34 Colo. Law. 27 (October 2005). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005).

Annotator's note. Rule 1.4 is similar to DR 6-101 and DR 9-102 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 9-102 have been included in the annotations to this rule. Cases construing DR 6-101 have been included under Rule 1.1.

Public censure appropriate where harm suffered by attorney's client was speculative, attorney retracted his misrepresentations and admitted to his client before the institution of disciplinary proceedings that he had done nothing on the client's appeal, attorney had no prior discipline, he made full and free disclosure of his misconduct to the grievance committee, and he expressed remorse for his misconduct. People v. Nelson, 848 P.2d 351 (Colo. 1993).

Public censure instead of private censure was appropriate where attorney failed to respond to discovery requests and motions for summary judgment and the findings of the board did not support the applicability of ABA Standard 9.32(i) as a mitigating factor since there was no medical evidence that attorney was affected by chemical dependency or that alcohol contributed to or caused the misconduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Aggravating and mitigating factors. The following factors are considered aggravating when deciding the appropriate level of discipline: (1) Prior discipline, (2) a pattern of misconduct, and (3) bad faith obstruction of the disciplinary proceedings through total non-cooperation with the disciplinary authorities. Failure to appear before the disciplinary board will cause one to lose the ability to present evidence of mitigating factors. People v. Stevenson, 980 P.2d 504 (Colo. 1999).

Attorney's restitution agreement was neither an aggravating nor mitigating factor since the attorney did not propose or attempt any form of restitution until after a request for investigation had been filed with the office of disciplinary counsel. People v. Brady, 923 P.2d 887 (Colo. 1996).

Attorney's argument that public discipline is not appropriate because it would stigmatize a recovering alcoholic was rejected since overriding concern in discipline proceedings is to protect the public through the enforcement of professional standards of conduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Neglecting to file response to motion for summary judgment and to return client files upon request was sufficient to result in one-year and one-day suspension. People v. Honaker, 847 P.2d 640 (Colo. 1993).

Ninety-day suspension justified where attorney's failure to respond to discovery requests resulted in default and entry of judgment against client for $816,613. People v. Clark, 927 P.2d 838 (Colo. 1996).

Attorney's inaction over a period of more than two years and other disciplinary violations warrant suspension for 30 days where there are mitigating factors. People v. LaSalle, 848 P.2d 348 (Colo. 1993).

Suspension for one year and one day appropriate when attorney neglected to return client files upon request. People v. Honaker, 847 P.2d 640 (Colo. 1993).

Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in

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14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. People v. Henderson, 967 P.2d 1038 (Colo. 1998).

Three-year suspension warranted for attorney who effectively abandoned and failed to communicate with clients. People v. Shock, 970 P.2d 966 (Colo. 1999).

Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 945 P.2d 1385 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Titoni, 893 P.2d 1322 (Colo. 1995); People v. Doherty, 908 P.2d 1120 (Colo. 1996); People v. Woodrum, 911 P.2d 640 (Colo. 1996); People v. Barbieri, 935 P.2d 12 (Colo. 1997); People v. Williams, 936 P.2d 1289 (Colo. 1997); People v. Buckingham, 938 P.2d 1157 (Colo. 1997); People v. Todd, 938 P.2d 1160 (Colo. 1997); People v. Doherty, 945 P.2d 1380 (Colo. 1997); People v. Barr, 957 P.2d 1379 (Colo. 1998).

Conduct violating rule sufficient to justify public censure. People v. Smith, 847 P.2d 1154 (Colo. 1993); People v. Damkar, 908 P.2d 1113 (Colo. 1996); People v. Marsh, 908 P.2d 1115 (Colo. 1996); People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Pooley, 917 P.2d 712 (Colo. 1996); People v. Belsches, 918 P.2d 559 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Kuntz, 908 P.2d 1110 (Colo. 1996); People v. Murray, 912 P.2d 554 (Colo. 1996); People v. Hohertz, 926 P.2d 560 (Colo. 1996); People v. [illegible], 930 P.2d 582 (Colo. 1997); People v. Bates, 930 P.2d 600 (Colo. 1997); People v. Reynolds, 933 P.2d [illegible]5 (Colo. [illegible]997); People v. Townshend, 933 P.2d 1327 (Colo. 1997); People v. Scott, 936 P.2d 573 (Colo. 1997); People v. Sathe[illegible]936 P.2d 576 (Colo. 1997); People v. Harding, 937 P.2d 393 (Colo. 1997); People v. Primavera, [illegible]42 P.2d 4[illegible] (Colo. 1997); People v. Field, 944 P.2d 1252 (Colo. 1997); People v. Johnson, 946 P.2d 469 (Colo. 19[illegible] People v. Wright, 947 P.2d 941 (Colo. 1997); People v. Rishel, 956 P.2d 542 (Colo. 1998); In re Corbin, 973 P.2d [illegible]3 (Colo. 1999); In re Bobbitt, 980 P.2d 538 (Colo. 1999); In re Demaray, 8 P.3d 427 (Colo. 1999).

Conduct violating this rule, in conjunction with other disciplinary rules, is sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, [illegible]2d 138 ([illegible]. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Jamrozek, 921 P.2d 725 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997); People v. Wallace, 936 P.2d 1282 (Colo. 1997); People v. [illegible]nnix, [illegible]36 P.2d 1285 (Colo. 1997); People v. Madigan, 938 P.2d 1162 (Colo. 1997); People v. Swan, 938 P.2d 116[illegible] Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Crist, 948 P.2d 1020 (Colo. 1997); People v. Boyd, 949 P.2d 993 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Holmes, 955 P.2d 101[illegible] Colo. 1[illegible]); People v. Hindman, 958 P.2d 463 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. [illegible]kaalerud, 963 P.2d 341 (Colo. 1998); In re Bilderback, 971 P.2d 1061 (Colo. 1999); In re Hugen, 97[illegible].2d 1267 ([illegible]olo. 1999); In re Tolley, 975 P.2d 1115 (Colo. 1999); In re Stevenson, 979 P.2d 1043 (Colo. 1999).

Conduct violating [illegible] sufficient to justify disbarment. People v. Robnett, 859 P.2d 872 (Colo. 1993).

Cases Decided [illegible]der Former DR 9-102.

Law rev[illegible] For [illegible]s of articles, "Interest on Lawyer Trust Accounts Program: A Primer for Lawyers", see 12 Colo. Law 577 (1[illegible]). For article, "Ethical Problem Areas for Probate Lawyers", see 19 Colo. Law. 1069 (1990).

Paragraphs (A) and (B)(3) require as a minimum standard of conduct that a lawyer segregate his clients' funds from his own and keep them in identifiable bank trust accounts. People v. Harthun, 197 Colo. 1, 593 P.2d 324 (1979); People v. Schubert, 799 P.2d 388 (Colo. 1990).

Most severe punishment is required when a lawyer disregards his professional obligations and converts his clients' funds to his own use. People v. Kluver, 199 Colo. 511, 611 P.2d 971 (1980); People v. Dohe, 800 P.2d 71 (Colo. 1990); People v. Whitcomb, 819 P.2d 493 (Colo. 1991).

Misuse of funds by a lawyer strikes at the heart of the legal profession by destroying public confidence in lawyers. The most severe punishment is required when a lawyer disregards his professional obligations and converts his clients' funds to his own use. People v. Buckles, 673 P.2d 1008 (Colo. 1984); People v. Wolfe, 748 P.2d 789 (Colo. 1987).

Conversion of client funds is conduct warranting disbarment because it destroys the trust essential to the attorney-client relationship, severely damages the public's perception of attorneys, and erodes public confidence in our legal system. People v. Radosevich, 783 P.2d 841 (Colo. 1989).

Disbarment is the presumed sanction for misappropriation of funds barring significant mitigating circumstances. People v. Young, 864 P.2d 563 (Colo. 1993); People v. Varallo, 913 P.2d 1 (Colo. 1996); People v. Coyne, 913 P.2d 12 (Colo. 1996).

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Failure and refusal to refund unearned portions of fees collected from two clients constituted violations of C.R.C.P. 241(B) (now C.R.C.P. 241.6), DR 2-110, and this rule. People v. Gellenthien, 621 P.2d 328 (Colo. 1981).

Attorney obligated to forward client's file upon request. Failure to forward client's file a year after a request is made constitutes conduct violative of disciplinary rules. People v. Belina, 765 P.2d 121 (Colo. 1988).

Failing to provide a client with an accounting of charges applied against a retainer after the client's request therefor, in conjunction with other instances of neglect, is conduct warranting public censure. People v. Goodwin, 782 P.2d 1 (Colo. 1989).

Failure to make proper accounting to client with respect to trust funds and failure to promptly deliver to the client funds to which she is entitled warrants public censure. People v. Robnett, 737 P.2d 1389 (Colo. 1987).

Failure to deposit funds in trust account, to notify client of receipt of funds and provide accounting, and to forward file promptly to new attorney constitute a violation of this rule and, with other offenses, warrants public censure. People v. Swan, 764 P.2d 54 (Colo. 1988).

Violation of duty to account for and promptly return client property upon request over a three-year period warrants public censure. People v. Shunneson, 814 P.2d 800 (Colo. 1991).

Public censure for failure to promptly distribute proceeds of a settlement is warranted since respondent's negligence did little or no actual or potential injury to client. People v. Genchi, 824 P.2d 815 (Colo. 1992).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Ashley, 796 P.2d 962 (Colo. 1990); People v. Sadler, 831 P.2d 887 (Colo. 1992).

Converting estate or trust funds for one's personal use, overcharging for services rendered, neglecting to return inquiries relating to client matters, failing to make candid disclosures to grievance committee and attempting to conceal wrongdoing during disciplinary proceedings warrants the severe sanction of disbarment. People v. Gerdes, 782 P.2d 2 (Colo. 1989).

Conduct violating this rule sufficient to justify public censure. People v. Bolinger, 648 P.2d 620 (Colo. 1982); People v. Wright, 698 P.2d 1317 (Colo. 1985); People v. Mayer, 716 P.2d 1094 (Colo. 1986); People v. Schaiberger, 731 P.2d 728 (Colo. 1987); People v. Barr, 748 P.2d 1302 (Colo. 1988); People v. Danker, 759 P.2d 14 (Colo. 1988).

Two-year unjustified retention of one client's file, coupled with failure to withdraw at request of said client and refusal to forward a second client's file to subsequent counsel resulting in both clients sustaining injuries, justifies suspension for the period of a year and a day. People v. Hodge, 762 P.2d 533 (Colo. 1988).

Failure to account for money collected on behalf of client, despite numerous client requests for accounting, and failure to adhere to terms of agreement with client regarding representation, coupled with prior, ongoing suspension, warrants additional six-month suspension. People v. Yost, 752 P.2d 542 (Colo. 1988).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Moya, 793 P.2d 115 (Colo. 1990); People v. Creasey, 793 P.2d 1159 (Colo. 1990); People v. Schubert, 799 P.2d 388 (Colo. 1990); People v. Garrett, 802 P.2d 1082 (Colo. 1990); People v. Lamberson, 802 P.2d 1098 (Colo. 1990); People v. Crimaldi, 804 P.2d 1 (Colo. 1991); People v. Dunsmoor, 807 P.2d 561 (Colo. 1991); People v. Dash, 811 P.2d 36 (Colo. 1991); People v. Chasse, 811 P.2d 40 (Colo. 1991); People v. Wilson, 814 P.2d 791 (Colo. 1991); People v. Heilbrunn, 814 P.2d 811 (Colo. 1991); People v. Smith, 828 P.2d 249 (Colo. 1992); People v. Driscoll, 830 P.2d 1019 (Colo. 1992); People v. Regan, 831 P.2d 893 (Colo. 1992); People v. Denton, 839 P.2d 6 (Colo. 1992). People v. Smith, 880 P.2d 763 (Colo. 1994); People v. Banman, 901 P.2d 469 (Colo. 1995); People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Dickinson, 901 P.2d 1132 (Colo. 1995); People v. Davis, 911 P.2d 45 (Colo. 1996).

Conduct violating this rule sufficient to justify suspension. People v. Vernon, 660 P.2d 879 (Colo. 1982); People v. Pilgrim, 698 P.2d 1322 (Colo. 1985); People v. Foster, 716 P.2d 1069 (Colo. 1986); People v. Coca, 716 P.2d 1073 (Colo. 1986); People v. Calvert, 721 P.2d 1189 (Colo. 1986); People v. Holmes, 731 P.2d 677 (Colo. 1987); People v. Geller, 753 P.2d 235 (Colo. 1988); People v. Griffin, 764 P.2d 1166 (Colo. 1988); People v. Goldberg, 770 P.2d 408 (Colo. 1989); People v. Goens, 770 P.2d 1218 (Colo. 1989); People v. Kaemingk, 770 P.2d 1247, (Colo. 1989); People v. McGrath, 780 P.2d 492 (Colo. 1989).

Derelictions in fiduciary duties by an attorney which go beyond mere negligence warrant disbarment. People v. Roads, 180 Colo. 192, 503 P.2d 1024 (1972).

Attorney failed to deliver property of a client in violation of this rule by ignoring requests for client's files made by the client, the client's attorney, and the grievance committee. People v. Felker, 770 P.2d 402 (Colo. 1989).

Refusal to provide accounting for money and jewelry delivered to him and refusal to itemize the services performed and the costs incurred warrant disbarment. People v. Lanza, 660 P.2d 881 (Colo. 1983).

Commingling and appropriation of funds warrants disbarment. When a lawyer collects $3000 on behalf of a client in connection with a sale of real estate and commingles it with his other trust funds and unlawfully converts it to his own use, his flagrant disregard of his professional obligation warrants disbarment. People v. McMichael, 199 Colo. 433, 609 P.2d 633 (1980).

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Where a practicing attorney breached fiduciary duties to his client in misrepresenting his dealings and in handling of funds given to him in trust, his conduct warranted disbarment, and, before he may seek readmittance to the state bar association, he must first demonstrate to the grievance committee that rehabilitation has occurred and that he is entitled to a new start. People ex rel. Buckley v. Beck, 199 Colo. 482, 610 P.2d 1069 (1980).

Commingling a client's funds with those of the lawyer is a serious violation of the Code of Professional Responsibility, even in the absence of an actual loss to the client, because the act of commingling subjects the client's funds to the claims of the lawyer's creditors. People v. McGrath, 780 P.2d 492 (Colo. 1989).

Misappropriation of funds, failure to account, and deceit and fraud in handling the affairs of a client necessitate that an attorney be disbarred. People v. Bealmear, 655 P.2d 402 (Colo. 1982); People v. Costello, 781 P.2d 85 (Colo. 1989).

Conduct which causes a client serious or potentially serious injury and demonstrates a complete lack of concern for a client's interests and welfare warrants disbarment. People v. Lyons, 762 P.2d 143 (Colo. 1988).

Alcoholism not excuse. Efforts at alcoholism rehabilitation do not excuse conduct which includes dishonesty and fraud, failing to preserve identity of client funds, and failing to properly pay or deliver client funds, and which otherwise warrants disbarment. People v. Shafer, 765 P.2d 1025 (Colo. 1988).

Total disregard of obligation to protect a client's rights and interests over an extended period of time in conjunction with the violation of a number of disciplinary rules and an extended prior record of discipline requires most severe sanction of disbarment. People v. O'Leary, 783 P.2d 843 (Colo. 1989).

Disbarment was appropriate where attorney removed $5,000 from a client's trust account, refused to return money upon several request by the client which ultimately resulted in a suit against the attorney, and the attorney lied about the transaction to the attorney with whom he shared office space. Factors in aggravation included a history of prior discipline, including suspension for conversion of client funds, the dishonest motive of the attorney in removing and not returning the client's funds, the attorney's refusal to acknowledge the wrongful nature of his conduct, the vulnerability of the client, and the attorney's legal experience. Mitigating factors were insufficient for disciplinary action short of disbarment. People v. McGrath, 833 P.2d 731 (Colo. 1992).

Disbarment is appropriate sanction where attorney knowingly converts client property and causes injury or potential injury to a client. People v. Bowman, 887 P.2d 18 (Colo. 1994); People v. Varallo, 913 P.2d 1 (Colo. 1996).

Rule is violated when attorney "knowingly" converts client funds; there is no requirement that the attorney intend to permanently deprive the client of the funds. People v. Varallo, 913 P.2d 1 (Colo. 1996).

Disbarment was appropriate where attorney converted $25,000 of client funds on seven different occasions over a period of four months and did not restore any of the missing funds until after he was detected. People v. Robbins, 869 P.2d 517 (Colo. 1994).

Disbarment was appropriate where the balance of the respondent's trust accounts fell below the amount necessary to pay settlements on at least 45 occasions and where the respondent withdrew attorney fees on at least 68 occasions from trust accounts before receiving the funds from which the fees were to be taken. People v. Lefly, 902 P.2d 361 (Colo. 1995).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Nichols, 796 P.2d 966 (Colo. 1990); People v. Broadhurst, 803 P.2d 478 (Colo. 1990); People v. Rhodes, 814 P.2d 787 (Colo. 1991); People v. Vermillion, 814 P.2d 795 (Colo. 1991); People v. Ashley, 817 P.2d 965 (Colo. 1991); People v. House, 817 P.2d 967 (Colo. 1991); People v. Whitcomb, 819 P.2d 493 (Colo. 1991); People v. Margolin, 820 P.2d 347 (Colo. 1991); People v. Bradley, 825 P.2d 475 (Colo. 1992); People v. Mullison, 829 P.2d 382 (Colo. 1992); People v. Tanquary, 831 P.2d 889 (Colo. 1992); People v. McGrath, 833 P.2d 731 (Colo. 1992); People v. Brown, 840 P.2d 348 (Colo. 1992); People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Varallo, 913 P.2d 1 (Colo. 1996); People v. Coyne, 913 P.2d 12 (Colo. 1996); People v. Jamrozek, 921 P.2d 725 (Colo. 1996).

Conduct violating this rule sufficient to justify disbarment. People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Golden, 654 P.2d 853 (Colo. 1982); People v. Fitzke, 716 P.2d 1065 (Colo. 1986); People v. Quick, 716 P.2d 1082 (Colo. 1986); People v. Yost, 729 P.2d 348 (Colo. 1986); People v. James, 731 P.2d 698 (Colo. 1987); People v. Coca, 732 P.2d 640 (Colo. 1987); People v. Foster, 733 P.2d 687 (Colo. 1987); People v. Quintana, 752 P.2d 1059 (Colo. 1988); People v. Kengle, 772 P.2d 605 (Colo. 1989); People v. Frank, 782 P.2d 769 (Colo. 1989); People v. Dulaney, 785 P.2d 1302 (Colo. 1990); People v. Franks, 791 P.2d 1 (Colo. 1990); People v. Mulligan, 817 P.2d 1028 (Colo. 1991); People v. Young, 864 P.2d 563 (Colo. 1993).

Failure to transfer file to new attorney after repeated requests constitutes a violation of this rule. People v. Hebenstreit, 764 P.2d 51 (Colo. 1988).

Conduct held to violate this rule. People v. Goss, 646 P.2d 334 (Colo. 1982).

Applied in People v. Spiegel, 193 Colo. 161, 567 P.2d 353 (1977); People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978); People v. Pacheco, 198 Colo. 455, 608 P.2d 333 (1979); People v. Belfor, 200 Colo. 44, 611 P.2d 979

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(1980); People ex rel. Silverman v. Anderson, 200 Colo. 76, 612 P.2d 94 (1980); People v. Lanza, 200 Colo. 241, 613 P.2d 337 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Davis, 620 P.2d 725 (Colo. 1980); People v. Dutton, 629 P.2d 103 (Colo. 1981); People v. Moore, 681 P.2d 480 (Colo. 1984); People v. Underhill, 683 P.2d 349 (Colo. 1984); People v. Franco, 698 P.2d 230 (Colo. 1985); People v. Blanck, 700 P.2d 560 (Colo. 1985); People v. Turner, 746 P.2d 49 (Colo. 1987).

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 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.

Source: (b) and Comment amended April 20, 2000, effective July 1, 2000; (d) amended and adopted April 18, 2001, effective July 1, 2001; entire rule and Comment amended and adopted May 30, 2002, effective July 1, 2002.

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Comment

Basis or Rate of Fee

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 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.

In setting a fee, a lawyer should also consider the inability of the client to pay a reasonable fee. Persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

Terms of Payment

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). 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.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interests, the lawyer should confer the client alternative bases for the fee and explain their implications. Chapter 23.3 of the Colorado Rules of Civil Procedure governs contingent fee arrangements, and contingent fees otherwise may be limited by applicable law.

Division of Fee

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (d) permits the lawyers to divide a fee on the basis of the proportion of services they render and responsibility assumed by each. The client must consent to the fee division in writing. The client must be advised of and agree to the share of the fee that each lawyer is to receive.

Disputes over Fees

If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

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Advances of Unearned Fees and Engagement Retainer Fees

The analysis of when a lawyer may treat advances of unearned fees as property of the lawyer must begin with the principle that the lawyer must hold in trust all fees paid by the client until there is a basis on which to conclude that the lawyer has earned the fee; otherwise the funds must remain in the lawyer's trust account because they are not the lawyer's property.

To make a determination of when an advance fee is earned, the written statement of the basis or rate of the fee, when required by Rule 1.5(b), should include a description of the benefit or service that justifies the lawyer's earning the fee, the amount of the advance unearned fee, as well as a statement describing when the fee is earned. Whether a lawyer has conferred a sufficient benefit to earn a portion of the advance fee will depend on the circumstances of the particular case. The circumstances under which a fee is earned should be evaluated under an objective standard of reasonableness. Colo. RPC 1.5(a).

Rule 1.5(f) Does Not Prohibit Lump-sum Fees or Flat Fees

Advances of unearned fees, including "lump-sum" fees and "flat fees," are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.15, the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the writ[illegible]ment of the basis of the fee, if a written statement is required by Rule 1.5(b). *See also* Restatement (Third) of [illegible]e Law G[illegible]erning Lawyers §§ 34, 38 (1998). Rule 1.5(f) does not prevent a lawyer from entering into these type[illegible] of a[illegible]gemen[illegible]

For example, the lawyer and client may agree that portions of the adva[illegible] of unear[illegible]d fe[illegible]re deemed earned at the lawyer's hourly rate and become the lawyer's property as and wi[illegible] the l[illegible]yer pr[illegible]es legal services.

Alternatively, the lawyer and client may agree to an advance lump-sum [illegible]at fee [illegible]t will be earned in whole or in part based upon the lawyer's completion of specific tasks or the occurrence of [illegible]ec[illegible]e events, regardless of the precise amount of the lawyer's time involved. For instance, in a crimi[illegible] defense mat[illegible], a lawyer and client may agree that the lawyer earns portions of the advance lump-sum or flat fee upon t[illegible] lawy[illegible]s entry of appearance, initial advisement, review of discovery, preliminary hearing, pretri[illegible]ference, [illegible]sition hearing, motions hearing, trial, and sentencing. Similarly, in a trusts and estates matter, a law[illegible] an[illegible]t may agree that the lawyer earns portions of the lump-sum or flat fee upon client consultation, le[illegible] researc[illegible]mpleting the initial draft of testamentary documents, further client consultation, and com[illegible]ing th[illegible] final [illegible]cuments.

The portions of the advance lump-sum [illegible]ee earne[illegible] as each such event occurs need not be in equal amounts. However, the fees attributed to [illegible]vent[illegible]ould [illegible]lect a reasonable estimate of the proportionate value of the legal services the lawyer provides [illegible] comp[illegible]ing e[illegible]designated event to the anticipated legal services to be provided on the entire matter. *See* Colo[illegible] R[illegible].5(a); *Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244, 1252--53 (Colo. 1996) (client's sophisti[illegible]ion is rel[illegible]nt factor).

Rule 1.5(f) Does Not P[illegible]ohibi[illegible] Engag[illegible]ment Retainer Fee"

"[A]n 'en[illegible]gem[illegible]t re[illegible]er[illegible]e' is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for [illegible] clien[illegible] f require[illegible]. An engagement retainer must be distinguished from a lump-sum fee constituting the entire payment [illegible] law[illegible]s service in a matter and from an advance payment from which fees will be subtracted (see § 38, Comment [illegible]. A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed." Restatement (Third) of the Law Governing Lawyers § 34 cmt. e. An engagement retainer fee agreement must comply with Rule 1.5(a), (b), and (g), and should expressly include the amount of the engagement retainer fee, describe the service or benefit that justifies the lawyer's earning the engagement retainer fee, and state that the engagement retainer fee is earned upon receipt. As defined above, an engagement retainer fee will be earned upon receipt because the lawyer provides an immediate benefit to the client, such as forgoing other business opportunities by making the lawyer's services available for a given period of time to the exclusion of other clients or potential clients, or by giving priority to the client's work over other matters.

Because an engagement retainer fee is earned at the time it is received, it must not be commingled with client property. However, it may be subject to refund to the client in the event of changed circumstances.

It is unethical for a lawyer to fail to return unearned fees, to charge an excessive fee, or to characterize any lawyer's fee as nonrefundable. Lawyer's fees are always subject to refund if either excessive or unearned. If all or some portion of a lawyer's fee becomes subject to refund, then the amount to be refunded should be paid directly to the client if there is no further legal work to be performed or if the lawyer's employment is terminated. In the alternative, if there is an ongoing client-lawyer relationship and there is further work to be done, it may be deposited in the lawyer's trust account, to be withdrawn from the trust account as it is earned.

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Committee Comment

The fee splitting provisions of Model Rule 1.5(e), now 1.5(d), have been revised to resemble more closely DR 2-107(A) and to tighten up the client consent requirements.

Annotation

Law reviews. For article, "Confirm Attorney Fees in Writing: Court Changes Colo. RPC 1.4, 1.5", see 29 Colo. Law. 27 (June 2000). For article, "Fee Agreements: Types, Provisions, Ethical Boundaries, and Other Considerations-Part I", see 31 Colo. Law. 35 (March 2002). For article, "Fee Agreements: Types, Provisions, Ethical Boundaries, and Other Considerations-Part II", see 31 Colo. Law. 35 (April 2002). For article, "Enforcing Civility: The Rules of Professional Conduct in Deposition Settings", see 33 Colo. Law. 75 (March 2004). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005). For article, "Non-Monetary Compensation for Legal Services How Many Chickens Am I Worth?", see 35 Colo. Law. 95 (January 2006).

Annotator's note. Since Rule 1.5 is similar to DR 2-103 and DR 2-106 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility, relevant cases construing those provisions have been included in the annotations to this rule.

Supreme court is exclusive tribunal for regulation of the practice of law, including reasonableness of fees, notwithstanding statutory provision allowing the director of the division of workers' compensation to determine reasonableness of fees in a workers' compensation case. In re Wimmershoff, 3 P.3d 417 (Colo. 2000).

Agreement for the division of fees between a firm and an attorney separating from the firm is valid and not against public policy. Where an attorney enters into a separation agreement with his or her firm upon departure and the agreement specifies the division of fees for clients continuing legal services with the departing attorney, the agreement is enforceable and does not implicate the policies behind this rule. Norton Frickey, P.C. v. James B. Turner, P.C., 94 P.3d 1266 (Colo. App. 2004).

Further, clients benefit from separation agreements between departing attorney and the firm because the client is not charged additional fees as a result of the agreement, nor is the client deceived or misled. Norton Frickey, P.C. v. James B. Turner, P.C., 94 P.3d 1266 (Colo. App. 2004).

Charging client for costs of defending grievance proceeding violates DR 2-106(A) where charges are not unfounded and there is no prior agreement to pay such costs. People v. Brown, 840 P.2d 1085 (Colo. 1992).

Lawyer who billed client for the costs of defending grievance violated this rule. There was no agreement between the attorney and the client to justify the billing, and the attorney's claim that the billing stemmed from the attorney's independent duty to report the client was found by the grievance panel to be false. Therefore, the billing based on such a theory is deceptive and dishonest in violation of this rule. The appropriate sanction for the lawyer's conduct is public censure. People v. Brown, 840 P.2d 1085 (Colo. 1992).

Attorney's professional misconduct involving the improper collection of attorney's fees in six instances justified 45-day suspension. People v. Peters, 849 P.2d 51 (Colo. 1993).

Lawyer's bills properly under this rule when lawyer billed attorney and secretarial services separately. Newport Pac. Capital Co. v. Wash., 875 P.2d 136 (Colo. App. 1994).

Relief in the nature of mandamus may be appropriate when it is alleged that a sheriff or chief of police has refused to accept applications for concealed weapons permits from private investigators who are not current or retired law enforcement officers and the sheriff or police chief has thereby breached a statutory duty to conduct a background check on each applicant. Miller v. Collier, 878 P.2d 141 (Colo. App. 1994).

Public policy of protecting a client's right to control settlement will be better served by not treating a clause in a representation agreement that restricts the client's right to control settlement as severable from the provision for calculating fees. Where representation agreement provided alternate method of calculating the fees payable if the client unreasonably refused to settle, court refused to enforce either provision and allowed only reasonable value of services rendered by law firm. Jones v. Feiger, Collison & Killmer, 903 P.2d 27 (Colo. App. 1994), rev'd on other grounds, 926 P.2d 1244 (Colo. 1996).

Stipulated agreement and recommendation of public censure with certain conditions and monitoring based upon conditional admission of misconduct were warranted for attorney who required that his associates sign a covenant that allowed his firm to collect 75 to 100 percent of the total fee generated by a case in which his firm did less than all the work. People v. Wilson, 953 P.2d 1292 (Colo. 1998).

Public censure and restitution were appropriate in case of attorney who unilaterally charged client $1,000 in addition to previously agreed contingent fee. In re Wimmershoff, 3 P.3d 417 (Colo. 2000).

Conduct violating this rule in conjunction with other disciplinary rules, where mitigating factors were present, warrants public censure. People v. Davis, 950 P.2d 586 (Colo. 1998).

Conduct violating this rule sufficient to justify public censure. In re Green, 11 P.3d 1078 (Colo. 2000).

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Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Hohertz, 926 P.2d 560 (Colo. 1996); People v. Sather, 936 P.2d 576 (Colo. 1997); People v. Kotarek, 941 P.2d 925 (Colo. 1997); People v. Johnson, 946 P.2d 469 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Jamrozek, 921 P.2d 725 (Colo. 1996); People v. Sousa, 943 P.2d 448 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Roybal, 949 P.2d 993 (Colo. 1997); People v. Valley, 960 P.2d 141 (Colo. 1998).

Cases Decided Under Former DR 2-103.

Law reviews. For article, "The Lawyer's Duty to Report Ethical Violations", see 18 Colo. Law. 1915 (1989). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990).

Attorney's conduct in paying inmates for referrals to attorney for the provision of legal services justifies 60-day suspension. People v. Shipp, 793 P.2d 574 (Colo. 1990).

Attorney's conduct in allowing company selling living trust packages to provide his name, exclusively, to customers upon sale, in conjunction with other violations and aggravating factors justifi[illegible]onth suspension. People v. Cassidy, 884 P.2d 309 (Colo. 1994).

Cases Decided Under Former DR 2-106.

Law reviews. For article, "Conflicts in Settlement of Personal Injury [illegible]ases", see 11 Colo. Law. 399 (1982). For article, "Attorney's Fees", see 11 Colo. Law. 411 (1982). For article, "Provid[illegible]Legal Services for the Poor: A Dilemma and an Opportunity", see 11 Colo. Law. 666 (1982). For article, "Reduced Malpractice and Augmented Competency: A Proposal", see 12 Colo. Law. 1444 (1983). For article, "Ethical Problem Areas for Probate Lawyers", see 19 Colo. Law. 1069 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Recovery of Attorney Fee by Lender Using In-House Counsel, see 20 Colo. Law. 7 (1991).

Where an attorney makes a uniform practice of imposing charges that exceed the statutory standards, such violates Canon 2. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Attorney's charges for probate proceedings considered excessive on facts of case. People ex rel. Goldberg v. Gordon, 199 Colo. 296, 607 P.2d 9[illegible](1980).

Attorney who assessed excessive legal fees and attempted to retain improperly charged fees, neglected clients' interests to their detriment, and made misrepresentations as to services actually performed on clients' cases was properly suspended for thirty days although attorney previously found to have engaged in professional misconduct, attorney suffered personal tragedy prior to misconduct and subsequently improved by engaging in activities beneficial to legal and professional community. People v. Brenner, 764 P.2d 1178 (Colo. 1988).

Where attorney enters into a fee arrangement basing his compensation directly on royalties his client might receive from oil and gas wells, it is clear that the arrangement is not intended as compensation for legal services provided and therefore constitutes conduct violating this rule sufficient to justify suspension. People v. Nutt, 696 P.2d 242 (Colo. 1984).

Contingent fee agreement in a probate proceeding is not unconscionable or unreasonable where it was openly made and supported by adequate consideration. In re Estate of Reid, 680 P.2d 1305 (Colo. App. 1983).

Excessive fees are basis for indefinite suspension of attorney. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Contract held not to violate prohibition against maintenance. Northland Ins. Co. v. Bashor, 177 Colo. 463, 494 P.2d 1292 (1972).

Evidence insufficient to establish excessive fee in violation of paragraph (A). People v. Lanza, 660 P.2d 881 (Colo. 1983).

Suspended or disbarred attorney does not lose right to assert a claim for fees earned prior to suspension or disbarment. Rutenbeck v. Grossenbach, 867 P.2d 36 (Colo. App. 1993).

Suspended attorney was entitled to collect one-third share of contingency fee under an agreement to divide the fee with two other attorneys where the agreement was based on a good faith division of services and responsibility at the time it was entered into. Rutenbeck v. Grossenbach, 867 P.2d 36 (Colo. App. 1993).

Public censure warranted where attorney kept the first lump sum check obtained in settlement as a lump sum payment of his contingency fee and reimbursement of costs even though he knew the settlement might

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later be reduced by the social security disability award and the client's union award. People v. Maceau, 910 P.2d 692 (Colo. 1996).

Suspension for one year and one day warranted where attorney billed for time that was not actually devoted to work contemplated by contract and for time not actually performed. People v. Shields, 905 P.2d 608 (Colo. 1995).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Schmad, 793 P.2d 1162 (Colo. 1990); People v. Sullivan, 802 P.2d 1091 (Colo. 1990); People v. Dunsmoor, 807 P.2d 561 (Colo. 1991); People v. Koeberle, 810 P.2d 1072 (Colo. 1991); People v. Kardokus, 881 P.2d 1202 (Colo. 1994); People v. Johnson, 881 P.2d 1205 (Colo. 1994); People v. Banman, 901 P.2d 469 (Colo. 1995); People v. Dickinson, 903 P.2d 1132 (Colo. 1995); People v. Mills, 923 P.2d 116 (Colo. 1996).

Conduct violating this rule sufficient to justify suspension. People v. Fleming, 716 P.2d 1090 (Colo. 1986).

Conduct violating this rule sufficient to justify disbarment. People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Golden, 654 P.2d 853 (Colo. 1982); People v. Franks, 791 P.2d 1 (Colo. 1990); In re Bilderback, 971 P.2d 1061 (Colo. 1999).

Applied in Hartman v. Freedman, 197 Colo. 275, 591 P.2d 1318 (1979); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People ex rel. Cortez v. Calvert, 200 Colo. 157, 617 P.2d 797 (1980); Mau v. E.P.H. Corp., 638 P.2d 777 (Colo. 1981); Heller v. First Nat'l Bank, 657 P.2d 992 (Colo. App. 1982); People v. [illegible] 698 P.2d 230 (Colo. 1985); People v. Coca, 732 P.2d 640 (Colo. 1987).

RULE 1.6 — CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b) [illegible].

(b) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.

(c) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary 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 proceedings concerning the lawyer's representation of the client.

(d) A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using such information, except that a lawyer may disclose the information allowed by paragraphs (b) and (c) through such persons.

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Comment

Confidentiality

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in

professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard confidential information of the client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, the lawyer should avoid professional discussion in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

A lawyer is impliedly authorized to make disclosure about a client when appropri[illegible]rrying out the representation, except to the extent that the client's instructions or special circumstances [illegible]it that a[illegible]ority. In litigation, for example, a lawyer may disclose information by admitting a fact that c[illegible]not p[illegible]erly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose [illegible]ach [illegible]er info[illegible]ation relating to a client of the firm, unless the client has instructed that particular information be c[illegible]ned to s[illegible]cified lawyers.

Disclosure Adverse to Client

The confidentiality rule is subject to limited exceptions. In bec[illegible]ing p[illegible]y to information about a client, a lawyer may foresee that the client intends to commit a crime[illegible]yer, to [illegible]tent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited fro[illegible]eve[illegible]facts which would enable the lawyer to counsel against a wrongful course of action. The p[illegible]c is bette[illegible]tected if full and open communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished[illegible]the lawy[illegible] may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). S[illegible]y, a l[illegible]yer h[illegible] a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special insta[illegible] of th[illegible]uty p[illegible]ibed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer [illegible]y have be[illegible]innocently involved in past conduct by the client that was criminal or fraudulent. In such a situat[illegible]the l[illegible]yer has[illegible]ot violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct req[illegible]ires k[illegible]ng tha[illegible]e conduct is of that character.

Third, th[illegible]awy[illegible] may [illegible]rm[illegible]at a client intends prospective conduct that is criminal. As stated in paragraph (b), the lawyer h[illegible]profe[illegible]ional dis[illegible]etion to reveal information in order to prevent such consequences.

The law[illegible]exerc[illegible]of discretion requires consideration of such factors as the nature of the lawyer's relationship with the [illegible]nt and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors [illegible]at may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b) does not violate this rule.

Withdrawal

If the lawyer's service will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

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Dispute Concerning a Lawyer's Conduct

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or professional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Former Client

Duty of confidentiality continues after the client-lawyer relationship has terminated.

Committee Comm

This Rule raises the delicate and complicated question of the balance between a lawyer's responsibility to keep clients' confidences inviolate and the scope of permissible disclosure of such information in particular instances. Rule 1.6 as proposed by the Committee sets forth the broader scope of permissive disclosure as provided in DR 4-101(C)(3) rather than the more limited scope of such disclosure as contained in the Proposed Model Rules. EC 4-4 has been included in the comments to further explain the distinction between the evidentiary attorney-client privilege and the principle of confidentiality. Subparagraph (d) of the Rule is comparable to DR 4-101(D) and is intended to amplify Rule 5.3.

Annotation

Law reviews. For formal opinion of the Colorado Bar Association on Ethical Duties of Attorney Selected by Insurer to Represent Its Insured, see 22 Colo. Law. 497 (1993). For article, "The Maverick Council Member: Protecting Privileged Attorney-Client Communications from Disclosure", see 23 Colo. Law. 63 (1994). For article, "Ethical Considerations and Client Identity", see 30 Colo. Law. 51 (April 2001). For article, "Preservation of the Attorney-Client Privilege: Using Agents and Intermediaries to Obtain Legal Advice", see 30 Colo. Law. 51 (May 2001). For article, "Policing the Legal System: The Duty to Report Misconduct", see 30 Colo. Law. 85 (September 2001). For article, "Am I My Brother's Keeper? Redefining the Attorney-Client Relationship", see 32 Colo. Law. 11 (April 2003). For article, "Metadata: Hidden Information Microsoft Word Documents Its Ethical Implications", see 33 Colo. Law. 53 (October 2004). For article, "Representation of Multiple Estate Or Trust Fiduciaries: Practical and Ethical Issues", see 34 Colo.

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Law. 65 (July 2005). For article, "Ethical Concerns When Dealing With the Elder Client", see 34 Colo. Law. 27 (October 2005). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005).

Annotator's note. Rule 1.6 is similar to DR 4-101 and DR 7-102 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 4-101 have been included in the annotations to this rule. Cases construing DR 7-102 have been included under Rule 1.2.

Public censure appropriate discipline for lawyer who delivered document containing admissions of client to district attorney without first obtaining client's authorization. People v. Lopez, 845 P.2d 1153 (Colo. 1993).

"Implied" consent not encompassed by rule authorizing attorney to disclose client confidences or secrets. Such disclosure may be made only after full disclosure to and with consent of client. People v. Lopez, 845 P.2d 1153 (Colo. 1993).

Disbarment appropriate where attorney accepted fees from a number of clients prior to terminating her legal practice, failed to inform her clients of such termination, failed to refund clients' retainer fees, failed to place clients' funds in separate account, and gave clients' files to other lawyers without clients' consent. People v. Tucker, 904 P.2d 1321 (Colo. 1995).

Cases Decided Under Former DR 4-101.

Law reviews. For article, "The Perjurious Defendant: A Proposed Solution to the [illegible] Lawyer's Conflicting Ethical Obligations to the Court and to His Client", see 59 Den. L.J. 75 (198[illegible] For arti[illegible] "Conflicts in Settlement of Personal Injury Cases", see 11 Colo. Law. 399 (1982). For article, "Inc[illegible]imin[illegible]g Evid[illegible]ce: What to do With a Hot Potato", see 11 Colo. Law. 880 (1982). For article, "Ethics, Tax Frau[illegible]d the Ge[illegible]al P[illegible]ctitioner", see 11 Colo. Law. 939 (1982). For article, "Prior Representation: The Specter of Disq[illegible]ific[illegible]n of Tr[illegible] Counsel", see 11 Colo. Law. 1214 (1982). For article, "The Search for Truth Continued: More Dis[illegible]ure, Le[illegible] Privilege", see 54 U. Colo. L. Rev. 51 (1982). For article, "The Search for Truth Continued. The Privileg[illegible]e[illegible]ed: A Response to Judge Frankel", see 54 U. Colo. L. Rev. 67 (1982). For article, "Some Comm[illegible]ts on Conflic[illegible]s of Interest and the Corporate Lawyer", see 12 Colo. Law. 60 (1983). For article, "Protecting Technica[illegible] form[illegible]n: The Role of the General Practitioner", see 12 Colo. Law. 1215 (1983). For article, "P[illegible] Liabil[illegible] Lawyers Employing Law Clerks", see 12 Colo. Law. 1243 (1983). For article, "Attorney Disclosure. [illegible]he [illegible] Rules in the Corporate/Securities Area", see 12 Colo. Law. 1975 (1983). For comment, "Colorad[illegible]s Approa[illegible] Searches and Seizures in Law Offices", see 54 U. Colo. L. Rev. 571 (1983). For casenote, "Caldw[illegible]v. Dis[illegible]ict C[illegible]t: Colorado Looks at the Crime and Fraud Exception to the Attorney-Client Privilege", see 55 U. Colo. [illegible]. 319 (1[illegible]84). For article, "Incest and Ethics: Confidentiality's Severest Test", see 61 Den. L.J. 619 (198[illegible] art[illegible] "D[illegible]nding the Federal Drug or Racketeering Charge", see 16 Colo. Law. 605 (1987). For article, "C[illegible]ing w[illegible]h the [illegible] Avalanche: A Survey on the Disposition of Client Files", see 16 Colo. Law. 1787 (1987). F[illegible] co[illegible]s[illegible], "Attorney-Client Confidences: Punishing the Innocent", see 61 U. Colo. L. Rev. 185 (1990). For form[illegible]pinion o[illegible]e Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation[illegible]d Ma[illegible]cting o[illegible]state Planning Documents, see 19 Colo. Law. 1793 (1990). For article, "Sex, Lawyers and Vili[illegible]catio[illegible]ee 21 C[illegible]lo. Law. 469 (1992). For formal opinion of the Colorado Bar Association Ethics Committee "Pre[illegible]rvati[illegible]of[illegible]ent Confidences in View of Modern Communications Technology, see 22 Colo. Law. 21 ([illegible]3).

Prevaili[illegible]e is [illegible]t will be presumed that confidences were reposed where an attorney-client relationship has been[illegible]own to have existed. Osborn v. District Court, 619 P.2d 41 (Colo. 1980).

Ethical oblig[illegible]on to preserve client confidences continues after termination of attorney-client relationship. Rodriquez v. District Court, 719 P.2d 699 (Colo. 1986).

Trustee in bankruptcy succeeds to a debtor's right to assert or waive the attorney-client privilege. In re Inv. Bankers, Inc., 30 Bankr, 883 (Bankr. D. Colo. 1983).

Crime-fraud exception to attorney-client privilege recognized. The code of professional responsibility recognizes the crime-fraud exception to the attorney-client privilege and work-product doctrine. Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215 (Colo. 1982).

Attorney's failure to safeguard a draft letter to a client in which the attorney suggests that the client misrepresented his qualifications, and where federal prosecutor later used the letter during the client's trial on federal criminal charges, violated DR 4-101(B)(1). People v. O'Donnell, 955 P.2d 53 (Colo. 1998).

Bald assertion insufficient to warrant disqualification of district attorney. Bald assertion by defendant that he made confidential statements to the prosecutor during the existence of a prior attorney-client relationship was insufficient to warrant disqualification of the district attorney. Osborn v. District Court, 619 P.2d 41 (Colo. 1980).

An accused seeking to disqualify a prosecutor because of prior representation of a co-defendant by a member of the prosecutor's former firm must show that either the prosecutor or the firm member, by virtue of the prior professional relationship with the co-defendant, received confidential information about the accused which was substantially related to the pending criminal action. McFarlan v. District Court, 718 P.2d 247 (Colo. 1986).

REPEALED

It is no abuse of discretion for court to order public defender to withdraw from a defendant's case where public defender's prior representation of a prosecution witness and his present representation of defendant created a conflict of interest. Rodriquez v. District Court, 719 P.2d 699 (Colo. 1986); People v. Reyes, 728 P.2d 349 (Colo. App. 1986).

Prior employment of plaintiff's attorney by defendant does not disqualify the attorney where the instant case is not substantially related to any matter in which the attorney previously represented the defendant. Food Brokers, Inc. v. Great Western Sugar, 680 P.2d 857 (Colo. App. 1984).

Disbarment warranted where attorney filed false pleadings and disciplinary complaints, disclosed information concerning the filing of disciplinary complaints, offered to withdraw a disciplinary complaint filed against a judge in exchange for a favorable ruling, failed to serve copies of pleadings on opposing counsel, revealed client confidences and material considered derogatory and harmful to the client, aggravated by a repeated failure to cooperate with the investigation of misconduct, disruption of disciplinary proceedings, and a record of prior discipline. People v. Bannister 814 P.2d 801 (Colo. 1991).

An attorney must disclose information to the court in camera if ordered to do so. People v. Salazar, 835 P.2d 592 (Colo. App. 1992).

Applied in People v. Schultheis, 44 Colo. App. 452, 618 P.2d 710 (1980); People v. Schultheis, 638 P.2d 8 (Colo. 1981); People v. Smith, 778 P.2d 685 (Colo. 1989).

RULE 1.7 — CONFLICT OF INTEREST: GENERAL RULE

REPEALED

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(c) For the purposes of this Rule, a client's consent cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of the particular situation.

Source: Committee comment amended October 17, 1996, effective January 1, 1997.

Comment

Loyalty to a Client

Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined.

If such conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. See also Rule 2.2(c). As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as

competing economic enterprises, does not require consent of the respective clients. Paragraph (a) applies only when the representation of one client would be directly adverse to the other.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests.

The conflict in effect forecloses alternatives that would otherwise be available to the client. Paragraph (b) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict 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 the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and Consent

A client may consent to representation notwithstanding a conflict, but only after consultation which involves full disclosure of the possible effect of such dual representation on the exercise of the lawyer's independent professional judgment on behalf of each client. However, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's Interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in Litigation

Paragraph (a) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met. Compare Rule 2.2 involving intermediation between clients.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in the appellate court.

Interest of Person Paying for a Lawyer's Service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See Rule 1.8 (f). For example,

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when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other Conflict Situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

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 of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be asked on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict Charged by an Opposing Party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

Committee Comment

The rule adopted is identical to Model Rule 1.7 except for section (c) which the Committee felt was necessary in order to provide more protection for a client whose consent is sought as a way of resolving a conflict of interest between the lawyer and client. The addition states that consent should not be obtained from a client in a situation in which a disinterested lawyer would advise the client not to agree to the representation.

For a discussion of the ethical ramifications of sexual relationships between a lawyer and a client see the committee comment to Rule 8.4.

Annotation

Law reviews. For formal opinion of the Colorado Bar Association on Ethical Duties of Attorney Selected by Insurer to Represent Its Insured, see 22 Colo. Law. 497 (1993). For article, "Representation of Multiple Estate Or Trust Fiduciaries: Practical and Ethical Issues", see 34 Colo. Law. 65 (July 2005). For article, "Ethical Concerns When Dealing With the Elder Client", see 34 Colo. Law. 27 (October 2005). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005).

Annotator's note. Since Rule 1.7 is similar to DR 5-101, DR 5-102, DR 5-104, DR 5-105, and DR 5-107 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility, relevant cases construing those provisions have been included in the annotations to this rule.

Where there is a large group of clients who are not recognized as a single legal entity, an attorney has an attorney-client relationship with each individual member of the group. Abbott v. Kidder Peabody & Co., Inc., 42 F. Supp.2d 1046 (D. Colo. 1999).

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Representation agreement that gives counsel the ability to negotiate settlement for each member of a large group of clients without providing him or her with personalized advisement and without obtaining individual authority to enter into a settlement agreement violates the professional and ethical standards created to regulate the legal profession in Colorado. Abbott v. Kidder Peabody & Co., Inc., 42 F. Supp.2d 1046 (D. Colo. 1999).

Any provision of an attorney-client agreement that deprives a client of a right to control his or her case is void as against public policy. Abbott v. Kidder Peabody & Co., Inc., 42 F. Supp.2d 1046 (D. Colo. 1999).

Valid client consent to waive the potential conflict of interest cannot be obtained under the circumstances. Abbott v. Kidder Peabody & Co., Inc., 42 F. Supp.2d 1046 (D. Colo. 1999).

Where counsel simultaneously represented company's interests as well as those of company's employees for a substantial period of time and the representation continued through the emergence of conflicts, counsel could continue to represent company because the company and the former clients, the employees, through counsel, consented to such representation after consultation and there was an indication that counsel reasonably believed that the continued representation would not adversely affect the relationship with the former clients. Gates Rubber Co. v. Bando Chem. Indus., Ltd., 855 F. Supp. 330 (D. Colo. 1994).

A defendant may waive the right to conflict-free counsel. The waiver is valid when: (1) The defendant is aware of the conflict and its likely effect on the attorney's ability to render effective assistance; and (2) the waiver is voluntary, knowing, and intelligent. A waiver is voluntary, knowing, and intelligent when the defendant is aware of and understands the various risks, has the capacity to make a decision on the basis of this information, and states unequivocally a desire to hazard those dangers. People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002).

A waiver is not knowing and intelligent where a defendant gives merely pro forma answers to pro forma questions. People v. Preciado-Flores, 66 P.3d 155 (Colo. App. 2002).

Lawyer violated paragraph (b) when his representation of a client was materially limited by his responsibilities to another client. He represented loan documents to be investment agreements to circumvent a provision in the Colorado Liquor Code that restricts the cross-ownership of businesses holding liquor licenses. In re Lopez, 980 P.2d 983 (Colo. 1999).

Public censure was appropriate for attorney who violated this rule by simultaneously representing, as defendants in a quantum meruit and lis pendens suit initiated by a subcontractor, the homeowners, the general contractor, the bank holding deed of trust on homeowners property, and two other parties who had contracted with contractor. Balancing the seriousness of the misconduct with the factors in mitigation, and taking into account the respondent's mental state when he entered into the conflicts in representation, public censure is appropriate. People v. Fritze, 926 P.2d 574 (Colo. 1996).

Public censure warranted for attorney's solicitation of prostitution during telephone conversation with wife of client whom he was representing in dissolution of marriage proceeding. People v. Bauder, 941 P.2d 282 (Colo. 1997).

Critical inquiry when representation of one client may be limited by representation of another is whether a conflict is likely to arise, and, if so, whether it materially interferes with the lawyer's independent professional judgment. People in Interest of J.A.M., 907 P.2d 725 (Colo. App. 1995).

Actual conflict existed where criminal charges were pending against defense counsel in the same district in which he was being prosecuted. People v. Edebohls, 944 P.2d 552 (Colo. App. 1996).

Attorney's representation of criminal defendant for whom attorney negotiated a plea bargain for testifying against another criminal defendant prohibited attorney from also representing the other criminal defendant where such other defendant did not consent to conflict-free counsel. People ex rel. Peters v. District Court, 951 P.2d 926 (Colo. 1998).

Attorney who was the trustee of client's trust violated paragraph (b) by utilizing the trust's funds to loan money to his daughter and to purchase his son-in-law's parents' former residence for the purpose of leasing it back to them, and by then failing to take any legal action against them when they did not make lease payments. People v. DeRose, 945 P.2d 412 (Colo. 1997).

Preparation of an extension agreement on the repayment of a loan made to a client by the attorney violated paragraph (b) because certain exceptions were not satisfied. People v. Ginsberg, 967 P.2d 151 (Colo. 1998).

Thirty-day suspension warranted where lawyer, who represented an individual accused of first-degree murder, communicated with co-defendant who also was charged with first-degree murder and whose interests were adverse to the lawyer's client, without the knowledge or consent of the co-defendant's lawyers. The potential for harm was high in a first-degree murder case and the number of unauthorized contacts demonstrated more than negligence on the lawyer's part. People v. DeLoach, 944 P.2d 522 (Colo. 1997).

Suspension for three years was appropriate in case involving violation of this rule and others, together with attorney's breach of his duty as client's trustee to protect his client, who was a particularly vulnerable victim that was recuperating from a serious head injury. People v. DeRose, 945 P.2d 412 (Colo. 1997).

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Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. Attorney's ability to represent his client in a bankruptcy was materially limited by his own interest as a creditor in collecting attorney fees. People v. Henderson, 967 P.2d 1038 (Colo. 1998).

The presumed sanction of suspension is appropriate where the attorney knew of a conflict of interest and did not fully disclose to a client the possible effect of that conflict even though such action caused no actual harm. In re Cimino, 3 P.3d 398 (Colo. 2000).

Whether an attorney expects to be paid or not is insignificant to the issue of whether an attorney-client relationship existed. In re Cimino, 3 P.3d 398 (Colo. 2000).

The hearing panel of the former grievance committee committed harmless error by failing to consider the personal and emotional problems that an attorney was experiencing at the time of the attorney's misconduct as mitigating in determining sanctions because no medical or psychological proof of emotional problems was brought forward. In re Cimino, 3 P.3d 398 (Colo. 2000).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Good, 893 P.2d 101 (Colo. 1995); People v. Silver, 924 P.2d 159 (Colo. 1996); People v. Mason, 938 P.2d 133 (Colo. 1997); People v. R[illegible] P.2d 65 (Colo. 1998); In re Tolley, 975 P.2d 1115 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Bennett, 843 P.2d 1385 (Colo. 1993); In re Lopez, 980 P.2d 983 (Colo. 1999).

Cases Decided Under Former DR 5-101.

Law reviews. For article, "The Conflicted Attorney", see 11 Colo. Law. 2[illegible] (1982). For article, "The Ethics of Moving for Disqualification of Opposing Counsel", see 13 Colo. Law. 55 (1984). For article, "Why Shouldn't an Attorney Go Into Business With a Client?", see 13 Colo. Law. 431 (1984). For article, "Avoiding Family Law Malpractice: Recognition and Prevention — Part I", see 14 Colo. Law. 37 (1985). For article, "Conflicts of Interest", see 15 Colo. Law. 2001 (1986). For article, "Defending the Federal Lawyer on a Racketeering Charge", see 16 Colo. Law. 605 (1987). For article, "Sex, Lawyers and Vilification", see 21 Colo. Law. 469 (1992).

License to practice law assures public that the lawyer who holds the license will perform basic legal tasks honestly and without undue delay, in accordance with the highest standards of professional conduct. People v. Dixon, 621 P.2d 322 (Colo. 1981).

Public expects appropriate discipline for lawyer misconduct. The public has a right to expect that one who engages in professional misconduct will be disciplined appropriately. People v. Dixon, 621 P.2d 322 (Colo. 1981).

A lawyer, by preparing 95 to 99 percent of the pleadings, continues to represent a client even though he has other attorneys sign the pleadings. People v. Garnett, 725 P.2d 1149 (Colo. 1986).

Public censure warranted where attorney engaged in sexual relations with client attorney represented in dissolution of marriage action even though client suffered no actual harm. People v. Zeilinger, 814 P.2d 808 (Colo. 1991).

By investing trust funds in a venture in which the attorney was involved financially and professionally, he allowed his personal interests to affect the exercise of his professional judgment on behalf of his client in violation of DR 5-101(A), justifying suspension from practice. People v. Wright, 698 P.2d 1317 (Colo. 1985).

Theft of client's money, misrepresentations, representation of multiple clients with adverse interests, and failure to respond to informal complaints warrants disbarment. People v. Quick, 716 P.2d 1082 (Colo. 1986).

Conduct found to violate disciplinary rules. People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L.Ed.2d 639 (1982).

Representing client without full disclosure of potential conflict of interest violates disciplinary rule. People v. Watson, 787 P.2d 151 (Colo. 1990).

No violation of paragraph (A). Although disclosure was inadequate as to the nature of the business relationships between the attorney and his business-partner client, record does not support conclusion that attorney's business relationship with individual client would or reasonably might affect his professional judgment with respect to his representation of that client. In re Quiat, 979 P.2d 1029 (Colo. 1999).

Violation of paragraph (B) where attorney knew, when he accepted employment in connection with his client's bankruptcy, that he could be a witness by virtue of his interests in the general and limited partnerships that were assets of the bankruptcy estate, and by his failure to transfer the partnership interests to his client's children prior to the filing of the bankruptcy. In re Quiat, 979 P.2d 1029 (Colo. 1999).

Representation of client when the exercise of the lawyer's professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests violates disciplinary rule. People v. Ginsberg, 967 P.2d 151 (Colo. 1998).

REPEALED

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Stevens, 883 P.2d 21 (Colo. 1994); People v. Wollrab, 909 P.2d 1093 (Colo. 1996); People v. O'Donnell, 955 P.2d 53 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Schmad, 793 P.2d 1162 (Colo. 1990); People v. Lopez, 796 P.2d 957 (Colo. 1990); People v. Watson, 833 P.2d 50 (Colo. 1992); People v. Boyer, 934 P.2d 1361 (Colo. 1997); In re Quiat, 979 P.2d 1029 (Colo. 1999); In re Cohen, 8 P.3d 429 (Colo. 1999).

Conduct violating this rule sufficient to justify suspension. People v. Vernon, 660 P.2d 879 (Colo. 1982); People v. Stineman, 716 P.2d 1079 (Colo. 1986).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. McGrath, 833 P.2d 731 (Colo. 1992).

Conduct violating this rule sufficient to justify disbarment. People v. McGrath, 833 P.2d 731 (Colo. 1992).

Applied in People v. Spiegel, 193 Colo. 161, 567 P.2d 353 (1977); Jones v. District Court, 617 P.2d 803 (Colo. 1980); McCall v. District Court, 783 P.2d 1223 (1989).

Cases Decided Under Former DR 5-102.

Law reviews. For article, "Prior Representation: The Specter of Disqualification of Counsel", see 11 Colo. Law. 1214 (1982). For article, "The Ethics of Moving for Disqualification of Opposing Counsel", see 13 Colo. Law. 55 (1984). For article, "Defending the Federal Drug or Racketeering Charge", see 16 Colo. Law. 505 (1987). For article, "Ethical Problem Areas for Probate Lawyers", see 19 Colo. Law. 1069 (1990).

A lawyer cannot act as an advocate on behalf of his client and give testimony adverse to the interests of that client in the same proceeding. Riley v. District Court, 181 Colo. 90, 507 P.2d 864 (1973).

Prosecution subpoena of accused's attorney may stand. A prosecutorial subpoena served on a criminal defendant's attorney can withstand a motion to quash only if the prosecution shows the following: (1) Defense counsel's testimony will be actually adverse to the accused; (2) the evidence will likely be admissible at trial; and (3) there is a compelling need for the evidence which cannot be obtained from another source. Williams v. District Court, 700 P.2d 549 (Colo. 1985).

The act of subpoenaing defense counsel is itself the functional equivalent of a motion to disqualify. Williams v. District Court, 700 P.2d 549 (Colo. 1985).

Test applied in Rodriquez v. District Court, 719 P.2d 699 (Colo. 1986).

Paragraph (A) of this rule relates to potential testimony of a lawyer during the trial of a matter for which he is presently employed. People v. Rhinehart, 688 P.2d 231 (Colo. 1984).

When deputy district attorney was endorsed as witness for prosecution, disqualification of deputy district attorney was proper, and disqualification of entire staff of county district attorney's office, under the circumstances, was not an abuse of discretion. People v. Garcia, 698 P.2d 801 (Colo. 1985).

Dismissal of charges not an appropriate remedy. People v. Garcia, 698 P.2d 801 (Colo. 1985).

Motion to disqualify must set forth specific facts which point to a clear danger that either prejudices counsel's client or his adversary. People ex rel. Woodard v. District Court, 704 P.2d 851 (Colo. 1985).

Paragraph (B) does not provide a tool for disqualifying counsel by the mere stratagem of suggesting that opposing counsel may be called as a witness during the trial. People ex rel. Woodard v. District Court, 704 P.2d 851 (Colo. 1985).

Although the Code mandates that an attorney withdraw on the attorney's own initiative if the attorney violates paragraph (B), there are no provisions in this rule for the trial court to disqualify attorneys and this rule does not require a new trial if the attorney does not withdraw. Although plaintiff's attorneys testified for the defendant, the court found that plaintiff was bound by his counsel's decision not to withdraw and refused to grant plaintiff a new trial. Taylor v. Grogan, 900 P.2d 60 (Colo. 1995).

Applied in Jones v. District Court, 617 P.2d 803 (Colo. 1980); Federal Deposit Ins. v. Isham, 782 F. Supp. 524 (D. Colo. 1992).

Cases Decided Under Former DR 5-104.

Law reviews. For article, "Why Shouldn't an Attorney Go Into Business With a Client?", see 13 Colo. Law. 431 (1984). For article, "Conflicts of Interest", see 15 Colo. Law. 2001 (1986). For article, "Update on Ethics and Malpractice Avoidance in Family Law — Part I", see 19 Colo. Law. 465 (1990). For article, "Update on Ethics and Malpractice Avoidance in Family Law — Part II", see 19 Colo. Law. 647 (1990).

Attorney, with power to act as trustee, who obtains a loan from the trust through the actual trustee, but does not disclose conflict and does not discuss security for the loan with the actual trustee, violates this section. People v. Tanquary, 831 P.2d 889 (Colo. 1992).

REPEALED

Public censure appropriate for lawyer who failed to make full disclosure to client of their differing interests prior to obtaining her consent for a loan to the lawyer. People v. Potter, 966 P.2d 1061 (Colo. 1998).

An attorney's conduct in lending money to a client, preparing a promissory note with an excessive interest rate, and failing to fully disclose his differing interest in the business transaction constitutes conduct violating this rule. People v. Ginsberg, 967 P.2d 151 (Colo. 1998).

Exploiting a client's friendship and trust to extort funds for one's personal use is reprehensible conduct deserving of disbarment. People v. McMahill, 782 P.2d 336 (Colo. 1988).

Lawyer's encouragement of a client to enter into a business transaction with said lawyer in which the two had differing interests and lawyer's failure to disclose relevant facts warrant disbarment. People v. Martinez, 739 P.2d 838 (Colo. 1987), cert. denied, 484 U.S. 1054, 108 S. Ct. 1003, 98 L.Ed.2d 970 (1988); People v. Score, 760 P.2d 1111 (Colo. 1988).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Lopez, 796 P.2d 957 (Colo. 1990); People v. Schubert, 799 P.2d 388 (Colo. 1990); People v. Sigley, 917 P.2d 1253 (Colo. 1996).

Conduct violating this rule sufficient to justify suspension. People v. Vernon, 660 P.2d 879 (Colo. 1982); People v. Foster, 716 P.2d 1069 (Colo. 1986).

An attorney's conduct in borrowing money from his former clients and in failing to [illegible] deeds of trust on their behalf to be used as security constitutes professional misconduct and justifies his suspension. People v. Brackett, 667 P.2d 1357 (Colo. 1983).

An attorney's failure to disclose to his clients that he was a lender and holder of a [illegible] mortgage on their property and that his interests in the transaction were necessarily adverse to the interests constitutes conduct violating this rule sufficient to justify suspension. People v. Nutt, 696 P.2d 242 (Colo. 1985).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Broadhurst, 803 P.2d 478 (Colo. 1990); People v. Rouse, 817 P.2d 967 (Colo. 1991); People v. Mulligan, 817 P.2d 1028 (Colo. 1991); People v. Tanquary, 831 P.2d 889 (Colo. 1992).

Conduct violating this rule sufficient to justify disbarment. People v. Quick, 716 P.2d 1082 (Colo. 1986); People v. Foster, 733 P.2d 687 (Colo. 1987); People v. Score, 760 P.2d 1111 (Colo. 1988).

Conduct found to violate disciplinary rules. People v. Lazatos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L.Ed.2d 636 (1982); People v. Bennett, 810 P.2d 661 (Colo. 1991); People v. McKie, 900 P.2d 768 (Colo. 1995).

Applied in People v. Good, 195 Colo. 17, 576 P.2d 1020 (1978); People v. Cameron, 197 Colo. 330, 595 P.2d 677 (1979); People v. Luxford, 634 P.2d 1015 (Colo. 1981); People v. Barbour, 639 P.2d 1065 (Colo. 1982); People v. Underhill, 683 P.2d 349 (Colo. 1984); People v. Stineman, 716 P.2d 1079 (Colo. 1986).

Cases Decided Under Former DR 5-105.

Law reviews. For article, "Conflicts in Settlement of Personal Injury Cases", see 11 Colo. Law. 399 (1982). For article, "Prior Representation: The Spectre of Disqualification of Trial Counsel", see 11 Colo. Law. 1214 (1982). For article, "The Conflicted Attorney", see 11 Colo. Law. 2589 (1982). For article, "Some Comments on Conflicts of Interest and the Corporate Lawyer", see 12 Colo. Law. 60 (1983). For article, "The Professional Liability Insurer's Duty to Defend -- Part II", see 15 Colo. Law. 1029 (1986). For article, "Conflicts of Interest", see 15 Colo. Law. 2001 (1986). For article, "Conflict of Interest Systems", see 16 Colo. Law 628 (1987). For article, "Corporate Fiduciary Surcharge Litigation", see 16 Colo. Law. 983 (1987). For article, "Ethics and the Estate Planning Lawyer", see 17 Colo. Law. 241 (1988). For article, "Update on Ethics and Malpractice Avoidance in Family Law — Part I", see 19 Colo. Law. 465 (1990). For article, "Update on Ethics and Malpractice Avoidance in Family Law — Part II", see 19 Colo. Law. 647 (1990). For article, "Ethical Problem Areas for Probate Lawyers", see 19 Colo. Law. 1069 (1990).

Intent of rule is to guarantee the independence of counsel from the conflicting interests of other clients in order to preserve the integrity of the attorney's adversary role. Allen v. District Court, 184 Colo. 202, 519 P.2d 351 (1974).

Genuine conflicts of interest must be scrupulously avoided. Allen v. District Court, 184 Colo. 202, 519 P.2d 351 (1974); McCall v. District Court, 783 P.2d 1223 (Colo. 1989).

It is of the utmost importance that an attorney's loyalty to his client not be diminished, fettered, or threatened in any manner by his loyalty to another client. Allen v. District Court, 184 Colo. 202, 519 P.2d 351 (1974); Watson v. District Court, 199 Colo. 76, 604 P.2d 1165 (1980).

Conflict arises where parties would be opposed in subsequent contribution action. Where litigants in a negligence action are represented by the same attorneys, a conflict of interest arises if the plaintiff are considered opposing parties in the same action for purposes of a subsequent contribution action, because both parties would want to place a higher degree of fault on the other party. Nat'l Farmers Union Property & Gas. Co. v. Frackelton, 662 P.2d 1056 (Colo. 1983).

REPEALED

Whenever a motion to withdraw is filed on the grounds that a conflict of interest may exist or may arise in the future, the trial judge must conduct a hearing to determine if a conflict of interest, or a potential conflict of interest, requires that counsel withdraw, and if, from the facts presented at the hearing, it appears that a substantial conflict of interest exists, or will in all probability arise in the course of counsel's representation, the motion to withdraw should be granted. Allen v. District Court, 184 Colo. 202, 519 P.2d 351 (1974); McCall v. District Court, 783 P.2d 1223 (Colo. 1989).

Consent of all parties may be insufficient. There are certain factual situations where the conflicts of interests between parties are so critically adverse to one another so as not to permit the representation of multiple parties by an attorney, even with the consent of all parties made after full disclosure. In re King Resources Co., 20 Bankr. 191 (Bankr. D. Colo. 1982).

Attorney should evaluate potential for impropriety. The attorney should not only inform the parties of the former representations, but should evaluate for himself, as well as for his client, any potential for impropriety that might arise. In re King Resources Co., 20 Bankr. 191 (Bankr. D. Colo. 1982); People v. Belina, 765 P.2d 121 (Colo. 1988).

It must be "obvious" that attorney can adequately represent clients. The general rule that a lawyer may represent clients with potentially conflicting interests with the consent of the clients is qualified in that it must be "obvious" that he can adequately do so. In re King Resources Co., 20 Bankr. 191 (Bankr. D. Colo. 1982); People v. Chew, 830 P.2d 488 (Colo. 1992).

Attorney may represent individual officer of client corporation. When an individual director or officer of a corporation seeks representation from an attorney hired by the corporation, the attorney may serve the individual only if the lawyer is convinced that differing interests are not present. In re King Resources Co., 20 Bankr. 191 (Bankr. D. Colo. 1982).

Knowledge of one attorney must be imputed to lawyers with whom he is associated. Osborn v. District Court, 619 P.2d 41 (Colo. 1980).

Imputed disqualification applies to public law firm. The same rule of imputed disqualification stated in subdivision (D) of this rule may be considered in determining the ethical standards for disqualification of a public law firm, such as a district attorney. People v. Garcia, 698 P.2d 80 (Colo. 1985); McCall v. District Court, 783 P.2d 1223 (Colo. 1989).

Rule of imputed disqualification applies to public defenders. Allen v. District Court, 519 P.2d 351 (Colo. 1974); McCall v. District Court, 783 P.2d 1223 (Colo. 1989).

Due to imputed disqualification, appellate division of state public defender's office must be permitted to withdraw from representing on appeal defendant who claims ineffective counsel provided by local deputy public defender. McCall v. District Court, 783 P.2d 1223 (Colo. 1989).

Disqualification of district attorney's office required where two former district attorneys are witnesses on contested issues in case. People v. District Court, 708 P.2d 800 (Colo. 1985).

Trial dates accepted should be honored before withdrawal from employment. When a public defender or a busy defense lawyer learns that his representation of one client is inimical to his representation of another client and he must make an election as to the client he will represent, he has a heavy duty to the court to see that he honors dates that he has agreed to for the trial of the case. Watson v. District Court, 199 Colo. 76, 604 P.2d 1165 (1980).

Attorney's compensation may be denied. Where an attorney is shown to represent more than one party with conflicting interests, a court may deny him all compensation under a retainer agreement. In re King Resources Co., 20 Bankr. 191 (Bankr. D. Colo. 1982).

Continued representation of clients with conflicting interests violates this rule and warrants discipline. People v. Awenius, 653 P.2d 740 (Colo. 1982).

Public censure is generally appropriate when a lawyer is negligent in determining whether the representation of a client will adversely affect another client, causing injury or potential injury to a client. Attorney's representation of two estates where the beneficiaries of the estates have conflicting interests and the attorney fails to obtain waivers from the beneficiaries violates this rule. People v. Gebauer, 821 P.2d 782 (Colo. 1991).

Public censure was appropriate where attorney simultaneously represented one client in automobile accident case and another client, who was involved in the automobile accident, in a bankruptcy proceeding without listing the accident client as a creditor of the bankruptcy client, and where aggravating factors existed. People v. Gonzales, 922 P.2d 933 (Colo. 1996).

Public censure warranted where attorney entered into compensated consulting agreement with law firm to which he referred client's cases, without full disclosure of agreement to client. People v. Mulvihill, 814 P.2d 805 (Colo. 1991).

An attorney is not always precluded from representing a client in a transaction with a former or currently inactive client. Whether an attorney properly may do so depends upon the nature and extent of the former

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legal work performed for the previous client as well as the possible relationship between the two transactions. Crystal Homes, Inc. v. Radetsky, 895 P.2d 1179 (Colo. App. 1995).

Evidence sufficient to justify suspension from the practice of law. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979); People v. Foster, 716 P.2d 1069 (Colo. 1986).

Three-month suspension appropriate for violation of DR 5-105 (A) and (B) and DR 5-101 (B). The interests of the client and the client's wife, from whom the client was then separated, were so adverse, or potentially adverse, that the conflicts could not be waived even had there been full disclosure. As such, it was not obvious that the attorney could represent the client, the client's estranged wife, and their children in the client's bankruptcy proceedings. Because the attorney knew of the conflicts involved when he undertook the multiple representation, a short period of suspension is warranted, but not the requirement of reinstatement proceedings. In re Quiat, 979 P.2d 1029 (Colo. 1999).

Forty-five-day suspension appropriate for violation of this rule where pattern of misconduct and multiple offenses are factors in aggravation. People v. Chew, 830 P.2d 488 (Colo. 1992).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Odom, 829 P.2d 855 (Colo. 1992); People v. Stevens, 883 P.2d 21 (Colo. 1994); People v. Vsetecka, 893 P.2d 1309 (Colo. 1995); People v. Wollrab, 909 P.2d 1093 (Colo. 1996).

Public censure appropriate where attorney represented buyer and seller of restaurant and did not properly advise the buyer or protect the buyer's interest. People v. Odom, 829 P.2d 855 (Colo. 1992).

Conduct violating this rule sufficient to justify public censure. People v. Gessler, 821 P.2d 782 (Colo. 1991).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Lopez, 796 P.2d 957 (Colo. 1990); People v. Hansen, 81[illegible] P.2d [illegible] (Colo. 1991); People v. Watson, 833 P.2d 50 (Colo. 1992); People v. Butler, 875 P.2d 219 (Colo. 1994); People v. Bergman, 901 P.2d 469 (Colo. 1995); People v. Miller, 913 P.2d 23 (Colo. 1996); People v. Silver, 924 P.2d 159 (Colo. 1996); In re Cohen, 8 P.3d 429 (Colo. 1999).

Conduct violating this rule sufficient to justify disbarment. People v. Quick, 716 P.2d 1082 (Colo. 1986); People v. Martinez, 739 P.2d 838 (Colo. 1987), cert. denied, [illegible] S. 1054, [illegible] S. Ct. 1003, 98 L.Ed.2d 970 (1988).

Conduct found to violate disciplinary rules. People v. Ramos, 636 P.2d 666 (Colo. 1981), appeal dismissed, 455 U.S. 930, 102 S. Ct. 1415, 71 L.Ed.2d 639 (1982).

Applied in People ex rel. MacFarlane v. Boyls, 197 Colo. 242, 591 P.2d 1315 (1979); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Castro, [illegible] P.2d 932 (Colo. 1983); People v. Underhill, 683 P.2d 349 (Colo. 1984); People v. McDowell, 718 P.2d 541 (Colo. 1986).

Cases Decided Under Former DR 5-1[illegible]

Law reviews. For article, "Conflicts in Settlement of Personal Injury Cases", see 11 Colo. Law. 399 (1982). For article, "Conflicts of Interest", see 15 Colo. Law. 2001 (1986). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19[illegible] Colo. Law. [illegible] (1990).

Applied in People ex rel. MacFarlane v. Boyls, 197 Colo. 242, 591 P.2d 1315 (1979).

REPEALED

RULE 1.8 — CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(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 to the client in a manner which can be reasonably understood by the client;

(2) the client is informed that use of independent counsel may be advisable and is given a reasonable opportunity to seek the advice of such independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(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) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the lawyer's client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses. A lawyer may forego reimbursement of some or all of the expenses of litigation if it is or becomes apparent that the client is unable to pay such expenses without suffering substantial financial hardship.

(f) 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.

(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 consents after consultation, including disclosure of 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 make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse or as one who has a cohabiting relationship shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(j) 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 granted 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.

REPEALED

Comment

Transactions Between Client and Lawyer

As a general principle, all transactions between client and lawyer should be fair and reasonable to the client. In such transactions a review by independent counsel on behalf of the client is often advisable. Furthermore, a lawyer may not exploit information relating to the representation to the client's disadvantage. For example, a lawyer who has learned that the client is investing in specific real estate may not, without the client's consent, seek to acquire nearby property where doing so would adversely affect the client's plan for investment. Paragraph (a) does not, however, apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or token of appreciation is permitted. If effectuation of a substantial gift

requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

Literary Rights

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraph (j).

Person Paying for a Lawyer's Services

Paragraph (f) requires disclosure of the fact that the lawyer's services are being paid for by a third party. Such an arrangement must also conform to the requirements of Rule 1.6 concerning confidentiality and Rule 1.7 concerning conflict of interest. Where the client is a class, consent may be obtained on behalf of the class by court-supervised procedure.

Acquisition of Interest in Litigation

Paragraph (j) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 and the exception for certain advances of the costs of litigation set forth in paragraph (e).

Relationships Between Lawyers

Paragraph (i) applies to related and cohabiting lawyers who are in different firms. Such lawyers in the same firm are governed by Rules 1.7, 1.9, and 1.10. The disqualification stated in paragraph (i) is personal and is not imputed to members of firms with whom the lawyers are associated.

Limiting Liability

This Rule is not intended to apply to customary qualifications and limitations in legal opinions and memoranda.

Committee Comment

Section (a)(2) of the Model Rule was amended by the Committee because it was felt that the Model Rule was not clear enough when it stated simply that a client should be given "reasonable opportunity" to consult with independent counsel in a conflict situation such as (a) contemplates. The Committee version adds the clarifying precaution that a client in such a situation should be told that "the use of independent counsel may be advisable."

Section (g) allows a lawyer to limit liability where such limitation is lawful and has been negotiated with a client who is independently represented.

Finally, both the rule (section i) and the comment thereto were amended to add "a cohabiting relationship" to the list of familial relationships in which disclosure and consent are needed prior to representation.

Annotation

Law reviews. For formal opinion of the Colorado Bar Association on Ethical Duties of Attorney Selected by Insurer to Represent Its Insured, see 22 Colo. Law. 497 (1993). For article, "Ethical Considerations of Attorney's Liens", see 31 Colo. Law. 51 (April 2002). For article, "Ethical Concerns When Dealing With the Elder Client", see 34 Colo. Law. 27 (October 2005). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005).

Annotator's note. Rule 1.8 is similar to DR 4-101, DR 5-103, DR 5-104, DR 5-106, DR 5-107, and DR 6-102 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 5-103, DR 5-106, and DR 5-602 have been included in the annotations to this rule. Cases construing DR 4-101 have been included under Rule 1.6 and cases construing DR 5-104 and DR 5-107 have been included under Rule 1.7.

Although the basis of this rule is to deter common law champerty and maintenance, the scope of the rule is not limited to conduct that would constitute champerty and maintenance. People v. Mason, 938 P.2d 133 (Colo. 1997).

REPEALED

A violation of this rule is per se a false representation under 11 U.S.C. § 523(a)(2)(A) of the federal bankruptcy code. In re Waller, 210 Bankr. 370 (Bankr. D. Colo. 1997).

Suspension for 60 days appropriate for lawyer who entered into an agreement with a client and failed to fully inform the client of the terms of the agreement in writing or obtain the client's consent to the transaction. People v. Foreman, 966 P.2d 1062 (Colo. 1998).

The presumed sanction of suspension is appropriate where the attorney knew of a conflict of interest and did not fully disclose to a client the possible effect of that conflict even though such action caused no actual harm. In re Cimino, 3 P.3d 398 (Colo. 2000).

Whether an attorney expects to be paid or not is insignificant to the issue of whether an attorney-client relationship existed. In re Cimino, 3 P.3d 398 (Colo. 2000).

The hearing panel of the former grievance committee committed harmless error by failing to consider the personal and emotional problems that an attorney was experiencing at the time of the attorney's misconduct as mitigating in determining sanctions because no medical or psychological proof of emotional problems was brought forward. In re Cimino, 3 P.3d 398 (Colo. 2000).

Conduct violating this rule in conjuntion with other disciplinary rules is sufficient to justify suspension. People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Silver, 924 P.2d 159 (Colo. 1996); People v. Ginsberg, 967 P.2d 151 (Colo. 1998); In re Tolley, 975 P.2d 1115 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Walsh, 880 P.2d 766 (Colo. 1994); In re Tolley, 975 P.2d 1115 (Colo. 1999).

Cases Decided Under Former DR 5-103.

Law reviews. For article, "Conflicts of Interest", see 15 Colo. Law. 20[illegible]986).

The effect of Canon 5 is that whenever a contingent fee contract becomes a subject of litigation in the courts, the lawyer, by reason of the canon, understands that the court, under its general supervisory powers over attorneys as officers of the courts, will determine the reasonableness of the amount and will subject it to the test of quantum meruit. Brillhart v. Hudson, 169 Colo. 329, 455 P.2d [illegible]1969).

However, this does not mean that the court can or should make the contract, but rather that it should determine from all the facts and circumstances the amount of time spent, the novelty of the questions of law, and the risks of nonreturn to the client as well as to the attorney in the situation. Brillhart v. Hudson, 169 Colo. 329, 455 P.2d 878 (1969).

Where the "legal services" rendered were for the most part those which are ordinarily performed by a business chance broker, the established commission payable to such broker at the time would be considered to determine reasonableness. Brillhart v. Hudson, 169 Colo. 329, 455 P.2d 878 (1969) (shown to be 10 percent of purchase price).

Court cannot approve commission of 25 percent. In the exercise of supervisory powers over attorneys as officers of this court, the supreme court cannot approve — under the guise of a "contingent fee" contract for legal services — the payment of what in fact amounts to a broker's commission of 25 percent of the purchase price of the leasehold interest. Brillhart v. Hudson, 169 Colo. 329, 455 P.2d 878 (1969).

Attorney secured by a note which was secured by a deed of trust on property to be sold violated this rule when, upon receipt of a check at closing, the attorney was aware that he had encumbered the property in excess of his client's share of the equity. People v. Franco, 698 P.2d 230 (Colo. 1985).

Arrangement of counsel and clients in written fee agreement which assigned alleged interest in oil and gas properties in order to secure payment of legal fees did not endanger a fair trial. Trial court abused its discretion in granting a mistrial, disqualifying counsel, and assessing attorney fees. Gold Rush Invs. v. Ferrell, 778 P.2d 297 (Colo. App. 1989).

Public censure warranted where attorney kept the first lump sum check obtained in settlement as a lump sum payment of his contingency fee and reimbursement of costs even though he knew the settlement might later be reduced by the social security disability award and the client's union award. People v. Maceau, 910 P.2d 692 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Smith, 830 P.2d 1003 (Colo. 1992); In re Polevoy, 980 P.2d 985 (Colo. 1999).

Evidence sufficient to justify suspension from the practice of law. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979).

Cases Decided Under Former DR 5-106.

Law reviews. For article, "Conflicts in Settlement of Personal Injury Cases", see 11 Colo. Law. 399 (1982).

REPEALED

Cases Decided Under Former DR 6-102.

Law reviews. For article, "Limiting Liability to the Client", see 11 Colo. Law. 2389 (1982). For article, "Potential Liability for Lawyers Employing Law Clerks", see 12 Colo. Law. 1243 (1983). For article, "The Ethical Obligation to Disclose Attorney Negligence", see 13 Colo. Law 232 (1984). For article, "A Proposal on Opinion Letters in Colorado Real Estate Mortgage Loan Transactions Parts I and II", see 18 Colo. Law. 2283 (1989) and 19 Colo. Law. 1 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Release and Settlement of Legal Malpractice Claims, see 19 Colo. Law. 1553 (1990).

Conduct violating this rule sufficient to justify suspension. People v. Foster, 716 P.2d 1069 (Colo. 1986).

Conduct violating this rule sufficient to justify disbarment. People v. Dwyer, 652 P.2d 1074 (Colo. 1982).

Applied in People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978).

RULE 1.9 — CONFLICT OF INTEREST: FORMER CLIENT

REPEALED

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rule 1.6 that is material to the matter; unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former law firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Source: Entire rule amended January 17, 1994, effective July 1, 1994.

Comment

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this Rule. The principles in Rule 1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

The scope of a "matter" for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Lawyers Moving Between Firms

When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the

client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there may be a presumption that all confidences known by the partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with disqualification is the appearance of impropriety proscribed in Canon 9 of the ABA Model Code of Professional Responsibility. This rubric has a two fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

Confidentiality

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, or presumptions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Application of paragraph (b) depends on a situation's particular facts. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(b). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

Adverse Positions

The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9(a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interests in the same or related matters, so long as the conditions of paragraphs (b) and (c) concerning confidentiality have been met.

Information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about the client when later representing another client.

REPEALED

Disqualification from subsequent representation is for the protection of former clients and can be waived by them. A waiver is effective only if there is disclosure of the circumstances, including the lawyer's intended role in behalf of the new client.

With regard to an opposing party's raising a question of conflict of interest, see Comment to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

Committee Comment

This rule, which was viewed by the Committee as an important contribution of the Model Rules, is identical to amended Model Rule 1.9 (which was amended at the February 1989 Mid-year ABA meeting) and its comments.

Annotation

Law reviews. For formal opinion of the Colorado Bar Association on Ethical Duties of Attorney Selected by Insurer to Represent Its Insured, see 22 Colo. Law. 497 (1993). For article, "Entity Foundation: Defining the Client And the Duty of Confidentiality", see 34 Colo. Law. 77 (July 2005).

Annotator's note. Rule 1.9 is similar to DR 4-101 and DR 5-105 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 4-101 have been included under Rule 1.6 and cases construing DR 5-105 have included under Rule 1.7.

The purpose of this rule and rule 1.10 is to protect a client's confidential communications with his attorney. Funplex Partnership v. FDIC, 19 F. Supp.2d 1202 (D. Colo. 1998).

Motions to disqualify counsel rest within the sound discretion of the trial court. FDIC v. Sierra Resources, Inc., 682 F. Supp. 1167 (D. Colo. 1987); Funplex Partnership v. FDIC, 19 F. Supp.2d 1202 (D. Colo. 1998).

The party seeking disqualification under this rule must provide the court with specific facts to show that disqualification is necessary and he cannot rely on speculation or conjecture. FDIC v. Sierra Resources, Inc., 682 F. Supp. 1167 (D. Colo. 1987); Funplex Partnership v. FDIC, 19 F. Supp.2d 1202 (D. Colo. 1998).

Specifically, the moving party must show that: (1) An attorney-client relationship existed in the past; (2) the present litigation involves a matter that is "substantially related" to the prior litigation; (3) the present client's interests are materially adverse to the former client's interests; and (4) the former client has not consented to the disputed representation after consultation. English Feedlot, Inc. v. Norden Lab., Inc., 833 F. Supp. 1498 (D. Colo. 1993); Funplex Partnership v. FDIC, 19 F. Supp.2d 1202 (D. Colo. 1998).

Substantiality is present if the factual contexts of the two representations are similar or related. English Feedlot, Inc. v. Norden Lab., Inc., 833 F. Supp. 1498 (D. Colo. 1993); Cole v. Ruidoso Municipal Sch., 43 F.3d 1373 (10th Cir. 1994); Funplex Partnership v. FDIC, 19 F. Supp.2d 1202 (D. Colo. 1998).

Attorney's former representation of the alternate suspect in criminal case prohibited him from representing the criminal defendant where the cases were substantially related because the murder victim in the present case was the informant in the former client's case. People ex rel. Peters v. District Court, 951 P.2d 926 (Colo. 1998).

An attorney needs to receive consent from his or her former client to represent a new client when the matter the attorney represented the former client in is substantially related to the representation of the new client. The two matters are "substantially related" when they involve the same transaction or legal dispute or if there is substantial risk that confidential factual information as would be normally be obtained by defense counsel in prior representation would materially advance the position of the new client in the current proceeding. The record does not support a finding that there was a substantial risk that confidential factual information as would be normally be obtained by defense counsel in prior representation would materially advance the position of the new client in the current proceeding. People v. Frisco, 119 P.3d 1093 (Colo. 2005).

Applied in English Feedlot, Inc. v. Norden Laboratories, Inc., 833 F. Supp. 1498 (D. Colo. 1993).

REPEALED

RULE 1.10 — IMPUTED DISQUALIFICATION: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 (c), 1.9 or 2.2.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

Comment

Definition of "Firm"

For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have actual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to the other.

With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11(a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11(c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7 and 1.9.

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences and therefore to the protections provided in Rules 1.6, 1.9 and 1.11. However, if the more extensive disqualification imposed upon a firm were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations and, thus, has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.

Principles of Imputed Disqualification

The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which

REPEALED

the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

Committee Comment

This rule and the comments to this rule are identical to amended Model Rule 1.10 (amended at the February 1989 Mid-year ABA meeting).

Annotation

Annotator's note. Rule 1.10 is similar to DR 5-105 as it existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing that provision have been included in the annotations to Rule 1.7.

The purpose of this rule and rule 1.9 is to protect a client's confidential communications with his attorney. Funplex Partnership v. FDIC, 19 F. Supp.2d 1202 (D. Colo. 1998).

When an attorney associates with a law firm, the principle of loyalty to the client extends beyond the individual attorney and applies with equal force to the other attorneys practicing in the firm. People ex rel. Peters v. District Court, 951 P.2d 926 (Colo. 1998).

The rule of imputed disqualification can be considered from the premise that a firm of attorneys is essentially one attorney for purposes of the rules governing loyalty to the client, or from the premise that each attorney is vicariously bound by the obligation of loyalty owed by each lawyer in the firm. People ex rel. Peters v. District Court, 951 P.2d 926 (Colo. 1998).

And the rule of imputed disqualification applies with equal force to court-appointed attorneys. People ex rel. Peters v. District Court, 951 P.2d 926 (Colo. 1998).

REPEALED

RULE 1.11 — SUCCESSIVE GOVERNMENTAL AND PRIVATE EMPLOYMENT

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

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

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

(1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(d) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

(e) As used in this Rule, the Term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

Comment

This Rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of Rule 1.10(b), which applies to lawyers moving from one firm to another.

A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9. In addition, such a lawyer is subject to Rule 1.11 and to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule.

Where the successive clients are a public agency and a private client, the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client. A lawyer should not be in a position where benefit to a private client might affect performance of the lawyer's professional functions on behalf of public authority. Also, unfair advantage could accrue to the private client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. However, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.

When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency.

Paragraphs (a)(1) and (b) do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement. They prohibit directly relating the attorney's compensation to the fee in the matter in which the lawyer is disqualified.

Paragraph (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice, however, is required to be given as soon as practicable in order that the government agency will have a reasonable opportunity to ascertain that the lawyer is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.

Paragraph (b) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

Paragraphs (a) and (c) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.

Committee Comment

The Committee recommends adoption of this Model Rule. It is a substantial improvement over the related Rule in the Code because it provides more specific guidance in recurring situations which are not directly addressed in the Code. Further, this Model Rule actually was developed in response to and codifies suggestions originally made by the Colorado Bar's comments regarding omissions in the preliminary draft of the Model Rules in 1980.

Annotation

Annotator's note. Rule 1.11 is similar to DR 9-101 as it existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing that provision have been included in the annotations to Rule 1.2.

REPEALED

RULE 1.12 — FORMER JUDGE OR ARBITRATOR

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after the disclosure.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or arbitrator. A lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for employment with a party or attorney involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge, other adjudicative officer or arbitrator.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

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

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party in other unrelated matters.

REPEALED

Comment

This Rule generally parallels Rule 1.11. The term "personally and substantially" signified that a judge who was a member of a multi-member court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had merely exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term "adjudicative officer" includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore, or retired judge recalled to active service, may not "act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto." Although phrased differently from this Rule, those rules correspond in meaning.

Committee Comment

The Committee recommends adoption of this Model Rule as proposed. This Model Rule addresses specific recurring questions not so identified in the Code.

Annotation

Annotator's note. Rule 1.12 is similar to DR 5-105 and DR 9-101 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 5-105 have been included under Rule 1.7 and cases construing DR 9-101 have been included under Rule 1.2.

RULE 1.13 — ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization which acts through its duly authorized constituents, and the lawyer owes allegiance to the organization itself, and not its individual stockholders, directors, officers, employees, representatives or other persons connected with the entity.

(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 which 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. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant consideration. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders and other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, but only in those instances in which such representation will not affect the lawyer's allegiance to the entity itself, and also 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.

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Comment

The Entity as the Client

An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.

Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents or an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organization client in order to carry out the representation or as otherwise permitted by Rule 1.6.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such circumstances, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails,

or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization's highest authority. Ordinarily, that is the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

The authority and responsibility provided in paragraph (b) are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's respon[illegible]nder Rule 1.6, 1.8, 1.16, 3.3, or 4.1. If the lawyer's services are being used by an organization to further a c[illegible]e or frau[illegible]y the organization, Rule 1.2(d) can be applicable.

Government Agency

The duty defined in this Rule applies to governmental organizations. H[illegible]ver, wh[illegible] the client is a governmental organization, a different balance may be appropriate bet[illegible]veen maintai[illegible]g confidentiality and assuring that the wrongful official act is prevented or rectified, for public busin[illegible]es involved. [illegible] addition, duties of lawyers employed by the government or lawyers in military service may be defin[illegible] by st[illegible]es and regulation. Therefore, defining precisely the identity of the client and prescribing th[illegible]ting ob[illegible]ons of such lawyers may be more difficult in the government context. Although in some circums[illegible]nces [illegible]lient may be a specific agency, it is generally the government as a whole. For example, if the acti[illegible]or failur[illegible]ct involves the head of a bureau, either the department of which the bureau is a part or the [illegible]overnm[illegible]t as a [illegible]hole may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of g[illegible]ent offic[illegible]ls, a government lawyer may have authority to question such conduct more extensively [illegible]t o[illegible] lawy[illegible]or a private organization in similar circumstances. This Rule does not limit that authority. See [illegible]te on [illegible]ope.

Clarifying the Lawyer's Role

There are times w[illegible]n the [illegible]ganiza[illegible]'s interest may be or become adverse to those of one or more of its constituents. In such circumst[illegible]s the la[illegible]yer should advise any constituent, whose interest the lawyer finds adverse to that of the organiz[illegible]n, [illegible]he co[illegible]lic[illegible] potential conflict of interest, that the lawyer cannot represent such constituent, and [illegible]t such [illegible]erson n[illegible]y wish to obtain independent representation. Care must be taken to assure that the individual understa[illegible]that, [illegible]n there is such adversity of interest, the lawyer for the organization cannot provide legal representation f[illegible]he constituent individual, and that discussions between the lawyer for the organization and the individual may not be p[illegible]vileged.

Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to

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the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Committee Comment

The proposed Rule has no direct counterpart in the Model Code and is essentially modeled after ABA Rule 1.13. The Committee has, however, taken the language from EC 5-18 of the Code and added that language to the "black letter" law of Rule 1.13(a) to make more explicit the focus of the lawyer's professional responsibility when representing a corporation. The word "individual" modifies the terms "stockholders, directors, officers, employees, representatives and other persons connected with the entity" in order to clarify that ultimately the shareholders or directors, collectively, frequently are the highest authority which can act for the organization and are thus the ultimate group to which the lawyer owes loyalty.

Annotation

Law Reviews. For article, "Am I My Brother's Keeper? Redefining the Attorney-Client Relationship", see 32 Colo. Law. 11 (April 2003). For article, "Entity Foundation: Defining the Client And the Duty of Confidentiality", see 34 Colo. Law. 77 (July 2005).

Annotator's note. Rule 1.13 is similar to DR 5-105 and DR 5-107 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing those provisions have been included in the annotations to Rule 1.7.

There is no ethical violation in the attorney general suing the secretary of state where no client confidences are involved and the attorney general is representing the broader institutional concerns of the state regarding allegedly unconstitutional legislation enacting a congressional redistricting plan. People ex rel. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003), cert. denied, 79 U.S. 1221, 124 S. Ct. 2228, 158 L. Ed. 2d 260 (2004).

RULE 1.14 — CLIENT UNDER A DISABILITY

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(a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) Not only can the mental, physical or other condition of the client impose additional responsibilities on the lawyer, the fact that a client is impaired does not relieve the lawyer of the obligation to obtain information from the client to the extent possible.

(c) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot act in the client's own interest.

Comment

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, an incapacitated person may have no power to make legally binding decisions. Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. Furthermore, to an increasing extent the law recognizes intermediate degrees of competence. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. If the person has no guardian or legal representative, the lawyer often must act as de facto guardian. Even if the person does have a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. If a legal representative has not been appointed, the lawyer should see to such an appointment where it would serve the client's best interests. Thus, if a disabled client has substantial property that should be sold for the client's benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client. Evaluation of these considerations is a matter of professional judgment on the lawyer's part.

If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Disclosure of the Client's Condition

Rules of procedure in litigation generally provide that minors or persons suffering mental disability shall be represented by a guardian or next friend if they do not have a general guardian. However, disclosure of the client's disability can adversely affect the client's interests. For example, raising the question of disability could, in some circumstances, lead to proceedings for involuntary commitment. The lawyer's position in such cases is an unavoidably difficult one. The lawyer may seek guidance from an appropriate diagnostician.

Committee Comment

The ABA Rule is being recommended but with the addition of a new subsection (b). The ABA subsection (b) becomes subsection (c), and the language in the proposed subsection (b) is derived from EC 7-1 and EC 7-12 of the Code which make clear that a lawyer should obtain all possible aid from the client by making these aspirational provisions of the Code part of the "black letter" law of the Rule, more definitive and appropriate direction as to the nature of ethical conduct is provided.

Annotation

Law reviews. For article, "Ethical Obligations of Petitioner's Counsel in Guardianship and Conservator Cases", see 24 Colo. Law. 2565 (1995). For article "Ethical Considerations When Dealing With the Elder Client", see 34 Colo. Law. 27 (October 2005).

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RULE 1.15 — SAFEKEEPING PROPERTY; INTEREST-BEARING ACCOUNTS TO BE ESTABLISHED FOR THE BENEFIT OF THE CLIENT OR THIRD PERSONS OR THE COLORADO LAWYER TRUST ACCOUNT FOUNDATION; NOTICE OF OVERDRAFTS; RECORD KEEPING

(a) In connection with a representation, an attorney shall hold property of clients or third persons that is in an attorney's possession separate from the attorney's own property. Funds shall be kept in a separate account maintained in the state where the attorney's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the attorney and shall be preserved for a period of seven years after termination of the representation.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall, promptly or otherwise as permitted by law or by agreement with the client, deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) "Accounts" as used in paragraph (a) above shall mean one or more identifiable interest-bearing, insured depository accounts; provided, that with the consent of the client or third person whose funds are in the account, an account maintained under subparagraph (e) (1) below (interest is paid to the client or third person) need not be an insured depository account, but all accounts maintained under subparagraph (e) (2) below (interest is paid to the Colorado Lawyer Trust Account Foundation) shall be insured depository accounts. For the purpose of this rule, "insured depository accounts" shall mean government insured accounts at a regulated financial institution, on which withdrawals or transfers can be made on demand, subject only to any notice period which the institution is required to reserve by law or regulation.

(e) (1) Except as may be prescribed by subparagraph (2) below, interest earned on accounts in which the funds are deposited (less any deduction for service charges or fees of the depository institution) shall belong to the clients or third persons whose funds have been so deposited; and the lawyer or law firm shall have no right or claim to such interest.

(2) If not held in accounts with the interest paid to clients or third persons as provided in (e) (1), a lawyer or law firm shall establish a pooled interest-bearing insured depository account for funds of clients or third persons which are nominal in amount or are expected to be held for a short period of time in compliance with the following provisions:

(a) No interest from such an account shall be made available to a lawyer or law firm.

(b) The account shall include funds of clients or third persons which are nominal in amount or are expected to be held for a short period of time.

(c) Lawyers or law firms depositing funds in an interest-bearing insured depository account under this subparagraph (e) (2) shall direct the depository institution:

(i) To remit interest, net any service charges or fees, as computed in accordance with institution's standard accounting practice, at least quarterly, to the Colorado Lawyer Trust Account Foundation; and

(ii) To transmit with each remittance to the Colorado Lawyer Trust Account Foundation a statement showing the name of the lawyer or law firm on whose account the remittance is sent and the rate of interest applied.

The provisions of this subparagraph (e) (2) shall not apply in those instances where it is not feasible to establish a trust account for the benefit of the Colorado Lawyer Trust Account Foundation for reasons beyond the control of the lawyer or law firm, such as the unavailability of a financial institution in the community which offers such an account.

(3) Information necessary to determine compliance or justifiable reason for noncompliance with subparagraph (2) shall be included in the annual attorney registration statement. The Colorado Lawyer Trust Account Foundation shall assist the court in determining whether lawyers or law firms have complied in establishing the trust account required under subparagraph (e) (2). If it appears that a lawyer or law firm has not complied where it is feasible to do so, the matter may be referred to the attorney regulation counsel for investigation and proceedings in accordance with C.R.C.P. 241.

(f) Required Bank Accounts. Every attorney in private practice in this state shall maintain in a financial institution doing business in Colorado, in the attorney's own name, or in the name of a partnership of attorneys, or in the name of the professional corporation or limited liability corporation of which the attorney is a member, or in the name of the attorney or entity by whom employed:

(1) A trust account or accounts, separate from any business and personal accounts and from any fiduciary accounts that the attorney may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which trust account or accounts funds entrusted to the attorney's care and any advance payment of fees that has not been earned shall be deposited (except that such a trust account shall not be required if the attorney does not ever receive such funds); and,

(2) A business account into which all funds received for professional services shall be deposited.

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(3) One or more of the trust accounts may be the account or accounts described in Rule 1.15(e)(2), known as COLTAF (Colorado Lawyer Trust Account Foundation) accounts.

(4) Other than fiduciary accounts maintained by an attorney as executor, guardian, trustee, or receiver, or in any other similar fiduciary capacity, all trust accounts, whether general or specific, as well as all deposits slips and checks drawn thereon, shall be prominently designated as a "trust account." Nothing herein shall prohibit any additional descriptive designation for a specific trust account. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as a "professional account," or an "office account." The COLTAF account or accounts shall each be designated "COLTAF Trust Account."

(5) The name of institutions in which such accounts are maintained and identification numbers of each account shall be recorded on a statement filed with the annual attorney registration payment, pursuant to Rule 227(2). Such information shall be available for use in accordance with paragraph (g) of this Rule. For all COLTAF accounts, the account numbers, the name the account is under, and the depository institution shall be indicated on the same statement.

(6) A trust account shall be maintained only in financial institutions doing business in Colorado which are approved by the Regulation Counsel with policy guidelines by the Board of Trustees of the Colorado Attorneys' Fund for Client Protection, which shall annually publish a list of such approved institutions. A financial institution shall be approved if it shall file with the Regulation Counsel an agreement, in a form provided, to report to the Regulation Counsel in the event any properly payable trust account instrument is presented against insufficient funds, irrespective of whether the instrument is honored; any such agreement shall apply to all branches of the financial institution and shall not be canceled except on thirty-days notice in writing to the Regulation Counsel. The agreement shall further provide that all reports made by the financial institution shall be in the following format: (1) in the case of dishonored instruments, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (2) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the attorney or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any; if an instrument presented against insufficient funds is honored, then the report shall be made within five banking days of the date of presentation for payment against insufficient funds. In addition, each financial institution approved by the Regulation Counsel must cooperate with the COLTAF program and must offer a COLTAF account to any attorney who wishes to open one. In addition to the reports specified above, approved financial institutions shall agree to cooperate fully with the Regulation Counsel and to produce any trust account or business account records on receipt of a subpoena therefor in connection with any proceeding pursuant to C.R.C.P. 251. Nothing herein shall preclude a financial institution from charging an attorney or law firm for the reasonable cost of producing the reports and records required by this Rule, but such charges shall not be a transaction cost to be charged against funds payable to the COLTAF program. Every attorney or law firm maintaining a trust account in this state shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements by financial institutions mandated by this Rule and shall indemnify and hold harmless the financial institution for its compliance with such reporting and production requirement. A financial institution shall be immune from suit arising out of its actions or omissions in reporting overdrafts or insufficient funds or producing documents under this Rule. The agreement entered into by a financial institution with the Regulation Counsel shall not be deemed to create a duty to exercise a standard of care and shall not constitute a contract for the benefit of any third parties that may sustain a loss as a result of lawyers overdrawing attorney trust accounts.

(7) A lawyer may deposit funds reasonably sufficient to pay anticipated service charges or other fees for maintenance or operation of such account into an account maintained under paragraph (f)(1), (f)(3), or (f)(4). Such funds shall be clearly identified in the attorney's records of the account.

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(g) Required Accounting Records. Attorneys, partnerships of attorneys, professional corporation and limited liability corporations in private practice in this state shall maintain in a current status and retain for a period of seven years after the event which they record:

(1) Appropriate receipt and disbursement records of all deposits in and withdrawals from accounts specified in subsection (a) of this rule and any other bank account which concerns their practice of law, specifically identifying the date, source and description of each item deposited as well as the date, payee, and purpose of each disbursement. All trust account receipts shall be deposited intact and the duplicate deposit slip should be sufficiently detailed to identify each item. All trust account withdrawals shall be made only by authorized bank or wire transfer or by check payable to a named payee and not to cash. Only an attorney admitted to practice law in this state or a person supervised by such shall be an authorized signatory on a trust account; and,

(2) An appropriate record-keeping system identifying each separate trust client, for all trust accounts, showing the source of all funds deposited in such accounts, the names of all persons for whom the funds are or were held, the amount of such funds, the description and amounts of charges or withdrawals from such accounts, and the names of all persons to whom such funds were disbursed. A regular trial balance of the individual client ledgers shall be maintained and reconciled at least quarterly with the applicable bank statements.

(3) Copies of all retainer and compensation agreements with clients; and,

(4) Copies of all statements to clients showing the disbursement of funds to them or on their behalf; and,

(5) Copies of all bills issued to clients and,

(6) Copies of all records showing payments to any persons, not in their regular employ, for services rendered or performed; and,

(7) All bank statements and prenumbered cancelled checks; and,

(8) Copies of those portions of each client's case file reasonably necessary for a complete understanding of the financial transactions pertaining thereto.

(h) Type and Availability of Accounting Records. The financial books and other records required by subsections (f) and (g) of this rule shall be maintained in accordance with generally accepted accounting principles, such as the accrual method, the cash basis method and the income tax method. Bookkeeping records may be maintained by computer provided they otherwise comply with this Rule and provided further that printed copies can be made on demand in accordance with this subsection or subsection (j). They shall be located at the principal Colorado office of each attorney, partnership, professional corporation, or limited liability corporation.

(i) Dissolution. Upon the dissolution of any partnership of attorneys or of any professional corporation or limited liability corporation, the former partners or shareholders shall make appropriate arrangements for the maintenance by one of them or by a successor form of the records specified in paragraph (g) of this Rule.

(j) Availability Of Records. Any of the records required to be kept by this Rule shall be produced in response to a subpoena duces tecum issued in connection with proceedings pursuant to C.R.C.P. 251. When so produced, all such records shall remain confidential except for the purposes of the particular proceeding and their contents shall not be disclosed by anyone in such a way as to violate the attorney-client privilege.

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Source: (a) amended and (g) to (j) added June 25, 1998, effective January 1, 1999; (f) added June 25, 1998, effective July 1, 1999; IP(f), (f)(3), and (f)(6) amended and adopted May 13, 1999, effective July 1, 1999; (e)(3) corrected and effective November 9, 1999; (f)(7) added and adopted April 18, 2001, effective July 1, 2001.

Comment

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box except when some other form of safekeeping is warranted by special circumstances. All

property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts.

Trust accounts of funds of clients or third persons held in connection with a representation must be interest-bearing for the benefit of the client or third person or for the benefit of the Colorado Lawyer Trust Account Foundation where the funds are nominal in amount or expected to be held for a short period of time. A lawyer should exercise good faith judgment in determining initially whether funds are of such nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest-bearing account for the benefit of the client or third person. The lawyer should also consider such other factors as (i) the cost of establishing and maintaining the account, service charges, accounting fees, and tax report procedures; (ii) the nature of the transaction (s) involved; and (iii) the likelihood of delay in the relevant proceedings. A lawyer should review at reasonable intervals whether changed circumstances require further action respecting the deposit of such funds.

Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. See Rule 1.16 (d) for standards applicable to retention of client papers.

A "client's security fund" provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of the lawyer. Where such a fund has been established, a lawyer should participate.

Committee Comment

This Rule is similar in substance to the code, DR 9-102. The Rule extends the concept to monies held for the benefit of third parties, which probably is implied under the Code.

Annotation

Law reviews. For article, "Settlement Ethics", see 30 Colo. Law. 53 (December 2001). For article, "Problems with Trust Accounts that Come to the Attention of Regulation Counsel", see 34 Colo. Law. 39 (April 2005). For article, "Non-Monetary Compensation for Legal Services How Many Chickens Am I Worth?", see 35 Colo. Law. 95 (January 2006).

Annotator's note. Rule 1.15 is similar to DR 5-103 and DR 9-102 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 5-103 have been included under Rule 1.8 and cases construing DR 9-102 have been included under Rule 1.4.

Supreme court has made the underlying ethical principle of this rule explicit: An attorney earns a fee only when the attorney provides a benefit or service to the client. In re Sather, 3 P.3d 403 (Colo. 2000).

Under this rule, all client funds — including engagement retainers, advance fees, flat fees, lump sum fees, etc., must be held in trust until there is a basis on which to conclude that the attorney "earned" the fee. In re Sather, 3 P.3d 403 (Colo. 2000).

This rule requires that attorneys segregate client funds, including those paid as advance fees, from the attorney's property; however, this holding is made prospective. In re Sather, 3 P.3d 403 (Colo. 2000).

In limited circumstances, an attorney may earn a fee before performing any legal services (engagement retainers) or the attorney and client may agree that the attorney may treat advance fees as the attorney's property before the attorney earns the fees by supplying a benefit or performing a service. However, the fee agreement must clearly explain the basis for this arrangement and explain how the client's rights are protected by the arrangement. But, under either arrangement, the fees are always subject to refund if excessive or unearned and the attorney cannot communicate otherwise to a client. In re Sather, 3 P.3d 403 (Colo. 2000).

Attorneys cannot enter into "non-refundable" retainer or fee agreements. In re Sather, 3 P.3d 403 (Colo. 2000).

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Failure to provide accounting with respect to fees charged and failure to return unearned fees in conjunction with neglect of civil rights suit warranted a 30-day suspension. People v. Fritsche, 849 P.2d 31 (Colo. 1993).

Public censure appropriate for failure by respondent to return clients' original tax returns in a timely manner and to inform the clients that the tax returns were in fact missing, in addition to other conduct violating rules. People v. Berkley, 858 P.2d 699 (Colo. 1993).

Public censure appropriate where attorney neglected and made misrepresentations in two separate legal matters. People v. Eagan, 902 P.2d 841 (Colo. 1995).

Public censure appropriate where the attorney filed the client's retainer in the operating account, rather than the trust account, and when the client fired the attorney and asked for a refund on the retainer, the attorney wrote the client a refund check that was returned for insufficient funds. People v. Pooley, 917 P.2d 712 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules, where mitigating factors were present, warrants public censure. People v. Davis, 950 P.2d 586 (Colo. 1998).

Commingling personal and client funds in trust account and writing 45 insufficient funds checks on trust account warrants six-month suspension where court found that no clients complained about misuses of funds, all checks were eventually honored, and attorney agreed to make restitution to bank for fees and cooperated in disciplinary proceedings. Court found that 120 days would have been insufficient in light of attorney's two prior admonitions and one prior private censure. People v. Davis, 893 P.2d 775 (Colo. 1995).

Suspension for one year and one day appropriate when attorney neglected to return client files upon request. People v. Honaker, 847 P.2d 640 (Colo. 1993); People v. Fager, 925 P.2d 750 (Colo. 1996).

Suspension for one year and one day is warranted for commingling and misuse of client funds. The hearing board found that the respondent acted recklessly, rather than knowingly, misappropriating client funds. People v. Zimmermann, 922 P.2d 325 (Colo. 1996).

Suspension for one year and one day appropriate where attorney violated paragraphs (a) and (b) by not returning or accounting for client funds held for emergencies after the client's firing the attorney and for negligently converting other client funds to the attorney's own use. People v. Johnson, 942 P.2d 524 (Colo. 1997).

Disbarment appropriate where attorney accepted fees from a number of clients prior to terminating her legal practice, failed to inform her clients of such termination, failed to refund clients' retainer fees, failed to place clients' funds in separate account, and gave client files to other lawyers without clients' consent. People v. Tucker, 904 P.2d 1321 (Colo. 1995).

When a lawyer accepts fees from clients and then abandons those clients while keeping their money and causing serious harm, disbarment is appropriate. People v. Steinman, 930 P.2d 596 (Colo. 1997).

Disbarment warranted where attorney intended to convert client funds, regardless of whether attorney intended to replace the funds at some point. Even consideration of attorney's personal and emotional problems was irrelevant where attorney violated this rule by knowingly converting client funds, as well as violating several other rules of professional conduct. People v. Marsh, 908 P.2d 1115 (Colo. 1996).

Disbarment not warranted where there was mitigating evidence concerning attorney's mental and physical disabilities. Instead, the board imposed a three-year suspension with a condition for reinstatement that professional medical evidence be presented that the disabilities do not interfere with the attorney's ability to practice law. People v. Stewart, 892 P.2d 879 (Colo. 1995).

Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 945 P.2d 1385 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Titoni, 893 P.2d 1322 (Colo. 1995); People v. Woodrum, 911 P.2d 640 (Colo. 1996); People v. Todd, 938 P.2d 1160 (Colo. 1997); People v. O'Donnell, 955 P.2d 53 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Wechsler, 854 P.2d 217 (Colo. 1993); People v. Kerwin, 859 P.2d 895 (Colo. 1993); People v. Murray, 912 P.2d 554 (Colo. 1996); People v. Paulson, 930 P.2d 582 (Colo. 1997); People v. Rishel, 956 P.2d 542 (Colo. 1998); People v. Barr, 957 P.2d 1379 (Colo. 1998); People v. Harding, 967 P.2d 153 (Colo. 1998); In re Nangle, 973 P.2d 1271 (Colo. 1999); In re Corbin, 973 P.2d 1273 (Colo. 1999); In re Fischer, 89 P.3d 817 (Colo. 2004).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Kelley, 840 P.2d 1068 (Colo. 1992); People v. Schindelar, 845 P.2d 1146 (Colo. 1993); People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Price, 929 P.2d 1316 (Colo.

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1996); People v. Mundis, 929 P.2d 1327 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997). People v. Wallace, 936 P.2d 1282 (Colo. 1997); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Sousa, 943 P.2d 448 (Colo. 1997); People v. Schaefer, 944 P.2d 78 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Singer, 955 P.2d 1005 (Colo. 1998); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Skaalerud, 963 P.2d 341 (Colo. 1998); People v. Gonzalez, 967 P.2d 156 (Colo. 1998); In re Bilderback, 971 P.2d 1061 (Colo. 1999); In re Stevenson, 979 P.2d 1043 (Colo. 1999).

Conduct violating this rule is sufficient to justify disbarment. People v. Townshend, 933 P.2d 1327 (Colo. 1997).

RULE 1.16 — DECLINING OR TERMINATING REPRESENTATION

REPEALED

(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) A lawyer may not request permission to withdraw in matters pending before a tribunal and may not withdraw in other matters unless such request or such withdrawal is because:

(1) the client:

(A) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

(B) personally seeks to pursue an illegal course of conduct.

(C) insists that the lawyer pursue a course of conduct that is illegal or that is prohibited by these rules.

(D) by other conduct renders it unreasonably difficult for the lawyer to carry out the lawyer's employment effectively.

(E) insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited by these rules; or

(F) deliberately disregards an agreement or obligation to the lawyer as to expenses or fees; or

(2) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal; or

(3) the lawyer's client knowingly and freely assents to termination of the lawyer's employment; or

(4) the lawyer believes in good faith in a proceeding pending before a tribunal that the tribunal will find the existence of other good cause for withdrawal.

(c) 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 that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.

Comment

A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion.

Mandatory Withdrawal

A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may wish an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Discharge

A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Whether future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a [illegible] by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself.

If the client is mentally incompetent, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and, in an extreme case, may initiate proceedings for conservatorship or similar protection of the client. See Rule 1.14.

Optional Withdrawal

A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may withdraw where the client insists on a repugnant or imprudent objective.

A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law.

Whether a lawyer for an organization may under certain unusual circumstances have a legal obligation to the organization after withdrawal or being discharged by the organization's highest authority is beyond the scope of these Rules.

REPEALED

Committee Comment

Rule 1.16(a) is similar to Code provision DR 1-109. Rule 1.16(b) is generally similar to Code provision DR 2-110(C), and has been revised to restrict counsel's flexibility in permissive withdrawals. The revisions are patterned after DR 2-110. The concept of permitting withdrawal where "other good cause for withdrawal exists," found in the ABA Model Rules has been deleted. The Committee believes that the public is best served when a specific basis for withdrawal is required. Rule 1.16(c) and (d) are substantially similar to Code provisions DR 2 110(A)(1), (2) and (3).

Annotation

Law Reviews. For article, "Am I My Brother's Keeper? Redefining the Attorney-Client Relationship", see 32 Colo. Law. 11 (April 2003). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005).

Annotator's note. Rule 1.16 is similar to DR 2-103, DR 2-104, and DR 2-110 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 2-104 have been included in the annotations to this rule. Cases construing DR 2-103 have been included under Rule 1.5 and cases construing DR 2-110 have been included under Rule 1.2.

Attorney discharged without cause may not recover damages under a non-contingency contract for services not rendered before the discharge. It is important to balance the attorney-client relationship and the attorney's right to receive fair and adequate compensation. interests. Olsen and Brown v. City of Englewood, 889 P.2d 673 (Colo. 1995).

The decision as to whether defense counsel should be permitted to withdraw lies within the sound discretion of the court. If the trial court has a reasonable basis for concluding that the attorney-client relationship has not deteriorated to the point at which counsel is unable to give effective assistance in the presentation of a defense, then the court is justified in refusing to appoint new counsel. People v. Rocha, 872 P.2d 1285 (Colo. App. 1993).

Disagreement concerning the refusal of defense counsel to call certain witnesses is not sufficient per se to require the trial court to grant a motion to withdraw. People v. Rocha, 872 P.2d 1285 (Colo. App. 1993).

Among the factors a trial court must consider in determining whether withdrawal is warranted is the possibility that any new counsel will be confronted with the same irreconcilable conflict. People v. Rocha, 872 P.2d 1285 (Colo. App. 1993).

Public censure instead of private censure was appropriate where attorney failed to respond to discovery requests and motions for summary judgment and the findings of the board did not support the applicability of ABA Standard 9.32(i) as a mitigating factor since there was no medical evidence that attorney was affected by chemical dependency or that alcohol contributed to or caused the misconduct. People v. Brady, 923 P.2d [illegible] (Colo. 1996).

Attorney's restitution agreement was neither an aggravating nor mitigating factor since the attorney did not propose or attempt any form of restitution until after a request for investigation had been filed with the office of disciplinary counsel. People v. Brady, 923 P.2d 887 (Colo. 1996).

Attorney's argument that public discipline is not appropriate because it would stigmatize a recovering alcoholic was rejected since overriding concern in discipline proceedings is to protect the public through the enforcement of professional standards of conduct. People v. Brady, 923 P.2d 887 (Colo. 1996).

Attorney's professional misconduct involving the improper collection of attorney's fees in six instances, and the failure to withdraw upon client's request in one instance justified 45-day suspension. People v. Peters, 849 P.2d 51 (Colo. 1993).

An attorney is entitled only to compensation for the reasonable value of the services rendered if the attorney is employed under a fixed fee contract to render specific legal services and is discharged by the client without cause. The client was entitled to discharge the attorneys without cause and without incurring any further liability, other than payment for services rendered on a quantum meruit theory. Olsen and Brown v. City of Englewood, 867 P.2d 96 (Colo. App. 1993).

Any contractual provision that constrains a client from exercising the right freely to discharge his or her attorney is unenforceable. A client has an unfettered right to discharge freely its attorney without incurring liability under ordinary breach of contract principles. Olsen and Brown v. City of Englewood, 867 P.2d 96 (Colo. App. 1993).

Disbarment appropriate where attorney accepted fees from a number of clients prior to terminating her legal practice, failed to inform her clients of such termination, failed to refund clients' retainer fees, failed to place clients' funds in separate accounts and gave clients' files to other lawyers without clients' consent. People v. Tucker, 904 P.2d 1321 (Colo. 1995).

Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 945 P.2d 1385 (Colo. 1997).

Conduct violating this rule, in conjunction with other disciplinary rules, sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 138 (Colo. 1997).

Suspension for one year and one day appropriate where attorney violated paragraph (d) by not returning or accounting for client funds held for emergencies after the clients fired the attorney and for negligently converting other client funds to the attorney's own use. People v. Johnson, 944 P.2d 524 (Colo. 1997).

Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. People v. Henderson, 967 P.2d 1038 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Williams, 936 P.2d 1289 (Colo. 1997); People v. Barr, 957 P.2d 1379 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Kuntz, 908 P.2d 1110 (Colo. 1996); People v. Johnson, 946 P.2d 469 (Colo. 1997); People v. Rishel, 956 P.2d 542 (Colo. 1998); In re Corbin, 973 P.2d 1273 (Colo. 1999).

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Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Damkar, 908 P.2d 1113 (Colo. 1996); People v. Jamrozek, 921 P.2d 725 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997); People v. Wallace, 936 P.2d 1282 (Colo. 1997); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Madigan, 938 P.2d 1162 (Colo. 1997); People v. Holmes, 951 P.2d 477 (Colo. 1998); People v. Holmes, 955 P.2d 1012 (Colo. 1998); People v. Valley, 960 P.2d 141 (Colo. 1998); People v. Skaalerud, 963 P.2d 341 (Colo. 1998).

Cases Decided Under Former DR 2-104.

Law reviews. For formal opinion of the Colorado Bar Association Ethics Committee on Lawyer Advertising, Solicitation and Publicity, see 19 Colo. Law. 25 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990).

RULE 1.17 — SALE OF LAW PRACTICE

REPEALED

A lawyer or law firm may sell or purchase a private law practice, including good will, if the following conditions are satisfied:

(a) The entire practice is sold to one or more lawyers or law firms.

(b) The fees charged clients shall not be increased by reason of the sale, and a purchaser shall not pass on the cost of good will to a client. The purchaser may, however, refuse to undertake the representation unless the client consents to pay fees regularly charged by the purchaser for rendering substantially similar services to other clients prior to the initiation of the purchase negotiations, except that any written fee agreements between seller and clients must be honored.

(c) Written notice of the pending sale shall be given at least sixty days prior to the date of transfer of responsibility for the client's file. Incident to the sale the seller shall provide to such client, via certified mail, return receipt requested, directed to the client's last known address, written notice, which shall include:

(1) Notice of the fact of the proposed sale;

(2) The identity of the purchaser;

(3) The terms of any proposed change in the fee agreement permitted under paragraph (c);

(4) Notice of the client's right to retain other counsel or to take possession of the file; and

(5) Notice that the client's consent to the transfer of the client's file to the purchaser will be presumed if the client does not retain other counsel or otherwise object within 60 days of receipt of the notice. If the purchaser has identified a conflict of interest that the client cannot waive and that prohibits the purchaser from undertaking the client's matter, the notice shall advise that the client should retain substitute counsel to assume the representation and arrange to have the substitute counsel contact the seller.

(d) The notice may describe the purchaser's qualifications, including the seller's opinion of the purchaser's suitability and competence to assume representation of the client, but only if the seller has made a reasonable effort to arrive at an informed opinion.

(e) If certified mail is not effective to give the client notice, the seller, or the purchaser in the event the selling lawyer is deceased or disabled, shall take such steps as may be reasonable under the circumstances to give the client actual notice of the proposed sale and the other information required in paragraph (c). If no response to the notice is received within 60 days of the mailing of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client.

(f) The sale of the goodwill of a law practice may be conditioned upon the seller ceasing to engage in the private practice of law for a reasonable period of time within the geographical area in which the practice had been conducted.

(g) If substitution of the purchasing lawyer or law firm in a pending matter is required by the tribunal, the purchasing lawyer or law firm shall provide for same promptly.

(h) Admission to or withdrawal from a partnership or professional company, retirement plans, and similar arrangements, or a sale limited to tangible assets of a law practice is not a purchase or sale for purposes of this rule.

(i) Notwithstanding Rule 1.5(d), the purchase price for the practice may be based upon a portion of the fees collected from the clients of the law practice, even if the division of such fees is not in proportion to the services performed or the responsibilities assumed by the seller and purchaser.

Source: Entire rule added June 12, 1997, effective July 1, 1997; (i) added and adopted and comment amended and adopted April 18, 2001, effective July 1, 2001.

Comment

This rule permits a selling lawyer, law firm, or the representatives of a deceased, disabled or disappeared lawyer to obtain compensation for the reasonable value of a private law practice in the same manner as withdrawing partners or shareholders of law firms. See Rules 5.4 and 5.6. This rule does not apply to the transfers of responsibility for legal representation from one lawyer or firm to another when such transfers are unrelated to the sale of a practice. For transfer of individual files in other circumstances, see Rules 1.15(b) and 1.16(d).

A lawyer participating in the sale of a law practice is subject to the ethical standards that apply when involving another lawyer in the representation of a client. These include, for example, the seller's obligation to act competently in identifying a purchaser qualified to assume the representation of the client and the purchaser's obligation to undertake the representation competently, Rule 1.1; the obligation to avoid disqualifying conflicts and to secure client consent after consultation for those conflicts that can be waived, Rule 1.7; and the obligation to protect information relating to the representation, Rules 1.6 and 1.9.

All elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice.

Selling Entire Practice

When a lawyer is closing a private practice the lawyer may negotiate with a purchaser for the reasonable value of the practice that has been developed by the seller. A seller may agree to transfer matters in one legal field to one purchaser, while transferring matters in another legal field to a separate purchaser. However, a lawyer may not sell individual files piecemeal.

The seller remains responsible for handling all clients' matters until the files are transferred under this rule.

Termination of Practice by the Seller

The requirement that all of the private practice be sold is satisfied if the seller in good faith makes the entire practice available for sale to one or more purchasers. The fact that a number of the seller's clients decide not to be represented by the purchaser but take their matters elsewhere, therefore, does not result in a violation. Neither does a return to private practice as a result of an unanticipated change in circumstances result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes practice upon being defeated in a retention election for the office.

The requirement that the seller cease to engage in the private practice does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity which provides legal services to the poor, or as in-house counsel to a business.

The rule permits a sale attendant upon retirement from the private practice of law within the state of Colorado. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state.

Conflicts

The practice may be sold to one or more lawyers or firms so long as the seller presents all clients with the opportunity to obtain competent representation.

Since the number of client matters and their nature directly bear on the valuation of good will and therefore directly relate to selling the law practice, conflicts that cannot be waived by the client and that prevent the prospective purchaser from undertaking the client's matter should be determined promptly. If the purchaser identifies a conflict that the client cannot waive, information should be provided to the client to assist in locating substitute counsel. If the

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conflict can be waived by the client, the purchaser should explain the implications and determine whether the client consents to the purchaser undertaking the representation. Initial screening with regard to conflicts, for the purpose of determining the good will of the practice, need be no more intrusive than conflict screening of a walk-in prospective client at the purchaser's firm.

Client Confidences, Consent and Notice

Negotiations between the seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client can be conducted in a manner that does not violate the confidentiality provisions of Rule 1.6 just as preliminary discussions are permissible concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the fact of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 60 days. If nothing is heard from the client within that time, consent to the transfer of the client's file to the identified purchaser is presumed.

A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. The purchaser may represent those clients who cannot be given actual notice of the proposed purchase or are not available to consent to the purchase or direct any other disposition of their files until otherwise notified by the client. The purchaser shall preserve the confidences of the client.

Fee Arrangements Between Client and Purchaser

Paragraph (c) is intended to prohibit a purchaser from charging the former clients of the seller a higher fee than the purchaser is charging the purchaser's existing clients. The sale may not be financed by increases in fees charged the clients of the practice that is purchased. Existing agreements between seller and the client as to fees and the scope of the work must be honored by the purchaser, unless the client consents after consultation.

Adjustments for differences in the fee schedules of the seller and purchaser should be made between the seller and purchaser in valuing good will, and not between the clients of the purchaser. If a written fee agreement exists between the seller and a client, the purchaser may not refuse to undertake the representation unless the client consents to pay the higher fees the purchaser usually charges. To prevent indirect financing of the sale, the higher fee the purchaser may charge must not exceed the fees charged by the purchaser for substantially similar service rendered prior to the initiation of the purchase negotiations.

Deceased, Disabled or Disappeared Lawyers

Even though a nonlawyer seller representing the estate of a deceased, disabled or disappeared lawyer is not subject to the Colorado Rules of Professional Conduct, a lawyer who participates in a sale of a law practice must conform to this rule. Therefore, the purchasing lawyer must see that its requirements are met.

REPEALED

COUNSELOR

RULE 2.1 — ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation. In a matter involving or expected to involve litigation, a lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought.

Comment

Scope of Advice

A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer

endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client under Rule 1.4 may require that the lawyer act as if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

A lawyer should exert the lawyer's best efforts to insure that decisions of the client are made only after the client has been informed of relevant considerations. Advice of lawyer to the client need not be confined to purely legal considerations. A lawyer should advise each client of the practical effect of each legal alternative. A lawyer should bring to bear upon this decision making process the fullness of the lawyer's experience as well as the lawyer's objective viewpoint. In assisting a client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. The lawyer may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client and not for the lawyer. In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

The last sentence of Rule 2.1 addresses the issue of alternative dispute resolution ("ADR"). Common forms of ADR include arbitration, mediation, and negotiations. Depending upon the circumstances, it may be appropriate for the lawyer to discuss with the client factors such as cost, speed, effects on existing relationships, confidentiality and privacy, scope of relief, statutes of limitation, and relevant procedural rules and statutes.

Committee Comment

This provision is consistent with the Code except that it raises the consideration of the providing of non-legal advice to a rule, while the Code treats the subject matter only as aspirational, in EC 7-8, which provision has been added as the penultimate paragraph of the Comment.

REPEALED

RULE 2.2 — INTERMEDIARY

(a) A lawyer may act as intermediary between clients if:

(1) the lawyer consults with and provides full disclosure in writing to each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent, in writing, to the common representation;

(2) the lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and

(3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

(b) While acting as intermediary, the lawyer shall consult with each client concerning the decisions to be made and the considerations relevant in making them, so that each client can make adequately informed decisions.

(c) A lawyer shall withdraw as intermediary if any of the clients so requests, or if any of the conditions stated in paragraph (a) is no longer satisfied. Upon withdrawal, the lawyer shall not continue to represent any of the clients in the matter that was the subject of the intermediation.

Comment

A lawyer acts as intermediary under this Rule when the lawyer represents two or more parties with potentially conflicting interests. A key factor in defining the relationship is whether the parties share responsibility for the lawyer's fee, but the common representation may be inferred from other circumstances. Because confusion can arise as to the lawyer's role where each party is not separately represented, it is important that the lawyer make clear the relationship.

The Rule does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties. In performing such a role the lawyer may be subject to applicable codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association.

A lawyer acts as intermediary in seeking 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, arranging a property distribution in settlement of an estate or mediating a dispute between clients. The lawyer seeks to resolve potentially conflicting interests by developing the parties' mutual interests. The alternative can be that each party may have to obtain separate representation, with the possibility in some situations of incurring additional cost, complication or even litigation. Given these and other relevant factors, all the clients may prefer that the lawyer act as intermediary.

In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails, the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

The appropriateness of intermediation can depend on its form. Forms of intermediation range from informal arbitration, where each client's case is presented by the respective client and the lawyer decides the outcome, to mediation, to common representation where the clients' interests are substantially though not entirely compatible. One form may be appropriate in circumstances where another would not. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating a relationship between the parties or terminating one.

Confidentiality and Privilege

A particularly important factor in determining the appropriateness of intermediation is the effect on client-lawyer confidentiality and the attorney-client privilege. In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

Since the lawyer is required to be impartial between commonly represented clients, intermediation is improper when that impartiality cannot be maintained. For example, a lawyer who has represented one of the clients for a long period and in a variety of matters might have difficulty being impartial between that client and one to whom the lawyer has only recently been introduced.

REPEALED

Consultation

In acting as intermediary between clients, the lawyer is required to consult with the clients on the implications of doing so, and proceed only upon obtaining written consent based on such a consultation. The consultation should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances.

Paragraph (b) is an application of the principle expressed in Rule 1.4. Where the lawyer is intermediary, the clients ordinarily must assume greater responsibility for decisions than when each client is independently represented.

Withdrawal

Common representation does not diminish the rights of each client in the client-lawyer relationship. Each has the right to loyal and diligent representation, the right to discharge the lawyer as stated in Rule 1.16, and the protection of Rule 1.9 concerning obligations to a former client.

Committee Comment

This rule has been adopted by most states without change. We have added that the attorney provide "full disclosure in writing" and receive the client's consent "in writing" as well. The providing of full disclosure in writing creates potential significant problems for the lawyer who must determine what constitutes full disclosure with the obvious peril that hindsight may demonstrate that determination to be incorrect. However, th[illegible]ves a lawyer in an attorney-client relationship with two (2) or more clients with differing interests, and an a[illegible]ney sho[illegible] only take on the role of intermediary if it is clear the attorney can do so effectively, and the clients are fully [illegible]vised of [illegible]e risks. This is consistent with the Code. See DR 5-105(B), (C) and EC 5-20.

Annotation

Law reviews. For article, "The Uniform Mediation Act: Its Potential Impa[illegible]or[illegible]olorado Mediation Practice—Part I", see 31 Colo. Law. 61 (May 2002). For article, "The [illegible]iform Media[illegible]on Act: Its Potential Impact on Colorado Mediation Practice—Part II", see 31 Colo. Law. 67 (June 2002).

Annotator's note. Rule 2.2 is similar to DR 5-105 [illegible]isted pr[illegible] the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases constr[illegible]ng t[illegible]ovision have been included in the annotations to Rule 1.7. For additional cases see the annotations [illegible]der form[illegible]R 5-105 in the 1990 replacement volume.

RULE 2.3 — E[illegible]ALU[illegible]TIO[illegible]FOR USE BY THIRD PERSONS

(a) A lawyer m[illegible]unde[illegible]ake a[illegible]evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the l[illegible]ye[illegible]reas[illegible]bl[illegible]believes that making the evaluation is compatible with other aspects of the [illegible]wye[illegible]relatio[illegible]ship with the client; and

(2) the c[illegible]t consents after consultation.

(b) Except [illegible]disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

Comment

Definition

An evaluation may be performed at the client's direction but for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

Lawyers for the government may be called upon to give a formal opinion on the legality of contemplated government agency action. In making such an evaluation, the government lawyer acts at the behest of the government as the client but for the purpose of establishing the limits of the agency's authorized activity. Such an opinion is to be distinguished from confidential legal advice given agency officials. The critical question is whether the opinion is to be made public.

REPEALED

A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duty to Third Person

When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations which are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances.

Financial Auditors' Requests for Information

When a question concerning a loan situation of a client arises at the insistence of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Committee Comment

There is no counterpart to Rule 2.3 in the Code. Rule 2.3 generally codifies current practice with respect to third-party (non-client) use of, and reliance upon, a lawyer's services. It is a helpful addition.

REPEALED

ADVOCATE

RULE 3.1 — MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

The professional responsibility of a lawyer derives from membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. Each member of our society is entitled to have his or her conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue or defense.

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Committee Comment

The Committee felt that this provision is an improvement on DR 7-102(A) which makes it improper for a lawyer to "file a suit . . . when he knows or when it is obvious that such action would serve merely to harass or maliciously injure." The Rule talks in terms of "frivolous" actions, rather than in terms that seem to speak to the motivation of the attorney. The Rule also seems preferable in that it sets out more clearly an objective standard for evaluating the conduct of the attorney. Some language from EC 7-1 was added at the start of the Comments to the Rule to emphasize that this Rule is not inconsistent with a lawyer's obligation to seek vigorously a client's lawful objectives through lawful means.

Annotation

Annotator's note. Since Rule 3.1 is similar to DR 1-102 and existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility, relevant cases construing that provision have been included in the annotations to this rule.

Public censure was appropriate where the attorney failed to cooperate in a disciplinary investigation, made frivolous motions, and made a statement recklessly disregarded as to its truth or falsity concerning the qualifications or integrity of a judge. People v. Thomas, 925 P.2d 1081 (Colo. 1996).

A violation of this rule must be proved by clear and convincing evidence in a disciplinary proceeding. Therefore, the fact that a district court had found by a preponderance of the evidence that an attorney had made a frivolous motion did not preclude the hearing board from determining that the attorney had not violated this rule. In re Egbune, 971 P.2d 1065 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Robinson, 850 P.2d 1145 (Colo. 1993).

Cases Decided Under Former DR 1-102.

Analysis

I. General Consideration.
II. Disciplinary Actions.
A. Public Censure.
B. Suspension.
C. Disbarment.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Incriminating Evidence: What to do With a Hot Potato", see 11 Colo. Law. 880 (1982). For article, "The Ethical Obligation to Disclose Attorney Negligence", see 13 Colo. Law. 232 (1984). For article, "Indemnification or Contribution Among Counsel in Legal Malpractice Actions", see 14 Colo. Law. 563 (1985). For article, "The Lawyer's Duty to Report Ethical Violations", see 18 Colo. Law. 1915 (1989). For article, "Update on Ethics and Malpractice Avoidance in Family Law — Part I", see 19 Colo. Law. 465 (1990). For article, "Update on Ethics and Malpractice Avoidance in Family Law — Part II", see 19 Colo. Law. 647 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Use of Subpoenas in Civil Proceedings, see 19 Colo. Law. 1556

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(1990). For article, "Punishing Ethical Violations: Aggravating and Mitigating Factors", see 20 Colo. Law. 243 (1991). For article, "Sex, Lawyers and Vilification", see 21 Colo. Law. 469 (1992).

Constitutionality upheld. This rule is not unconstitutionally vague on its face or as applied. People v. Morley, 725 P.2d 510 (Colo. 1986).

Standards used in determining a constitutional challenge to a statute are used in determining a constitutional challenge to this rule. People v. Morley, 725 P.2d 510 (Colo. 1986).

Presumption of constitutionality attaches to such enactment, and the burden is on the party challenging an enactment to demonstrate its unconstitutionality beyond a reasonable doubt. People v. Morley, 725 P.2d 510 (Colo. 1986).

Since a disciplinary rule is promulgated for the purpose of guiding lawyers in their professional conduct, and is not directed to the public at large, the central consideration in resolving a vagueness challenge should be whether the nature of the proscribed conduct encompassed by the rule is readily understandable to a licensed lawyer. People v. Morley, 725 P.2d 510 (Colo. 1986).

Attorney's psychological problems considered as aggravating and mitigating circumstances in arriving at a recommendation for discipline. The presence of psychological problems, however, does not automatically prevent the attorney from assisting in his own defense where evidence is shown to the contrary. People v. Belina, 765 P.2d 121 (Colo. 1988).

Attorney's conduct was so careless or reckless as to constitute sufficient showing of knowledge for violation of subsection (A)(4) of this disciplinary rule. People v. Rader, 822 P.2d 950 (Colo. 1992).

In order to find that attorney engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of this disciplinary rule, it must be shown that attorney had culpable mental state greater than simple negligence. People v. Rader, 822 P.2d 950 (Colo. 1992).

Failure to respond to inquiries from referral service, to pay consultation charges and forwarding fees to service, and to return case status reports to service constitutes a violation of sections (A)(1), (A)(4), and (A)(6). People v. Taylor, 799 P.2d 930 (Colo. 1990).

Attorney's conduct violated section (A)(4), (A)(5), (A)(6), and DR 2-106(A), where the attorney's multiple billing practice resulted in the charging or collection of a clearly excessive fee because the compensation claimed bore no rational relationship to the work performed and exceeded the compensation authorized by law. People v. Walker, 832 P.2d 935 (Colo. 1992).

Attorney's conduct violated sections (A)(4) and (A)(6) where the attorney failed to file applications for approval of fees in a bankruptcy case, did not seek court approval of compensation after the bankruptcy petition was filed, and left the state while the case was pending without providing his client means of contacting him. These actions, aggravated by a previous public censure, warranted a 60-day suspension. People v. Mills, 923 P.2d 116 (Colo. 1996).

Hearing board should not have found violations of sections (A)(4) and (A)(5) where board absolved attorney of the charges the complainant advised him to defend. By failing to find a violation for the failure to disclose certain payments until ordered to do so, the board should not have proceeded with finding that attorney committed misconduct in not maintaining the secrecy of the disputed income. In re Quiat, 979 P.2d 1029 (Colo. 1999).

Board erred in concluding that attorney's representation of individual client with whom he had a business relationship constituted conduct adversely reflecting on attorney's fitness to practice law. Neither complainant's expert nor hearing board paid sufficient attention to the specific and unusual facts of the general and limited partnerships' actual or potential liabilities. The record does not support the board's findings that an actual conflict existed among the general and limited partners, including the attorney, or that potential for conflict was likely. In re Quiat, 979 P.2d 1029 (Colo. 1999).

An attorney's appearance as counsel of record in numerous court proceedings following an order of suspension constituted a violation of DR 1-102(A)(4). People v. Kargol, 854 P.2d 1267 (Colo. 1993).

Attorney's effort to cause suppression of relevant evidence at driver license revocation proceeding in a manner not authorized by statute or other law constitutes conduct prejudicial to administration of justice and contrary to DR 1-102 (A)(5). People v. Attorney A., 861 P.2d 705 (Colo. 1993).

Attorney's effort to condition settlement of a malpractice claim upon client's agreement not to file a grievance against him constituted conduct prejudicial to the administration of justice in violation of paragraph (A)(5). People v. Moffitt, 801 P.2d 1197 (Colo. 1990).

Adopting a conscious scheme to take ownership of homes, collect rents from tenants, make virtually no efforts to sell the homes, and permit foreclosures to occur on which the department of housing and urban development (HUD) would absorb the losses constituted equity skimming in violation of § 18-5-802 and constitutes a violation of sections (A)(4) and (A)(6) for which suspension for one year is appropriate. People v. Phelps, 837 P.2d 755 (Colo. 1992).

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As officers of the court, lawyers are charged with obedience to the laws of this state and to the laws of the United States, and intentional violation by them of these laws subjects them to the severest discipline. People v. Wilson, 176 Colo. 389, 490 P.2d 954 (1971).

The crime with which an attorney is charged is one of serious consequences denoting moral turpitude and he is found guilty of such a crime, he cannot, in good conscience, be permitted to practice law in this state. People v. Wilson, 176 Colo. 389, 490 P.2d 954 (1971).

It is unprofessional conduct and dishonorable to deal other than candidly with the facts in drawing affidavits and other documents. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

By filing false documents, an attorney perpetrates a fraud upon the court. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Where an attorney receives as a fee from one of his clients stolen property, then even though he does ask the client whether the item was stolen and receives a negative answer from him, he should make further inquiry as to the actual source of the item, and failure to do so constitutes a breach of his obligations as a member of the bar. People v. Zelinger, 179 Colo. 379, 504 P.2d 668 (1972) (stolen car).

License to practice law assures public that the lawyer who holds the license will perform basic legal tasks honestly and without undue delay, in accordance with the highest standards of professional conduct. People v. Witt, 200 Colo. 522, 616 P.2d 139 (1980); People v. Dixon, 621 P.2d 322 (Colo. 1981); People v. Ken[illegible]6 P.2d 337 (Colo. 1982).

An attorney must adhere with dedication to the highest standards of h[illegible]est[illegible]d integ[illegible]ty in order that members of the public are assured that they may deal with attorneys with the kn[illegible]edge that [illegible]ir m[illegible]ters will be handled with absolute propriety. People v. Golden, 654 P.2d 853 (Colo. 1982).

Client has right to expect competency and integrity from lawyer. A [illegible]t has e[illegible]ry right to expect that conduct taken on its behalf will be carried out with that competence a[illegible]d integrity id[illegible]lly [illegible]ared by every lawyer who is licensed to practice law in the jurisdiction. Williams v. Burns, 463 F. S[illegible]n. 1278 (D. C[illegible]o. 1979); People v. Pooley, 774 P.2d 239 (Colo. 1989).

Public expects appropriate discipline for miscon[illegible] The pub[illegible]s a right to expect that one who engages in professional misconduct will be disciplined appro[illegible]tely[illegible]le v. Witt 200 Colo. 522, 616 P.2d 139 (1980); People v. Dixon, 621 P.2d 322 (Colo. 1981)

Most severe punishment is required [illegible]en a l[illegible]yer [illegible] regards his professional obligations and converts his clients' funds to his own use. People v. Kluver, 1[illegible]. 511, 61[illegible] P.2d 971 (1980); People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Bealmear, 655 P[illegible] (Co[illegible] 198[illegible]

Conversion of client funds i[illegible]onduc[illegible]warran[illegible]g disbarment because it destroys the trust essential to the attorney-client relationship, sever[illegible]ly da[illegible]s the public's perception of attorneys, and erodes public confidence in our legal system. People v. Rados[illegible]ch, 783 P[illegible] 841 (Colo. 1989).

Where attorney, a[illegible]uste[illegible]withdre[illegible]$13,100 from the trust without the client-settlor's knowledge and refused to repay the money w[illegible] given t[illegible] opportunity by the client-settlor, attorney's conduct was sufficient to warrant disbarmen[illegible]eop[illegible]v. W[illegible]c[illegible], 819 P.2d 493 (Colo. 1991).

Conve[illegible]on of [illegible]ent fun[illegible]s cannot be tolerated regardless of the apparent fact that the attorney did not use such funds for per[illegible]gain[illegible]to pay the costs and expenses incident to handling a large practice that included many non-paying clients. P[illegible]le v. Franco, 698 P.2d 230 (Colo. 1985).

Fitness to pra[illegible]ice law adversely reflected upon by attorney's business judgment and violations of the code of professional responsibility although his legal competence was not questioned. People v. Franco, 698 P.2d 230 (Colo. 1985).

Failure to represent a client also adversely reflects upon an attorney's fitness to practice law. People v. Coca, 732 P.2d 640 (Colo. 1987).

Attorney should never obstruct justice or judicial process. An attorney has a high duty as an officer of the court to never participate in any scheme to obstruct the administration of justice or the judicial process. People v. Kenelly, 648 P.2d 1065 (Colo. 1982); People v. Haase, 781 P.2d 80 (Colo. 1989).

Submission of false transcript to obtain admission to law school and to qualify for admission as a member of the bar is a violation of this rule and requires that respondent's admission to the bar be voided. People v. Culpepper, 645 P.2d 5 (Colo. 1982).

Failure to disclose a misdemeanor conviction in another state when applying for the bar and subsequent disbarment from the other state constitutes conduct involving fraud, deceit, and misrepresentation prejudicial to the administration of justice. People v. Mattox, 639 P.2d 397 (Colo. 1982).

Lawyer owes obligation to client to act with diligence in handling his client's legal work and in his representation of his client in court. People v. Bugg, 200 Colo. 512, 616 P.2d 133 (1980).

REPEALED

Failure to take any action on behalf of his client after he was retained and entrusted with work and in making representations to his client which were false, an attorney violates the code of professional responsibility and C.R.C.P. 241.6. People v. Southern, 638 P.2d 787 (Colo. 1982).

Fact that attorney informed client that workers' compensation hearing was cancelled due to attorney's illness when attorney was actually abandoning practice constituted conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of this rule. People v. Felker, 770 P.2d 402 (Colo. 1989).

Fabricating documents to justify conduct breaches attorney's ethical obligations to his client and to the bar. People v. Yost, 729 P.2d 348 (Colo. 1986).

Falsification of an adoption decree with the original intent to use it for a fraudulent purpose is forgery in violation of § 18-5-103 and is a violation of DR 1-102 and DR 7-102 whether of not the attorney who falsified the decree actually used or attempted to use the decree. People v. Marmon, 903 P.2d 651 (Colo. 1995).

Absence of contempt finding by trial court concerning attorney's willful failure to pay child support is a non-dispositive factor to be considered when imposing discipline. People v. Kolenc, 887 P.2d 1024 (Colo. 1994).

Trial court's finding in child support hearing that attorney willfully violated child support order should be accorded collateral estoppel effect before the hearing board as long as court makes finding by clear and convincing evidence or beyond a reasonable doubt. People v. Kolenc, 887 P.2d 1024 (Colo. 1994).

Attorney violated this rule and C.R.P.C. 1.1 when he prepared and filed child s[illegible]orksheets that failed to properly reflect the new stipulation concerning custody. People v. Davies, 926 P[illegible] 572 (C[illegible] 1996).

Lawyer may not secretly record any conversation he has with another l[illegible]yer [illegible]person. [illegible]ople v. Selby, 198 Colo. 386, 606 P.2d 45 (1979).

Telephone conversation, which attorney initiated and recorded witho[illegible]the p[illegible]mission [illegible]other party to conversation established unethical conduct on attorney's part. People v. Wallin, [illegible].2d 33[illegible] (Colo. 1981).

Inherent in the undisclosed use of a recording device is an el[illegible]ment of dec[illegible]io[illegible]rtifice, and trickery which does not comport with the high standards of candor and fairness by w[illegible]h all attorney[illegible]are bound. People v. Selby, 198 Colo. 386, 606 P.2d 45 (1979); People v. Smith, 778 P.2d 685 (Colo. 19[illegible]

Suspension from practice in tax court is a determ[illegible]of mis[illegible]uct in another jurisdiction constituting grounds for discipline under these rules. People v. Hartman, 7[illegible]P.2[illegible] (Colo. 1987).

Unfounded assertion of attorney's lien v[illegible]olates pr[illegible]ional code. The assertion of an attorney's lien in circumstances where the attorney has no statuto[illegible]or leg[illegible]found[illegible]ion for a lien and, in fact, has only an uncertain claim to the fee on which the purported lien is founded v[illegible]s the code of professional responsibility. People v. Razatos, 636 P.2d 666 (Colo. 1981), appeal dismissed [illegible]S. [illegible]10[illegible]. Ct. 1415, 71 L.Ed.2d 639 (1982).

Willful and knowing failu[illegible]o ma[illegible]a fed[illegible]income tax return is an offense involving moral turpitude. People v. Emeson, 638 P.2d 293 (Colo. [illegible]8[illegible]

Both the charges a[illegible]the well p[illegible]aded complaint are deemed admitted by the entry of a default judgment. People v. Richards, 748 P.2[illegible]41 (C[illegible]o. 198[illegible]

Continued represe[illegible]ion of c[illegible]ents with conflicting interests violates this rule and warrants discipline. People v. Awenius[illegible]3 P[illegible]d 74[illegible]Col[illegible]1982).

Attorn[illegible]s repr[illegible]entation [illegible]f two estates where the beneficiaries of the estates had conflicting interests and the attorney fails to ou[illegible]wai[illegible]om the beneficiaries is a violation of this rule. People v. Gebauer, 821 P.2d 782 (Colo. 1991).

Attorney vio[illegible]ed this rule by lying to grievance committee counsel regarding the return of client's files. People v. Felker, 770 P.2d 402 (Colo. 1989).

Conduct found to violate disciplinary rules. People v. Bugg, 635 P.2d 881 (Colo. 1981); People v. Sachs, 732 P.2d 633 (Colo. 1987); People v. Ross, 810 P.2d 659 (Colo. 1991).

Conduct held to violate this rule. People v. Goss, 646 P.2d 334 (Colo. 1982).

Applied in People v. Spiegel, 193 Colo. 161, 567 P.2d 353 (1977); People v. Schermerhorn, 193 Colo. 364, 567 P.2d 799 (1977); People v. Pittam, 194 Colo. 104, 572 P.2d 135 (1977); People v. Good, 195 Colo. 177, 576 P.2d 1020 (1978); People v. McMichael, 196 Colo. 128, 586 P.2d 1 (1978); People v. Susman, 196 Colo. 458, 587 P.2d 782 (1978); People v. Harthun, 197 Colo. 1, 593 P.2d 324 (1979); People v. Cameron, 197 Colo. 330, 595 P.2d 677 (1979); People ex rel. Aisenberg v. Young, 198 Colo. 26, 599 P.2d 257 (1979); People v. Pacheco, 198 Colo. 455, 608 P.2d 333 (1979); People ex rel. Gallagher v. Hertz, 198 Colo. 522, 608 P.2d 335 (1979); People ex rel. Silverman v. Anderson, 200 Colo. 76, 612 P.2d 94 (1980); People v. Hilgers, 200 Colo. 211, 612 P.2d 1134 (1980); People v. Lanza, 200 Colo. 241, 613 P.2d 337 (1980); People v. Meldahl, 200 Colo. 332, 615 P.2d 29 (1980); People v. Hurst, 200 Colo. 537, 618 P.2d 1113 (1980); People v. Kendrick, 619 P.2d 65 (Colo. 1980); People v. Gottsegen, 623 P.2d 878 (Colo. 1981); People v. Luxford, 626 P.2d 675 (Colo. 1981); People v. Rotenberg, 635 P.2d 220 (Colo. 1981); People v. Wright, 638 P.2d 251 (Colo. 1981); People v. Kane, 638 P.2d 253 (Colo. 1981); People v. Archuleta, 638 P.2d 255 (Colo. 1981); Law Offices of Bernard D. Morley, P.C. v. MacFarlane, 647 P.2d 1215 (Colo. 1982); People v. Whitcomb, 676 P.2d 11

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(Colo. 1983); People v. Tucker, 676 P.2d 680 (Colo. 1983); People v. Bollinger, 681 P.2d 950 (Colo. 1984); People v. Underhill, 683 P.2d 349 (Colo. 1984); People v. Simon, 698 P.2d 228 (Colo. 1985); People v. McDowell, 718 P.2d 541 (Colo. 1986); People v. Smith, 778 P.2d 685 (Colo. 1989).

II. DISCIPLINARY ACTIONS.

A. Public Censure.

Violation of election laws sufficient to justify public censure. People v. Casias, 646 P.2d 391 (Colo. 1982).

Bigamy, an offense of moral turpitude, warrants public censure. People v. Tucker, 755 P.2d 452 (Colo. 1988).

An attorney's inaction in response to the grievance committee's request concerning informal complaint filed, considered with other circumstances, justified public censure. People v. Moore, 681 P.2d 480 (Colo. 1984).

Where an attorney repeatedly issued checks from his law office account knowing that they would not be paid by the bank, such conduct, considered with other circumstances, justified public censure. People v. Moore, 681 P.2d 480 (Colo. 1984).

Public censure warranted where attorney kept the first lump sum check obtained in settlement as a lump sum payment of his contingency fee and reimbursement of costs even though he knew settlement might later be reduced by the social security disability award and the client's union award. People v. Macek, 910 P.2d 692 (Colo. 1996).

Adjudicating, as a judge, the criminal case of a person who is his client in a divorce proceeding warrants public censure because it is the duty of an attorney-judge to promptly disclose conflicts of interest and to disqualify himself without suggestion from anyone. People v. Perrott, 769 P.2d 1075 (Colo. 1989).

Conduct was prejudicial to the administration of justice and warranted public censure where, during the course of criminal proceedings, attorney made an offer to the deputy district attorney to dismiss a related civil action if the criminal charges against his client were dismissed. People v. Calvola, 893 P.2d 244 (Colo. 1995).

Use of racial epithet by prosecutor in discussing case with defense counsel for two Hispanic defendants constituted a violation of this section warranting public censure. People v. Sharpe, 781 P.2d 659 (Colo. 1989).

Neglect of a legal matter ordinarily warranting a letter of admonition by way of reprimand requires imposition of public censure when such conduct is repeated after three letters of admonition. People v. Goodwin, 782 P.2d 1 (Colo. 1989).

Public censure was appropriate where already suspended attorney was the subject of prior discipline for misdemeanor convictions of assault and driving while impaired and where an additional period of suspension would have little, if any, practical effect and would not have afforded a meaningful measure of protection for the public. People v. Flores, 871 P.2d 1181 (Colo. 1994).

Evidence sufficient to justify public censure. People v. Hertz, 638 P.2d 794 (Colo. 1982).

Public censure was appropriate where lawyer's actions involving criminal activity did not seriously affect the lawyer's fitness to practice law and mitigating factors were present in the absence of any aggravating factors. People v. Rahsel, 807 P.2d 586 (Colo. 1991).

Public censure was appropriate where multiple representations and neglect caused no actual harm and attorney was cooperative during disciplinary proceedings, had no prior discipline, and was relatively inexperienced at the time the misconduct occurred. People v. Ramseur, 897 P.2d 1391 (Colo. 1995).

Threatening to invoke disciplinary proceedings against judge in anticipation of adverse ruling warrants public censure. People v. Tatum, 814 P.2d 388 (Colo. 1991).

Failure to timely file a paternity action constitutes neglect of a legal matter that warrants public censure. People v. Good, 790 P.2d 331 (Colo. 1990).

Public censure was warranted where attorney made false statements in the course of discovery in cases where the attorney was the plaintiff. Evidence showed that the attorney was suffering from a psychiatric condition at the time, and the assistant disciplinary counsel could not prove that the attorney's false statements were knowing, but only that they were negligent. People v. Dillings, 880 P.2d 1220 (Colo. 1994).

Public censure was appropriate where attorney failed to provide a critical document to opposing counsel after agreeing to do so and failed to reveal relevant information at the time of trial. People v. Wilder, 860 P.2d 523 (Colo. 1993).

Failure to inform arbitrators of errors in expert witness' testimony constituted violation of DR 7-102 warranting public censure because attorney did not disclose that expert had informed attorney of mistakes in writing, and attorney made closing arguments based on uncorrected expert conclusions. People v. Bertagnolli, 861 P.2d 717 (Colo. 1993) (decided under DR 7-102).

REPEALED

Public censure was appropriate where attorney's failure to appear at three hearings violated subsection (A)(5) and, in aggravation, there was a pattern of misconduct. People v. Cabral, 888 P.2d 245 (Colo. 1995).

Public censure warranted where attorney engaged in sexual relations with client attorney represented in dissolution of marriage action even though client suffered no actual harm. People v. Zeilinger, 814 P.2d 808 (Colo. 1991).

Discharging firearm in direction of spouse while intoxicated, although not a crime involving dishonesty, goes beyond mere negligence and public censure is appropriate. Mitigating factors, although present, were insufficient to warrant making censure private. People v. Senn, 824 P.2d 822 (Colo. 1992).

Public censure is appropriate for attorney's negligence in closing estates in an untimely manner and for representing two estates where the beneficiaries of the estates have conflicting interests and the attorney fails to obtain waivers from the beneficiaries. People v. Gebauer, 821 P.2d 782 (Colo. 1991).

Attorney's unlawful assertion of charging lien against client's share of estate proceeds following client's demand for return of property is subject to public censure. People v. Mills, 861 P.2d 708 (Colo. 1993) (decided under DR 1-102 (A)(5)).

Public censure is appropriate where lawyer's predominant mental state was one of negligence and there was an absence of actual harm to the client. People v. Hickox, 889 P.2d 47 (Colo. 1995).

Public censure is appropriate if attorney's course of behavior exhibits a serious error in judgment going beyond simple negligence. People v. Blundell, 901 P.2d 1268 (Colo. 1995).

Public censure was appropriate where the attorney failed to cooperate in a disciplinary investigation, made frivolous motions, and made a statement with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. People v. Thomas, 925 P.2d 1081 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Ashley, 796 P.2d 962 (Colo. 1990); People v. Mulvihill, 814 P.2d 805 (Colo. 1991); People v. Smith, 819 P.2d 497 (Colo. 1991); People v. Richardson, 820 P.2d 1120 (Colo. 1991); People v. Hilton, 840 P.2d 351 (Colo. 1992); People v. Vsetecka, 893 P.2d 1309 (Colo. 1995); People v. Wollrab, 909 P.2d 1093 (Colo. 1996); People v. Fitzgibbons, 909 P.2d 1098 (Colo. 1996); People v. Cohan, 913 P.2d 525 (Colo. 1996).

Conduct violating this rule sufficient to justify public censure. People v. Bollinger, 648 P.2d 620 (Colo. 1982); People v. Driscoll, 716 P.2d 1086 (Colo. 1986); People v. Mason, 716 P.2d 1094 (Colo. 1986); People v. Carpenter, 731 P.2d 726 (Colo. 1987); People v. Schlieberger, 732 P.2d 728 (Colo. 1987); People v. Horn, 738 P.2d 1186 (Colo. 1987); People v. Stauffer, 745 P.2d 240 (Colo. 1987); People v. Barr, 748 P.2d 1302 (Colo. 1988); People v. Dowhan, 759 P.2d 4 (Colo. 1988); People v. Fierro, 788 P.2d 830 (Colo. 1990); People v. Stayton, 798 P.2d 903 (Colo. 1990); People v. Brinn, 801 P.2d 1195 (Colo. 1990); People v. Moffitt, 801 P.2d 1197 (Colo. 1990); People v. Barr, 805 P.2d 440 (Colo. 1991); People v. Shuteson, 814 P.2d 807 (Colo. 1991); People v. Reichman, 819 P.2d 1035 (Colo. 1991); People v. Gebauer, 821 P.2d 782 (Colo. 1991); People v. Dillings, 880 P.2d 1220 (Colo. 1994); People v. Wollrab, 909 P.2d 1093, (Colo. 1996).

B. Suspension.

Preparing false or fraudulent letters of correspondence to a client and testifying falsely to grievance committee of the supreme court concerning these letters warrants suspension from practice of law for period of at least three years, but not disbarment. People v. Rubin, 179 Colo. 408, 500 P.2d 1181 (1972).

Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding, or when a lawyer knows that he is violating a court order or rule and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding. People v. Walker, 832 P.2d 935 (Colo. 1992).

One-year suspension warranted where attorney failed to promptly respond to discovery requests, failed to inform client of case progress after custody hearing, failed to withdraw upon client's request, failed to advise client of child support modification hearing, misrepresented to the court that he was unable to contact client, and had been previously suspended for similar misconduct. People v. Regan, 871 P.2d 1184 (Colo. 1994).

Fraud, jury tampering, and excessive fees are basis for indefinite suspension. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Attorney suspended for three years for repeated neglect and delay in handling legal matters, failure to comply with the directions contained in a letter of admonition, failure to answer letter of complaint from the grievance committee, and conviction of a misdemeanor. People v. Hebenstreit, 764 P.2d 51 (Colo. 1988).

By commingling trust funds with his own, failing to maintain complete records of his client's funds, and failure to render appropriate accounts to his client, the attorney's conduct adversely reflected on his fitness to practice law, justifying suspension from practice. People v. Wright, 698 P.2d 1317 (Colo. 1985).

REPEALED

For commingling of funds in trust account warranting suspension from practice, see People v. Calvert, 721 P.2d 1189 (Colo. 1986).

Recommendation of prosecution without legitimate interest warrants suspension. Where an attorney took advantage of his position of respect and status in a district attorney's office by repeatedly urging criminal prosecution in matters where his only legitimate professional interest could be in related civil matters, such actions are prejudicial to the administration of justice in violation of paragraph (A) (5). People ex rel. Gallagher v. Hertz, 198 Colo. 522, 608 P.2d 335 (1979).

Actions taken by attorney contrary to court order violate this rule and justify suspension. People v. Awenius, 653 P.2d 740 (Colo. 1982).

Suspension is appropriate discipline given number and severity of instances of misconduct, including pattern of neglect over clients' affairs over lengthy period and in variety of circumstances and misrepresentation in dissolution case to client who wished to remarry concerning the filing of a dissolution petition. Considering proper mitigating factors such as attorney's lack of experience, absence of prior discipline, attorney's willingness to undergo psychiatric evaluation and accept transfer to disability inactive status, suspension without credit for time on disability inactive status is appropriate. People v. Griffin, 764 P.2d 1166 (Colo. 1988).

Suspension is appropriate for a lawyer addicted to alcohol and cocaine and who neglected a client's case resulting in the entry of default judgment, but who entered into an uncompelled restitution a[illegible]t and successfully completed substance abuse treatment. People v. Richtsmeier, 802 P.2d 471 (Colo. 1990).

Attorney misconduct of neglecting a guardianship matter and engaging in c[illegible]nduct prejudici[illegible] to the administration of justice warrant 90-day suspension when aggravated by history [illegible]ive prior [illegible]tan[illegible] of disciplinary offenses for neglect, pattern of misconduct, refusal to acknowledge wrongful n[illegible]ure o[illegible]nduct, [illegible]nerability of victim, and substantial experience in the practice of law. People v. Dolan, 813 P.2d 733 ([illegible]. 1991).

Conduct manifesting gross carelessness in representation of clients is [illegible]fici[illegible]t to justify suspension. People v. Roehl, 655 P.2d 1381 (Colo. 1983); People v. Fahrney, 782 [illegible]d 743 (Colo. [illegible]89).

Attorney's neglect of dissolution case and misrepresentation to [illegible]ent co[illegible]erning the filing of dissolution petition was especially egregious in view of client's desire to [illegible]y. Such [illegible]uct in addition to number and severity of other instances of misconduct, taking into account mitigati[illegible] fac[illegible]s sufficient for suspension. People v. Griffin, 764 P.2d 1166 (Colo. 1988).

Felony theft held sufficient grounds [illegible] susp[illegible]sion. [illegible]eople v. Petrie, 642 P.2d 519 (Colo. 1982).

Photocopying another attorney's secu[illegible]i[illegible]opinion l[illegible]tter and presenting it as one's own, refusing to comply with discovery rules and court o[illegible]liti[illegible]on t[illegible]hich one is a party, and continuously failing to answer grievance complaint without good ca[illegible] warra[illegible]s susp[illegible]on. People v. Spangler, 676 P.2d 674 (Colo. 1983).

An attorney's conduct [illegible] bo[illegible]g money from his former clients and in failing to record deeds of trust on their behalf to be used as secu[illegible]y constitu[illegible] professional misconduct and justifies his suspension. People v. Brackett, 667 P.2d 1357 (Colo. 1983).

Where attor[illegible]ey en[illegible]d in a [illegible]ttern of neglect, obvious conflict, and caused injury to his clients, suspension is warr[illegible]ed. [illegible]ople [illegible]B[illegible]a, 765 P.2d 121 (Colo. 1988).

Evide[illegible] suffi[illegible]ent to ju[illegible]ify suspension from the practice of law. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979); P[illegible] v. S[illegible]ian, 716 P.2d 1079 (Colo. 1986).

Both the c[illegible]ges and the well pleaded complaint are deemed admitted by the entry of a default judgment. People v. Richards, 748 [illegible]2d 341 (Colo. 1987); People v. McMahill, 782 P.2d 336 (Colo. 1988).

Suspended attorney must demonstrate rehabilitation for readmittance to bar. Actions of a suspended attorney who took part in a complex real estate transaction and engaged in the practice of law by representing, counseling, advising, and assisting a former client warranted suspension until he demonstrates by clear and convincing evidence that (1) he has been rehabilitated; (2) he has complied with and will continue to comply with all applicable disciplinary orders and rules; and (3) he is competent and fit to practice law. People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980).

Where a practicing attorney breached fiduciary duties to his client in misrepresenting his dealings and in handling of funds given to him in trust, his conduct warranted disbarment, and before he may seek readmittance to the state bar association, he must first demonstrate to the grievance committee that rehabilitation has occurred and that he is entitled to a new start. People ex rel. Buckley v. Beck, 199 Colo. 482, 610 P.2d 1069 (Colo. 1980).

Attorney's payment to inmates for referrals to attorney for the provision of legal services justifies 60-day suspension. People v. Shipp, 793 P.2d 574 (Colo. 1990); People v. Whitaker, 814 P.2d 812 (Colo. 1991).

Three-month suspension appropriate where attorney intentionally misrepresented that he possessed automobile insurance coverage to automobile accident victim, police officer, and grievance committee investigator, and where attorney was previously publicly censured for engaging in lengthy delay tactics. People v. Dowhan, 814 P.2d 822 (Colo. 1991).

REPEALED

Reckless disregard for the propriety of submitting multiple and duplicative billing in court-appointed cases constitutes knowing conduct warranting a 90-day suspension. People v. Walker, 832 P.2d 935 (Colo. 1992).

Repeated drawings of checks upon insufficient funds and misuse of trust account moneys constituted grounds for suspension. People v. Lamberson, 802 P.2d 1098 (Colo. 1990).

Attorney's failure to file personal state and federal income tax returns and to pay withholding taxes for federal income taxes and FICA, and use of cocaine and marijuana constitute conduct warranting suspension for one year and one day. People v. Holt, 832 P.2d 948 (Colo. 1992).

Suspension for one year and one day warranted where attorney misrepresented to client that a trial had been scheduled, that continuances and new trial settings had been made, that a settlement had been reached, and where the attorney's previous, similar discipline, was a significant aggravating factor. People v. Smith, 888 P.2d 248 (Colo. 1995).

Suspension for one year and one day warranted for attorney who "represented" client for a period of 19 months without that person's knowledge or consent, even asserting a counterclaim on his behalf without talking to him; who did not communicate with him in any manner for an extended period of time and then did not withdraw within a reasonable time after being unable to contact him; and who failed to answer discovery requests, resulting in the entries of default and then a default judgment against him. People v. Silvola, 915 P.2d 1281 (Colo. 1996).

Suspension for one year and one day is warranted for commingling and misu[illegible]nt funds. The hearing board found that the respondent acted recklessly, rather than knowingly, in misa[illegible]opriating [illegible]ient funds. People v. Zimmermann, 922 P.2d 325 (Colo. 1996).

Suspension of one year and one day necessary where lawyer engage[illegible]n sexual [illegible]ati[illegible]ship with client, had been previously disciplined, and submitted false evidence to the hearing b[illegible]d co[illegible]rning [illegible] sexual relationship. People v. Good, 893 P.2d 101 (Colo. 1995).

Suspension of one year and one day warranted in light of the seriousne[illegible] of [illegible]torney's misconduct in conjunction with his noncooperation in the disciplinary proceedings a[illegible] his substantial experience in the practice of law. People v. Clark, 900 P.2d 129 (Colo. 1995).

**Suspension for one year and one day warranted [illegible] attorney[illegible]ed for time that was not actually devoted to work contemplated by contract and for time not ac[illegible]ally [illegible]rmed. People v. Shields, 905 P.2d 608 (Colo. 1995).

Suspension for one year and one da[illegible]as wa[illegible]ante[illegible]for attorney who violated this rule and C.R.P.C. 1.1 by preparing and filing child support worksh[illegible]t[illegible] failed t[illegible] properly reflect the new stipulation concerning custody and where aggravating factors i[illegible]d a p[illegible]ious [illegible]ciplinary history and failure to appear in the grievance proceedings. People v. Davies, 926 P[illegible]572 ([illegible]lo. 19[illegible]

Mental disability that [illegible]ause[illegible]i[illegible]onduct is a mitigating factor which, when considered in conjunction with other factors, justifies su[illegible]nsion of [illegible]orney for conversion of funds that would otherwise warrant disbarment. People v. Lujan, 890 P.2d [illegible] (Col[illegible]1995).

District attorney's [illegible]re to p[illegible]secute personal friend for possession of marijuana violates paragraphs (A)(1), (A)(5), and [illegible](c) of thi[illegible]le[illegible]d warrants three-year suspension. People v. Larsen, 808 P.2d 1265 (Colo. 1991).

Suspens[illegible]law[illegible]or three years, which is the longest possible period for suspension, is appropriate where there was exte[illegible]ve pattern of client neglect and intentional deception in client matters over a period of years. Anything less would be[illegible]o lenient. People v. Hellewell, 811 P.2d 386 (Colo. 1991).

Suspension justified where respondent violated federal and state laws by failing to file personal income tax returns, failing to pay withholding taxes, using cocaine, and using marihuana. People v. Holt, 832 P.2d 948 (Colo. 1992).

The fact that no specific client of the respondent was actually harmed by the respondent's misconduct misses the point in proceeding for suspension of an attorney. While the primary purpose of attorney discipline is the protection of the public and not to mete punishment to the offending lawyer, lawyers are, nonetheless, charged with obedience to the law, and intentional violation of those laws subjects an attorney to the severest discipline. People v. Holt, 832 P.2d 948 (Colo. 1992).

Felony convictions warrant suspension for attorney convicted of violating California Tax Code where numerous mitigating factors were found to exist. People v. Mandell, 813 P.2d 732 (Colo. 1991).

Three-year suspension appropriate where attorney was convicted for felony distribution of cocaine, but had no record of prior discipline, there was no selfish or dishonest motive associated with crime, and the attorney successfully participated in interim rehabilitation programs. People v. Rhodes, 829 P.2d 850 (Colo. 1992).

Failure to communicate with clients, court, and opposing counsel, misrepresentation of the status of the proceedings to client, and failure to investigate clients' case justifies three-year suspension. People v. Wilson, 814 P.2d 791 (Colo. 1991).

REPEALED

Abusive, insulting, and unprofessional conduct towards deponent and opposing counsel during deposition and repeated instances of using health as an excuse for continuances when respondent was ill-prepared for trial warrants six-month suspension. People v. Genchi, 824 P.2d 815 (Colo. 1992).

Adopting a conscious scheme to take ownership of homes, collect rents from tenants, make virtually no efforts to sell the homes, and permit foreclosures to occur on which HUD would absorb the losses constituted equity skimming in violation of § 18-5-802 and constitutes a violation of sections (A)(4) and (A)(6) for which suspension for one year is appropriate. People v. Phelps, 837 P.2d 755 (Colo. 1992).

Attorney who employed devices to defraud, made untrue statements of material fact, and engaged in acts which operated as fraud or deceit upon persons in violation of the Securities and Exchange Act violated DR 1-102 (A)(4) and DR 1-102 (A)(6) for which suspension of two years is appropriate, considering mitigating factors. People v. Hanks, 967 P.2d 141 (Colo. 1998).

Attorney who conveyed real property to defraud creditors suspended from the practice of law. In mitigation, the attorney had fully cooperated with the board. People v. Koller, 873 P.2d 761 (Colo. 1994).

Respondent's multiple acts of violence are indicative of a dangerous volatility which might well prejudice his ability to effectively represent his client's interests. Although respondent had taken major steps towards rehabilitation the acts committed were of such gravity as to require a public censure and a three-month suspension. People v. Wallace, 837 P.2d 1223 (Colo. 1992).

Third-degree sexual assault of wife adequate basis for one-year and one day suspension. People v. Brailsford, 933 P.2d 592 (Colo. 1997).

Suspension for 180 days is warranted based upon conviction of third degree assault charges. People v. Knight, 883 P.2d 1055 (Colo. 1994).

Willful nonpayment of child support and failure to pay arrearages as ordered by court to do so are violations of subsections (A)(5) and (A)(6) and constitute adequate basis for six-month suspension. People v. Tucker, 837 P.2d 1225 (Colo. 1992).

Where deputy district attorney was convicted of possession of cocaine under federal law, one-year suspension is appropriate due to seriousness of offense and fact attorney has higher responsibility to the public by virtue of engaging in law enforcement. People v. Robinson, 8[illegible] P.2d [illegible] (Colo. 1992).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Murphy, 778 P.2d 658 (Colo. 1989); People v. Hodge, 782 P.2d 25 (Colo. 1989); People v. Masson, 782 P.2d 335 (Colo. 1989); People v. Cl[illegible], 783 P.2d 838 (Colo. 1989); People v. Moya, 793 P.2d 1154 (Colo. 1990); People v. Creasey, 793 P.2d [illegible] (Colo. 1990); People v. Schmad, 793 P.2d 1162 (Colo. 1990); People v. Wilbur, 796 P.2d 976 (Colo. 1990); People v. [illegible]ptie, [illegible].2d 978 (Colo. 1990); People v. Schubert, 799 P.2d 388 (Colo. 1990); People v. Taylor, 79[illegible] P.2d [illegible] (Colo. 1990); People v. Barber, 799 P.2d 936 (Colo. 1990); People v. Garrett, 802 P.2d 1082 (Colo. 1990); People v. Sullivan, 802 P.2d 1091 (Colo. 1990); People v. Rhodes, 803 P.2d 514 (Colo. 1991); People v. Flo[illegible] 804 [illegible]d 192 [illegible]olo. 1991); People v. Crimaldi, 804 P.2d 863 (Colo. 1991); People v. Dunsmoor, 807 P.2d 561 (Co[illegible]991); People v. Bennett, 810 P.2d 661 (Colo. 1991); People v. Hall, 810 P.2d 1069 (Colo. 1991); People v. [illegible]eberi[illegible]10 [illegible]2d 1072 (Colo. 1991); People v. Gaimara, 810 P.2d 1076 (Colo. 1991); People v. Dash, 811 P.2d [illegible]6 (Co[illegible]1991); People v. Honaker, 814 P.2d 785 (Colo. 1991); People v. Anderson, 817 P.2d 1035 (Colo. 1991); People v. [illegible]Red[illegible]819 P.2d 495 (Colo. 1991); People v. Rader, 822 P.2d 950 (Colo. 1992); People v. Hyland, 830 P.2d 10[illegible] (Colo. 1992); People v. Smith, 830 P.2d 1003 (Colo. 1992); People v. Driscoll, 830 P.2d 1019 (Colo. 1992); People v. [illegible]aubolt, 831 P.2d 462 (Colo. 1992); People v. Regan, 831 P.2d 893 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. 1992); People v. Denton, 839 P.2d 6 (Colo. 1992); People v. Hindorff, 860 P.2d 526 (Colo. 1993); People v. Brown, 863 P.2d 288 (Colo. 1993); People v. Cole, 880 P.2d 158 (Colo. 1994); People v. Smith, 880 P.2d 763 (Colo. 1994); People v. Swan, 893 P.2d 769 (Colo. 1995); People v. Davis, 893 P.2d 775 (Colo. 1995); People v. Miller, 913 P.2d 23 (Colo. 1996); People v. Calvert, 915 P.2d 1310 (Colo. 1996); People v. Sigley, 917 P.2d 1253 (Colo. 1996); People v. Boyer, 934 P.2d 1361 (Colo. 1997).

Conduct violating this rule sufficient to justify suspension. People v. Yaklich, 646 P.2d 938 (Colo. 1982); People v. Craig, 653 P.2d 1115 (Colo. 1982); People v. Kane, 655 P.2d 390 (Colo. 1982); People v. Vernon, 660 P.2d 879 (Colo. 1982); People v. Pilgrim, 698 P.2d 1322 (Colo. 1985); People v. Convery, 704 P.2d 296 (Colo. 1985); People v. Doolittle, 713 P.2d 834 (Colo. 1985); People v. Foster, 716 P.2d 1069 (Colo. 1986); People v. Coca, 716 P.2d 1073 (Colo. 1986); People v. Barnett, 716 P.2d 1076 (Colo. 1986); People v. Fleming, 716 P.2d 1090 (Colo. 1986); People v. Larson, 716 P.2d 1093 (Colo. 1986); People v. McPhee, 728 P.2d 1292 (Colo. 1986); People v. Yost, 729 P.2d 348 (Colo. 1986); People v. Holmes, 731 P.2d 677 (Colo. 1987); People v. Proffitt, 731 P.2d 1257 (Colo. 1987); People v. May, 745 P.2d 218 (Colo. 1987); People v. Turner, 746 P.2d 49 (Colo. 1987); People v. Susman, 747 P.2d 667 (Colo. 1987); People v. Richards, 748 P.2d 341 (Colo. 1987); People v. Geller, 753 P.2d 235 (Colo. 1988); People v. Convery, 758 P.2d 1338 (Colo. 1988); People v. Lustig, 758 P.2d 1342 (Colo. 1988); People v. Preblud, 764 P.2d 822 (Colo. 1988); People v. Goldberg, 770 P.2d 408 (Colo. 1989); People v. Goens, 770 P.2d 1218 (Colo. 1989); People v.

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Kaemingk, 770 P.2d 1247, (Colo. 1989); People v. Fahrney, 782 P.2d 743 (Colo. 1989); People v. Bottinelli, 782 P.2d 746 (Colo. 1989); People v. Barnthouse, 775 P.2d 545 (Colo. 1989), cert. denied, 493 U.S. 1026, 110 S. Ct. 734, 107 L.Ed.2d 752 (1990); People v. Gregory, 788 P.2d 823 (Colo. 1990); People v. Macy, 789 P.2d 188 (Colo. 1990); People v. Lopez, 796 P.2d 957 (Colo. 1990); People v. Abelman, 804 P.2d 859 (Colo. 1991); People v. Heilbrunn, 814 P.2d 819 (Colo. 1991); People v. Barr, 818 P.2d 761 (Colo. 1991); People v. Nulan, 820 P.2d 111 (Colo. 1991); People v. Dieters, 825 P.2d 478 (Colo. 1992); People v. Larson, 828 P.2d 793 (Colo. 1992); People v. Tisdel, 828 P.2d 795 (Colo. 1992); People v. Rhodes, 829 P.2d 850 (Colo. 1992); People v. Walker, 832 P.2d 935 (Colo. 1992); People v. Koller, 873 P.2d 761 (Colo. 1994); People v. Dickinson, 903 P.2d 1132 (Colo. 1995); People v. Kolbjornsen, 917 P.2d 277 (Colo. 1996); People v. Pierson, 917 P.2d 275 (Colo. 1996).

C. Disbarment.

Disbarment is discipline for lawyer guilty of crimes of moral turpitude. People v. Wilson, 176 Colo. 389, 490 P.2d 954 (1971).

Attorney disbarred for continued pattern of conduct involving neglect and misrepresentation and for failure to cooperate in investigation by grievance committee. People v. Young, 673 P.2d 1003 (Colo. 1984); People v. Coca, 732 P.2d 640 (Colo. 1987); People v. Johnston, 759 P.2d 10 (Colo. 1988).

Continuing pattern of neglect, including failure to timely file tax returns on behalf of personal representative of estate, failure to file timely notice of alibi, failure to notify opposing counsel, and failure to be adequately prepared for argument, coupled with similar behavior resulting in previous suspension, warrants disbarment. People v. Stewart, 752 P.2d 528 (Colo. 1987).

Misappropriation of funds, failure to account, and deceit and fraud in handling the affairs of a client necessitate that an attorney be disbarred. People v. Bealmear, 655 P.2d 402 (Colo. 1982).

A lawyer's knowing misappropriation of funds, whether belonging to a client or third party, warrants disbarment except in the presence of extraordinary factors of mitigation. People v. Lanphar, 934 P.2d 1355 (Colo. 1997).

Lawyer's encouragement of a client to enter into business transaction with said lawyer in which the two had differing interests and lawyer's failure to disclose relevant facts warrant disbarment. People v. Martinez, 739 P.2d 838 (Colo. 1987), cert. denied, 484 U.S. 1054, 108 S. Ct. 1005, 98 L.Ed.2d 970 (1988).

Convictions for crimes of theft, theft by receiving, and conspiracy to commit theft are serious, involve moral turpitude, and are grounds for disbarment as opposed to an indefinite suspension. People v. Silvola, 195 Colo. 74, 575 P.2d 413 (1978).

Conviction of two counts of sexual assault on a child warrants no less a sanction than disbarment. People v. Grenemyer, 745 P.2d 1027 (Colo. 1987).

Disbarment warranted by attorney's conviction of conspiracy to deliver counterfeited federal reserve notes, serious neglect of several legal matters, unjustified retention of clients' property, failure to respond to the grievance committee, and previous disciplinary record. People v. Mayer, 752 P.2d 537 (Colo. 1988).

False testimony and counseling of such conduct warrant disbarment. When a lawyer counsels his client to testify falsely at a hearing on a bankruptcy petition and the client does so, and the lawyer gives a false answer to a question asked of him by the bankruptcy judge, his misconduct warrants disbarment. People v. McMichael, 199 Colo. 433, 609 P.2d 633 (1980).

Misrepresenting the status of a dissolution of marriage action with knowledge of impending remarriage and then forging the purported decree of dissolution is conduct involving moral turpitude deserving of disbarment. People v. Belina, 782 P.2d 26 (Colo. 1989).

Where an attorney demonstrates an extreme indifference to the welfare of his clients and the status of their cases and an extreme insensitivity to his professional duties in the face of adverse judgments due to neglect, client complaints, and repeated disciplinary proceedings, disbarment is the appropriate sanction. People v. Wyman, 782 P.2d 339 (Colo. 1989).

Abandoning clients sufficient to justify disbarment. People v. Sanders, 713 P.2d 837 (Colo. 1985).

Abandoning clients without notice, causing them financial losses, and failing to cooperate with grievance committee justified disbarment despite lack of any prior professional misconduct. People v. Lovett, 753 P.2d 205 (Colo. 1988).

Abandoning law practice, engaging in multiple acts of misconduct involving dishonesty, fraud, deceit, and misrepresentation grounds for disbarment. People v. Greene, 773 P.2d 528 (Colo. 1989).

Converting estate or trust funds for one's personal use, overcharging for services rendered, neglecting to return inquiries relating to client matters, failing to make candid disclosures to grievance committee, and attempting to conceal wrongdoing during disciplinary proceedings warrants the severe sanction of disbarment. People v. Gerdes, 782 P.2d 2 (Colo. 1989).

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Use of license to practice law for the purpose of bringing into being an illegal prostitution enterprise renders disbarment the only possible form of discipline. People v. Morley, 725 P.2d 510 (Colo. 1986).

Theft of client's money, misrepresentations, representation of multiple clients with adverse interests, and failure to respond to informal complaints warrants disbarment. People v. Quick, 716 P.2d 1082 (Colo. 1986).

Felony theft held sufficient grounds for disbarment in Colorado where respondent was convicted of crime and disbarred in another jurisdiction. Unless the disciplinary proceedings conducted in the foreign jurisdiction involved a denial of due process or other infirmity, or the imposition of the same discipline would result in a grave injustice, or the attorney's conduct warrants a substantially different discipline, the court is required to impose the same discipline. People v. Bradbury, 772 P.2d 46 (Colo. 1989).

Altering authentic dissolution decrees coupled with past attorney misconduct sufficient to warrant disbarment. People v. Blanck, 713 P.2d 832 (Colo. 1985).

Continuing to practice while suspended is conduct justifying disbarment. People v. James, 731 P.2d 698 (Colo. 1987).

Disbarment in another state warrants disbarment. People v. Montano, 744 P.2d 480 (Colo. 1987); People v. Brunn, 764 P.2d 1165 (Colo. 1988).

Attorney's failure to disclose felony conviction and subsequent disbarment in another state is sufficient for disbarment. People v. Brunn, 764 P.2d 1165 (Colo. 1988).

Facts sufficient to justify disbarment of attorney for failure to comply with registration requirements of C.R.C.P. 227, misappropriation of funds, and improper withdrawal from employment. People v. Scudder, 197 Colo. 99, 590 P.2d 493 (1979).

A lawyer who enters into a conspiracy to violate the law by importing narcotic drugs for distribution should be disbarred. People v. Unruh, 621 P.2d 948 (Colo. 1980).

Where a lawyer's conduct not only constitutes a violation of the code of professional responsibility, but also involves felonious conduct, clearly and convincingly proven by testimony of sheriff's officers, the grievance committee is justified in requiring disbarment. People v. Harfmann, 638 P.2d 745 (Colo. 1981).

Total disregard of obligation to protect a client's interests and intentional conversion over an extended period of time in conjunction with the violation of a number of disciplinary rules and an extended prior record of discipline requires most severe sanction of disbarment. People v. O'Leary, 783 P.2d 1215 (Colo. 1989).

Attorney's continued practice of law while under an order of suspension, with no efforts to wind up the legal practice, and the failure to take action to protect the legal interests of the attorney's clients, warrants disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

Convictions for conspiring to commit fraud against the United States and impeding an officer of a United States court warrant disbarment. People v. Pilgrim, 802 P.2d 1084 (Colo. 1990).

Disbarment was the proper remedy where the attorney was afforded multiple opportunities including two suspensions and court ordered rehabilitation and where attorney's conduct demonstrated (a) neglect of legal matters entrusted to him; (b) misrepresentation to the client and the grievance committee; and (c) a pattern of neglect followed by the respondent that had the potential of causing serious injury to his clients. People v. Susman, 787 P.2d 1119 (Colo. 1990).

A lawyer's continued practice of law while under an order of suspension, with no efforts to wind up the legal practice, and failure to take action to protect the legal interests of the lawyer's clients, warrants disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

Likewise, disbarment was appropriate where attorney removed $5,000 from a client's trust account, refused to return money upon several requests by the client which ultimately resulted in a suit against the attorney, and the attorney lied about the transaction to the attorney with whom he shared office space. Factors in aggravation included a history of prior discipline, including suspension for conversion of client funds, the dishonest motive of the attorney in removing and not returning the client's funds, the attorney's refusal to acknowledge the wrongful nature of his conduct, the vulnerability of the client, and the attorney's legal experience. Mitigating factors were insufficient for disciplinary action short of disbarment. People v. McGrath, 833 P.2d 731 (Colo. 1992).

Disbarment is essentially automatic when a lawyer converts funds or property and there are no significant factors in mitigation. People v. Lujan, 890 P.2d 109 (Colo. 1995).

Entering guilty pleas to multiple counts of bank fraud evidences serious criminal conduct warranting disbarment. People v. Vidakovich, 810 P.2d 1071 (Colo. 1991).

Payment of restitution required prior to petition for readmission. Where, in proceedings to enforce a debt, attorney fails to pay debt, appear for deposition, produce documents requested by subpoena duces tecum or appear at an examination pursuant to C.R.C.P. 69 and on separate occasions writes insufficient funds checks and fails to comply with requests for investigation, restitution is a proper condition of readmission and is to be made prior to petition for readmission. People v. Koransky, 830 P.2d 490 (Colo. 1992).

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Where money was accepted for investment plans which were false, fictitious, and fraudulent and the presence of aggravating factors, including substantial experience by attorney, prior disciplinary offenses, dishonest or selfish motive, presence of multiple offenses, refusal to acknowledge the wrongful nature of conduct, and an indifference to making restitution, disbarment of attorney for violation of legal ethics was proper. People v. Kramer, 819 P.2d 77 (Colo. 1991).

Disbarment appropriate where attorney accepted fees from a number of clients prior to terminating her legal practice, failed to inform her clients of such termination, failed to refund clients' retainer fees, failed to place clients' funds in separate account, and gave clients' files to other lawyers without clients' consent. People v. Tucker, 904 P.2d 1321 (Colo. 1995).

Disbarment warranted where attorney was convicted of two separate sexual assaults on a client and a former client and attorney's previous dishonest conduct was an aggravating factor as well as findings of the attorney's selfish motive in engaging in the sexual misconduct, the two clients' vulnerability, the attorney's more than 20 years practicing law, and the attorney's failure to acknowledge the wrongful nature of his conduct. People v. Bertagnolli, 922 P.2d 935 (Colo. 1996).

Notwithstanding the entry of attorney's "Alford" plea in sexual assault proceedings, for purpose of disciplinary proceeding, the attorney was held to have actually committed the acts necessary to accomplish third degree sexual assault and therefore the attorney knowingly had sexual contact with a former client without either woman's consent. People v. Bertagnolli, 922 P.2d 935 (Colo. 1996).

Disbarment appropriate when attorney engages in conduct prejudicial to client and the administration of justice and neglects numerous legal matters. People v. Theodore, 926 P.2d 12[illegible] (Colo. 19[illegible]).

Notwithstanding financial stress and serious and costly medical problem[illegible] intentional conversion of law firm funds required disbarment. People v. Guyerson, 898 P.2d 1062 (Colo. 19[illegible]).

Propounding interrogatories to harass parties to a case and falsely accusing judicial officers and others of conspiracy warranted disbarment where respondent had been previously suspended for similar conduct. People v. Bottinelli, 926 P.2d 553 (Colo. 1996).

Failure to respond to discovery and motions, failure to attend case management hearing, and failure to inform client of progress of a civil case is grounds for disbarment. People v. Hebenstreit, 823 P.2d 125 (Colo. 1992).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Lyons, 762 P.2d 143 (Colo. 1988); People v. Costello, 781 P.2d 85 (Colo. 1989); People v. Nichols, 976 P.2d 966 (Colo. 1990); People v. Bergman, 807 P.2d 568 (Colo. 1991); People v. Rhodes, 814 P.2d 787 (Colo. 1991); People v. Vermillion, 814 P.2d [illegible] (Colo. 199[illegible]); People v. Bannister, 814 P.2d 801 (Colo. 1991); People v. Grossenbach, 814 P.2d 810 (Colo. 1991); People v. [illegible]ley, 817 P.2d 965 (Colo. 1991); People v. Rouse, 817 P.2d 967 (Colo. 1991); People v. Calt[illegible]17 P.2d [illegible] (Colo. 1991); People v. Mulligan, 817 P.2d 1028 (Colo. 1991); People v. Margolin, 820 P.2d 347 (Colo. 1991); People v. Koransky, 824 P.2d 819 (Colo. 1992); People v. Bradley, 825 P.2d 475 (Colo. 1992); People v. Mu[illegible]on, [illegible] P.2d [illegible] (Colo. 1992); People v. Tanquary, 831 P.2d 889 (Colo. 1992); People v. Southern, 832 P.2d 946 (Colo. [illegible]92); People v. McGrath, 833 P.2d 731 (Colo. 1992); People v. Brown, 840 P.2d 348 (Colo. 1992); People v. [illegible]lsh, [illegible] P.2d [illegible]66 (Colo. 1994); People v. Tyler, 884 P.2d 694 (Colo. 1994); People v. Kolenc, 887 P.2d [illegible]024 (Colo. 1994); People v. Fritsche, 897 P.2d 805 (Colo. 1995); People v. Sims, 913 P.2d 526 (Colo. 1996); People v. [illegible], 913 P.2d 532 (Colo. 1996); People v. McDowell, 942 P.2d 486 (Colo. 1997); People v. Singer, 955 P.2d [illegible] (Colo. 1998).

Conduct violating this rule sufficient to justify disbarment. People v. Kendrick, 646 P.2d 337 (Colo. 1982); People v. Dwyer, 652 P.2d 1074 (Colo. 1982); People v. Golden, 654 P.2d 853 (Colo. 1982); People v. Buckles, 673 P.2d 1008 (Colo. 1984); People v. Loseke, 698 P.2d 809 (Colo. 1985); People v. Fitzke, 716 P.2d 1065 (Colo. 1986); People v. Rice, 728 P.2d 714 (Colo. 1986); People v. Young, 732 P.2d 1208 (Colo. 1987); People v. Foster, 733 P.2d 687 (Colo. 1987); People v. Franco, 738 P.2d 1174 (Colo. 1987); People v. Quintana, 752 P.2d 1059 (Colo. 1988); People v. Brooks, 753 P.2d 208 (Colo. 1988); People v. Cantor, 753 P.2d 238 (Colo. 1988); People v. Turner, 758 P.2d 1335 (Colo. 1988); People v. Danker, 759 P.2d 14 (Colo. 1988); People v. Score, 760 P.2d 1111 (Colo. 1988); People v. Hanneman, 768 P.2d 709 (Colo. 1989); People v. Kengle, 772 P.2d 605 (Colo. 1989); People v. Vernon, 782 P.2d 745 (Colo. 1989); People v. Frank, 782 P.2d 769 (Colo. 1989); People v. Johnston, 782 P.2d 1195 (Colo. 1989); People v. Hedicke, 785 P.2d 918 (Colo. 1990); People v. Dulaney, 785 P.2d 1302 (Colo. 1990); People v. Franks, 791 P.2d 1 (Colo. 1990); People v. Gregory, 797 P.2d 42 (Colo. 1990); People v. Broadhurst, 803 P.2d 478 (Colo. 1990); People v. Goens, 803 P.2d 480 (Colo. 1990); People v. Hansen, 814 P.2d 816 (Colo. 1991); People v. Schwartz, 814 P.2d 793 (Colo. 1991); People v. Whitcomb, 819 P.2d 493 (Colo. 1991); People v. Kinkade, 831 P.2d 892 (Colo. 1992); People v. Marmon, 903 P.2d 651 (Colo. 1995); People v. Gilbert, 921 P.2d 48 (Colo. 1996).

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RULE 3.2 — EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

Comment

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Committee Comment

The Committee viewed this Rule as an important one and an improvement over the [illegible] in that it places on attorneys a positive obligation to make reasonable efforts to expedite litigation and it also makes clear that delaying tactics engaged in solely for the purpose of benefiting a client are improper.

Annotation

Law reviews. For article, "Enforcing Civility: The Rules of Professional Conduct in Deposition Settings", see 33 Colo. Law. 75 (March 2004).

Annotator's note. Rule 3.2 is similar to DR 1-102 and DR 7-101 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 1-102 have been included under Rule 3.1 and cases construing DR 7-101 have been included under Rule 1.2.

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Robinson, 853 P.2d 1145 (Colo. 1993); People v. Barr, 855 P.2d 1386 (Colo. 1993).

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RULE 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and later learns that the evidence is false, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Comment

[1] The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

[2] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be condoned by lawyers.

Misleading Legal Argument

[3] The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that the lawyer will present and argue the existing law in the light most favorable to the client. The advocate may urge any permissible construction of the law favorable to the lawyer's client, without regard to the lawyer's professional opinion as to the likelihood that the construction will ultimately prevail.

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. But having made such disclosure, the lawyer may challenge its soundness in whole or part.

False Evidence

A lawyer should present any admissible evidence the client desires to have presented unless the lawyer knows, or from facts within the lawyer's knowledge should know, that such testimony or evidence is false, fraudulent or perjured.

[4] When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

[5] When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

[6] Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

[7] Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when the persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

[8] The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other

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hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

[9] Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

[10] The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Remedial Measures

[11] If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should take reasonable remedial measures.

Constitutional Requirements

[12] The general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client—applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Duration of Obligation

[13] A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to be False

[14] Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

[15] Ordinarily an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Committee Comment

Much of this Rule is substantially similar to provisions of the Code. The major difference is, of course, (a)(4) which places on the lawyer the obligation to take reasonable remedial measures in a situation where the lawyer comes to know that he or she has offered evidence that the lawyer knows to be false. (Under section (b) this obligation only continues until the end of the proceeding.) Unlike the present Code, there is no exception in this Rule from the obligation to take remedial measures for client perjury or other false evidence presented by the client. Thus even if the lawyer's knowledge of the falsity of the evidence presented is the result of privileged information, the lawyer must take reasonable remedial measures.

A lawyer's obligation when faced with client perjury is, of course, one of the most controversial problems in professional ethics. The comments to Rule 3.3 nicely bring out the other alternative positions on client perjury. On

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balance the Committee felt that the position put forward in Rule 3.3, which might necessitate revealing the perjury in certain situations, represented the proper balance among a lawyer's duty to protect client confidences, a lawyer's obligation to the court and a lawyer's duty not to assist in the commission of a crime.

Annotation

Law reviews. For article, "The Attorney, the Client and the Criminal History: A Dangerous Trio", see 23 Colo. Law. 569 (1994). For article, "Exculpatory Evidence and Grand Juries", see 28 Colo. Law. 47 (April 1999). For article, "Ethical Considerations and Client Identity", see 30 Colo. Law. 51 (April 2001). For article, "Policing the Legal System: The Duty to Report Misconduct", see 30 Colo. Law. 85 (September 2001). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005).

Annotator's note. Rule 3.3 is similar to DR 1-102, DR 7-102, DR 7-106, and DR 7-107 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 7-106 and DR 7-107 have been included in the annotations to this rule. Cases construing DR 1-102 have been included under Rule 3.1 and cases construing DR 7-102 have been included under Rule 1.2.

It was inappropriate for counsel to file a motion and not mention contrary legal authority that was decided by the chief judge when the existence of the authority was readily available to counsel. United States v. Crumpton, 23 F. Supp.2d 1218 (D. Colo. 1998).

An attorney will not be held responsible for failing to inform the court of material information of which the attorney is unaware. Waters v. District Ct., 935 P.2d 981 (Colo. 1997).

An attorney cannot close her eyes to obvious facts, however, the duty to inform the court concerning her client's financial status does not obligate the attorney to undertake an affirmative investigation of her client's financial status. Waters v. District Ct., 935 P.2d 981 (Colo. 1997).

An attorney is not responsible for informing the court of every known change in a client's financial circumstances but she must inform the court of material changes that, if not disclosing to the court would work a fraud on the court. For the purpose of determining eligibility for court appointed counsel, material changes are those which clearly render the client capable, on a practical basis, of securing competent representation or reimbursing some or all of the expenses of court-appointed counsel and costs. Waters v. District Ct., 935 P.2d 981 (Colo. 1997).

Public censure is appropriate discipline for attorney who submitted falsified response to grievance committee's request for investigation, violated prohibition against engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, and revealed client confidences to district attorney without client's consent. People v. Lopez, 845 P.2d 1153 (Colo. 1993).

Public censure is appropriate discipline where attorney falsely testified that he had automobile insurance at the time of an accident, but outcome of case was not thereby affected. People v. Small, 962 P.2d 258 (Colo. 1998).

Attorney signing substitute counsel's name to pleadings in a style different from his own signature, without authority to sign in representative capacity and without any indication that he was signing in a representative capacity, violated this rule and warranted six-month suspension. People v. Reed, 955 P.2d 65 (Colo. 1998).

Thirty-day suspension appropriate where attorney failed to inform U.S. bankruptcy court in Colorado, in a hearing on motion to remand the matter to U.S. bankruptcy court in Massachusetts, that an order of dismissal of the bankruptcy proceeding between the same parties had been entered in California. People v. Farry, 927 P.2d 841 (Colo. 1996).

Attorney conduct violating this rule, in conjunction with other rules, sufficient to justify suspension when violation did not arise from neglect or willingness to take advantage of client's vulnerability and is mitigated by her inexperience in the practice of law, her lack of any prior disciplinary record, the fact that she had already been held in contempt and punished by the district court, and the fact that there is no suggestion of selfish motivation. Attorney's failure to appreciate the serious nature of conduct and the jurisdiction of the hearing board to discipline her is a serious matter meriting a period of suspension and a redetermination of her fitness before being permitted to practice law again. In re Roose, 69 P.3d 43 (Colo.), cert. denied, 540 U.S. 1053, 124 S. Ct. 815, 157 L.Ed.2d 705 (2003).

Aiding client to violate custody order sufficient to justify disbarment. People v. Chappell, 927 P.2d 829 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Rolfe, 962 P.2d 981 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Mason, 938 P.2d 133 (Colo. 1997).

REPEALED

Cases Decided Under Former DR 7-106.

Law reviews. For formal opinion of the Colorado Bar Association Ethics Committee on Use of Subpoenas in Civil Proceedings, see 19 Colo. Law. 1556 (1990).

Lawyers, as officers of the court, must maintain the respect due to courts and judicial officers. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973).

License to practice law assures public that the lawyer who holds the license will perform basic legal tasks honestly and without undue delay, in accordance with the highest standards of professional conduct. People v. Dixon, 621 P.2d 322 (Colo. 1981).

Public expects appropriate discipline for misconduct. The public has a right to expect that one who engages in professional misconduct will be disciplined appropriately. People v. Dixon, 621 P.2d 322 (Colo. 1981).

Actions taken by attorney contrary to court order violate this rule and justify suspension. People v. Awenius, 653 P.2d 740 (Colo. 1982); People v. Belina, 765 P.2d 121 (Colo. 1988).

Willful nonpayment of child support and failure to pay arrearages after ordered by court to do so is a violation of subsection (A). People v. Tucker, 837 P.2d 1225 (Colo. 1992).

Threatening to invoke disciplinary proceedings against judge in anticipation of adverse ruling warrants public censure. People v. Tatum, 814 P.2d 388 (Colo. 1991).

Prosecutor engaged in professional misconduct where references to the defense [illegible]s "insulting" or a "lie" and to the defense's challenge to the credibility of a prosecution witness as "cheap i[illegible]uendos" were made for the obvious purpose of denigrating defense counsel. People v. Jones, 832 P.2d 1036 (Co[illegible] App. 1991).

Prosecutor made argument of a highly improper nature by implying to jurors th[illegible]ng counsel did not have a good faith belief in the innocence of her client and such an argume[illegible]erved no legiti[illegible]e purpose but had the function only of erroneously diverting the attention of the jurors from the fac[illegible]issues concerning defendant's guilt. People v. Jones, 832 P.2d 1036 (Colo. App. 1991).

An attorney's personal belief in the veracity of a witness's testimony is not a proper subject of closing argument. Consequently, the law requires that the prosecutor's personal opinion as to the truth or falsity of any testimony or as to guilt shall not be outwardly indicated nor [illegible]d to the jury as an interpretation based upon legitimate inferences which might be drawn from the evidence [illegible]dduced at trial. People v. Jones, 832 P.2d 1036 (Colo. App. 1991).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Dalton, 840 P.2d 351 (Colo. 1992).

Conduct violating this rule [illegible]t to justify public censure. People v. Fieman, 788 P.2d 830 (Colo. 1990).

Conduct violating this [illegible]rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Crease, 793 P.2d 1[illegible]0 (Colo. 1990); People v. Taylor, 799 P.2d 930 (Colo. 1990); People v. Hyland, 830 P.2d 1000 (Co[illegible] 1992); People [illegible]Cohan, 913 P.2d 523 (Colo. 1996); People v. Wotan, 944 P.2d 1257 (Colo. 1997); People v. Porter[illegible]0 P.2d 5[illegible]6 (Colo. 1999); In re Bobbitt, 980 P.2d 538 (Colo. 1999).

Conduct violating this rule [illegible]sufficient to justify suspension. People v. Kane, 655 P.2d 390 (Colo. 1982); People v. Barnth[illegible]se, 77[illegible]P.2d 54[illegible](Colo. 1989), cert. denied, 493 U.S. 1026, 110 S. Ct. 734, 107 L.Ed.2d 752 (1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People [illegible]Schaefer, 944 P.2d 78 (Colo. 1997).

Applied in People ex rel. Aisenberg v. Young, 198 Colo. 26, 599 P.2d 257 (1979); People v. Kane, 638 P.2d 253 (Colo. 1981); People v. Harfmann, 638 P.2d 745 (Colo. 1981); Wilson v. People, 743 P.2d 415 (Colo. 1987).

Cases Decided Under Former DR 7-107.

Law reviews. For formal opinion of the Colorado Bar Association Ethics Committee on Lawyer Advertising, Solicitation and Publicity, see 19 Colo. Law. 25 (1990).

Trial judge has power to punish summarily for contempt any lawyer who in his presence wilfully contributes to disorder or disruption in the courtroom. Losavio v. District Court, 182 Colo. 180, 512 P.2d 266 (1973).

News releases by counsel held contrary to good practice. Sergent v. People, 177 Colo. 354, 497 P.2d 983 (1972).

The participation of the district attorney and his deputy in an ill-timed radio interview which suggested a connection between the condominium fires and organized crime is not condoned. People v. Mulligan, 193 Colo. 509, 568 P.2d 449 (1977).

REPEALED

RULE 3.4 — FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative of a client or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

REPEALED

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information.

[3] With regard to paragraph (b), it is not improper to pay a witness' expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of the lawyer's personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as the guilt or innocence of an accused is not a proper subject for argument to the triers of fact. It is improper as to factual matters because admissible evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to the client. However, a lawyer may argue based on the lawyer's own analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, because employees may identify their interests with those of the client. See also Rule 4.2.

Committee Comment

Many of the provisions of Rule 3.4 are similar to provisions in the Code. The main differences occur in subsections (d) and (f). Subsection (d) has no Code analog but the Committee felt that (d) was a sound addition because abuse of discovery is a serious problem with our system of justice. Subsection (f) is a little broader than DR 7-

106(C)(5) in that it allows a lawyer to give advice in certain circumstances to relatives or employees of a client. The Committee felt it was appropriate to broaden the Code provision to allow a lawyer to request that a relative or employee of a client not volunteer information to another party because in many such situations the relative or employee will identify with the interests of the client.

Some language from EC 7-24 was added to the Comment section because the Committee felt that this language was helpful in explaining the reasons why the conduct elaborated in subsection (e) is proscribed.

Annotation

Law reviews. For article, "Enforcing Civility: The Rules of Professional Conduct in Deposition Settings", see 33 Colo. Law. 75 (March 2004).

Annotator's note. Rule 3.4 is similar to DR 1-102, DR 7-102, DR 7-104, and DR 7-106 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 7-104 have been included in the annotations to this rule. Cases construing DR 1-102 have been included under Rule 3.1, cases construing DR 7-102 have been included under Rule 1.2, and cases construing DR 7-106 have been included under Rule 3.3.

Thirty-day suspension, petition for reinstatement requirement, and requirement of payment of costs of prior disciplinary proceedings justified where aggravating factors include attorney's previous public censure, refusal to acknowledge the wrongfulness of his conduct, substantial experience in the practice of law, and indifference to making restitution. In re Bauder, 980 P.2d 507 (Colo. 1999).

Ninety-day suspension justified where attorney's failure to respond to discovery requests resulted in default and entry of judgment against client for $816,613. People v. Clark, 917 P.2d 258 (Colo. 1996).

Ninety-day suspension and order of restitution as a condition of reinstatement was justified where attorney failed to pay court-ordered award of attorney's fees resulting from his filing of a frivolous motion, without regard to whether this debt was subsequently discharged in attorney's bankruptcy proceedings. People v. Huntzinger, 967 P.2d 160 (Colo. 1998).

Attorney conduct violating this rule, in conjunction with other rules, sufficient to justify suspension when violation did not arise from neglect or willingness to take advantage of client's vulnerability and is mitigated by her inexperience in the practice of law, her lack of any prior disciplinary record, the fact that she had already been held in contempt and punished by the district court, and the fact that there is no suggestion of selfish motivation. Attorney's failure to appreciate the serious nature of conduct and the jurisdiction of the hearing board to discipline her is a serious matter meriting a period of suspension and determination of her fitness before being permitted to practice law again. In re Roose, 69 P.3d 43 (Colo.), cert. denied, 540 U.S. 1053, 124 S. Ct. 815, 157 L.Ed.2d 705 (2003).

Attorney conduct violating this rule, in conjunction with other rules, sufficient to justify disbarment when attorney failed to comply with court orders applicable to his child support payments until after contempt citation was issued and attorney was ordered to report to jail to begin serving his sentence, and also committed numerous other violations consisting of knowingly commingling and misappropriating clients' funds, and neglecting multiple cases resulting in the entry of default judgments against attorney's clients. People v. Gonzalez, 967 P.2d 156 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules, where mitigating factors were present, warrants public censure. People v. Davis, 950 P.2d 586 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Barr, 855 P.2d 1386 (Colo. 1993); People v. Babinski, 951 P.2d 1240 (Colo. 1998); People v. Blunt, 952 P.2d 356 (Colo. 1998); People v. Hanks, 967 P.2d 144 (Colo. 1998); People v. Harding, 967 P.2d 153 (Colo. 1998); In re Demaray, 8 P.3d 427 (Colo. 1999); In re Fischer, 89 P.3d 817 (Colo. 2004).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Singer, 955 P.2d 1005 (Colo. 1998); In re Hugen, 973 P.2d 1267 (Colo. 1999).

Cases Decided Under Former DR 7-104.

Rule held inapplicable to district attorney's communications with defendant when communications are unrelated to pending charges for which defendant had retained counsel. People v. Hyun Soo Son, 723 P.2d 1337 (Colo. 1986).

Evidence sufficient to justify suspension from the practice of law. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979); People v. Zinn, 746 P.2d 970 (Colo. 1987).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Crews, 901 P.2d 472 (Colo. 1995).

Applied in People ex rel. MacFarlane v. Boyls, 197 Colo. 242, 591 P.2d 1315 (1979); In re East Nat'l Bank, 517 F. Supp. 1061 (D. Colo. 1981).

REPEALED

RULE 3.5 — IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law; or

(c) engage in conduct intended to disrupt a tribunal.

Comment

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

Committee Comment

The Committee felt that this provision was uncontroversial because it simply makes it unethical to do what is already illegal and is very similar to present Code provisions. Section (c) was viewed as an improvement because it is more specific than DR 7-106(C)(6) which proscribes "undignified or discourteous" courtroom conduct.

Annotation

Law reviews. For article, "Ex Parte Communication with the Tribunal: From Both Sides", see 29 Colo. Law. 55 (April 2000).

Annotator's note. Rule 3.5 is similar to DR 7-101, DR 7-106, DR 7-108, DR 7-109, DR 7-110, and DR 8-101 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 7-108, DR 7-109, DR 7-110, and DR 8-101 have been included in the annotations to this rule. Cases construing DR 7-101 have been included under Rule 1.2, and cases construing DR 7-106 have been included under Rule 3.3.

Cases Decided Under Former DR 7-108.

Jury tampering is basis for indefinite suspension of attorney. People v. Radinsky, 176 Colo. 357, 490 P.2d 951 (1971).

Cases Decided Under Former DR 7-109.

Evidence sufficient to justify suspension from the practice of law. People v. Belfor, 197 Colo. 223, 591 P.2d 585 (1979).

Cases Decided Under Former DR 7-110.

Suggesting that witness contact chief justice for attorney's benefit justifies public censure. Where an attorney suggested to a principal witness in a pending grievance proceeding against that attorney that he write a letter on behalf of the attorney to the chief justice of the state supreme court, substantially recanting his testimony in the grievance proceeding, the attorney's conduct violated the code of professional responsibility and C.R.C.P. 241.6. Public censure is the appropriate discipline for this breach of professional obligations. People v. Hertz, 638 P.2d 794 (Colo. 1982).

The imposition of a one-year suspension in Illinois for the loaning of money to a judge warrants imposition of the same sanction in Colorado. People v. Chatz, 788 P.2d 157 (1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Bannister, 814 P.2d 801 (Colo. 1991).

Cases Decided Under Former DR 8-101.

District attorney not tribunal. It is not the intent of paragraph (A)(2) to treat a district attorney or those acting under him as a tribunal. People ex rel. Gallagher v. Hertz, 198 Colo. 522, 608 P.2d 335 (1979).

REPEALED

RULE 3.6 — TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) The claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) Information contained in a public record;

(3) That an investigation of a matter is in progress;

(4) The scheduling or result of any step in litigation;

(5) A request for assistance in obtaining evidence and information necessary thereto;

(6) A warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) In a criminal case, in addition to subparagraphs (1) through (6):

(i) The identity, residence, occupation and family status of the accused;

(ii) If the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) The fact, time and place of arrest; and

(iv) The identity of investigating and arresting officer or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Source. Initial comment replaced and adopted June 12, 1997, effective January 1, 1998.

REPEALED

Comment

It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

The rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

There are, on the other hand, certain subjects which are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness or the identity of a witness, or the expected testimony of a party or witness;

(2) In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) Information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) The fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

Finally, extrajudicial statements that might otherwise raise a question under this rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

Model Code Comparison

Rule 3.6 is similar to DR 7-107 except as follows: First, Rule 3.6 adopts the general criterion of "substantial likelihood of materially prejudicing an adjudicative proceeding" to describe impermissible conduct. Second, Rule 3.6 makes clear that only attorneys who are or have been involved in a proceeding, or their associates, are subject to the rule. Third, Rule 3.6 omits the particulars in DR 7-107(b), transforming them instead into an illustrative compilation as part of the rule's commentary that is intended to give fair notice of the kinds of statements that are generally thought to be more likely than other kinds of statements to pose unacceptable dangers to the fair administration of justice. Whether any statement will have a substantial likelihood of materially prejudicing an adjudicatory proceeding will depend upon the facts of each case. The particulars of DR 7-107(c) are retained in Rule 3.6(b), except DR 7-107(c)(7), which provided that a lawyer may reveal "[a]t the time of seizure, a description of the physical evidence seized, other than a confession, admission or statement." Such revelations may be substantially prejudicial and are frequently the subject of pretrial suppression motions whose success would be undermined by disclosure of the suppressed evidence to the press. Finally, Rule 3.6 authorizes a lawyer to protect a client by making a limited reply to adverse publicity substantially prejudicial to the client.

Annotation

Annotator's note. Rule 3.6 is similar to DR 7-107 as it existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 7-107 have been included under Rule 3.3.

REPEALED

RULE 3.7 — LAWYER AS WITNESS

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer shall not act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless the requirements of Rule 1.7 or Rule 1.9 have been met.

Comment

[1] Combining the roles of advocate and witness can involve a conflict of interest between the lawyer and client and can prejudice the opposing party. If a lawyer is both counsel and witness, the lawyer becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as the advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his or her own credibility.

[2] The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyer to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has first hand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the opposing party. Whether the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or more of the other parties could reasonably foresee that the lawyer would probably be a witness.

[5] Whether the combination of roles involves an improper conflict of interest with respect to the client is determined by Rule 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the representation is improper. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. See Comment to Rule 1.7. If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest Rule 1.10 disqualifies the firm also.

Committee Comment

The Committee disagreed with the approach taken in section (b) of the Model Rules version of Rule 3.7 which stated that a lawyer could act as an advocate, even if another lawyer in the advocate's firm was going to testify, unless precluded by either Rule 1.7 or Rule 1.9. In such a situation, a lawyer is not required to argue his or her own credibility to the fact-finder. But there is still a potential conflict of interest which can be serious in such situations. For example, it may be that the firm relationship between the advocate-lawyer and the witness-lawyer may make the witness seem less credible to the jury. The Committee felt that (b) of 3.7 did not give sufficient emphasis to the conflicts of interest that can arise in such situations. Thus the Committee changed the emphasis in (b) considerably to state that a lawyer shall not act as an advocate in such a situation unless the lawyer first complies with the requirements of Rules 1.7 or 1.9.

Annotation

Law reviews. For Formal Opinion No. 78 of the CBA Ethics Committee, "Disqualification of the Advocate/ Witness", see 23 Colo. Law. 2087 (1994).

REPEALED

Annotator's note. Rule 3.7 is similar to DR 5-101 and DR 5-102 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing those provisions have been included in the annotations to Rule 1.7.

A violation of section (a) of this rule ordinarily will require disqualification because the very purpose of the rule is to avoid the taint to a trial that results from jury confusion when a lawyer acts as both witness and advocate. Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell, 239 F. Supp.2d 1170 (D. Colo. 2003).

Section (a) is a prohibition only against acting as an advocate at trial. It does not automatically require that a lawyer be disqualified from pretrial activities, such as participating in strategy sessions, pretrial hearings, settlement conferences, or motions practice. Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell, 239 F. Supp.2d 1170 (D. Colo. 2003).

Disqualification from pretrial matters may be appropriate, however, where that activity includes obtaining evidence which, if admitted at trial, would reveal the attorney's dual role. Merrill Lynch Bus. Fin. Servs., Inc. v. Nudell, 239 F. Supp.2d 1170 (D. Colo. 2003).

A party seeking disqualification of any attorney as "likely to be a necessary witness" must show that "the advocate's testimony is necessary, and not merely cumulative". Religious Tech. Ctr. v. F.A.C.T. Net, Inc., 945 F. Supp. 1470 (D. Colo. 1996).

This rule does not mandate a hearing where there is a possibility of a conflict of interest on the part of an attorney called as a witness against his or her client. Taylor v. Grogan, 900 P.2d 60 (Colo. 1995).

Rule requires that plaintiffs' counsel who is also their son be disqualified from appearing as an advocate because he is likely to be called as a witness at trial. Determining whether the moving party has demonstrated that opposing counsel is "likely to be a necessary witness" involves a consideration of the nature of the case, with emphasis on the subject of the lawyer's testimony, the weight the testimony might have in resolving disputed issues, and the availability of other witnesses or documentary evidence which might independently establish the relevant issues. The moving party's burden is complete if he proves that opposing counsel is "likely to be a witness" at trial. Here, the facts and circumstances demonstrate that plaintiffs' son who is also their counsel and who was endorsed by plaintiffs as a fact witness is likely to be a necessary witness on his client's and parents' behalf. The statements of plaintiffs' counsel and son is that he spoke with the defendant doctor after the procedure performed on his plaintiff father and that the defendant made certain admissions against interest. Fognani v. Young, 115 P.3d 1268 (Colo. 2005).

Rule permits a lawyer to maintain a dual role in the same proceeding if "disqualification would work substantial hardship on the client". Even if there is a risk of prejudice to both parties if the attorney is permitted to testify, court must balance the competing interests, according "due regard" to the effect of disqualification on his clients. When determining whether disqualification would impose a substantial hardship on the client, court should consider all relevant factors in light of the specific facts before it, including the nature of the case, financial hardship, giving weight to the stage in the proceedings at the time at which the attorney became aware of the likelihood of his testimony, and whether the client has secured alternative representation. Here, considering the specific facts and circumstances, trial court did not abuse its discretion in rejecting plaintiffs' substantial hardship claim. In light of ample justification in the record, trial court did not abuse its discretion in disqualifying plaintiffs' counsel and son from his representation of his parents at trial. Fognani v. Young, 115 P.3d 1268 (Colo. 2005).

Court did not adopt a rule that would permit automatic participation by disqualified attorney in all pretrial litigation. Upon assuring that the client has consented to pretrial representation by the disqualified attorney, trial court has discretion to determine whether participation by the attorney in a particular pretrial activity would undermine the purpose of the rule. If, for example the attorney's dual role in a deposition proceeding would likely be revealed at trial, trial court may properly limit attorney's role in that activity. Here, trial court was given opportunity on remand to fashion its orders in a way dictated by facts of the case. Fognani v. Young, 115 P.3d 1268 (Colo. 2005).

Rule does not impose automatic vicarious disqualification of the disqualified attorney's law firm. As such, the trial court must consider whether the requirements of C.R.C.P. 1.7 and 1.9 have been met. The inquiry is two-fold: (1) Whether the firm reasonably believes its representation of the plaintiffs will not be materially limited by its responsibilities to the attorney; and (2) the client's consent to the ongoing representation and whether that consent is objectively reasonable under the circumstances. The trial court has the authority to decline to honor the client's choice if the court concludes that the client should not agree to the representation under the circumstances of the case. In making that determination, the court may balance the clients' interests in the continuing representation against the nature of the anticipated testimony and the credibility issues that the testimony may pose. Here, record does not permit supreme court to determine whether trial court abused its discretion in disqualifying the law firm of plaintiffs' son from representing plaintiffs. Accordingly, remand is necessary to determine whether the requirements of C.R.C.P. 1.7 have been met. Fognani v. Young, 115 P.3d 1268 (Colo. 2005).

REPEALED

RULE 3.8 — SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing, except that this does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has waived the rights to counsel and silence.

(d) make timely disclosure to the defense of all evidence of information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6.

(f) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless:

(1) the prosecutor reasonably believes:

(i) the information sought is not protected from disclosure by any applicable privilege;

(ii) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(iii) there is no other feasible alternative to obtain the information.

(2) (Deleted.)

REPEALED

Source: (f) and comment amended and adopted and (2) deleted, effective February 19, 1997.

Comment

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] Paragraph (c) does not apply to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of a suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

Committee Comment

Because this provision is based to a considerable extent on the ABA Standards of Criminal Justice Relating to the Prosecution Function which many jurisdictions have adopted and because it deals with a specialized area of practice, the Committee felt it should leave this provision as it was set out in the Model Rules.

Annotation

Annotator's note. Rule 3.8 is similar to DR 7-103, DR 7-104, and DR 7-107 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 7-103 have been included in the annotations to this rule. Cases construing DR 7-104 have been included under Rule 3.4 and cases construing DR 7-107 have been included under Rule 3.3.

Paragraph (f)(1) is inconsistent with federal law and thus is invalid as applied to federal prosecutors practicing before the grand jury. As applied to proceedings other than those before the grand jury, paragraph (f)(1) is not inconsistent with federal law and does not violate the supremacy clause. Thus, paragraph (f)(1) is valid and enforceable except as it pertains to federal prosecutors practicing before the grand jury. U.S. v. Colo. Supreme Court, 988 F. Supp. 1368 (D. Colo. 1998), aff'd, 189 F.3d 1281 (10th Cir. 1999).

Paragraph (d) should be read as containing a requirement that a prosecutor disclose exculpatory, outcome-determinative evidence that tends to negate the guilt or mitigate the punishment of the accused in advance of the next critical stage of the proceeding, consistent with the materiality standard adopted with respect to the rules of criminal procedure. In re Attorney C, 47 P.3d 1167 (Colo. 2002).

Violation of paragraph (d) requires mens rea of intent. In re Attorney C, 47 P.3d 1167 (Colo. 2002).

Cases Decided Under Former DR 7-103.

While the prosecutor may strike hard blows, he is not at liberty to strike f[illegible] ones, [illegible] is as much his duty to refrain from improper methods calculated to produce a wrongful conviction [illegible] it is [illegible]use eve[illegible] legitimate means to bring about a just one. People v. Walker, 180 Colo. 184, 504 P.2d 1098 [illegible]/2).

Prosecutor's zealous prosecution of a case is not improper. People v. [illegible]arin[illegible] P.2d [illegible]1 (Colo. App. 1983).

A prosecutor's duty is to seek justice, not merely to convict. People v. [illegible]ker, 1[illegible] Colo. 184, 504 P.2d 1098 (1972); People v. Drake, 841 P.2d 364 (Colo. App. 1992).

If the prosecution witness advises prosecutor that he or s[illegible] knows or re[illegible]gnizes one of the jurors, the prosecutor has an affirmative duty immediately to notify the court and o[illegible]sing [illegible]nsel of the witness' statement. People v. Drake, 841 P.2d 364 (Colo. App. 1992).

There was no prosecutorial misconduct when the [illegible]istr[illegible] [illegible]orney and police had no knowledge of any evidence that would negate the defendant's guilt [illegible] reduce [illegible]nishment. People v. Wood, 844 P.2d 1299 (Colo. App. 1992).

Prosecutor should see that justice is [illegible]y seeking the truth. The duty of a prosecutor is not merely to convict, but to see that justice is done by [illegible]g th[illegible]uth [illegible]he matter. People v. Elliston, 181 Colo. 118, 508 P.2d 379 (1973).

No evidence proving d[illegible]fend[illegible] [illegible]nocence shall be withheld from him. It is the duty of both the prosecution and the courts to [illegible] that no k[illegible]vn evidence in the possession of the state which might tend to prove a defendant's innocence is w[illegible]held [illegible]n the [illegible]ense before or during trial. People v. Walker, 180 Colo. 184, 504 P.2d 1098 (1972).

A prose[illegible]or [illegible]st be [illegible]r[illegible] in his conduct to ensure that the jury tries a case solely on the basis of the facts presented [illegible]it. Pe[illegible]le v. El[illegible]on, 181 Colo. 118, 508 P.2d 379 (1973).

The dist[illegible]attor[illegible] has the duty to prevent conviction on misleading or perjured evidence. The duty of the district attorney e[illegible]nds not only to marshalling and presenting evidence to obtain a conviction, but also to protecting the court and [illegible]e accused from having a conviction result from misleading evidence or perjured testimony. DeLuzio v. People, 177 Colo. 389, 494 P.2d 589 (1972).

REPEALED

RULE 3.9 — ADVOCATE IN NONADJUDICATIVE PROCEEDINGS

A lawyer representing a client before a legislative or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Comment

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the

integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

In all appearances before legislative bodies, municipal councils, administrative agencies, and the like, a lawyer should identify himself or herself and, if the lawyer is appearing in a representative capacity, indicate that fact. The lawyer should also disclose to the agency the identity of the client or clients on whose behalf the lawyer is appearing, unless the identity is privileged.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

Committee Comment

This Rule takes some of the provisions that were in the Code and that applied to lawyers appearing before tribunals, such as DR 7-106(B)(1), and extends those provisions to apply equally in front of administrative or legislative bodies. The Committee approved this Rule reasoning that most of the provisions in this Rule are already embodied in EC 7-15, EC 7-16 and EC 7-8 and belong in a Rule. The comments to the Rule were extended to include some language from EC 7-15 that help explain a lawyer's obligations when appearing before administrative or legislative bodies.

Annotation

Annotator's note. Rule 3.9 is similar to DR 7-106 as it existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing that provision have been included in the annotations to Rule 3.3.

REPEALED

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

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 or misleading statement of 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.

Comment

Misrepresentation

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

Statements of Fact

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiations, certain types of statements ordinarily are not taken as statements of fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.

Fraud by Client

Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

Committee Comment

The deletions the Committee made in subparagraph (a) are those adopted by Minnesota to not limit the prohibition to material statements, and to eliminate the argument over whether or not a statement concerned a "material" fact. This provision is substantially the same as DR 7-102(A)(3) and (5) of the Code.

Annotation

Law reviews. For article, "Ethical Considerations and Client Identity", see 30 Colo. Law. 51 (April 2001).

Annotator's note. Rule 4.1 is similar to DR 7-102 as it existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing that provision have been included in the annotations to Rule 1.2.

Conduct violating this rule in conjunction with other rules of disciplinary conduct sufficient to justify public censure. People v. Newman, 925 P.2d 783 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Mason, 938 P.2d 133 (Colo. 1997); In re Meyers, 981 P.2d 143 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Jackson, 943 P.2d 450 (Colo. 1997); In re Hugen, 973 P.2d 1267 (Colo. 1999).

RULE 4.2 — COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Source: Comment amended and adopted June 17, 1999, effective July 1, 1999.

Comment

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for the purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f).

This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question. A pro se party to whom limited representation has been provided in accordance with C.R.C.P. 11(b), or C.R.C.P. 311(b), and Colo.RPC 1.2 is considered to be unrepresented for purposes of this Rule unless the lawyer has knowledge to the contrary.

Committee Comment

This Rule is proposed as adopted by the ABA, and is essentially the same as DR 7-104(A) of the Code.

Annotation

Law reviews. For formal opinion of the Colorado Bar Association on Ex Parte Contacts with Government Officials, see 23 Colo. Law. 329 (1994). For formal opinion of the Colorado Bar Association on Ex Parte Communications With Represented Persons During Criminal and Civil Regulatory/Investigations and Proceedings, see 23 Colo. Law. 2297 (1994). For article, "Discrete Task Representation a/k/a Unbundled Legal Services", see 29 Colo. Law. 5 (January 2000). For article, "Policing the Legal System: The Duty to Report Misconduct", see 30 Colo. Law. 85

REPEALED

(September 2001). For article, "Settlement Ethics", see 30 Colo. Law. 53 (December 2001). For article, "Investigative Tactics: They May Be Legal, But Are They Ethical?", see 35 Colo. Law. 43 (January 2006).

Annotator's note. Rule 4.2 is similar to DR 7-104 as it existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing that provision have been included in the annotations to Rule 3.4.

The protections of this rule attach only once an "adversarial relationship" sufficient to trigger an organization's right to counsel arises. Johnson v. Cadillac Plastic Group, Inc., 930 F. Supp. 1437 (D. Colo. 1996).

The fact that an employee is a management level employee alone does not make him a "party" for purposes of this rule. Johnson v. Cadillac Plastic Group, Inc., 930 F. Supp. 1437 (D. Colo. 1996).

Public censure was warranted for attorney who prepared motions to dismiss for his client's wife to sign when proceedings had been brought by the client's wife against the client and the client's wife was represented by counsel and was not advised that she should contact her own lawyer before signing the motions, nor asked if she wished to discuss the motions with her lawyer before signing. Three letters of admonition for unrelated misconduct also were an aggravating factor for purposes of determining the appropriate level of discipline. People v. McCray, 926 P.2d 578 (Colo. 1996).

Thirty-day suspension warranted where lawyer, who represented an individual accused of first-degree murder, communicated with co-defendant who also was charged with first-degree murder and whose interests were adverse to the lawyer's client, without the knowledge or consent of the co-defendant's lawyers. The potential for harm was high in a first-degree murder case and the number of unauthorized contacts demonstrated more than negligence on the lawyer's part. People v. DeLoach, 944 P.2d 522 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules insufficient to justify suspension. People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Wotan, 944 P.2d 1257 (Colo. 1997); In re Tolley, 975 P.2d 1115 (Colo. 1999).

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 state that the lawyer is representing a client and 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 advice to the unrepresented person other than to secure counsel.

Source: Comment amended and adopted June 17, 1999, effective July 1, 1999.

REPEALED

Comment

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel. The lawyer must comply with the requirements of this Rule for pro se parties to whom limited representation has been provided, in accordance with C.R.C.P. 11(b), C.R.C.P. 311(b), Colo.RPC 1.2, and Colo.RPC 4.2. Such parties are considered to be unrepresented for purposes of this Rule.

Committee Comment

The Committee has added to the ABA provision the language requiring the lawyer to "state that the lawyer is representing a client". The Committee has also added the requirement that "the lawyer shall not give advice to the unrepresented person other than to secure counsel", to parallel DR 7-104(A)(2) of the Code.

Annotation

Law reviews. For article, "Discrete Task Representation a/k/a Unbundled Legal Services", see 29 Colo. Law. 5 (January 2000).

Annotator's note. Rule 4.3 is similar to DR 7-104 as it existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing that provision have been included in the annotations to Rule 3.4.

A noble motive does not justify departure from any rule of professional conduct. A prosecutor trying to protect public safety is not immune from the code of professional conduct when he or she chooses deception as means for protecting public safety. In re Pautler, 47 P.3d 1175 (Colo. 2002).

There is no imminent public harm, duress, or choice of evils exception or defense for a prosecutor to the rules of professional conduct. In re Pautler, 47 P.3d 1175 (Colo. 2002).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. In re Meyers, 981 P.2d 143 (Colo. 1999).

RULE 4.4 — RESPECT FOR RIGHTS OF THIRD PERSONS

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Comment

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impossible to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

Committee Comment

This rule is unchanged from that adopted by the ABA. It provides, in different language, the provisions contained in DR's 7-102(A)(1) and 7-106(C)(2) of the Code.

Annotation

Law reviews. For article, "Enforcing Civility: The Rules of Professional Conduct in Deposition Settings", see 33 Colo. Law. 75 (March 2004).

Annotator's note. Rule 4.4 is similar to DR 2-110, DR 7-101, DR 7-102, DR 7-106, and DR 7-108 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 2-100, DR 7-101, and DR 7-102 have been included under Rule 1.2, cases construing DR 7-106 have been included under Rule 3.3, and cases construing DR 7-108 have been included under Rule 3.5.

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Benn, 858 P.2d 1385 (Colo. 1993).

REPEALED

RULE 4.5 — THREATENING PROSECUTION

(a) A lawyer shall not threaten to present criminal, administrative or disciplinary charges to obtain an advantage in a civil matter nor shall a lawyer present or participate in presenting criminal, administrative or disciplinary charges solely to obtain an advantage in a civil matter.

(b) It shall not be a violation of Rule 4.5 for a lawyer to notify another person in a civil matter that the lawyer reasonably believes that the other's conduct may violate criminal, administrative or disciplinary rules or statutes.

Source: Entire rule and comment amended and adopted June 19, 1997, effective July 1, 1997.

Editor's note: Committee comment is retained as it existed prior to 1997 amendments to this rule.

Comment

The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal, disciplinary and some administrative processes are designed for the protection of society as a whole. For

purposes of this rule, a civil matter is a controversy or potential controversy over rights and duties of two of more persons under the law whether or not an action has been commenced.

Threatening to use, or using the criminal, administrative or disciplinary process to coerce adjustment of private civil matters is a subversion of that process; further, the person against whom the criminal, administrative or disciplinary process is so misused may be deterred from asserting valid legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal, administrative or disciplinary process tends to diminish public confidence in our legal system.

The rule distinguishes between threats to bring criminal, administrative or disciplinary charges and the actual filing or presentation of such charges. Threats to file such charges are prohibited if a purpose is to obtain any advantage in a civil matter while the actual presentation of such charges is proscribed by this rule only if the sole purpose for presenting the charges is to obtain an advantage in a civil matter.

This distinction is appropriate because the abuse of the judicial process is at its greatest when a threat of filing charges is used as a lever to obtain an advantage in a collateral, civil proceeding. This leverage is either eliminated or greatly reduced when the charge actually is presented.

Moreover, this rule does not prohibit a lawyer from notifying another person involved in a civil matter that such person's conduct may violate criminal, administrative or disciplinary rules or statutes where the notifying lawyer reasonably believes that such a violation has taken place.

While it may be difficult in certain circumstances to distinguish between a notification and a threat, public policy is served by allowing a lawyer to notify another person of a perceived violation without subjecting the notifying lawyer to discipline. Many minor violations can be eliminated, rectified or minimized if there is frank dialogue among participants to a dispute.

Rule 4.5(b) provides a safe harbor for notifications of this type. Other factors that should be considered to differentiate threats from notifications in difficult cases include (a) an absence of any suggestion by the notifying lawyer that he or she could exert any improper influence over the criminal, administrative or disciplinary process, (b) consideration of whether any monetary recovery or other relief sought by the notifying lawyer is reasonably related to the harm suffered by the lawyer's clients. Where no such reasonable relationship exists, the communication likely will constitute a proscribed threat. For example, a lawyer violates Rule 4.5 when the lawyer threatens to file a charge or complaint of tax fraud against another party where issues of tax fraud have nothing to do with the dispute. It is not a violation of Rule 4.5 for a lawyer to notify another party that the other person's writing of an insufficient funds check may have criminal as well as civil ramifications in addition to an action for collection of the bad check.

Committee Comment

The Model Rules contain no counterpart to Disciplinary Rule 7-105(A). The Committee believes that the prohibition of DR 7-105(A) against threatening criminal prosecution in order to obtain an advantage in civil proceeding should be maintained. Proposed Rule 4.5 is adopted from California Rule of Professional Conduct 7-104. It broadly applies to threats of bringing and actually bringing administrative and disciplinary charges, as well as bringing criminal charges. Note that while threatening to bring criminal, administrative or disciplinary charges to obtain any advantage in a civil proceeding is a violation of Rule 4.5, the actual bringing of such charges is subject to discipline only if it is done solely to obtain an advantage in a civil matter.

The phrase "nor shall a lawyer present or participate in presenting . . . disciplinary charges solely to obtain an advantage in a civil matter" (emphasis added), arguably is inconsistent with the immunity accorded lawyers and others who file requests for investigation with the Colorado Supreme Court Grievance Committee. See C.R.Civ.P. 241.25(e) "All requests for investigation submitted to the Supreme Court, the Committee, the Committee Counsel, or the Disciplinary Counsel, and all complaints filed with the Committee, shall be absolutely privileged and no lawsuit may be predicated thereon." Nevertheless, the Committee determined that (1) immunity under C.R.Civ.P. 241.25(e) does not protect a lawyer from disciplinary proceedings for filing false complaints with the Grievance Committee; (2) similarly, violations of proposed Rule 4.5 based on improper grievance filings would not be immune from discipline under Rule 241.25(e); and (3) even if the immunity provisions could be construed so broadly, it is Rule 241.25(e) not proposed Rule 4.5 that should be changed.

The proposed Official Comment to Rule 4.5 is adapted from Ethical Consideration 7-21 of the current Colorado Code of Professional Responsibility.

Annotation

Law reviews. For article, "Policing the Legal System: The Duty to Report Misconduct", see 30 Colo. Law. 85 (September 2001). For article, "Settlement Ethics", see 30 Colo. Law. 53 (December 2001). For article, "Colo. RPC 4.5: The Ethical Prohibition Against Threatening Prosecution", see 35 Colo. Law. 99 (May 2006).

REPEALED

Annotator's note. Since Rule 4.5 is similar to DR 7-105 as it existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility, relevant cases construing that provision have been included in the annotations to this rule.

Threatening client with criminal prosecution to obtain attorney fees violates this rule. People v. Farrant, 852 P.2d 452 (Colo. 1993).

Attorney threatened to present disciplinary charges to obtain an advantage in a civil action where the attorney, in response to a legal malpractice action, threatened to file a grievance against the attorney filing the action unless the action was dismissed. People v. Gonzales, 922 P.2d 933 (Colo. 1996).

Applied in People v. Sigley, 951 P.2d 481 (Colo. 1998).

Cases Decided Under Former DR 7-105.

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Bannister, 814 P.2d 801 (Colo. 1991).

Applied in People ex rel. Gallagher v. Hertz, 198 Colo. 522, 608 P.2d 335 (1979).

REPEALED

LAW FIRMS AND ASSOCIATIONS

RULE 5.1 — RESPONSIBILITIES OF A PARTNER OR SUPERVISORY LAWYER

(a) A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

Paragraph (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and the shareholders in a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.

The measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition ordinarily might be sufficient. In a large firm, or in practice situations in which intensely difficult ethical problems frequently arise, more elaborate procedures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules.

Paragraph (c) (1) expresses a general principle of responsibility for acts of another. See also Rule 8.4 (a).

Paragraph (c) (2) defines the duty of a lawyer having direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has such supervisory authority in particular circumstances is a question of fact. Partners of a private firm have at least indirect responsibility for all work being done by the firm, while a partner in charge of a particular matter ordinarily has direct authority over other firm lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the

seriousness of the misconduct. The supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

Apart from this Rule and Rule 8.4 (a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

Annotation

Annotator's note. Rule 5.1 is similar to DR 1-102, DR 4-101, DR 7-107, and DR 7-108 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 1-102 have been included under Rule 3.1, cases construing DR 4-101 have been included Rule 1.6, cases construing DR 7-107 have been included under Rule 3.3, and cases construing DR 7-108 have been included under Rule 3.5.

RULE 5.2 — RESPONSIBILITIES OF A SUBORDINATE LAWYER

REPEALED

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Comment

Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position should be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and each is equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Annotation

Annotator's note. Rule 5.2 is similar to DR 1-102 as it existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing that provision have been included in the annotations to Rule 3.1.

The protection afforded by subsection (b) for a subordinate who acts in accordance with a supervisory lawyer's direction is not available to an attorney who failed to disclose his client's true identity in violation of Rule 3.3(b). However, a good-faith but unsuccessful attempt to bring an ethical problem to a superior's attention to receive guidance may be a mitigating factor in superior's determining punishment. People v. Casey, 948 P.2d 1014 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Bennett, 843 P.2d 1385 (Colo. 1993).

RULE 5.3 — RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Comment

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer should give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Committee Comment

The Committee concluded that public policy dictates that lawyers must be responsible for the acts of those they supervise. The lawyer's status as partner, associate, or otherwise has little or nothing to do with his or her professional responsibilities.

Annotation

Law review For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005). For article, "Investigative Tactics: They May Be Legal, But Are They Ethical?" see 35 Colo. Law. 43 (January 2006).

Annotator's note. Rule 5.3 is similar to DR 1-102, DR 4-101, DR 7-107, and DR 7-108 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 1-102 have been included under Rule 3.1, cases construing DR 4-101 have been included under Rule 3.3, and cases construing DR 7-108 have been included under Rule 5.5.

This rule does not apply to attorney special advocates. In re Redmond, ___ P.3d ___ (Colo. App. 2005).

RULE 5.4 — PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer; and

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(3) a lawyer who purchases the practice of a lawyer pursuant to the provisions of Rule 1.17 may, in the case of a deceased lawyer or one for which a legal guardian or representative has been appointed, pay such estate or representative the purchase price;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association, or limited liability company, authorized to practice law for a profit, except in accordance with C.R.C.P. 265 and any successor rule or action adopted by the Colorado Supreme Court.

Source: Entire rule amended and adopted June 12, 1997, effective July 1, 1997.

Editor's note: The 1997 amendments to this section added a new (a)(3) and renumbered the existing (a)(3) as (a)(4). No changes were made to the comment.

Comment

The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment on behalf of the lawyer's client. Moreover, since a lawyer should not aid or encourage a nonlawyer to practice law, the lawyer should not practice law or otherwise share legal fees with a nonlawyer. This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in the lawyer's firm or practice may not be paid to the lawyer's estate or specified persons such as the lawyer's spouse or heirs. In like manner, profit-sharing retirement plans of a lawyer or law firm which include nonlawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with nonlawyers are permissible since they do not aid or encourage nonlawyers to practice law. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c) such arrangements should not interfere with the lawyer's professional judgment on behalf of the lawyer's client. A lawyer should, however, make full disclosure of such arrangements to the client; and if the lawyer or client believes that the effectiveness of lawyer's representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of the client.

To assist a lawyer in preserving the lawyer's professional independence, a number of courses are available. For example, a lawyer may practice law in the form of a professional legal corporation, if in doing so the lawyer complies with all applicable rules of the Colorado Supreme Court. Although a lawyer may be employed by a business corporation with nonlawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of the lawyer's professional judgment from any nonlawyer. Various types of legal aid offices are administered by boards of directors composed of lawyers and nonlawyers. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client the lawyer serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between the lawyer and the organization and provides for the lawyer's independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain the lawyer's professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

As part of the legal profession's commitment to the principle that high quality legal services should be available to all, lawyers are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services. Participation should at all times be in accordance with the basic tenets of the profession independence, integrity, competence, and devotion to the interests of individual clients. A lawyer so participating should make certain that a relationship with a qualified legal assistance organization in no way interferes with the lawyer's independent, professional representation of the interests of the individual client. A lawyer should avoid situations in which officials of the organization who are not lawyers attempt to direct lawyers concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy are given undue weight in determining the lawyers employed by an organization or the legal services to be performed for the

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member or beneficiary rather than competence and quality of service. A lawyer interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess those factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standards of effort and competence.

Committee Comment

Subsections (a), (b), and (c) are virtually identical to DR 3-102(A), DR 3-103(A), and DR 5-107(B), respectively. Subsection (d) has been modified so that it now corresponds to DR 5-107(C).

Annotation

Annotator's note. Rule 5.4 is similar to DR 2-103 and DR 5-107 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 2-103 have been included under Rule 1.5 and cases construing DR 5-107 have been included under Rule 1.7.

Transferring various ownership interests to lawyer employees of firm who did not receive profits and were not managers warranted suspension of one year and a day. Suspension appropriate because attorney made misrepresentations and was dishonest in such transfers. People v. Reed, 942 P.2d 1204 (Colo.

Motion to dismiss should have been denied on the basis that a joint venture cannot shield itself from liability on the grounds that the joint venture was prohibited by this rule of professional conduct. Bebo Constr. Co. v. Mattox & O'Brien, 998 P.2d 475 (Colo. App. 2000).

An attorney's attempt to share legal fees with nonlawyers is professional misconduct. People v. Easley, 956 P.2d 1257 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules sufficient to justify suspension. People v. Easley, 956 P.2d 1257 (Colo. 1998).

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RULE 5.5 — UNAUTHORIZED PRACTICE OF LAW

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the Colorado bar in the performance of activity that constitutes the unauthorized practice of law.

Comment

The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (b) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in governmental agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

Committee Comment

The two subparts in this Rule are nearly identical to DR 3-101(B) and DR 3-101(A), respectively. Rule 5.3(b) replaces "nonlawyer" found in DR 3-101(A) with "person who is not a member of the Colorado bar." The latter phrase is better, especially since it should eliminate some of the confusion that now arises when lawyers who are licensed elsewhere relocate to Colorado and begin work, perhaps in a law firm as an associate, before gaining admission to the Colorado bar.

Annotation

Law reviews. For article, "Negotiations and the Unauthorized Practice of Law", see 23 Colo. Law. 361 (1994). For comment, "Increasing Access to Justice: Expanding the Role of Nonlawyers in the Delivery of Legal

Services to Low-Income Coloradans", see 72 U. Colo. L. Rev. 459 (2001). For article, "Avoiding the Unauthorized Practice of Law by Non-lawyer Assistants", see 32 Colo. Law. 27 (March 2003).

Annotator's note. Rule 5.5 is similar to DR 3-101 as it existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing that provision have been included in the annotations to this rule.

An attorney's appearance as counsel of record in numerous court proceedings following an order of suspension constituted conduct involving the unauthorized practice of law. People v. Kargol, 854 P.2d 1267 (Colo. 1993).

An attorney who is suspended for failure to comply with CLE requirements is barred from practicing law under this rule and C.R.C.P. 241.21 (d), the same as if the attorney had been suspended following a disciplinary proceeding. Continuing to practice law after such an administrative suspension warranted an additional 18-month suspension. People v. Johnson, 946 P.2d 469 (Colo. 1997).

Public censure justified where, although the attorney failed to notify opposing counsel and appeared in one hearing after imposition of the suspension, the attorney's involvement was minimal, it occurred only upon request by the client, it did not result in any harm to the client, and the attorney did not receive any benefit from the appearance. People v. Pittam, 917 P.2d 710 (Colo. 1996).

Public censure appropriate for practicing law while suspended where 90-day suspension ended four years before the unauthorized practice and where the attorney never applied for reinstatement. People v. Cain, 957 P.2d 346 (Colo. 1998).

Suspension of one year and one day warranted in light of the seriousness of attorney's misconduct in conjunction with his noncooperation in the disciplinary proceedings and his substantial experience in the practice of law. People v. Clark, 900 P.2d 129 (Colo. 1995).

Conduct violating this rule, in conjunction with other disciplinary rules sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, 938 P.2d 13[illegible] (Colo. [illegible]97).

Conduct violating this rule in conjunction with other rules of professional conduct is sufficient to justify public censure. People v. Newman, 925 P.2d 783 (Colo. 1996).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Johnson, 946 P.2d 469 (Colo. 1997).

Conduct violating this rule sufficient to justify disbarment where attorney continued to practice law when under suspension. People v. Redman, 903 P.2d 639 (Colo. 1995); People v. Ebbert, 925 P.2d 274 (Colo. 1996).

Counsel violated this rule by allowing his nonlawyer wife to conduct initial client interviews and to counsel clients concerning appropriate actions to take while in bankruptcy proceedings. This in conjunction with violation of other disciplinary rules was sufficient to justify disbarment. People v. Steinman, 930 P.2d 596 (Colo. 1997).

Conduct violating this rule in conjunction with other disciplinary rules sufficient to justify disbarment. People v. Steinman, 930 P.2d 596 (Colo. 1997); People v. Holmes, 955 P.2d 1012 (Colo. 1998); In re Hugen, 973 P.2d 1267 (Colo. 1999).

Cases Decided Under Former DR 3-101.

Law review. For article, "Potential Liability for Lawyers Employing Law Clerks", see 12 Colo. Law. 1243 (1983). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990).

License to practice law assures public that the lawyer who holds the license will perform basic legal tasks honestly and without undue delay, in accordance with the highest standards of professional conduct. People v. Dixon, 621 P.2d 322 (Colo. 1981).

Public expects appropriate discipline for professional misconduct. The public has a right to expect that one who engages in professional misconduct will be disciplined appropriately. People v. Dixon, 621 P.2d 322 (Colo. 1981).

Services of an attorney not licensed in Colorado are compensable as attorney fees where no court appearances made and the work performed consisted of obtaining a variance from a municipal zoning code. Catoe v. Knox, 709 P.2d 964 (Colo. App. 1985).

Consulting services performed by an out-of-state lawyer do not constitute unauthorized practice of law and therefore may be compensated as attorney fees. Dietrich Corp. v. King Resources Co., 596 F.2d 422 (10th Cir. 1979).

Evidence sufficient to justify one-year suspension. People ex rel. MacFarlane v. Boyls, 197 Colo. 242, 591 P.2d 1315 (1979).

Suspended attorney must demonstrate rehabilitation. The actions of a suspended attorney who took part in a complex real estate transaction and engaged in the practice of law by representing, counseling, advising, and

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assisting a former client warranted suspension until he demonstrates by clear and convincing evidence that (1) he has been rehabilitated; (2) he has complied with and will continue to comply with all applicable disciplinary orders and rules; and (3) he is competent and fit to practice law. People v. Belfor, 200 Colo. 44, 611 P.2d 979 (1980).

Permitting law clerk to render legal advice to clients constitutes aiding a nonlawyer in the unauthorized practice of law. People v. Felker, 770 P.2d 402 (Colo. 1989).

Lawyer's review of living trusts which were sold by nonlawyers constituted aiding a nonlawyer in the unauthorized practice of law. Although suspension is generally proscribed for this type of conduct, weighing factors in mitigation against the seriousness of the conduct, public censure is an appropriate sanction in this case. People v. Volk, 805 P.2d 1116 (Colo. 1991); People v. Laden, 893 P.2d 771 (Colo. 1995).

The counseling and sale of living trusts by nonlawyers constitutes the unauthorized practice of law. Lawyer's review of living trusts that were sold by nonlawyers constituted aiding a nonlawyer in the unauthorized practice of law. Six-month suspension held justified in this case because of aggravating factors including selfish motive, multiple offenses, and refusal to acknowledge the wrongful nature of such conduct. People v. Cassidy, 884 P.2d 309 (Colo. 1994).

Attorney's practice of law while on inactive status constituted unauthorized practice of law. People v. Cassidy, 884 P.2d 309 (Colo. 1994).

Attorney's continued practice of law while under an order of suspension, with [illegible]rts to wind up the legal practice, and the failure to take action to protect the legal interests of the attorney's [illegible]ents, wa[illegible]nts disbarment. People v. Wilson, 832 P.2d 943 (Colo. 1992).

Public censure justified where attorney failed to attend to bankruptcy [illegible]ceeding [illegible] sch[illegible]uled meetings, failed to timely file pleadings and responses, and allowed his paralegal to enga[illegible] in u[illegible]thorize[illegible] practice of law. People v. Fry, 875 P.2d 222 (Colo. 1994).

Attorney who continued to practice law while under suspension but d[illegible]n[illegible]arm any client was suspended. Attorney had been suspended from practice for three yea[illegible] when the cour[illegible] imposed an additional three-year suspension. People v. Ross, 873 P.2d 728 (Colo. 1994).

Conduct violating this rule sufficient to justify s[illegible]ion. Pe[illegible]. Macy, 789 P.2d 188 (Colo. 1990).

Continuing to practice law while suspended is co[illegible]uct [illegible]fying disbarment. People v. James, 731 P.2d 698 (Colo. 1987).

Conduct violating this rule in conju[illegible]on wi[illegible] oth[illegible] disciplinary rules is sufficient to justify disbarment. People v. Pilgrim, 802 P.2d 1084 (C[illegible]90); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Madigan, 938 P.2d 1162 (Colo. 1997).

Conduct violating this rul[illegible]ufficie[illegible] to ju[illegible] disbarment. People v. Bealmear, 655 P.2d 402 (Colo. 1982); People v. Rice, 728 P.2d 7[illegible]4 (C[illegible]86).

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RU[illegible]E 5.6 [illegible]RESTRICTIONS ON RIGHT TO PRACTICE

A lawyer s[illegible]ll not participate in offering or making:

(a) A partne[illegible]ship or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement or as permitted in Rule 1.17; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of a settlement of a controversy or suit.

Source: (a) and Comment amended and adopted June 12, 1997, effective July 1, 1997.

Comment

An agreement restricting the right of a lawyer to practice after leaving a firm not only limits the lawyer's professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm or restrictions included in the terms of a sale pursuant to Rule 1.17.

Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

Committee Comment

This Rule is substantially similar to DR 2-108, but it properly extends the proscriptions contained in the Disciplinary Rule to offers as well as actual agreements.

Annotation

Law reviews. For formal opinion of the Colorado Bar Association Ethics Committee on Practice Restrictions in Settlement Agreements, see 22 Colo. Law. 1673 (1993). For article, "Settlement Ethics", see 30 Colo. Law. 53 (December 2001).

PUBLIC SERVICE

RULE 6.1 — VOLUNTARY PRO BONO PUBLIC SERVICE

REPEALED

A lawyer should aspire to render at least fifty (50) hours of pro bono public legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the fifty (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide any additional legal or public service through:

(1) delivery of legal services at no fee or a substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Where circumstances or statutory or regulatory restrictions prohibit government and public sector lawyers or judges from performing the pro bono services outlined in paragraphs (a)(1) and (2), those individuals should fulfill their pro bono responsibility by performing services or participating in activities outlined in paragraph (b).

Source: Entire rule repealed and readopted November 2, 1999, effective January 1, 2000; Comment amended and effective November 23, 2005.

Comment

Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay. Indeed, the oath that Colorado lawyers take upon admittance to the Bar requires that a lawyer will never "reject, from any consideration personal to myself, the cause of the defenseless or oppressed." In some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means.

Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono under paragraph (a) if an anticipated fee is uncollected, but the award of statutory lawyers' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the extent that any hours of service remain unfulfilled, the lawyer may satisfy the remaining commitment in a variety of ways as set forth in paragraph (b).

Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. However, in special circumstances, such as death penalty cases and class action cases, it is appropriate to allow collective satisfaction by a law firm of the pro bono responsibility.

There may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

REPEALED

Model Code Comparison

There was no counterpart of this Rule in the Disciplinary Rules of the Model Code. EC 2-25 stated that the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . . Every lawyer, regardless of professional prominence or professional work load, should find time to participate in serving the disadvantaged." EC 8-9 stated that "[t]he advancement of our legal system is of vital importance in maintaining the rule of law . . . [and] lawyers should encourage, and should aid in making, needed changes and improvements." EC 8-3 stated that "[t]hose persons unable to pay for legal services should be provided needed services."

Recommended Model Pro Bono Policy for Colorado Licensed Attorneys and Law Firms

Preface. Providing pro bono legal services to indigent persons and organizations serving indigent persons is a core value of Colorado licensed attorneys enunciated in Colorado Rule of Professional Conduct 6.1. Adoption of a law firm pro bono policy will commit the firm to this professional value and assure attorneys of the firm that their pro bono work is valued in their advancement within the firm.

The Colorado Supreme Court has adopted the following recommended Model Pro Bono Policy that can be modified to meet the needs of individual law firms. References are made to provisions that may not apply in a small firm setting. Adoption of such a policy is entirely voluntary.

At the least, a pro bono policy would:

(1.) Clearly set forth an aspirational goal for attorneys, as well as the number of hours for which billable credit will be awarded for firms that operate on a billable hour system (the attached model policy uses the figure of at least 50 hours per attorney per year, which mirrors the aspirational goal set out in Rule 6.1 of the Colorado Rules of Professional Conduct);

(2.) Demonstrate that pro bono service will be positively considered in evaluation and compensation decisions; and

(3.) Include a description of the processes that will be used to match attorneys with projects and monitor pro bono service, including tracking pro bono hours spent by lawyers and others in the firm.

The Colorado Supreme Court will recognize those firms that make a strong commitment to pro bono work by adopting a policy that includes:

(1.) An annual goal of performing *50 hours of pro bono legal service by each Colorado licensed attorney in the firm*, pro-rated for part-time attorneys, primarily for indigent persons and/or organizations serving indigent persons consistent with the definition of pro bono services as set forth in the Colorado Supreme Court's Model Pro Bono Policy, and

(2.) A statement that the firm will value at *least 50 hours of such pro bono service* per year by each Colorado licensed attorney in the firm, for all purposes of attorney evaluation, advancement, and com[illegible]n in the firm *as the firm values compensated client representation*.

The Colorado Supreme Court will also recognize on an *annual basis* those Colo[illegible] law fi[illegible]s that voluntarily advise the Court by February 15 that their attorneys, *on average*, duri[illegible] the previ[illegible] cal[illegible]dar year, performed 50 hours of pro bono legal service, primarily for indigent persons o[illegible]rgani[illegible]ions se[illegible]ng indigent persons consistent with the definition of pro bono services as set forth in the Colorado Su[illegible]e Cou[illegible]'s Model Pro Bono Policy.

Recommended Model Pro Bono Policy
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REPEALED

I. Introduction

The firm recognizes that the legal community has a unique responsibility to ensure that all citizens have access to a fair and just legal system. In recognizing this responsibility, the firm encourages each of its attorneys to actively participate in some form of pro bono legal representation.

> This commitment mirrors the core principles enunciated in the Colorado Rules of Professional Conduct: A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest . . . A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service. (Preamble, Colorado Rules of Professional Conduct).

The firm understands there are various ways to provide pro bono legal services in our community. In selecting among the various pro bono opportunities, the firm encourages and expects that attorneys (both partners and associates or other designation) will devote a minimum of fifty (50) hours each year to pro bono legal services, or a proportional amount of pro bono hours by attorneys on alternative work schedules. In fulfilling this responsibility, firm attorneys should provide a substantial majority of the fifty (50) hours of pro bono legal services to (1) persons of limited means, or (2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means. (Colorado Rules of Professional Conduct 6.1). The firm strongly believes that this level of participation lets our attorneys make a meaningful contribution to our legal community, and provides important opportunities to further their professional development.

II. Firm Pro Bono Committee/Coordinator (see suggested change for small firms below)

The firm has established a Pro Bono Committee responsible for implementing and administering the firm's pro bono policies and procedures. The Pro Bono Committee consists of a representative group of attorneys of the firm. In addition, the firm has designated a Pro Bono Coordinator. The Pro Bono Committee/Pro Bono Coordinator has the following principal responsibilities:

1. Encouraging and supporting pro bono legal endeavors;
2. Reviewing, accepting and/or rejecting pro bono legal projects;
3. Coordinating and monitoring pro bono legal projects, ensuring, among other things, that appropriate assistance, supervision and resources are available;
4. Providing periodic reports on the firm's pro bono activities; and
5. Creating and maintaining a pro bono matter tracking system.

Attorneys are encouraged to seek out pro bono matters that are of interest to them.

****[Small firms may wish to designate only a Pro Bono Coordinator and can introduce the above paragraph as follows:** "The firm has designated a Pro Bono Coordinator responsible for implementing and administering the firm's pro bono policies and procedures" and then delete the next two sentences.]

III. Pro Bono Services Defined

The foremost objective of the firm pro bono policy is to provide legal services to indigent or near-indigent members of the community and the nonprofit organizations that assist them, in accordance with Rule 6.1 of the Colorado Rules of Professional Conduct. The firm recognizes there are a variety of ways in which the firm's attorneys and paralegals can provide pro bono legal services in the community. The following, while not intended to be an exhaustive list, reflects the types of pro bono legal services the firm credits in adopting this policy:

A. Representation of Low Income Persons. Representation of individuals who cannot afford legal services in civil or criminal matters of importance to a client;

B. Civil Rights and Public Rights Law. Representation or advocacy on behalf of individuals or organizations seeking to vindicate rights with broad societal implications (class action suits or suits involving constitutional or civil rights) where it is inappropriate to charge legal fees; and

C. Representation of Charitable Organizations. Representation or counseling to charitable, religious, civic, governmental, educational, or similar organizations in matters where the payment of standard legal fees would significantly diminish the resources of the organization, with an emphasis on service to organizations designed primarily to meet the needs of persons of limited income or improve the administration of justice.

D. Community Economic Development. Representation of or counseling to micro-entrepreneurs and businesses for community economic development purposes, recognizing that business development plays a critical role in low income community development and provides a vehicle to help low income individuals to escape poverty;

REPEALED

E. Administration of Justice in the Court System. Judicial assignments, whether as pro bono counsel, or a neutral arbiter, or other such assignment, which attorneys receive from courts on a mandatory basis by virtue of their membership in a trial bar;

F. Law-related Education. Legal education activities designed to assist individuals who are low-income, at risk, or vulnerable to particular legal concerns or designed to prevent social or civil injustice.

G. Mentoring of Law Students and Lawyers on Pro Bono Matters. Colorado Supreme Court Rule 260.8 provides that an attorney who acts as a mentor may earn two (2) units of general credit per completed matter in which he/she mentors a law student. An attorney who acts as a mentor may earn one (1) unit of general credit per completed matter in which he/she mentors another lawyer. However, mentors shall not be members of the same firm or in association with the lawyer providing representation to the indigent client.

Because the following activities, while meritorious, do not involve direct provision of legal services to the poor, the firm will not count them toward fulfillment of any attorney's, or the firm's, goal to provide pro bono legal services to indigent persons or to nonprofits that serve such persons' needs: participation in a non-legal capacity in a community or volunteer organization; services to non-profit organizations with sufficient funds to pay for legal services as part of their normal expenses; client development work; non-legal service on the board of directors of a community or volunteer organization; bar association activities; and non-billable legal work for family members, friends, or members or staff of the firm who are not eligible to be pro bono clients under the above crit[illegible].

IV. Firm Recognition of Pro Bono Service (see suggested change for small firms below).

A. Performance Review and Evaluation. The firm recognizes that the commitment to pro bono involves a personal expenditure of time. In acknowledgment of this commitment and to support firm goals, an attorney's efforts to meet this expectation will be considered by the firm in measuring various aspects of the attorney's performance, such as yearly evaluations and bonuses where applicable. An attorney's pro bono legal work will be subject to the same criteria of performance review and evaluation as those applied to client-billable work. As with all client work, there should be an emphasis on effective results for the client and the efficient and cost-effective use of firm resources.

B. Credit for Pro Bono Legal Work. The firm will give full credit for at least fifty (50) hours of pro bono legal services, and additional hours as approved by the Pro Bono Committee and/or Coordinator, in considering annual billable hour goals, bonuses and other evaluative criteria based on billable hours.

****[Small firms may wish to only include the following paragraph in lieu of the above provisions:** The firm recognizes that the commitment to pro bono involves a personal expenditure of time. In acknowledgment of this commitment and to support firm goals, volunteer pro bono service will be considered a positive factor in performance evaluations and compensation decisions and will be subject to the same criteria of performance review and evaluation as those applied to client-billable work. As with all client work, there should be an emphasis on effective results for the client and the efficient and cost-effective use of firm resources.]

V. Administration of Pro Bono Service (see suggested change for small firms below).

A. Approval of Pro Bono Matters. The Pro Bono Committee/Coordinator will review all proposed pro bono legal matters to ensure that:

1. There is no client or issue conflict or concern;
2. The legal issue raised is not frivolous or untenable;
3. The client does not have adequate funds to retain an attorney and
4. The matter is otherwise appropriate for pro bono representation.

All persons seeking approval of a pro bono project must: (1) submit a request identifying the client and other entity involved; (2) describe the nature of the work to be done; and (3) identify who will be working on the matter. Once the firm undertakes a pro bono matter, the matter is treated in the same manner as the firm's regular paying work.

B. Opening a Pro Bono Matter. It is the responsibility of the attorney seeking to provide pro bono legal services to complete the conflicts check and open a new matter in accordance with regular firm procedures.

C. Pro Bono Engagement Letter. After a matter has received initial firm approval, the principal attorney on a pro bono legal matter must send an engagement letter to the pro bono client. Typically, the engagement letter should be sent after the initial client meeting during which the nature and terms of the engagement are discussed.

D. Staffing of Pro Bono Matters. Pro bono legal matters are initially staffed on a voluntary basis. It may become necessary to assign additional attorneys to the matter if the initial staffing arrangements prove to be inadequate, and the firm reserves the right to make such assignments.

E. Supervision of Pro Bono Matters. As appropriate, a partner shall supervise any associate working on a pro bono legal matter and the supervising partner shall remain informed of the status of the matter to ensure its proper handling. In addition, it may be appropriate to use assistance or resources from outside the firm. The firm will assist attorneys in finding a supervisor if necessary.

REPEALED

F. Professional Liability Insurance. Attorneys may provide legal assistance through those pro bono organizations that provide professional liability insurance for their volunteers. The firm also carries professional liability insurance for its attorneys in instances where no coverage is available on a pro bono matter through a qualified legal aid organization. Before undertaking any pro bono legal commitments, the professional liability implications should be reviewed with the Pro Bono Committee or the Pro Bono Coordinator.

G. Paralegal Pro Bono Opportunities. Approved pro bono legal work for paralegals includes: (1) work taken on in conjunction with and under the supervision of an attorney working on a specific pro bono legal matter, or (2) work handled independently for an organization that provides pro bono legal opportunities, provided, however, that such participation does not create an attorney-client relationship and/or involve the paralegal's provision of legal advice.

H. Disbursements in Pro Bono Matters. The firm can and should bill and collect disbursements in pro bono legal matters where it is appropriate to do so based on the client's resources. The firm encourages attorneys to pursue petitions for the waiver of filing fees in civil matters (Chief Justice Directive 98-01) when applicable, and to use pro bono experts, court reporters, investigators and other vendors when available to minimize expenses in pro bono legal matters. The firm may advance or guarantee payment of incidental litigation expenses, provided the client agrees to be ultimately responsible for them. However, the firm may later forego repayment of such expenses if such repayment would cause the client substantial financial hardship. (Colo. Rule of Professional Conduct [illegible]) The Pro Bono Committee/Pro Bono Coordinator must approve in advance any expense of a non-routine or significant nature, such as expert fees or translation costs. The supervising partner in a pro bono legal matter should participate in decisions with respect to disbursements.

I. Attorney Fees in Pro Bono Matters. The firm encourages its attorneys to seek and obtain attorney fees in pro bono legal matters where possible. In the event of a recovery of attorney fees, the firm encourages the donation of these fees to an organized non-profit entity whose purpose is or includes the provision of pro bono representation to indigent or near-indigent persons.

J. Departing Attorneys. When an attorney handling a pro bono case leaves the firm, he or she should work with the Pro Bono Committee/Coordinator to (1) locate another attorney in the firm to take over the representation of the pro bono client, or (2) see if the referring organization can facilitate another placement.

****[Small firms may wish to title this section "Pro Bono Procedures" and include only the following paragraph in lieu of the above provisions:** All pro bono legal matters will be opened in accordance with regular firm procedures, including utilization of a conflicts check and a client engagement letter. Pro bono matters should be supervised by a partner, as appropriate. The firm encourages its attorneys to seek and obtain attorney fees in pro bono legal matters whenever possible.]

VI. CLE Credit for Pro Bono Work

Colorado Rule of Civil Procedure 260.8 provides that attorneys may be awarded up to nine (9) hours of CLE credit per three-year reporting period for (1) performing uncompensated pro bono legal representation on behalf of indigent or near indigent clients in a civil legal matter, or (2) mentoring another lawyer or law student providing such representation.

A. Amount of CLE Credit. Attorneys may earn one (1) CLE credit hour for every five (5) billable-equivalent hours of pro bono representation provided to the indigent client. An attorney who acts as a mentor may earn one (1) unit of general credit per completed matter in which he/she mentors another lawyer. Mentors shall not be members of the same firm or in association with the lawyer providing representation to the indigent client. An attorney who acts as a mentor may earn two (2) units of general credit per completed matter in which he/she mentors a law student.

B. How to Obtain CLE Credit. An attorney who seeks CLE credit under CRCP 260.8 for work on an eligible matter must submit the completed Form 8 to the assigning court, program or law school. The assigning entity must then report to the Colorado Board of Continuing Legal and Judicial Education its recommendation as to the number of general CLE credits the reporting pro bono attorney should receive.

Model Code Comparison

There was no counterpart of this Rule in the Disciplinary Rules of the Model Code. EC 2-25 stated that the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . . Every lawyer, regardless of professional prominence or professional work load, should find time to participate in serving the disadvantaged." EC 8-9 stated that "[t]he advancement of our legal system is of vital importance in maintaining the rule of law . . . [and] lawyers should encourage, and should aid in making, needed changes and improvements." EC 8-3 stated that "[t]hose persons unable to pay for legal services should be provided needed services."

REPEALED

Annotation

Law reviews. For article, "Like It or Not, Colorado Already Has 'Mandatory' Pro Bono", see 29 Colo. Law. 35 (April 2000).

RULE 6.2 — ACCEPTING APPOINTMENTS

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable and oppressive burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Comment

A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, sometimes qualified. All lawyers have a responsibility to assist in providing pro bono public service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular or repugnant clients or causes or persons unable to afford legal services.

Appointed Counsel

For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the lawyer-client relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust. On the other hand, good cause does not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, or the belief of the lawyer that the defendant in a criminal proceeding is guilty.

Committee Comment

Rule 6.2 is an outgrowth of the sentiment expressed in EC 2-29. To clarify a portion of the Comment under the heading "Appointed Counsel," the Committee added some of the language now contained in EC 2-29.

REPEALED

RULE 6.3 — MEMBERSHIP IN LEGAL SERVICES ORGANIZATION

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that lawyers provided by the organization serve persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of a lawyer provided by the organization whose interests are adverse to a client of the lawyer.

Comment

Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by

the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

It may be necessary in appropriate cases to reassure a client of a lawyer provided by the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

Committee Comment

Rule 6.3 is a clearer expression of some of the principles currently contained in Ethical Consideration 2-33 (now incorporated into the Comment under Rule 5.4) and DR 5-101(A). The language — "a lawyer provided by" — has been added to the ABA Model simply to make clear what otherwise has to be presumed, i.e., that it is the staff attorneys of the organization who provide the legal services to the clients who have come to the organization for assistance.

Annotation

Annotator's note. Rule 6.3 is similar to DR 5-101 as it existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing that provision have been included in the annotations to Rule 1.7.

RULE 6.4 — LAW REFORM ACTIVITIES AFFECTING CLIENT INTERESTS

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reforms may affect the interests of a client of the lawyer. When the lawyer knows or reasonably should know that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact to the organization but need not identify the client.

Comment

Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows or reasonably should know that a private client might be materially benefitted.

Committee Comment

In addition to the principles contained in Ethical Consideration 2-33 and DR 5-101(A), this Rule draws on the principles contained in DR 8-101.

Annotation

Annotator's note. Rule 6.4 is similar to DR 5-101 and DR 8-101 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 5-101 have been included under Rule 1.7 and cases construing DR 8-101 have been included under Rule 3.5.

REPEALED

INFORMATION ABOUT LEGAL SERVICES

RULE 7.1 — COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(3) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated;

(b) No lawyer shall, directly or indirectly, pay all or a part of the cost of communications concerning a lawyer's services by a lawyer not in the same firm unless the communication discloses the name and address of the non-advertising lawyer, the relationship between the advertising lawyer and the non-advertising lawyer, and whether the advertising lawyer may refer any case received through the advertisement to the non-advertising lawyer.

(c) Unsolicited communications concerning a lawyer's services mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery.

(d) Any communication that states or implies a client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs. This provision does not apply to communications that only state that contingent or percentage fee arrangements are available, or that only state the initial consultation is free.

(e) A lawyer shall not knowingly permit, encourage or assist in any way employees, agents or other persons to make communications on behalf of the lawyer or the law firm in violation of this rule or Rules 7.2 through 7.4.

(f) In connection with the sale of a private law practice under rule 1.17, an opinion of the purchasing lawyer's suitability and competence to represent existing clients shall not violate this rule if the lawyer complies with rule 1.17(d).

REPEALED

Source: (f) added and adopted June 12, 1997, effective July 1, 1997; entire rule and comment amended and adopted June 12, 1997, effective January 1, 1998.

Comment

This rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2 and solicitations governed by Rule 7.3.

The touchstone of this rule, as well as Rules 7.2 through 7.4, is that all communications regarding a lawyer's services must be truthful. Truthful communications regarding a lawyer's services provide a valuable public service and, in any event, are constitutionally protected. False and misleading statements regarding a lawyer's services do not serve any valid purpose and may be constitutionally proscribed.

It is not possible to catalog all types and variations of communications that are false or misleading. Nevertheless, certain types of statements recur and deserve special attention.

One of the basic covenants of a lawyer is that the lawyer is competent to handle those matters accepted by the lawyer. C.R.P.C. 1.1. It is therefore false and misleading for a lawyer to advertise for clients in a field of practice where the lawyer is not competent within the meaning of Rule 1.1.

Characterizations of a lawyer's fees such as "cut-rate", "lowest" and "cheap" are likely to be misleading if those statements cannot be factually substantiated. Similarly, characterizations regarding a lawyer's abilities or skills have the potential to be misleading where those characterizations cannot be factually substantiated. Equally problematic are factually unsubstantiated characterizations of the results that a lawyer has in the past obtained. Such

statements often imply that the lawyer will be able to obtain the same or similar results in the future. This type of statement, due to the inevitable factual and legal differences between different representations, is likely to mislead prospective clients.

Statements that a law firm has a vast number of years of experience, by aggregating the experience of all members of the firm, provide little meaningful information to prospective clients and have the potential to be misleading.

Statements such as "no recovery, no fee" are misleading if they do not additionally mention that a client may be obligated to pay costs of the lawsuit. Any communication that states or implies the client does not have to pay a fee if there is no recovery shall also disclose that the client may be liable for costs.

Finally, Rule 7.1(c) proscribes unsolicited communications sent by restricted means of delivery. It is misleading and an invasion of the recipient's privacy for a lawyer to send advertising information to a prospective client by registered mail or other forms of restricted delivery. Such modes falsely imply a degree of exigence or importance that is unjustified under the circumstances.

Annotation

Annotator's note. Rule 7.1 is similar to DR 2-101, DR 2-102, and DR 9-101 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 2-101 and DR 2-102 have been included in the annotations to this rule. Cases construing DR 9-101 have been included under Rule 1.2.

The relevant portions of the Colorado Consumer Protection Act are not inconsistent with the prohibition on misleading communications in C.R.P.C. 7.1. Attorney conduct that constitutes deceptive or unfair trade practices is not in compliance with the rules of professional conduct and is not exempted from CPA liability. Crowe v. Tull, 126 P.3d 196 (Colo. 2006).

Lawyer advertisement containing false, misleading, deceptive, or unfair statements in violation of the rule warrants public, rather than private, censure. Respondent terminated referral service being advertised after the initial request for investigation was filed and cooperated in disciplinary proceedings but had received a past letter of admonition and had substantial experience in the practice of law. Respondent's conduct involved dishonesty and misrepresentation and, in conjunction with prior discipline, warranted a public sanction. People v. Carpenter, 893 P.2d 777 (Colo. 1995).

Cases Decided Under Former DR 2-101.

Law reviews. For comment, "A Consumer Rights Interpretation of the First Amendment Ends Bans on Legal Advertising", see 55 Den. L.J. 103 (1978). For article, "Lawyer Advertising", see 15 Colo. Law. 1819 (1986). For article, "Marketing Your Practice", see 16 Colo. Law. 259 (1987). For article, "Reading Beyond the Labels: Effective Regulation of Lawyers' Targeted Direct Mail Advertising", see 58 U. Colo. L. Rev. 255 (1987). For formal opinion of the Colorado Bar Association Ethics Committee on Lawyer Advertising, Solicitation and Publicity, see 19 Colo. Law. 25 (1990). For comment, "After Shapero v. Kentucky Bar Association: Much Remains Unresolved About the Allowable Limits of Restrictions on Attorney Advertising", see 61 U. Colo. L. Rev. 115 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Collaboration with Non-Lawyers in the Preparation and Marketing of Estate Planning Documents, see 19 Colo. Law. 1793 (1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Smith, 830 P.2d 1003 (Colo. 1992).

Conduct violating this rule sufficient to justify suspension. People v. Roehl, 655 P.2d 1381 (Colo. 1983).

Cases Decided Under Former DR 2-102.

Law reviews. For formal opinion of the Colorado Bar Association Ethics Committee on Lawyer Advertising, Solicitation and Publicity, see 19 Colo. Law. 25 (1990). For formal opinion of the Colorado Bar Association Ethics Committee on Listing Support Personnel Names on Letterhead and Business Cards, see 19 Colo. Law. 629 (1990).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Smith, 830 P.2d 1003 (Colo. 1992).

REPEALED

RULE 7.2 — ADVERTISING

(a) A lawyer may advertise a lawyer's services or fees through any public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or

television, electronic media or through written or recorded communication including those governed by Rule 7.3, to prospective clients, consumers or the public at large. Such communications shall be referred to as "advertisements."

(b) A copy or recording of an advertisement shall be kept by the lawyer for four years after its last dissemination along with a record of when and where it was used.

(c) 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 advertisements permitted by this rule;

(2) Pay the usual charges of a not-for-profit lawyer referral service or legal service organization; and

(3) Pay for a law practice in accordance with Rule 1.17.

(d) Any advertisement made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

(e) All advertisements governed by this rule shall also comply with the requirements of Rules 7.1 and 7.4.

Source: (c)(1), (2), and (3) amended and adopted June 12, 1997, effective July 1, 1997; entire rule and comment amended and adopted June 12, 1997, effective January 1, 1998.

Comment

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer

A lawyer is allowed to pay for advertising permitted by the Rule, and for the purchase of a law practice in accordance with the provisions of Rule 1.17, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

Editor's note: The only change to this comment as a result of the 1997 amendments are in the last paragraph.

REPEALED

Annotation

Annotator's note. Rule 7.2 is similar to DR 2-101, DR 2-102, and DR 2-103 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 2-101 and DR 2-102 have been included in the annotations to Rule 7.1. Cases construing DR 2-103 have been included under Rule 1.5.

Public censure was appropriate where attorney continued to advertise with an unapproved, for-profit attorney referral service and where attorney had previously been disciplined with regard to use of client funds and was on suspension at the time of censure. People v. Mason, 938 P.2d 133 (Colo. 1997).

RULE 7.3 — DIRECT CONTACT WITH PROSPECTIVE CLIENTS

REPEALED

(a) A lawyer shall not either in-person or by live telephone contact, solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship where a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person or telephone 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 provision 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 Rule 7.1, Rule 7.2 and the following:

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

(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.

(3) No such communication shall be made to resemble legal pleadings or other legal documents.

(4) Any such written or recorded communication shall 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.

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

(d) Every written, recorded or electronic communication governed by this Rule 7.3 shall include the words "this is an advertisement" in a form that is clear and conspicuous on the outside of the envelope, if any, and at the beginning and end of any written, recorded or electronic communication.

Comment

There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in

the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

This potential for abuse inherent in direct in-person or live telephone solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written and recorded communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written and recorded communications which may be mailed or auto dialed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person or telephone persuasion that may overwhelm the client's judgment.

The use of general advertising and written and recorded communications to transmit information from lawyer to prospective client, rather than direct in-person or live telephone contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person or live telephone conversations between a lawyer to a prospective client can be disputed and are not subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations.

But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(b).

This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insured, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

The requirement that certain communications be marked "This Is An Advertisement" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

REPEALED

Source: Entire rule and comment amended and adopted and committee comment deleted by amendment June 12, 1997, effective January 1, 1998.

Annotation

Annotator's note. Rule 7.3 is similar to DR 2-101, DR 2-103, and DR 2-104 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 2-101 have been included under Rule 7.1, cases construing DR 2-103 have been included under Rule 1.5, and cases construing DR 2-104 have been included under Rule 1.16.

RULE 7.4 — COMMUNICATION OF FIELD OF PRACTICE

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may state or imply that the lawyer is a specialist in accordance with Rule 7.1.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in admiralty practice may use the designation "Admiralty", "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer may permit his or her name to be listed by a lawyer referral service in specific fields of law in which the lawyer will accept referrals.

(e) A lawyer available to act as a consultant to or as an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers and publish in legal journals an announcement of such availability. The announcement may state that the lawyer is a specialist, in accordance with Rule 7.1.

(f) In any advertisement in which a lawyer affirmatively claims to be certified in any area of the law, such advertisement shall contain the following disclosure: "Colorado does not certify attorneys as specialists in any field." This disclaimer is not required where the information concerning the lawyer's services is contained in a law list, law directory or a publication intended primarily for use of the legal profession.

(g) A lawyer purchasing a private law practice under Rule 1.17 may allow the lawyer's qualifications to be described by the lawyer selling the private law practice.

Source: (g) added and adopted June 12, 1997, effective July 1, 1997; entire rule and comment amended and adopted and committee comment deleted June 12, 1997, effective January 1, 199

REPEALED

Comment

This Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services, for example, in a telephone directory or other advertising. If the lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted to so indicate.

Recognition and specialization in patent matters is a matter of long established policy of the Patent and Trademark Office. Designation of admiralty practice has a long historical tradition associated with maritime commerce and federal courts.

In some instances, a lawyer confines his or her practice to a particular field of law. A lawyer may indicate in permitted advertising, if it is factual, limitation of the practice in one or more particular areas or fields of law in which the lawyer practices.

The legal profession has developed referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of the lawyer referral system enables a lay person to avoid uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved.

Rule 7.4 requires disclosures when attorneys claim to be certified in a particular area of law. This rule recognizes the fact that Colorado does not certify lawyers in any field of practice and seeks to protect the public from the impression that a lawyer's claimed expertise signifies the lawyer has proven such claimed expertise through any type of Colorado certification process. It should additionally be noted that the rule requires compliance with Rule 7.1, and thereby Rule 1.1, in reference to a lawyer's claim of expertise or limitation of practice to particular fields of law. Therefore, a lawyer is prohibited from claiming expertise or emphasis in a field of law unless the lawyer has or develops the legal knowledge, skill, thoroughness and preparation reasonably necessary for representation of clients in that field of law.

A claim of certification contained in a lawyer's letterhead does not require the disclaimer in Rule 7.4(f) unless the letterhead is used in an advertisement.

Annotation

Annotator's note. Rule 7.4 is similar to DR 2-101, DR 2-102, and DR 2-105 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 2-105 have been included in the annotations to this rule. Cases construing DR 2-101 and DR 2-102 have been included under Rule 7.1.

Cases Decided Under Former DR 2-105.

Law reviews. For formal opinion of the Colorado Bar Association Ethics Committee on Lawyer Advertising, Solicitation and Publicity, see 19 Colo. Law. 25 (1990).

RULE 7.5 — FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use or participate in the use of a firm name, letterhead, professional card, office sign, telephone directory listing, law list, legal directory listing, or other professional designation that violates Rule 7.1.

(b) A lawyer in private practice shall not practice under a tradename, a name that is misleading as to the identity of the lawyer or lawyers practicing under such a name, or firm name containing names other than those of one or more of the lawyers in the firm; provided, the name of a professional corporation or professional association may contain "P.C.", "L.L.C.", "L.L.P.", "P.A." or similar symbols indicating the nature of the organization, and a legal clinic which meets all of the criteria of a legal clinic as defined by these rules may use "legal clinic" in its name.

(c) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations of those not licensed to practice in the jurisdiction where the office is located.

(d) A firm may use, or continue to include in its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.

(e) The name of a lawyer holding a public office shall not be used in the name of a law firm or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(f) Lawyers may state or imply that they practice in a partnership or other organization only when that is a fact.

Source: (b) amended October 17, 1996, effective January 1, 1997.

Comment

The firm may be designated by the names of all or some of its members or by the names of deceased members where there has been a continuing succession in the firm's identity. It may be observed that any name including the name of a deceased partner is, strictly speaking, a tradename. The use of such names to designate law firms is proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

With regard to paragraph (f), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, "Smith & Jones", for that title suggests partnership in the practice of law.

A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his or her name to remain in the name of the firm if the lawyer actively continues to practice law as a member of the firm. Otherwise, the name should be removed from the firm name, and the lawyer should not be identified as a past or present member of the firm. In addition, the lawyer should not hold himself or herself out as a practicing lawyer.

In order to avoid the possibility of misleading persons with whom the lawyer deals, a lawyer should be scrupulous in the representation of his or her professional status. The lawyer should not hold himself or herself out as being a partner or associate of a law firm if the lawyer is not one in fact, and thus should not hold himself or herself out as a partner or associate if the lawyer only shares office space with another lawyer.

Committee Comment

The Committee decided not to adopt the provision in ABA proposed Model Rule 7.5 which permits lawyers to practice under a tradename. The Committee determined that it would be misleading to the public if any attorney practiced under a tradename. Firms develop "a persona" which becomes known to the public, which might not be known if lawyers practiced under a tradename. The Committee incorporated portions of DR2-102(B) into Model Rule 7.5, paragraph (b) and (c). The Committee also believes that incorporating EC2-12 and EC2-13 into the Comments is helpful in providing guidance to practicing lawyers.

Annotation

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Reed, 955 P.2d 65 (Colo. 1998).

REPEALED

MAINTAINING THE INTEGRITY OF THE PROFESSION

RULE 8.1 — BAR ADMISSION AND DISCIPLINARY MATTERS

An applicant for admission or reinstatement to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary or reinstatement matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond reasonably to a lawful demand for information from an admission or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6 or prohibit a good faith challenge to the demand for such information.

Comment

The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. This Rule also requires affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.

Committee Comment

The Committee added reinstatement to the scope of proceedings to which this rule is applicable. The Committee also added language clarifying that the provisions of subparagraph (b) are not intended to prohibit a good faith challenge to requests for information.

Annotation

Annotator's note. Rule 8.1 is similar to DR 1-101 and DR 1-102 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 1-101 have been included in the annotations to this rule. Cases construing DR 1-102 have been included under Rule 3.1.

Recklessly making a false statement of material fact in a disciplinary matter, in conjunction with violation of other disciplinary rules, sufficient to justify suspension. People v. Porter, 980 P.2d 536 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. In re Demaray, 8 P.3d 427 (Colo. 1999).

Cases Decided Under Former DR 1-101.

Law reviews. For article, "Update on Ethics and Malpractice Avoidance in Family Law — Part I", see 19 Colo. Law. 465 (1990). For article, "Update on Ethics and Malpractice Avoidance in Family Law — Part II", see 19 Colo. Law. 647 (1990).

Submission of false transcript to obtain admission to law school and to qualify for admission as a member of the bar is a violation of this rule and requires that respondent's admission to the bar be voided. People v. Culpepper, 645 P.2d 5 (Colo. 1982).

Failure to disclose a misdemeanor conviction in another state when applying for the bar and subsequent disbarment from the other state constitutes conduct involving fraud, deceit, and misrepresentation prejudicial to the administration of justice. People v. Mattox, 639 P.2d 397 (Colo. 1982).

REPEALED

Bar reinstatement requires demonstration of possession of moral and professional qualifications. Where a state attorney had been convicted of failing to file his federal income tax return and making false representations to a special agent of the Internal Revenue Service regarding the filing of income tax returns, and where the attorney was later found to have made a false statement in his application to the Arizona State Bar by answering in the negative an inquiry as to whether he had ever been questioned regarding the violation of any law, he was suspended from the practice of law in Colorado for three years, and was required to demonstrate upon application for reinstatement that he possessed moral and professional qualifications for admission to the bar of this state. People v. Gifford, 199 Colo. 205, 610 P.2d 485 (1980).

Public censure appropriate where attorney acted recklessly in failing to disclose prior investigations for alleged criminal conduct on his application to the bar, but where attorney had practiced law in Colorado for five years without any other discipline and had cooperated in the disciplinary proceedings. People v. North, 964 P.2d 510 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Mannix, 936 P.2d 1285 (Colo. 1997).

RULE 8.2 — JUDICIAL AND LEGAL OFFICIALS

REPEALED

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election, appointment or retention in judicial or legal office.

(b) A lawyer who is a candidate for retention to judicial office shall comply with the applicable provisions of the code of judicial conduct.

Comment

Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial offices and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Committee Comment

The Committee notes that applicable provisions of the Colorado Code of Judicial Conduct also apply to the process for selecting and retaining judges.

Annotation

Annotator's note. Rule 8.2 is similar to DR 8-102 as it existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing that provision have been included in the annotations to this rule.

Respondent's motion to recuse was not supported by an affidavit as required by C.R.C.P. 97, thus the statements made therein were made with reckless disregard as to their truth or falsity. People v. Thomas, 925 P.2d 1081 (Colo. 1996).

Cases Decided Under Former DR 8-102.

Falsely accusing judicial officers and others of conspiracy warranted disbarment where respondent violated other disciplinary rules and had been previously suspended for similar conduct. People v. Bottinelli, 926 P.2d 553 (Colo. 1996).

Disbarment warranted where attorney filed false pleadings and disciplinary complaints, disclosed information concerning the filing of the disciplinary complaints, offered to withdraw a disciplinary complaint filed

against a judge in exchange for a favorable ruling, failed to serve copies of pleadings on opposing counsel, revealed client confidences and material considered derogatory and harmful to the client aggravated by a repeated failure to cooperate with the investigation of misconduct, disruption of disciplinary proceedings, and a record of prior discipline. People v. Bannister, 814 P.2d 801 (Colo. 1991).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Bannister, 814 P.2d 801 (Colo. 1991).

Applied in People v. Harfmann, 638 P.2d 745 (Colo. 1981).

RULE 8.3 — REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of a lawyers' peer assistance program that has been approved by the Colorado Supreme Court initially or upon renewal, to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege.

Source: Entire rule amended and adopted June 19, 2003, effective July 1, 2003.

Comment

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforcable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers' or judges' assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek treatment through such programs. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. The Rule therefore exempts the lawyer from the reporting requirements of paragraphs (a) and (b) with respect to information that would be privileged if the relationship between the impaired lawyer or judge and the recipient of the information were that of a client and a lawyer. On the other hand, a lawyer who receives such information would nevertheless be required to comply with the Rule 8.3 reporting provisions to report misconduct if

REPEALED

the impaired lawyer or judge indicates an intent to engage in illegal activity, for example, the conversion of client funds to his or her use.

Committee Comment

In recommending this rule, the Committee adopted the definition of knowledge contained in Restatement of Restitution, 10, Comment (d)(1937), similarly adopted in Colorado Bar Association Ethics Committee Opinion 64 (April 23, 1983) "Knowledge means no substantial doubt."

Annotation

Law reviews. For article, "Policing the Legal System: The Duty to Report Misconduct", see 30 Colo. Law. 85 (September 2001).

RULE 8.4 — MISCONDUCT

REPEALED

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 act 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 judge, judicial officer, government agency or official;

(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 which violates accepted standards of legal ethics; or

(h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

Source: Committee comment amended October 17, 1996, effective January 1, 1997.

Comment

Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

Committee Comment

The Committee added the proscriptions contained in C.R.Civ.P. 241.6 and DR 1-102(a)(6) of the Code.

Sexual relationships between a lawyer and a client raise many issues regarding a lawyer's professional conduct. For example, in *People v. Good*, 893 P.2d 101 (Colo. 1995), The Colorado Supreme Court held that because

of the risks inherent in a sexual relationship between a lawyer and a client, such a relationship or even suggestions of such a relationship will almost always violate Rule 8.4(h). *See also People v. Bergner*, 873 P.2d 726 (Colo. 1994).

Annotation

Law reviews. For article, "Settlement Ethics", see 30 Colo. Law. 53 (December 2001). For article, "Improper Recording of an Attorney's Charging Lien", see 32 Colo. Law. 61 (February 2003). For article, "Discipline Against Lawyers for Conduct Outside the Practice of Law", see 32 Colo. Law. 75 (April 2003). For article, "Enforcing Civility: The Rules of Professional Conduct in Deposition Settings", see 33 Colo. Law. 75 (March 2004). For article, "Metadata: Hidden Information Microsoft Word Documents Its Ethical Implications", see 33 Colo. Law. 53 (October 2004). For comment, "Should a Lawyer Ever Be Allowed to Lie? People v. Pautler and a Proposed Duress Exception", see 75 U. Colo. L. Rev. 301 (2004). For article, "The Duty of Loyalty and Preparations to Compete", see 34 Colo. Law. 67 (November 2005). For article, "Investigative Tactics: They May Be Legal, But Are They Ethical?", see 35 Colo. Law. 43 (January 2006).

Annotator's note. Rule 8.4 is similar to DR 1-102, DR 2-101, DR 2-103, DR 3-101, DR 7-102, DR 8-101, and DR 9-101 as they existed prior to the 1992 repeal and reenactment of the Code of Professional Responsibility. Relevant cases construing DR 1-102 have been included under Rule 3.1, cases construing DR 2-101 have been included under Rule 7.1, cases construing DR 2-103 have been included under Rule 1.5, cases construing DR 3-101 have been included under Rule 5.5, cases construing DR 8-101 have been included under Rule 3.5, and cases construing DR 7-102 and DR 9-101 have been included under Rule 1.2.

Attorney's refusal to return documents belonging to client's parent and assertion of retaining lien constitute conduct which is prejudicial to the administration of justice. People v. Brown, 840 P.2d 1085 (Colo. 1992).

Lawyer violated paragraph (c) when he represented loan documents be investment agreements to circumvent a provision in the Colorado Liquor Code that restricts the cross-ownership of businesses holding liquor licenses. In re Lopez, 980 P.2d 983 (Colo. 1999).

Failure of former district attorney to make ordered child support payments constitutes conduct prejudicial to the administration of justice and conduct that adversely reflects on a lawyer's fitness to practice law. People v. Primavera, 904 P.2d 883 (Colo. 1995).

Attorney who conditioned settlement agreement on plaintiffs not pursuing a grievance against him violated paragraph (d) and constituted conduct prejudicial to the administration of justice. In re Lopez, 980 P.2d 983 (Colo. 1999).

Attorney signing substitute client's name to pleadings in a style different from his own signature, without authority to sign in a representative capacity and without any indication that he was signing in a representative capacity, violated this rule and warranted a six-month suspension. People v. Reed, 955 P.2d 65 (Colo. 1998).

A noble motive does not justify departure from any rule of professional conduct. A prosecutor trying to protect public safety is not immune from the rule of professional conduct when he or she chooses deception as means for protecting public safety. In re Pautler, 47 P.3d 1175 (Colo. 2002).

There is no requirement that harm, duress, or choice of evils exception or defense for a prosecutor to the rules of professional conduct. In re Pautler, 47 P.3d 1175 (Colo. 2002).

Suspension appropriate where prosecutor engaged in intentional deception in order to secure a suspect's arrest. The prosecutor's conduct violated the public and professional trust, was intentional, created potential harm, and involved aggravating factors, thus, justifying suspension. In re Pautler, 47 P.3d 1175 (Colo. 2002).

When considering discipline of attorneys who criticize judges, the New York Times standard should be applied because of the interests in protecting attorney speech critical of judges. Under the New York Times standard (New York Times Co. v. Sullivan, 376 U.S. 254 (1964)), a two-part inquiry applies in determining whether an attorney may be disciplined for statements criticizing a judge: (1) Whether the disciplinary authority has proven that the statement was a false statement of fact (or a statement of opinion that necessarily implies an undisclosed false assertion of fact); and (2) assuming the statement is false, whether the attorney uttered the statement with actual malice--that is, with knowledge that it was false or with reckless disregard as to its truth. In re Green, 11 P.3d 1078 (Colo. 2000).

Public censure was appropriate for attorney who violated this rule by simultaneously representing, as defendants in a quantum meruit and lis pendens suit initiated by a subcontractor, the homeowners, the general contractor, the bank holding deed of trust on homeowners property, and two other parties who had contracted with contractor. Balancing the seriousness of the misconduct with the factors in mitigation, and taking into account the respondent's mental state when he entered into the conflicts in representation, public censure is appropriate. People v. Fritze, 926 P.2d 574 (Colo. 1996).

Public censure warranted where, although respondent did not notify his clients and opposing counsel of his suspension, he did notify the court early in proceedings, did not go forward with court proceedings while on suspension and no actual harm was demonstrated to any of his clients. People v. Dover, 944 P.2d 80 (Colo. 1997).

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Stipulated agreement and recommendation of public censure with certain conditions and monitoring based upon conditional admission of misconduct were warranted for attorney who required that his associates sign a covenant that hindered a client's right to choose his or her own lawyer by interfering with the client's right to discharge his or her lawyer at any time, with or without cause. People v. Wilson, 953 P.2d 1292 (Colo. 1998).

Public censure was appropriate where attorney falsely testified that he had automobile insurance at the time of an accident, but outcome of case was not thereby affected. People v. Small, 962 P.2d 258 (Colo. 1998).

Knowingly deceiving a client by altering a settlement check generally would warrant a 30-day suspension, however, because the client was uninjured by the deception and the respondent had no previous discipline in 13 years of practice, public censure was adequate. People v. Waitkus, 962 P.2d 977 (Colo. 1998).

One-year and one-day suspension warranted where respondent failed to serve a cross-claim, failed to respond to several motions, failed to keep client informed, advanced defense that was not warranted by the facts and existing law, and misrepresented to client the basis for the judgment in favor of the opposing party. People v. Genchi, 849 P.2d 28 (Colo. 1993).

Six-month penalty justified for attorney pleading guilty to making and altering a false and forged prescription for a controlled substance and of criminal attempt to obtain a controlled substance by forgery and alteration, where mitigating factors included: (1) No prior disciplinary history; (2) personal or emotional problems at time of misconduct; (3) full and free disclosure by attorney to grievance committee; (4) imp[illegible]of other penalties and sanctions resulting from criminal proceeding; (5) demonstration of genuine remorse[illegible]d (6) re[illegible]ve inexperience in the practice of law. People v. Moore, 849 P.2d 40 (Colo. 1993).

Six-month suspension appropriate for respondent convicted of dru[illegible]en drivin[illegible]offe[illegible] and assault. People v. Shipman, 943 P.2d 458 (Colo. 1997); People v. Reaves, 943 P.2d 46[illegible]olo[illegible]97).

Multiple criminal and traffic convictions demonstrate a pattern of [illegible]conduct and the presence of multiple offenses warrants suspension for six months with the requirement of reinst[illegible]m[illegible] proceedings. People v. Van Buskirk, 962 P.2d 975 (Colo. 1998).

Demonstration of four conditions required for attorney pu[illegible]ly cer[illegible]red after conviction of driving while ability impaired: Continue psychotherapy, remain on [illegible]e, sub[illegible]onthly reports regarding progress on antabuse, and execute written authorization to therapist to rele[illegible]e m[illegible]l information regarding status on antabuse. People v. Rotenberg, 911 P.2d 642 (Colo. 1996).

Thirty-day suspension warranted w[illegible]e lawy[illegible]; wh[illegible]epresented an individual accused of first-degree murder, communicated with co-defendant who a[illegible]charged with first-degree murder and whose interests were adverse to the lawyer's client, without th[illegible]ledg[illegible]r co[illegible]nt of the co-defendant's lawyers. The potential for harm was high in a first-degree murder cas[illegible]d the [illegible]mber[illegible]nauthorized contacts demonstrated more than negligence on the lawyer's part. People v. DeLo[illegible]h, 9[illegible]P[illegible]522 (Colo. 1997).

Stipulated agreem[illegible]and reco[illegible]mendation of suspension for 30 days based upon conditional admission of misconduct were warra[illegible]d for[illegible]orney [illegible]o committed unfair insurance claim settlement practices and tortious conduct in handling insuranc[illegible]estigati[illegible]of fire claim that he was not competent to handle. People v. McClung, 953 P.2d 1282 (Colo. 1[illegible]).

Forty-[illegible]e-day [illegible]uspensi[illegible]warranted for attorney's professional misconduct involving the improper collection of attor[illegible]fees [illegible]instances. People v. Peters, 849 P.2d 51 (Colo. 1993).

Suspension [illegible]three months is appropriate when attorney engaged in sexual intercourse with dissolution of marriage client on one [illegible]asion, had a history of disciplinary sanctions, but cooperated with the disciplinary investigation. People v. Barr, 929 P.2d 1325 (Colo. 1996).

Suspension for one year and one day appropriate where attorney, among other disciplinary rule violations, violated paragraph (d) by failing to pay attorney fees until two years after a malpractice action against the attorney and paragraph (h) by engaging in two non-sufficient funds transactions involving his "special" account, and twenty-two non-sufficient funds transactions in his personal account. People v. Johnson, 944 P.2d 524 (Colo. 1997).

Suspension for one year and one day appropriate where attorney had a selfish or dishonest motive in retaining fees he received from clients that rightfully belonged to his law firm, but had no prior disciplinary record and made a timely good faith effort to provide restitution. People v. Bronstein, 964 P.2d 514 (Colo. 1998) (overruled in In the Matter of Thompson, 991 P.2d 820 (Colo. 1999)).

Suspension for one year and one day warranted where attorney violated paragraph (c) by knowingly submitting a false statement to the small business administration for the purpose of obtaining a loan. People v. Mitchell, 969 P.2d 662 (Colo. 1998).

Suspension of one year and one day appropriate where attorney committed offense of third-degree sexual assault on a client and recklessly accused a lawyer and judge of having an improper ex parte communication. In re Egbune, 971 P.2d 1065 (Colo. 1999).

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Two-year suspension warranted when attorney entered Alford plea to defer judgment on a charge of soliciting for child prostitution. People v. Gritchen, 908 P.2d 70 (Colo. 1995).

Driving while under the influence of alcohol with an expired driver's license and no proof of insurance, and accepting one ounce of cocaine as payment for legal services from a person believed to be a client facing drug charges, warranted a three-year suspension. People v. Madrid, 967 P.2d 627 (Colo. 1998).

Suspension for three years was appropriate in case involving violation of this rule and others, together with attorney's breach of his duty as client's trustee to protect his client, who was a particularly vulnerable victim that was recuperating from a serious head injury. People v. DeRose, 945 P.2d 412 (Colo. 1997).

Suspension of three years was appropriate for attorney who drove a vehicle on at least four occasions after his driver's license was revoked and who also failed to appear in two cases involving his illegal driving. People v. Hughes, 966 P.2d 1055 (Colo. 1998).

Suspension for one year and one day warranted where attorney failed to appear in county court on a charge of driving under the influence. People v. Myers, 969 P.2d 701 (Colo. 1998).

A long period of suspension, rather than disbarment, is warranted when acts complained of occurred before an earlier disciplinary action against the attorney and mitigating factors exist. Attorney's actions were more properly viewed as a pattern of misconduct. In re Van Buskirk, 981 P.2d 607 (Colo. 1999).

Behavior toward client that precipitated conflict on day of client's criminal trial [illegible] client's newly appointed public defender to seek a continuance to have adequate time to prepare violated this rule. People v. Brenner, 852 P.2d 456 (Colo. 1993).

Pushing another attorney in the courtroom, resulting in a conviction of third-degree assault, warranted a 30-day suspension. People v. Nelson, 941 P.2d 922 (Colo. 1997).

Lawyer who imposed unauthorized charging lien and subsequently refused to release such lien, and who testified at grievance proceedings that he kept documents belonging to third parties in order to protect his client's financial interests, which was the first instance at which such a theory was raised, violated this rule. Although the attorney's motives were dishonest and selfish, the grievance against the attorney involved multiple offenses, the attorney violated a disciplinary rule at the grievance proceedings, and the attorney failed to acknowledge wrongful nature of his conduct, the mitigating factors included the fact that the attorney had not been subject to prior grievances and the attorney was relatively inexperienced. Thus, the appropriate sanction is public censure. People v. Brown, 840 P.2d 1085 (Colo. 1992).

In determining appropriate sanction, it is not important whether injured party was attorney's client, when attorney-respondent was appointed [illegible]. People v. Vigil, 929 P.2d 1311 (Colo. 1996).

Conduct warranted one-year extension of attorney's suspension. People v. Silvola, 933 P.2d 1308 (Colo. 1997).

Disbarment warranted for respondent who continued to practice law while under suspension. Respondent was suspended [illegible] upon conviction for possession of cocaine, a class 3 felony, and upon release from prison represented to several persons that he was a licensed attorney and provided legal services to those persons. Board's finding that respondent had a history of prior discipline, a dishonest or selfish motive, displayed a pattern of misconduct, had committed multiple offenses, had engaged in a bad faith obstruction of the disciplinary process, had refused to acknowledge any wrongful conduct on his part, had substantial experience in law, and could offer no mitigating factors warranted disbarment. People v. Stauffer, 858 P.2d 694 (Colo. 1993).

Disbarment appropriate remedy where attorney neglected a legal matter, misappropriated funds and property, abandoned client, engaged in fraud, evaded process, and failed to cooperate in disciplinary investigation. People v. Hindman, 958 P.2d 463 (Colo. 1998).

Disbarment is the presumed sanction for knowing misappropriation of funds from clients or one's law firm, barring significant mitigating circumstances. People v. Guyerson, 898 P.2d 1062 (Colo. 1995); People v. Varallo, 913 P.2d 1 (Colo. 1996); In the Matter of Thompson, 991 P.2d 820 (Colo. 1999) (overruling People v. Bronstein, 964 P.2d 514 (Colo. 1998)).

Disbarment appropriate when attorney accepted legal fees, performed limited services, abandoned the client, and then misappropriated the unearned fees. People v. Kuntz, 942 P.2d 1206 (Colo. 1997).

Aiding client to violate custody order sufficient to justify disbarment. People v. Chappell, 927 P.2d 829 (Colo. 1996).

Structuring financial transaction to enable client to avoid reporting requirements, a felony under federal law, warranted disbarment. In re DeRose, 55 P.3d 126 (Colo. 2002).

Conduct violating this rule sufficient to justify disbarment where attorney continued to practice law when under suspension. People v. Redman, 902 P.2d 839 (Colo. 1995).

One-year and one-day suspension plus payment of restitution and costs proper for attorney who induced a loan through misrepresentations, assigned a promissory note obtained with proceeds of such loan without lender's

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knowledge or consent, and misrepresented that sufficient funds were in trust account to cover check. People v. Kearns, 843 P.2d 1 (Colo. 1992).

False statements by attorney in connection with an accident in which the attorney was at fault adversely reflects on attorney's fitness to practice law. People v. Dieters, 935 P.2d 1 (Colo. 1997).

Pleading guilty to a single count of bank fraud evidences serious criminal conduct warranting disbarment. People v. Terborg, 848 P.2d 346 (Colo. 1993).

Attorney's repeated assurances to client that he would file a motion for reconsideration, his failure to do so, and his neglect of a legal matter entrusted to him constitute disciplinary violations warranting suspension for 30 days where there are mitigating factors. People v. LaSalle, 848 P.2d 348 (Colo. 1993).

Attorney's neglect resulting in an untimely filing of an inadequate certificate of review and dismissal of his client's case, combined with fact that certificate contained false statements of material fact that attorney later repeated to an investigative counsel with the office of disciplinary counsel, constituted disciplinary violations warranting a 45-day suspension, despite mitigating factors. People v. Porter, 980 P.2d 536 (Colo. 1999).

Ninety-day suspension justified where attorney's failure to respond to discovery requests resulted in default and entry of judgment against client for $816,613. People v. Clark, 927 P.2d 838 (Colo. 1996).

Ninety-day suspension and order of restitution as a condition of reinstatement was justified where attorney failed to pay court-ordered award of attorney's fees resulting from his filing of a frivolous motion and then failed to appear at a deposition. People v. Huntzinger, 967 P.2d 160 (Colo. 1998).

Thirty-day suspension appropriate where attorney failed to inform U.S. bankruptcy court in Colorado, in a hearing on a motion to remand the matter to U.S. bankruptcy court in Massachusetts, that an order of dismissal of the bankruptcy proceeding between the same parties had been entered in California. People v. Hardy, 927 P.2d 841 (Colo. 1996).

Lawyer advertisement containing false, misleading, deceptive, or unfair statements violates this rule and warrants public censure where respondent terminated referral service being advertised after the initial request for investigation was filed and cooperated in disciplinary proceedings but had received a past letter of admonition and had substantial experience in the practice of law. People v. Carpenter, 903 P.2d [illegible] (Colo. 1995).

Public censure appropriate where attorney misrepresented status of a dismissed case to his client, the resultant actual harm to the client was only the cost of hiring a new lawyer to pursue an appeal of the dismissal, the attorney's law firm reimbursed the client for all fees it had collected, the attorney reimbursed the firm for such fees, the only aggravating factor was a 1994 letter of admonition given to the attorney for improperly communicating with a represented person, and mitigating factors included the absence of a dishonest or selfish motive, remorse, and full and free disclosure in the disciplinary proceedings. People v. Johnston, 955 P.2d 1051 (Colo. 1998).

Public censure appropriate where harm suffered by attorney's client was speculative, attorney retracted his misrepresentations and admitted to his client before the institution of disciplinary proceedings that he had done nothing on the client's appeal, attorney had no prior discipline, he made full and free disclosure of his misconduct to the grievance committee, and he expressed remorse for his misconduct. People v. Nelson, 848 P.2d 351 (Colo. 1993).

Public censure appropriate where attorney neglected and made misrepresentations in two separate legal matters. People v. Flagan, 902 P.2d 941 (Colo. 1995).

Public censure appropriate in light of mitigating circumstances for possession of cocaine in violation of state and federal controlled substance laws. People v. Gould, 912 P.2d 556 (Colo. 1996).

Public censure appropriate where respondent was convicted of driving while ability impaired and had also appeared in court while intoxicated on two consecutive days. People v. Coulter, 950 P.2d 176 (Colo. 1998).

Public censure appropriate for attorney who had been reprimanded in Connecticut for failure to file federal income tax return and attorney had not been disciplined before in Colorado. People v. Perkell, 969 P.2d 703 (Colo. 1998).

Public censure was warranted where attorney twice requested arresting officers in driving under the influence cases not to appear at license revocation hearings before the department of motor vehicles. People v. Carey, 938 P.2d 1166 (Colo. 1997).

Public censure was appropriate where significant mitigating factors were present. Attorney was convicted of vehicular assault, a class 4 felony, and two counts of driving under the influence of alcohol. The crimes are strict liability offenses for which attorney must serve three years in the custody of the department of corrections, followed by a two-year mandatory period of parole. Section 18-1-105(3) provides that, while he is serving his sentence, attorney is disqualified from practicing as an attorney in any state courts. The sentence and disqualification from practicing law are a significant "other penalty[] or sanction[]" and therefore a mitigating factor in determining the level of discipline. In re Kearns, 991 P.2d 824 (Colo. 1999) (decided under former C.R.C.P. 241.6(5)).

Public censure was warranted for attorney who prepared motions to dismiss for his client's wife to sign when proceedings had been brought by the client's wife against the client and the client's wife was represented by

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counsel and was not advised that she should contact her own lawyer before signing the motions, nor asked if she wished to discuss the motions with her lawyer before signing. Three letters of admonition for unrelated misconduct also were an aggravating factor for purposes of determining the appropriate level of discipline. People v. McCray, 926 P.2d 578 (Colo. 1996).

Public censure warranted for attorney's solicitation of prostitution during telephone call with wife of client whom he was representing in a dissolution of marriage proceeding. People v. Bauder, 941 P.2d 282 (Colo. 1997).

Public censure was warranted where attorney made inappropriate, harmful, offensive, harassing, and sexually abusive comments to potential client. The mitigating factors found by the hearing board do not compel a different result. People v. Meier, 954 P.2d 1068 (Colo. 1998).

Chief deputy district attorney's theft of less than $50 constitutes conduct warranting public censure where significant mitigating factors exist. People v. Buckley, 848 P.2d 353 (Colo. 1993).

Two-year suspension was an adequate sanction where attorney neglected client matters by representing that he would file a lawsuit and neglected to do so, engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation by agreeing to represent client and thereafter failing to advise the client of attorney's suspension, and where attorney further engaged in misrepresentation by collecting legal fees and costs from client while attorney was under suspension. People v. de Baca, 948 P.2d 1 (Colo. 1997).

Transferring various ownership interests to lawyer employees of firm who did not receive profits and were not managers warranted suspension of one year and a day. Suspension appropriate because attorney made misrepresentations and was dishonest in such transfers. People v. Reed, 942 P.2d 1261 (Colo. 1997).

Thirty-day suspension was appropriate discipline where attorney advised client to take action in violation of child custody order but failed to warn her of criminal consequences of such action. People v. Olson, 962 P.2d 261 (Colo. 1998).

Suspension of one year and one day was appropriate based on evidence of three separate incidents in which the attorney physically assaulted his girlfriend. It was immaterial that no charges had been filed in any of the incidents, because the acts alone reflected adversely on the attorney's fitness to practice law. The fact that the attorney's behavior was not directly related to his practice of law was a factor to be considered, but was not conclusive. The attorney had failed to take any steps toward rehabilitation following the incidents, and the three separate assaults showed a pattern of misconduct. Therefore, it was appropriate to suspend the attorney and require him to demonstrate rehabilitation and completion of a certified domestic violence treatment program as a condition of reinstatement. People v. Musick, 960 P.2d 89 (Colo. 1998).

Attorney conduct violating this rule in conjunction with other rules, sufficient to justify suspension when violation did not arise from negligent or willful conduct to take advantage of client's vulnerability and is mitigated by her inexperience in the practice of law, her lack of any prior disciplinary record, the fact that she had already been held in contempt and punished by the district court, and the fact that there is no suggestion of selfish motivation. Attorney's failure to appreciate the seriousness nature of conduct and the jurisdiction of the hearing board to discipline her is a serious matter meriting a period of suspension and a redetermination of her fitness before being permitted to practice law again. In re Roose, 71 P.3d 343 (Colo.), cert. denied, 540 U.S. 1053, 124 S. Ct. 815, 157 L.Ed.2d 705 (2003).

Suspension for three years, rather than disbarment, was appropriate where violation of this rule and others caused serious harm to attorney's clients, but mitigating factors were present, including no previous discipline in 14 years of practice, personal and emotional problems, and cooperation and demonstrated remorse in proceedings. People v. Henderson, 961 P.2d 1038 (Colo. 1998).

Conduct violating this rule in conjunction with other disciplinary rules, where mitigating factors were present, warrants public censure. People v. Davis, 950 P.2d 586 (Colo. 1998).

Pleading guilty to one count of bribery evidences conduct warranting disbarment. People v. Viar, 848 P.2d 934 (Colo. 1993).

Disbarment is warranted where attorney was convicted of felony offense of forging a federal bankruptcy judge's signature and had engaged in multiple types of other dishonest conduct and where there was an insufficient showing of mental disability. People v. Goldstein, 887 P.2d 634 (Colo. 1994).

Disbarment is warranted where attorney was convicted in Hawaii of second-degree murder. People v. Draizen, 941 P.2d 280 (Colo. 1997).

Disbarment is warranted for attorney convicted of one count of sexual assault on a child, notwithstanding lack of a prior record of discipline. People v. Espe, 967 P.2d 159 (Colo. 1998).

Disbarment was appropriate, despite existence of mitigating factors, where attorney violated paragraph (c) of this rule by misappropriating bar association funds for his personal use and where such misappropriation was knowing. People v. Motsenbocker, 926 P.2d 576 (Colo. 1996).

Disbarment was appropriate for knowing misappropriation of funds despite fact respondent had not been previously disciplined. People v. Dice, 947 P.2d 339 (Colo. 1997).

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Disbarment is appropriate when a lawyer knowingly misappropriates client funds in the absence of extraordinary mitigating factors. Mitigating factors such as stress due to prolonged divorce, personal financial losses, a serious motor vehicle accident, filing for bankruptcy, a deteriorating law practice, and alcohol abuse were insufficient to deviate from the rule that a clear and convincing showing of a knowing misappropriation of client funds warrants disbarment. People v. Torpy, 966 P.2d 1040 (Colo. 1998).

Disbarment is only appropriate remedy for knowingly misappropriating client funds, unless significant extenuating circumstances are present. In re Cleland, 2 P.3d 700 (Colo. 2000).

Attorney conduct violating this rule, in conjunction with other rules, sufficient to justify disbarment when attorney knowingly commingled and misappropriated clients' funds for his personal use, neglected filing a complaint in a case until it was barred by the statute of limitations, failed to comply with court orders applicable to his child support payments, and neglected two other cases causing default judgments to be entered against his client, despite fact that one of the judgments was subsequently set aside. People v. Gonzalez, 967 P.2d 156 (Colo. 1998).

Attorney who was the trustee of client's trust violated paragraph (h) by utilizing the trust's funds to loan money to his daughter and to purchase his son-in-law's parents' former residence for the purpose of leasing it back to them, and by then failing to take any legal action against them when they did not make lease payments. People v. DeRose, 945 P.2d 412 (Colo. 1997).

Previously disbarred attorney who violated this rule would be forced to pay restitution to clients as a condition of readmission. People v. Vigil, 945 P.2d 1385 (Colo. 1997).

Prior discipline for conduct violating this rule is an important factor in determining the proper level of discipline, therefore disbarment is merited where attorney continues to engage in misconduct. In re de Baca, 11 P.3d 426 (Colo. 2000).

Court erred when it ordered special advocate to refund fees without determining whether conduct violated paragraph (c). In re Redmond, __ P.3d __ (Colo. App. 2005).

Conduct violating this rule, in conjunction with other disciplinary rules, sufficient to justify disbarment where the attorney continued to practice law while on suspension, repeatedly neglecting his clients and failing to take reasonable steps to protect clients' interests. People v. Fager, [illegible] 2d 138 ([illegible] 1997).

Conduct found to violate disciplinary rules. People v. Farrant, 852 P.2d 452 (Colo. 1993).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify public censure. People v. Doherty, 908 P.2d 1120 (Colo. 1996); People v. Woodrum, 911 P.2d 640 (Colo. 1996); People v. Pooley, 917 P.2d 712 (Colo. 1996); People v. Nevin, 925 P.2d 783 (Colo. 1996); People v. Yates, 952 P.2d 340 (Colo. 1998); People v. Barr, 957 P.2d 1379 (Colo. 1998); People v. Wolfe, 962 P.2d 981 (Colo. 1998).

Conduct violating this rule sufficient to justify public censure. People v. Gonzalez, 933 P.2d 1306 (Colo. 1997); People v. Meier, 954 P.2d 1068 (Colo. 1998); In re Wilson, 982 P.2d 840 (Colo. 1999).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Barr, 865 P.2d 1386 (Colo. 1993); People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Kuntz, 908 P.2d 1110 (Colo. 1996); People v. Sibley, 917 P.2d 1253 (Colo. 1996); People v. McCaffrey, 925 P.2d 269 (Colo. 1996); People v. Farrant, 930 P.2d 620 (Colo. 1996); People v. Hohertz, 926 P.2d 560 (Colo. 1996); People v. Bates, 930 P.2d 600 (Colo. 1997); People v. Reynolds, 933 P.2d 1295 (Colo. 1997); People v. White, 935 P.2d 20 (Colo. 1997); People v. McGuire, 936 P.2d [illegible] (Colo. 1997); People v. Mason, 938 P.2d 133 (Colo. 1997); People v. Kotarek, 941 P.2d 925 (Colo. 1997); People v. Primavera, 942 P.2d 496 (Colo. 1997); People v. Field, 944 P.2d 1252 (Colo. 1997); People v. Wotan, 944 P.2d 125[illegible] (Colo. 1997); People v. Johnson, 946 P.2d 469 (Colo. 1997); People v. Barnthouse, 948 P.2d 534 (Colo. 1997); People v. Blunt, 952 P.2d 356 (Colo. 1998); People v. Easley, 956 P.2d 1257 (Colo. 1998); People v. Hanks, 967 P.2d 144 (Colo. 1998); People v. Harding, 967 P.2d 153 (Colo. 1998); In re Nangle, 973 P.2d 1271 (Colo. 1999); In re Corbin, 973 P.2d 1273 (Colo. 1999); In re Bobbitt, 980 P.2d 538 (Colo. 1999); In re Meyers, 981 P.2d 143 (Colo. 1999); In re Demaray, 8 P.3d 427 (Colo. 1999); In re Hickox, 57 P.3d 403 (Colo. 2002); In re Fischer, 89 P.3d 817 (Colo. 2004).

Conduct violating this rule sufficient to justify suspension. People v. Farrant, 852 P.2d 452 (Colo. 1993); People v. Graham, 933 P.2d 1321 (Colo. 1997); People v. Dieters, 935 P.2d 1 (Colo. 1997); People v. Rudman, 948 P.2d 1022 (Colo. 1997); In re Van Buskirk, 981 P.2d 607 (Colo. 1999); In re Sather, 3 P.3d 403 (Colo. 2000).

Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify disbarment. People v. Kelley, 840 P.2d 1068 (Colo. 1992); People v. Walsh, 880 P.2d 766 (Colo. 1994); People v. Marsh, 908 P.2d 1115 (Colo. 1996); People v. Jenks, 910 P.2d 688 (Colo. 1996); People v. Jamrozek, 921 P.2d 725 (Colo. 1996); People v. Ebbert, 925 P.2d 274 (Colo. 1996); People v. Steinman, 930 P.2d 596 (Colo. 1997); People v. Wallace, 936 P.2d 1282 (Colo. 1997); People v. Mannix, 936 P.2d 1285 (Colo. 1997); People v. Madigan, 938 P.2d 1162 (Colo. 1997); People v. Odom, 941 P.2d 919 (Colo. 1997); People v. McDowell, 942 P.2d 486 (Colo. 1997); People v. Sousa, 943 P.2d 448 (Colo. 1997); People v. Jackson, 943 P.2d 450 (Colo. 1997); People v. Schaefer, 944 P.2d 78 (Colo. 1997); People v. Clyne, 945 P.2d 1386 (Colo. 1997); People v. Crist, 948 P.2d 1020 (Colo. 1997); People v.

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Conduct violating this rule sufficient to justify disbarment. People v. Kelly, 840 P.2d 1068 (Colo. 1992); People v. Townshend, 933 P.2d 1327 (Colo. 1997); People v. Sichta, 948 P.2d 1018 (Colo. 1997); People v. Nearen, 952 P.2d 371 (Colo. 1998).

RULE 8.5 — JURISDICTION

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

Comment

In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5.

If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

Annotation

Law reviews. For article, "Negotiations and the Unauthorized Practice of Law", see 23 Colo. Law. 361 (1994).

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HOW KNOWN AND CITED

RULE 9. TITLE — HOW KNOWN AND CITED

These rules shall be known and cited as The Colorado Rules of Professional Conduct or Colo. RPC.

Source: Entire rule amended and adopted April 10, 1997, effective July 1, 1997.

1993 COLORADO RULES OF PROFESSIONAL CONDUCT SUBJECT INDEX

Numbers refer to rules, not pages

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CHANGES HIGHLIGHTED

Chapter 3

COLORADO BAR ASSOCIATION ETHICS COMMITTEE FORMAL OPINIONS

NOTICE: The practitioner should not rely on withdrawn opinions for ethical guidance, although the fact that an opinion has been withdrawn does not necessarily indicate that the Ethics Committee believes the opinion is incorrect in its entirety. The practitioner should be aware that the conclusions of some Formal Opinions, whether or not they have been withdrawn, may be affected by the re-enacted Colorado Rules of Professional Conduct that became effective January 1, 2008.

Please note that this *Handbook* does not contain the text of most withdrawn Formal Opinions.

ETHICS

The opinions printed in this book have been adopted as formal opinions by the Ethics Committee of the Colorado Bar Association and its predecessor, the Committee on Ethics and Grievances. Published opinions are adopted by the Committee as appropriate on matters of general and continuing interest to the Bar, and upon adoption are published in *The Colorado Lawyer*, the official publication of the Association.

Formal Ethics Opinions are issued for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of the Attorney Regulation Counsel and do not provide protection against disciplinary actions.

SYNOPSIS

FORMAL OPINIONS

(Italics indicate withdrawn opinion.)

1EG *Business cards and letterheads, 7/31/1953; withdrawn*

2EG *"Tax expert," 7/31/1953; withdrawn*

1 *Judge's involvement in private business venture, 5/28/1958; withdrawn*

2 *Judge's involvement in private business venture, 6/21/1958; withdrawn*

3 *Publications by lawyer, 4/11/1959; withdrawn 11/1989*

4 *Announcement cards implying specialty, 4/11/1959; withdrawn 7/24/1993*

5 *Announcement cards implying specialty, 4/11/1959; withdrawn 7/24/1993*

6 *Announcement cards for partnership, 4/11/1959; withdrawn 7/24/1993*

7 *Office sharing with collection agency, 4/11/1959; addendum issued 1995; withdrawn 12/14/1996; see Formal Opinion 98*

8 Office sharing — "associates," 6/26/59; addendum issued 1995

9 Office sharing — "associates," 6/26/59; addendum issued 1995

10 *Business card published in general newspaper, 6/26/1959; withdrawn*

11 *Law practice in combination with insurance sales, 1/11/60; addendum issued 7/24/93; withdrawn 10/17/2015*

12 Title opinion for lending institution, disclosure to customer, 3/26/60

13 Office sharing — municipal judge, 3/26/60; revised 5/18/96

14 Attorney as city councilman, 3/26/60; addendum issued 1996; addendum issued 2009

15 *Attorney listing in telephone directory, 8/19/1960; withdrawn*

16 *Fees as Guardian Ad Litem, 12/02/1960; withdrawn 1/25/1997*

17 Preparation of legal documents in real property sale, 1/20/61; addendum issued 1995

18 *Attorney as city councilman, 1/20/1961; addendum issued 1996, withdrawing this opinion*

19 *Lower fees may be improper solicitation, 3/17/1961; withdrawn*

20 Fee collection, 6/23/61; addendum issued 1995

21 *Fee to estate, 8/11/1961; amended 7/20/1962; addendum issued 1995; withdrawn by 1/20/2007. See C.R.S. § 15-12-721. The Ethics Committee is undertaking a review of the ethical issues.*

22 *Recording conversations, 1/26/1962; addendum issued 1995; withdrawn 7/19/2003*

23 Representation of guardian for minor in personal injury settlement, 7/20/62; addendum issued 1995

24 Offices on client's property, 7/20/62; addendum issued 1995

25 Use of attorney's signature on collection case summons, 8/25/62; addendum issued 1995

26 *Real estate commission for attorney-executor, 9/28/62; addendum issued 1995; withdrawn 10/17/2015*

27 *Attorney's partner as witness in lawsuit, 3/16/1963; withdrawn 1/25/1997*

28 Letterhead; revised 4/28/73; revised 7/24/93

29 Representation of seller, buyer or borrower by lawyer for financial institution, 1/18/64

30 *Soliciting funds on letterheads, 6/6/1964; withdrawn 7/24/1993*

31 Publications, pending litigation, 6/6/64

32 *Advertising candidacy for office, revised 3/11/1972; withdrawn 7/24/1993*

33 Contributions, judicial campaign, 6/6/64

34 Advancement of living expenses for personal injury client, 3/27/65; addendum issued 1995

35 *Advertising, use of signs, 6/19/1965; withdrawn 7/24/1993*

36 *Advertising for title insurance business from law office, 6/19/1965; addendum issued 1995; withdrawn 12/14/1996; see Formal Opinion 98*

37 *Announcements, transition from government service to private practice, 11/13/1965; withdrawn 7/24/1993*

38 Referral fees, 6/4/66; addendum issued 1995

39 *Brokerage from law office, 7/15/1967; withdrawn 12/14/1996; see Formal Opinion 98*

40 Accepting case handled by another lawyer, 2/3/68; addendum issued 1995

41 *Practice of law and accounting, 2/3/1968; withdrawn 12/14/1996; see Formal Opinion 98*

42 *Client newsletters, 5/10/1968; withdrawn 6/1987*

43 Duty to insured, 12/13/69; addendum issued 1995

44 *Lay witness fees, 2/14/1970; withdrawn 12/19/1998; see Formal Opinion 103*

45 Representation of client by part-time judge; revised 6/16/84; addendum issued 1996

46 Municipal attorney, representation of defendants, 2/20/71; revised 5/18/96

47 Attorney representation in dissolution of marriage, 2/26/72; addendum issued 1995

48 Representation of public body, conflict of interest, 6/3/72; revised 5/18/97

49 *Announcement of lawyers' withdrawals or firm dissolution, 6/3/1972; withdrawn 7/24/1993*

50 Definition of associates as applied to lawyers, 11/29/72; addendum issued 1995

51 *Announcements concerning qualifications, 11/29/1972; withdrawn 7/24/1993*

52 *Spouse-attorneys representing clients, conflicts of interest, revised 12/13/75; addendum issued 1995; withdrawn 3/16/13*

53 *Successor lawyers and law firms, sale of practice, 6/29/1974; withdrawn 10/18/1997*

54 Fees charged in foreclosure or redemption, undated; addendum issued 1995

55 Partnership which includes professional corporation, undated; addendum issued 1995

56 Settlement of lawyer malpractice, withdrawal of grievance complaint, 3/22/80; addenda issued 1995 and 1998

57 Conflicts of interest, 3/21/81; addendum issued 1995

58 Water rights, representation of multiple clients, 3/21/81; revised 10/14/95

59 Legal services programs, 1/23/82; addendum issued 1995

60 Duty with respect to client's incriminating physical evidence, 7/24/82

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62 Duties of public prosecutor, release of defendant's civil claims, 11/20/82; revised 11/19/88; addendum issued 1995

63 Lawyer's relationship with a traffic clinic, 2/19/83; addendum issued 1995

64 Duty of attorney to report an ethical violation, 4/23/83; amended 6/15/96

65 Guidelines for opposing counsel contacting witnesses, 3/17/84

66 Imposition of interest or finance charges on client accounts, 10/20/84; revised 10/5/16

67 Contingent fee arrangement in child support and spousal maintenance cases, 3/16/85; addendum issued 1995

68 Conflicts of interest: propriety of multiple representation, 4/20/85; amended 12/9/11

69 Propriety of communicating with employee or former employee of an adverse party organization; 2010 revision; revised 11/18/17

70 Juror communications, 9/21/85; addendum issued 1995

71 *Ex parte* communications with treating physicians; revised 9/21/85; addendum issued 4/18/92

72 Recovery of attorney fee by lender using in-house counsel, 4/19/86; revised 1/19/91; addendum issued 1995

73 Contact with insurance adjuster, 5/17/86

74 Lawyer newsletters, 7/26/86; addendum issued 1995

75 *Spousal conflicts, 6/20/87; addendum issued 1995; withdrawn 3/16/13*

76 Lawyer advertising guidelines, 10/17/87; addendum issued 1995

77 Participation with medical-legal consulting firm: contingent fee, 3/19/88

78 Disqualification of the advocate/witness, 6/18/88; revised 6/18/94, 5/10/97, 10/20/12, and 2/20/13

79 Use of legal assistants in client representation, 2/18/89; addendum issued 1995

80 Lawyer's duty to disclose mistakes in commercial closing, 2/18/89; addendum issued 1995

81 Lawyer's participation in prepaid legal service plans, 3/18/89

82 Assertion of attorney's retaining lien on client's papers, 4/15/89; addendum issued 1995

83 *Lawyer advertising, solicitation and publicity, 11/18/89; addendum issued 7/24/93; withdrawn 9/21/13*

84 Listing of support personnel names on letterhead and business cards, 2/26/90; addendum issued 1995

85 Release and settlement of legal malpractice claims, 5/19/90; addenda issued 1995 and 1998

86 *Use of subpoenas in civil actions and proceedings, 1/17/98; withdrawn 3/16/13*

87 Collaboration with non-lawyers in preparation and marketing of estate planning documents, 7/14/90; revised 12/14/91; addendum issued 1995

88 *Use and misuse of "confidentiality walls," 5/18/91; amended 4/18/92; withdrawn 7/08*

89 Office sharing and virtual offices, 9/21/91; revised and reissued 3/12/18

90 Preservation of client confidences in view of modern communications technology, 11/14/92; revised 7/12/18

91 Ethical duties of attorney selected by insurer to represent its insured, 1/16/93; revised 2/23/13

92 Practice restrictions in settlement agreements, 6/19/93

93 *Ex parte* contacts with government officials, 10/16/93; amended 02/16

94 Ethical duties relating to a client's property held by a lawyer in which a third party has an interest, 11/20/93; addendum issued 2006

95 Funds of missing clients, 11/20/93; withdrawn 5/21/16

96 *Ex parte* communications with represented persons during criminal and civil regulatory/investigations and proceedings, 7/15/94; amended 3/17/12

97 Ethical considerations where an attorney or the attorney's partner serves on the board of a public entity, 6/17/95

98 Ethical responsibilities of lawyers who engage in other businesses, adopted 01/17/15, superseding opinion 98 12/14/96

99 Use of credit cards to pay for legal services, 5/10/97

100 Use of conversion clauses in contingent fee agreements, 6/21/97

101 Unbundled/limited scope representation, 1/17/98; addendum issued 2006; approved 5/21/16

102 Use of subpoenas in criminal proceedings, 3/21/98

103 Propriety of compensating a non-expert witness in a civil action, 12/19/98

104 Surrender of papers to the client upon termination of the representation, 4/17/99

105 Opinion on temporary lawyers, 5/22/99

106 Referral fees and networking organizations, 6/19/99; revised 10/21/13

107 Third-party auditors, 9/18/99

108 Inadvertent disclosure of privileged or confidential documents, 5/20/00

109 Acquiring an ownership interest in a client, 5/19/01; annotated 6/20/09 and 8/6/15

110 Assertion of attorney's charging lien/security interest in property, 1/19/02; amended 5/19/02

111 Communicating with represented person for the purpose of providing a "second opinion," 1/19/02

112 Surreptitious recording of conversations or statements, 7/19/03

113 Ethical duty of attorney to disclose errors to client, 11/19/05; modified 7/18/15 solely to reflect 1/1/08 changes in the Rules of Professional Conduct

114 Responsibilities of respondent parents' attorneys in dependency and neglect proceedings, 10/14/06; revised 6/19/10

115 Ethical considerations in the collaborative and cooperative law contexts, 2/24/07

116 Ethical considerations in the dissolution of a law firm or a lawyer's departure from a law firm, 3/17/07

117 Ethical responsibilities of attorneys in legal services and pro bono programs concerning prospective clients, 6/16/07

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120 Representing an organization as a party in a dispute, 5/17/08

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122 The applicability of Colo. RPC 7.2 to internet-based lawyer marketing programs, 3/20/10; amended 10/16/10

123 Candor to the tribunal and remedial measures in civil proceedings, 6/18/11

124 A lawyer's medical use of marijuana, 4/23/12; addendum issued 12/10/12; revised 10/19/15

125 *The extent to which lawyers may represent clients regarding marijuana-related activities, 10/21/13; addendum issued 10/21/13; withdrawn 5/17/14*

126 Representing the adult client with diminished capacity, 5/6/15

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8 OFFICE SHARING — "ASSOCIATES"

Adopted June 26, 1959.
Addendum issued 1995.

Syllabus

Where the role or main relationship among a group of lawyers is merely the sharing of office space and expenses, they may not list each other's names on their respective letterheads as "associates."

Facts

Five lawyers occupy the same suite of offices. Each conducts his own law practice independently of the others, except on rare occasions when one or more of them may collaborate on a case. One of the lawyers pays the overhead expenses, for which he charges the other lawyers on the basis of the space each occupies or on some other appropriate basis. Each lawyer keeps his own books and records, maintains his own files, and has his own clients. On the stationery of each lawyer is the following letterhead:

A. B.
Attorney at Law
_____ Building
_____, Colorado

Associates:
C. D.
E. F.
G. H.
J. K.

Opinion

In the opinion of the Committee, this letterhead violates the Canons of Ethics.

The letterhead is misleading in that it implies that the lawyers are either partners or that they practice together as an association with common clients, records, and files. It may be an attempt to lend weight and prestige to the particular lawyer's name. Where the sole or main relationship among lawyers is merely the sharing of office space and expenses, they should not imply that there is some deeper relationship by the use of each others' names on their letterheads in addition to their own. To do so constitutes a violation of Canon 27, which prohibits indirect advertising. See, also, Canons 32 and 33 and Opinion 106 of the Committee on Professional Ethics of the American Bar Association.

1995 Addendum

This Opinion was based upon the Canons of Professional Ethics, the predecessor to the Code of Professional Responsibility. The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code and the Canons, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 7.1 (requiring that communications concerning a lawyer's services not be false or misleading); and Rule 7.5 (regarding firm names and letterheads). The Ethics Committee directs attorneys to Opinion 89 and the relevant provisions of the Colorado Rules of Professional Conduct contained in that opinion. This opinion is supplemented by Opinion 89 which should be reviewed in conjunction with the Rules.

9 OFFICE SHARING — "ASSOCIATES"

Adopted June 26, 1959.
Addendum issued 1995.

Syllabus

A lawyer who merely rents office space to other lawyers may not represent by his letterhead, telephone listing, or otherwise, that the other lawyers are associated with him nor may he include their names with his in a firm name.

Facts

A lawyer, A, represents by his letterhead, telephone listing, and otherwise, that he is a member of the firm A, B, and C. By the same means he represents that D, E, and F are associated with or employed by the firm. In fact, no partnership or employer-employee relationship exists, nor are B, C, D, E, and F associated with A in any manner other than to rent space from him.

Opinion

In the opinion of the Committee, these representations violate the Canons of Ethics.

This case is similar to our previous Opinion No. 8, but more aggravated. ABA Opinion No. 106, cited therein, prohibits a lawyer from representing that other lawyers are partners (by inclusion in a firm name) when they are merely employees; and, therefore, this cannot be done when they are merely tenants, as above. See Canons 27, 32, and 33. As stated in Opinion No. 8, such representations are misleading in that they imply an association which, in fact, does not exist.

1995 Addendum

This Opinion was based upon the Canons of Professional Ethics, the predecessor to the Code of Professional Responsibility. The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code and the Canons, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

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11 LAW PRACTICE IN COMBINATION WITH INSURANCE SALES

Adopted January 11, 1960.
Addendum issued July 24, 1993.
Withdrawn October 17, 2015.

WITHDRAWN

Syllabus

A person admitted to the Bar of this state may not disclose, nor permit others to disclose, the fact that he is a lawyer, if the manner of such disclosure would be in violation of Canon 27, if done by a practicing lawyer, and if such person is engaged in a business or occupation which, if performed by a lawyer, would constitute, at least in part, the practice of law.

A lawyer engaged in the occupation of selling life insurance may not give legal advice to his customers or clients.

A lawyer associated with an insurance corporation may not give legal advice [illegible] the corporation to its customers or clients.

Facts

John Doe is a life insurance agent or salesman associated with the X Life Insurance Co. He is also a lawyer licensed to practice in the State of Colorado, but his livelihood is derived through the sale of life insurance. He uses various means to advertise and promote his insurance business, among which are the following:

1. The mailing and distribution of desk calendars upon which appears:

John Doe, LL.B.
Tax-Planned Insurance

2. The mailing and distribution of folder prepared by X Insurance Co. containing Mr. Doe's picture and the following biographical data:

   Mr. Doe received his LL.B. from _____ Law School in _____. He is a member of the _____ and _____ Bars. He has appeared frequently as a lecturer and has written various law review articles.

3. The use of stationery and envelopes upon which appears Mr. Doe's name, followed by "LL.B."
4. Participation in newspaper advertisements of the X Insurance Co. in which appears Mr. Doe's name followed by "LL.B."
5. The mailing of letters to potential buyers of life insurance, a sample of which is the following:

   Dear _____,

   Recent changes made in the tax laws now give the opportunity to doctors alone to obtain a tax-free retirement income, in some cases as high as $18,000.00 a year.

   Just mail the enclosed card to receive complete information. No obligation, of course.

   Sincerely,
   John Doe, LL.B.

6. The mailing of a monthly four-page circular, prepared by the X Insurance Co., digesting recent cases in the field of tax, wills and estates, and trust law, and containing suggestions and addresses, and signed by "John Doe, LL.B."

Opinion

The Committee is of the opinion that Mr. Doe is in violation of the Canons of Professional Ethics.

A difficult aspect of this case is the fact that Mr. Doe is not practicing law in the sense of earning his living therefrom. He is an insurance salesman who is using his legal education, degree and license as an

aid to, and in promotion of, his insurance business. If he were a practicing lawyer, or if he prepared any legal instruments for a fee in connection with his insurance business, his advertising and promotional activities enumerated above would constitute a clear violation of Canon 27. Assuming that this is not the case, we must resolve the more perplexing problem of how far a lawyer not engaged in active practice may go in using his legal degree and license to promote another business.

The Committee is of the opinion that a person admitted to the Bar of this state may not disclose, nor permit others to disclose, the fact that he is a lawyer, if the manner of such disclosure would be in violation of Canon 27, if done by a practicing lawyer, and if such person is engaged in a business or occupation which, if performed by a lawyer, would constitute, at least in part, the practice of law.

This conclusion by the Committee would preclude Mr. Doe from using the initials "LL.B." after his name in each of the six instances set out in the facts above.

We believe that the facts show that Mr. Doe's activities would in some measure constitute the practice of law. While the selling of life insurance is not the practice of law *per se,* Mr. Doe purports to offer a so-called "estate planning" service and to give advice as to the federal tax laws and other laws affecting the ownership, transfer, and devolution of property. This advice, if given by a lawyer, would be the practice of law.

We are not unmindful of the fact that the Canons of Professional Ethics are generally regarded as applying to the legal *profession* as such and are meant to provide a standard of conduct among *lawyers* which will merit the respect and confidence of the profession, the courts and the public. We, nevertheless, feel that a person licensed to practice law, but engaged in another occupation, subjects himself to the Canons of Professional Ethics when he holds himself out as a lawyer in connection with such other occupation.

It may be argued that, in any event, the prohibition against advertising contained in Canon 27 does not apply to Mr. Doe since the Canon refers to professional employment, meaning employment *as a lawyer,* and Mr. Doe is not seeking such employment. Nevertheless, the only purpose which the disclosure that Mr. Doe is an attorney would serve would be to convey the impression to potential buyers of insurance that Mr. Doe is educated and qualified to advise with regard to legal and tax problems which might arise in the planning of an estate. Certainly the fact that Mr. Doe is a lawyer has nothing to do with his business as an insurance salesman, if in fact he does nothing other than sell insurance. If, on the other hand, he uses his legal knowledge as an aid in selling insurance, and at the same time holds himself out to the public as a lawyer, he subjects himself to the provisions of the canons. We hold that the activities of Mr. Doe constitute the soliciting of professional employment within the meaning of Canon 27.

But we are not confined to Canon 27 as a basis for this opinion. If Mr. Doe is giving legal advice to customers or clients in connection with his association with the X Life Insurance Co., he is in violation of Canon 35, which provides that the professional services of a lawyer should not be controlled or exploited by any lay agency. A corporation may not practice law. Neither may an attorney practice law through or on behalf of a corporation which intervenes between him and his client. If the employees of a corporation are engaged in the activity of giving legal advice to third parties on behalf of the corporation, such constitutes the corporate practice of law and is prohibited.

If the X Life Insurance Co. is practicing law, Mr. Doe is also in violation of Canon 47, which prohibits a lawyer from permitting his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.

1993 Addendum

To the extent that Opinion 11 addresses advertising and promotional activities, such opinion is modified by Colorado Rules of Professional Conduct 7.1 through 7.5.

WITHDRAWN

12 TITLE OPINION FOR LENDING INSTITUTION, DISCLOSURE TO CUSTOMER

Adopted March 26, 1960.

Syllabus

A lawyer who is retained by a lending institution to render a title opinion on property on which the institution is making a loan may not sell, or acquiesce in the sale of, a copy of such opinion to the customer of the institution.

Facts

A lawyer represents a lending institution. For that client he renders a title opinion with respect to property on which the institution is making a loan. The client (the lending institution) makes a charge to its customer on the settlement sheet for the title opinion addressed to the lending institution. At the closing, and with the knowledge of the lawyer, the customer is offered a copy of that title opinion, for an additional charge. Is the lawyer in violation of the Canons of Professional Ethics?

Opinion

In the opinion of the Committee, the lawyer violated Canons 6, 27 and 35 of the Canons of Professional Ethics.

The lawyer, through his acquiescence in the sale of the title opinion to the customer of the lending institution, has caused the customer to believe he has purchased a title opinion upon which he can rely for his own purposes. Further, this arrangement may well discourage the customer from retaining his own counsel. It is the opinion of the Committee that an attorney-client relationship was established, in fact, between the lawyer and the customer of the lending institution by the furnishing of the opinion to the customer.

The attorney-client relationship was created through the solicitation of the lending institution, which was a violation of Canon 27. Canon 27 prohibits the solicitation of professional employment by a lawyer. It is equally unprofessional for a lawyer to permit such solicitation to be made on his behalf by a third party.

Canon 6 forbids a lawyer from representing conflicting interests, except in those situations where a full disclosure of the facts is made to the parties concerned. It can only be assumed that a complete disclosure of the conditions upon which the lawyer was retained by the lending institution and the limited scope and purpose of the title opinion was not personally made by the lawyer to the customer of the lending institution. The failure to disclose constituted a violation of Canon 6.

It is also assumed that all discussions with the customer relating to the copy of the title opinion to be sold were conducted solely by the lending institution. The action of the lawyer in permitting the lending institution to act in that matter on his behalf was a breach of Canon 35. That Canon, entitled "intermediaries," provides in part as follows:

> A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediaries. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client.

The Committee is also of the opinion that the same Canons would be violated should the lawyer permit the lending institution to advise its customer that the fee to be charged the customer on the settlement sheet would automatically entitle the customer to a copy of the lawyer's title opinion. The lawyer may not circumvent the prohibitions of the Canons of Professional Ethics by making an arrangement with the lending institution to charge one fee that would be passed on in its entirety to the customer of the lending institution and entitle the customer to a copy of the title opinion.

The disposition of the fee charged by the lending institution of its customer is not stated in the fact situation presented. If all or any part of the fee was retained by the lending institution with the knowledge and consent of the lawyer, it is the opinion of the Committee that the lawyer would also be in violation of Canon 34. Canon 34, entitled "Division of Fees," states an absolute prohibition against a division of fees with a lay agency.

13 OFFICE SHARING — MUNICIPAL JUDGE

Adopted March 26, 1960.
Revised May 18, 1996.

Syllabus

It is improper for a municipal judge and a city attorney to engage in private law practice in the same suite of offices.

Facts

Both the municipal judge and the city attorney are permitted to engage in the private practice of law, and are office associates. However, they do not share professional fees or their salaries from the municipality, and each maintains his or her own separate practice and individual books and records.

Opinion

This practice violates Rules 3.5 and 8.4(e) of the Colorado Rules of Professional Conduct.[1] It is improper for a municipal judge and a city attorney to engage in private law practice in the same suite of offices. This relationship should be severed and separate offices established.

The arrangement is obviously fraught with peril. The danger is twofold: first, the inference that by reason of this extra-judicial relationship, the city attorney might enjoy unwarranted status in the eyes of the Court for economic reasons; secondly, the inference that, consciously or unconsciously, some legal point urged by the city attorney might assume extra weight on grounds informally voiced by the city attorney outside Court, and thus not be open to argument by defense counsel at the trial with both sides present.

The Committee is drawing upon the spirit of several ethical rules.

In Opinion 104, the American Bar Association Committee held that an attorney who occupied law offices with a police magistrate, although not in actual partnership with the lawyer should not accept employment by persons accused of crime who were arraigned before the lawyer's office associate, either while the case was pending before the police magistrate or thereafter, stating unequivocally: "Lawyers should not conduct themselves in such a way as to impair the confidence which the community has in the administration of justice." Like reasoning would apply to the lawyer for the prosecution.

And that same Committee, in its Opinion 16, held that it was clearly unethical for one member of a law firm to act as defense counsel and another to serve as county prosecutor, because this would require one member of the firm to oppose the interests of the state while the other member represented those interests, categorizing those positions as "inherently antagonistic" irrespective of Canon 6 (Conflicting Interests).

Looking to the reciprocal principles in the Colorado Rules of Professional Conduct, Rule 3.5, entitled "Impartiality and Decorum of the Tribunal," provides:

> A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; (b) communicate *ex parte* with such a person except as permitted by law; . . .

Rule 8.4 provides in pertinent part:

> It is professional misconduct for a lawyer to: (e) state or imply an ability to influence improperly a judge, judicial officer, government agency or official; . . .

It is that insurmountable *implication* that the prosecutor has the ability to influence the judge that would give rise to professional misconduct.

It would require almost superhuman conduct for the two persons involved in this factual situation to refrain from conscious or unconscious reference to matters before the municipal court, where professional quarters outside the court are so intimately shared. Furthermore, the financial entanglements of sharing overhead expenses in the law offices are apt to interfere with the attitude each must assume toward

the other when one becomes the advocate and prosecutor for the municipality and the other sits as municipal judge, a task requiring impartiality and objectivity.

In view of the foregoing, we feel that the existing arrangement, if not an open invitation to impropriety, cannot help but seem suspect to the Bar and the community and render the task of the municipal judge most difficult. The extra-judicial relationship ought to be severed.

NOTE

1. This practice also may violate Canons 1, 2, 5(c)(1) and 8(c) of the Colorado Code of Judicial Conduct.

Canon 1 of the Colorado Code of Judicial Conduct states: "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing and enforcing, and should personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved."

Canon 2 provides: "A. A judge should respect and comply with the law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. B. . . . A judge should not lend the prestige of his or her office to advance the private interests of others; nor should a judge convey or permit others to convey the impression that they are in a special position to influence him or her. . . ."

Canon 5(C)(1) states: "A judge should refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, interfere with the proper performance of judicial duties, exploit the judge's judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves." *See also* Canon 8(C).

The commentary to Canon 8 provides in pertinent part: "A part-time judge who practices law must avoid undertaking or continuing any relationship which precludes the judge from maintaining the integrity of the bench which he or she serves. . . ." This code does not apply to municipal judges except to the extent it is made applicable by statute, municipal charter or ordinance. However, reference to the code by all judicial officers, including municipal judges, is recommended to provide guidance concerning the proper conduct for judges. *See also* 8.4(f) of the Colorado Rules of Professional Conduct.

14 ATTORNEY AS CITY COUNCILMAN

Adopted March 26, 1960.
Addendum issued 1996.
Addendum issued 2009.

Syllabus

It is improper for an attorney who is also a city councilman to appear on behalf of defendants who are prosecuted for violation of city ordinances in the municipal court of that city.

Facts

An attorney is a member of a city council. The city council hires the municipal judge and fixes his or her salary. The attorney, while serving on the city council, continues to practice in the municipal court on behalf of defendants who are charged with violations of city ordinances.

Opinion

In the opinion of the CBA Ethics Committee (Committee), this practice is improper. Canon 6 of the Canons of Professional Ethics reads, in part, as follows:

> It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this Canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The Committee also relies on the spirit of Canon 3 of the Canons of Professional Ethics, the heading of which is "Attempts to Exert Personal Influence on the Court."

> The attorney in this fact situation, as a councilman, is one of those who have the authority to select the municipal judge before whom he practices. The temptation to exert influence on the judge through control of his tenure and salary, should the judge render decisions unfavorable to the attorney, seems obvious. The judge in this position might reasonably feel that influence is being exerted through this medium of council control, even though such influence is not in fact exerted. Even if this possibility never occurred to either the attorney-councilman or the municipal judge, members of the community might conclude that improper influence was exerted upon the judge.

Moreover, the attorney must be mindful of appearances of improper conduct that might reasonably cause members of the community to conclude that persons charged with violation of city ordinances might find it to their advantage to retain an attorney-councilman to appear on their behalf.

The situation in the statement of facts above must also be disturbing in its implications to the municipal judge who is placed in his or her office by the city council. Canon 13 of the Canons of Judicial Ethics states, in part, that "a judge . . . should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, ..."

As stated in Opinion No. 13, the Committee feels that this situation cannot help but seem suspect to the Bar and the community and thus have an adverse effect on the administration of justice and the public's approbation of it.

1996 Addendum

On January 1, 1993, the Colorado Rules of Professional Conduct became effective. Although the Canons of Professional Ethics that formed the basis for this Opinion are no longer the disciplinary rules governing lawyers, the Ethics Committee considers the conclusions of this Opinion to be correct based on the Colorado Rules of Professional Conduct. For an analysis of these issues, attorneys should review Rules 1.7(b), 8.4(d) and (e), and 3.5.

2009 Addendum

On January 1, 2008, substantial amendments to the Colorado Rules of Professional Conduct (Rules) became effective. Rules 1.7(b), 8.4(e) and (f), and 3.5 were revised. Rule 8.4(d) was not. The "appearance of impropriety" standard no longer appears in the Rules. The conclusion of Opinion 14 remains correct based on the current Rules.

17 PREPARATION OF LEGAL DOCUMENTS IN REAL PROPERTY SALE

Adopted January 20, 1961.
Addendum issued 1995.

Syllabus

It is improper for a lawyer to prepare legal documents in connection with the sale of real property at the request of a firm, which specializes in assisting persons in the sale of their own property, and which does not act as a true broker in the transaction.

Facts

A firm offers services in connection with the sale of real property. The services comprise, among other things, the maintaining of files and other information on available property in the area; a file of prospective buyers and sellers of property; and the closing of real estate transactions including the preparation of deeds, notes, deeds of trust, and allied documents. A seller wishing to avail himself of the services of the firm signs a contract under the terms of which he agrees that if he sells his property within the time prescribed (usually 90 days) he will pay the firm a flat fee of $300. The firm then places a "For Sale" sign on the property, inserts advertisements in the newspapers, and in other respects aids the person in the sale of his property. The contract provides that the seller furnish a title insurance policy (no mention is made of an abstract of title). When the seller finds a buyer for the property, the firm or its attorney prepares the option contract and, at the appropriate time, closes the sale. No separate charge is made for the preparation of the legal documents, but the seller is informed that if he retains his own lawyer the $300 fee will be reduced by $25. Otherwise, an attorney employed or retained by the firm will prepare all the legal documents.

Opinion

The preparation of legal documents in connection with the sale of property constitutes the practice of law. This is true even though standard printed forms are used and the only service performed is filling in the blank spaces on the forms. But the Supreme Court of Colorado decided in the so-called "real estate cases" (135 Colorado 398) in 1957 that even though constituting the practice of law these documents could be prepared without charge by licensed real estate brokers with respect to transactions handled by them. The first question to be disposed of is whether the attorney in question is in violation of Canon 47 which provides that no lawyer shall permit his professional services to be used in the aid of the unauthorized practice of law.

We hold that the firm in question is not within the ambit of the real estate cases. We are convinced that the opinion of the court, as it relates to sales of real estate, is intended to apply only to the usual seller-broker or buyer-broker relationship. In such instances the broker can prepare the legal documents necessary to close the sale by completing standard and approved printed forms. The facts of the above case disclose an entirely different relationship. The firm is not acting as a broker, though it may be licensed as such, but rather is offering certain *services* for sale, including services which are the practice of law. We cannot believe that the protective umbrella of the court was intended to extend so far. Thus the activities of the firm, in our opinion, constitute the unauthorized practice of law.

It follows that the attorney in question, by aiding or making possible this unauthorized practice, is in violation of Canon 47. By his conduct the attorney also violates Canon 35, which states in part:

> The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer's responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary. A lawyer's relation to his client should be personal, and the responsibility should be direct to the client.

Who is the client? Even though the attorney is employed or retained by the firm, the legal documents he prepares affect the rights and liabilities of the buyer and seller of the property, not the firm. Therefore, the intervention of the firm between the attorney and the parties to the sale is improper.

Furthermore, the attorney also violates Canon 6, since he is in effect representing both buyer and seller. This Canon provides that it is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts.

Lastly, Canon 27 prohibiting advertising is violated, since the described activity is a feeder supplying the lawyer with legal business from persons who would not otherwise seek him out.

1995 Addendum

This Opinion was based upon the Canons of Professional Ethics, the predecessor to the Code of Professional Responsibility. The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code and the Canons, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 5.4(b) (prohibiting lawyers from assisting in the unauthorized practice of law); Rule 5.4 and Rule 2.1 (regarding the duty to exercise independent professional judgment); Rule 5.4(a) (regarding division of fees with non-lawyers) and Rule 1.7 (regarding representing conflicting interests) and Rule 7.2(c) (regarding giving value for recommending a lawyer's services).

20 FEE COLLECTION

Adopted June 23, 1961.
Addendum issued 1995.

Syllabus

Although controversies with and lawsuits against clients concerning compensation are to be avoided by the lawyer, a lawyer may ethically seek recovery of a fee for services rendered to which the client has agreed and which the client has promised but failed to pay, either by a lawsuit against the client in the lawyer's own name or by assignment of the claim against the client to a collection agency.

Facts

A lawyer performs non-litigation legal services for a client for an agreed fee. After the services have been concluded to the apparent satisfaction of the client and the work product has been delivered to the client, the lawyer renders a statement in the agreed amount which the client fails to pay. The lawyer's discussions with the client about the bill do not disclose any dissatisfaction with the services nor the amount of the fee and the lawyer knows of no reason why payment of the fee would cause the client undue financial hardship, but repeated promises by the client to pay the bill are not fulfilled. May the lawyer ethically: (1) assign the bill to a collection agency? or (2) sue the client in the lawyer's own name?

Opinion

Canon 14 of the Canons of Professional Ethics provides:

> Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

This admonition against controversies with or lawsuits against clients is couched in forceful terms and should be considered a strong substantive limitation on the action which a lawyer may take in efforts to collect a fee. Ours is a learned profession, not a mere money-getting trade (See Canon 12). However, Canon 14 also gives clear recognition to the right of a lawyer to be reasonably compensated for his services and to the right to bring suit to collect this compensation where necessary.

The facts presented indicate that no settlement fund or judgment belonging to the client is available upon which he might assert the lien granted by C.R.S. 1953, § 12-1-10. Further it appears that he has already delivered to the client any papers against which he could assert a lien pursuant to C.R.S. 1953, § 12-1-11. The fact that he has not availed himself of this statutorily prescribed method of enforcing payment for his services does not, however, cause him to lose the right to avail himself of other legitimate means of obtaining a reasonable recompense for his services.

It should be noted that no controversy is presented as to the amount of the fee; the only question relates to the methods of collection which may be used. The facts imply that the lawyer has reasonably reached the conclusion that satisfaction of his claim cannot be obtained without resorting to one of the two suggested methods for obtaining such recovery, but it is the opinion of the Committee that the lawyer should honestly reach this conclusion before embarking on either course. Only where circumstances imperatively require it should the lawyer resort to either of these means to compel payment.

It is the opinion of the Committee that in this case, if the lawyer has reasonably concluded that only by resort to one of the two suggested methods of collection could he collect the fee, he may use either method for that purpose. Neither assignment of his claim to a collection agency nor suit in the lawyer's own name for the purpose of collecting the fee would be unethical.

1995 Addendum

This Opinion was based upon the Canons of Professional Ethics, the predecessor to the Code of Professional Responsibility. The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code and the Canons, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.5 (regarding fees) and Rule 1.6 (regarding confidential information). Reference should also be made to Opinion 82 and C.R.S. §§ 12-5-119 and 120.

NO CHANGES TO OPINIONS 21-40

23 REPRESENTATION OF GUARDIAN FOR MINOR IN PERSONAL INJURY SETTLEMENT

Adopted July 20, 1962.
Addendum issued 1995.

Syllabus

It is unethical for an attorney to represent the guardian of a minor when the attorney is selected or employed by the insurance company with whom a damage settlement for injuries sustained by the minor has been negotiated.

Facts

In a recent case an insurance company negotiated a settlement with the natural guardian of a minor who had been injured by an act of an insured person of the insurance company. The insurance company, with the consent of the guardian, selected or employed an attorney to represent the guardian in commencing the guardianship proceedings and obtaining court approval of the settlement agreement. The attorney disclosed to the court his relationship to the insurance company. The court denied the right of the attorney to appear on behalf of the guardian.

Opinion

On the factual situation presented, it is the opinion of the Committee that the actions of the attorney violated Canons 6 and 35 of the Canons of Ethics.

Canon 6 prohibits an attorney from representing conflicting interests. It is patently apparent that the attorney was attempting to represent incompatible interests. He could not conceivably be considered as appearing before the court even as an impartial person advocating the fairness of the settlement agreement, when he was initially selected or employed by the insurance company to represent the guardian. The attorney represents only the lay agency which intervened in violation of Canon 35 between himself and the alleged client.

A proviso to Canon 6 permits an attorney to represent conflicting interests if the express consent of all concerned is given after a full disclosure of the facts. This proviso cannot be construed as having universal application. It cannot be employed to permit an attorney to represent both the plaintiff and the defendant in an adversary proceeding, nor can it be employed to permit an attorney to represent a fiduciary when the consent of the fiduciary to the conflicting interest of the attorney would constitute a breach of the fiduciary's duty.

The propriety of the court's action in guarding the interests of the minor under similar facts is fully established in *Seaton v. Tohill,* 11 Colo. App. 211, 53 Pac. 170.

It should not be concluded from this Opinion, however, that it would be improper for the insurance company to agree to reimburse the guardian for legal fees incurred by the guardian in connection with the proceeding, when the selection and employment of the attorney is entirely within the discretion of the guardian.

1995 Addendum

This Opinion was based upon the Canons of Professional Ethics, the predecessor to the Code of Professional Responsibility. The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code and the Canons, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.7, in particular 1.7(c) (regarding conflicts of interest); and Rule 1.8(f) (regarding acceptance of fee payments from one other than the client). The Ethics Committee directs attorneys to Opinion 91 and the relevant provisions of the Colorado Rules of Professional Conduct contained in that opinion. This opinion is supplemented by Opinion 91 which should be reviewed in conjunction with the Rules.

24 OFFICES ON CLIENT'S PROPERTY

Adopted July 20, 1962.
Addendum issued 1995.

Syllabus

It is not unethical for a firm of attorneys to have its offices in the business premises of a financial institution which is a client of the firm even though one of the attorneys may hold an executive position in the institution. However, in such a situation, the firm of attorneys will have to use great care to be certain that the close connection with the financial institution is not in any way used, directly or indirectly, for the purpose of soliciting professional employment for the law firm.

Facts

A firm of attorneys has its offices in the business premises of a financial institution. One or more of the members of the firm hold important executive positions in the institution. The firm is the legal representative of the institution. A portion of the firm's business consists of examining real estate titles for the institution, preparing instruments of conveyance and security, and closing loans.

Is such an arrangement proper under the Canons of Ethics?

Opinion

Canon 27 of the Canons of Professional Ethics prohibits the solicitation by a lawyer of professional employment. The ABA Committee on Professional Ethics has, in several opinions, warned against the indirect solicitation of business through a relationship which an attorney may have with a lay agency. (See ABA Committee on Professional Ethics Opinions Nos. 31, 35, 57 and 225.) The following admonition of the ABA Committee in its Opinion No. 57, quoted in Opinion No. 7 of this Committee, is directed to this problem and is worthy of being quoted again:

> It is not necessarily improper for an attorney to engage in a business; but impropriety arises when the business is of such a nature or is conducted in such a manner as to be inconsistent with the lawyer's duties as a member of the Bar. Such an inconsistency arises when the business is one that will readily lend itself as a means for procuring professional employment for him, is such that it can be used as a cloak for indirect solicitation on his behalf, or is of a nature that, if handled by a lawyer, would be regarded as the practice of law. To avoid such inconsistencies it is always desirable and usually necessary that the lawyer keep any business in which he is engaged entirely separate and apart from his practice of the law and he must, in any event, conduct it with due observance of the standards of conduct required of him as a lawyer.

The facts indicate that the law firm has a very close connection with the financial institution in whose offices it conducts its practice. The close physical arrangement may, of itself, cause the lay agencies to serve as "feeders" of professional employment to the firm, in violation of Canon 27. A heavy duty rests upon all members of the law firm, and particularly upon the lawyer who holds an executive position with or controls the lending institution, to see that no such violation is allowed to occur. All persons connected with the lay agency must be made to clearly understand that the law firm is not associated with the lending institution and that it would be unethical for the members of the law firm to take advantage of the close relationship for the purpose of providing the law firm with additional professional employment.

The question is whether in fact indirect solicitation would be probable. If, for example, the financial institution is a bank, industrial bank, or savings and loan association, having a ground floor office which is visited by large numbers of the public, and if it contains signs identifying the firm, or identifying individuals as lawyers, there would surely be a dangerous possibility of solicitation, and perhaps

advertising. Borrowers might infer that employment of the firm was necessary or at least highly desirable, in order to obtain loans. The firm should move its offices to another part of the building.

If, on the other hand, the financial institution is a life insurance company, or some other entity having an upstairs office which is not visited by large numbers of the public, the possibility of indirect solicitation is probably remote. There may be difficult borderline cases between these two extremes.

On carefully reviewing the situation, the members of the law firm may determine that it is impossible to effectively avoid violations of Canon 27 while the firm is practicing in the same premises as the lending institution with which one of its members is so closely associated. While this Committee believes that the relationship, of itself, does not automatically result in unethical conduct, it calls attention to the duty of the lawyers to carefully conduct their practice in such a manner that any such violations will be avoided.

1995 Addendum

This Opinion was based upon the Canons of Professional Ethics, the predecessor to the Code of Professional Responsibility. The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code and the Canons, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 5.4(a) (regarding division of fees with non-lawyers); Rule 7.2 (regarding advertising); Rule 7.2(c) (regarding giving value for recommending a lawyer's services) and Rule 7.3 (regarding direct contact with prospective clients).

25 USE OF ATTORNEY'S SIGNATURE ON COLLECTION CASE SUMMONS

Adopted August 25, 1962.
Addendum issued 1995.

Syllabus

It is unethical for a lawyer to consent to or acquiesce in an arrangement whereby his name or signature appears on a summons as attorney when the summons is in fact prepared by his client, a collection agency, and not under his direction and control.

Facts

An attorney represents a collection agency. The collection agent frequently finds it necessary to file suit on claims assigned to it. Lay employees of the agency, with the consent of the attorney, prepare the Justice Court summons in each such case within that court's jurisdiction and cause the attorney's name or signature to be placed on the summons, together with the telephone number of the agency. Defendants in the cases frequently call the number shown on the summons purporting to be the attorney's number and lay employees answering such calls fail to disclose the fact that they are not attorneys and instead give the impression that it is the attorney's office that has been contacted. The attorney representing the agency has no knowledge of the case at all until just prior to the time it goes on trial. A substantial portion of the cases are settled before such time and consequently never come to the attention of the attorney.

Is the attorney in violation of the Canons of Ethics?

Opinion

The attorney is in violation of the Canons of Ethics.

The collection agency is practicing law in the preparation of the summons and subsequent negotiations with the respective defendants. The attorney has allowed his name to be used by a lay agency in direct violation of Canon 35 (prohibiting lay intermediaries) and Canon 47 (aiding the unauthorized practice of law).

Furthermore, Canon 9 may also be involved, since it provides in part that "it is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law." The lawyer has consented to an arrangement tending to mislead defendants in the cases filed by the collection agency. The actions or statements of the lay employees of the agency in dealing with a defendant after a suit is filed (purportedly by the lawyer) are beyond the knowledge or control of the lawyer, and this very fact is sufficient to condemn the arrangement under Canon 9.

The lawyer is also in violation of Canon 22 requiring candor and fairness in dealings with courts and other lawyers. The filing of a summons showing the lawyer's name is a representation not only to the defendant but to the Court that the lawyer has knowledge of the case and that the summons was drawn by him or drawn under his direction and control.

We, therefore, conclude that the conduct of the lawyer is unethical. The mere acquiescence by the lawyer in an arrangement whereby his name or signature appears on pleadings or other documents not prepared by him, and not under his direction and control, is sufficient without other facts to render the conduct unethical. Although not directly in point, we refer for instructive purposes to our prior Opinion No. 7 regarding the relationship between attorneys and collection agencies. See also Opinion No. 35 of the American Bar Association Ethics Committee.

1995 Addendum

This Opinion was based upon the Canons of Professional Ethics, the predecessor to the Code of Professional Responsibility. The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code and the Canons, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.1 (requiring competent representation); Rule 1.3 (reasonable diligence required in client representation); Rule 1.6 (requiring confidentiality by lawyer and lawyer's employees and associates unless disclosure permitted by client); Rule 3.3 (prohibiting knowingly false statements of material fact or law to a tribunal); Rule 4.1 (prohibiting knowingly false statements of material fact or law to third persons); Rule 5.3 (regarding the use of non-lawyer assistants and attorney responsibility for non-lawyer assistants); and Rule 5.6 (prohibiting lawyer assistance to non-lawyers in the unauthorized practice of law).

26 REAL ESTATE COMMISSION FOR ATTORNEY-EXECUTOR

Adopted September 28, 1962.
Addendum issued 1995.
Withdrawn October 17, 2015.

WITHDRAWN

Syllabus

An attorney who is executor or administrator of an estate or who is attorney for an estate may not ethically charge or receive or participate in a commission on the sale of real estate or other assets of the estate whether or not he has a real estate broker's or agent's license.

Facts

An attorney is the executor or administrator of an estate or is attorney for the estate. In settlement of the estate, real estate or other assets belonging to the estate are sold. May the attorney who is connected with someone who has, a real estate broker's or agent's license receive or participate in a commission on the sale?

Opinion

An executor or administrator of an estate, whether lawyer or layman, is forbidden to so deal with the assets of the estate that he makes a personal profit out of such dealings, whether such profit depletes the estate or not – *In Re Macky's Estate*, 73 Colo. 1, 213 P. 1 (1923). In the *Macky* case it was held that an executor could not receive a commission on premiums paid for his bond as executor.

In *Murray v. Stuart,* 79 Colo. 454, 247 P. 187 (1926), directly in point, it was held that an administrator who participated in the sale of realty belonging to an estate could not lawfully charge or collect a commission on the sale, even though it was agreed the commission would be paid. The Court held that this agreement was contrary to public policy inasmuch as it was in breach of the administrator's trust.

As a fiduciary, an executor or administrator occupies a position of trust and confidence and is held to the highest degree of good faith. The purpose of the rule forbidding a fiduciary to profit personally from his dealings with the assets entrusted to him is to prevent both the fact and the appearance of fraud and breach of the confidential relationship.

The lawyer, who is enjoined from any conduct involving disloyalty to the law and is held to the utmost fidelity to private and public duty by Canon 32, and who is required by Canon 29 at all times to uphold the honor and maintain the dignity of the profession, is no less bound to observe the law and appearances than the fiduciary.

Therefore, the lawyer, acting as executor or administrator, may not receive or participate in a commission on the sale of estate assets.

The rationale of the above applies just as strongly to the attorney for an estate. He is in no less a confidential position with regard to his client than is an executor or administrator with regard to the beneficiary of an estate. To hold otherwise and to permit a lawyer for an estate to receive or participate in commissions for dealing with estate properties or interests when he is not permitted to do so as executor or administrator would be to hold that a lesser degree of fidelity to his trust is required of a lawyer acting as such than is required of the same lawyer acting in the lay position of executor or administrator. To state the proposition is to refute it.

Canon 11 provides in part: "Money of the client or collected for the client or other trust property coming into the possession of the lawyer should be reported and accounted for promptly, and should not under any circumstances be commingled with his own or be used by him."

Therefore, any commission coming to a lawyer for an estate as the result of his dealing with estate property is trust property belonging to the estate and must be turned over to it.

1995 Addendum

This Opinion was based upon the Canons of Professional Ethics, the predecessor to the Code of Professional Responsibility. The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code and the Canons, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.5 (requiring reasonable fees) and Rules 1.8(a) and (b) (regarding conflicts of interest). The conduct discussed in this opinion could potentially be violative of these Rules and, if the commission is contingent upon the successful sale of an asset, the provisions of C.R.C.P. Chapter 23.3 would also be applicable.

WITHDRAWN

28 LETTERHEAD

Revised April 28, 1973.
Revised July 24, 1993.

Syllabus

When a member of a law firm is elected or appointed to a judicial, legislative, or public executive or administrative office for any substantial period of time during which he is not actively and regularly practicing law as a member of the firm, he may not properly hold himself out as a member of the firm, and his name shall not be used in the firm name, on the firm letterhead, in any firm identification placard or in professional notices of the firm.

Facts

An attorney who is a member of a law firm is elected or appointed to a judicial, legislative, or public executive or administrative office for a substantial period of time during which he will not actively and regularly practice law with his firm. Should he, prior to assuming the duties of his public office, resign from his firm, and should his name be removed from the firm name, from the firm letterhead and identification placards, and professional notices of the firm?

Opinion

A lawyer should not hold himself out as offering legal counsel to the public if he is not actively and regularly practicing law. Service in a judicial, legislative, or public executive or administrative office which, for a substantial period of time, prevents the lawyer from actively practicing law also prevents him from holding himself out as a practicing lawyer. Whether he has the right to practice law concurrently while holding that office or not, his name should be removed from the firm name, and he should not be identified as a past or present member of the firm. Canon 2, Code of Professional Responsibility; Ethical Consideration 2-12; Disciplinary Rule 2-102(B).

If he does have the right to practice law concurrently while holding the public office, he may continue to be identified with his firm so long as he actively continues to practice law as a member thereof. Rule 7.5(e) and comment to Rule 7.5 of the Colorado Rules of Professional Conduct; Ethical Consideration 2-12.

But if the public office requires substantially all of his time, he cannot actively engage in the practice of law to the extent necessary to avoid misleading persons with whom he deals, and therefore he must not hold himself out as a partner of a law firm, whether he remains a partner or not. Rule 7.5(e) and comment to Rule 7.5 of the Colorado Rules of Professional Conduct; Ethical Considerations 2-12 and 2-13; Disciplinary Rules 2-102(B) and (C). If he is not in fact a partner, the prohibition is clear. Rule 7.5(e) and comment to Rule 7.5 of the Colorado Rules of Professional Conduct; Ethical Consideration 2-13 and Disciplinary Rule 2-102(C). Even if he remains a partner, where permitted by law, the use of his name in the firm name or in any connection with the firm, on its letterhead or otherwise, is prohibited. Rule 7.5(e) and comment to Rule 7.5 of the Colorado Rules of Professional Conduct; Ethical Consideration 2-12 and Disciplinary Rules 2-102(B) and (E).

It should be observed that an attorney who retains membership in his firm after assuming a government office may thereby disqualify his firm, for either statutory or ethical reasons, from representing the interests of clients before certain courts, legislative or executive bodies, or administrative agencies.

29 REPRESENTATION OF SELLER, BUYER OR BORROWER BY LAWYER FOR FINANCIAL INSTITUTION

Adopted January 18, 1964.

Syllabus

A lawyer who represents a financial institution may not permit his client systematically to refer its customers to him for legal services the customers may require personally in connection with loans in which the financial institution is involved. Furthermore, the lawyer may not represent, in addition to the financial institution, the seller, buyer, or borrower, unless he has the express consent of such parties given after a full disclosure of the facts.

Facts

A lawyer represents a financial institution engaged in making residential loans. Home owners and purchasers who apply for loans are directed by the financial institution to its lawyer, who then prepares the contract of sale between the parties. Later, for the closing, this lawyer prepares the deed, the note and deed of trust, and any second mortgage papers. He also examines the abstract and performs necessary title remedial work. The seller is charged by the lawyer for the deed, the remedial work, and one-half of the fee for the contract and the closing. The buyer is charged for the abstract examination, the note and deed of trust to the lending institution, any second mortgage papers, and one-half of the fee for the contract and closing.

Is the lawyer in violation of the Canons of Professional Ethics?

Opinion

In the opinion of the Committee, the lawyer may be in violation of Canon 27 (solicitation of professional employment), Canon 35 (intervention of lay intermediary), and Canon 6 (representation of conflicting interests).

The lawyer is in violation of Canon 27 if the financial institution, with his knowledge and consent, systematically refers its customers to him for such legal services as the customers may require personally in connection with loans in which the financial institution is involved. The lender is utilizing the services of its own lawyer in the preparation of the loan statement and the note and deed of trust to which it is a party. The other documents, while necessary to the loan, are instruments to which the lender is not a party and which should be drawn by the parties' own attorneys. The lender's lawyer, in systematically accepting this employment and charging the parties therefor, is guilty of the solicitation of professional employment through touters in violation of Canon 27. The lawyer should request his client not to refer customers to him unless they have no attorney of their own and unless they ask the lender to recommend counsel. Even in these circumstances, the customers should be apprised by the lender of the other local counsel available for such services, in addition to the lender's lawyer.

If the lawyer permits the systematic referral to him of the lender's customers, he is also in violation of Canon 35, because of the intervention of the lay intermediary between himself and the parties to the transaction. It is obvious that if the parties do not freely select the lawyer, but instead are routinely referred to him, he has allowed his lay client to intervene between himself and the parties whose rights and liabilities are affected by the performance of his services. The lawyer's relation to these parties becomes impersonal and his responsibility, rather than being direct to them, is to the lender to whom he owes his primary allegiance.

Finally, the lawyer violates Canon 6 unless he obtains the express consent of all parties whom he represents after a full disclosure of the facts. The interests of the lender may conflict with the interests of the buyer and seller and the interests of the buyer and seller may conflict with each other. If the lender's lawyer

also represents either the buyer or seller or both, he must have their consent to do so. The lawyer is "representing" these parties if he prepares documents affecting their rights and liabilities for a fee as in the instant case.

The above conclusions apply whether the loan involved is a residential loan or other type of real estate loan.

The Committee has relied in part upon its prior Opinion No. 12, adopted March 12, 1960, Opinion No. 17, adopted January 20, 1961, and Opinion No. 24, adopted July 20, 1962.

With the changes effective January 1, 2008, the term "consent after consultation" was changed to "informed consent." "Consultation" only required "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Despite the fact that the American Bar Association Ethics 2000 committee indicated that no substantive change was intended by the change to "informed consent," its definition now "denotes the agreement by a person to a proposed course if conduct after the lawyer has communication adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." *See* Rule 1.0 Comment [6] to Rule 1.0 indicates that the crux of this requirement is that "the lawyer must make reasonable efforts to ensure that the client or the other person possesses information reasonably adequate to make an informed decision." Thus, the lawyer's duty is not just to explain the significance of the decision, but also to make sure the client is sufficiently informed to consider available options and risks prior to making that decision. The Subcommittee recommends appending this legend to the following Formal Opinions: 29 (representation of seller, buyer or borrower by lender's counsel); 58 (water rights representation, multiple clients), 97 (service on board of public entity), 107 (Third-Party Auditors), 115 (collaborative law).

31 PUBLICATIONS, PENDING LITIGATION

Adopted June 6, 1964.

Statement of Principles on Published Comment Concerning Pending Litigation

Canon 20 of the Canons of Professional Ethics reads as follows:

> Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally, they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

As good as this statement is, there is abundant evidence that it has not been effective. It has not prevented counsel from holding press conferences or issuing press releases relating to pending or prospective civil or criminal cases. Moreover, as the Canon was drafted before the advent of radio and television, it is limited to newspaper publications. It needs embellishment and implementation.

The very foundation of the administration of justice is that no litigant be deprived of a fair trial. Fair trial presupposes an impartial finder of facts whether judge or jury and for this reason the penalties for "jury tampering" or improperly influencing judges are severe. But bribery or improper approaches to members of a jury out of court are not the only means by which a jury may be improperly influenced. A jury can also be improperly influenced by what they are told in television or radio broadcasts or by what they read in newspapers. This improper influence at times affects civil as well as criminal trials.

No lawyer would be permitted to show a jury a newspaper account prejudicial to one of the parties, yet the same result can be accomplished by the publication in the press of, for example, alleged confessions or the supposed testimony of witnesses which has been excluded by the court.

It is clear that lawyers are responsible for many of the prejudicial statements that appear in the press and are seen or heard on radio and television. The legal profession should not criticize news media for reporting extrajudicial statements made by counsel – statements frequently made with no other purpose than that they shall be publicized by the news media. We cannot hope to receive the cooperation of the press until we clean our own house.

Members of the Bar have a duty to refrain from originating the same types of statements which should not be originated by the press, or otherwise be published. In criminal proceedings, such statements include among others the following:

(1) Any criminal record of the accused.
(2) Any alleged confession or admission of fact bearing upon the guilt of the accused.
(3) Any statement of any public official as to the guilt of the accused.
(4) Any statement of counsel's personal opinion as to the guilt or innocence of the accused.
(5) Any statement that a witness will testify to certain facts.
(6) Any comment upon evidence already introduced.
(7) Any comment as to the credibility of any witness at the trial.
(8) Any statement of matter which has been excluded from evidence by the court at the trial.

In relation to civil proceedings, such types of statements include among others the following:

(1) Any statement of counsel's personal opinion as to the factual or legal merits of the claims of the plaintiff or defendant.
(2) Any statement that a witness will testify to certain facts.
(3) Any comment upon evidence already introduced.
(4) Any comment as to the credibility of any witness at the trial.
(5) Any statement of matter which has been excluded from evidence by the court at the trial.

We hope that this statement of principles on published comment concerning pending litigation will implement and make more understandable the substance of Canon 20.

Trials "are not like elections, to be won through the use of the meeting hall, the radio, and the newspaper." *Craig v. Harney,* 331 U.S. 367, 377. The judicial admonition to jurors to refrain from reading newspapers or listening to radio or television is often an idle gesture. It is only by self-restraint of the kind exemplified by the statements set forth above that meaning can be given to the constitutional safeguards for a fair trial of which we are so justifiably proud.

It is our hope that by putting our house in order we may set an example of the kind of restraint that should be exercised by the various news media.

33 CONTRIBUTIONS, JUDICIAL CAMPAIGN

Adopted June 6, 1964.

Syllabus

Lawyers may contribute reasonable amounts to the campaign funds of candidates for judicial office, and may solicit contributions from others.

A candidate for judicial office may not receive and lawyers may not give any contribution which is excessive in amount or which might justify the inference that the contribution is a device or attempt to gain from a judge his special consideration or favor, in the receipt of appointments from the bench or otherwise.

Lawyers may circulate and sign petitions endorsing candidates for judicial office. However, the practice of asking brother lawyers to sign postcards or pamphlets soliciting votes for the candidates, when coupled with a request that such material then be returned to the campaign committee for mailing, violates Judicial Canon 30, even though the candidate may not at the time be a judge. Lawyers who participate in such a breach by the candidate are in violation of Professional Canon 32.

Facts

A lawyer is a candidate for judicial office. His campaign manager, also a lawyer, desires to make gifts to the candidate's campaign fund, and to solicit others to do so. He also desires to send postcards to other members of the bar imprinted with a message endorsing the candidate. The other members are instructed to address and sign the postcards and return them to the campaign manager for mailing. The Committee has been asked whether either the candidate or his campaign manager is violating any of the canons of professional or judicial ethics.

Opinion

Lawyers have a particular obligation to assist in the selection of well qualified judges, Professional Canon 2. This must, however, be done in a manner which cannot be construed as an attempt to exert personal influence on the court, Professional Canon 3.

Lawyers may contribute to the campaign funds of judges if the contributions are reasonable in amount and not tainted by any motive of influencing the judge in the administration of his office or in the appointment of receivers, referees, trustees, special masters, and the like. Since a judge may not receive gifts from lawyers, Judicial Canon 32, and they may not make such gifts, Professional Canon 3, such contributions must be given only to a campaign fund managed by others and not to the candidate himself. The committee must itself expend the moneys on his behalf, and no part of the fund may be paid over to the candidate by the committee. Otherwise, the committee serves merely as a conduit for transmitting funds from lawyers to judges.

Lawyers may solicit such contributions from other members of the Bar and from the public at large, under the same limitations.

A lawyer may send postcards or pamphlets endorsing the candidacy to those with whom he has an established professional or personal relationship. Distribution to any larger group violates Professional Canon 27 (advertising) if the sender is identified as a lawyer. The campaign manager may not, however, request that the postcards or pamphlets be signed or addressed and then be returned to him for mailing. This practice creates an inference that the candidate or his manager is using the power and prestige of judicial office to promote the candidacy in violation of Judicial Canon 30. Under this Canon, the candidate may not permit others to do acts which he himself is forbidden, and the action of the campaign manager is equally unethical, Professional Canon 32. The result is the same even though the candidate may not at the time be a judge. Lawyers should, however, have the moral stamina to resist such coercion.

Since a judge cannot use the power and prestige of his office to promote his own candidacy, he may not send out letters to members of the bar asking for endorsement of his candidacy, ABA Op. 105 (1934); ABA Op. 139 (1935); or solicit his own campaign funds, N.Y. County Op. 304 (1933).

Ordinarily a judge should stand on his official record and leave the promotion of his candidacy to others. ABA 139 (1935) *supra*.

Obviously the candidate and his supporters are under other inhibitions, particularly those imposed by Professional Canons 2, 3, 27 and 32, and by Judicial Canons 4, 12, 13, 14, 24, 26, 28, 30 and 32.

34 ADVANCEMENT OF LIVING EXPENSES FOR PERSONAL INJURY CLIENT

Adopted March 27, 1965.
Addendum issued 1995.

Syllabus

It is improper for a lawyer in a personal injury case to advance living expenses to or for the benefit of his injured client.

Facts

A lawyer handles personal injury cases. He desires to advance funds for living expenses to his injured clients, with the understanding that he will be reimbursed at the time the case is concluded and that such reimbursement will be in addition to any fee for professional services. The Committee has been asked whether such a practice violates the Canons of Ethics.

Opinion

The Committee is of the opinion that such a practice clearly violates Canons 6 and 10. Canon 42 outlines the limits which must be observed and clearly does not authorize this practice.

The principal objection to this practice is that it amounts to the purchase by the lawyer of an interest in the litigation. This is clearly prohibited by Canon 10. This is true whether or not the client's agreement to reimburse the lawyer is contingent on recovery. A client whose assets are so meager that he requires advances from his counsel to live is unlikely to have any realistic chance of repaying such advances if there is no recovery on his claim.

This practice, by giving the lawyer an additional stake in the case beyond his fees, places the attorney in a situation where his own personal pecuniary interests may well conflict with the best interests of his client and make it impossible for him to represent the client with the undivided fidelity required by Canon 6. While this conflict exists already with respect to counsel fees (particularly in contingent fee cases), we feel that it should *not* be extended to a situation where the lawyer seeks not only compensation but reimbursement.

The justification usually given in support of the practice of advancing living expenses is that it eliminates the urgency of an injured person's need for funds as a factor to be considered in disposing of the case, either by settlement or by trial, and tends to prevent the disparity in economic status usually present in personal injury cases from being a factor in the case. The Committee recognizes that such economic disparity exists in many cases, that it ought not to affect the outcome of the cases, and that, unfortunately, it sometimes does. The Committee is of the opinion, however, that the practice of having a lawyer advance living costs is not an appropriate nor professionally proper method of resolving the problem. The law is a profession and those engaging therein must use all of the skills of that profession on behalf of those who seek their counsel. Money lending is not one of those professional skills. A remedy for the problem created by economic disparity of litigants must be sought in the proper use of professional skills.

This question has been considered elsewhere. In Opinion 288 by the ABA Ethics Committee, 41 ABA Journal 33, that Committee concluded that such a practice was improper. A like conclusion was reached recently by the Ohio Supreme Court in *Mahoning County Bar Association v. Ruffalo*, 199 N.E.2d 396 (1964). This Committee agrees with these authorities and, like them, is not persuaded by *People v. McCallum,* 173 N.E. 827 (1930), in which the Illinois Supreme Court reaches a different conclusion.

Finally, it should be pointed out that the practice, if publicized, constitutes a holding out by the lawyer of an improper inducement to clients to employ him, in addition to the assurance of performing legal services for the client (see Canon 27).

1995 Addendum

This Opinion was based upon the Canons of Professional Ethics, the predecessor to the Code of Professional Responsibility. The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code and the Canons, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are contained in Rule 1.8 (regarding conflicts of interest). The conduct discussed in this opinion could potentially be violative of these Rules and the provisions of C.R.C.P. Chapter 23.3 would also then be applicable.

38 REFERRAL FEES

Adopted June 4, 1966.
Addendum issued 1995.

Syllabus

It is improper for a lawyer to accept or another attorney to pay a referral fee unless such fee is based upon a division of service or responsibility after full disclosure to the client and his consent to the payment of such fee obtained.

Facts

A lawyer in representing a client on a building and land development project is authorized by the client to get title insurance for purposes of a loan. The lawyer obtains a policy from a title insurance company. Because the lawyer can select one of the attorneys who will examine title for the title company, he receives a referral fee from the lawyer selected. His client does not know of the referral fee.

Opinion

The Committee is of the opinion that the payment of the referral fee violates Canon 34, which provides that: "No division of fees for legal services is proper except with another lawyer, based upon a division of service or responsibility."

According to the facts, the recipient of the referral fee did not perform any services or bear any responsibility for which the fee was paid. It is clear that accepting a fee for merely recommending another lawyer is a violation of this Canon. See, e.g., ABA Opinion No. 97 (1933).

Furthermore, even if the referral fee were proper, the failure of the attorney who accepted it to make full disclosure to and obtain the consent of his client would violate Canon 38, providing that: "A lawyer should accept no compensation, commissions, rebates or other advantages from others without the knowledge and consent of his client after full disclosure." See ABA Opinion No. 304 (1962) (holding that a lawyer who receives a commission for recommending or selling title insurance without fully disclosing to his client his interest in the transaction is guilty of unethical conduct) and ABA Informal Opinion No. 883 (1965) (holding that a lawyer who may receive a rebate from title insurance premium paid by his client should disclose to the client the fact that he, the lawyer, may receive such a rebate and obtain the client's consent).

1995 Addendum

This Opinion was based upon the Canons of Professional Ethics, the predecessor to the Code of Professional Responsibility. The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code and the Canons, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are contained in Rules 1.5 (regarding fees); 1.6 (relating to confidentiality of information); 1.7(b) (regarding conflict of interest); 5.4 (regarding professional independence of a lawyer) and 7.2 (regarding advertising).

40 ACCEPTING CASE HANDLED BY ANOTHER LAWYER

Adopted February 3, 1968.
Addendum issued 1995.

Syllabus

A lawyer may properly accept employment to handle a matter which has been previously handled by another lawyer, provided that the first lawyer has been given notice by the client that his employment has been terminated.

Facts

Lawyer A has begun representing a client on a particular matter. Subsequently, the client contacts Lawyer B and says that he wants to terminate Lawyer A's employment and employ Lawyer B on this matter. Lawyer B asks whether he may accept the employment.

Opinion

The American Bar Association Committee on Professional Ethics has long held that the client has the right to be represented at all times by counsel of his own selection. Canon 7, ABA Opinions on Professional Ethics, Formal Opinion No. 10. A lawyer may properly accept employment to handle a matter which has been previously handled by another lawyer, provided that the superseding lawyer has assured himself that the first lawyer has been given notice by the client that his employment has been terminated. As ABA Formal Opinion No. 10 points out:

> The lawyer originally engaged has his remedy at law for any breach of contract that may occur through the client's termination of his employment but he cannot insist that his professional brethren refuse employment in the matter merely because he claims such a breach of contract. To hold otherwise would be to deny a litigant's right to be represented at all times by counsel of his own selection.

Moreover, a superseding lawyer is not responsible for the fees due the superseded one. ABA Formal Opinion 130; ABA Informal Opinion 243. Any question as to the amount of a lawyer's fee or method of its payment is a matter of contract, express or implied, to be construed as other contracts are construed. Any controversy concerning such a matter is a matter of law to be determined by the courts. See ABA Formal Opinion 63. However, the superseded lawyer is entitled to notice so as to enable him to protect his right or lien. ABA Formal Opinion 17.

1995 Addendum

This Opinion was based upon the Canons of Professional Ethics, the predecessor to the Code of Professional Responsibility. The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code and the Canons, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are contained in Rule 1.16 (regarding declining or terminating representation).

NO CHANGES TO OPINIONS 41-60

43

DUTY TO INSURED

Adopted December 13, 1969.
Addendum issued 1995.

Syllabus

A lawyer, employed by a liability insurance carrier to defend a claim against the company's insured, must represent the *insured* with undivided fidelity and cannot ethically take any position which is potentially disadvantageous to the insured even though that position may be advantageous to the carrier.

Facts

An attorney is employed by an insurance company to represent the insured defendant in a personal injury action. Upon undertaking the defense, the attorney learns that the defendant is also involved in a Workers' Compensation action arising out of the same incident. The claimant in both proceedings is the same person. The insurance company has no exposure with reference to the Workers' Compensation action, it is obviously to the insurance company's interest to abate the personal injury action as long as possible and to assert that the Workers' Compensation proceeding constitutes a bar to any recovery under the insurance policy. On the other hand, the defendant insured will benefit from an immediate trial of the personal injury action and he directs the attorney to proceed to trial immediately. The insurance company opposes this course of action.

Opinion

The essential point of ethics involved is that a lawyer must represent his client with undivided loyalty.

Canon 6 of the Canons of Professional Ethics makes unequivocal reference to "the obligation to represent the client with undivided fidelity. . . ." Canons 5 and 9 of the new Code of Professional Responsibility are also apposite. They require that a lawyer exercise independent professional judgment on behalf of the client and that he avoid even the appearance of professional impropriety.

The requirement of undivided loyalty is predicated upon the fact that maintenance of public confidence in the Bar and preservation of respect for each lawyer's integrity require that no lawyer can appear both for and against the same party in the same controversy. Drinker, *Legal Ethics,* at page 115; ABA Informal Opinion No. C-728; and Ethical Consideration 9-1, Code of Professional Responsibility.

The principle of undivided loyalty is further articulated in the first Ethical Consideration to Canon 5 of the Code of Professional Responsibility as follows:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

The client in the instant situation is the defendant insured and not the insurance company. The problem is analogous to conflict of interest situations involving uninsured motorist coverage and other similar cases where the interests of the insured and his insurance carrier are divergent. Universally, these situations have resulted in opinions which recognize that the lawyer employed by the insurance company must be loyal to the insured who is, in fact, the client. ABA Informal Opinions Nos. C-728, 853, 949, and 977.

The courts have likewise recognized that the insured, and not the insurance company, is the client. *Allstate Insurance Company v. Keller,* 17 Ill. App.2d 44, 149 N.E.2d 482 (1958); *Fidelity and Casualty Co. of N.Y. v. McConnaughy,* 228 Md. 1, 179 A.2d 177 (1962).

Although the contract of insurance may give the insurance company the right to select the lawyer who will control the incidents of litigation, the insured has not contracted away the right to the undivided loyalty of his attorney. ABA Formal Opinion No. 282 and ABA Informal Opinion 977.

A lawyer who knowingly permits considerations advantageous to the insurance carrier to influence his conduct to the disadvantage of the insured is guilty of unethical conduct.

1995 Addendum

This Opinion was based upon the Canons of Professional Ethics, the predecessor to the Code of Professional Responsibility. The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code and the Canons, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

The Ethics Committee directs attorneys to Opinion 91 and the relevant provisions of the Colorado Rules of Professional Conduct contained in that opinion. This opinion is supplemented by Opinion 91 which should be reviewed in conjunction with the Rules.

45 REPRESENTATION OF CLIENT BY PART-TIME JUDGE

Revised Opinion adopted June 16, 1984.
Addendum issued 1996.

Syllabus

(A) It is improper for a lawyer who is employed part-time as a judge to represent a person: (a) with respect to any matter which appears likely to come before the lawyer in his capacity as a judge or which has come before the lawyer in his capacity as a judge; (b) with respect to any matter which has derived from or was incident to a matter which has or is likely to come before the lawyer in his capacity as a judge.

(B) It is improper for a lawyer who is employed part-time as county court judge to represent a person who is accused of violating a municipal ordinance or a state criminal statute.

(C) It is not improper for a lawyer who is employed part-time as a municipal judge to represent defendants in any county or district court, or in another municipal court: (1) if the alleged crime did not take place in the municipal jurisdiction in which the lawyer sits as judge; (2) if no peace officer or other employee of the municipal jurisdiction in which the lawyer sits as judge was involved in the investigation of the matter or will appear as a witness at trial; and (3) if the criminal representation will in no way cast in doubt the legality of any aspect of the municipal ordinances which the lawyer interprets as a judge.

(D) It is improper for a lawyer whose partner, associate, employee or co-shareholder in the practice of law is employed part-time as a judge to accept or continue employment: (a) with respect to any matter which appears likely to come before the part-time judge or which has come before the part-time judge; (b) with respect to any matter which has derived from or was incident to a matter which has or is likely to come before the part-time judge. But, assuming compliance with the Code of Professional Responsibility, it is not improper for a partner, associate, employee or co-shareholder of a lawyer who is a part-time judge to represent persons accused of violating a municipal ordinance or a state criminal statute in a jurisdiction other than the one in which the part-time judge serves.

Opinion

The Colorado statutes specifically contemplate the appointment of lawyers to serve as county and municipal judges on a part-time basis. *See* C.R.S. §§ 12-5-110, 13-6-204, 13-6-208, 13-10-106. And C.R.S. § 12-5-110 specifically provides that a part-time county court judge may practice in courts higher than his own "in any case which has not been before the county court." But that conduct is declared to be legal does not always answer the ethical questions such conduct may raise. The purpose of this opinion is to answer some of the ethical issues involved when practicing lawyers serve as part-time judges.

A. Conflicts of Interest in the Dual Role of Part-time Judge and Part-time Practicing Attorney

No one can dispute that there are serious practical problems involved in finding qualified part-time judges for counties and municipalities of limited population or limited lawyer resources. But these practical problems must not be permitted to blind us to the serious ethical problems that may arise for practicing lawyers who are employed as part-time judges.

Lawyers who are part-time judges must be sensitive to potential conflicts of interest that may later force the lawyer to withdraw from representing the client and will force recusal as well. Late withdrawal by a lawyer who is a part-time judge works a substantial hardship (1) on the client, who will be forced to the expense and awkwardness of retaining new counsel in the middle of the representation, and (2) on the judicial system, because the lawyer as judge will be unable to hear cases involving the former client, forcing another judge to take over such cases. For this reason, it is improper for a lawyer to accept employment in a matter that is likely to come before the court in which the lawyer is a part-time judge. And this prohibition is to be read broadly to apply not only to controversies that are themselves likely to come before the court in

which the lawyer is a judge, but also to matters that are derived from or incident to such initial controversy and which are likely to come before the court in which the lawyer sits as a judge.

With respect to matters that have already been passed upon by the lawyer in his capacity as judge, DR 9-101(A) says specifically that "[a] lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity." Because public confidence in the judicial system is crucial to an effective system of justice, see generally EC 9-2, this prohibition on the acceptance of employment in matters passed upon by the lawyer while acting in his capacity as judge, must also be read broadly to preclude the acceptance of employment in matters that are incident to or derived from matters that came before the lawyer in his capacity as judge.

B. Representation of Criminal Defendants in Other County or District Courts by a Lawyer Who is Also Part-time County Court Judge

The American Bar Association Committee on Professional Ethics dealt in Formal Opinion 242 (1942) with a situation that is directly analogous to this question. The issue in that opinion was whether a part-time judge in a court with jurisdiction over misdemeanors and preliminary hearings could represent defendants in a court with felony jurisdiction. In concluding that it was improper for such a judge to represent criminal defendants in higher courts, the ABA Committee stated:

> It is the duty of the judge to rule on questions of law and evidence in misdemeanor cases and examinations in felony cases. That duty calls for impartial and uninfluenced judgment, regardless of the effect on those immediately involved or others who may, directly or indirectly, be affected. Discharge of that duty might be greatly interfered with if the judge, in another capacity, were permitted to hold himself out to employment by those who are to be, or who may be, brought to trial in felony cases, even though he did not conduct the examination.

In our opinion, acceptance of a judgeship with the duties of conducting misdemeanor trials and examinations in felony cases to determine whether those accused should be bound over for trial in a higher court ethically bars a judge from acting as attorney for defendants in felony trials whether they were previously examined by him or by some other county court judge. Such a practice would not only diminish public confidence in the administration of justice in both courts but would produce serious conflict between the private interests of the judge as a lawyer and of his clients, and his public duties as a judge in adjudicating important phases of criminal processes in other cases. The public and private duties within the same judicial system are incompatible. And there is a serious danger that such conduct would demean the prestige of the judicial office and would lessen public respect for the criminal justice system.

C. Representation of Criminal Defendants in County or District Court or in Other Municipal Courts by Lawyers Who Are Also Part-time Municipal Judges

ABA Informal Opinion 997 (1967) dealt with the ethical propriety of a part-time United States magistrate who wished to know if he could accept appointments to represent indigent defendants charged with a crime in state court. In that opinion the ABA Committee concluded that given the responsibility on the bar to provide counsel for indigent defendants and the fact that the lawyer would be defending those charged with violations of state law, not federal law, the lawyer could accept such appointments in the absence of special circumstances.

Among the special situations mentioned in Informal Opinion 997 that would bar accepting such appointments are: cases where the defendant is also charged with federal crimes and has appeared or may appear before the lawyer in his capacity as magistrate and cases where federal law enforcement officers who regularly appear before the lawyer in his capacity as magistrate will be important witnesses at the state trial.

We think that Informal Opinion 997 is helpful in the case of part-time municipal judges who wish to represent defendants charged with crimes in different municipal courts or in county or district courts. Unlike county or district court judges who interpret laws which apply throughout the state, municipal judges apply ordinances which are local in application. Because municipal judges apply local law only and also

because the jurisdictional limits of municipal courts are very narrow, a lawyer who is also a part-time municipal judge may ethically represent defendants in any county or district court or in municipal courts other than the one in which the lawyer sits as judge, in the absence of special circumstances: (1) if the alleged crime did not take place in the municipal jurisdiction where the lawyer sits a judge, and (2) if no peace officer or other employee of the municipal jurisdiction in which the lawyer sits as judge was involved in the investigation or will appear as a witness at trial, and (3) if the criminal representation would in no way cast in doubt the legality of any aspect of the municipal ordinance which the lawyer interprets as a judge.

These guidelines are very similar to those announced by the Ethics Committee in Opinion 46 governing part-time municipal attorneys. In that opinion the Committee decided that a part-time municipal attorney may not (1) represent clients in criminal matters which occurred within that municipality, if the attorney prosecutes cases in municipal court or advises the municipality on matters that are likely to be in issue in criminal prosecutions; (2) nor may such part-time municipal attorney represent a defendant in any criminal case in which an employee of the municipal government will appear as a witness for the prosecution; (3) nor may such part-time municipal attorney represent a party in any litigation which may require the lawyer to take a position that could adversely affect the validity of any law or ordinance governing the municipality.

Among the special circumstances that would preclude a lawyer who is also a part-time municipal judge from representing a defendant in a different municipal court or in a county or district court, would be the situation where the defendant also faces charges in the municipal court where the lawyer sits as judge or where the defendant has appeared previously to answer charges before the lawyer in his capacity as judge. These are only two examples of the sorts of special circumstances that would bar a lawyer who is also a part-time municipal judge from representing a defendant in another municipal court or in a county or district court. A lawyer in such a position must be continually careful to avoid these situations and others that may arise that could suggest to the public that the lawyer is using his position as a municipal judge to benefit his practice of law.

D. Partners, Associates, Employees, or Co-shareholders of a Lawyer Who is a Part-time Judge

Section A of this opinion concluded that the disciplinary rules of the Code of Professional Responsibility made it improper for a lawyer, who is a part-time county court judge, to accept employment in a matter that is likely to come before the court in which the lawyer is a part-time judge. And because of the hardship withdrawal works on both the client and the judicial system, the conflicts of interest provisions must be read broadly to apply not only to controversies that are themselves likely to come before the court in which the lawyer is a judge, but also to matters that are derived from or incident to such initial controversy and which are likely to come before the court in which the lawyer sits as a judge. In addition, Section A of this opinion concluded that DR 9-101(A) bars a lawyer who is a part-time judge from accepting employment in matters passed upon by the lawyer while acting in his capacity as judge, and we read that disciplinary rule broadly to include the acceptance of employment in matters that are incident to or derived from matters that came before the lawyer in his capacity as judge.

With respect to the possible vicarious disqualification of those who work with the lawyer in the practice of law, DR 5-105(D) provides:

> If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

Because Section A of this opinion is based on DR 5-105(A) on conflicts of interest as well as DR 9-101(A) in Canon 9 which is aimed at public confidence in the judicial system, these disciplinary rules apply through DR 5-105(D) with equal force to a partner, associate, employee or co-shareholder of a lawyer who is a part-time judge. Such lawyers may not accept employment (a) with respect to matters which have or may come before the lawyer who is a part-time judge; (b) with respect to matters which derive from or are incidental to matters which have or may come before the lawyer in his capacity as judge; or (c) with respect

to matters involving persons who are parties to any matter which is or appears likely to come before the lawyer in his capacity as a judge.

The rules of conduct set out in Section B above which preclude a part-time county court judge from representing a person accused of violating a criminal statute in another county court or in a district court are based upon ethical considerations in Canon 9 relating to the appearance of impropriety and the necessity for promoting public confidence in the system of judicial administration. Since no disciplinary rule is involved, DR 5-105(D) does not automatically preclude a partner, associate, employee or co-shareholder of a judge from representing defendants charged with violating either local ordinances or state criminal statutes in jurisdictions other than the one in which the part-time judge sits.[1]

But although a lawyer who practices with a lawyer who is also a part-time judge is not automatically precluded from handling all criminal cases, such a lawyer must always be vigilant for special circumstances that would make the representation of a defendant in a criminal case improper. For example, representation of a defendant in a criminal case would be improper where the defendant had recently appeared and been sentenced in an unrelated criminal case by the part-time judge. In such a case, the danger that public confidence in the independence of the judiciary will be lessened is too great to permit subsequent representation by a lawyer who practices with the part-time judge.

1996 Addendum

On January 1, 1993, the Colorado Rules of Professional Conduct became effective. Relevant provisions of the Colorado Rules of Professional Conduct which support the conclusions of this Opinion include: Rule 1.7(a) and (b); Rule 1.9(a); Rule 1.10(a) and (b); Rule 1.12(a), (b) and (c); Rule 2.2(a)(1), (2) and (3); and Rule 8.4(e) and (f). Relevant provisions of the Colorado Code of Judicial Conduct, Canon 8, including the commentary thereto, Canon 1, Canon 2 and Canon 3, should also be examined. Canon 8 is of particular significance because in some respects it differs from Rule 1.10(c) and Rule 1.12(a) and (c). For example, Canon 8B prohibits part-time judges from taking certain cases. Rule 1.10, although similar to Canon 8C, provides for waiver of disqualification in accordance with Rule 1.10(c). The Canons, however, contain no waiver provision. A lawyer who relies solely on the Rules might obtain a waiver and proceed to take the case, but his or her partner who is the part-time judge would be held to the stricter standard of the Canons. Accordingly, where such differences exist between the Rules and the Canons, prudence dictates adherence to the strict limitations found in the Canon.

NOTE

1. Before undertaking such representation, however, lawyers might want to consider the force of C.R.S. § 12-5-118 which provides that "[a] judge shall not have a partner acting as an attorney in any court in his judicial district, county or precinct."

On January 1, 2008, substantial amendments to the Colorado Rules of Professional Conduct became effective. The text of Colo. RPC 1.7, *Conflict of Interest: Current Clients*, was significantly modified. However, the ABA Ethics 2000 Commission reported that it intended no substantive changes in the rule, and that the changes were intended for clarification purposes only. The Committee agrees that the changes to Rule 1.7 are not substantive and do not alter the conflict analysis. Rather, the changes to Rule 1.7 merely alter the procedure through which informed consent must be obtained. Accordingly, the changes to Rule 1.7 do not alter the analysis or conclusions contained in this Formal Opinion.

The Subcommittee recommends appending this legend to the following Formal Opinions: 45 (Representation of client by part-time judge), 46 (Municipal attorney, representation of defendants), 58 (Water rights, representation of multiple clients), 97 (Ethics considerations where an attorney or the attorney's partner serves on the board of a public entity), 98 (Ethical Responsibilities of Lawyers who Engage in other Business), 109 (Acquiring an ownership interest in a client), 115 (Collaborative Law).

46 MUNICIPAL ATTORNEY, REPRESENTATION OF DEFENDANTS

Adopted February 20, 1971.
Revised May 18, 1996.

Introduction and Scope

The Ethics Committee of the CBA ("the Committee") has been asked to provide guidance to lawyers and their firms concerning the ethical propriety of a lawyer's defense of clients in municipal court, and in other litigation which might affect the interests of the municipality when that lawyer is also employed as a municipal attorney or on retainer to represent the municipality. This opinion only addresses the ethical issues raised by the Colorado Rules of Professional Conduct ("the Rules") and does not address the applicability of the Colorado Code of Ethics, C.R.S. §§ 24-28-101, *et seq.*, or any conflict of interest rules a government entity or agency may have promulgated.

Syllabus

1. A lawyer employed as a municipal attorney or on retainer to represent a municipal government may not ethically represent a criminal defendant who is being prosecuted in the municipal court.

2. A lawyer employed as a municipal attorney, reasonably believing that his or her representation will not be affected by responsibilities to another client or a third person, or by the lawyer's own interest, and after consultation with and consent by the municipal entity and the client, may represent a criminal defendant in a non-municipal court case in which an employee of a municipality will appear as a witness for the prosecution.

3. In rare situations, a lawyer employed as a municipal attorney, reasonably believing that his or her representation will not be affected by his responsibilities to another client or a third person, or by his own interest, and after consultation and consent by his or her municipal entity and the client, may represent a client in litigation under circumstances where such representation may require the lawyer to take a position which could adversely affect the validity of a law or ordinance governing the municipality.

Facts

Many attorneys engaged in private practice within Colorado are also employed by municipalities within the geographical area of the lawyer's practice. In some instances this employment by the municipality is on a part-time basis with the fees set in response to the work done. In other instances, a monthly retainer is paid for the attorney's services by the municipality. The nature of the fee arrangement is immaterial in respect with the ethical considerations, and the controlling factor is the continuing employment of the lawyer as a representative of the municipality and his or her public identification with that role.

Opinion

Rule 1.7(b) and (c):

> (b) A lawyer shall not represent a client when the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interest, unless:
>
> (1) The lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) The client consents after consultation . . .
>
> (c) For the purposes of this Rule, a client's consent cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of a particular situation.

Further, Rule 8.4(e) provides:

> It is professional misconduct for a lawyer to:
>
> (e) State or imply an ability to influence improperly a judge, judicial officer, government agency or official; . . .

A lawyer employed as a municipal attorney or on retainer to represent a municipal government has obligations and responsibilities to that municipal government. *See* comments to Rules 1.7 and 8.4. Those responsibilities will be hampered if the lawyer is permitted to defend clients in the municipal court since (1) the government's interests are antagonistic to the client's interests, (2) the lawyer will be materially limited by the obligations and responsibilities he or she owes to the municipality, and (3) there is a great risk that the lawyer's conduct implies that the lawyer is able to improperly influence a governmental agency or official.

Lawyers employed by municipalities must be ever mindful of the public's perception of their ability to influence government. A lawyer is not permitted to engage in conduct which implies that the lawyer is able to improperly influence the government agency or official, in this case the municipal court. Under these facts, where a lawyer is employed by or on retainer to a municipality and proposes to act as a defense attorney acting on behalf of a client in the matter before the municipal court, a great risk exists of public mistrust and public belief that improper influence has or will occur because of the lawyer's dual roles.

As stated by the Iowa Supreme Court and as referenced in Opinion 97 of this Committee, the problem is the lawyer's: ". . . conflicting loyalties when acting as a public servant as well as a private advocate (and) . . . the real potential for public misunderstanding and mistrust when attorneys serve in those dual roles.[1]"

For these reasons the Committee concludes that it would be improper for the lawyer to represent clients in the municipal court and therefore a violation of Rules 1.7(b) and 8.4(e).

While the lawyer must always be aware of the proscriptions of Rule 8.4(e), the Committee is of the opinion that a lawyer may, in appropriate situations, represent a criminal defendant in a non-municipal court case in which an employee of the municipal government will appear as a witness for the prosecution. Further, in exceptional circumstances, a lawyer may represent a party in litigation if that representation may require the lawyer to take a position which could adversely affect the validity of any law or ordinance governing the municipality. In either situation, such representation requires compliance with Rule 1.7(b).

Even where consent is obtained pursuant to Rule 1.7(b),[2] the lawyer must be ever mindful of the provisions of Rule 1.7(c), since, while it may be possible to obtain consent from the affected parties, a disinterested lawyer could conclude that the client or clients could not agree to the representations under the circumstances of a particular situation. This is especially true in the situation where a lawyer is called upon to take a position which could adversely affect the validity of any law or ordinance governing the municipality, since the Committee believes it unlikely that a disinterested lawyer could conclude that consent would be approved under most circumstances. While Rule 1.3 is not directly on point in this regard, the comment to said Rule should be considered.

It provides in part that: "A lawyer should act with commitment and dedication to the interest of the client and with zeal and advocacy on the client's behalf."

NOTES

1. Iowa Ethics Opinion 91-49, p. 324.

2. The comment to Rule 1.11 recognizes that statutes and government regulations "may circumscribe the extent to which [a] government agency may give consent" in potential conflict situations.

On January 1, 2008, substantial amendments to the Colorado Rules of Professional Conduct became effective. The text of Colo. RPC 1.7, *Conflict of Interest: Current Clients*, was significantly modified. However, the ABA Ethics 2000 Commission reported that it intended no substantive changes in the rule, and that the changes were intended for clarification purposes only. The Committee agrees that the changes to Rule 1.7 are not substantive and do not alter the conflict analysis. Rather, the changes to Rule 1.7 merely alter the procedure through which informed consent must be obtained. Accordingly, the changes to Rule 1.7 do not alter the analysis or conclusions contained in this Formal Opinion.

The Subcommittee recommends appending this legend to the following Formal Opinions: 45 (Representation of client by part-time judge), 46 (Municipal attorney, representation of defendants), 58 (Water rights, representation of multiple clients), 97 (Ethics considerations where an attorney or the attorney's partner serves on the board of a public entity), 98 (Ethical Responsibilities of Lawyers who Engage in other Business), 109 (Acquiring an ownership interest in a client), 115 (Collaborative Law).

47 ATTORNEY REPRESENTATION IN DISSOLUTION OF MARRIAGE

Adopted February 26, 1972.
Addendum issued 1995.

Syllabus

A lawyer may no more ethically represent both parties to an action under the Colorado Uniform Dissolution of Marriage Act than he can in any other matter. In most dissolutions of marriage, the parties, even though they may not then be aware of it, will have conflicting interests on matters such as property, support, custody, or spousal maintenance. In some cases where no interests of the parties are conflicting, a lawyer may represent both parties; however, in the event conflicting interests develop after such dual representation has commenced, the lawyer must withdraw entirely from the case and thereafter decline to represent either party.

Facts

The Colorado General Assembly has enacted the Uniform Dissolution of Marriage Act. 1971 Session Laws, Chapter 130. The underlying purposes of the Act are the promotion of amicable settlements to disputes between the parties to a marriage, the mitigation of potential harm to the parties to a marriage and their children arising from the process of legal dissolution, and the modification of the law to render more effective the process of dissolution by making "irretrievable breakdown" the sole basis for dissolution.

The Act, while softening the nature of divorce, or dissolution, does not eliminate the adversary nature of the proceedings insofar as property, support, custody, and spousal maintenance are concerned.

Citing the new Act, the Family Law Section of the Colorado Bar Association poses the question: Can an attorney represent both parties to a marriage in a dissolution proceeding; and if other issues such as disposition of property and child custody are present or arise, can the attorney represent both parties to the action, particularly when contested issues develop after the proceedings have been initiated?

Opinion

The Colorado Uniform Dissolution of Marriage Act renders moot ethical problems of collusion which existed under the prior law which required the proof of fault before a marriage could be terminated. See ABA Formal Opinion No. 245.

In addition, the new Colorado Act declares that it is in the public interest to promote the amicable dissolution of marriages. Conceivably, this policy can, in some cases, be promoted through the use of a single attorney to represent both parties. DR 5-105 provides, in part: ". . . a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

This rule allows an attorney to represent both parties to the dissolution proceeding in some cases. It is clear, however, that in most cases conflicting interests are involved or are potentially involved and, consequently, three Canons of the Code of Professional Responsibility are apposite. Canon 4 states, "A lawyer should preserve the confidences and secrets of a client." Canon 5 provides, "A lawyer should exercise independent professional judgment on behalf of a client." Canon 7 requires, "A lawyer should represent a client zealously within the bounds of the law."

EC 5-15 provides: "If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in

litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardships on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients."

Since conflicting interests will nearly always exist with regard to matters of property, support, custody or maintenance, whether or not one or both clients know or agree that their interests are conflicting, an additional ethical problem exists when a single lawyer attempts to or has attempted to represent both parties to the dissolution proceedings. Any consultation between the parties and their attorney is privileged whether or not a fee is paid. *Wigmore on Evidence,* 3rd ed., vol. 8, §§ 2290-2329. When a lawyer's advice is sought he becomes immediately and ethically bound to preserve the confidence and secrets of the client or clients. Canon 4, Code of Professional Responsibility. DR 4-101(A) states:

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

EC 4-5 provides: "A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes."

The obligation to preserve confidence and secrets of a client continues after the termination of the employment. EC 4-6. This fact, coupled with the ethical obligation to zealously represent a client, renders unethical any attempt by a lawyer to represent or continue representation of either party to a dissolution of marriage proceeding after conflicting interests appear with regard to any relevant matter between them. It follows that no lawyer should undertake or continue to represent both parties to a dissolution proceeding when any conflicting interest exists or develops concerning any aspect of the dissolution proceeding.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.6(a) (regarding confidentiality); Rules 1.7, 1.8(b) and (f), 1.9(c) (regarding conflicts of interest); and Rule 1.16 (a) and (d) (regarding declining or terminating representation). There is new language in Rule 1.7(c) which should be considered in connection with the possibility of client waiver in conflict situations.

The Ethics Committee directs attorneys to Opinion 68 and the relevant provisions of the Colorado Rules of Professional Conduct contained in that opinion. This opinion is supplemented by Opinion 68 which should be reviewed in conjunction with the Rules.

48 REPRESENTATION OF PUBLIC BODY, CONFLICT OF INTEREST

Adopted June 3, 1972.
Revised May 18, 1997.

Introduction and Scope

The Ethics Committee of the CBA ("Committee") has been asked to provide guidance to lawyers and their firms concerning the ethical propriety of a lawyer's (or the lawyer's firm's) representation of clients before a public or quasi-public body ("governmental body"), when the lawyer serves as counsel to the governmental body. This Opinion addresses only the ethical issues raised by the Colorado Rules of Professional Conduct ("Rules") and does not address the applicability of the Colorado Code of Judicial Conduct, the Colorado Code of Ethics, C.R.S. §§ 24-18-101, *et seq.,* or any conflict of interest rules a governmental entity or agency may have promulgated.

Syllabus

A lawyer representing a governmental body assumes certain responsibilities of a public or quasi-public official and thus, having the same ethical responsibilities as a public official, may not represent a client where such representation results in a conflict of interest or implies improper influence of a government agency or official. For example, a County Attorney may not represent an applicant for a liquor license or a subdivider presenting a subdivision plat or represent a client in other matters before the Board of County Commissioners. Similarly, a County Attorney may not represent a property owner through whose land the county wishes to acquire a road easement. A lawyer may not act as counsel for a Special District as well as represent an employee in presenting a claim for workers' compensation benefits against the District.

The County Attorney's firm will generally be disqualified from representing the liquor license applicant, the subdivider, or the property owner in the above examples; the firm of the Special District lawyer's firm will similarly generally be disqualified from representing the employee for workers' compensation benefits.

The reference to specific examples made throughout this opinion is for the purpose of illustration only and is not to be considered exclusive.

Facts

A County Attorney represents an applicant for a liquor license or a subdivider in presenting a subdivision plat or in other matters before the Board of County Commissioners. A County Attorney represents a property owner through whose land the county wishes to acquire a road easement. A lawyer for a Special District represents an employee of such a district in presenting a claim for workers' compensation benefits against the District.

Opinion

The general rule on conflicts of interest is provided by Rule 1.7(a):

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.

Since representation of clients in matters before the governmental body is directly adverse to the interests of the governmental body, the lawyer for the body may not represent such clients without client consent.[1]

Further, a lawyer representing a governmental body has assumed obligations and responsibilities to that governmental body and has the same ethical responsibilities as a public official.

Rule 1.7(b) states:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interest, unless:
>
> (1) The lawyer reasonably believes the representation will not be adversely affected; and
>
> (2)The client consents after consultation. . . .

See also comments to Rule 1.7 and Rule 8.4. Those responsibilities to the governmental body will be hampered if the lawyer is permitted to represent clients in matters affecting the interests of or pending before the governmental body, since the possibility that the governmental body's interests will be fundamentally antagonistic to the client's interests is great, and the lawyer will be materially limited by the obligations and responsibilities he or she owes to the governmental body.

Rule 8.4(c) states:

It is professional misconduct for a lawyer to:

> (c) State or imply an ability to influence improperly a judge, judicial officer, government agency or official . . .

Attorneys who serve as public lawyers must be mindful of the public's perception of their ability to influence government. A lawyer is not permitted to engage in conduct which implies that the lawyer is able to improperly influence a governmental agency or official. Where a lawyer is acting as a County Attorney and acting on behalf of a client in a matter pending before the Board of County Commissioners or requiring other official county action, a great risk exists that the public will believe that improper influence has or will occur because of the lawyer's dual roles. The lawyer's involvement with the Board of County Commissioners, even if the lawyer recuses himself or herself; may imply that the lawyer is able to influence favorably the members of the Board of County Commissioners to whom the lawyer normally provides legal advise and counsel, or to favorably influence other county officials with whom the lawyer interacts on a regular basis. As stated by the Iowa Supreme Court, the problem is the lawyer's:

> . . . conflicting loyalties when acting as a public servant as well as a private advocate [and]
>
> . . . the real potential for public misunderstanding and mistrust when attorneys serve in those dual roles. *See* Iowa Ethics Opinion 91-49, page 324.

For these reasons it would be improper for the County Attorney to represent an applicant for a liquor license, a subdivider presenting a subdivision plat, a property owner through whose land the county wishes to acquire a road easement, or a client in other matters before the Board of County Commissioners. Such representation would violate Rules 1.7(b) and 8.4(e).

Since the County Attorney and the lawyer for the Special District are disqualified from representing the clients in the specific examples described, the question arises whether under Rule 1.10, the partners and associates of the County Attorney or Special District lawyer are also precluded from such representation.

Rule 1.10 provides:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8(c), 1.9 or 2.2.
>
> (c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

While, under certain limited circumstances a waiver might be obtained from the governmental body (see comment to Rule 1.11), even if the firm was successful in avoiding the conflict under Rule 1.10, the County Attorney or Special District lawyer's firms would be precluded by Rule 8.4(c) from representing the client.

The concern raised by Rule 8.4(c) about the lawyer's own conduct similarly applies to the representation of clients by other lawyers in the lawyer's firm. The law firm's representation of the client in

these specific examples creates the implication that by hiring the law firm, the client will obtain treatment more favorable than that which the client would otherwise receive. While the implication of improper influence under Rule 8.4(c) created by the County Attorney or Special District lawyers partner or associate appearing before the Board of County Commissioners or the District might be overcome in unique circumstances, under the general facts described in the specific examples the law firm should prudently assume disqualification.

NOTE

1. The Comment to Rule 1.11 recognizes that statutes and government regulations "may circumscribe the extent to which [a] government agency may give consent" in potential conflict situations.

50 DEFINITION OF ASSOCIATES AS APPLIED TO LAWYERS

Adopted November 29, 1972.
Addendum issued 1995.

Syllabus

It is improper to use the term "associates" to describe lawyers, not employees, who share office space and some costs but do not share in responsibility and liability for each other's acts. It is also improper to use "associates" to describe lawyers who are in fact partners. However, it is proper to use the term "associates" to describe lawyers who are employees of another lawyer or law firm and who do not generally share in responsibility or liability for the acts of the firm.

Facts

1. Lawyers A and B share office space and costs but are not partners and do not share liability or responsibility for each other's acts. Their letterhead reads "A and B, Associates."

2. Lawyer B offices in the same suite of offices as Lawyer A. In return for a specific amount of work done each month for A, B gets his rent free. However, in all other respects each lawyer maintains his own separate business. Lawyer A's letterhead reads "A and Associates."

3. Lawyers A, B and C are partners. Their letterhead reads "A and Associates" with B and C's names printed along the margin.

4. Lawyer A employs lawyers B and C on a full-time basis. B and C do not share in responsibility for acts of the firm. The letterhead reads "A and Associates."

5. Lawyers A, B and C are partners. They employ lawyers D, E, F and G on a full-time basis. The letterhead reads "A, B, C and Associates."

(The foregoing fact situations are illustrative and serve as a guide to the general principles contained in this Opinion. These principles, therefore, may also be applicable to other fact situations not given.)

Opinion

It is the opinion of the Committee that examples 1, 2 and 3 violate the Code of Professional Responsibility, while examples 4 and 5 are proper.

Traditionally, in connection with the practice of law, the word "associates" is used to describe lawyers who are employees of a firm.

Canon 2 of the Code of Professional Responsibility and the ethical considerations and disciplinary rules thereunder govern this situation.

The ethical considerations to Canon 2 state in part:

> . . . The use of a trade name or an assumed name could mislead laymen concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under his own name, the name of a lawyer employing him, a partnership name composed of one or more of the lawyers practicing in a partnership, or, if permitted by law in the name of a professional legal corporation which should be clearly designated as such. EC 2-11.
>
> In order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representation of his professional status. He should not hold himself out as being a partner or associate of a law firm if he is not one in fact, and thus should not hold himself out as a partner or associate if he only shares offices with another lawyer. EC 2-13.

In addition, the disciplinary rules associated with Canon 2 require:

> A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm. . . . DR 2-102(B).
>
> A lawyer shall not hold himself out as having a partnership with one or more lawyers unless they are in fact partners. DR 2-102(C).
>
> It is clearly misleading for persons merely sharing office space to hold themselves out as associates.

ABA Formal Opinion 310 adopted in 1963 is directly on point with regard to the use of the term "associates." That Opinion referred to Formal Opinion 219 to substantiate its opinion that the use of the term "associates" negates the existence of a partnership. The Opinion was careful to clarify when the use of the term "associates" was proper:

> Those lawyers who are working for an individual lawyer or law firm may be designated on the letterhead and in other appropriate places as 'associates.' Thus a letterhead giving the name of the firm as Jones and Smith and listing as partners Charles Jones and Peter Smith, could also list as 'associates' the names of other lawyers who are employed by the firm.
>
> Even without listing the 'associates' the word may properly be used in connection with the name of the partner or the individual in private practice to describe a situation in which the firm or the individual has other lawyers working for them or him who are not partners and who do not generally share in the responsibility and liability for the acts of the firm.

The use of the word "associates" to describe the employer-employee relationship also serves as a notice to persons who select a particular firm that Lawyer A of "A and Associates" employs other attorneys and that while A may not himself perform all the work, that A is responsible for any work performed by his employees. Further, persons who deal with the firm are on notice that lawyers other than A may be doing some of the work.

ABA Opinion 310 was followed and expanded upon by ABA Opinion 318 adopted in 1967. That Opinion held it was proper to use the term "associates" as a method of indicating limited responsibility of a member of a lawyer's professional corporation.

Although both ABA Opinion 310 and 318 were adopted prior to the adoption of the Code of Professional Responsibility, footnote 35 to Canon 2 of the Code indicates that the use of the term "associates" is still proper for the limited purpose of describing employees of a lawyer or law firm.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 7.1 (regarding communications regarding a lawyer's services); and Rule 7.5, including the Comment and Committee Comment (regarding firm names and letterheads).

The Ethics Committee directs attorneys to Opinion 89 and the relevant provisions of the Colorado Rules of Professional Conduct contained in that opinion. This opinion is supplemented by Opinion 89 which should be reviewed in conjunction with the Rules.

52 SPOUSE-ATTORNEYS REPRESENTING CLIENTS, CONFLICTS OF INTEREST

Revised Opinion adopted December 13, 1975.
Addendum issued 1995.
Withdrawn March 16, 2013.

WITHDRAWN

Syllabus

It is improper for a lawyer to represent a client whose interests differ from those of a client who is represented by the lawyer's spouse if the exercise of the independent professional judgment by the lawyer on behalf of the client will be or reasonably may be affected by reason of the marital relationship between the two lawyers.

Question

Where both husband and wife are lawyers, but they are not practicing in association with one another, may they or their firms represent differing interests?

Facts

This question may arise in varying forms. A law firm may be asked to represent a client opposing the interest represented by another law firm that employs the husband or wife of a lawyer who is associated with the first law firm. A further example of a situation in which the question may arise is when the office of a public prosecutor employs a lawyer whose spouse is associated with a firm which represents a client who is being prosecuted by that office.

Opinion

Whether it is improper for husband-and-wife lawyers who are practicing in different offices or firms to represent differing interests depends upon the facts in each situation. No disciplinary rule expressly requires a lawyer to decline employment if a husband, wife, son, daughter, brother, father, or other close relative represents the opposing party in negotiation or litigation. Likewise, it is not necessarily improper for a law firm employing a married lawyer to represent clients who are opposed to interests represented by another law firm with which the married lawyer's spouse is associated as a lawyer. However, a lawyer whose husband or wife is also a lawyer must, like every other lawyer, obey all disciplinary rules, for the disciplinary rules apply to all lawyers without distinction as to marital status.

The realities of the marital relationship must be recognized with the possibility, at least, that the domestic and professional responsibilities of husband-and-wife lawyers may be incompatible when they represent conflicting interests. It takes but little imagination to anticipate a number of situations in which either spouse might find it difficult to exercise professional judgment solely for the benefit of the client and free of personal considerations. This is not to impute improper intentions to any lawyer, nor to ignore the fact that in many marriage situations no actual conflict of interest would exist. It simply recognizes that this situation is generally fraught with a potential for conflict of interest. Because of the closeness of the husband-and-wife relationship, a lawyer who is married to a lawyer must be particularly careful to observe the suggestions and requirements of Ethical Considerations 4-1, 4-5, 5-1, 5-2, 5-3, and 5-7, and Disciplinary Rules 4-101 and 5-101. As a guideline, such a lawyer "should resolve all doubts against the propriety of the representation." (EC 5-15.)

Even though the representation by husband and wife of opposing parties is not necessarily a violation of any disciplinary rule, the possibility of a violation of DR 5-101, in particular, is real and must be carefully considered in each instance. Certain facts, such as a fee being contingent or varying according to results obtained, may be particularly relevant in determining whether DR 5-101(A) is violated in situations where husband-and-wife lawyers represent opposing interests. It seems likely that in some

instances, the interest of one spouse in the other's income resulting from a particular fee will be such that professional judgment may be affected, while in other situations it may not be. Thus, if the interest of one of the marriage partners as attorney for an opposing party creates a financial or personal interest that *will or reasonably may* affect the ability of a lawyer to represent fully his or her client with undivided loyalty and free exercise of professional judgment, *the employment must be declined.* The existence of such interest is a fact determination to be made in each individual case.

In addition, there are other situations in which the representation of a client by a lawyer who is married to a lawyer who is identified with opposing interests is likely or may appear to prejudice the rights of the client, in which case the representation must be declined. For example, it would be improper for a lawyer who is married to a public prosecutor to defend a client who is being prosecuted by that public prosecutor.

However, there is no automatic disqualification of a lawyer who is associated with a law firm (or of that law firm) in the representation of a client by reason of the fact that the spouse of another lawyer in that firm either represents or practices law with a firm that represents interests which oppose those of that client because there is not necessarily a violation under these circumstances of DR 5-105(A) [illegible]. Moreover, if a lawyer who is married to a lawyer declines employment by a client because of the lawyer's understanding and application of an ethical consideration rather than because of the applicability of a disciplinary rule of the Code of Professional Responsibility to that lawyer, the DR 5-105(D) would not apply to disqualify the law firm with which that lawyer is associated in the practice of law from representing that client.

The advice contained in EC 5-3 and EC 5-16 is appropriate. The lawyer shall advise the client of all circumstances that might cause one to question the undivided loyalty of the law firm and let the client make the decision as to its employment.

Accordingly, a law firm employing a lawyer whose spouse is a lawyer associated with another law firm need not, because of that fact, fear consistent with mandatory disqualification when the two firms represent opposing interests. Yet, it is both proper and necessary for the firm always to be sensitive to both the possibility of disqualification and the wishes of its client. And the marriage partners who are lawyers must guard carefully at all times against inadvertent violations of their professional responsibilities arising by reason of the marital relationship. All doubts should be resolved against the propriety of the representaion.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.8(i) (regarding the specific conflict situation addressed in this Opinion); Rule 1.7(c) (regarding client waiver of a conflict of interest); Rule 1.10 (regarding imputed disqualification of a lawyer's firm from representation where the lawyer cannot ethically represent the client); Rule 1.6(a) and (c) (regarding confidentiality); Rules 1.7 (a)-(c), 1.8(b) and (f), and 1.9(a) (regarding conflicts of interest); and Rule 5.1(c) (responsibilities of a supervising lawyer or partner).

The Ethics Committee directs attorneys to Opinion 75 and the relevant provisions of the Colorado Rules of Professional Conduct contained in that opinion. This opinion is supplemented by Opinion 75 which should be reviewed in conjunction with the Rules.

WITHDRAWN

54 FEES CHARGED IN FORECLOSURE OR REDEMPTION

Undated.
Addendum issued 1995.

Syllabus

1. It is unethical for a lawyer to enter into an agreement for, charge or collect an illegal or clearly excessive fee for services performed in the management of a foreclosure procedure. The lawyer is not relieved from this ethical obligation because the promissory note or security instrument specifies a fee which is excessive, nor is the lawyer relieved from this obligation when the entity paying the fee is one other than the client for whom the service is ultimately performed. The ethical guides for the determination of fees are found in DR 2-106(B) of the Colorado Code of Professional Responsibility.

2. It is unethical for an attorney to enter into an arrangement whereby the debtor upon curing or at redemption, or the purchaser at foreclosure sale, would be charged an attorney fee greater in amount than that which otherwise properly would be charged to the attorney's client.

3. It is unethical for a lawyer to share with the client any portion of a fee received in a foreclosure action.

Opinion

The scope of this Opinion is limited to attorney fees charged in foreclosure proceedings. This Opinion does not consider nor limit fees determined and assessed by a court. Foreclosure proceedings herein considered are those which involve the foreclosure of deeds of trust, mortgages, installment contracts or other obligations or security devices permitting the assessment of attorney fees as a portion of the recovery obtained in the proceeding. In some instances, attorney fees and costs are charged to a debtor who redeems or cures the default, or a redeeming junior lienor or to the purchaser at foreclosure sale without a judicial determination of the amount. Oftentimes the underlying obligation or security instrument prescribes a method of the determination of the fee: "Reasonable attorney fees," a specified attorney fee, a percent of the debt or a combination of these.

Excessive fees are a matter of professional ethics. The Colorado Supreme Court in *People v. Radinsky,* 176 Colo. 357, 490 P.2d 951 (1971), held that excessive fees are the basis of disciplinary action.

Each lawyer is reminded of DR 2-106(B), which states:

> (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides 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.
>
> (8) Whether the fee is fixed or contingent.

Contractual provisions establishing attorney fees, while a factor to be considered, are not necessarily determinative of the question of reasonableness and cannot be relied upon to set an ethical standard. Thus, provisions in the underlying obligations pertaining to the amount of a fee do not justify an

excessive fee. The Colorado Supreme Court in *Waterman v. Silverman,* 156 Colo. 199, 397 P.2d 739 (1964), states that ". . . the Plaintiff was entitled to recover attorney's fees only upon a showing that such fees had been paid or incurred *and were reasonable.*" (emphasis supplied)

Occasionally, a statute prescribes the maximum attorney fees which may be assessed. Any amount charged in excess of the statutory maximum is illegal and hence, unethical.

The purpose of payment of attorney fees by a purchaser at foreclosure sale, a redeeming debtor or a debtor who cures a default is to *reimburse* the creditor for its expenses incurred by the default. A purchaser at foreclosure sale, a redeeming debtor or junior lienor, or a debtor curing a default does not by virtue of the foreclosure proceeding become the client of the foreclosing attorney. The law does not contemplate that a lawyer should reap a windfall simply because the individual paying the fee is not his client. The expectation that a client will be reimbursed for attorney fees through redemption is not a proper factor to consider in determining a reasonable fee. It is unethical to enter into an agreement with the client whereby the fee will be increased if it is paid by the foreclosure-purchaser, the redeeming debtor or junior lienor, or a debtor curing a default. It is also unethical to assess, with or without an agreement, a greater fee than the fee which would be charged to the creditor.

It is improper for a lawyer to share a portion of the fee with the client. The lawyer must insist that all fees received to reimburse the client be paid to the lawyer. DR 3-102(A) provides: "A lawyer or law firm shall not share legal fees with a non-lawyer. . ."

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.5 (requiring that fees be reasonable); and Rule 5.4 (regarding sharing legal fees with a non-lawyer).

55 PARTNERSHIP WHICH INCLUDES PROFESSIONAL CORPORATION

Undated.
Addendum issued 1995.

Syllabus

It is ethically proper for a professional corporation, consisting of one or more lawyers, to practice law in partnership with one or more individual lawyers or professional corporations. A partnership which has a professional corporation as a partner must clearly designate the corporate status of the partner when such a partner is listed on its letterheads, announcements, cards, signs, and other written notices.

Facts

1. An existing partnership of lawyers desires to merge its practice with a professional corporation, consisting of one or more lawyers, the result of which will be a new partnership which includes a professional corporation as a partner.

2. A lawyer in an existing partnership desires to form a professional corporation and have that professional corporation substituted for him as a general partner in the partnership.

Opinion

The ethical propriety of the existence of the professional corporation within a law partnership is not addressed directly by the ethical considerations or disciplinary rules of the Code of Professional Responsibility. The question was addressed in Informal Opinion No. 1383 of the American Bar Association dated May 11, 1977. According to that Opinion, such a practice had been ruled unethical in Florida but the Oregon Attorney General has opined that a professional corporation could ethically participate as a partner in a law partnership.

The Committee rejects the reasoning of Informal Opinion No.1383 and determines that there is nothing in the arrangement set forth in the facts above which is inconsistent with the Code of Professional Responsibility if the proper disclosures are made.

Professional service corporations are authorized and permitted under Rule 265 of the Colorado Rules of Civil Procedure. That rule safeguards the attorney/client relationship. There is nothing in Rule 265 that changes the attorney/client relationship merely because one or more lawyers are practicing as shareholder/employees of a professional corporation.

DR 2-102(C) provides: "A lawyer shall not hold himself as having a partnership with one or more other lawyers unless they are in fact partners." EC 2-11 prohibits the use of a trade name or an assumed name and requires that a lawyer should practice only under his own name, the name of a lawyer employing him, the names of lawyers practicing in a partnership, or the name of a professional legal corporation. It is our view that the words "other lawyers" include other professional legal corporations.

The Committee believes that DR 2-102(C) does not prohibit the type of partnership approved in this Opinion. The partnership should, however, in compliance with EC 2-11, designate on its letterhead, cards, and announcements which list attorneys, those partners in the partnership which have formed a professional corporation. All usages of the partnership name which identify individual partners shall designate the professional corporation status of those partners. Any such usage must contain and show the corporate status to avoid misleading the public as to the relationship of the lawyers in the firm. In addition to the foregoing, the professional corporation electing to maintain professional liability insurance as one of the alternatives in Rule 265, should maintain such insurance in the same amount as all other members of the partnership.

Having met the above criteria and complied with Rule 265 C.R.C.P., a partnership of this nature does not differ from a partnership in the traditional sense.

The Committee concludes therefore that a partnership formed in accordance with this Opinion is ethically proper.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

A relevant provision of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, is Rule 7.5 (regarding firm names and letterheads). Lawyers should also give consideration to the amendment to Rule 265, C.R.C.P., which includes Limited Liability Companies.

56 SETTLEMENT OF LAWYER MALPRACTICE, WITHDRAWAL OF GRIEVANCE COMPLAINT

Adopted March 22, 1980.
Addendum Issued 1995.
Addendum Issued 1998.

Syllabus

It is unethical for an attorney to condition settlement of a civil action for malpractice against his lawyer-client upon the withdrawal by the plaintiff of a grievance complaint filed against the lawyer-client.

Facts

An informal complaint was filed with the Grievance Committee of the Colorado Supreme Court directed to the conduct of an attorney. The particular conduct in question also provided the basis of a civil action alleging malpractice by the attorney. A settlement of the civil action was negotiated during the Grievance Committee's consideration of the grievance. As a part of such settlement, counsel for the lawyer-defendant in the civil action interposed the requirement that the plaintiff write a letter to the Grievance Committee

(1) requesting that the grievance he had instituted against the attorney be withdrawn as improvidently instituted

(2) representing that the plaintiff, through discovery, had ascertained that the facts affirmatively alleged in his Complaint to the Grievance Committee were no longer true and that discovery established that no impropriety had actually occurred in the course of lawyer-defendant's representation of plaintiff.

Opinion

DR 7-105 of the Colorado Code of Professional Responsibility prohibits an attorney from presenting, directly or indirectly, or threatening to present criminal charges for the sole purpose of obtaining an advantage in a civil case. The rationale for this prohibition is that the civil adjudicative process is designed to resolve fairly disputes between parties free of intimidation or coercion that can subvert the process. Threats of criminal prosecution can unjustifiably deter the person threatened from fully and freely asserting rights he may have in the civil action. EC 7-21. Conduct of attorneys violative of DR 7-105 or its predecessor canons has formed the basis for severe public censure or suspension from the practice of law. See, *e.g., People v. Hertz,* 608 P.2d 335 (Colo. 1979) (*The Colorado Lawyer,* Jan. 1980, at 176); *Matter of Gelman*, 230 App. Div. 524, 245 N.Y.S. 416 (1930).

The logic of DR 7-105 and EC 7-21 has been extended to cases involving threats of disciplinary action in order to effect a civil settlement. Drinker, *Legal Ethics* (1953), at 153. Informal Opinion C-734 (1964) of the ABA Standing Committee on Ethics and Professional Responsibility found unethical two types of threatening conduct by attorneys not involving criminal charges. In one instance a lawyer threatened a debtor with proceedings under a municipal licensing ordinance if he did not pay an alleged debt. In the other, the debtor received a letter from the creditor's lawyer threatening the pursuit of remedies with the State Real Estate Commission in the event the debtor failed to pay a certain amount to the creditor. In each case the threat, although not raising the spectre of criminal charges, raised fears of the debtor as to his ability to continue to conduct a business which required licensing. Threats to a person's economic livelihood can have as deleterious an effect on the debtor's willingness and ability to freely and fully litigate the issues in a civil action on the debt as the threat of criminal charges.

The facts presented here are the converse of those discussed above in that they involve a refusal by defense counsel to settle a malpractice suit against a lawyer-client unless the plaintiff effectively withdraws the complaint he filed against the lawyer-client with the Colorado Supreme Court Grievance Committee.

The effect of counsel's insistence upon the cessation of the grievance procedure, however, has the same dampening effect on the willingness and ability of the plaintiff layman to pursue fully his legal right to question the conduct of an attorney through the Colorado Supreme Court grievance procedure.

Of perhaps even greater significance in these facts are the objectives of the Colorado Supreme Court and the Bar of this State in ensuring that unethical conduct of attorneys is disciplined. Once a complaint is filed with the Grievance Committee, an investigation is undertaken to determine whether the complaint is well-founded. If the investigation reveals that the case has merit and is of a serious nature, prosecution of the grievance against the attorney respondent is launched not on behalf of the individual complainant but on behalf of the people of the State of Colorado. Such prosecution proceeds regardless of whether the lawyer's conduct may have also given rise to potential civil liability as a result of damages sustained by the client-complainant.

To permit counsel for the lawyer-client here to insist upon effective withdrawal of the grievance complaint as a condition of the civil settlement would subvert the purpose of the Colorado Supreme Court's grievance process and permit possible unethical conduct to go undisciplined. Such insistence by counsel is prejudicial to the administration of justice and is unethical conduct that violates DR l-102(A)(5). The plaintiff-complainant is entitled to negotiate a settlement of the civil action he instituted free of the condition that he not pursue his legal rights in a discrete disciplinary action.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 4.5, including Comment (regarding threatening prosecution, which rule against threatening prosecution is more comprehensive than the rule contained in the Code of Professional Responsibility); Rule 3.1 (regarding meritorious claims and contentions); Rule 3.3(a)(1), (2) and (4) (regarding candor toward the tribunal); Rule 3.4 (regarding fairness to opposing party and counsel); Rule 8.1(b) (regarding bar admission and disciplinary matters); and Rule 8.4(d) and (f) (regarding misconduct).

The Ethics Committee directs attorneys to Opinion 85 and the relevant provisions of the Colorado Rules of Professional Conduct contained in that opinion. This opinion is supplemented by Opinion 85 which should be reviewed in conjunction with the Rules.

1998 Addendum

Effective July 1, 1997, the Colorado Supreme Court established a grievance mediation process in which relatively minor grievances filed against lawyers by former clients may, in appropriate circumstances, be resolved and dismissed pursuant to written Mediation Agreements signed by the lawyer, the former client, and the mediator. *See* C.R.C.P. 241.4(c)(11) [to be repealed and reenacted as C.R.C.P. 251.3(c)(11), effective January 1, 1999] and 251.13 [effective July 1, 1998]. Under the rules promulgated by the Mediation Committee to govern that process, the resolution of threatened or pending civil disputes between lawyer and former client is appropriate and encouraged as part of the mediation process. It is therefore not a violation of Colo. RPC 8.4(d) or any other Colorado Rule of Professional Conduct for an attorney to seek or obtain the resolution of all pending or contemplated civil disputes between an attorney and a former client, including legal fee and malpractice disputes, as part of a settlement reached in a mediation conducted pursuant to the Colorado Rules of Civil Procedure cited above.

57 CONFLICTS OF INTEREST

Adopted March 21, 1981.
Addendum issued 1995.

Introduction

The Ethics Committee receives many inquiries each year from members of the Bar seeking guidance in situations raising possible conflicts of interest. It has also been true in recent years that many conflicts of interest or possible conflicts of interest have reached the courts through motions to disqualify attorneys. In order to provide guidance in this area, the Ethics Committee has decided in this Opinion to consider several of the most common conflicts situations.

Syllabus

The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. In order to ensure that each client receives the independent professional judgment to which he is entitled, a lawyer must be careful to recognize situations which may involve the lawyer in conflicts of interest. Among the situations raising potential conflicts are: (1) situations where the lawyer wishes to represent more than one client in a certain transaction; (2) situations where a lawyer has a financial interest in the matter in which he wishes to represent the client; (3) situations where an attorney is considering suit against a former client; (4) situations where a former government lawyer wishes to represent a client in a matter involving a government agency which previously employed the lawyer; and (5) situations where a lawyer may be called as a witness in litigation he intends to handle.

Opinion

1. The simultaneous representation of multiple clients.

DR 5-105 provides that a lawyer must decline proffered employment "if the exercise of his professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of such employment." In resolving situations which present potential conflicts of interest, a lawyer's prime concern should be ensuring that his loyalty to his client is not diluted by the interests of other clients.

Because of the nature of litigation and the fact that unforeseen conflicts may sometimes develop at trial causing hardship to both clients should a lawyer be forced to withdraw, a lawyer should rarely represent more than one client in a litigation setting. EC 5-15 states that a lawyer "should never represent in litigation multiple clients with differing interests" and warns that "there are few situations in which a lawyer would be justified in representing in litigation multiple clients with potentially differing interests." Of course, in any such situation if a lawyer determines that he can adequately represent each of the clients, it is obligatory that an attorney fully disclose to the clients the potential conflicts that may arise no matter how remote and obtain the consent of the clients to such representation.

When considering whether to represent two parties in litigation it is important to remember that agreement over trial tactics and strategies by the two clients does not resolve the question of conflicts because settlement negotiations may still raise serious conflicts. For example, where the amount of proceeds in a case will not be sufficient to cover the claims of both clients, a lawyer will be severely limited in negotiating settlements and it would be preferable that the negotiations be conducted by separate counsel for each client.

Similarly, in criminal cases, a lawyer who represents two defendants may be precluded by his position from fully exploring plea negotiations on behalf of one of the defendants that would involve cooperating with the prosecution. Or at sentencing a lawyer may find it difficult to argue for a light sentence on behalf of one defendant when the consequence may be a heavier sentence for the other defendant. In

Holloway v. Arkansas, 435 U.S. 475 (1978), the Supreme Court warned that in cases of joint representation of conflicting interests the evil "is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and at the sentencing process."

Government attorneys also face potential conflict situations from multiple representation, such as situations where an attorney represents both an agency and individual employees of the agency. The warning contained in EC 5-15 that "there are few situations in which a lawyer would be justified in representing in litigation multiple clients with potentially differing interests" applies with equal force to attorneys working part-time or even full-time for the government. And like the private practitioner, a government attorney has the same obligation in any case involving multiple representation of parties with potentially differing interests to make sure that each of the parties represented has received full disclosure and has consented to such multiple representation. See, e.g., *Aetna Cas. & Ins. Co. v. United States,* 570 F.2d 1197 (4th Cir. 1978). It is important to remember, however, that there may be instances where an attorney representing a public body may not engage in conflicting representation regardless of disclosure and consent. See DR 9-101 and Formal Opinions 45 and 48 of the Ethics Committee of the Colorado Bar Association.

In situations other than litigation DR 5-105(c) provides that a lawyer may represent clients with differing interests if

> it is obvious that he can adequately represent the interest of each and if each consents after full disclosure of the possible effects of such representation on the exercise of his independent professional judgment on behalf of each.

Such full disclosure should include careful explanation to each client of the implications of common representation including the risks involved as well as the advantages of common representation. One of the risks of representing clients with differing interests which should be explained to the clients before undertaking joint representation is the possibility that at some later point a serious conflict may develop which would require the lawyer to withdraw from representing either of the clients in the matter.

The ethical considerations in representing both parties in a dissolution of marriage were discussed in an earlier opinion of the Ethics Committee. See CBA Ethics Opinion No. 47 (February 26, 1972). For a case dealing with the propriety of representing both the buyer and seller in a real estate transaction and specifying the nature of the disclosure and consent that is required, see *In re Dolan,* 76 N.J. 1, 384 A.2d 1076 (1978).

2. Representation of a client in a transaction where the attorney has financial interest in the transaction.

EC 5-3 warns that the "self-interest of a lawyer resulting from his ownership of property in which his client also has an interest . . . may interfere with the exercise of free judgment on behalf of his client." When a lawyer wishes to enter into a business, financial, or property interest with a client, a lawyer should be careful to determine whether his self-interest will interfere with his ability to exercise his professional judgment on behalf of his client. Obviously such a decision depends on the nature of the transaction and the degree to which the interests of the lawyer and client differ. If the interests of the client and the lawyer in a transaction differ significantly a lawyer should not attempt to represent both the client and himself the transaction. See, e.g., *People v. Good*, 195 Colo. 177, 576 P.2d 1020, 1024-25 (1978). But if the interests of the lawyer and client differ only slightly and the lawyer is certain that the transaction will involve no risk of unfairness to the client, the lawyer may enter into such a transaction but only after the client has consented to the representation by the lawyer after the lawyer has fully disclosed the risks and the advantages of joint representation in the transaction. Such disclosure is required by DR 5-104(A).

While a lawyer may enter into certain transactions with a client, this does not include the acquisition of a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client. DR 5-103 bars the acquisition of any such interest, other than a contingent fee interest in a civil case.

3. Suits against former clients.

In deciding whether to accept an offer of employment involving litigation against a former client, a lawyer's paramount concern should be his obligation to preserve the confidences of the former client. Canon 4, in particular DR 4-101(B), forbids a lawyer from using a confidence or secret of a client to the disadvantage of the client and this obligation continues even after the termination of employment. The determination of whether confidences of a former client will be protected in the present litigation depends to a large extent on the nature of the prior relationship between the lawyer and his former client. Where a lawyer handled a single, discrete transaction for the former client, it may not be difficult to determine whether confidences would be jeopardized by the present litigation against that client. But if the former representation involved advice in a range of matters over a period of time the determination that a lawsuit against the former client will not endanger any secrets or confidences will be much more difficult to make. If it appears likely that confidences and secrets of the former client cannot be protected, the proffered employment must be refused.

A second factor to be considered in determining whether to undertake litigation against a former client is the subject matter of the litigation and its relationship to the subject matter of the prior representation. Where the subject matter of the present litigation is substantially related to the subject matter of the previous representation, a lawyer should not undertake the employment against the former client. In situations where the subject matter of the present and prior representation is substantially related, it will be difficult to tell whether confidences of the former client will be protected. In order to protect confidences, a number of courts when faced with a motion to disqualify have held as a procedural matter that a lawyer is disqualified from representing a party in litigation if he formerly represented an adverse party in a substantially related matter. See, e.g., *Westinghouse Elec. Corp. v. Gulf Oil Corp.,* 588 F.2d 221(7th Cir. 1978); *Government of India v. Cook Industries Inc.,* 569 F.2d 737 (2d Cir. 1978). See also, *Osborn v. District Court,* 619 P.2d 41 (Colo. 1980). In addition to concern for confidences, a lawsuit against a former client on a matter substantially related to the prior representation poses a serious threat to a lawyer's independent professional judgment under Canon 5. It also may undermine the protection of public confidence under Canon 9 which demands that a lawyer not appear to be "switching sides" by accepting employment against a former client where the subject matter of the litigation is substantially related to the subject matter of the previous representation.

4. Suits by a former government lawyer against his former employer.

DR 9-101(B) provides that a lawyer shall not represent a private client "in a matter in which he had substantial responsibility while he was a public employee." The term "substantial responsibility" is not capable of a precise definition, especially in light of the broad spectrum of types of government practice and the various kinds of authority in certain agencies. But in ABA Formal Opinion 342, which was aimed at interpreting DR 9-101(B) in light of its history and underlying purposes and policies, "substantial responsibility" was interpreted to require more than that as a government employee, the lawyer "passed upon" a matter. The Opinion concluded that "substantial responsibility" contemplates

> a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question.

Thus where an attorney, while working for the government on a certain transaction or lawsuit, became "personally involved to an important, material degree" in the handling of that matter, a lawyer upon leaving government service should not represent a private client in that matter. To do so might jeopardize confidential government information and would give the appearance of professional impropriety in that it creates the suspicion that a lawyer conducted his governmental work in a way to facilitate his own future employment in that matter.

The bar against representing a client in a "matter" in which the lawyer as a government employee had substantial responsibility is not meant to bar an attorney from ever representing a private client in a case against the former government agency simply because the lawyer at one time had a responsibility in

drafting the statutes or regulations of the agency. If the statute was of broad application this would in effect bar the lawyer from ever appearing before that agency. ABA Formal Opinion 342 concludes that the term "matter" contemplates "a discrete and isolatable transaction or set of transactions between identifiable parties." It is not the fact that a former government employee brings into a later proceeding a knowledge of the procedures and substantive law of an agency that gives rise to a conflict of interest. Rather it is the situation where a former government lawyer brings into a proceeding on behalf of a private client a personal knowledge of particular background facts and data that creates a conflict of interest demanding that the lawyer not undertake the representation of the private client.

5. The lawyer as a witness and an advocate on behalf of his client.

Occasionally it may occur that a lawyer will be, or is likely to be, a witness in a lawsuit he wishes to handle on behalf of a client. Such a role for the lawyer as both advocate and witness may create conflicts because a lawyer may be forced in certain circumstances to argue his own credibility. Such a dual role may weaken the lawyer's role either as advocate or as witness and it may lead to confusion on the part of the jury over the distinction between argument and testimony.

Like other conflicts of interest situations, whether a lawyer should remain as an advocate in a case where he is likely to be a witness depends on the particular factual situation and, in particular, on the nature of the lawyer's testimony. DR 5-101 provides that if the lawyer's testimony relates only to an uncontested issue or to a matter of formality which is unlikely to be disputed, the lawyer may nonetheless undertake employment as an advocate in that case. Similarly, if the lawyer's testimony relates only to the nature and value of the legal services rendered in the case on behalf of the client, a lawyer may continue to serve as an advocate for the client. But where the testimony of the lawyer goes beyond such matters and concerns a material issue in the case, a lawyer should not act as an advocate. In *People v. Spiegel,* 193 Colo. 161, 567 P.2d 353 (1977), one of the violations leading to discipline was an instance where an attorney continued to represent a defendant in a criminal case despite the fact that the attorney knew he would be an important witness.

The only exception in DR 5-101 to continuing as an advocate in a case where the lawyer's testimony goes to a material issue is the situation mentioned in DR 5-101(B)(4) where the refusal to act as an advocate "would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case." ABA Formal Opinion 339 (November 16, 1974), which deals at some length with the substantial hardship exception, gives as an example of substantial hardship where new counsel should not be required, the situation of a complex lawsuit which has been in preparation over a long period of time where an unanticipated development suddenly makes the lawyer's testimony essential. In such a situation it would be unfair to compel the client to seek new trial counsel at substantial additional expense and delay. Another such exceptional circumstance would be the situation where a long and extensive professional relationship with a client has given the lawyer such extensive familiarity with the client's affairs that the value to the client of representation by that lawyer in a trial involving those matters would clearly outweigh the disadvantages of having the lawyer testify on a disputed issue. See *Greenebourn- Mountain Mortgage Co. v. Pioneer National Title Insurance Co.,* 421 F.Supp. 1348 (D. Colo. 1976).

In any situation where a lawyer may be required to be both advocate and witness, the decision whether or not to obtain new counsel belongs to the client and, in order to make an informed decision, the client should be made aware of the materiality and necessity of the lawyer's testimony and the possible detrimental effect on both the lawyer's testimony and his advocacy. If withdrawal under the circumstances would clearly work a substantial hardship and if the client wants counsel to continue to represent the client, counsel should advise the court and opposing counsel that he intends to testify and the nature of such testimony. See ABA Formal Opinion 339 (November 16, 1974). See generally, Note, The Advocate-Witness Rule, 52 N.Y.U.L. Rev. 1365 (1977).

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rules 1.7(a) (b) and (c), 1.8(a), (b), (d), (e), (g) and (j), and 1.9(a) (regarding conflicts of interest); Rule 1.10(c) (regarding imputed disqualification of a lawyer's firm when the lawyer cannot ethically represent a client); Rule 1.11(a) (regarding successive government and private employment); Rule 1.12(a) and (b) (regarding former judges or arbitrators); Rule 1.13(e) (regarding an organization as client); Rule 1.15 (regarding safekeeping property and COLTAF accounts); Rule 1.16 (regarding declining or terminating representation); Rule 2.2(a) and (c) (regarding the lawyer as intermediary); Rule 3.7(a) (regarding the lawyer as witness); Rule 6.3 (regarding membership in legal services organizations); and Rule 6.4 (law reform activities affecting client interests).

The Ethics Committee directs attorneys to Opinions 68 and 78 and the relevant provisions of the Colorado Rules of Professional Conduct contained in those opinions. This opinion is supplemented by Opinions 68 and 78 which should be reviewed in conjunction with the Rules.

58 WATER RIGHTS, REPRESENTATION OF MULTIPLE CLIENTS

Adopted March 21, 1981.
Revision adopted October 14, 1995.

Syllabus

The fact that an attorney or firm may accept employment for two or more persons involved in litigation concerning water rights from the same river system does not, in and of itself, constitute an ethical impropriety. As used in this Opinion, the term "river system" means "water of the natural streams" as that term is used in Colorado law, including surface flows and alluvial and tributary ground water, which are tributary to the same river. An ethical impropriety arises when, in the course of such litigation, the water right or the water supply of one client is in fact impaired, or there is a likelihood of such impairment occurring, as a result of the representation of the other party.

Opinion

This Opinion addresses the issue of whether an attorney's or firm's representation of a client owning or claiming water rights in a river system in and of itself bars that attorney or firm from accepting additional employment involving other water rights within that river system.[1] This Opinion considers the application of the relevant provisions of the Colorado Rules of Professional Conduct to the issues of conflict of interest (as addressed in Rule 1.7 and related provisions). Initially, it should be noted that the Rules apply equally to all attorneys and that there is no different standard applicable to water lawyers. However, due to the unique nature of water law practice, this Opinion is issued to guide water lawyers in situations where they represent more than one client in a river system.

Rule 1.7 specifically states:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless
>
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantage and risks involved.
>
> (c) For the purposes of this Rule, a client's consent cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of the particular situation.

Further, the provisions of Rules 1.6, 1.8(b) and 1.9 apply insofar as previous client contacts may give rise to the presence of information protected as confidential. Rule 1.10 extends the restriction of Rules 1.7 and 1.9 to the lawyer's entire firm. Rule 1.11 imposes additional duties on lawyers representing government entities and agencies. Moreover, the water attorney should be aware that disclosure and consent would not allow him or her to represent one client in negotiations or appearances before a public body he or she also represents. *See* Opinions 57, 45, 48, and 97 and Rule 1.11. Rule 2.2 governs a lawyer's conduct when acting as "intermediary" between or among multiple clients.

Water rights adjudications in Colorado and most other litigations involving water rights are *in rem* proceedings binding all persons within a particular river system and water division. Because of the *in rem*

nature of such actions and the vast geographical extent of the area potentially affected by any water proceeding, it might appear that all water rights owners are in competition with one another for the same limited resource, whether they be owners of previously adjudicated rights, rights for junior priorities in the process of adjudication, or rights for which a change of water right or plan for augmentation is in the process of adjudication. An examination of the water right decrees issued in such proceedings, however, reveals that the degree of actual competition involved between water rights owners varies substantially from case to case, and in many cases, there is not a real competition at all.

A decree adjudicating a water right in Colorado confirms the existence of an appropriative right in water and defines certain of its parameters. The decree confirms the fact that an appropriation has been made, establishes an appropriation date for the water right, specifies the quantity or rate of flow allowable for such appropriation, specifies the source and location from which the appropriation is exercised, and specifies certain uses which are allowable. A decree confirming an appropriation in Colorado does not assure that water will always be available to satisfy the appropriation being confirmed. Each water right owner is at his or her own peril as to whether the water right actually will yield any water under the physical supply and priority restrictions that will prevail from time to time.

Thus, a water right decree will define and set out the parameters and conditions upon which an appropriator may divert water from a scarce and variable supply of water under the priority system. The decree will establish the relative priority of one user *vis-à-vis* others. The variable conditions of physical supply and users' fluctuating demands will determine who gets water under each of the relative priorities set out by the decrees. The decree proceeding, however, will not in and of itself determine whether water will actually be delivered under priority administration to one party or another on the river system.

Furthermore, each decree becomes a final judicial act upon its completion and entry, though many water decrees are subject to the court's retained jurisdiction for a period of time. The validity of the parameters assigned to appropriations previously decreed generally is not at issue in a subsequent proceeding to adjudicate another water right.This is manifested in the longstanding water law rule (subject to few exceptions) that no priority given in a subsequent adjudication can be senior to the latest priority given in a prior adjudication proceeding. Similarly, under the current statute, water rights decreed upon applications filed in any calendar year generally are junior to rights decreed on applications filed in previous years. C.R.S. § 37-92-306. Allowable diversion rates, volumes and uses of water are likewise insulated by the principles of *res judicata* from attack in a later adjudication proceeding for different water rights. Thus, it is evident that the outcome of an adjudication proceeding to determine a water right for a present client does not automatically pose a threat to parties who have previously obtained adjudicated rights. However, a new appropriator may have a basis to challenge certain existing decreed rights based on abandonment, lack of diligence (for conditional water rights) or similar grounds. Moreover, some types of newly decreed appropriations (such as federal reserved water rights and existing exchanges) may take priority over some previously decreed rights.

These stream adjudications often occur in the context of an extensive river system where there may be many previously adjudicated water rights. The Colorado River system has, for example, at least 10,000 individual water rights. Clearly, the adjudication of a junior priority has no impact under the law on most of the previously adjudicated 10,000 rights and, absent other ethical considerations, no conflict would exist from representation of an owner of one or more of the 10,000 water rights and the simultaneous representation of a junior appropriator.

A lawyer undertaking representation of a client should consider the potential for real harm to another client, based on a realistic assessment of actual and likely future administration and factual conditions on the river. While the tests to be satisfied as to initial applicability of Rule 1.7 are whether the clients' interests are "directly adverse" and whether the lawyer's representation "may be materially limited," in most water law situations the operative question will be whether the water supply available under a decreed priority to one client will be impaired as a result of the endeavor of another client. Because of the usual complexity of the factual situations involved, the question should be further expanded to include the "likelihood of impairment."

There may be situations in which two presently proceeding appropriators may be in actual conflict with one another, where the appropriations are near each other or are large in comparison to the remaining water supply in a particular area. First of all, if both were asserting an appropriation on the same stream within the basin, and both were filing within the same calendar year, there might then be an actual competition for a certain portion of the scarce resource. Present adjudication statutes provide that for any water decrees upon applications filed in the same calendar year, the relative priority is determined by the actual date of appropriation proven by each. In some of these concurrently proceeding cases where there is an actual competition for the same physical supply, the court's determination of parameters such as flow rate and appropriation date may decide the ultimate administrative question of which of the appropriators gets a full water supply under foreseeable low flow conditions. It would be improper to represent both appropriators in such circumstances. In addition, as noted above, there are some circumstances in which decreed priorities may be vulnerable in subsequent proceedings.

In other adjudication cases involving changes of previously decreed rights or plans for augmentation, where the standard is whether or not there will be any injurious effect on water rights entitled to take water, factual issues will arise as to whether the granting of the application will alter the historic regimen of the stream so as to injure the decreed water rights of others. In such circumstances, the question of whether a Rule 1.7 conflict exists will depend on whether there is an impairment in fact, or in likelihood, of the supply available for other water rights owners. This question in turn depends on certain factual characteristics of the case and of the part of the river system involved. It is not always true that each change of water right case necessarily puts in jeopardy all previously decreed water rights or even the supply of water available to such water rights. It may well be possible that change cases on certain segments of the river system can be implemental without potential impact on others in other portions of the river system. It is generally true, for example, that a change case involving a certain priority will not adversely affect the supply of water available for upstream parties having priorities senior thereto, though it may affect the amount of return flow available to downstream parties, and the extent to which upstream junior rights are curtailed.

Each of these cases involves factual variations and must be examined for actual or potential impairment of a client's water supply. Representation of one client will be less likely to affect another client adversely if the water rights involved are located in separate water districts, on separate tributaries within a river system, or at distances far removed, although the circumstances of each case will control.

In determining whether there is an actual or potential impairment, the lawyer must be mindful of confidentiality obligations to each client. Rule 1.7(b) restricts representation which "may be limited by a lawyer's responsibilities to another client. . . ." These responsibilities include the lawyer's confidentiality obligation under Rule 1.6, which extends to all "information relating to representation" of each client. Similarly Rule 1.8(b) prohibits use of such information to the client's disadvantage, unless the client consents, and Rule 1.9(c) requires consent for any adverse use or disclosure of information relating to representation of former clients. In determining whether actual or potential impairment of another client's water rights exists, the lawyer must be careful to protect the confidential information of each client, and to obtain each client's informed consent to any disclosures that may be needed to satisfy Rule 1.7.

In circumstances where a potential impairment exists, the lawyer must consider the likelihood of such impairment. If such impairment is likely, we think "a disinterested lawyer would conclude that the client should not agree to the representation," so the lawyer must decline representation under Rule 1.7(c). If the likelihood of impairment is remote, each client must consent to the representation after "consultation which involves full disclosure of the possible effect of such dual representation on the exercise of the lawyer's independent professional judgment on behalf of each client." Comment to Rule 1.7. A prerequisite to such full disclosure is, of course, obtaining each client's consent under Rule 1.6 to any disclosure of "information relating to representation of" that client.

In conclusion, the fact that each of multiple clients seeks to take water from the same river system does not in and of itself create an actual conflict which would bar multiple employment by a water rights practitioner. The practitioner must look to the likelihood that an actual impairment of water supply available

to a client's water rights might result from such multiple employment, and must abide by the requirements of Rules 1.6 and 1.7 regarding confidentiality and client consent.

NOTE

1. This Opinion does not address potential conflicts of interest which may arise in representing multiple clients claiming rights in designated ground water, Denver Basin ground water, nontributary ground water, or other water resources which are not part of a "river system" as defined in the Syllabus. While the Opinion does not discuss the factual and legal issues involved in such circumstances, the Colorado Rules of Professional Conduct do, of course, govern lawyers' and firms' conduct and should be applied in the pertinent text.

On January 1, 2008, substantial amendments to the Colorado Rules of Professional Conduct became effective. The text of Colo. RPC 1.7, *Conflict of Interest: Current Clients*, was significantly modified. However, the ABA Ethics 2000 Commission reported that it intended no substantive changes in the rule, and that the changes were intended for clarification purposes only. The Committee agrees that the changes to Rule 1.7 are not substantive and do not alter the conflict analysis. Rather, the changes to Rule 1.7 merely alter the procedure through which informed consent must be obtained. Accordingly, the changes to Rule 1.7 do not alter the analysis or conclusions contained in this Formal Opinion.

The Subcommittee recommends appending this legend to the following Formal Opinions: 45 (Representation of client by part-time judge), 46 (Municipal attorney, representation of defendants), 58 (Water rights, representation of multiple clients), 97 (Ethics considerations where an attorney or the attorney's partner serves on the board of a public entity), 98 (Ethical Responsibilities of Lawyers who Engage in other Business), 109 (Acquiring an ownership interest in a client), 115 (Collaborative Law).

With the changes effective January 1, 2008, the term "consent after consultation" was changed to "informed consent." "Consultation" only required "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Despite the fact that the American Bar Association Ethics 2000 committee indicated that no substantive change was intended by the change to "informed consent," its definition now "denotes the agreement by a person to a proposed course if conduct after the lawyer has communication adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." *See* Rule 1.0 Comment [6] to Rule 1.0 indicates that the crux of this requirement is that "the lawyer must make reasonable efforts to ensure that the client or the other person possesses information reasonably adequate to make an informed decision." Thus, the lawyer's duty is not just to explain the significance of the decision, but also to make sure the client is sufficiently informed to consider available options and risks prior to making that decision. The Subcommittee recommends appending this legend to the following Formal Opinions: 29 (representation of seller, buyer or borrower by lender's counsel); 58 (water rights representation, multiple clients), 97 (service on board of public entity), 107 (Third-Party Auditors), 115 (collaborative law).

59 LEGAL SERVICES PROGRAMS

Adopted January 23, 1982.
Addendum issued 1995.

Topic

Ethical responsibilities of legal services program management and staff attorneys in facing totally eliminated or substantially reduced funding. Responsibility of the Bar in these circumstances.

Digest

When facing the likelihood of no or substantially reduced funding, legal services program management and staff attorneys must make reasonable efforts to prepare for the possible interruption of services.

When the impact of reduced or no funding becomes reasonably evident, legal services attorneys may be required to decline new representation to avoid prejudice to existing clients.

If, as a result of disrupted services due to lost funding, a substantial number of legal services program clients will be prejudiced, every reasonable effort should be made to find substitute counsel in order to handle pending matters.

If efforts to secure alternative funding or substitute counsel fail, legal services attorneys may withdraw from representation in accordance with all rules and procedures governing withdrawal in civil matters. Such withdrawal is permitted both for remaining legal services attorneys who are overburdened by the additional caseloads of departing lawyers and for legal services attorneys who are departing because they are no longer being compensated. In these instances, it is the responsibility of the legal profession in Colorado, collectively, and of members of the profession, individually, to act to meet the needs of indigent clients.

Background

Organized legal assistance to the poor in the United States began in the last quarter of the nineteenth century. Through the early 1960s, legal aid societies developed in communities throughout the country, supported both by legal services contributed by lawyers and by funds through various charitable contributions. New growth surged in the mid-1960s when, at the urging of the American Bar Association, the federal Office of Economic Opportunity supported legal assistance to the poor in civil matters through grants to statewide and local legal services programs. In 1974, the Legal Services Corporation Act established, under the direction of the Legal Services Corporation ("LSC"), a national system of funding for civil legal services to the indigent (42 U.S.C. § 2996a-k). Today, the LSC's annual funding is $321 million, which is an estimated 85 percent of the funding which supports civil legal services to the poor throughout the nation.

In Colorado, the LSC currently provides approximately $3 million for four major legal services programs: the Legal Aid Society of Metropolitan Denver, serving Denver, Adams, Arapahoe, Jefferson, Boulder, Gilpin, and Douglas Counties; Colorado Rural Legal Services, serving much of rural Colorado; Pueblo County Legal Services; and Pikes Peak Legal Services, serving El Paso County and the surrounding areas. Fifteen to 20 percent of each program's total funding is made up of additional funding from other sources, such as the United Way and the Older Americans Act. Additionally, there are significant amounts of legal services to the poor also provided by volunteer lawyers through such programs as the Denver Bar Association's "Thursday Night Bar."

The questions presented in this Opinion arise because the extent of future funding of the LSC is in doubt. The President of the United States last spring formally announced his intention to abolish the LSC and to eliminate any funding for legal services for FY '82. Under this plan, state governments would apparently have the discretion to provide funding for legal services from federal block grants designed for

other services. Throughout the summer and fall of 1981, congressional consideration of the LSC and its funding has been intense; the future of the program has teetered, day to day, on the brink of elimination. However, most recently, there is increasing evidence that the LSC will continue for FY ’82 at perhaps 70 to 75 percent of its FY ’81 funding level.

The potential impact of the total or substantial withdrawal of federal funds for legal services to the poor in Colorado is illustrated by a close look at the Legal Aid Society of Metropolitan Denver. Its FY ’81 funding was $1.4 million; 80 percent or $1.1 million was provided by the LSC, 13 percent or $181,000 through United Way, and 5 percent or $70,000 through the Older Americans Act. The society, with a full-time legal and paralegal staff of 30, plus support staff of 15, fully handles approximately 4,000 cases annually, and provides legal advice and related assistance in approximately 9,000 additional matters. It presently maintains about 1,200 open cases.

The total or substantial loss of federal funds for legal services to the poor is not a mere specter posing theoretical issues. Rather, the net effect of events over the past nine months is that detailed contingency plans must be developed and, to the extent necessary, implemented to provide for reduced and, possibly, eliminated federal funding for legal services to the poor. The ethical issues inherent in this defunding situation must be resolved in order for proper planning to proceed and for effective daily operations presently to continue. In view of the pressing nature of the situation, the Denver Bar Association has requested that the Ethics Committee issue an opinion offering ethical guidance to Colorado lawyers.

Questions Presented

1. What are the ethical responsibilities of legal services staff lawyers and lawyer management when faced with the imminent threat of substantial defunding of the legal services programs?

2. In the event of defunding and the resulting inability of a legal services program to continue handling existing cases due to lack of staff, what is the obligation of a legal services lawyer to continue representing clients in pending cases in the following two circumstances: first, the legal services lawyer who, due to the additional caseloads of departing lawyers, is no longer able to competently represent all his or her clients; and second, the departing legal services lawyer who is no longer being compensated by the legal services program?

3. May legal services programs accept new cases during periods of substantial cutbacks in available legal services?

4. If funding is cut off or substantially reduced, what is the responsibility of other Colorado lawyers to aid legal services programs and handle matters unable to be concluded by the legal services programs?

Two bar associations recently addressed these and related questions. On December 1, 1981, the American Bar Association (“ABA”) Committee on Ethics and Professional Responsibility issued Formal Opinion 347. In November 1981, the Committee on Professional Responsibility and Conduct of the State Bar of California issued its *draft* Formal Opinion No. 1981-64, which to date has not been approved by that Bar’s board of directors. Similar questions are presently under consideration by several other state bar association ethics committees throughout the country. As indicated below, the Colorado Bar Association’s Ethics Committee is in general agreement with the principles and analysis set forth in ABA Formal Opinion 347.

Opinion

The Code of Professional Responsibility does not deal with the particular issue of possible termination of all or a substantial part of a program delivering legal services to the poor. For guidance, the relevant underpinnings of the Code must be identified and applied to fit these unprecedented circumstances.

Every lawyer has the general duty to act competently, which includes the obligation of adequate preparation and the responsibility not to neglect client affairs (*see* Canon 6). Every lawyer also has the duty to represent a client zealously, including the objective to carry out a contract for legal services and to not prejudice or damage the client [*see* DR 7-101(A)]. Subsumed within these duties is the responsibility to manage one’s resources in order to effectively provide competent and zealous representation. In this regard,

the primary responsibility of legal services attorneys is to existing clients (*see* ABA Formal Opinion 334 and ABA Informal Opinion 1359).

1. Required Actions if Substantial Defunding Becomes Evident:

So long as future funding is unclear, there is no requirement to decline representation to protect against the effects of reduced or eliminated staff due to the possibility of defunding. Such an approach, due to the constant ebb and flow of funding prospects, would be too disruptive. However, as the funding picture becomes reasonably clear, and based thereon, the extent of the reduction in legal services becomes reasonably evident, appropriate action is warranted. Depending on the actual facts, legal services attorneys would be required to decline new representation to avoid prejudice to existing clients (*see* ABA Formal Opinion 334 and ABA Informal Opinion 1359). Naturally, such determinations should be continually reassessed. Action should include the following:

a. Existing clients and newly accepted clients must be notified promptly of the situation, together with an explanation of its potential effects and of the risk of delayed or terminated services.
b. A system of priorities should be implemented for handling pending matters and for accepting new clients. Pending matters facing near deadlines should be identified and appropriately handled. Consistent with each lawyer's duties of competency and adequate preparation and the responsibility to avoid neglect of client affairs, ABA Informal Opinion 1359 (1976) previously concluded that legal services programs may adopt fair and reasonable policies to allocate their limited resources in accordance with a system of priorities, both for existing matters and for accepting new clients. However, in implementing such a system, priority must be given to existing clients [ABA Formal Opinion 334 (1974)].
c. Lawyers in supervisory positions should fully inform the local courts of the situation and the planned approaches to be taken by the local legal services programs. To the extent permissible, arrangements should be made with the court for acceptable procedures to effectively deal with the pressures of limited resources and the need to assure continuity of representation during a period of high change in representation.
d. Reasonable efforts should be made to obtain substitute lawyers to handle pending matters. Additionally, organized efforts, both through the Colorado Bar Association and through local bar associations in Colorado, should be pursued to enhance programs of voluntary legal services to the poor by members of the Bar.[1]

2. Ethical Obligations of Legal Services Attorneys Regarding Continued Representation in the Event of Severe Loss of Funds:

Ordinarily, it has been assumed, based on ABA Informal Opinion 1428 (1979), that a legal services program should be treated as a law firm retained by the client, and that, absent a particular agreement with a client, the program as a whole has the responsibility of providing continued representation in the cases of an attorney departing the program [see also, *Lefcourt v. Legal Aid Society,* 445 F.2d 1150, 1152 (2d Cir. 1971)]. However, it is evident on its face that Informal Opinion 1428 does not contemplate the closure or dramatic cutback of a legal services program. Depending on the actual extent of funding reductions, two interrelated questions regarding continued representation in existing cases will arise: (1) What are the obligations of continued representation of the fewer remaining legal services attorneys, if the pending caseload is so large as to prevent competent representation? (2) What are the obligations of continued representation for the departing attorneys?

a. The ethical obligations of remaining legal services attorneys regarding continuing representation of existing cases. For purposes of this segment of this Opinion, we assume the following situation. Despite funding cutbacks, sufficient funds exist to operate the legal services programs at some minimal level. The departing attorneys have properly prepared for their departure, minimized potential prejudice to their clients due to the onset of more limited available services and have properly transferred

their cases to the fewer remaining legal services personnel. The legal services program also has properly prepared for defunding, as outlined above. Nevertheless, it becomes apparent that the remaining legal services attorneys are not able to competently handle the legal matters pending in this office because the total caseload is excessive.

DR 2-110 of the Code of Professional Responsibility sets forth the rules pertaining to mandatory or permissive withdrawal. It provides, in relevant part, as follows:

> DR 2-110 Withdrawal from Employment
>
> (A) In general.
>
> (1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.
>
> (2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.
>
> . . .
>
> (B) Mandatory withdrawal.
>
> A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:
>
> . . .
>
> (2) He knows or it is obvious that his continued employment will result in violation of a disciplinary rule.
>
> . . .
>
> (C) Permissive withdrawal.
>
> If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:
>
> (1) His client:
>
> . . .
>
> (f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.
>
> (2) His continued employment is likely to result in a violation of a disciplinary rule.
>
> . . .
>
> (6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

DR 6-101(A)(2) prohibits a lawyer from handling a legal matter without adequate preparation. DR 6-101(A)(3) proscribes neglect of legal matters entrusted to the lawyer.

Under the assumptions outlined above, the legal services lawyer who becomes responsible on a continuing basis for substantially more matters than a lawyer can competently handle faces violation of DR 6-101(A)(2) and (3). If continued representation would result in violation of these disciplinary rules, the lawyer could seek mandatory withdrawal under DR 2-110(B)(2) or permissive withdrawal under DR 2-110(C)(2). In any event, the required actions of DR 2-110(A) to minimize foreseeable prejudice and to obtain permission of the tribunal, where local court rules so require, must be followed.[2]

Under DR 2-110, permission of a tribunal is required to effect withdrawal only in matters before a tribunal. We emphasize, however, that DR 2-110(A)(2), regarding required actions to minimize foreseeable prejudice to the client, fully applies to withdrawal from all representation, not just matters in litigation.[3]

In any instance of withdrawal from representation under these circumstances, reasonable efforts to avoid foreseeable harm will include timely and fully informing the client of key facts and advising the client regarding alternatives. For example, the client should be advised fully about the effect of any applicable

statutes, jurisdictional periods of limitations or court deadlines; or the client should be advised of the possible alternatives of resolving the particular problems through other available services, such as mediation services, voluntary legal services, small claims court, or proceeding *pro se.* The possibility of reduced fee arrangements with private attorneys also should be considered. Arrangements should be made to deliver all papers and property to which the client is entitled (see EC 2-32).

How to decide in which matters to continue representation and from which to withdraw is difficult and complex. The Committee agrees with the following recommendation contained in ABA Formal Opinion 347:

> The methods of choosing the matters will vary from office to office, depending upon the urgency of pending matters, the needs of different types of clients, the availability of other lawyers to represent certain clients, and other factors. When drastically reduced funding forces a local office to address this question, priorities similar to those that regularly govern acceptance of new matters in a legal services office should be developed to determine the matters from which the office should withdraw [see ABA Informal Opinion 1359 (1976)].

The Committee is aware of at least one proposal being considered in Texas[4] to properly dispose of accepted cases. This model establishes the governing board of the legal services program with the hub responsibility for insuring that all pending cases will be competently handled to completion. The board would contract with attorneys for client representation, arrange with local bar associations for *pro bono* services, or take other appropriate action to that end. The Committee encourages similar approaches to focus responsibility for coordinating continued representation in existing cases.

b. The ethical obligations of departing legal services attorneys regarding continued representation of legal services clients when the attorneys are no longer compensated. In dealing with this question, the Committee assumes the following facts. Funding withdrawals have forced the closure of the legal services programs or so reduced available services as to eliminate the ability of the remaining attorneys to handle the departing attorney's cases. The lawyer or the legal services programs have previously fulfilled the obligations outlined above of notifying the clients, diligently preparing to minimize the consequences of a massive withdrawal, and reasonably pursued possibilities of substitute counsel. The departing lawyer is no longer receiving a salary from the legal services program.

In legal services programs, representation is commenced under the express or implied assumption that services will be provided to the client and the lawyer will be compensated by salary from the legal services program. The client is the beneficiary of the employment contract between the attorney and the legal services program. EC 2-17 recognizes that a lawyer may expect to be adequately compensated for his services. DR 2-110(C), which was apparently drafted with the private practitioner in mind, provides in relevant part that a lawyer may withdraw if the client deliberately disregards an obligation to pay the lawyer's fees or expenses or, in a proceeding before a tribunal, the lawyer believes in good faith that the tribunal will find good cause for withdrawal.

Recently, in *Anderson, et al. v. District Court of Larimer County,* 629 P.2d 603 (1981), the Colorado Supreme Court restated the principle that: "Generally, an attorney who undertakes to conduct an action impliedly stipulates that he will prosecute it to its conclusion; the attorney is not at liberty to abandon the representation of his client *without reasonable cause*" [*id.* at 603-604 (*emphasis added*)]. In this criminal case, the defense attorneys sought withdrawal from representation eighteen weeks prior to the testimony hearing because the client had paid only $500 of a $4,000 retainer and was past due on his next installment. The trial court refused to permit withdrawal and, on appeal, asserted the position that withdrawal is permissible only when it will not inconvenience others and will not interfere with the client's rights. After noting the attorney's compliance with DR 2-110(A)(2), particularly regarding adequate notice to the client and the taking of reasonable steps to avoid foreseeable prejudice to the client, the supreme court reversed the trial court and permitted withdrawal.

The Committee also observes that a departing legal services attorney is in the least likely position to assume the continued responsibility for handling large amounts of uncompensated legal work. A

departing legal services attorney would not have an existing office and available resources to maintain a law practice. Nor would an attorney who comes with an existing nonremunerative caseload make an attractive candidate for employment with an existing private law firm. In short, to require a departing legal services attorney to keep his or her caseload would put the attorney in an almost impossible practical situation with extraordinarily harsh financial consequences.[5]

Under the foregoing circumstances, the Committee believes that a departing legal services attorney has, in the words of DR 2-110(C)(6), "other good cause for withdrawal." As stated in ABA Formal Opinion 347:

> (t)he legal services attorney who has diligently prepared for the loss of funding of the office, and who nonetheless faces the prospect of handling a substantial ongoing caseload of pending matters, for a significant time without salary, has good cause for withdrawal based upon the personal hardship imposed upon the lawyer as a consequence of terminated funding. (Footnotes omitted.)

The Committee is aware that the "good cause" provision of DR 2-110(C)(6) is expressly limited to "proceedings before a tribunal." Nevertheless, we agree with the view expressed in ABA Formal Opinion 347 that under these circumstances there appears to be no legal or logical reason to limit the requirement to cases in litigation only.[6]

The Committee re-emphasizes that DR 2-110(A)(1) requires that, if permission for withdrawal from employment is required by a tribunal's rules, a departing legal services attorney may not withdraw without the tribunal's permission. In Colorado, most local court rules so require.[7]

Also, ABA Informal Opinion 1428 concluded that, when an attorney departs from a legal services program and the program cannot provide continued representation, both the program and the departing attorney share responsibility for withdrawal from employment. Accordingly, departing attorneys and the legal services program management must cooperate in meeting the withdrawal requirements.

In any situation of wide scale withdrawal from representation, there will be particular cases which present circumstances of such urgent need or risk of serious, irreparable injury to the client that a court will feel compelled to require continued representation. Presumably in such cases the departing legal services attorney also will feel obligated to continue representation.

3. During Periods of Substantial Cutbacks in Available Legal Services, May Legal Services Attorneys Accept New Cases?

Under the Code of Professional Responsibility, representation of existing clients is a priority before the acceptance of new cases in two major respects: the new matter should not cause neglect of or inadequate preparation regarding legal matters entrusted to the legal services program and its lawyers; and the exercise of professional independent judgment regarding pending matters should not be affected by the new representation [DR 6-101(A)(2) and (3), EC 6-3, and EC 6-4; DR 5-105(A), EC 5-14, EC 5-23, and EC 5-24; see ABA Formal Opinion 334 and ABA Informal Opinion 1359]. Accordingly, once it is apparent that staffing reductions caused by defunding make it impossible to serve existing clients of the legal services program, new matters should not be accepted unless extraordinary circumstances in the interests of justice compel representation. If no other lawyer can be found and immediate legal services are necessary to avoid irreparable injury, acceptance of the new representation would be proper. We agree with the cautious conclusion reached in ABA Formal Opinion 347 regarding the acceptance of new cases under these circumstances:

> In considering the acceptance of new cases, utmost care must be exercised to avoid leaving indigent clients in a worse position than they would have been without legal counsel, by virtue of the fact that counsel must withdraw while a matter is pending. Nevertheless, extreme cases may arise, such as a petition for court ordered sterilization of an indigent woman, that would justify occasional acceptance of a new client even if existing clients with less urgent problems could possibly suffer as a consequence.

4. The Responsibility of Colorado Lawyers to Aid Legal Services Programs and to Handle Matters Unable to be Concluded by the Legal Services Programs, if Funding is Cut Off or Substantially Reduced:

The Code of Professional Responsibility clearly states that every lawyer in Colorado has a responsibility both to help provide legal assistance to the disadvantaged and to support programs which attempt to meet this need for legal services.

EC 2-25 states:

> Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

As an ethical consideration, EC 2-25 is "aspirational in character and represent(s) (an) objective toward which every member of the profession should strive . . . (It is a principle) upon which the lawyer can rely for guidance in many specific situations"[8] (Preliminary Statement, Code of Professional Responsibility).

The specific situation at hand, as described in ABA Formal Opinion 347, is the possibility that many indigent clients with pending matters will be abandoned in our legal system. This prospect of widespread defenselessness not only proposes individual harm but undermines our society's commitment to a system of fair administration of justice.

The principle stated in EC 2-25, applied to this problem of reduced funding in legal services programs, easily leads to a straightforward conclusion: "The legal profession has a clear responsibility to respond by helping to obtain funds for existing legal services programs and by providing free legal services to indigent clients who would be served by legal services offices were funding available"[9] (ABA Formal Opinion 347).

Noting that the courts have taken an active interest in this problem of decreased funding, Formal Opinion 347 also states: "Judges, who must contend with delays and dislocations that come about from appearances by unrepresented litigants, should help to assure the smoothest possible continuity of representation within each locality." The Committee therefore encourages the governing bodies of the various legal services programs and the availability of legal services committees of the various bar associations to take all necessary actions to help obtain funds for existing legal services programs in Colorado and to arrange for the necessary mechanisms to furnish voluntary legal services to the former clients of legal services programs.[10]

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.1 (regarding competence); Rule 1.2 (regarding scope of representation); Rule 1.3 (regarding diligence); Rule 1.4 (regarding communication); Rule 1.5(a) (regarding

compensation for services); Rule 1.7 (regarding conflicts of interest); Rule 1.16 (regarding declining or terminating representation); Rule 3.2 (regarding expediting litigation); Rule 5.4 (regarding professional independence of a lawyer); Rule 6.1 (regarding pro bono public service) and Rule 6.2 (regarding accepting appointments).

NOTES

1. While not properly an ethical requirement, a practical approach in the event of loss of federal funds is to explore possible alternative funding through foundation and local government sources and through charitable contributions, both private and public.

2. See, for example, the following local rules requiring the court's permission to withdraw in matters pending before the district courts of the respective judicial districts: First – rule 16(b); second – rule 9(b); fourth – rule 8; fifth – rule 15-4 and -5; sixth – rule 14, § 4; seventh – rule 10-4; eighth – rule 11 § 3; ninth – rule 17-4; twelfth – rule 4-6; thirteenth – rule X, § 2; fourteenth – rule 10, § 3; fifteenth – rule 8, § 4; sixteenth – rule XXII, § 2; seventeenth – rule 9, § 3; eighteenth – rule XII, § 3; nineteenth – rule 14, § 2; twentieth – rule 8, § 2; and twenty-second – rule 8, §§ 3 and 4. See also, rule 1(c) of the Local Rules of Practice for the United States District Court for the District of Colorado.

The Committee also notes proposed rule 121 of the Colorado Rules of Civil Procedure entitled "Local Rules – Statewide Practice Standards," particularly the section on "Entry and Withdrawal of Appearance." If proposed rule 121 is adopted, it will preempt any local state court rules on the same subject. The proposed rule appears at 10 *The Colorado Lawyer* (October, 1981), p. 2509.

3. *Supra,* note 2.

4. See the September 9, 1981, letter of the Committee on Legal Services to the Indigent in Civil Matters of the State Bar of Texas to that bar's Professional Ethics Committee.

5. The Committee is aware that the ethical considerations under Canon 2 strongly urge every lawyer to provide free legal services to the poor and disadvantaged (EC 2-25). A lawyer should not seek to be excused from such representation except for compelling reasons (EC 2-29). The issue under consideration here is not an attorney's obligation to handle one or several cases on a *pro bono* basis. The question is whether any attorney is obligated to provide substantial legal services for no compensation at an unreasonable risk to earning a living. The Committee believes to do so would unfairly place a disproportionately higher burden on the former legal services attorney than on any other private lawyer.

6. See ABA Formal Opinion 347, footnote 3. This interpretation of the permissive withdrawal is reinforced by Rule 1.16(b)(4) of the Proposed Final Draft of the Model Rules of Professional Conduct (May 30, 1981), now being considered by the ABA to replace its Model Code of Professional Responsibility, the model upon which the Colorado Code of Professional Responsibility is based. Proposed Rule 1.16(b)(4) permits withdrawal in *any* representation of a client if "other good cause for withdrawal exists." The same provision is found in proposed DR 2-110(D)(4) of the Alternative Draft of the ABA Proposed Model Rules, which follows the format of the current Code of Professional Responsibility.

7. See note 2, *supra*.

8. In the Committee's opinion, it is not necessary to get caught up in a debate over the fact that under the Code of Professional Responsibility the *pro bono publico* responsibility is not a mandatory minimal requirement codified in a disciplinary rule, but is only an aspirational principle embodied in an ethical consideration. The function of this Committee, as an ethics committee, is to offer guidance as to what in its opinion a lawyer *should* do in a given situation based on the entire Code of Professional Responsibility.

9. The same conclusion would be reached under Rule 6.1 and comment of the Proposed Final Draft of the Model Rules of Professional Conduct, *supra,* note 6.

10. The Committee agrees with many of the observations of the Standing Committee on Professional Responsibility and Conduct of the State Bar of California made in § VI. "The Future of Legal Services to the Poor," of the appendix to its draft Opinion No. 1981-64. "Reliance exclusively upon gratuitous services to be rendered by volunteer lawyers cannot by themselves meet the extensive needs which exist." That Committee noted various reasons for this conclusion and urged the development of alternative plans for the effective delivery of legal services to those who cannot afford it. Depending on the likelihood of future funding for legal services programs, this Committee urges a similar effort by the legal profession in Colorado.

60 DUTY WITH RESPECT TO CLIENT'S INCRIMINATING PHYSICAL EVIDENCE

Adopted July 24, 1982.

Syllabus

A lawyer has an affirmative duty to surrender incriminating physical evidence in his possession. Upon surrender of the evidence, the lawyer must not reveal the identity of the client and confidential communications of the client. When a lawyer observes incriminating evidence as a result of his representation of the client and does not alter or disturb the evidence, he must not disclose these observations to authorities.

Facts

This Opinion is designed to set out ethical guidelines for lawyers when faced with situations linking their clients to incriminating physical evidence. This Opinion is limited to these specific patterns:

1. The client charged with murder under felony murder theory, where the felony is aggravated robbery, shows his lawyer the gun used in the crime and asks him to hold it for him.

2. The wife of a client charged with felony murder brings a gun to the lawyer's office and tells the lawyer that her husband, the client, told her to ask the lawyer to hold the gun for him.

3. The best friend of a client charged with felony murder brings a gun to the lawyer stating that before the client was jailed, the client left the gun with him, stating he had just used it in a stick-up. The friend says he feels guilty holding the gun and gives it to the lawyer.

4. The robbery for which the client is being investigated, felony murder, involved the taking of 50 unmarked $100 bills. The client retains the lawyer with 25 unmarked $100 bills. The lawyer, aware of the denominations taken in the robbery, asks his client whether the retainer came from the robbery. The client grins and says, "What do you think?"

5. The client, a suspect in a robbery-homicide, before his surrender takes the lawyer to the area where the getaway car and the body of the victim are located.

6. In the situation described in paragraph 5, the lawyer directs his investigator to scrape a sample of material from the deceased's fingernails in order to determine whether the sample contains the defendant's flesh and could possibly be a fact supportive of the defense of self-defense.

Discussion

These fact patterns illustrate the conflict between the lawyer's duty of loyalty to the client and his duty of disclosure to the authorities as an officer of the court. The duty of client loyalty in this context emanates from a mixture of ethical duties requiring the lawyer to preserve his client's confidences and secrets, to represent his client zealously in the statutory attorney-client privilege. C.R.S. 1973, § 13-90-107(b). The purpose of this privilege is "to secure the orderly administration of justice by insuring candid and open discussions by the client to the attorney without fear of disclosure." *Losavio v. District Court,* 188 Colo. 127, 533 P.2d 32, 34 (1975).

The Code of Professional Responsibility ("Code") requires the lawyer *not* to "reveal a confidence or secret of his client," DR 4-101(B)(1) and *not* to "[u]se a confidence or secret of his client to the disadvantage of the client," DR 4-101(B)(2). "'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." DR 4-101(A).

A lawyer has a duty not to prejudice or damage his client during the course of the professional relationship except when the client commits an unprivileged fraud upon a tribunal. *See,* DR 7- 101(A)(3) and DR 7- 102(B)(1). EC 4-4 and EC 4-5 state that this duty of client loyalty is broader than the statutory

attorney-client privilege and direct the lawyer not to reveal information detrimental to the client in the absence of full client consent. *See also,* ABA Commission on Professional Ethics, Opinion No. 341 (1975).

The lawyer must reveal fraud perpetrated by the client upon a tribunal provided that the fraudulent information is not protected by the attorney-client privilege. DR 7-102(B)(1). The duty of disclosure arises only when the unprivileged client conduct involves affirmative misrepresentations made to a tribunal and does not extend to harmful material facts which are not revealed. *See,* ABA Commission on Professional Ethics, Opinion No. 314 (1965) (attorney in practice before IRS is under no duty to disclose weaknesses of client's case) and Opinion No. 287 (1953) (attorney has no duty to disclose client's admission of perjury in divorce proceedings and attorney has no need to correct erroneous information concerning defendant's past criminal record at the client's sentencing).

Lawyers may disclose client confidences and secrets "when permitted under Disciplinary Rules or required by law or court order," DR 4-101(C)(2) and when the secrets involve "[t]he intention of his client to commit a crime and the information necessary to prevent the crime." DR 4-101(C)(3). The Code commands that a lawyer not "[c]onceal or knowingly fail to disclose that which he is required by law to reveal." DR 7-102(A)(3). EC 7-27 requires that a lawyer "not suppress evidence that he or his client has a legal obligation to reveal or produce." Colorado makes conduct criminal if anyone, including a lawyer, "renders assistance" by helping a person "conceal, destroy or alter any physical evidence that might aid in the . . . prosecution . . . of such person." C.R.S. 1973, § 18-8-105(2)(e). Any person, including a lawyer, who "[d]estroys, . . . conceals, removes, or alters physical evidence with intent to impair its verity or availability in the pending or prospective official proceeding . . ." commits the felony of tampering with physical evidence. C.R.S. 1973, § 18-8-610.

The Code does not resolve the conflict of which duty, loyalty or disclosure prevails in a given situation. A method for solving this irreconcilable conflict may be found in one of the overriding principles of the Code which prohibits a lawyer from engaging in illegal conduct or from assisting his client in conduct known to be illegal. DR 7-102(A)(7) and (8). When a lawyer acts illegally he also acts unethically. By looking at the case law which requires disclosure depending upon the circumstances, the lawyer's ethical dilemma may be resolved.

One principle emerges clearly from the case law: When the lawyer takes physical possession of incriminating evidence, he has an affirmative duty to give the incriminating evidence to the proper authorities. *People v. Meredith,* 631 P.2d 46, 175 Cal. Rptr. 612 (Cal. 1981) (defense investigator removed victim's wallet from trash can as a result of client communication; *held,* prosecution entitled to be shown location of wallet which was crucial to homicide prosecution); *State v. Olwell,* 394 P.2d 681, 64 Wash.2d 828 (1964) (counsel required to produce knife obtained from client over objection of attorney-client privilege).

If the incriminating evidence is removed from its location with the assistance of the attorney, then the details of where the physical item was found, the original condition of the item and any defense testing of the item are provable by the prosecution at the trial and must be disclosed regardless of the lawyer's duty of loyalty to the client and the attorney-client privilege. *See, People v. Meredith, supra* and *State v. Olwell, supra.* If the lawyer, acting in good faith, alters the crime scene by taking or disturbing in any way a physical item, the right of the prosecution to discover evidence of crime is hindered and the public interest in prosecution prevails over the lawyer's duty of loyalty and the attorney-client privilege. In these situations, however, the client's communication to the lawyer and the lawyer's observations made as a consequence of protected communications are protected from disclosure except for the narrow area previously discussed.

Implicit in the reasoning of these decisions is the duty of the lawyer to preserve the evidence in the same form as it was found once he removes it. The prosecution will be deprived of the opportunity to discover the evidence if the lawyer destroys its tell-tale markings or wipes the object free from fingerprints.

When the lawyer receives incriminating evidence from his client or an agent of his client, he must voluntarily turn it over to authorities. In these situations, the identity of the client and the communication with the client must not be disclosed. *People v. Meredith, supra,* at 52, notes 4 and 5; *State v. Olwell, supra*, at 684-685. When the incriminating evidence is obtained through means independent of any client

communication (i.e., through third parties) there is no attorney-client privilege and the attorney must turn over the item and may be compelled to testify as to the source of the evidence. *Morrell v. State,* 575 P.2d 1200 (Alaska, 1978) (kidnapping plan in defendant's handwriting properly turned over to authorities and lawyer required to answer source questions); *People v. Lee*, 3 Cal.App.3d 514, 83 Cal. Rptr. 715 (1970) (lawyer had no right to withhold shoes of client given by wife independently to lawyer). In these situations, the duty of client loyalty gives way to the need of the public to prosecute criminals and the duty of the attorney as an officer of the court.

The lawyer's duty of disclosure does not extend to situations which involve the observation of incriminating evidence as the result of a lawyer-client representation or communication. Disclosure by the lawyer without the client's consent may subject the lawyer to disciplinary action. In *People v. Belge,* 50 A.D.2d 1088, 376 N.Y.S.2d 771 (1975), the lawyer was indicted for failure to disclose the existence and location of a body he found as the result of a client communication. The indictment was dismissed because the attorney-client privilege prohibited disclosure. *See also, State v. Douglass,* 20 W.Va. 770 (1882), where the court held that lawyer's observations of the location of his client's pistol were protected by the attorney-client privilege. N.Y. Ethics Op. 479 (1978). In *Belge, supra,* photographs of the body taken by the lawyer were also protected and not subject to voluntary disclosure. It is only when the lawyer takes possession of incriminating physical evidence from its present location that the duty of voluntary disclosure arises.

Independent of an existing duty requiring a lawyer to turn over incriminating evidence, a lawyer may not accept as a fee payment in goods or items which he has reason to suspect have been stolen. *People v. Zelinger,* 179 Colo. 379, 504 P.2d 668 (1972). If the lawyer wrongfully retains funds suspected of being stolen, he will be forced to surrender the funds and may be forced to testify about their source. *In re January 1976 Grand Jury,* 534 F.2d 719 (7th Cir. 1976); *In re Michaelson,* 511 F.2d 882 (9th Cir. 1975), *cert. denied,* 421 U.S. 978 (1975).

Opinion

A. Fact Situations 1, 2 & 3

In each of these fact situations, possession by the lawyer of the incriminating evidence[1] requires voluntary disclosure to the authorities regardless of client consent. A lawyer may not hold incriminating evidence for a client because disclosure of the client's secret, the gun, is required by law and withholding it would be illegal.

In the first two fact situations, the lawyer obtained the gun through protected client communications. Therefore, he must turn over the gun to the authorities, but protect his client's identity and not reveal statements made by his client or his agent, his wife, about the gun. In the third situation, the lawyer received the gun from a third party and may be compelled to answer questions about the circumstances leading to his possession of the gun, even though he owes a duty of loyalty to his client not to use information gained in a professional capacity to his client's detriment.

In situations when the client intends to give possession of incriminating evidence to the lawyer, the lawyer has an ethical duty to inform the client that the lawyer is obligated to surrender the evidence to the authorities. If the client decides not to give the evidence to the lawyer, the lawyer's response should be to advise the client to permit the lawyer to surrender the evidence or, if the evidence is not on the person of the client, to leave the evidence where it is and urge the client to inform the authorities as to its location. ABA Informal Ethics Opinions, Nos. 778, 1057. Advice from the lawyer which might be construed by the client that the evidence should be destroyed is unethical and might constitute criminal conduct. *See, Clark v. State,* 261 S.W.2d 339 (Tex. 1953), *cert. denied,* 346 U.S. 855 (1953) (attorney unethically advised client to destroy murder weapon). If the evidence is not under the personal control of the client, informing the client to leave the evidence where it is an ethically permissible alternative based upon the lawyer's duty not to "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." DR 7-102(A)(7). *Cf., People v. Schultheis,* 638 P.2d 8 (1981) (Justice Erickson's discussion of the lawyer's responsibility not to commit an illegal or deceitful act).

B. Fact Situation 4

If the lawyer accepts the 25 unmarked bills, he must voluntarily give this evidence to the authorities under the principles previously discussed. Independent of this duty to disclose, the lawyer may not accept as a fee payment in goods or items suspected of being contraband.

C. Fact Situations 5 and 6

As stated in the cases discussed earlier, the lawyer has a duty *not* to reveal incriminating evidence which he observes as a result of a client's communication. He may not tell the authorities the location of the getaway car or the body of the victim. Observations made and information obtained by the lawyer as a consequence of client communication may not be revealed because of the lawyer's duty of confidentiality. This duty to protect the client does not extend however to the evidence itself. Client information about incriminating evidence is protected, but the evidence itself is not if it is possessed or disturbed by the lawyer or his agent.

The defense attorney's testing of the scrapings of the deceased's fingernails must be voluntarily revealed to the prosecution. The scraping constitutes an alteration of physical evidence which deprives the prosecution of the opportunity to discover the evidence in the same way in which the defense lawyer initially found it. Under the holdings of both *People v. Meredith, supra,* and *State v. Olwell, supra,* the lawyer must reveal the facts of the removal and any test results to the prosecution. It is important to stress that the defense lawyer who does take possession of physical evidence for scientific testing is acting ethically. He is attempting to establish his client's innocence. He must, however, make a tactical decision before testing because voluntary disclosure is required once the attorney or his agent removes evidence from its location.

NOTE

1. The words "incriminating evidence" as used in this Opinion include evidence which is contraband.

CHANGES HIGHLIGHTED

61 LEGAL ASSISTANTS

Adopted October 23, 1982.
Addendum issued 1995.

The proper use of assistants who are not licensed lawyers significantly increases the ability of lawyers to provide quality professional services to the public at reasonable cost. A lawyer cannot, however, delegate his ethical proscriptions by claiming that the violation was that of an employee. Thus, in order to assure compliance with the Code of Professional Responsibility, the following ethical guidelines are applicable to the lawyer's use of non-licensed assistants:

1. A lawyer shall ascertain the assistant's abilities, limitations and training, and must limit the assistant's duties and responsibilities to those that can be competently performed in view of those abilities, limitations and training.

2. A lawyer shall educate and train assistants with respect to the ethical standards which apply to the lawyer.

3. A lawyer is responsible for monitoring and supervising the conduct of assistants to prevent the violation of the ethical standards which apply to the lawyer, and the lawyer is responsible for assuring that assistants do not do anything which the lawyer could not do.

4. A lawyer shall continually monitor and supervise the work of assistants in order to assure that the services rendered by the assistant are performed competently and in a professional manner.

5. A lawyer is responsible for assuring that the assistant does not engage in the unauthorized practice of law.

6. A lawyer shall assume responsibility for the improper conduct of assistants and must take appropriate action to prevent recurrence of improper behavior or activities.

7. Assistants who deal directly with lawyer's clients must be identified to those clients as non-lawyers, and the lawyer is responsible for obtaining the understanding of the clients with respect to the role of and the limitations which apply to those assistants.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 5.3 (regarding the use of non-lawyer assistants); Rule 1.6(d) (requiring confidentiality by lawyer, lawyer's employees and associates unless disclosure permitted by client or otherwise permitted by the Rules); and Rule 5.5(b) (prohibiting the assistance of non-lawyers engaged in the unauthorized practice of law).

The Ethics Committee directs attorneys to Opinions 79 and 84 and the relevant provisions of the Colorado Rules of Professional Conduct contained in those opinions. This opinion is supplemented by Opinions 79 and 84 which should be reviewed in conjunction with the Rules.

62 DUTIES OF PUBLIC PROSECUTOR, RELEASE OF DEFENDANT'S CIVIL CLAIMS

Adopted November 20, 1982.
Revised November 19, 1988.
Addendum issued 1995.

Syllabus

Under DR 7-105(A), EC 7-21, and DR 1-102(A)(5), it is always unethical to coerce the release of a civil claim in exchange for dismissal of a criminal accusation. Release-dismissal agreements are fraught with possibilities for coercion. But release-dismissal agreements may be proper as an exception to this general rule if the charges arise from the same transaction as the criminal episode and are well founded, no serious civil rights violation has occurred of which the prosecutor is aware, the agreement is informed, voluntary and judicially approved and the agreement is in the public interest. Thus it is necessary to determine on a case-by-case basis whether it is improper for a public prosecutor to bargain for releases of governmental agencies or their agents from actual or potential civil claims. Depending on the facts, it may likewise be improper for a city attorney to make such request of a public prosecutor. This opinion is limited to release-dismissal agreements, which is the context in which this question usually arises.

Facts

An individual arrested by municipal police officers was charged criminally. The defendant gave statutory notice of his intent to sue the municipality, and the officers involved, for actual and punitive damages arising from the same incident. The city attorney requested that the district attorney not enter into any plea disposition, or sentencing concession, without first obtaining a release from the defendant absolving the municipality and its police officers of civil liability arising from the incident.

Opinion

The duty of a public prosecutor is to "seek justice." American Bar Association Standards for Criminal Justice, 2d Ed. Vol. I, 3-1.1(c). Ethical Consideration 7-13 likewise provides that:

> The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of the governmental powers. . . .
>
> Ethical Consideration 7-21 states:
>
> The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private claims or controversies is a subversion of the process; further, a person against whom criminal process is misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

A prosecutor has broad discretion in the charging decision. Illustrative factors which he or she may properly consider are found in Part IV, Sec. 4.1 Standards for Criminal Justice, American Bar Association, 2d Ed. Vol. I:

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;
(ii) the extent of the harm caused by the offense;
(iii) the disproportion of the authorized punishment in relation to the particular offense of the offender;

(iv) possible improper motives of a complainant;
(v) prolonged non-enforcement of a statute, with community acquiescence;
(vi) reluctance of the victim to testify;
(vii) cooperation of the accused in the apprehension or conviction of others;
(viii) availability and likelihood of prosecution by another jurisdiction.

These criteria are in keeping with a duty of a public prosecutor as set forth in Disciplinary Rule 7-103(A): "A public prosecutor . . . shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause."

In fulfilling his duty to "seek justice," a public prosecutor must use his best professional judgment, disregarding the desires of others which might impair his free judgment. EC 5-21. Similarly, DR 7-105(A) precludes a lawyer from presenting, participating in presenting, or threatening to present criminal charges "solely" to obtain an advantage in a civil matter. EC 7-21 makes it clear that "coercion" of settlement of a civil claim is what is unacceptable. This would cover claims of the government or any other party, such as a forfeiture or restitution plea bargain. Further, a lawyer has a duty under DR 1-102(A)(5) to avoid all conduct, "prejudicial to the administration of justice."

A prosecutor may be justified in reducing criminal charges, or making sentencing concessions, even where a defendant's guilt on all charges can be proven. Standards for Criminal Justice, American Bar Association, 2d Ed. Vol. 1. The prosecutor's criteria for reduction of charges or sentencing concessions do not include "coercing" a defendant to abandon what may be a meritorious civil claim against a municipality or its police officers. Even assuming that a defendant is guilty of criminal charges, he or she may still possess meritorious civil claims against governmental agents. EC 7-21, quoted supra, underscores the impropriety of coercing release of civil claims, as does Formal Opinion No. 56 of the Colorado Bar Association Ethics Committee.

In light of the ethical considerations and prosecutorial standards which apply, a public prosecutor should refrain from adopting a blanket policy of refusing to dismiss criminal charges unless civil releases are granted. Bargaining for release of civil claims not arising from the same transaction would be likewise unethical. It is improper for a city attorney to attempt to influence a public prosecutor in this manner. As stated by EC 7-21, using the criminal process to coerce adjustment of private claims or controversies is a subversion of that process.

A recent decision of the U.S. Supreme Court indicates that release-dismissal agreements are enforceable if they are entered into under circumstances which are not coercive. *Town of Newton v. Rumery,* 480 U.S. 94 (1987). However, *Town of Newton* makes it clear that such agreements must be scrutinized on a case-by-case basis to determine whether the agreement is enforceable.

From the point of view of the public prosecutor, the scrutiny required of such an agreement is substantial. *Newton* brings up a need for guidance in an area which the Ethics Committee had previously considered out-of-bounds because of the difficulty of the ethical questions posed. In order to justify an exception to the ethical prohibition of blanket or coerced release-dismissal agreements, a public prosecutor must be satisfied that all of the following factors are present:

(1) That the charges are well-founded and that no serious civil rights violation has occurred. This factor does not impose a burden of investigation on the prosecutor but does require that the prosecutor consider all facts known at the time of the plea.
(2) That the defendant's decision is informed. The factors which should be considered include the opportunity to consult with counsel and to participate meaningfully in the negotiation of the terms of the plea bargain, the defendant's age, mental status, education and the like.
(3) That the defendant's decision is voluntary. The factors which should be considered include the defendant's mental state, whether the defendant was in custody at the time, whether the defendant was under the influence of any drug at the time and the like. In appropriate cases, as in *Newton,* a cooling off period to allow for an evaluation of the plea bargain may be appropriate.

(4) That the reciprocal promises of the plea agreement deal with a single transaction as opposed to disparate claims.
(5) That the agreement is judicially approved.
(6) That the agreement is in the public interest.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 4.5 (prohibiting threatening prosecution) and Rule 8.4(g) (defining misconduct as violating of accepted standards of legal ethics).

63 LAWYER'S RELATIONSHIP WITH A TRAFFIC CLINIC

Adopted February 19, 1983.
Addendum issued 1995.

Syllabus

A lawyer may not ethically be employed by a traffic clinic owned and operated by nonlawyers because he would be aiding and abetting the unauthorized practice of law by a corporation and there would be an impermissible division of fees with nonlawyers.

Facts

This opinion sets forth two principal ethical problems created by the employment of lawyers in traffic clinics owned and controlled by nonlawyers. The employment relationship may also create other potential ethical problems.

Attorney X inquired whether he could ethically enter into an employment relationship with Traffic Clinic Y. He states that he responded to an advertisement in the classified section of the newspaper, and subsequently met with one of the nonlawyer owners of the clinic, who outlined the following proposal:

(1) The clinic would provide all advertising services, standardized office forms, answering service for the operation of a "clinic-type" legal practice for the handling, *through disposition only,* of traffic offenses;
(2) There would be a fee schedule provided by the clinic based, at least in part, on the alleged traffic offender's driving record, the violation(s) charged, and the court in which the matter was pending;
(3) Trial of any offense which could not be handled by disposition would be by the clinic referral to the handling attorney for a separate written fee agreement with the client. These fees would be over and above those set forth in the clinic fee schedule;
(4) The clinic attorney would receive a flat monthly "retainer" (to be negotiated), and any trial fees. All additional funds would accrue to the corporate clinic;
(5) Monies retained by the clinic would be for overhead costs.

None of the owners of the clinic are lawyers. The Articles of Incorporation on file with the Secretary of State reveal that the corporation is not designated as a non-profit corporation. Presumably, the nonlawyer owners of the clinic expect a monetary profit from the clinic's operation. The owners verbally advised Attorney X that they would exercise no control over the handling of any traffic case and would make no attempt to interfere with the attorney-client relationship.

Discussion

There are two principal ethical problems created by a lawyer's relationship with a traffic clinic as outlined above:

(1) Whether the lawyer is aiding and abetting the unauthorized practice of law by a corporation; and
(2) Whether the fee arrangement, at the disposition stage, between lawyer and clinic amounts to an impermissible division of fees between a lawyer and a nonlawyer.

Other potential ethical problems could come into existence by virtue of the particular arrangement herein. The discussion and opinion do not purport to define the unauthorized practice of law, but enumerate the pitfalls for a lawyer employed by a nonlawyer-owned traffic clinic.

A. Aiding and Abetting the Unauthorized Practice of Law

The services offered by the clinic are legal services, i.e., the defense of penal traffic charges. The Supreme Court of Florida has held that conduct of a corporation, by having nonlawyer officers of the

corporation control attorney employees who provided legal services for a fee, with the provision that those legal services are the only means of producing income for the corporation, was the unauthorized practice of law by the corporation. The Court noted that such practice could be constitutionally proscribed without violating First Amendment associational rights. *The Florida Bar v. Consolidated Bus., Etc.,* 386 S.2d 797 (Fla. 1980).

DR 3-101 prohibits a lawyer from aiding and abetting the unauthorized practice of law. The clinic lawyer would be aiding the clinic in the unauthorized practice of law. The Colorado Supreme Court imposed discipline upon a lawyer for aiding a corporation in preparing trust instruments for individuals. *People ex rel. MacFarlane v. Boyls,* 197 Colo. 242, 591 P.2d 1315 (1979). See also, ABA Formal Opinions 122 (12-14-34); 239 (2-21-42); and 297 (2-24-61).

B. Division of Fees

It is plain that the clinic receives the fee directly from the client at the plea bargaining stage. Thereafter, the clinic filters a portion of the fee down to the clinic lawyer in order to pay him the "flat monthly retainer." The clinic retains the balance of the fee for clinic operations and profits to the nonlawyer principals. From whichever perspective this is viewed, the arrangement amounts to an impermissible division of fees between a lawyer and nonlawyers, contrary to the provisions of DR 3-102. See ABA Informal Opinion 1392 (6-2-77).

C. Potential Problems

In addition to the ethical problems discussed, there are other areas of potential ethical problems which could arise. One consideration involves the potential for non-lawyer principals of the clinic to influence the independent professional judgment of the clinic lawyer. Regardless of the ostensible mechanics of the relationship between clinic lawyers and clinic ownership, an employer-employee relationship most likely exists. See DR 5-107; EC 5-22; EC 5-23; and EC 5-24.

Another potential problem would involve the situation where a clinic lawyer leaves the employment of the clinic. What happens to the cases of that lawyer? Does he take them with him at an additional charge to the client or at no charge to the client? DR 2-110 prohibits a lawyer from withdrawing from representation of a client without taking steps to avoid foreseeable prejudice to that client. If a case were still at the plea bargaining stage, and the departing lawyer took the case with him for further plea bargaining efforts, DR 2-106 would most likely prohibit the lawyer from entering into a new fee arrangement with the client for further plea bargaining, since the fee arrangement for plea bargaining had already been consummated with the clinic. This could cause the departing lawyer to be in a financially difficult position. It should be mentioned that the Code of Professional Responsibility requires an attorney to zealously represent his client, with undivided fidelity, from start to finish, unless an appropriate withdrawal of counsel is effected.

Finally, the referral of cases, incapable of disposition by plea bargaining, to the handling clinic attorney for trial, as opposed to an open referral, may not comply with the recently amended lawyer referral provisions of DR 2-103. Whether or not there is compliance may depend upon the advice concerning the availability of legal services given at the time of referral. EC 2-8 indicates that referrals should be disinterested in order that a client may make an informed and intelligent judgment about appropriate legal services.

Conclusion

Employment of a lawyer in a traffic clinic, owned and controlled by nonlawyers, wherein the clinic sets a fee schedule and collects the fees from the client, using a portion thereof for operating costs and profits and pays a portion to the lawyer in the form of the "flat monthly retainer," amounts to an ethically impermissible division of fees. Since the legal services provided by the clinic are the only means of producing income for the clinic, the lawyer's participation in clinic operations amounts to aiding and

abetting the unauthorized practice of law by a corporation. This opinion does not purport to define the unauthorized practice of law by nonlawyers. It does, however, deal with a lawyer's activities in aid of the unauthorized practice.

Other ethical difficulties in the arrangements between lawyer and nonlawyer-owned traffic clinic involve a potential for improper influence on the independent professional judgment of the lawyer by his superiors and the problems created by the departure of a clinic lawyer. Canon 7 of the Code of Professional Responsibility requires a lawyer to zealously represent his client from start to finish unless a permissible withdrawal of counsel occurs. Finally, the referral of cases for trial may not meet the requirements of DR 2-103.

The Committee concludes that because of the impermissible division of fees between lawyer and nonlawyers, and because of the proscription against aiding and abetting in the unauthorized practice of law by a corporation, a lawyer may not enter into an employment relationship with a traffic clinic owned and operated by nonlawyers.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 5.5(b) (prohibiting lawyers from assisting in the unauthorized practice of law); Rule 5.4 (regarding sharing legal fees with non-lawyers) and Rule 5.4 and 2.1 (regarding the duty to exercise professional judgment).

64 DUTY OF ATTORNEY TO REPORT AN ETHICAL VIOLATION

Adopted April 23, 1983.
Amended June 15, 1996.

Questions Presented

The questions addressed by this Opinion are as follows: (1) what type of knowledge possessed by an attorney regarding an ethical violation triggers the duty to report that violation; and (2) to whom must that violation be reported. This Opinion is directed to violations of the Rules of Professional Conduct and not to other statutory violations, such as criminal conduct.

Introduction

Rule 8.3(a) of the Colorado Rules of Professional Conduct provides:

> A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority.

The Duty to Report

For the purposes of this Opinion, the Committee adopts the definition of "knowingly," "known," or "knows" in the terminology section of the Colorado Rules of Professional Conduct ("denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances").[1] As an example, where an attorney in the course of a representation, or otherwise, has directly observed conduct which the attorney believes clearly to be in violation of the Rules of Professional Conduct, the attorney has "knowledge" and may be duty-bound to report it to the appropriate authority, regardless of the personal ramifications. *See In re Gopman*, 531 F.2d 262 (5th Cir. 1976) (decided under the Code of Professional Responsibility). However, Rule 8.3(c) provides that a lawyer is not required to disclose "information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while serving as a member of an approved lawyer's assistance program to the extent such information would be confidential if it were communicated subject to the attorney-client privilege. *See also In re: Ethics Advisory Panel*, Opinion No. 92-1, 627 A.2d 317 (R.I. 1993).

When an attorney is informed of an alleged ethical violation by a communication from a third party whether from a client,[2] a fellow attorney,[3] or otherwise but has no other information concern ing the alleged violation, the attorney does not possess knowledge triggering the duty to report and does not have a duty to investigate these allegations.[4] When the attorney becomes aware of an alleged violation, but has no direct information concerning it, the attorney may either recommend that the informing party file a request for investigation with the appropriate professional authority or the attorney may file a request for investigation.

Substantial Question

Rule 8.3(a) changed the broader standard of DR 1-103(A) significantly by limiting the duty to report to those instances when the alleged violation raises a substantial question as to that lawyer's (a) honesty, (b) trustworthiness, or (c) fitness as a lawyer in other respects. "Substantial" is defined in the terminology section of the Rules of Professional Conduct to require reporting only those violations which raise a clear and weighty question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

Timing of Reporting

One issue which is frequently encountered is the timing of making the required report. The Rules of Professional Conduct do not provide an express time within which a report must be made. The attorney should balance the potential prejudice or damage to the client against the attorney's duty to report, as provided by Rule 8.3(c), and should report the violation as soon as practical, bearing in mind the attorney's duties to his/her client and the judicial system. The attorney should be aware, however, of Rule 4.5 which provides that a lawyer may not present or participate in presenting disciplinary charges solely to obtain an advantage in a civil matter.

Filing a request for investigation with a disciplinary authority while an action is pending before a tribunal potentially adds a collateral issue which can adversely affect the fair or orderly conduct of the proceedings. For this reason, it is usually appropriate to wait to file the request for investigation until the conclusion of the proceeding, unless the nature of the underlying conduct calls for immediate attention by the disciplinary authorities under Rule 241 of the Colorado Rules of Civil Procedure.

Reporting Violations

Once the duty to report has arisen, the Rules of Professional Conduct mandates its reporting to "the appropriate professional authority." [Rule 8.3(a).] Complaints concerning violations of the Rules of Professional Conduct may be made to the Supreme Court Disciplinary Counsel, which has original jurisdiction in all matters involving disciplinary proceedings against attorneys. [Rule 241 C.R.C.P.]

NOTES

1. *See also* "knowledge means no substantial doubt." Restatement of Restitution, § 10, Comment d (1937). Rule 8.3 of the Colorado Rules of Professional Conduct.

2. Where an alleged violation is reported to a lawyer by a client, the attorney-client privilege may prohibit reporting unless the privilege is waived by the client.

3. In appropriate circumstances, the attorney-client privilege may attach to communications from a fellow attorney.

4. Hearsay is not sufficient. *See* Illinois State Bar Association Opinion 90-28. However, the attorney may report the violation based on hearsay information if otherwise appropriate.

65 GUIDELINES FOR OPPOSING COUNSEL CONTACTING WITNESSES

Adopted March 17, 1984.

Syllabus

It is unethical conduct for an attorney or his representative to advise or to imply to a potential witness that he should not submit to a pre-trial interview by opposing counsel or his agent.

In any communication to potential witnesses concerning their duties and privileges, both prosecutors and defense counsel are required routinely to advise that: (1) It is proper and may be the duty of both parties to attempt to interview all persons who may be witnesses and that it is in the interest of justice that such persons, subject to their voluntary and informed consent, be available for pre-trial interviews, and (2) There is no obligation for the witness to submit to a pre-trial interview by the prosecution or defense and the decision to submit to such an interview belongs to the witness.

Facts

This opinion is designed to establish ethical guidelines for both prosecutors and defense counsel whose potential witnesses are contacted by the opposing counsel for purposes of a pre-trial interview. Occasionally, lawyers in criminal cases have advised or implied to such witnesses that they may refuse to grant opposing counsel's request and have thus limited access to the witness by opposing counsel.

Discussion

Rule 16 of the Colorado Rules of Criminal Procedure has adopted the ABA *Standards for Criminal Justice* relating to discovery prior to criminal trial. The Rule and the ABA Standards are aimed at discouraging legal games of "blindman's bluff" in criminal trials. Both the ABA *Standards Relating to the Prosecution Function* and the ABA *Standards Relating to the Defense Function* make clear the impropriety of advising witnesses to refuse to consider submitting to a pre-trial interview by opposing counsel or a member of his staff. This is made clear in the commentary to Standard 3-3.1(C) of the ABA *Standards Relating to the Prosecution Function*:

> Prospective witnesses are not partisans. They should be regarded as impartial and as relating the facts as they see them. Because witnesses do not "belong" to either party, it is improper for a prosecutor, defense counsel or anyone acting for either to suggest to a witness that the witness not submit to an interview by opposing counsel. It is not only proper but it may be the duty of the prosecutor and defense counsel to interview any person who may be called as a witness in the case (except that the prosecutor is not entitled to interview a defendant represented by counsel). In the event a witness asks the prosecutor or defense counsel, or a member of their staffs, whether it is proper to submit to an interview by opposing counsel or whether it is obligatory, the witness should be informed that, although there is no legal obligation to submit to an interview, it is proper and may be the duty of both counsel to interview all persons who may be witnesses and that it is in the interest of justice that the witness be available for interview by counsel.

See also, People v. Antunes, 680 P.2d 1321 (Colo. App. 1984).

Conclusion

Since free access to potential witnesses is integral to the administration of justice, attorneys are bound to refrain from interfering with efforts of opposing counsel to conduct pre-trial interviews. It is deemed unethical conduct for an attorney or his representative to advise or to imply to a potential witness that he should not submit to a pre-trial interview by opposing counsel or his representative.

66 IMPOSITION OF INTEREST OR FINANCE CHARGES ON CLIENT ACCOUNTS

Adopted October 20, 1984.
Revised October 5, 2016.

Introduction

Lawyers often struggle to ensure clients pay their legal fees, and may wonder whether they may charge interest on unpaid fees. Lawyers may want to collect interest as an impetus for clients to pay fees on time, to recoup administrative costs associated with the efforts to collect unpaid fees over time, or to offset the economic loss suffered when a client defaults on paying fees due. In this opinion, the Colorado Bar Association Ethics Committee (Committee) considers whether lawyers may charge interest on unpaid fees and, if so, whether the lawyer must first specify in writing his or her intent to collect interest on any unpaid fees.

Syllabus

A lawyer may contract to charge reasonable interest on unpaid fees. However, a lawyer may not unilaterally impose interest on delinquent fee accounts or charge a finance fee unless there is a prior agreement between the lawyer and the client specifying that interest will be charged on unpaid fees and expenses, and the applicable interest rate. Consistent with the Colorado Rules of Professional Conduct (Colo. RPC or the Rules), this should be reflected in the written basis and rate of the fee.

The Committee notes that this opinion applies only to interest charged on fees not paid when due, and does not address circumstances where fees are paid over time, for instance, as the result of an agreed-upon payment plan.

Analysis

Nothing inherent in the lawyer-client relationship prohibits the charging of interest. Lawyers whose clients carry a balance of unpaid fees or expenses may contract to charge interest on the unpaid balance like any creditor to whom money is owed. However, lawyers have different duties to their clients that may exceed those of other creditors.

The Rules do not directly address the issue of lawyers charging interest on unpaid fees and expenses. However, Colo. RPC 1.4 and 1.5 provide guidance. Rule 1.4 addresses communications between a lawyer and client. Rule 1.4(a) requires a lawyer to provide necessary information to, and reasonably consult with, a client. Rule 1.4(b) requires a lawyer to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment [7A] to Rule 1.4 specifically addresses fees and expenses:

> *Explanation of Fees and Expenses*
>
> [7A] Information provided to the client under Rule 1.4(a) should include information concerning fees charged, costs, expenses, and disbursements with regard to the client's matter. . . . It is strongly recommended that all these communications be in writing.

Rule 1.5 governs charges for fees and expenses. Rule 1.5(a) requires that fees and expenses must be reasonable under the circumstances, and provides a non-exclusive list of factors to determine what is or is not reasonable. *See also* Colo. RPC 1.5, comment [1]. Rule 1.5(b) provides:

> When the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. Any changes in the basis or rate of the fee or expenses shall also be promptly communicated to the client, in writing.

The comments to Rule 1.5 address "Terms of Payment," but do not directly address the charging of interest on unpaid fees and expenses.

Rules 1.4 and 1.5 address charges for, and communications regarding, "fees" and "expenses." The Committee concludes that interest charged on unpaid fees and expenses is neither a fee nor an expense. A fee is a "charge for labor or services, esp. professional services." Black's Law Dictionary 629 (7th ed. 1999). An expense is typically defined as an expenditure of money, time, labor, or resources to accomplish a result. *Id.* at 598. Although interest is directly related to the underlying fees and expenses, and may be analogized to expenses in some circumstances, interest is neither a charge for services nor a cost incurred by the lawyer. Nonetheless, the Committee concludes that the Rules, consistent with the spirit of Rules 1.4 and 1.5, govern the charging of interest on unpaid fees and expenses.

Lawyers who intend to charge interest on unpaid fees and expenses should enter into a prior agreement with the client specifically stating that interest will be charged, the amount of interest to be charged, and the period for which interest will be imposed. The Rules do not require a specific form in which the lawyer must convey to the client information regarding interest, fees, or other details of the representation. Rule 1.5(b) specifies only that the basis and rate of a fee must generally be conveyed in writing as noted above. The Committee opines that the same writing that suffices to satisfy Colo. RPC 1.5(b) for a fee is also sufficient with regard to the interest disclosure. The Committee also opines that the disclosure need not be made at the outset of the representation; instead, the facts of an individual matter will dictate the terms under which the disclosure is made. This approach is consistent with that reached in other jurisdictions that have addressed the issue.[1]

Related to the question of *whether* a lawyer may charge interest, is *how much* interest the lawyer may charge. The Committee concludes that the reasonableness requirement that applies to fees and expenses applies equally to any interest charged on unpaid fees and expenses. Interest must be reasonable under the circumstances. *See* Colo. RPC 1.5(a) & cmt. [1]. The rate that is reasonable depends on the circumstances.

Lawyers may find themselves in circumstances in which they feel it is necessary to file suit against a client to collect unpaid fees. If a lawyer initiates such a lawsuit, the lawyer may seek statutory interest, even without a fee agreement permitting the lawyer to charge interest on unpaid fees and expenses. This may result in the apparently anomalous situation in which a court permits a lawyer to recover interest from the date that an account was payable, even though it would have been unethical for the lawyer to charge interest unilaterally if there was no agreement concerning interest. Nevertheless, the Committee believes it is appropriate to distinguish between (1) a lawyer's submittal of a bill for services, which is governed by the contract between lawyer and client and, therefore, subject to the Rules, and (2) a lawyer's pursuit of relief in a legal proceeding because a client has breached that contract by failing to pay a bill when due, which is governed by other law, including potentially applicable interest statutes.

Conclusion

A lawyer may contract to charge reasonable interest on unpaid legal fees and expenses owed by the client; however, such interest may not be unilaterally imposed and the lawyer must give the client notice that such interest will be charged specifying terms and the applicable interest rate that will apply.

NOTE

1. *See* D.C. Bar Legal Ethics Comm., Op. 310, "Propriety of Lawyer Charging Interest When Client Fails to Pay Fees" (2001) (a lawyer may charge interest provided the client agrees, in advance of representation or prior to a new stage in the representation); N.Y. City Bar Ass'n Comm. on Prof. Ethics, Formal Op. 2000-2, "Charging Interest on Unpaid Legal Fees" (2000) (it is not improper for a lawyer to include a provision in the legal fee agreement specifying that interest will be charged on unpaid fees, and a lawyer may charge interest – even where the fee agreement is silent – provided that the lawyer advises the client in advance that interest will

be charged and gives the client the opportunity to pay the unpaid balance before interest is imposed); and Neb. Lawyer's Advisory Comm., Op. 86-3 (1986) (a lawyer may collect interest on unpaid fees provided the agreement is in writing, entered into early in the representation, the interest is reasonable, and it clearly states when the interest will become due).

67 CONTINGENT FEE ARRANGEMENT IN CHILD SUPPORT AND SPOUSAL MAINTENANCE CASES

Adopted March 16, 1985.
Addendum issued 1995.

Syllabus

A lawyer may ethically enter into a contingent fee arrangement to collect past due child support or past due spousal maintenance (support).

A lawyer may not ethically enter into a contingent fee arrangement for the collection of future child support or future spousal maintenance.

Facts

A lawyer is requested by a client to collect past due child support or past due spousal maintenance owed to the client under a prior order of support (permanent order in domestic relations case, or support order in parentage or support case from juvenile court). May the lawyer ethically contract with the client to collect the child support or spousal maintenance arrearages on a contingency fee basis?

Opinion

The Code of Professional Responsibility DR 5-103(A)(2) provides that a lawyer may contract with the client for a reasonable contingent fee. *See* DR 2-106 (reasonableness of fee). C.R.Civ.P. Chapter 23.3 (1980) sets forth the rules an attorney must follow concerning all contingent fee agreements. Courts retain authority to review the reasonableness of contingent fee agreements. *Anderson v. Kenelly,* 37 Colo. App. 217, 547 P.2d 260 (1975); EC 5-7; *Brillhart v. Hudson*, 169 Colo. 329, 455 P.2d 878 (1969).

Contingent fee arrangements in civil cases have historically been accepted because ". . . (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid." EC 2-20. Contingent fee contracts in civil cases are met with approval if the arrangement benefits the client, and the client is fully informed of all relevant factors. EC 5-7; EC 2-20.

The creation or augmentation of a *res* out of which a fee can be paid does not occur in domestic relations cases when potential property division or support awards are undetermined. "No contingent fee arrangement shall be made . . . in respect of the procuring of a dissolution of marriage, determination of invalidity of marriage or legal separation, ..." C.R.Civ.P. Chapter 23.3 (1980). "Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified." EC 2-20.

Courts have uniformly held that an attorney may not, on a contingent fee basis, negotiate or litigate a property settlement, property division, or divorce decree. *Wall v. Lindner*, 159 Colo. 83, 410 P.2d 186 (1966); *In re Smith,* 42 Wash.2d 1988, 254 P.2d 464 (1953); *Morfeld v. Andrews*, 579 P.2d 426 (Wyo. 1978); *I. S. Speiser Attorneys' Fees* § 2.6 (1973). Contingent fee agreements based upon a percentage of an expected child support, spousal maintenance, or property award create tension between an attorney's ability to earn a fee in that particular case, and society's desire to preserve the integrity of the marriage.

A contingent fee agreement for the collection of *past due* child support or *past due* spousal maintenance, however, does not contravene this public policy. Collection of past due child support or past due maintenance can occur only *after* a court has determined the status of the marriage or the existence of the parent-child relationship. Therefore, an attorney pursuing such a collection on a contingent fee basis would not be placed in a position in conflict with the public's policy or the law's requirements.

It is well-settled law in Colorado that installments of child support or spousal maintenance become fixed and are judgments as each such installment comes due. *Carey v. Carey*, 29 Colo. App. 328, 486 P.2d 38 (1971); *Schaffer v. District Court*, 172 Colo. 43, 470 P.2d 18 (1970). Collection of non-domestic relation

judgments is permitted under contingent fee agreements. Contingent fee agreements are employed in civil collection matters where, but for the lawyer's efforts, the debt would go unpaid. There is little risk of a conflict of interest since the financial relationship between the parties has already been set and the lawyer's duty is merely to enforce the pre-fixed (liquidated) obligation.

The Committee is of the opinion that a contingent fee contract for services rendered in collecting *past due* child support or *past due* spousal maintenance is ethically proper, provided the attorney complies with the rules set forth in the Colorado Rules of Civil Procedure and the Disciplinary Rules contained in the Code of Professional Responsibility. The required advice to the client regarding other collection/fee alternatives under the Rules and the Code continues. Due to the unique remedies accorded to collecting child support and spousal maintenance, full advisement regarding collection alternatives and fee alternatives must occur (including but not limited to, the availability of the services of the offices of the district/county attorneys; the availability of contempt proceedings; and the authority of the court to award attorney fees and costs for the collection).

Accordingly, a lawyer may accept employment to collect *past due* child support or *past due* maintenance on a contingent fee basis. This opinion is in accord with the majority of those jurisdictions considering this question. Kentucky Bar Ass'n., Ethics Opinion E-205 (1979); Maryland State Bar Ass'n., 2 Informal Opinion Docket 80-34; Mississippi State Bar Ass'n., Ethics Opinion No. 88 (Sept. 23, 1983); Missouri Bar Administration, Formal Opinion No. 114 (Sept. 9, 1977); Montana State Bar Ass'n*., reprinted in part* 11 *Montana Lawyer* (June 1981); New York County Lawyers Ass'n., Answer to Question No. 660 (May 4, 1984); Virginia State Bar Ass'n., Legal Ethics Opinion No. 189 (February 17, 1984); West Virginia Bar Ass'n., L.E.I. 82-1 (June 18, 1982).

This opinion does not approve of contingent fee contracts to collect *future* child support or *future* spousal maintenance.

Note

While the Committee does not purport to give rules for constructing such agreements, nor to list all potential problem areas, our research showed at least two areas in which the lawyer must be wary:

(1) The assignment of a claim for support or maintenance will permit the claim to be discharged in bankruptcy under the current law. 11 U.S.C. § 523(a)(5)(A) (1984).

(2) A private collection effort was enjoined by the welfare department when the collecting parents were, or had been, receiving public assistance, since the effort would compromise the claims of the government to reimbursement for support payments. *See County of Santa Clara v. Support Incorporated*, 89 Cal. App. 3d 687, 152 Cal. Rptr. (1979).

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.8(j) (permitting reasonable contingent fees in civil cases) and Rule 1.5 (reasonableness of fees).

68 CONFLICTS OF INTEREST: PROPRIETY OF MULTIPLE REPRESENTATION

Adopted April 20, 1985.
Revised December 9, 2011.

Introduction

The Colorado Bar Association (CBA) Ethics Committee (Committee) has issued several opinions regarding conflicts of interest. Despite the guidelines provided in previous opinions, concern remains over the application of these guidelines to specific conflict situations. This opinion considers the propriety of multiple representation in the following common conflict situations:

1) representation of both a husband and wife in negotiating a property settlement before dissolution proceedings commence;
2) representation of both the buyer and seller in a residential real estate transaction;
3) representation of both the buyer and seller of a business; and
4) representation of individuals in drafting an entity agreement, and representation of solely an entity in its formation.

Syllabus

The Colorado Rules of Professional Conduct (Colorado Rules or Colo. RPC) may prohibit a lawyer from representing both a husband and wife in drafting an uncontested divorce settlement agreement, because this agreement ultimately must be approved by a court. Representation of both parties in a filed dissolution of marriage proceeding is not permissible. The other three scenarios present transactional rather than litigation situations and require thorough analysis as to whether the representation is proper. The Committee does not adopt a *per se* rule prohibiting a lawyer from representing opposing parties in a transactional matter; however, a lawyer should proceed very cautiously. Before accepting employment, the lawyer must determine whether the lawyer can adequately represent the interests of each party to the transaction. In those situations in which a lawyer ethically may accept such a role and agrees to do so, the lawyer must obtain the informed consent of each client, confirmed in writing. The nature of the disclosures required and the ability to represent each party adequately will depend on the situation in question. Under no circumstances should a lawyer representing multiple parties be considered a mere "scrivener" in a transaction.

Analysis

I. General Conflicts Analysis: Current Clients

Colo. RPC 1.7 addresses conflicts of interest for current clients. It provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  (1) the representation of one client will be directly adverse to another client; or
  (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
  (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  (2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

The structure of Colo. RPC 1.7 provides an analytical framework: (1) identify whether there is a concurrent conflict, based on either direct adversity between the lawyer's clients or a significant risk of a material limitation on the lawyer's representation of the client; (2) if a conflict is present, determine whether each client can consent to the conflict or if it is nonconsentable; and (3) if the conflict is consentable, determine what must be communicated to the client to obtain informed consent, confirmed in writing.

A. Does a concurrent conflict of interest exist?

Colo. RPC 1.7(a) provides that a concurrent conflict of interest exists both where there is direct adversity and where there is a significant risk that a lawyer's other responsibilities or interests will materially limit the lawyer's ability to represent the client.[1] If a concurrent conflict exists, the lawyer must consider whether, despite the existence of the conflict, the lawyer will be able to provide competent and diligent representation. If more than one client is involved, the issue must be resolved as to each client.

The lawyer's duty to assess conflicts does not end with the initial consent of each client. If there is any significant change in the circumstances of the representation, the lawyer should repeat the analysis and again obtain informed consent.

B. If a conflict is present, may the client consent to the conflict?

Some conflicts may not be resolved by consent. Colo. RPC 1.7, cmts. [14]–[15]. If a conflict is nonconsentable, the lawyer must decline the representation. Both Colo. RPC 1.7 and the *Restatement (Third) of the Law Governing Lawyers* (*Restatement*) identify three categories of nonconsentable conflicts: (1) representation prohibited by law; (2) representation of opposing parties in the same proceeding; and (3) where a lawyer is unable to provide competent and diligent representation to each affected client. Colo. RPC 1.7(b) and *Restatement*, § 122. Representation prohibited by law includes, for example, limitations on the ability of some government entities to consent to conflicts. Colo. RPC 1.7, cmt. [16]. The second category, representation of opposing parties in the same litigation, undercuts our adversarial system of justice. Colo. RPC 1.7, cmt. [17].

Determining whether representation falls in the third category can be difficult. The lawyer must reasonably conclude that the lawyer will be able to provide competent and diligent representation to both clients. Colo. RPC 1.7(b)(1) and cmt. [15]. The *Restatement* standard asks whether a disinterested lawyer would conclude the conflict would result in an adverse effect on the lawyer's relationship with or representation of either client. *Restatement*, § 122, cmt. g(iv).[2] If so, the conflict is nonconsentable. *Id.* Nonconsentable conflicts include joint representation of criminal co-defendants with irreconcilable interests and conflicts among members of a class action, despite informed consent of the class representative. *Id*. *See also* Colo. RPC 1.7, cmts. [16], [33]. A nonconsentable conflict also exists when a lawyer's duty of confidentiality to others precludes the lawyer from providing sufficient information to obtain another client's informed consent. *See* Thomas D. Morgan, *Lawyer Law: Comparing the ABA Model Rules of Professional Conduct with the ALI Restatement (Third) of the Law Governing Lawyers*, § 4.A.5 (2005).

No *per se* prohibition exists against representing more than one client on the same side in a litigation or transaction as long as the lawyer determines that the representation of all the clients is not materially limited by the joint representation. *See* Colo. RPC 1.7(b), cmts. [29]–[33]. *See also* American Bar Association (ABA) Comm. on Ethics and Prof. Resp., Formal Op. 95-390 (1995) (lawyer who represents a corporate client may not represent a non-client corporate affiliate in an unrelated matter if the representation of either entity may be materially limited by the lawyer's obligations to the other). Even outside the litigation context, representing opposing parties is always problematic, and it is the opinion of the Committee that it should be undertaken only in rare circumstances.

A lawyer may not represent opposing parties in negotiations. Colo. RPC 1.7, cmts. [28]–[29]. Therefore, before agreeing to represent both parties, the lawyer must ascertain whether the parties have substantially agreed on the material terms of the subject of the negotiations. Even then, as discussed below, the lawyer must remember that one party or the other may not have understood the consequences of the terms to which "agreement" had been made.

Another factor to be considered is the duration and intimacy of the lawyer's relationship with one or both of the clients. A long-standing relationship with one client may make it difficult for the lawyer to believe reasonably that he or she will be able to represent both parties diligently. The lawyer's personal and financial interest in maintaining that relationship may materially interfere with the lawyer's independent professional judgment. Colo. RPC 1.7, cmts. [8], [26]. *See, e.g.*, *In re Kamp*, 40 N.J. 588, 194 A.2d 236, 240–41 (1963).

Case law holding a conflict is nonconsentable often involves an unsophisticated client who was inadequately informed about or incapable of adequately appreciating the risks of the conflict. *Restatement*, § 122, cmt. g(iv). However, when the client is sophisticated, particularly where the client has made use of independent legal counsel such as in-house counsel, courts rarely hold a conflict nonconsentable. *Id*.

C. What must be communicated to the client to obtain informed consent?

If the lawyer reasonably believes that other interests will not affect the representation, and the conflict is consentable, the lawyer may represent multiple clients if each client gives informed consent confirmed in writing. Colo. RPC 1.7(b)(4).

"Informed consent" and "confirmed in writing" are specifically defined in Colo. RPC 1.0. "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. Colo. RPC 1.0(e). The communication necessary will vary according to the circumstances. The lawyer ordinarily must (1) disclose the facts and circumstances giving rise to the conflict; (2) explain the advantages and disadvantages of the proposed course of conduct; (3) discuss other options or alternatives; and (4) in some circumstances, advise the client to seek advice from independent counsel. Colo. RPC 1.0, cmt. [6].

The lawyer should disclose that as between commonly represented clients, the attorney–client privilege does not attach, and if subsequent litigation develops, the privilege will not protect any communications between the lawyer and each party. In a joint representation, the lawyer also should disclose that information obtained from each client will be shared and that if one client decides that a material matter should not be shared with the other, or if a dispute otherwise develops, the lawyer probably will have to withdraw from representing both parties. The likely effect of such a withdrawal is that each party will incur higher legal costs than if separate counsel had been secured at the outset of the transaction. *See* Colo. RPC 1.7, cmts. [29]–[32].

For informed consent to be valid, the lawyer must explain the risks and benefits in sufficient detail. The analysis of the Wisconsin Supreme Court, although made under a prior version of the Rules of Professional Conduct, is instructive:

> An effective waiver of a conflict or potential conflict of interest which is knowing and voluntary requires the lawyer to disclose the following: (1) the existence of all conflicts or potential conflicts in the representation; (2) the nature of the conflicts or potential conflicts, in relationship to the lawyer's representation of the client's interests; and (3) that the exercise of the lawyer's independent professional judgment could be affected by the lawyer's own interests or those of another client. On the part of the client, it also requires: (1) an understanding of the conflicts or potential conflicts and how they could affect the lawyer's representation of the client; (2) an understanding of the risks inherent in the dual representation then under consideration; and (3) the ability to choose other representation.

In re Guardianship of Lillian P., 617 N.W.2d 849, 856 (Wis.App. 2000).

Valid informed consent to a conflict of interest involves more than just a statement from the lawyer; it also requires the lawyer to ensure the client understands the ramifications of the representation. Each client must be aware of his or her ability to reject the proposed conflicted representation.

Even when the lawyer provides an extensive conflicts of interest disclosure, the lawyer may be at risk of violating Colo. RPC 1.7. For example, in *People v. Quiat*, 979 P.2d 1029 (Colo. 1999), the lawyer was suspended for ninety days for representation despite impermissible conflicts of interest. He had provided a disclosure of the conflicts in writing, even though under the former version of Rule 1.7 he was not required to do so. The Colorado Supreme Court upheld the finding that "Quiat's disclosures were 'totally insufficient' in that they did not detail the potential for conflicts, nor disclose the waiver of attorney-client privilege." *Id.* at 1035.

"Confirmed in writing" denotes either informed consent that is given in writing by the client or a writing that the lawyer promptly transmits to the client and that confirms an oral informed consent. If it is not feasible to obtain a contemporaneous written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. Colo. RPC 1.0(b) and cmt. [1]. "Writing" and "written" are defined broadly as "a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail." A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing. Colo. RPC 1.0(n).

II. Specific Conflicts Situations

A. Representing a husband and a wife in negotiating a property settlement agreement before a dissolution proceeding commences and joint representation after a dissolution proceeding commences

When a husband and a wife approach a lawyer to draft an "uncontested" settlement agreement as part of their pending dissolution of marriage action, the situation presents a direct conflict. Even though they may not be aware of it, the wife and husband have conflicting interests on matters such as property division, child support, allocation of parental responsibilities, parenting time, and spousal maintenance. Even if the husband and the wife have agreed to the general terms beforehand, the situation may quickly deteriorate into animosity.

Under Colo. RPC 1.7(b)(3), representing both the husband and the wife in a pending dissolution of marriage proceeding is not permissible. It is unclear whether that prohibition applies to joint representation *prior to* the filing of the action. Because a dissolution of marriage cannot be completed without filing the separation agreement with and seeking approval by the court, the rule may also prohibit the representation of both the husband and the wife in any matters related to the dissolution, even prior to filing. Regardless of how amicable the husband and the wife appear, the inherent conflict in their interests may make it impossible for a lawyer to represent both of them.[3]

B. Representing the buyer and the seller in a residential real estate transaction

In a real estate transaction, the positions of the purchaser and the seller are inherently conflicting because the buyer desires to purchase for less money and the seller to sell for more money.[4] *In re Wagner*, 599 N.W.2d 721, 726 (Iowa 1999); *Baldasarre v. Butler*, 254 N.J.Super. 502, 517, 604 A.2d 112, 119 (App.Div. 1992), *aff'd in part and rev'd in part on other grounds*, 132 N.J. 278, 625 A.2d 458 (1993).

May the lawyer still proceed with the representation? The lawyer must reasonably believe that the interests of the clients will be adequately protected. Then, if the lawyer reaches that conclusion, the clients must provide informed consent in writing after full disclosure of the potential conflicts.

Other states generally have agreed that, as long as the lawyer complies with the requirements of Colo. RPC 1.7—that is, where the parties already have agreed to the essential terms of the transaction and they have given informed consent confirmed in writing—a lawyer may represent both parties in a

residential transaction. *See*, *e.g.*, *Matter of Dolan*, 384 A.2d 1076, 1081–82 (N.J. 1978); Mass. Bar Comm. on Professional Ethics, Ethics Op. 90-3 (1990); S.C. Bar Ethics Advisory Comm., Advisory Op. 00-17 (2000). Essential terms would include at least price, time, and manner of payment, status of title on transfer, whether any personal property is to be included, status of leases or tenancies, the amount of earnest money deposit, and the treatment of amounts so deposited on default.

The complexity of the transaction will be a factor in whether it is appropriate to ask for client consent. *See Baldasarre*, 625 A.2d at 467 (lawyer may not represent both buyer and seller in high-value or complex commercial real estate transaction, even with client consent). The lawyer also should consider practical factors such as the financial and emotional significance of the transaction for either party. If the lawyer previously has represented either party, this fact must be disclosed. *See* Comment, "Conflicts of Interest in Real Estate Transactions; Dual Representation—Lawyers Stretching the Rules," 6 *W. New Eng. L.Rev.* 73, 78-80 (1983).

Although decided under different rules (requiring, for example, "full" disclosure), several of the cases cited in this opinion will be useful for the lawyer in crafting appropriate disclosures. *See*, *e.g.*, *People v. Quiat*, 979 P.2d at 1031-42; *In re Wagner*, 599 N.W.2d at 726-29; *Matter of Dolan*, 384 A.2d at 1080-82. *See also id.* at 1085 (dissenting opinion); *In re Kamp*, 194 A.2d at 239–41. Lawyers should be especially mindful that disclosures must be made and all clients' informed consent must be obtained at the outset of the representation.

Even though the parties have negotiated the business terms of their agreement, the lawyer must fulfill the full range of duties accompanying the attorney–client relationship. *See* CBA Formal Op. 29 (Jan. 18, 1964) (the lawyer is "representing" these parties if he or she prepares documents affecting their rights and liabilities for a fee). The lawyer may not act solely as a scrivener. *See In re Cohen*, 8 P.3d 429, 431 (Colo. 1999); *Florida Bar v. Teitleman*, 261 So.2d 140, 143 (Fla. 1972) (preparation of legal documents for a fee constitutes representation; suggestion that it is merely a "scrivener's" task borders on the presumptuous). *See also, Restatement*, § 130, cmt. b. To permit otherwise would allow a lawyer to limit liability for acts performed as a lawyer. Colo. RPC 1.8(h). Although a lawyer may provide unbundled or limited legal services (*see* Colo. RPC 1.2(c)), limitations on the scope of the representation must be made clear at the outset. Even where parties have agreed on what they consider to be the material terms, many if not all of the "boilerplate" provisions of a purchase contract have the potential to result in an advantage for one party over the other. Inherent in legal representation is that a lawyer will provide advice as to the desirability of the terms of the sale. Where the lawyer represents both the buyer and the seller, the lawyer must advise each on many points. For a thorough discussion of the difficulties involved in appropriately carrying out the duties accompanying multiple representation, *see Matter of Dolan*, 384 A.2d at 1082-86 (Pashman, J., concurring and dissenting).

Two issues that frequently develop in multiple representation in real estate transactions are (1) how the lawyer should resolve material issues the parties failed to consider, and (2) how the lawyer should resolve a situation where, in light of information acquired during the representation, a contract term is fraudulent or materially misrepresents the true state of affairs. These issues are difficult because a lawyer accepting multiple representation assumes the role of an adviser to both clients, rather than that of an advocate for only one client. *See* Colo. RPC 1.7, cmt. [17].

The first issue may exist, for example, if inspection of the property reveals previously undiscovered structural defects or needed repairs of other problems. The lawyer must inform the parties of the alternatives in resolving such an issue and of the effect each alternative will have on the parties. Regardless of the lawyer's professional judgment regarding resolution of the issue, such as the terms of the initial agreement, the issue must be resolved solely by the parties, not the lawyer.

The second issue could arise, for example, when prior to closing a lawyer discovers a defect in title that the seller has not previously disclosed. Colo. RPC 1.4 requires a lawyer to communicate adequately with the client (the seller) about the risks of failing to disclose the title defect. However, the seller might not want the lawyer to disclose the defect, to the detriment of the other client (the buyer). Colo. RPC 1.4 also requires the lawyer to communicate adequately with the buyer about the defect in title. Therefore, the

lawyer should ensure that each party understands at the commencement of the representation that any problem or defect discovered concerning the real estate or the transaction itself would necessarily be raised for their mutual consideration. *See* Note, "Simultaneous Representation: Transaction Resolution in the Adversary System," 28 *Case W. Res. L.Rev.* 86, 114 (1977). Furthermore, failure to disclose such a defect, if it amounts to a criminal act or fraud, would violate Colo. RPC 1.2(d).

As mentioned above in the general analysis, if circumstances change, the lawyer must reconsider whether joint representation is still permissible. For example, if the transaction fails and the parties disagree about whether the buyer is entitled to a refund of the earnest money, the lawyer might have no option but to withdraw from representing both parties.

In the Committee's judgment, representation of the buyer and the seller in a residential real estate transaction is permissible if the lawyer has complied with the standards outlined above. However, it will be difficult to comply with those standards except, perhaps, in a case where both parties are knowledgeable and sophisticated.

C. Representing the buyer and the seller in the sale of a business

A lawyer's representation of both the buyer and the seller in a business transaction has been characterized as one of the clearest cases of improper representation of conflicting interests. *In re Boivin*, 271 Or. 419, 533 P.2d 171, 174 (1975).

Even where the lawyer's role is merely to set forth the parties' understanding, few agreements are so simple that no provision could be added, condition imposed, or terminology shaded so as to favor one of the parties. Therefore, the Committee concludes that only in the rarest of circumstances would a lawyer be able to represent adequately the interests of the buyer and the seller in a proposed sale of a business. Colo. RPC 1.7. *See also People v. Underhill*, 683 P.2d 349 (Colo. 1984) (representing both the buyers and the sellers of bars in two separate transactions without disclosure of possible conflicts of interests resulted in one year and one day suspension); *accord In re Sedor*, 276 A.D.2d 103 (N.Y. 2000) (representing the buyer and the seller of business without adequate disclosures resulted in six month suspension).

It has been held that where the parties independently agreed to the terms of the agreement, the lawyer did not "sit at both sides of the table during the negotiations," and the clients signed waivers acknowledging both the risks inherent in joint representation and their ability to seek other counsel, the lawyer was ethically permitted to represent both the buyer and the seller in a simple business transaction. *Van Kirk v. Miller*, 869 N.E.2d 534 (Ind. 2007). However, as in a real estate transaction, the more complex the matter, the less likely the lawyer could represent both the buyer and seller.

The inherent difficulty in representing both parties in the sale of a business stems from the many legal decisions that must be made regarding choice of entity, employee status, tax implications, representations to be made or requested, appropriate default provisions, and other issues going far beyond the basic terms and conditions of payment. For an illustration of the dangers inherent in multiple representation in the context of a sale of a business (and the severe repercussions from an improper multiple representation), *see People v. Razatos*, 636 P.2d 666 (Colo. 1981). Thus, a lawyer who undertakes to represent both the buyer and the seller of a business must be aware of the heavy burden that he or she must meet.

D. Representing individuals in drafting an entity agreement and/or representing solely an entity in its formation

The comments to Colo. RPC 1.7 specifically contemplate a lawyer acting on behalf of multiple clients when their interests are generally aligned, such as helping entrepreneurs to organize and establish a business entity.[5] Colo. RPC 1.7, cmt. [28]. In such circumstances, "the lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests." *Id.*

Representation of an entity in formation involves numerous potential conflicts of interest. At this stage, crucial decisions are made regarding the operation of the entity. The lawyer must be very clear about the identity of the client. Otherwise, the lawyer may be perceived to be representing one or more of the

individual partners/shareholders/members (entity members) rather than, or in addition to, the entity itself. Especially if the business fails, an unrepresented entity member might later claim that he or she thought the lawyer represented him or her. The parties in this type of transaction may be sophisticated in business and legal matters. The lawyer cannot assume that sophistication, however. The lawyer must feel confident that all entity members understand the differing interests and the possibility that, if a dispute arises, the lawyer may be unable to represent either the entity members or the entity. For a discussion of the possible roles the lawyer may take and the ethics rules implicated, *see* Rothrock, "Entity Formation: Defining the Client and the Duty of Confidentiality," 34 *The Colorado Lawyer* 77 (July 2005) (Rothrock); Thomas E. Rutledge and Phuc H. Lu, "No Good Deed Goes Unpunished: Pitfalls for Counsel to a Business Organization about to be Governed by a New Law," 45 *Brandeis L.J.* 755 (2007).

The lawyer also must consider the implications of Colo. RPC 1.13, which provides in pertinent part:

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

If the lawyer intends to represent only the new entity or some but not all of the entity members, and if the lawyer knows or reasonably should know that an unrepresented entity member misunderstands the lawyer's role, the lawyer should inform that entity member that the lawyer does not represent such member. Colo. RPC 4.3.

A common scenario leading to a conflict is when some entity members contribute capital and others contribute ideas or management expertise to a new venture. The parties must agree on the relative value of each entity member's contribution to the enterprise, and the lawyer may not negotiate for the parties.

Another issue arises if the lawyer wishes to represent only the entity in its formation. The conflict potential exists because the entity does not exist at the outset of the representation and, therefore, the lawyer must instead communicate with some or all of the entity members. However, because the entity does not yet exist, it cannot consent to the conflict. Some states overcome these problems by applying the following analysis:

> Where (1) a person retains a lawyer for the purpose of organizing the 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.

Jesse v. Danforth, 485 N.W.2d 63, 67 (Wis. 1992). *See also* Rothrock at 81 n.18, *citing* additional cases following this approach.

Other courts have concluded that a lawyer does maintain an attorney–client relationship with individual entity members post-formation, contrary to the principle stated in *Jesse*. *See*, *e.g.*, *Franklin v. Callum*, 804 A.2d 444, 448 (N.H. 2002) (attorney for unincorporated solid waste management district represented each member thereof). Although the Colorado courts have not yet addressed this issue, the Committee suggests that, if a lawyer makes adequate disclosures of his or her intent to not represent individual entity members, then the lawyer should be able to avoid forming an attorney–client relationship with the individuals and may represent solely the to-be-formed entity.

The Committee concludes that in the formation of a new entity, the lawyer may choose to represent (a) some or all of the entity members but not the entity; (b) the entity itself and none of the individual entity members; and (c) the entity and one or more of the individual entity members. However, in all circumstances, the lawyer must first undertake the conflicts analyses described above. The lawyer will need to identify current and potential areas of conflict, adequately determine whether those conflicts are consentable, and then, if they are consentable, obtain informed consent from each affected client.

NOTES

1. *See also* Colo. RPC 1.7, cmts. [6]–[13].

2. The current version of Colo. RPC 1.7(b)(4) omits the statement in the old rule that the client's consent could not be validly obtained where a disinterested lawyer would conclude that the client should not consent under the circumstances. Nevertheless, the Committee believes the lawyer still should consider carefully whether consent is truly "informed" if a disinterested lawyer would advise against it. Moreover, the Committee believes that most, if not all, situations in which a disinterested lawyer would conclude that the client should not consent also will be situations in which the lawyer considering undertaking the representation will not be able to reasonably believe that the lawyer will be able to provide competent and diligent representation to each affected client. Colo. RPC 1.7(b)(1).

3. Texas Ethics Opinion No. 583 (2008) appears to support the conclusion that the *per se* prohibition stated in Rule 1.7(b)(3) applies to any matters that necessarily must proceed to litigation, whether contested or not. Certainly, the safer course for any lawyer is not to agree to joint representation of adverse parties in any matter that, like a dissolution of marriage, ultimately must proceed to litigation.

4. This opinion assumes the residential real estate transaction is between parties dealing at arm's length and without a prior substantial relationship to each other. The parties' interests may be more closely aligned in transactions between family members, close friends, related entities, or a closely held corporation and its owners. Even in those scenarios, the lawyer must undertake the above analysis to determine whether the representation is proper.

5. This opinion assumes the transaction is between parties dealing at arm's length and without a prior substantial relationship to each other. *See supra* at n.4.

69 PROPRIETY OF COMMUNICATING WITH EMPLOYEE OR FORMER EMPLOYEE OF AN ADVERSE PARTY ORGANIZATION

Revision adopted June 20, 1987.
Addendum issued 1995.
Revised Opinion adopted June 19, 2010.
Revised Opinion adopted November 18, 2017.

Introduction and Scope

Members of the Bar are concerned about the propriety of communicating with an employee or former employee (or other agent) of a represented organization. This opinion provides guidance in this area. It is intended to cover not only the situation where attorneys wish to communicate with the employee of a represented organization that is a party to litigation, but also those situations where there is actual knowledge of representation prior to litigation. This opinion does not address the scope of the attorney-client privilege, the persons protected under the privilege, or the limitations on *ex parte* contacts that flow from the existence of the privilege. *See Upjohn Co. v. U.S.*, 449 U.S. 383 (1981); *Wright v. Group Health Hospital,* 103 Wash. 2d 192, 691 P.2d 564 (1984).

The Committee issued an earlier version of this opinion based on DR 7-104(A)(1) of the Colorado Code of Professional Responsibility. The Committee later issued an addendum to that opinion when the Colorado Rules of Professional Conduct (Colorado Rules or Colo. RPC) were adopted effective January 1, 1993. The Colorado Supreme Court repealed and reenacted the Colorado Rules effective January 1, 2008. The Committee believes that it is appropriate at this time to issue a revised opinion based on the current Colorado Rules. Because members of the Bar relied on the earlier version of this opinion, in large part this opinion tracks the organization of the earlier version. The Committee has removed discussion of issues that were clarified under the Colorado Rules.

Syllabus

Before communicating with a current employee or constituent[1] of an organization, which organization a lawyer knows to be represented on the subject matter of the proposed communication, the lawyer must obtain the prior consent of the lawyer representing that organization in that matter if the person is a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter, or has authority to obligate the organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the organization, unless the communication is otherwise permitted by law or a court order.

Consent of the organization's lawyer is not required for communication with a former constituent. In communicating with a former constituent, a lawyer must not use methods that violate the legal rights of the organization, including methods that might invade the attorney-client privilege of the organization.

A lawyer does not avoid the requirement of obtaining the prior consent of the organization's lawyer by directing another to communicate with the organization's current constituent.

An attorney may interview a former constituent *ex parte* with regard to all matters except as to communications which are the subject of the attorney-client privilege.

Analysis

Colo. RPC 4.2 provides as follows:

Communicating With Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment [7] to Colo. RPC 4.2 provides further guidance regarding contacting constituents of a represented organization:

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

The purpose of Colo. RPC 4.2 is to prevent the deprivation, undermining, or bypassing of a client's right to the advice of counsel. An attorney's advice to his or her client includes explaining the law for the client's best interests; protecting the client against unfair and misleading settlements; correcting errors in the client's communication; protecting the client against self-prejudice; and preserving the client's right to privileged communications.

In other words, Colo. RPC 4.2 protects a person or organization that has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by other lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation. Colo. RPC 4.2, Comment [1].

The rule can be broken down into four parts:

1. "Communication."
2. "Subject of the Representation."
3. "Knows" to be represented in the matter.
4. "Authorized by law or court order."

"Communication" is that made either by the attorney or his or her agent: "A lawyer may not make a communication prohibited by [Rule 4.2] through the acts of another." Colo. RPC 4.2, Comment [4]. This includes causing one's client to communicate directly with a constituent of a represented organization. Nevertheless, "[p]arties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." *Id.*

Furthermore, whenever an attorney is going to communicate with a constituent who is not represented by counsel, he or she should identify himself or herself and the client. The lawyer also should refrain from stating that he or she is disinterested. When the lawyer knows or reasonably should know that the constituent misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. Colo. RPC 4.3.

The parameters of the group protected by Rule 4.2 and Comment 7 differ in material respects from those who are clients entitled to the attorney-client privilege. *See Upjohn Co. v. U.S.,* 449 U.S. 383, 101 S. Ct. 677, 66 L.Ed.2d 584 (1981); *Wright v. Group Health Hospitals,* 103 Wash. 2d 192, 691 P.2d 564 (1984).

The phrase "subject of the representation" concerns the matter in which the interviewing counsel is representing his or her client. If the interviewing lawyer is communicating with a constituent of an organization regarding a matter outside the interviewing lawyer's representation, then there would be no violation of the rule; or, if the questioning lawyer knows that the opposing party is represented by a lawyer, but knows that such representation is on a totally unrelated matter, then such communication would not be a violation. Colo. RPC 4.2, Comment [4].

Where the interviewing lawyer knows that the organization is represented by an attorney but he or she is unclear about the area or scope of that representation, he or she is best advised to check with that lawyer before commencing the communication. *See State v. Yatman,* 320 So. 2d 401 (Fla. 4th DCA 1975) (where a criminal defendant was represented by counsel in an existing criminal case, the prosecutor's

attempt to interview that defendant for the purpose of filing a separate case based on the same criminal episode was improper). *See Abeles v. State Bar,* 9 Cal. 3d 603, 510 P.2d 719, 108 Cal. Rptr. 359 (1973) (where a party had counsel of record, the attorney could not communicate with that party without the consent of the counsel of record, even where the client denied being represented personally by counsel of record); *In re Schwabe,* 242 Or. 169, 408 P.2d 922 (1965) (attorney was reprimanded for contacting a party directly to determine if he was in fact represented by another attorney who had so notified the attorney of such representation). Thus, if there is any question about whether the representation of a party relates to the subject matter of the communication, it is advisable to contact the purported counsel for that party in order to determine the nature of that representation, if any, before proceeding.

This leads to the next part of the Rule: "[K]nows to be represented by another lawyer in the matter . . . ." "Knows" denotes actual knowledge of the fact of representation in the matter, which knowledge may be inferred from circumstances. Colo. RPC 4.2, Comment [8]; Colo. RPC 1.0(f). Recklessness does not substitute for actual knowledge. Colo. RPC 1.0, Comment [7A]. Knowledge that the entity is represented in a different matter, even if related, is not necessarily knowledge of representation in the matter at issue. *See People v. Wright,* 196 P.3d 1146, 1147 (Colo. 2008) (Colo. RPC 4.2 "only purports to constrain a lawyer . . . from communicating about the subject of that representation, with someone who is represented by a lawyer *in the same matter*") (emphasis added); *State v. Harper,* 995 P.2d 1143, 1145-46 (Okla. 2000); *Miller v. Material Sciences Corp.,* 986 F. Supp. 1104, 1106-07 (N.D. Ill. 1997).

Even though one has indirect or general knowledge of legal representation, such as insurance carriers generally having legal counsel, there is no duty to inquire if a party has legal counsel in the specific matter in question.[2] However, a "lawyer cannot evade the requirement of obtaining consent of counsel by closing eyes to the obvious."[3] Colo. RPC 4.2, Comment [8].

"Authorized by law or a court order" simply means that which is authorized by statute, rule or order of court, and most probably the rule of any administrative agency having jurisdiction over the case. *Weinstein v. Rosenblum,* 59 Ill.2d 475, 322 N.E.2d 20 (1974). This includes "communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government." In addition it may include investigative activities of government lawyers. Colo. RPC 4.2, Comment [5]; *see also* CBA Formal Ethics Ops. 93 and 96.

A lawyer may seek a court order authorizing communication with a person if the lawyer is uncertain if that communication is prohibited by Colo. RPC 4.2. In exceptional circumstances, such as where necessary to avoid reasonably certain injury, a lawyer may seek a court order authorizing a communication that would otherwise be prohibited by Colo. RPC 4.2. Colo. RPC 4.2, Comment [6].

Once it has been determined that an organization is represented by counsel, it should be determined which constituents of that organization may be contacted and which may not be contacted directly by the lawyer.

Constituents who may be contacted differ from those who may not be contacted by their role (or lack of role) with respect to the organization's legal affairs and their authority to obligate or bind the organization regarding the subject matter of representation. Colo. RPC 4.2 prohibits a lawyer from contacting a constituent of a represented organization if that constituent "supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." Colo. RPC 4.2, Comment [7].

Constituents who interact with the organization's lawyer on other matters, or with authority to obligate or bind the organization with respect to other matters, but not with respect to the matter involved in the proposed communication, are not within the scope of Colo. RPC 4.2 and Comment [7]. Thus, any constituent of a corporation, no matter how senior, who does not have decision-making authority or regularly consult with the organization's lawyer *concerning the matter involved* would not be protected by Colo. RPC 4.2 and Comment [7] (unless his or her acts, omissions, or statements regarding the matter involved would bind or be imputed to the organization).

Colo. RPC 4.2 does not preclude a lawyer from interviewing fact witnesses who are employed by a represented organization but who are not part of the group identified by Comment [7]. *See, e.g., Cole v. Appalachian Power Co.*, 903 F. Supp. 975, 979 (S.D. W.Va. 1995) ("*ex parte* interviews of employees who are 'mere witnesses' to an event for which the organization is sued (i.e., holders of factual information), are permitted"); *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 104, 111 (M.D.N.C. 1993) (protective order barring further *ex parte* contacts with employees of defendant railroad would not extend to employee-witnesses); *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc*., 144 F. Supp. 2d 1147, 1157 (D.S.D. 2001) ("ex parte interviews of employees who are 'mere witnesses' to an event for which the corporation or organization is sued (i.e., holders of factual information), are permitted"); *United States ex rel. O'Keefe v. McDonnell Douglas Corp*., 961 F. Supp. 1288, 1293 (E.D. Mo. 1997) ("[s]imply because an employee witnessed an event for which the organization is sued" does not prevent *ex parte* contact); *Terra Int'l v. Mississippi Chem. Corp*., 913 F. Supp. 1306, 1320 (N.D. Iowa 1996) ("court rejects any 'automatic representation' rule, which would require a total ban on ex parte contacts with any current employees on the ground that all are automatically represented by the organizational party's counsel simply by virtue of their employment with the organization").

The need to inquire into the responsibilities and authority of a constituent does not apply to an organization's former constituents. Comment [7] provides explicitly that "[c]onsent of the organization's lawyer is not required for communication with a former constituent." However, as discussed above, Colo. RPC 4.2 is designed in part to preserve the confidentiality of privileged attorney-client communications. Accordingly, the inquiring attorney may not, while communicating with the organization's former constituent, inquire into privileged attorney-client communications; nor may the inquiring attorney listen while the former constituent attempts to divulge privileged communications voluntarily. The organization's privilege belongs to the organization, not the constituent, and can be waived only by the organization. *See A. v. District Court,* 191 Colo. 10, 550 P.2d 315, 323 (1976), *cert. denied*, 429 U.S. 1040 (1977); *Sequa Corp. v. Lititech, Inc.*, 807 F. Supp. 653, 659-61 (D. Colo. 1992) (citing previous version of this Opinion); *see also* Colo. RPC 1.13.

In conclusion, unless authorized by the organization's or constituent's lawyer or by law or by court order, a lawyer may not communicate with a current constituent of a represented organization "who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." A former constituent of a represented organization may be interviewed *ex parte* with regard to all matters except as to communications which are the subject of the attorney-client privilege.

NOTES

1. For convenience purposes, we use the term "constituent" which includes employees and other agents or representatives of an organization. *See* Colo. RPC 4.2, Comment [7].

2. Based on the preceding discussion of "subject matter," if one has direct information, not indirect general knowledge, that an organization is represented by a lawyer and one is uncertain whether the representation extends to the subject matter of the communication, the safest course is to establish the scope of the representation, and the scope of the communication, with the lawyer before communicating.

3. In the event that a lawyer wishes to communicate with a person not known to be represented by counsel, the lawyer must abide by Colo. RPC 4.3, which addresses communications with unrepresented persons.

70 JUROR COMMUNICATIONS

Adopted September 21, 1985.
Addendum issued 1995.

Syllabus

After a verdict has been returned, it is improper for an attorney who has participated in the trial to tell the jury about information that was not presented at trial, if such information is disclosed to the jury with the intention of or in the spirit of criticizing the jury's decision, influencing the actions of jurors in future jury service, harassing the jury, or otherwise behaving improperly toward jurors in any manner prohibited by the Code of Professional Responsibility. This rule applies whether the information not presented was suppressed or inadmissible pursuant to a ruling by the judge in the case.

Applicable Standards and Law

The following obligation is imposed by DR 7-108(D), of the Colorado Code of Professional Responsibility (the "Code"):

> (d) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

Also pertinent are EC 7-29, 7-30, 7-31 and 7-32, which state as follows:

> EC 7-29 To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extrajudicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.
>
> EC 7-30 Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen or jurors should act with circumspection and restraint.
>
> EC 7-31 Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors.
>
> EC 7-32 Because of his duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a venireman, a juror, or a member of the family of either should make a prompt report to the court regarding such conduct.

See also EC 7-36 of the Code, which states that judicial hearings are to be conducted in a dignified manner, and that an attorney should not engage in conduct that offends the decorum of judicial proceedings.

The American Bar Association *Standards for Criminal Justice: The Prosecution Function* (the "Criminal Justice Standards"), Section 3.54(c) provide:

> (c) After discharge of the jury from further consideration of a case, it is unprofessional conduct for the prosecutor to intentionally make comments to or ask questions of a juror for the purpose of harassing or embarrassing the juror in any way which will tend to influence judgment in future jury service.

The comment to the above-quoted section of the Criminal Justice Standards states in part (footnote omitted):

Post-trial Interrogation

Since it is vital to the functioning of the jury system that jurors not be influenced in their deliberations by fears that they subsequently will be harassed by lawyers or others who wish to learn what transpired in the jury room, neither defense counsel nor the prosecutor should discuss a case with jurors after trial in a way that is critical of the verdict.

Pursuant to Rule 606(b), Colorado Rules of Evidence, where there is an inquiry into the validity of the jury's verdict, a juror may not testify about statements made by jurors during the course of deliberations. A juror may, however, "testify on the question whether extraneous prejudicial information was improperly brought to bear" upon him.

If an attorney disclosed to the jury evidence that had been suppressed, there is a risk that where a post-trial inquiry is made, and the jurors subsequently are required to testify pursuant to Rule 606(b), the jurors' recollections will be tainted by the subsequently received, inadmissible information. It is even possible that a juror would himself initiate such an inquiry on the basis of the evidence that was not admitted at trial. This would lead to uncertainty in jury verdicts.

Still another pertinent consideration is Colorado Jury Instructions Civil 1-16 Mandatory Instruction Upon Discharge. This instruction, like its very similar criminal counterpart, must be repeated by the court upon the discharge of the jury. It states, in pertinent part:

> The attorneys or the parties at the conclusion of a jury trial may desire to talk with the members of the jury concerning the reasons for their verdict. For your guidance, you are advised that it is entirely proper for you to talk with the attorneys or the parties and you are at liberty to do so; however, you are not required to do so. Whether you do so is entirely a matter of your own choice.
>
> Undoubtedly, your decision will be respected. However, if you decline to discuss the case and an attorney persists in discussing the case over your objection, or becomes critical of your services as a juror, please report the incident to me.

Rationale

The Code contemplates that attorneys may speak with jurors after a trial regarding the proceedings. The practice of talking informally with willing jurors after a trial is a common one in our state courts, although it is not permitted in the federal courts and some attorneys would rather the practice was prohibited.

The Code also imposes a responsibility on attorneys, however, not to say anything to jurors with the intent to create a negative impression by the jurors regarding future jury service. The Criminal Justice Standards, quoted above, impose a slightly different obligation than the Code, that is, the obligation not to discuss the case in a way that is critical of the verdict.

In either a civil or a criminal case, disclosure to the jurors of evidence that was inadmissible or was suppressed, or simply was not introduced, could be designed to be critical of the verdict that had been rendered. This would be true where the evidence not introduced would tend to support a verdict other than the one actually rendered by the jury. In effect, the attorney very well could be telling members of the jury that they were wrong.

Not only is such conduct exactly the kind of conduct that is prohibited by the Criminal Justice Standards, but it also appears to be calculated to embarrass the jurors, by showing them that they made the wrong decision. Such is not permitted, and an attorney who observes or becomes aware of such conduct is required to report it to the court pursuant to EC 7-32.

Conclusion

After a verdict has been returned, it is improper for an attorney who has participated in the trial to tell the jury about information that was not presented at trial, if such information is disclosed to the jury with the intention of, or in the spirit of, criticizing the jury's decision, influencing the actions of jurors in future jury service, harassing the jury, or otherwise behaving improperly toward jurors in any manner prohibited by the Code of Professional Responsibility.

If an attorney becomes aware of improper communications with a juror by an attorney, *i.e.,* conduct proscribed by any of the above, pursuant to EC 7-32, the attorney who became aware of the improper conduct has an obligation to "make a prompt report to the court regarding such conduct."

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 3.5(a) (regarding improperly influencing jurors); Rule 3.5(c) (concerning conduct intended to disrupt a tribunal); Rule 4.4 (relating to rights of third persons); and Rule 8.4(d) (regarding conduct prejudicial to the administration of justice).

71 *EX PARTE* COMMUNICATIONS WITH TREATING PHYSICIANS

Revision adopted September 21, 1985.
Addendum issued April 18, 1992.

Syllabus

By pleading a physical or mental condition as the basis of a claim in a personal injury or medical malpractice case, a plaintiff impliedly waives the physician-patient or psychologist-client privilege of confidentiality for matters relating to those conditions. However, a lawyer representing a defendant in that lawsuit may engage in *ex parte* discussions with the plaintiff's treating physicians or psychologists concerning the doctor's care and treatment of the plaintiff or opinions resulting from that care and treatment only after first giving plaintiffs counsel reasonable notice and an opportunity to be present. In the event of a dispute between plaintiff's counsel and defendant's counsel, recourse to the formal discovery process remains an option.

Facts

A plaintiff files a personal injury or medical malpractice action against a defendant, claiming physical or mental injuries. Can counsel for defendant discuss with the plaintiff's treating physicians or psychologist, *ex parte*, the plaintiff's care and treatment and any opinions the doctor may hold which result from that care and treatment?

Opinion

A lawyer representing a party to a lawsuit may ordinarily engage in expanded discussions with prospective witnesses, so long as no privilege applies. However, under Colorado law, a physician "shall not be examined without the consent of his patient as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient . . . ." C.R.S. § 13-90-107(d). Communications between psychologists and their clients are similarly protected. C.R.S. § 13-90-107(g). The plaintiff in a personal injury or medical malpractice action "impliedly waives any claim of confidentiality *respecting that same condition*" by pleading a physical or mental condition as the basis of a claim. *Clark v. District Court*, 688 P.2d 3, 10 (Colo. 1983).

The fact that a plaintiff in a personal injury or malpractice action impliedly waives the physician-patient or psychologist-client privilege for information "respecting that same condition" does not mean that counsel for the defendant may engage in *ex parte* discussions with the plaintiff's treating physicians or psychologists without first giving plaintiff's counsel reasonable notice and an opportunity to be present. Such *ex parte* discussions with plaintiff's treating physicians or psychologists may result in the disclosure of privileged information by the plaintiff's treating doctor in violation of Colorado law and, if held without first giving plaintiff's counsel reasonable notice and an opportunity to be present, are prejudicial to the orderly administration of justice.

The plaintiff's treating physician or psychologist may have treated the plaintiff for conditions unrelated to the conditions put in issue by the pending lawsuit. At other times a treating physician, during the course of treatment for the condition in issue, may receive sensitive or embarrassing information which was not necessary for the treatment of that condition or related to that treatment. If the physician or psychologist voluntarily discloses such unrelated information, he or she may, and in all likelihood would, be exposed to potential lawsuits by the plaintiff for violating C.R.S. § 13-90-107(d) or (g). This potential for liability of the physician to the plaintiff for inadvertently disclosing non-waived matters has been addressed. See *Alexander v. Knight*, 197 Pa. Super.Ct. 79, 177 A.2d 142 (1962); *Hammonds v. Aetna Casualty and Surety Co.*, 243 F.Supp. 793 (N.D. Ohio 1965); and *Schaffer v. Spicer*, 88 S.D. 36, 215 N.W.2d 134 (1974). The *Hammonds* case, in language quoted by the *Schaffer* court states:

> It is one thing to say that a doctor may be examined and cross-examined by the defense in a courtroom, in conformity with the rules of evidence, with the vigilant surveillance of plaintiff's counsel, and the careful scrutiny of the trial judge; it is quite another matter to permit, as alleged here, an unsupervised conversation between the doctor and his patient's protagonist. It is the opinion of this Court that the mere waiver of a testimonial privilege does not release the doctor from his duty of secrecy and from his duty of loyalty in litigation, and no one may be permitted to induce the breach of these duties.

243 F. Supp. at 805.

The policy considerations underlying the physician-patient and psychologist-client confidentiality privilege have been recognized as being even more compelling in the relation between a psychiatrist and patient or psychologist and client than in the physician-patient relationship. *Bond v. District Court*, 892 P.2d 33 (Colo. 1984).

In Colorado, a trial court cannot issue an order permitting defense counsel to engage in *ex parte* discussions with plaintiff's treating doctors, but may ordinarily order the plaintiff to permit inspection and copying by defense counsel of plaintiff's medical records and x-rays. *Fields v. McNamara*, 540 P.2d 327 (Colo. 1975). The *Bond* case also holds that if counsel for plaintiff or plaintiff's treating doctor object to the release of plaintiff's medical records, then the trial court must balance the plaintiff's interest in protecting the confidentiality of his or her communications with the defendant's interest in full disclosure during discovery. These two policy considerations are "equally compelling." *Bond*, *supra* at 39.

It is unreasonable to expect the treating doctor, unschooled in law and unfamiliar with the issues framed by the plaintiff's lawsuit, to make the decision as to what information is included within the plaintiff's waiver of the physician-patient privilege, as opposed to what information is still privileged. Counsel for the defendant cannot make this determination, since he or she has a duty of undivided loyalty to the defendant, not the plaintiff, and since, to make the determination, counsel for the defendant would have to know the substance of the privileged information. Counsel for plaintiff must be informed and given the right to object so that, if required, a court can decide the issue of whether the information in question is privileged.

Courts from other jurisdictions have discussed this issue and agreed with the analysis. See *Jaap v. District Court*, 623 P.2d 1389 (Mont. 1981) and *Miles v. Farrell*, 549 F. Supp. 82 (N.D. Ill. 1982).

Lawyers may not "engage in conduct that is prejudicial to the administration of justice." DR 1-102(5). Similarly, DR 7-101(A)(l) states:

> (A) A lawyer shall not intentionally:
>
> (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, *by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process*. (Emphasis added.)

Disciplinary Rule 7-102(A)(8) states:

> (A) In his representation of a client, a lawyer shall not:
>
> (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

Ethical Consideration 7-10 states:

> The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

Ethical Consideration 7-39 states:

> A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver or procedural formalities, and similar matters which do not prejudice the rights of this client. He should follow local customs of courtesy and practice, *unless he gives timely notice to opposing counsel of his intention not to do so*. (Emphasis added)

We believe that the above disciplinary rules and ethical considerations provide clear guidance to the Bar that orderly procedures designed to protect the rights of all the parties must be followed.

Allowing carte blanche, *ex parte* communications concerning a physician's care and treatment of the plaintiff could create the spectre of abuse of the orderly discovery process. Additionally, there could be inadvertent disclosure of unwaived privileged information which could expose the doctor to potential liability.

The Committee is of the opinion that treating physicians or psychologists should not be consulted *ex parte* concerning their care and treatment of the plaintiff or opinions which result from the care and treatment, without first giving plaintiff's counsel reasonable notice and an opportunity to be present at the meeting with the doctor. In the event of a dispute between plaintiff's counsel and defendant's counsel, recourse to the formal discovery process remains an option. We believe that this procedure will give credence to the ethical considerations involved and protect the plaintiff's attorney, and the defense attorney, from running afoul of the Code of Professional Responsibility.

The above procedure avoids the appearance of impropriety by the legal profession and assists in maintaining the integrity and competence of the legal profession.

1992 Addendum

The principles and conclusions stated in this Formal Opinion 71 apply equally to workers' compensation actions as they do to personal injury and medical malpractice actions.

72 RECOVERY OF ATTORNEY FEE BY LENDER USING IN-HOUSE COUNSEL

Adopted April 19, 1986.
Revised January 19, 1991.
Addendum issued 1995.

Syllabus

It is ethical in Colorado for an attorney employed by a lender (including the term "holder") on a salaried basis to seek recovery of an attorney fee on behalf of the lender as part of a bid in a public trustee's foreclosure of a deed of trust, or in a legal action seeking recovery on a promissory note, when the attorney employed by the lender in the collection effort claims as a fee only a pro-rata portion of those amounts actually paid in the form of salary or benefits to the attorney.

Questions Presented

(1) If a promissory note secured by a deed of trust provides for recovery of a reasonable attorney fee, may an attorney employed on a salaried basis by a lender include in the lender's bid as a public trustee's foreclosure sale a reasonable attorney fee for services performed by such attorney in foreclosing the lien?

(2) If a promissory note provides for recovery of an attorney fee, may an attorney employed on a salaried basis by a lender include as part of the amount due and owing under the note a reasonable attorney fee for services performed by such attorney in collecting the note after default?

Facts

A lender (holder) employs attorneys on a salaried basis ("in-house counsel") who represent the lender in connection with foreclosure proceedings relating to real property securing promissory notes held by the lender, collection proceedings relating to the promissory notes, as well as other legal matters of concern to the lender.

The lender has contractual rights under the notes and security documents to recover costs of collection in the event of default, including a reasonable attorney fee.

Attorney X is employed on a full-time basis by the lender and has inquired whether and to what extent it is ethical to seek recovery of an attorney fee for the benefit of his employer in a foreclosure or other judicial proceeding, to collect amount due the lender under the note and/or security documents.

Discussion

The issues presented are specifically governed by two disciplinary rules as follows:

DR 2-106 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

DR 3-102 Dividing Legal Fees with a Nonlawyer.

(A) A lawyer or law firm shall not share legal fees with a nonlawyer . . .

The opinion is limited to consideration of the conduct of an attorney employed by a lender (holder) and does not consider the conduct of the lender *per se*.

Further, this opinion only addresses the question of an attorney fee to be collected in connection with a contractual commitment by a borrower. This opinion does not consider claims for recovery of attorney fees which are specifically authorized by statute, *e.g.*, 42 U.S.C. §§ 13-17-101 *et seq.*, or court rule, *e.g.*, C.R.C.P. Rules 11 and 17.

Finally, this opinion does not address the question of whether an attorney engaged in such practice is aiding a nonlawyer in the unauthorized practice of law. The Supreme Court of the state of Colorado has established a separate committee to consider questions relating to the unauthorized practice of law. However, that issue must not be overlooked by in-house counsel facing this question.

Several other state bar associations have issued opinions relating to the questions set forth above. Two state associations have advised that the request for an attorney fee by a salaried lawyer in a proceeding to collect on a promissory note or in a proceeding to foreclose on a mortgage securing the note is ethical, provided the lawyer does not request, or permit the court to award, a fee in excess of the amount necessary to reimburse the employer for the actual salary and legal expenses paid in obtaining relief.

These committees held that recovery in any amount in excess of a pro-rata portion of the attorney's salary and expenses would constitute an excessive fee and the improper sharing of a fee with a nonlawyer. *See* Tennessee Supreme Court Board of Professional Responsibility, Formal Opinion 84-F-67 (1984) (legal action to collect on note by government agency with in-house counsel); Illinois State Bar Association Committee on Professional Ethics, Opinion No. 768 (1982) (foreclosure proceeding by bank with in-house counsel).

One state bar association appears to approve of recovery of a fee for the services of in-house counsel so long as the institution does not charge the customer (in this case for services rendered to the financial institution in preparation for a mortgage closing) more than the actual, pro-rata costs of the bank of its counsel's services including overhead. Massachusetts Bar Association Committee on Professional Ethics, Opinion 84-1 (1984).

On the other hand, one state committee has advised that it is unethical for in-house counsel (in this case a full time salaried county attorney) to seek to recover an attorney fee in litigation. Since the lawyer's salary is part of the county's general overhead, payment of a fee would result in the improper sharing of a legal fee with a nonlawyer. South Carolina Bar Association, Ethics Advisory Committee Opinion 84-9 (1984).

The American Bar Association Committee on Ethics and Professional Responsibility has considered several related issues. That committee has advised that an attorney improperly shares his or her fee with a layperson or corporation when he or she is employed by a mortgage lender to perform duties for the bank relating to the closing of a mortgage loan and the customer pays the mortgage lender a legal fee based on a set fee schedule unrelated to the salary of the attorney. ABA Informal Decision 544 (1962).

The ABA Committee has also advised that it is unethical for an attorney to accept less for his or her services than is awarded and paid to the client as an attorney fee in a suit brought to collect on a promissory note. ABA Formal Opinion 157 (1936). Accord, *In re the Matter of Chemical Bank*, 84 Misc.2d 721 (1975) (lending institution collected an attorney fee based on a set percentage or schedule as opposed to an amount related to actual work performed by salaried attorneys).

Colorado law has been consistent and clear that in order to recover an attorney fee in a note collection case, there must be a showing that the fee is reasonable and that it has in fact been incurred. *Waterman v. Silverman*, 397 P.2d 739 (1964); *Rockwell Insulating Company v. Huston*, 346 P.2d 576 (Colo. 1959). The note-holder has the burden of proof as to the fee incurred. *Metro National Bank v. Roe*, 675 P.2d 331 (Colo. App. 1983).

Formal Opinion No. 54 of the Ethics Committee of the Colorado Bar Association [8 *The Colorado Lawyer* 741 (April 1979)] identifies three proscribed practices with respect to attorney fees in a foreclosure proceeding. They are: (1) charging an excessive fee; (2) charging the debtor a higher fee than would be charged to the client; and (3) sharing any part of their fee with the client. Opinion No. 54 states that the purpose of permitting the collection of an attorney fee in this context is to reimburse the creditor for its expenses.

CBA Ethics Committee Informal Opinion U addresses, in part, the question of fees assessed by a lending institution for the services of an attorney including in-house counsel. It states that "the attorney could not properly authorize any practice by the lending institution of assessing legal fees to the borrower, *except to the extent that such fees are, in fact, paid by the institution to the attorney* (Canon 3)." (Emphasis added.)

Thus, an attorney employed on a salaried basis by a lender may only participate in the collection from a defaulting debtor of a proportionate amount of the attorney's salary and paid benefits. To permit the recovery of other costs in excess of those amounts would constitute a division of an attorney fee with the

lender and would violate DR 3-102. In this respect, this Committee follows the decisions of the bar associations of Tennessee and Illinois.

Other costs may have been incurred as a general business expense separate and apart from the collection effort by the note holder and its in-house counsel. While these costs may be incurred by the lender for the benefit of employing the attorney, they are not amounts paid to the attorney and are therefore not properly recoverable. The attorney cannot acquiesce in the sharing or splitting of the "fee" with his or her lender-employer.

It is the opinion of this Committee that an in-house attorney may ethically participate in the collection of an attorney fee by a lender if the lender can establish with certainty that the fee was incurred solely due to foreclosure or other collection proceeding and paid in full to the attorney. This would require a reasonably precise determination of the pro-rata portion of the salary and benefits paid to the attorney which is allocated to the particular collection matter. This would not include the costs of overhead or support personnel.

In addition, the lender should bear the burden of establishing the appropriate proportion of the salary and benefits paid to the attorney and attributable to the matter in question based preferably on accurate time records. *See*, *e.g.*, Legal Rule 105(a) of the U.S. District Court, District of Colorado. Any such fees are still subject to the limitations and reasonableness set forth in DR 2-106.

Conclusion

An attorney fee based on the cost of the salary and benefits of in-house counsel and which is incurred as a direct result of the collection action is properly recoverable by the lender (holder). The attorney must be certain the fee is a direct cost of the foreclosure or of the suit on the note, and the attorney must maintain adequate time records. The fee must be reasonable. Payment of the recovered fee to the lender as reimbursement of the salary and benefits paid to the attorney is not deemed to be fee sharing in violation of DR 3-102(a).

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the Colorado Ethics Handbook), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.5(a) (requiring that a lawyer's fees be reasonable); and Rule 5.4(a) (prohibiting lawyers from sharing fees with non-lawyers with exceptions that do not apply to fees charged for services rendered by salaried lawyers which are the subject matter of this Opinion).

73 CONTACT WITH INSURANCE ADJUSTER

Adopted May 17, 1986.

Syllabus

Once a lawyer who represents a claimant or plaintiff knows an insurance company has retained counsel to represent its insured in the specific matter, that lawyer may not communicate or cause another to communicate with the insurance adjuster regarding that matter unless the claimant's or plaintiff's lawyer has obtained the prior consent of the lawyer representing the insured.

Facts

This opinion addresses the question of whether plaintiff's lawyer may communicate with the insurance company or its adjuster without the prior consent of defendant's lawyer, even if the adjuster initiates the communication. This opinion does not address the conduct of non-lawyers nor does it attempt to deal with the broad spectrum of investigative and adjustment practices within the insurance industry. References herein to plaintiff's or defendant's lawyer include all persons or entities of adverse interest and not merely litigants.

Opinion

The Code of Professional Responsibility, DR 7-104(A)(l), provides as follows:

> *Communicating With One of Adverse Interest*
> (A) During the course of his representation of a client a lawyer shall not:
> (1) Communicate or cause another to communicate on the subject of the representation with the party he knows to be represented by a lawyer in that matter unless he has the prior consent of a lawyer representing such other party or is authorized by law to do so.

It is the opinion of the Colorado Bar Association Ethics Committee that DR 7-104(A)(l) prohibits communication by plaintiff's lawyer with the adjuster for the defendant's insurance company, once plaintiff's lawyer knows[1] that the defendant is represented by counsel, without the prior consent of the lawyer who is known to represent the defendant.

The policy underlying the rule and Ethical Consideration 7-18 is intended to preserve the proper function of the attorney-client relationship and to shield the adverse party from improper inquiry. Indeed, CBA Ethics Committee Formal Opinion 69,[2] adopted May 18, 1985, concludes that

> [t]he purpose of DR 7-104(A)(l) is to prevent the deprivation, undermining or bypassing of a client's right to the advice of counsel. . . . In other words, the purpose of DR 7-104(A)(l) is to prevent opposing counsel from impeding an attorney's performance.

It is the unanimous view of the other state bar associations which have addressed the same question that if plaintiff's lawyer knows that defendant is represented by counsel, plaintiff's lawyer must receive the prior consent of defendant's counsel before communicating with defendant's insurance adjuster. Arizona Ethics Opinion 162 (1964); Florida Opinions 65-62 (1965); Kansas 54-13, Opinion 42 (1968); Kentucky Opinions, E-67 (1973); Missouri Opinion 98; North Carolina State Bar II-176, Opinion 631 (1968); Oklahoma B.A.L.E.C. Supp. 55, Opinion 240 (1966); Virginia Ethics Opinion 550 (1983); Washington State Bar 150, Opinion 137 (1968).

The ABA Committee on Ethics and Professional Responsibility adopted a more stringent approach in its Informal Opinion 1190 (August 27, 1971) which, on similar facts, declared:

> If counsel for the insurance carrier representing the Defendant in litigation consents and authorizes negotiations between Plaintiff's counsel and the adjuster for the insurance carrier and if such negotiations are carried on under the supervision of the counsel for the insurance company, we believe that then it is proper for Plaintiff's counsel to carry on such negotiations with the insurance adjuster.

The ABA Committee even suggested that defense counsel's consent should be obtained in writing before plaintiff's lawyer begins communication with the adjuster.

Courts agree with the unanimous opinion of the bar associations. Two cases are found dealing with the fact situation presented. In *Waller v. Kotzen*,[3] the court relied on the Pennsylvania Code of Professional Responsibility, DR 7-104, which is identical to the Colorado provision, in holding that plaintiff's lawyer should not have discussed settlement with the insurance company without first having obtained the consent of defense counsel retained by the insurance company to represent its insured. Similarly, in *Estate of Vafiades v. Sheppard Bus Service, Inc.*,[4] the court found that the plaintiff's attorney violated DR 7-104(A)(l) by conducting settlement negotiations directly with the insurance company for the defendants, where there was no evidence that consent was ever requested from or granted by the defendant's lawyer.

Conclusion

When a plaintiff's lawyer knows that the defendant is represented in the matter, that lawyer should obtain the prior consent of the defendant's lawyer before participating in any communication with the defendant's insurance adjuster regarding that matter.

NOTES

1. "Knows" means information of representation received by direct verbal or written communication or by constructive notice from the pleadings. CBA Ethics Comm., Formal Op. 69, 14 *The Colorado Lawyer* 1225 (July 1985) at 1226, *Colorado Ethics Opinions Handbook*, p. 203.

2. *Id.*

3. 567 F.Supp. 424 (E.D. Pa. 1983).

4. 192 N.J. Super. 301, 469 A.2d 971 (1983).

74 LAWYER NEWSLETTERS

Adopted July 26, 1986.
Addendum issued 1995.

Introduction and Scope

The Colorado Bar Association Ethics Committee ("Committee") is aware that a number of lawyers in Colorado are sending newsletters to their existing clients and to other persons. The Committee also has received a number of inquiries from lawyers seeking the Committee's informal views as to the propriety of the sending of particular newsletters. In addition, recent decisions of the U.S. Supreme Court under the First Amendment and amendments to the Colorado Code of Professional Responsibility ("Code") have raised questions as to what a lawyer may and may not do in this area.

The purpose of this opinion is to provide guidance in the area of lawyer newsletters. This opinion does not address any special limitations or constraints applicable to communications broadcast by electronic forms of communication (television and radio). We also do not address what specific disclaimers may be appropriate in a lawyer newsletter.

Definitions

For the purpose of this opinion, the following terms have the following meaning:

1. *Newsletter or lawyer newsletter*. A lawyer newsletter means a written communication distributed by a lawyer that contains information on current developments in the law or items of general interest concerning legal matters. A lawyer newsletter may be periodic (*i.e.*, published monthly or quarterly) or it may be published at irregular intervals. It may be limited to particular areas of the law, or it may cover more than one area of the law.
2. *Sending lawyer*. A sending lawyer means the lawyer or law firm that sends the lawyer newsletter to the recipient, irrespective of who actually prepares or publishes the newsletter.

Syllabus

A lawyer may send a newsletter to existing clients and persons other than existing clients (including other lawyers and prospective clients) provided that the newsletter does not contain any false, fraudulent, misleading, deceptive or unfair statement or claim, and provided that it conforms in all respects to the applicable provisions of DR 2-101(A), (B) and (C).

It is unethical for a lawyer (or law firm) to send a newsletter to clients or others which has been prepared by someone other than the sending lawyer without disclosing on the face of the newsletter the fact that the sending lawyer did not author the newsletter.

Opinion

I. The first issue to be addressed is whether lawyer newsletters are ever permissible under the Code. Lawyer newsletters serve the salutary function of providing the recipient with current information on changes and developments in the law. EC 2-1 recognizes that one of the important functions of the legal profession is to educate laymen to recognize their legal problems and to assist in making legal services fully available.

Lawyer newsletters, by their nature, also may have advertising and solicitation components that cannot be ignored. It is, of course, possible that some lawyer newsletters have no solicitation or advertising component. For instance, a newsletter prepared by a lawyer-employee (or volunteer) of a public interest group may not have any advertising or solicitation components. Such newsletters are not subject to the advertising or solicitation rules set forth in the Code and would be subject to full First Amendment protection. *See Zauderer v. Office of Disciplinary Counsel, Supreme Court of Ohio*, 85 L.Ed.2d 652, 664, n.

7 (1985). However, the Committee believes that it will be the rare lawyer newsletter, sent by a lawyer in private practice, that is devoid of any advertising or solicitation component.

The Code defines "solicitation":

> . . . "Solicitation" means any unrequested communications to a nonlawyer, directly or indirectly, initiated by a lawyer which indicates or implies that it is transmitted for the purpose of securing or obtaining professional legal employment for the lawyer, the lawyer's partner or the lawyer's firm. "Solicitation" does not include advertising in or through any public communication.

Definition 11 of the Code (adopted Nov. 15, 1984, effective April 1, 1985)

Following the U.S. Supreme Court's decision in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the Colorado Supreme Court made major changes to DR 2-101 to bring it into compliance with the U.S. Supreme Court's interpretation of the First Amendment. DR 2-101(E) provides:

> . . . Unless expressly authorized in these rules, solicitation is prohibited. Where pecuniary gain is a significant motive for the solicitation, a lawyer may engage in solicitation if the solicitation is in writing, is general in nature and is not directed to a specific claim or matter involving the recipient of the solicitation. Solicitation is permitted, and need not be limited to general or written solicitation, if pecuniary gain is not a significant motive for the solicitation.

There are three possible categories into which a newsletter may fall. First, it may not constitute a solicitation at all, such as where a lawyer-employee of a non-profit public interest group publishes a newsletter. Such newsletters are not subject to the solicitation limitations of the Code. Second, the motivation behind the sending of the newsletter may be primarily for pecuniary purposes. If so, the solicitation may be engaged in if it is in writing, is general in nature, and is not directed to a specific claim or matter involving the recipient of the solicitation. Third, if pecuniary gain is not a significant motive for the solicitation, the solicitation does not have to be limited to one of a general nature or a written solicitation.

Since, by definition, the newsletter is a general treatment of current developments in the law, the sending of a newsletter to a client would not normally be "directed to a specific claim or matter involving the recipient of the solicitation." *See* DR 2-101(E). However, in certain circumstances, the sending of a newsletter could be deemed to be "directed to a specific claim or matter." For a discussion of this subject, *see Matter of Von Wiegen*, 101 App. Div. 2d 627, 474 N.Y.3d 147, *modified*, 63 N.Y.2d 163, 470 N.E.2d 838 (1984), *cert. denied*, 105 S.Ct. 2701(1985) (holding that New York State's blanket prohibition against lawyer's direct mail solicitation of accident victims violated the First Amendment).

Every ethics committee in the United States that has considered the issue after the Supreme Court's decision in *Bates* has determined that it is proper for a lawyer to send a newsletter regarding current developments in the law to existing clients, provided that the newsletter does not contain any false, fraudulent, misleading, deceptive or unfair statement or claim and provided that the newsletter does not contain self-laudatory statements or testimonials regarding the sending lawyer.[1] *See* DR 2-101.

At least two courts have addressed the issue in the context of reviewing disciplinary action imposed against a lawyer for sending a newsletter. *In re Ratner*, 194 Kan. 362, 399 P.2d 865 (1965) (decided prior to *Bates* on ground that newsletter sent to clients was not a "solicitation"); *In re Madsen*, 68 Ill.2d 472, 370 N.E.2d 199 (1977) (decided after *Bates*, noting that after *Bates* a question existed whether a lawyer may be disciplined for mailing a "tip sheet" to his clients).

The American Bar Association's Committee on Professional Ethics decided in Formal Opinion No. 213 (1941) that it was not improper for a patent firm to circulate to its regular clients a *Law News Bulletin* which included significant features of current legislation, administrative rules and important decisions in the patent field.

Based upon these authorities, we conclude that if all rules relating to solicitations are met, a lawyer may send a newsletter to existing clients provided that the newsletter does not contain any false, fraudulent, misleading, deceptive or unfair statement or claim.

II. The question as to whether a lawyer may send a newsletter to persons other than existing clients is more difficult. This is so because the solicitation component when dealing with a lawyer's existing clients is minimized, while it is substantially increased when non-clients or prospective clients are involved. In addition, any communication by a lawyer to a non-client carries with it an increased risk that the communication may be deemed to be intimidating or an invasion of privacy. DR 2-101(A).

The ethics committees and bar associations that have considered the issue are split. Some have concluded that it is unethical to distribute a newsletter to prospective clients; others have held that it is permissible. *See* ABA/BNA *Lawyers Manual of Professional Conduct* 801:1319-801:9105. Our analysis must again begin with the Colorado Code.

Even though there is a much greater likelihood that the lawyer's motivation for sending the newsletter to non-clients is for pecuniary gain, DR 2-101 does not prohibit solicitations merely because the solicitation component is strong. Indeed, DR 2-101 provides special rules for solicitations in which pecuniary gain is a significant motive. Therefore, in the Committee's view, the sending of lawyer newsletters to non-clients cannot be prohibited on the ground that such solicitations are more likely to be motivated by considerations of pecuniary gain.

However, the sending of a newsletter to non-clients does carry with it risks and problems that exceed those relating to the sending of a newsletter to an existing client. For example, a newsletter sent to a nonclient may be deemed by the recipient to be intimidating and an invasion of the recipient's privacy. DR 2-101(A). It is established that certain types of in-person solicitation by lawyers may constitutionally be prohibited. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978). *See* ED 2-3; ABA Model Code of Professional Conduct § 7.3 (1983).

While the sending of a newsletter to a non-client's home or office arguably may be considered more invasive than the advertisement which the Supreme Court held was protected conduct in *Zauderer*, the Committee believes that the invasive potential of a newsletter is minimal at least in comparison to the invasive characteristics of in-person solicitations. The recipient of the unwanted lawyer's newsletter may immediately dispose of it. It simply does not carry with it the same pressures and dangers as an in-person solicitation.

Therefore, we conclude that under the Code, a lawyer may send a newsletter to non-clients, even if pecuniary gain is a significant motive for the sending of the newsletter, provided that the solicitation limitations of DR 2-101 are observed.

III. The final issue to be addressed by this opinion is whether it is ethical for a lawyer to send to his or her clients (and others) a newsletter which has not been written by the lawyer, but rather has been obtained from a third party by the sending lawyer.

The question presented is whether it is misleading or deceptive to pass off another author's work as the work of the sending lawyer. To the extent that a client or prospective client reads a newsletter sent to him and concludes that any aspect of the newsletter reflects favorably upon the sending lawyer, it obviously is misleading if, in fact, the sending lawyer had nothing to do with the preparation of the newsletter. Accordingly, we conclude that it is a violation of DR 2-101 of the Code for a lawyer to send a newsletter to any person without clearly identifying on the newsletter the actual author.

1995 Addendum

Note: The previous addendum to Formal Opinion 74 issued on July 24, 1993 is withdrawn.

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 7.1 (regarding communications concerning a lawyer's services), Rule 7.2 (regarding advertising) and Rule 7.4 (regarding communication of field of practice).

NOTE

1. In 1968, the Ethics Committee of the Colorado Bar Association issued Formal Opinion 42 which concluded by stating that: "If the communication goes to persons other than regular clients of the lawyer, or if it contains information not strictly applicable to the interests of the recipient, though he be a regular client of the lawyer, it would constitute an advertisement in violation of Canon 27. A periodic bulletin containing general information about statutes, decisions, etc. disseminated to a number of clients having different interests, even though through regular clients, would violate Canon 27." As a result of the later decisions of the U.S. Supreme Court in *Bates* and *Zauderer*, *supra*, and the amendment to the Code which became effective in 1978 and 1985, the Committee believes that portions of Formal Opinion 42 are no longer viable. Accordingly, Formal Opinion 42 is withdrawn.

75 SPOUSAL CONFLICTS

Adopted June 20, 1987.
Addendum issued 1995.
Withdrawn March 16, 2013.

WITHDRAWN

Introduction and Scope

The Committee has before it a letter from a lawyer married to a deputy district attorney whose present duties consist mainly of prosecuting misdemeanor cases in county court. The lawyer inquires concerning the circumstances in which she can properly represent defendants in felony and misdemeanor cases. She also raises an issue as to the circumstances under which lawyers with whom she is associated in practice can represent defendants in such cases. The inquiry is one of several made over the past few years by prosecutors and criminal defense lawyers whose spouses are affiliated with a group of lawyers representing interests adverse to interests which the inquirer or lawyers connected in practice with the inquirer propose to represent. In addition, members of the Committee have received informal questions from lawyers married to other lawyers with enough frequency to suggest that ethical questions arising from these marriage relationships continue to arise, despite the issuance of Revised Opinion No. 52 on December 13, 1975. Consequently, the Committee has decided to review the ethical questions presented when spouses, or groups of lawyers with whom the spouses are affiliated in practice, seek to represent adverse parties, with special attention being given to situations where a spouse is a lawyer for a governmental entity.

At the outset, two observations should be made about the scope of this opinion. First, the opinion will discuss only situations where both spouses are involved as lawyers and not those where one spouse is a judge. The latter situation implicates the Code of Judicial Conduct as well as the Code of Professional Responsibility. The relationship between the two spouses often raises issues which are beyond this Committee's purview. *See generally Smith v. Beckman*, 683 P.2d 1214 (Colo. App. 1984); *Stephens v. Stephens*, 292 S.E.2d 689 (Ga. 1982).

Second, the Committee has focused on circumstances where lawyers legally married to one another (or lawyers with whom such lawyers are associated) seek to represent adverse interests in litigation or negotiation. There is, however, no clear line in this area between the marriage relationship and other close relationships among lawyers, such as parent and child, best friends, roommates, and the like. While the inquiry before the Committee involves the marital relationship and it is thus this relationship which the Committee has had in mind in its discussions, the principles discussed herein may be applicable to these other relationships. This opinion, however, does not attempt to consider such relationships in detail.

There is general consensus that the ethical precepts implicated when lawyers married to one another become directly or indirectly involved in antagonistic situations are those found in Canons 4, 5, and 9. Canon 4 admonishes lawyers to preserve the confidences and secrets of their clients. Canon 5, insofar as it is relevant to the marriage relationship, requires a lawyer to refuse employment when the lawyer's own interests may impair his or her independent professional judgment. Canon 9 generally tells lawyers that they should avoid even the appearance of professional impropriety.

The remainder of this opinion will commence with a general discussion of how the disciplinary rules and ethical considerations found in each of the three canons are implicated by the marriage relationship. Thereafter, this discussion will be applied to three situations: (1) the situation where both spouses seek to become directly involved in the contested matter; (2) the situation where neither spouse is directly involved in the matter, but lawyers with whom the spouses are somehow affiliated find themselves on opposing sides; and (3) the situation where only one of the spouses is directly involved against lawyers who are affiliated in some way with the other spouse. Particular attention will be paid to situations where one of the spouses is employed by a public agency.

General Discussion

Canon 4

DR 4-101 prohibits a lawyer from knowingly revealing a client's confidences or secrets or using a client's confidences or secrets to the disadvantage of the client, for the advantage of the lawyer himself, or for the advantage of a third person. Canon 4's ethical considerations also exhort the lawyer to avoid placing himself or herself in situations which might precipitate inadvertent disclosure of confidences or secrets. For example, absent the consent of the client, the lawyer should not "seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer." EC 4-2. The lawyer is "to shun indiscreet conversations concerning his clients." *Id.* He or she should exercise care "to prevent the disclosure of the confidences and secrets" of one client to another client. EC 4-5. Finally, the lawyer is told to refuse employment "that might require such disclosure." *Id.*

There is a potential for intentional or inadvertent disclosure of clients' confidential information in the marital relationship, not only because of the frequency and extent of contact between the spouses, but also because the relationship itself ordinarily involves the sharing of trust and confidence. With a single exception, however (N.J. Advisory Comm. on Professional Ethics Op. 237 [1972]), the ethics opinions and cases have not regarded Canon 4 as an insuperable obstacle to the spouses' representation of adverse interests. With respect to the problem of intentional disclosure, these authorities should not refuse to assume "that an attorney is going to divulge professional confidences to a spouse, whether or not that spouse is also an attorney. . . ." Fla. Bar Professional Ethics Comm. Op. 74-49 (1974). *Accord, Blumenfeld v. Borenstein*, 276 S.E.2d 607, 609 (Ga. 1981); Ore. Bar Ass'n Comm. on Professional Responsibility Op. 281 (1975); ABA Comm. on Ethics and Professional Responsibility Op. 340 (1975). With respect to the possibility of inadvertent disclosure, the authorities admonish the spouse-lawyers to exercise "exceptional" care that confidential information is not inadvertently disclosed in "the seemingly routine discussion of professional experiences between them," D.C. Bar Comm. on Professional Ethics Op. 50 (1978), by "information contained in a telephone message left for the lawyer at home," ABA Comm. on Ethics and Professional Responsibility Formal Op. 340 (1975), or by any other means.

Canon 5

That portion of Canon 5 particularly applicable to lawyer-spouses is found in DR 5-101(A):

> *Except with the consent of the client after full disclosure*, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own *financial*, business, *property*, *or personal* interests. (Emphasis supplied.)

Depending upon the substantive law of domestic relations and their own personal arrangements, each spouse may be regarded as having some "financial" or "property" interest in money which the other earns by performing professional services for clients. This interest may be especially problematical where one spouse has a contingent-fee arrangement with his or her client. See ABA Comm. on Ethics and Professional Responsibility Op. 340 (1975).

Even if the spouses have no financial or property interest in one another's income, they still may be regarded as having a "personal" interest in one another's general reputation, success, and welfare. As another ethics committee has put it:

> The marriage relationship is such that it is the duty of one to do everything in his or her power for the enhancement of the reputation and well being of the other. Each is concerned not only with demonstrating the personal ability and skill of the other, but with the success of the other in the performance of professional duties. Ill. Bar Professional Ethics Op. 311 (1969).

Because one or both spouses might find it hard to exercise professional judgment free of personal considerations, "the domestic and professional responsibilities of husband-and-wife lawyers may be incompatible when they represent conflicting interests." Colo. Bar. Ass'n Ethics Comm. Rev. Op. 52 (1975).

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Canon 9

Canon 9's adjuration to avoid even the appearance of impropriety is most frequently mentioned in opinions where one of the spouse-lawyers is employed by a public prosecutor or other public agency. While some opinions fail to distinguish between public and private lawyers in discussing an appearance of impropriety, *e.g.*, N.J. Advisory Comm. on Professional Ethics Op. 288 (1974), courts increasingly evidence a reluctance to disqualify private attorneys based on "appearance" of impropriety alone, where there is no "actual" impropriety. *See*, *e.g.*, *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980); *Armstrong v. McAlpin*, 625 F.2d 433 (2d Cir. 1980); *Blumenfeld v. Borenstein*, 276 S.E.2d 607 (Ga. 1981); *Non-Punitive Segregation Inmates of Holmesburg Prison v. Kelly*, 589 F. Supp. 1330 (E.D. Pa. 1984).

At least as applied to lawyers employed by a governmental agency, the problem presented by Canon 9 is twofold. First, it is sometimes thought that marriage and advocacy are so inconsistent that there is an inevitable appearance of impropriety. "How two people can live together as husband and wife while they are in the midst of contending with all the strength, energy and ability at their command as opponents in a lawsuit and particularly in a criminal case, is difficult to understand." Ill. Bar Professional Ethics Op. 311 (1969). Second, where one private lawyer, or another lawyer affiliated with that lawyer, litigates or negotiates with a spouse employed by a governmental agency, there may be an impression that the private lawyer is able to influence the public official improperly or upon irrelevant grounds. *Cf.*; DR 9-101(C); N.J. Advisory Comm. on Professional Ethics Op. 288 (1974); N.Y. State Bar Comm. on Professional Ethics Op. 368 (1974).

Particular Situations

Spouse v. Spouse

Of the three situations considered in this opinion, the situation where both lawyer-spouses are directly involved in attempting to represent adverse interests presents the greatest potential for unethical conduct under Canons 4, 5, and 9. With respect to DR 4-101's prohibition against knowing disclosure of confidences, the Committee accepts the proposition that the spouses would respect the professional obligation of each to hold inviolate the confidences of the respective clients. *Blumenfeld v. Borenstein*, 276 S.E.2d 607 (Ga. 1981); Fla. Bar Professional Ethics Op. 74-49 (1974); ABA Comm. on Ethics and Professional Responsibility Op. 340 (1975). Because each spouse directly involved in the representation of competing clients will ordinarily possess the respective clients' confidences and secrets, however, there is a real possibility of inadvertent disclosure, whether by indiscreet conversations (EC 4-2), routine discussion of professional experiences (D.C. Bar Comm. on Legal Ethics Op. No. 50 [1978]), messages left for one of the lawyers at home (ABA Comm. on Ethics and Professional Responsibility Op. 340 [1975]), or another of the myriad ways which might be imagined, given the extent of contact between the spouses. Moreover, the circumstances of dual involvement by both spouses is one in which the inadvertent disclosure of confidential information is likely to be compounded by use of the information to the disadvantage of the client whose information is disclosed and/or the advantage of the opposing client. Indeed, the spouse who inadvertently acquires the opposing client's confidential information, because he or she is directly involved in the professional representation of his or her own client, confronts the unpleasant proposition that his or her duty to represent the client zealously, DR 7-101, may require disclosure or use of the confidential information. *Cf.*, EC 4-5.

Direct involvement of both spouse-lawyers in representing antagonistic interests also presents the greatest potential for conflict between the spouses' domestic and professional responsibilities and the greatest potential for an inability on the part of one or both spouses to exercise independent professional judgment. It would be a remarkably unusual couple who could at all times zealously represent clients in litigation — maneuvering against one another, formulating strategy to defeat one another, and seizing every legitimate advantage from the opposition's mistakes — and yet maintain trust, confidence, and openness in their domestic life. This inevitable tension between the spouses' "personal" interest and their professional obligations to the clients would be exacerbated in a situation where one or the other spouse had a direct financial interest in the outcome of the litigation, such as a contingent-fee contract.

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Finally, direct involvement of the spouses as adversaries is likely to involve an appearance of impropriety. Because most people regard the marital relationship as involving shared confidences and a commitment on the part of one spouse to do nothing which could bring the other into disrepute, it would not take an overly-cynical member of the profession or the public to doubt whether professional confidences are kept or whether professional obligations are always placed before marital ones. Although precautions might be taken and nice distinctions occasionally woven with a view toward avoiding problems under Canons 4 and 5, the nature of the problems already discussed makes the appearance of impropriety virtually inevitable.

Like other groups which have considered the subject, *e.g.*, ABA Comm. on Ethics and Professional Responsibility Op. 340 (1975), the Committee is reluctant to suggest a *per se* rule requiring that spouses always be prohibited from direct involvement in work on a matter for clients who are adversaries. Instances can be imagined where the possibility of disclosure or conflict are remote. For example, one or both spouses may, at the behest of other lawyers for whom they work, perform pieces of discrete, isolated legal research on different issues raised by the contested matter. Neither may possess confidences, and neither may have enough "personal" interest in the matter so that there would be a conflict between professional and marital obligations. Instances where both spouses can properly be involved, however, are sufficiently rare that such involvement should ordinarily be avoided. Moreover, the spouses should undertake such involvement only with the informed consent of each client. See Colo. Bar Ass'n Ethics Comm. Rev. Op. 52 (1975); ABA Comm. on Ethics and Professional Responsibility Op. 340 (1975); D.C. Bar Comm. on Legal Ethics Op. 50 (1978).

The one circumstance in which a *per se* rule does seem justified is the instance where one of the spouses is employed as lawyer for a public prosecutor or other public agency and the other seeks to become directly involved in a matter handled by the governmental employee. The Committee believes that there would be an inevitable perception that improper or irrelevant influence would come to bear on decisions made by the governmental lawyer. *See* DR 9-101(B); EC 9-2; Colo. Bar Ass'n Ethics Comm. Rev. Op. 52 (1975) (public prosecutor); N.Y. State Bar Comm. on Professional Ethics Op. 409 (1975) (public prosecutor); N.Y. State Bar Comm. on Professional Ethics 368 (1974) (civil matter); Ore. Bar Ass'n Comm. on Professional Responsibility Op. 281 (1975) (public prosecutor).

"Firm" v. "Firm"

The situation where legal organizations with which the spouse-lawyers are affiliated represent opposing interests, but neither spouse is directly involved, presents only remote and insubstantial possibilities of ethical improprieties, provided certain common-sense precautions are observed by the organizations and the members of the organizations. The inadvertent disclosure of confidences prohibited by Canon 4 is unanimated (1) if the involved members of both organizations scrupulously refrain from discussing the matter with the respective spouses and (2) if the organizations institute procedures to ensure that files, documents, and other confidential information are screened from the lawyer-spouses. For example, files and similar materials might be marked with a warning to serve as a constant reminder that their contents should not be shared with the spouses and that lawyers handling the case should remain sensitive to the problem.

Canon 5 problems are likewise remote where neither spouse is directly involved in the contested matter, because the lawyers performing professional obligations on behalf of the clients do not themselves have any "personal" interest which might conflict with that of the clients. Even where one of the organizations has a "financial" interest in the outcome of the matter, such as a contingent fee agreement, the interest of the spouse associated with that organization will be indirect, since it will be an inchoate monetary interest by virtue of whatever arrangement, if any, permits that spouse to share in the organization's profits. Again, so long as other members of the organization do not share confidences with the spouses and so long as the spouses cannot influence the performance of professional obligations by other members of the organization, the potential conflict is remote.

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Finally, the Committee believes that there is ordinarily no appearance of impropriety in the organizations' representation of opposing interests, even where one of the organizations is a public prosecutors' office or other group of governmental lawyers. So long as (1) the lawyers handling the contested matter do not discuss the matter with the spouses; (2) there are in place other procedures (discussed above) ensuring that confidential information is protected; and (3) neither spouse has professional responsibility for representation of the clients in the matter or is in a position to influence handling of the matter, then, although "there are always those who will find a hint of impropriety in any situation involving dual attorney-spouses, it does not appear that such would be the reaction of any significant portion of the bar or public at large, if informed of the circumstances." D.C. Bar Comm. on Legal Ethics Op. 50 (1978).

The Committee is as reluctant to articulate a *per se* rule legitimizing the organizations' representation of antagonistic interests as it is to articulate a *per se* rule prohibiting direct representation of adversaries by the spouses. There may be rare situations, particularly when a governmental agency is involved, where such representation should be avoided. For example, where one spouse is the district attorney or other official ultimately responsible for conduct of the public's legal business and for supervision of other lawyers in his or her organization, it might well be regarded as improper for an organization with which that attorney's spouse is affiliated to represent clients adverse to the interests of the public organization, even though the public attorney is not directly responsible for the particular matter. Given the publicly-employed spouse's high position in this example, there is really no way (absent disqualification of the entire office) in which he or she can be isolated from (1) ultimate supervisory responsibility for the matter in question and (2) general responsibility for making organizational decisions (compensation, for example) affecting the lawyers directly involved in handling the matter. A reasonably informed public might thus conclude that members of the private organization were being retained because of their connection to a public official and that the government attorney spouse could ultimately influence the agency's handling of the matter. *See* N.Y. State Bar Commission on Professional Ethics Op. 368 (1974).

Spouse v. "Firm"

Where one lawyer-spouse (hereinafter, for simplicity, called the "participating spouse") is directly involved in an adversary matter and the opposing client is represented by members of an organization with which the other spouse (hereinafter, for simplicity, called the "uninvolved spouse") is affiliated, generalizations are more difficult and propriety may depend on factual nuances. If lawyers in the uninvolved spouse's organization refrain from discussing the matter with the uninvolved spouse and if they establish procedures, similar to those already mentioned, to minimize the possibility that the uninvolved spouse will inadvertently obtain their client's confidential information, then the problem of inadvertent disclosure is almost limited to the participating spouse's inadvertent disclosure of information to the uninvolved spouse. Even if there were such disclosure, the uninvolved spouse, unfamiliar with the matter, might not appreciate the significance of the disclosure. More importantly, the practice of not discussing the matter with other members of that spouse's organization would minimize the likelihood that the inadvertent disclosure could be used to the disadvantage of the participating spouse's client or the advantage of the opposing client. This practice, together with the practice of isolating the uninvolved spouse from the case and files, should allay concerns arising under Canon 4.

The Canon 5 problems presented by the direct involvement of one spouse, but not both, in a matter contested between the spouses' organizations are more problematic than the Canon 4 issues. The participating spouse, directly responsible for the professional representation of his or her client, arguably has some potentially conflicting "personal" interest in his or her relationship with the uninvolved spouse's professional colleagues. Also, a contingent-fee contract between the uninvolved spouse's firm and its client might, if the potential fee is large, give rise to a sufficient "financial" interest to affect the participating spouse's professional judgment.

To resolve the Canon 5 problems presented in this situation, the Committee believes that the participating spouse who discovers that he or she represents a client adverse to a client represented by the

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uninvolved spouse's organization is obliged to disclose that fact to his or her own client and to the opposing organization. The organization, in turn, must disclose the face to its own client. Each client, having been fully informed, should be permitted to decide whether to retain or continue with the lawyer or law firm. Colo. Bar Ass'n Ethics Comm. Rev. Op. 52 (1975) (citing EC 5-15); ABA Comm. on Ethics and Professional Responsibility Op. 340 (1975); DR 5-101(A). Conversely, if the uninvolved spouse's organization is the first to acquire actual knowledge that it is adverse to a client represented by the participating spouse, it should be the one to initiate the disclosure process.

While the involvement of a public agency employing one of the spouse lawyers complicates the issues heretofore discussed, the Committee does not conclude either that the privately-employed spouse (hereinafter, for simplicity, called the "private spouse") must always decline to participate directly in adversarial matters handled by agency lawyers unrelated to him or her or, conversely, that unrelated lawyers in the private firm must always decline cases handled by the publicly-employed spouse (hereinafter, for simplicity, called the "governmental spouse"). "If Canon 9 were construed . . . to prohibit an attorney from defending an accused because his or her spouse, although not prosecuting the case, was a member of the district attorneys' office, the Bar would be elevating its desire for public respect far beyond its confidence in the integrity of its own members and its belief in the public's ability to distinguish proper activities of members of the Bar from improper activities." Ore. Bar Ass'n Comm. on Professional Responsibility Op. 281(1975).

Since the primary danger to be avoided (beyond those arising under Canons 4 and 5) is the perception that the private lawyer or firm is able to influence the public agency official on improper or irrelevant grounds, the general principle is that each situation should be examined to determine the directness or remoteness of that danger. Some of the pertinent questions should be:

(1) *What is the nature of the publicly-employed spouse's responsibilities?* There is a significant difference between a deputy responsible only for handling assigned cases, bereft of any supervisory duties, and the district attorney, United States attorney, or attorney general. In the former case, if the governmental spouse has a matter where he or she is opposed by lawyers affiliated with his or her uninvolved spouse, his or her decisions are subject to review, and ought to be closely reviewed, by superiors in the agency. Conversely, if the private spouse participates directly in contesting a matter against other agency lawyers, it is difficult to see how the governmental spouse is really in a position to influence handling of the matter, if his or her duties are non-supervisory in nature.

(2) *How does the organization of the public entity affect the governmental spouse's connection with the contested matter?* Groups of public lawyers are sometimes organized into divisions (county court-district court; civil-criminal; antitrust-organized crime; etc.) or separate with separate groups of lawyers having distinct areas of responsibility. It should be proper for the private spouse or the affiliated firm to oppose an agency on matters for which the governmental spouse has no sort of responsibility.

(3) *In cases where unrelated lawyers in the private firm seek to be adverse to the governmental spouse, is the private uninvolved spouse wholly uninvolved in the area of practice out of which the contested matter arises, or merely uninvolved in the particular matter?* In the latter situation, "the question of disqualification is more substantial because the non-governmental spouse is not insulated from the firm's practice before the agency generally, and has a much higher degree of knowledge of, and interest in major matters before the agency, whether or not personally employed to represent clients in particular such matters." D.C. Bar Comm. on Legal Ethics Op. 50 (1978).

(4) *Is the contested matter civil or criminal in nature?* Accused persons in criminal cases are afforded a panoply of rights by state and federal constitutions and statutes, including the right to effective assistance of counsel. While the relationship between these rights and ethical precepts is beyond the scope of an ethics opinion, the Committee believes it particularly prudent and appropriate in criminal cases that a private firm contacted by an

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> accused who is being prosecuted or investigated by a prosecutor married to a lawyer in the firm should always make full disclosure of the spousal relationship to the client and permit the client to decide whether to commence or continue the relationship. *See People v. Castro*, 657 P.2d 932, 945- 946 (Colo. 1983). In making the disclosure, however, the firm must at the same time take special care to stress that the client should not expect any advantage by reason of the spousal relationship. DR 9-101(C); N.Y. State Bar Comm. on Professional Ethics Op. 368 (1974).

Two principles mentioned earlier — that close questions should be resolved in favor of declining representation in a contested matter and that the client, having been fully informed of the potential ethical problem, decide whether to continue the relationship — can also apply even when a public agency is involved. In so stating, the Committee is aware of *ipse dixit* in certain authorities holding that consent is an impossibility insofar as one of the clients, the public, cannot give its consent. *E.g.*, Ore. Bar Ass'n Comm. on Professional Responsibility Op. 281 (1975). While it is obviously true that referenda cannot be held in each instance where consent is required, the very function of a public official, whether that official is a lawyer or not, is to make daily decisions on the public's behalf in conducting the business of his or her agency. The Committee perceives no valid reason why such decisions should not encompass a determination to give the public's consent to legal representation in the situation under consideration, provided that the official himself or herself does not have a personal interest in the determination. For example, although a spouse who is the district attorney could not appropriately give consent, he or she could consent where it is a deputy whose marriage to a lawyer gives rise to a potential ethical problem.

Vicarious Disqualification

A strict, narrow, literal reading of DR 5-105(D) of the Model Code of Professional Responsibility's so-called "vicarious disqualification" provision, arguably casts doubt on a number of conclusions suggested in this opinion (and nearly every other opinion and case which has considered the issues raised herein). It provides:

> If a lawyer is required to decline employment or to withdraw from employment *under a Disciplinary Rule*, no partner or associate or any other lawyer affiliated with him or his firm may accept or continue such employment. (Amended and effective October 23, 1974.) (Emphasis supplied.)

Since the Committee has concluded that it is rarely appropriate for spouse-lawyers to oppose one another, absent client consent, a literal reading of DR 5-105(D) would suggest that it is likewise rarely appropriate for the spouse's firms or groups to oppose one another, absent client consent.

The authorities considering the problem posed by DR 5-105(D) have handled it in one of three ways. The first is to ignore it. The second is to limit it to "a multiple client situation, where a single attorney seeks to represent a client who is opposing a client of another member of the firm." Ore. Bar Ass'n Comm. on Professional Responsibility Op. 281 (1975). While this second view finds support in the circumstance that the vicarious disqualification provision appears in DR 5-105, which generally addresses only conflicts of interest issues presented by multiple clients, it is inconsistent with the language of DR 5-105(D) (which speaks generally of "a" Disciplinary Rule, not "this" Disciplinary Rule) and with cases applying DR 5-105(D) to situations other than ones involving multiple clients. *E.g.*, *Greitzer & Locks v. Johns-Manville Corp.*, No. 81-1379 (4th Cir. March 4, 1982) (Slip opinion).

The third way of dealing with DR 5-105(D) is to suggest that it does not apply to disqualify a lawyer's entire law firm "if a lawyer who is married to a lawyer declines employment because of that lawyer's understanding and application of an ethical consideration rather than because of the applicability of a disciplinary rule. . . ." Colo. Bar Ass'n Ethics Comm. Rev. Op. 52 (1975). This approach, although facile and elastic, seems to invite justification of a particular decision by ad hoc nomenclature and ignores the fact that it is rarely clear whether a spouse's conduct is based entirely on an ethical consideration, entirely upon a disciplinary rule, or partly on both types of precepts. The approach thus does not embody a very useful rule for guiding what the spouses or their firms ought to do or for evaluating what they have done.

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The Committee does not believe there is a way satisfactorily to reconcile some of the conclusions reached in this opinion and other cases and opinions with a narrow, literal reading of DR 5-105(D). It is instructive, however, to consider how the authorities have handled the similar problems created when a governmental lawyer leaves the government to accept employment with a private firm. DR 9-101(B) prohibits the lawyer from handling a matter "in which he had substantial responsibility while he was a public employee." A literal reading of DR 5-105(D) would compel the conclusion that his new private employer could likewise not handle such a matter.

Although Colorado has expressly declined to pass on the question, *Osborn v. District Court*, 619 P.2d 41, 46 n. 6 (Colo. 1980), other opinions and cases have held that institution of procedures to prevent the former government attorney from discussing the matter with his new private colleagues and to separate him from the matter (similar to those suggested elsewhere in this opinion) is sufficient to avoid disqualification of the entire firm, despite the literal reading of DR 5-105(D). ABA Comm. on Ethics and Professional Responsibility Formal Op. 342 (1975); *Greitzer & Locks v. Johns-Manville Corp.*, No. 81-1379 (4th Cir. March 4, 1982) (slip opinion) (intrafirm screen is an acceptable alternative to automatic disqualification of a law firm hiring a former government attorney); *Armstrong v. McAlpin*, 625 F.2d 433, 445-46 (2d Cir. 1980) (attorney adequately screened from any participation in case and no threat of taint from firm's continued representation), *vacated on other grounds with instructions to dismiss app.*, 101 S.Ct. 911(1981); *Central Milk Producers Cooperative v. Sentry Food Stores, Inc.*, 573 F.2d 988, 992-93 (8th Cir. 1978) (disqualification not warranted when opposing counsel approved screening procedures of former government attorneys who had worked in closely related case and there were no allegations of actual impropriety); *Chambers v. Superior Court*, 121 Cal. App. 3d 893, 175 Cal. Rptr. 575 (1981) (even though government had not waived imputed knowledge, screening was sufficient and, since case was filed three years previously, disqualification would have adverse effect on firm's "innocent client"). *But see Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980) *vacated on other grounds and remanded with instructions to dismiss app.*, 450 U.S. 903 (1981) (firm's screening device found inadequate as a matter of fact). The basis for such decisions is the adverse impact which a strict reading of DR 5-105(D) would have upon the ability of governments to hire able lawyers, if those lawyers were to find it difficult to enter private practice because their ethical problem is imputed to the entire firm. A similar argument can be made to support the proposition that disqualification of one spouse should not automatically disqualify the spouse's entire firm. "Such a rule could be expected to affect the hiring practices of law firms and the professional opportunities of lawyers. A *per se* rule would effectively create a category of legal 'Typhoid Marys,' chilling both professional opportunities and personal choices." *Blumenfeld v. Borenstein*, 276 S.E.2d 607, 609 (Ga. 1981).

Conclusion

In light of the foregoing discussion, the inquiring attorney's specific questions can be answered as follows:

1. Because the attorney's spouse is currently assigned to handle misdemeanors in a particular courtroom and (the Committee assumes) has no supervisory duties, the attorney may represent persons accused in criminal cases, so long as her spouse is not prosecuting the case. She should disclose the marriage relationship to the prospective client, take care to avoid any implication that the relationship could permit her to influence the prosecutors' decisions on improper or irrelevant grounds, and proceed only with client's consent. The district attorney's office should follow the procedures suggested herein, in cases where she represents the accused, to insulate her spouse from those cases.

2. The view set forth in paragraph 1 of the Conclusion is not necessarily affected by the fact that the inquiring lawyer's husband has spoken with the accused at an arraignment or pre-trial conference. The inquiring lawyer may still represent the accused, so long as the husband's responsibility for the case ceases before she is retained. The Committee notes, however, that the husband's conversation with the accused raises potential ethical issues about the husband's role as a witness (and the wife's role in his examination should he become a witness), *see generally* DR 5- 101(B), DR 5-102, and about whether one spouse may

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properly recommend employment of the other, especially where the recommending spouse is a prosecutor speaking to an accused asking for names of possible defense lawyers, *see generally* DR 2-103. Because the inquiring attorney does not state the substance of the spouse's conversation with the accused and because an adequate discussion of these issues would further lengthen this opinion, the Committee chooses not to address these possible issues at this time.

3. Lawyers with whom the inquiring lawyer is associated may represent accused persons prosecuted by any deputy in the district attorney's office, having disclosed the spousal relationship and its implications to the client and having obtained the client's consent to proceed. The law firm should follow the procedures suggested herein to insulate the inquiring lawyer from any case in which her spouse is involved.

4. A lawyer with whom the inquiring lawyer merely shares office space may represent accused persons, so long as the lawyer generally observes the requirement to protect the client's confidences and secrets. DR 4-101.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.8(i) (regarding the specific conflict situation addressed in this Opinion); Rule 1.7(c) (regarding client waiver of a conflict of interest), Rule 1.10 (regarding imputed disqualification of a lawyer's firm from representation where the lawyer cannot ethically represent the client); Rule 1.6(a) and (c) (regarding confidentiality), Rule 1.7 (a)-(c), 1.8(b) and (f), and 1.9(a) (regarding conflicts of interest); and Rule 5.1(c) (responsibilities of a supervising lawyer or partner).

The Ethics Committee directs attorneys to Opinion 52 and the relevant provisions of the Colorado Rules of Professional Conduct contained in that opinion. This opinion is supplemented by Opinion 52 which should be reviewed in conjunction with the Rules.

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76 LAWYER ADVERTISING GUIDELINES

Adopted October 17, 1987.
Addendum issued 1995.

Fact Situation

An example of the kind of fact situation giving rise to this Opinion can be summarized as follows:

A law firm consisting of two lawyers published advertisements in local newspapers which referred to the firm's skill in preparation of clients' personal injury cases "for trial," to its medical knowledge that would "make complicated medical facts clear for the jury," and to its licensed investigators who discovered facts "essential for victory in the courtroom." From the time the firm was formed until the advertisements appeared, no lawyer at the firm had tried a personal injury case to a conclusion. One lawyer had never tried such a case at all, while the experience of the other in that area consisted of from three or four trials more than ten years before. The firm settled 95 percent of its clients' claims without filing a complaint and referred virtually all actions it did commence to other lawyers for trial.

These facts are largely identical to those in the case of *Matter of Zang*, 741 P. 2d 267 (Ariz. 1987). This ethics opinion is not limited to those facts, however.

Syllabus

Lawyer advertising engenders responsibilities to the public as well as professional opportunities. Lawyers who advertise must have or develop the competency to handle the representations for which they advertise. Lawyers should not claim to be "experienced" in matters which typically involve litigation in the absence of substantial trial experience. A lawyer may associate with another lawyer to handle a representation obtained through advertising, but must disclose to the public such associations if there is a likelihood the lawyer will associate with more experienced lawyers at the time the advertisement is placed. Referral or forwarding fees are forbidden. Clients obtained through advertising must be given the same attention and zealous advocacy required for any other client. Lawyers cannot hold themselves out as certified specialists except to the extent permitted by the Colorado Supreme Court, although they may advertise their areas of preference.

Opinion

Background

Lawyer advertising was first given constitutional protection by the United States Supreme Court in *Bates v. Arizona State Bar Association*, 433 U.S. 350 (1977). The right of lawyers to advertise has been more recently refined by the Supreme Court in *In re R. M. J.*, 455 U.S. 191 (1982), and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985). In Colorado, the scope of permissible advertising was most recently expanded by amendments to Canon 2 of the Code of Professional Responsibility, effective April 1, 1985.

The cases recognizing and upholding the rights of lawyers to advertise their services are in part a recognition of their commercial free speech right. *See Zauderer, supra*, 471 U.S. at 638, and *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U. S. 557, 561-62 (1980). Just as important, lawyer advertising is consistent with the ethical obligation of Canon 2 of the Code: "A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." It is at least as much concern for the public as it is protection of lawyers' rights that makes advertising a permissible activity by the legal profession. *See also, Central Hudson, supra*, 447 U.S. at 561-62 ("Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information.").

Responsibilities to the Public

While lawyer advertising creates professional opportunities for the Bar, it also engenders responsibilities to the public. Concern has been raised within the profession regarding the scope of ethical advertising and the ethics of certain professional conduct resulting from obtaining clients through advertising. The following guidelines govern the professional responsibilities of lawyers who advertise.

1. A key provision of lawyer advertising is set forth in DR 2-101(A), which states:

> A lawyer shall not, on behalf of himself, his partner, associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of advertising, solicitation or publicity containing a false, fraudulent, misleading, deceptive, or unfair statement or claim.

The scope of what is meant by "a false, fraudulent, misleading, deceptive, or unfair statement or claim" is explained in DR 2-101(B). Such statements can be improper by omission on account of a failure to "contain reasonable warnings or disclaimers necessary to make the representation or implication not deceptive." DR 2-101(B)(6). *See also, Zauderer, supra*, 471 U.S. at 650-53. Lawyers who advertise must be prepared to disclose in their advertisements information the absence of which would cause a reasonable layperson to be misled or deceived. "[T]he bar retains the power to correct omissions that have the effect of presenting an inaccurate picture. . . ." *Bates, supra*, 433 U.S. at 375.

2. A lawyer should be competent or promptly become competent in any area of law in which the lawyer seeks clients through advertising. Competence is achieved through experience, but also "through study and investigation." EC 6-3. New or inexperienced lawyers are not precluded from advertising so long as the requirements of the Disciplinary Rules under Canons 2 and 6 are followed.

3. Lawyers who are new or inexperienced in a particular area of law should not state in their advertisements that they are experienced in that area. Similarly, lawyers without substantial trial experience who advertise for clients in an area of law which typically involves litigation (*e.g.*, personal injury cases, workers' compensation, products liability and professional malpractice) are misleading the public if they hold themselves out as "experienced" in that area of law. *See, Matter of Zang, supra*. Subject to the other guidelines herein set forth, lawyers may advertise and accept resulting clients without having prior experience in a particular area of law so long as they achieve the qualifications required to render the service competently. *See*, EC 6-3 and 6-4.

4. Lawyers who are new or inexperienced in a particular area of law can acquire the necessary competency required of the Code by "associating with . . . a lawyer who is competent to handle" the matter. DR 6-101(A)(1). Thus, a lawyer who obtains a representation through advertising and, subsequent to the time of acceptance, recognizes that such representation is beyond the lawyer's competence to handle it, may associate with another lawyer who is competent to handle it. *See also* paragraph 6 below.

5. However, if at the time the advertisement is placed there is a likelihood that the lawyer will later associate with more experienced lawyers to handle the resulting cases, that fact should be disclosed to the public. For example, lawyers should not without adequate disclosure advertise with the expectation that they will undertake litigation matters in order to obtain settlements for most or all cases received through the advertisements, intending to refer those that go to trial to other lawyers. A lawyer who advertises in an area of law which normally involves litigation is expected to be able to handle the matter competently through trial. *Matter of Zang, supra*.

6. Lawyers who advertise and who, for any reason, refer clients to another lawyer cannot obtain a referral or forwarding fee. The requirements of DR 2-107, "Division of Fees Among Lawyers," must be scrupulously observed by the referring and the receiving lawyers. Those requirements include informed consent by the client, overall reasonableness of the fee and a fee division "in proportion to the services performed and responsibility assumed by each" lawyer. DR 2-107. The referral or forwarding of a case by a lawyer to another lawyer is not the rendition of "services" or the undertaking of "responsibility" within the meaning of DR 2-107(A)(2) for which fee division is permitted. *See* ABA Formal Opinion 204 (1940); ABA Informal Opinion 1392 (1977). A division of fees should be apportioned in accordance with the relative value of services performed and responsibilities assumed by each lawyer. *McNeary v. American Cyanamid*

Co., 105 Wash.2d 136, 712 P.2d 845, 848 (1986); Annot., 28 A.L.R. 4th 665 (1985). Nominal services and responsibilities do not justify more than a nominal fee.

7. Canon 7 mandates that "A lawyer should represent a client zealously within the bounds of the law." *See also* DR 7-101; EC 7-1. Lawyers who advertise may sometimes obtain a high volume of cases. However, lawyers must treat each case individually and seek the maximum result for the client consistent with the client's wishes. It is improper for a lawyer to settle cases obtained through advertising on terms which are less favorable to the client than if the client was not obtained through advertising. It is also improper for a lawyer to accept more cases as a result of the advertising than he or she can diligently and competently handle.

8. Lawyers should not hold themselves out as certified specialists or specialists in a particular field of law or law practice, except to the extent permitted by the Colorado Supreme Court. DR 2-105(A)(4).

9. Lawyers may, however, indicate, if appropriate, that a certain area of the law is one to which they limit their practice, in which they concentrate, in which they have extensive experience or which they emphasize. Lawyers may also indicate that they prefer or accept cases in a certain area of law, subject to the above guidelines. *See In re R. M. J., supra*, 455 U.S. at 203; *Parker v. Commonwealth of Kentucky, Board of Dentistry*, 818 F.2d 504, 510-11(6th Cir. 1987).

1995 Addendum

Note: The previous addendum to Formal Opinion 76 issued on July 24, 1993 is withdrawn.

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 7.1 (regarding false or misleading communication about the lawyer or lawyer's services); Rule 7.2 (regarding advertising in general); Rule 7.4(a), (d) and (e) (relating to communication of field of practice); Rule 1.1 (relating to competence); Rule 1.3 (relating to diligence); and Rule 1.5(d) (relating to division of fees). Consideration should also be given to Opinion 83.

77 PARTICIPATION WITH MEDICAL-LEGAL CONSULTING FIRM: CONTINGENT FEE

Adopted March 19, 1988.

Introduction and Scope

The Colorado Bar Association Ethics Committee is aware of concern by members of the bar about the propriety of using medical-legal consulting firms in medical malpractice and personal injury cases on a contingent fee or a modified contingent fee basis. The Committee has received a number of inquiries requesting the Committee's opinion on whether such contingent fee and modified contingent fee contracts are ethically permissible and whether attorneys should enter into such contracts. The Committee is aware that members of the bar are being solicited to use such medical-legal consulting firms on a contingent fee or modified contingent fee basis. The Committee has reviewed several versions of contingent fee and modified contingent fee contracts submitted to members of the bar by such medical-legal consulting firms.

This opinion is offered in order to provide guidance in this area of concern. Whether a lawyer violates the Code of Professional Responsibility by recommending, participating in, or acquiescing in the use of a medical-legal consulting firm on a contingent fee or modified contingent fee basis depends upon all the facts and circumstances of the particular case. This Committee does not undertake to resolve factual disputes. However, the Committee feels that the use of medical-legal consulting firms on a contingent fee or modified contingent fee basis poses a number of ethical considerations and risks for the lawyer.

Syllabus

The use of a medical-legal consulting service on a contingent fee or modified contingent fee basis in a medical malpractice or personal injury case raises serious ethical concerns and may violate the Code of Professional Responsibility in several areas. These areas include: (1) whether the lawyer's fee is excessive, (2) whether expert witnesses are compensated contingent upon the content of their testimony or the outcome of the case, (3) whether restrictions on the selection of expert witnesses in the future affect the lawyer's obligations to future clients, and (4) whether the arrangement erodes the lawyer's exercise of independent professional judgment.

Facts

The several versions of contingent fee and modified contingent fee contracts reviewed by the Ethics Committee vary somewhat in their terms and provisions. However, they contain certain common elements.

The medical-legal consulting firm ("consultant") offers to perform certain technical services for the plaintiff in a medical malpractice or personal injury case. There is a fixed fee for an initial evaluation of the case and, if the case is deemed meritorious, the consultant may perform additional services in return for a certain percentage of the plaintiff's gross recovery.

These additional services, performed by one of the consultant's directors, may include medical research, analysis of medical records, assisting plaintiff's counsel with discovery on the medical issues, formulating questions for the medical experts and defendants to answer, and assisting plaintiff's counsel during depositions and at trial. The director does not testify at any time in the proceeding.

In addition, the consultant agrees to use its best efforts to locate expert witnesses to review plaintiff's case, prepare written reports and, if necessary, testify in deposition and at trial. These expert witnesses are from the consultant's independent consulting staff. According to the consultant, they are not consultant's employees and have no knowledge of the contract between the consultant and the plaintiff.

The plaintiff must pay an hourly rate for the services of the expert witnesses, with certain hourly minimums. Such fees are to be paid in advance and are to be made payable to the expert witnesses. However, they are to be paid through the consultant. The contracts state that the expert witnesses are not

paid contingent on plaintiff's recovery. In addition, the plaintiff must pay all expenses of the expert witnesses and medical director, such as transportation, meals and lodging.

Most of the contracts specify a percentage of 20 percent to be paid to the consultant, although some are higher. They also specify that they are completely unrelated to any contract for services and expenses which the plaintiff may have with the attorney, and they specify that no costs are to be deducted from the consultant's fee. One of the modified contingent fee contracts included the provision that any amounts paid by the defendants and designated as attorney fees would be included in the gross recovery in calculating the consultant's percentage.

The contingency fee or modified contingency fee contract is entered into between the plaintiff and the consultant; however, plaintiff's counsel is also required to sign the contract agreeing to distribute the funds of any recovery pursuant to the contract. In some of the contracts, plaintiff's counsel is also required to agree that each expert witness is a trade secret of the consultant and that plaintiff's counsel will not contact or use that expert witness on any other case without prior written permission of the consultant.

Opinion

The Code of Professional Responsibility provides: "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." DR 2-106(A). Plaintiff's counsel in a medical malpractice or personal injury case usually handles such a case for a contingent fee of at least 30 percent. If the consultant collects a contingent fee of at least 20 percent, and neither the lawyer's fee nor the consultant's fee is reduced by the other, as recited in the contracts reviewed by the Committee, the total contingent fees would be at least 50 percent. This leaves the client at most 50 percent of the total recovery, less reimbursable expenses.

"A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." DR 2-106(B). Factors to consider in determining the reasonableness of a fee include, among others, the time and labor required; the novelty and difficulty of the questions involved; the skill requisite to perform the legal service properly; the experience, reputation and ability of the lawyer; and whether the fee is fixed or contingent. DR 2-106(B).

In medical malpractice and personal injury cases, the lawyer customarily selects expert witnesses and works with them in evaluating and preparing the case. When the consultant undertakes to provide services which the lawyer customarily provides, the lawyer's service is reduced. The lawyer's contingent fee, which might otherwise be considered reasonable, may become unreasonable in light of the reduced services provided by the lawyer. *See*, ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 87-354 (1987).

Although a lawyer may advance, guarantee or acquiesce in the payment of a reasonable fee for the professional services of an expert witness, a lawyer shall not pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. DR 7-109(C). The contingent fee and modified contingent fee contracts reviewed by the Committee state that the expert witnesses are not paid contingent upon the plaintiff's recovery, and are not aware of the contract between the consultant and the plaintiff. However, the plaintiff is to send payment for the expert witnesses to the consultant, who presumably forwards the payment on to the expert witnesses.

It appears that the expert witnesses, who are on the consultant's independent consulting staff, may be used regularly by the consultant and may be substantially dependent on the consultant. This is particularly true in light of a contract provision prohibiting plaintiff's counsel from contacting the same expert witnesses in other cases without the consultant's written consent. Furthermore these expert witnesses may be aware of the fact that the consultant contracts with plaintiffs on a contingent fee basis. The lawyer should be aware that such an arrangement could be construed as payment to an expert witness contingent upon the content of his testimony or the outcome of the case, depending upon the facts and circumstances of the particular arrangement. *See*, ABA Formal Opinion 87-354 (1987). The lawyer would not be able to avoid responsibility for such payment by claiming that the contract is between the consultant and the

plaintiff only. DR 7-109(C) prohibits the lawyer from paying, offering to pay or acquiescing in the payment of such compensation. Furthermore, a lawyer shall not circumvent a disciplinary rule through the action of another. DR 1-102(A)(2).

A lawyer should exercise independent professional judgment on behalf of a client. Code of Professional Responsibility, Canon 5. A lawyer shall decline proffered employment or discontinue employment by multiple clients if the exercise of his independent professional judgment on behalf of a client will be, or is likely to be, adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests. DR 5-105(A) and (B). Some of the contracts reviewed by the Committee require the plaintiff's attorney to agree not to contact or use an expert witness supplied by the consultant on any other case without prior written permission of the consultant. This presents a potential conflict of interest with respect to the lawyer's representation of other clients in medical malpractice or personal injury cases. By agreeing to this condition, the lawyer has restricted the options of other clients with respect to the use of expert witnesses. As a practical matter, by agreeing to this restriction, the lawyer may have forced other clients to contract with the consultant or to not use certain expert witnesses, even though they may be particularly well-qualified or the only experts available on the matters at issue. *See*, ABA Formal Opinion 87-354 (1987).

Furthermore, the lawyer's exercise of independent professional judgment may be eroded by the agreement with the consultant. The consultant retains substantial authority with respect to the choice of experts. The plaintiff is committed to pay the consultant a percentage of any recovery before plaintiff's counsel knows who the experts will be or the substance of their opinions. The interests of the consultant, the substantial authority retained by the consultant, and the financial burden on the plaintiff could influence the lawyer in advising the plaintiff regarding settlement or continued prosecution of the case and may erode the lawyer's independent professional judgment. Furthermore, if the attorney is dissatisfied with the experts provided by the consultant, theoretically the attorney is free to retain other experts unrelated to the consultant. However, this may be impractical when the plaintiff has agreed to pay the consultant a percentage of the total recovery even though experts provided by the consultant are not used. Thus, the contingent fee and modified contingent fee contracts may, as a practical matter, erode the lawyer's exercise of independent professional judgment in the selection and use of experts. *See*, ABA Formal Opinion 87-354 (1987). Ethical Consideration 5-1 states:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Conclusion

In conclusion, whether a lawyer violates the Code of Professional Responsibility by recommending, participating in or acquiescing in the use of a medical-legal consulting firm on a contingent fee or modified contingent fee basis depends upon all the facts and circumstances of the particular case. However, there are substantial risks for the lawyer and possible violations of the Code of Professional Responsibility in any given case. These include questions as to the reasonableness of the lawyer's fee, compensation to expert witnesses contingent upon the content of their testimony or the outcome of the case, restrictions affecting the lawyer's obligations to other clients, and erosion of the lawyer's exercise of independent professional judgment.

78 DISQUALIFICATION OF THE ADVOCATE/WITNESS

Adopted June 18, 1988.
Revised June 18, 1994; May 10, 1997; October 20, 2012; and February 20, 2013.

Introduction and Scope

This opinion provides ethical guidance when a lawyer who will serve as an advocate at trial or another lawyer in the trial advocate's firm may also be called as a witness. The opinion also discusses the ethical limitations and considerations of subpoenaing or disclosing another party's trial advocate (or another lawyer in the trial advocate's firm) as a witness or potential witness.

Although Rule 3.7 of the Colorado Rules of Professional Conduct (Colo. RPC or Rules) is most often invoked as the basis for a motion to disqualify another party's lawyer, rather than as the basis for lawyer discipline, this opinion does not purport to be a *legal* opinion regarding the circumstances under which a motion to disqualify should be filed by a lawyer, or granted or denied by a tribunal.

Syllabus

A lawyer may not both serve as an advocate at trial and testify as a necessary witness at a trial except as permitted under one of the exceptions in Colo. RPC 3.7(a). A lawyer who is a necessary witness generally may act as an advocate in pretrial activities unless the lawyer's participation in a particular pretrial activity would undermine the purpose of Rule 3.7.

Unless precluded from doing so by Colo. RPC 1.7 or 1.9, a lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness.

In the representation of a client, a lawyer may be required to obtain discovery from, or call as a witness at trial, a lawyer who represents an adverse party. No ethical proscription automatically prohibits a lawyer from taking such action. However, a lawyer should not routinely or lightly subpoena, identify as a potential witness, or call as a witness an opposing party's trial counsel (or another lawyer in the opposing lawyer's firm). Doing so solely as a contrivance to disqualify opposing counsel (whether or not combined with a motion to disqualify) violates the Rules.

Analysis

Construing the predecessor Colorado Code of Professional Responsibility (Colorado Code), the Colorado Supreme Court observed:

> A lawyer who intermingles the functions of advocate and witness diminishes his effectiveness in both roles. . . . [T]he lawyer is placed in the unseemly position of arguing his own credibility to the jury. . . . Obviously a lawyer's duty to exercise independent judgment on behalf of his client will be even more seriously jeopardized when the lawyer is called as a witness to give testimony adverse to his client.

Williams v. District Court, 700 P.2d 549, 553 (Colo. 1985) *(Williams).* Colo. RPC 3.7, cmt [1] reflects similar considerations.[1]

I. Analysis of Advocate-Witness Issues Under the Rules

A number of the Rules bear on the propriety of a lawyer simultaneously acting as trial advocate and testifying as a witness at trial, or of another lawyer in the testifying lawyer's firm acting as a trial advocate.

A. Colo. RPC 3.7

Colo. RPC 3.7 directly addresses the advocate-witness situation. It is divided into two subsections: the first establishes the general rule that a necessary witness may not be a trial advocate and enumerates the exceptions to that rule; the second governs when another non-testifying lawyer in a testifying lawyer's firm may and may not serve as trial advocate.[2]

1. Colo. RPC 3.7(a): The General Rule

Colo. RPC 3.7 provides that, absent an applicable exception, a trial advocate may not simultaneously testify as a necessary witness in the same matter: "A lawyer *shall not act* as an advocate in a trial in which the lawyer is likely to be a necessary witness *unless*...." (Emphasis added.)

a. Necessity of Lawyer's Testimony

Before a lawyer is precluded from serving as an advocate at trial under Colo. RPC 3.7, it must be "likely" that the lawyer will be a "necessary" witness. *Compare* Colorado Code DR 5-l 01(B) (lawyer must decline employment if the lawyer "ought to be called" as a witness). The "necessary" witness standard requires "an even more specific showing of necessity" than under the prior Code. *Security Gen. Life Ins.* Co. *v. Superior Court,* 149 Ariz. 332, 718 P.2d 985 (1986) (Rule 3.7(a) "requires a showing that the proposed testimony is relevant, material, and unobtainable elsewhere"). Courts have held that the advocate's testimony must be truly necessary, and not merely cumulative, and that the court may delay ruling on a motion to disqualify until it can determine whether another witness's testimony can adequately replace the lawyer's testimony. Rule 3.7(a) is "less prone [than the predecessor Code provision] to exploitation by opposing parties and more compatible with each party's interest in retaining counsel of choice." *Cannon Airways, Inc. v. Franklin Holdings Corp.,* 669 F. Supp. 96, 100 (D. Del. 1987).

The "necessary witness" test is flexible and the result depends on the circumstances. Thus, the naming of a party's lawyer does not automatically render the named lawyer a "necessary witness" under Colo. RPC 3.7. While the availability of other witnesses to testify regarding the same matters as to which the lawyer has knowledge usually will render the lawyer an "unnecessary" witness, that determination also depends upon the particular circumstances.

b. Prohibition Limited to Advocacy at Trial

Despite the breadth of its general prohibition, Colo. RPC 3.7 applies only to a lawyer "act[ing] as [an] advocate at a trial." Thus, with the client's informed consent, a lawyer who is likely to be a necessary witness may generally accept employment and continue to represent the client in all litigation roles short of in-court trial advocacy.[3]

Colo. RPC 3.7, like Model Rule 3.7, addresses only advocacy at "trial." In reliance upon that language, courts in Colorado and elsewhere have held that the disqualification rule is inapplicable to proceedings other than "trials." Thus, in *People ex rel. S.G.*, 91 P.3d 443, 450 (Colo.App. 2004), the Court of Appeals held that Rule 3.7 was inapplicable to post-trial proceedings. The Court of Appeals further noted that courts from other jurisdictions with rules similar to Colo. RPC 3.7 have held that the disqualification rule is inapplicable to "appeals, summary judgment motions or pretrial or post trial proceedings." *Id.*; *see also United States v. Berger,* 251 F.3d 894, 906 (10th Cir. 2001) (Oklahoma rule substantially similar to Colo. RPC 3.7 does not apply to appeals); *Carroll v. Town of University Park,* 12 F. Supp. 2d 475, 486 (D. Md. 1997) (rule substantially similar to Colo. RPC 3.7 does not bar counsel's affidavits attached to a summary judgment motion), *aff'd,* 155 F.3d 558 (4th Cir. 1998); *Columbo v. Puig,* 745 So.2d 1106, 1107 (Fla. Dist. Ct. App.1999) (rule substantially similar to Colo. RPC 3.7 does not encompass pretrial or posttrial proceedings).[4]

However, the Colorado Supreme Court has held that limiting participation to pretrial procedures will not always avoid a Rule 3.7 violation.

> We also accept the conclusions by other jurisdictions that such activities may include strategy sessions, pretrial hearings, mediation conferences, motions practice and written discovery, or being consulted by the non-testifying counsel. However, we decline to issue a rule that would permit automatic participation by the disqualified attorney in all pretrial litigation. Upon assuring that the client has consented to pretrial representation by the disqualified attorney, the trial court has the discretion to determine whether participation by the attorney in a particular pretrial activity would undermine the purpose of Rule 3.7. Accordingly, if for

> example, the attorney's dual role in deposition proceedings would likely be revealed at trial, the court may properly limit the attorney's role in that activity. We leave to the trial court upon remand the opportunity to fashion its orders in a way dictated by the facts of this case.

Fognani v. Young, 115 P.3d 1268, 1277 (Colo. 2005); *see also World Youth Day, Inc. v. Famous Artists Merch. Exch., Inc.*, 866 F. Supp. 1297, 1303 (D. Colo. 1994) (disqualifying lawyer from taking or defending depositions because "[r]ealistically, the testimony from oral depositions in this case cannot easily be taken and read into evidence without revealing [lawyer's] identity as the deposing attorney").

The advocate faced with the prospect of being a witness is well advised to consult fully with the client early in the case regarding both the potential complications arising from being a witness and the potential advantages and disadvantages of serving as "pretrial" counsel. The consultation should address the possibility of retaining a second "shadow" trial lawyer early in the case in the event the first lawyer is ethically precluded from acting as trial advocate.

c. Non-Jury Trials

It is unclear in Colorado whether the advocate-witness disqualification rule is relaxed in non-jury proceedings. In *In re Leventhal*, 2012 WL 1067568 (Bkrtcy. N.D. Ill. March 22, 2012), the court denied a motion to disqualify a lawyer who was also a witness because the trial was a bench trial, not a jury trial: "Because the trial will be a bench trial, not a jury trial, there is no risk whatever that the trier of fact will confuse the roles of advocate and witness." *Id.* at *5; *see also United States v. Johnston*, 690 F.2d 638, 644 (7th Cir. 1982) (advocate-witness rule is applied more flexibly in a bench trial); *Saline River Prop., LLC v. Johnson Controls, Inc.*, No. 10-10507, 2011 WL 4916688 *3 (E.D. Mich. 2011). *But see Mount Rushmore Broad., Inc. v. Statewide Collections*, 42 P.3d 478, 482 (Wyo. 2002) (Wyoming Rule 3.7 (which is identical to Colo. RPC 3.7) "does not make any exceptions between jury and bench trials.").

d. Enumerated Exceptions

Colo. RPC 3.7(a) identifies three instances in which a lawyer who is likely to be called as a necessary witness may also act as an advocate:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

Colo. RPC 3.7(a)(l) recognizes that where the advocate's testimony relates to an uncontested issue, the policy considerations that support the general rule are inapplicable. However, it is not enough that the facts pertaining to a disputed issue are uncontested; the *issue* itself must be uncontested. *People v. Pasillas-Sanchez*, 214 P.3d 520, 526 (Colo. App. 2009).

For similar reasons, Colo. RPC 3.7(a)(2) permits an advocate to give testimony regarding the nature and value of the lawyer's legal services.

Colo. RPC 3.7(a)(3) liberalizes the "substantial hardship" provision of DR 5-101(B)(4), by deleting the Colorado Code's requirement that the hardship must result "because of the distinctive value of the lawyer or his firm as counsel in the particular case." Comment [4] to Colo. RPC 3.7 recognizes that "a balancing is required between the interests of the client and those of the tribunal and the opposing party." Thus, the financial burden on the client of replacing the lawyer, if combined with other circumstances, may be sufficient to permit the lawyer to act in both roles. *See generally Wolfram* § 7.5.2, at 386-88.

In *Fognani*, the Supreme Court addressed when disqualification imposes a substantial hardship on the client:

> . . . [W]e consider all relevant factors in light of the specific facts before the court, including the nature of the case, financial hardship, giving weight to the stage in the proceedings, and the time at which the lawyer became aware of the likelihood of his testimony. In addition, we also consider whether the client has secured alternative representation.

115 P.3d at 1275.

B. *Conflicts of Interest; Colo. RPC 1.7 and 1.9*[5]

If the trial advocate concludes that Rule 3.7 will not be violated by the lawyer's testimony or the testimony of another lawyer in the trial advocate's firm, the general conflict of interest rule, Colo. RPC 1.7 (current client), and the former client conflict of interest rules, Rule 1.9, must also be considered. While Colo. RPC 3.7 expressly refers to Rules 1.7 and 1.9 only in subsection (b), concerning a lawyer acting as an advocate in instances where *another* lawyer in the firm is likely to be called as a witness, Comment [6] to Colo. RPC 3.7 makes clear that the general conflict of interest rules also pertain to Rule 3.7(a):

> In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9.

If a conflict of interest exists under Colo. RPC 1.7 or 1.9, the lawyer must comply with those Rules to obtain an effective waiver. Any such waiver would require the informed consent of the affected client or former client, and would need to be confirmed in writing. See Colo. RPC 1.0(e) (defining "informed consent"); Colo. RPC 1.0(b) (defining "confirmed in writing").

C. Other Colorado Rules

Even where the trial advocate or another lawyer in the trial advocate's firm may testify, the lawyer must comply with all other applicable Rules. Thus, for example, the lawyer must consult with the client regarding the means by which the client's objectives are to be pursued and consult concerning the limits of representation due to the lawyer's role as a trial witness. *See* Colo. RPC 1.2(c) (limitation of scope of representation). Also, the lawyer-witness must consider the effect of Colo. RPC 1.6 regarding confidentiality of information relating to the representation. The testifying lawyer may face a conundrum upon cross-examination into information that would otherwise be protected from disclosure.

D. Vicarious Disqualification

If the conflict of interest rules—Rule 1.7 (conflict with current client) or Rule 1.9 (conflict with former client)—preclude a lawyer from testifying, then Colo. RPC 1.10 imputes that disqualification to all lawyers in the same firm unless the client gives informed consent confirmed in writing under the conditions stated in Colo. RPC 1.7. *See* Colo. RPC 3.7, cmt. [7]. However, absent a Colo. RPC 1.7 or 1.9 conflict, Colo. RPC 1.10 does not impute to all lawyers in a firm the disqualification of an advocate-witness under Rule 3.7(a), which is intended only as a personal bar.

II. Propriety of Identifying or Listing Another Party's Lawyer as a Witness or Moving for Disqualification

A lawyer is not ethically prohibited from calling another party's lawyer or another member of opposing counsel's law firm as a witness, either in discovery or at trial, where the lawyer may have unprivileged knowledge relevant to the case or reasonably calculated to lead to the discovery of admissible evidence.

Frequently, the identification or subpoenaing of a lawyer as a witness is accompanied by a motion to disqualify that lawyer (and the lawyer's firm) from further participation in the lawsuit. Indeed, the Colorado Supreme Court has deemed the act of subpoenaing opposing counsel as a trial witness under certain prescribed circumstances as the "functional equivalent" of a motion to disqualify. *Williams,* 700 P.2d

at 555. In *Taylor v. Grogan*, 900 P.2d 60 (Colo. 1995), the Supreme Court described the ethical obligation imposed upon a lawyer who is considering subpoenaing (or naming as a witness) opposing counsel:

> In *Williams v. District Court,* 700 P.2d 549, 553 (Colo. 1985), we examined the ethical considerations that "necessarily arise when an attorney of record is subpoenaed by opposing counsel in order to testify against the subpoenaed attorney's client in a pending trial." We concluded that an attorney may subpoena opposing counsel to testify adversely to his client only after showing:
>
> > (1) that [opposing counsel's] testimony will be actually adverse to [his or her client]; (2) that the evidence sought to be elicited from the lawyer will likely be admissible at trial under the controlling rules of evidence; and (3) that there is a compelling need for such evidence, which need cannot be satisfied by some other source.
>
> *Williams, 7*00 P.2d at 555-56 (footnotes omitted). *Id.* at 62.
>
> * * *
>
> *Williams* was a criminal case in which the prosecution subpoenaed the attorney of the accused as a prosecution witness. DR 5-102(B) was applicable to both civil and criminal cases. In our view, the *Williams* factors are equally applicable in the civil context.

Id. at 62 (n.5). The lawyer subpoenaing or listing opposing counsel as a witness must decide whether to file a motion to disqualify. However, regardless of whether the lawyer files a motion to disqualify, the subpoenaed or named lawyer has a duty to promptly determine whether or not the Rules require withdrawal, and to act accordingly. *Id*.

The proliferation of motions to disqualify has led courts to view them with suspicion. *See*, *e.g.*, *Greenbaum-Mountain Mort. Co. v. Pioneer Nat 'l Title Ins. Co*., 421 F. Supp. 1348, 1354 (D. Colo. 1976) ("We also recognize that counsel can approach the Code and Canon 5 as another arrow in his quiver of trial tactics."). *See also J.P. Foley & Co. v. Vanderbilt*, 523 F.2d 1357 (2d Cir. 1975). In the criminal context the United States Supreme Court has ruled that the erroneous disqualification of defense counsel denied the defendant of his right to counsel under the Sixth Amendment and his conviction was reversed. *United States v. Gonzales-Lopez*, 548 U.S. 140 (2006).

Before filing a disqualification motion, the moving lawyer should make a good faith effort, through both investigation and available discovery, to ascertain the validity of the facts underlying the motion. Timeliness in subpoenaing, identifying or listing an opposing lawyer or another member of the opposing lawyer's firm is an important factor in determining whether counsel is genuinely seeking relevant, significant testimony or is merely seeking to disqualify an adversary. What a lawyer learned or should have learned in the development of the case is important in determining timeliness.

A motion to disqualify not well supported in law or fact exposes the lawyer filing the motion (and the lawyer's client) to various sanctions, apart from the denial of the motion. These may include an award of attorney's fees incurred in connection with opposing the motion against the moving lawyer, the client or both. *See* C.R.C.P. 11 and Fed. R. Civ. P. 11; C.R.S. §§ 13-17-101 *et seq*; C.R.C.P. 121, § 1-15(7); 28 U. S. C. § 1927. *See also Wold v. Minerals Eng'g Co.,* 575 F. Supp. 166 (D. Colo. 1985) (imposing Rule 11 sanctions against lawyer filing motion to disqualify). Such conduct can also violate the Rules. *See*, *e.g.*, Colo. RPC 3.1 (precluding frivolous claims, defenses, and assertions).

The use of the subpoena power solely as a contrivance to disqualify opposing counsel may also constitute unprofessional conduct prejudicial to the administration of justice in violation of Colo. RPC 8.4(d). *Cf.*, *Williams*, 700 P.2d at 554 (construing the Colorado Code). The assertion of a position merely to harass or maliciously injure another, and knowingly advancing a claim unwarranted under existing law, further violates Colo. RPC 3.1. Irrespective of whether a court denies a motion to disqualify, a frivolous motion to disqualify constitutes independent grounds for lawyer discipline. *See generally Wolfram* § 7.5.1 at 375.

NOTES

1. Historic rationales for the advocate-witness rule are numerous, often contradictory and have begot no shortage of critical comment. *See generally* Wolfram, *Modern Legal Ethics* § 7.5.2, at 337-79 (1986) (Wolfram); Hazard & Hodes, 1 *The Law of Lawyering*, § 3.7:102, at 678-79 (Supp. 1992).

2. Effective January 1, 2008, Colo. RPC 3.7 and Rule 3.7 of the American Bar Association Model Rules of Professional Conduct (Model Rules) are identical. That was not always the case. When the Rules were first adopted in Colorado (effective January 1, 1993), the Colorado Supreme Court appeared to reverse the presumption of non-disqualification contained in Model Rule 3.7(b). ABA Model Rule 3.7(b) provides:

> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Prior to January 1, 2008, Colo. RPC 3.7(b) provided:

> (b) A lawyer shall not act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless the requirements of Rule 1.7 or Rule 1.9 have been met.

There was a question as to whether this difference in wording had any significance – an issue that is academic now that Colo. RPC 3.7 and Model Rule 3.7 are identical.

3. Colo. RPC 3.7 does not expressly require informed consent for a lawyer to act as both advocate and witness. However, the Colorado Supreme Court has indicated that the client's informed consent is necessary for a lawyer who may not act as an advocate at trial to provide pretrial representation. *Fognani v. Young*, 115 P.3d 1268, 1277 (Colo. 2005). Moreover, when a conflict of interest under either Colo. RPC 1.7 or 1.9 arises as a result of the lawyer acting in both witness and advocate roles, those Rules expressly require the client's informed consent, confirmed in writing, as a condition to an effective waiver of the conflict. The Colorado Bar Association Ethics Committee does not believe that informed consent is required when an exception in Colo. RPC 3.7(a)(1), (2), or (3) permits the lawyer to act as both advocate and lawyer, or when the lawyer is not a "necessary" witness.

4. While Colo. RPC 3.7 expressly limits only "act[ing] as an advocate *at trial*" (emphasis added), many of the policies supporting Rule 3.7 apply equally to administrative adjudicative proceedings.

5. The version of Colo. RPC 1.7 in effect prior to January 1, 2008 included in its text a comment from the then-operative version of Model Rule 1.7, which stated a "disinterested lawyer" standard for assessing whether a conflict was subject to a waiver by the affected client. The current version of Colo. RPC 1.7 does not contain the disinterested lawyer standard; instead, it provides (as does current Model Rule 1.7) that a conflict may not be waived unless "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." Whether the disinterested lawyer and reasonable belief tests materially differed is another academic issue, which this opinion does not address.

79 USE OF LEGAL ASSISTANTS IN CLIENT REPRESENTATION

Adopted February 18, 1989.
Addendum issued 1995.

Syllabus

The use of paralegals, law clerks or other legal assistants (who are not licensed attorneys) employed by a licensed attorney to appear at depositions, hearings or administrative proceedings to represent the attorney's client constitutes a violation of DR 3-101(A) and 6-101 of the Code of Professional Responsibility where the duty thus entrusted to such legal assistants would constitute the unauthorized practice of law. Where the use of such lay assistants does not constitute the practice of law, or where such use is expressly authorized under Colorado Supreme Court Rule or decision, the attorney must, nonetheless, train, supervise and control such assistants to assure competent representation of clients as required by DR 6-101. (See the guidelines formulated by the Ethics Committee in Formal Opinion No. 61, adopted on October 23, 1982.)

Facts

This opinion addresses the propriety of the use of paralegals, law clerks and legal assistants (who are not licensed attorneys) employed by a licensed attorney to appear at depositions, hearings, administrative proceedings or other proceedings to represent the interests of the attorney's client or clients, where the nature of the representation involved would constitute the practice of law.

Opinion and Analysis

DR 3-101(A) prohibits a lawyer from aiding a nonlawyer in the unauthorized practice of law. As stated in EC 3-l and 3-2, this Rule is grounded in the need of the public for the integrity and competence of those who undertake to render legal services, in the recognition that competent professional judgment is the product of a trained familiarity with law and legal process and a disciplined, analytical approach to legal problems coupled with a firm ethical commitment. Further, as recognized by the statements contained in EC 3-5, though there is no single, specific definition of what constitutes the practice of law, it nonetheless relates to the rendition of services for others that call for the professional knowledge and judgment of a lawyer.

Formal Opinion No. 61 adopted by the Ethics Committee on October 23, 1982, sets forth ethical guidelines applicable to the use of lay legal assistants to assure compliance with the Code of Professional Responsibility. That opinion provides, in part: "A lawyer is responsible for assuring that the assistant does not engage in the unauthorized practice of law. . . ."

The practice of law in the State of Colorado by an unlicensed person constitutes contempt of the Colorado Supreme Court. C.R.S. § 12-5-112, *Unauthorized Practice of Law Committee v. Grimes*, 654 P.2d 822 (Colo. 1982). Determining what acts do or do not constitute the practice of law is a judicial function falling within the powers and duties of the judicial branch exercised by the Supreme Court. *Unauthorized Practice of Law Committee v. Prog*, 761 P.2d 1111 (Colo. 1988); *Unauthorized Practice of Law Committee v. Employers Unity, Inc.*, 716 P.2d 460 (Colo. 1986), *Conway-Bogue Realty Inv. Co. v. Denver Bar Assn.*, 135 Colo. 398, 312 P.2d 998 (1957); *Ross v. Industrial Comm.*, 39 Colo. App. 204, 566 P.2d 367 (Colo. App. 1977). (*See*, C.R.C.P. 228-240.) Precise boundaries of what constitutes the unlawful practice of law are not firmly drawn (*Ross v. Industrial Comm., supra*), but must be judged by surrounding circumstances and the nature of the activity involved. *People, ex rel. Atty. Gen. v. Jersin*, 101 Colo. 406, 74 P.2d 668(1937); *Denver Bar Assoc. v. Public Utilities Comm.*, 154 Colo. 273, 391 P.2d 467 (1964). Generally, when one acts in a representative capacity in protecting, enforcing or defending legal rights and duties of another and in counseling, advising and assisting in connection with such rights and duties, such conduct

constitutes the "practice of law." *Denver Bar Assoc. v. Public Utilities, supra*; *Unauthorized Practice of Law Committee v. Prog, supra*.

Persons appearing in a representative capacity in, or in connection with, proceedings which may be characterized as judicial, or which involve the resolution of disputes of adjudicative facts or law, whether before administrative agencies or courts of record, are generally deemed to be practicing law. *See, Denver Bar Assoc. v. Public Utilities Comm., supra*, at 471. Those appearing in a representative capacity before administrative agencies in connection with proceedings which are purely legislative or non-judicial, generally are not deemed to be practicing law, *id.* Nonetheless, representation of a client at hearings or proceedings of a legislative character before legislative committees or administrative agencies may entail the practice of law where a client's rights, privileges or immunities could be adversely affected. As an example, a client called upon to testify in a proceeding "investigative" in nature concerning proposed legislation but involving past conduct, could provide testimony which may be self-incriminating. The client should be properly advised by an attorney with respect to such testimony and the desirability of invoking the privilege against self-incrimination. Further, even though the proceedings are legislative in nature, because of circumstances peculiar to the client, the resulting rule or regulation could constitute a deprivation of constitutionally protected rights, in which case representation would involve the practice of law.

To determine whether the use of paralegals or other lay legal assistants in the representation of the attorney's client or clients at such hearings or proceedings constitutes aiding a non-lawyer in the unauthorized practice of law, examination must be made into the purpose, nature and effect of the particular hearing or proceeding involved. Factors which must be considered (*see generally, Denver Bar Assoc. v. Public Utilities Comm., supra*) include:

a. Whether the client's testimony is to be taken under oath and recorded, or whether there is significant potential for collateral use of such testimony. Where testimony is under oath and recorded, its potential for impeachment or collateral use is magnified and the client's interests in collateral actions or proceedings must be taken into account. The degree to which the client's testimony may be used in other pending or foreseeable actions or proceedings, and the effect of such use, must be carefully analyzed and considered.

b. Whether the client will be subject to cross-examination, and if so, the potential need for rehabilitation. The potential use of the client's testimony given on cross-examination dictates the lawyer's duty to ensure that it fully discloses all relevant circumstances to allow its assessment in a light most favorable to the client.

c. Whether there may be a need to invoke privileges, such as the privilege against self-incrimination and the attorney-client privilege. Constitutional or evidentiary privileges not invoked in a timely fashion are generally deemed waived and thus the lawyer must take care to ensure that privileged information is protected from disclosure.

d. Whether spontaneous decisions may be required concerning the assertion or waiver of privileges, recording objections, limiting the scope of examination, stipulations, and similar decisions requiring professional legal judgment. Whether a privilege should be asserted or objection made generally calls for artful decisions of strategy which require professional skill and judgment based on full knowledge of the facts and governing law.

e. Whether the hearing or proceeding involved is adjudicative, rather than legislative, in nature. Representation in legislative actions or proceedings generally does not constitute the practice of law. *Denver Bar Assoc. v. Public Utilities Comm., supra*.

f. Whether the testimony of an essential or important witness or that of an adversary is to be taken at the proceeding. The importance or significance of the evidence to the issues affecting the client's interest must be evaluated in determining the need for or extent of cross-examination.

g. Whether the client may need assistance or advice concerning applicable law during the course of the hearing or proceeding. Identifying and explaining applicable legal principles and giving counsel concerning them lies at the heart of the practice of law.

h. Whether determinations made based on the particular hearing or proceeding may affect the client's rights to life or liberty or significantly affect the client's property rights. The degree to which the outcome of the proceeding may affect or impinge on the client's rights must necessarily direct and affect the manner of representation.

Thus, defending a debtor upon examination at § 341 meetings may involve artful (and possibly spontaneous) decisions concerning waiving or invoking the privilege against self-incrimination, and obtaining "use and derivative use" immunity under § 344, as it may relate to the risk of subsequent criminal prosecution (*See, e.g.*, 18 U.S.C. § 152), and detrimental use of damaging admissions in the bankruptcy case (i.e. motions to dismiss petition or to bar discharge, or adversary proceedings).

In view of the nature of a Creditors Meeting under § 341 of the Code, and the requisite knowledge, judgment and skill necessary to proper representation of the Debtor thereat, use of paralegals by a licensed attorney to accomplish such representation would constitute a violation of the provisions of DR 3-101(A) of the Code of Professional Responsibility.

Similarly, the lawyer's use of lay legal assistants in client representation at depositions upon oral examination would, except in the most extraordinary circumstances, constitute a violation of DR 3-101(A) and DR 6-101. The importance of the deposition in litigation stems, in part, from its potential use at trial to provide or impeach evidence. Such use is expressly allowed against any "party who was present or represented at the taking of the deposition. . ." C.R.C.P. 32(a).

In view of the potential for use of testimony taken by deposition against the client, utilization of lay assistants by the lawyer in client representation at the deposition would be inappropriate. The knowledge, judgment and skill necessary for proper decisions regarding examination, cross-examination or objections thereto, and other deposition strategies require the direct involvement of a licensed lawyer. Special circumstances may permit the use of lay legal assistants to attend depositions for the sole purpose of taking notes on testimony given or taken in actions or proceedings in which the client is either not a party or has only limited interest or involvement. In such special cases, the lawyer must, after careful evaluation, determine that the client's interests will not require participation in the deposition by examination or cross-examination of witnesses or making of objections to questions or testimony, or the consideration of stipulations, before authorizing such use of lay assistants.

The Supreme Court of the State of Colorado has permitted lay representation under certain limited circumstances before the Public Utilities Commission and before the Division of Employment and Training of the Colorado Department of Labor and Employment. *See, Denver Bar Assoc. v. Public Utilities Comm., supra*, and *Unauthorized Practice of Law Committee v. Employers Unity, Inc.*, 716 P.2d 460 (Colo. 1986). Absent such express permission by the Supreme Court of Colorado, lay representation of clients in adjudicatory proceedings before administrative agencies is deemed to constitute the unauthorized practice of law.

In those instances in which the use of lay legal assistants by the attorney would not constitute aiding the unauthorized practice of law and in those cases where lay representation is expressly authorized by the Supreme Court (*see, Denver Bar Assoc. v. Public Utilities Comm.*, and *Unauthorized Practice of Law Committee v. Employers Unity, Inc., supra*), the attorney must nonetheless ensure that the legal assistant possesses the requisite knowledge, judgment and skill necessary for proper and competent representation of the client's interests under all the circumstances, and that the ethical guidelines noted in Formal Opinion No. 61, adopted by the Committee on October 23, 1982, are observed. In this regard, attention is directed to the Guidelines for the Utilization of Legal Assistants, promulgated by the Legal Assistants Committee of the Colorado Bar Association, for guidance. (14 Colo. Law. 1599, Sept. 1985.)

The economic expenditure of the client's resources must always be an important consideration of the lawyer and proper utilization of legal assistants can be a valuable means to assist the lawyer in providing quality professional services to the public at a reasonable cost. Nonetheless, lawyers are ultimately responsible for the work product of their assistants and cannot aid or abet the unauthorized practice of law or delegate their ethical responsibilities mandated by the Code of Professional Responsibility.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 5.3 (regarding the use of non-lawyer assistants); Rule 1.1 (requiring competent representation); Rule 1.3 (reasonable diligence required in client representation); and Rule 1.4 (communication with client during representation).

80 LAWYER'S DUTY TO DISCLOSE MISTAKES IN COMMERCIAL CLOSING

Adopted February 18, 1989.
Addendum issued 1995.

Syllabus

In representing a client at the closing of a commercial transaction, a lawyer has both a duty of loyalty to the client and a duty of honesty and fair dealing to the other party and to the other party's attorney. If at the closing, one party or its attorney has made an undeniable mistake in the closing settlement statement regarding a basic assumption or element upon which the contract between the parties is based and silence by the other party would be conduct amounting to a knowing misrepresentation under the facts and circumstances, an attorney must advise his client to disclose the mistake rather than remain silent about the mistake and accept the benefits of it. If the client refuses disclosure, the attorney may not continue representing the client in the closing. To do so would violate DR 1-102(A)(4) and, depending on the facts, might also violate DR 7-102(A)(3), (5), (7) or (8). Whether the attorney also either is permitted or required to make disclosure to the other party depends on whether, under the facts and circumstances, the attorney's previous silence and other conduct, despite discontinuing participation in the closing, would be conduct by the attorney (i) involving dishonesty, fraud, deceit or misrepresentation, (ii) resulting in concealing or knowingly failing to disclose that which the attorney is required by law to reveal, or (iii) knowingly making a false statement of fact or law. If the attorney participates in the closing without disclosure being made and later determines disclosure should have been made, the attorney should call upon the client to rectify the error. If the client refuses, the lawyer may similarly be permitted or required to disclose the mistake to the other party, depending on the facts and circumstances.

Introduction and Summary of Facts

A request has been submitted to the Ethics Committee ("Committee") for its opinion regarding a lawyer's duties in representing a client in the closing of a commercial transaction when the lawyer realizes the other party, in preparing the settlement statement, has made an undeniable mistake regarding a basic assumption or element on which the contract between the parties is based. The mistake, if not discovered, will benefit the client financially. The client requests the attorney to not disclose the mistake. While the Committee does not know all of the facts and in any event cannot make factual determinations regarding individual circumstances, the Committee assumes that the following is a reasonably accurate summary of the situation in question:

> Attorney X ("Seller's Attorney") represents Client Y, a corporation ("Seller"), in the purchase and sale of Seller's assets to A, a corporation ("Buyer"), represented by B, an attorney representing Buyer ("Buyer's Attorney"). Z is the president and sole shareholder of Seller. The parties had entered into a written contract for the purchase and sale of Seller's assets. Among other typical provisions, the contract provided for the purchase price, including the assumption of certain liabilities by Buyer, and the allocation of the purchase price among the assets and assumed liabilities. It appears but it is not certain that the written contract was prepared by Buyer's Attorney. At the closing Buyer and Buyer's Attorney presented the contemplated closing documents and the closing settlement statement, apparently prepared by Buyer's Attorney. When Z and Seller's Attorney reviewed the closing settlement statement, they realized that it clearly and undeniably contained a conceptual and formatting error relating to the allocation of the purchase price. The effect of the error was that Seller would receive a net payment substantially in excess of that undeniably contemplated by and due under the sale and purchase contract. When Z and Seller's Attorney conferred about the closing documents and the error in the closing settlement statement, they speculated that

Buyer or Buyer's Attorney may have corrected or adjusted for the error in the disbursement checks to be delivered at the end of the closing. In any event Z requested of Seller's Attorney that, if at all possible, he did not wish to point out the mistake. No disclosure of the error was made. The parties proceeded with the closing. The final disbursements mirrored the closing settlement statement and the mistaken, excess payment was delivered to Seller.

All of these events occurred within a short period of time during which Seller's Attorney realized the conflict between his duty of loyalty to his client on the one hand and, on the other hand, his duty to act honestly and fairly in dealing with Buyer and Buyer's Attorney. Seller's Attorney did not know how to resolve the conflict and determine which duty was paramount and still permit the closing to occur. He states he therefore decided to participate in the closing and permit the erroneous disbursements to be made without any comment regarding the mistake, but to do so with the intent to resolve the problem after the closing.

Subsequently, in seeking guidance from various colleagues, Seller's Attorney received conflicting advice on how to assess his duties in the situation and on whether any obligation to disclose the mistake to Buyer and Buyer's Attorney existed at or after the closing. Therefore, Seller's Attorney decided to submit this inquiry to the Committee and so informed Z. In the meantime Seller's Attorney also advised Z that, should the mistake be discovered by Buyer or Buyer's Attorney, Buyer would have a good claim against Seller and Z for return of the excess money and in all likelihood they would be required to return the money. Also, Seller's Attorney advised Z to place the money in a separate account for safekeeping until this matter could be resolved.

For policy reasons the Committee frequently declines to answer requests regarding the completed conduct of a specific attorney. Completed events frequently involve many determinations of facts and applications of substantive law and require individual legal advice. Nevertheless, the Committee determined to address the general questions presented by this inquiry because they are particularly important for guidance to the bar and because this opinion may assist in the resolution of problems underlying the inquiry. The Committee offers no opinion regarding any party's duty and possible liability under applicable substantive law, for example, under principles of contract or agency law. Given the particular circumstances, the Committee also has recommended to the attorney presenting the inquiry to consider obtaining individual legal advice in this matter.

Questions Presented

1. In representing a client in the closing of a commercial transaction, what are a lawyer's duties to the client and to the other party when confronted by the other party's undeniable mistake regarding a basic assumption or element on which the contract between the parties is based, when the lawyer's client benefits financially from non-disclosure and the client requests disclosure not be made?

2. If the parties closed without disclosure having been made and in doing so the attorney had not been able to resolve the attorney's conflicting duties in the situation, what duty, if any, does that lawyer have to rectify the situation if the lawyer determines that disclosure was required at the closing?

Applicable Provisions of the Code of Professional Responsibility ("Code")

This opinion involves application of: DR 1-102(A)(4) (dishonesty, fraud, deceit or misrepresentation is misconduct); DR 4-101(B)(1) and (2) (a lawyer has the duty to maintain the confidences and secrets of his client); DR 4-101(C)(2) (when disclosure of confidences and secrets is permitted); DR 7-102(A)(3) (a lawyer shall not conceal or *knowingly* fail to disclose that which he is required by law to reveal); DR 7-102(A)(5) (a lawyer shall not *knowingly* make a false statement of law or fact); DR 7-102(A)(7) (a lawyer shall not counsel or assist his client in conduct that the lawyer *knows* to be illegal or fraudulent); DR 2-110(B) (mandatory withdrawal); and DR 2-110(C) and DR 7-101(A)(2) (permissive withdrawal).

Canon 1 states: "A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession." DR 1-102 Misconduct, in relevant part provides: "(A) A lawyer shall not . . . (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

Canon 4 states: "A Lawyer Should Preserve the Confidences and Secrets of a Client." DR 4-101 Preservation of Confidences and Secrets of a Client, in relevant part provides: "(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly: (1) Reveal a confidence or secret of his client. (2) Use a confidence or secret of his client to the disadvantage of the client." In DR 4-101(A) "confidence" is defined as "information protected by the attorney-client privilege under applicable law" and "secret" means "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." However, DR 4-101(C)(2) provides: "A lawyer may reveal: . . . . Confidences or secrets when permitted under Disciplinary Rules or required by law or court order."

Canon 7 states: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." DR 7-101 Representing a Client Zealously, provides "(A) A lawyer shall not intentionally: . . . (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B) . . . ." DR 7-101(B)(2) permits a lawyer to refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal. DR 7-102 Representing a Client Within the Bounds of the Law provides:

> (A) In his representation of a client, a lawyer shall not: . . . (3) Conceal or knowingly fail to disclose that which he is required by law to reveal. . . . (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

Regarding a lawyer's withdrawal from representation, DR 7-101(A)(2) provides that: "(A) lawyer shall not intentionally: . . . (2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105." DR 2-110 Withdrawal from Employment, provides: "(B) Mandatory Withdrawal. A lawyer representing a client . . . (in matters other than before a tribunal) . . . shall withdraw from employment, if: (2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule."

Legal Background

The inquiry presents the persistent problem of resolving a lawyer's sometimes conflicting duties of loyalty to the lawyer's client and the duties of candor and fairness when dealing with third parties. This opinion first describes the nature and scope of the applicable duties of Seller's Attorney and then presents the analytical bases for resolving any apparent conflicts among those duties and for choosing a proper course of conduct in the situation presented.

A. *Description of Seller's Attorney's Roles as Advisor and Representative and the Responsibilities Inherent in these Functions*

Attorneys perform different functions. Depending upon the circumstances and the functions being performed, an attorney's generally paramount duty of loyalty to the client may be affected by the client's and the attorney's coexisting duties to third parties or the courts. The following general examples are illustrative of the shifting circumstances. As legal advisors or counselors at law, attorneys listen to, consult with and give advice to their clients. With rare exception those communications are confidential. DR 4-101(B). As negotiators and representatives, outside the context of litigation, attorneys assist clients in solving problems or gaining opportunities. When providing such representation involves dealing with third parties, an attorney's duties may include duties to not only the client but also to third parties. See, for example, DR 1-102(A)(3), (4) and (5), DR 4-101(B), DR 4-101(C)(2) and (3) and DR 7-102(A)(3), (7) and (8). As advocates, attorneys resolve disputes within the context of our adversary system of justice, for the most part dealing with a client's past conduct and taking the facts as they happened. However, as an advocate, an attorney's loyalty in representing the client is subject to rules of conduct which prohibit presenting non-meritorious claims and require the lawyer's candor to the court. See, for example, C.R.C.P. 11 and DR 7-102.

Each of these different functions involves the lawyer-client relationship complicated to a greater or lesser degree by other varying relationships with and resulting duties to third parties or the courts. The

proper course of an attorney's conduct may depend on whether the lawyer is functioning as a legal advisor, transactional negotiator or representative, or as an advocate. EC 7-3 and EC 7-5. In this case the Committee begins its analysis with the fact that Seller's Attorney functioned both as a legal advisor and as the client's representative at the closing.

As a legal advisor, Seller's Attorney's responsibility is to assist Seller in evaluating present circumstances and in determining the course of future conduct and relationships. EC 7-3. In this capacity a lawyer furthers the interests of the client by giving his professional opinion regarding the applicable principles or rules of law, the client's legal responsibilities, duties and potential liabilities under the law, by expressing what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing the client of the legal and practical effect of various courses of action. EC 7-5.

Seller's Attorney also was the client's representative at the closing. This expanded role brings the added dimension of a third party relationship with Buyer and Buyer's Attorney. In this role Seller's Attorney is both a fiduciary and an agent, actively participating in the transaction on behalf of his client, the principal. As such Seller's Attorney's conduct is subject both to the provisions of the Code as an officer of the court and to applicable principles of agency law. Restatement (Second) of Agency § 1, comment e (1958). *See* DR 7-102(A)(3) and (7) as examples of ethical duties depending on requirements of substantive law. (For an exposition of the law of agency's significant import, both historically and legally, in analyzing an attorney's duty of confidentiality to a client in relation to the attorney's duty of truthfulness to third parties, *see* American Bar Association, *Annotated Model Rules of Professional Conduct* Comment and Legal Background to Rule 1.6 Con fidentiality of Information, 60-72, and Comment and Legal Background to Rule 4.1 Truthfulness in Statements to Others, 264-267 (1984).)

B. *Lawyer's Duty of Loyalty and Confidentiality of Information*

The fiduciary relationship between client and lawyer and the proper functioning of our legal system require the preservation by the lawyer of the "confidences" and "secrets" of the lawyer's client. EC 4-l. A lawyer's duty to protect a client's confidences and secrets is generally considered paramount. For example, ABA Formal Opinion 341 (1978), in balancing the lawyer's duty to preserve confidences against the obligation to reveal frauds, interpreted the phrase "privileged communication" in the 1974 Amendment to DR 7-102(B) as referring to those confidences and secrets that are required to be preserved by DR 4-101, thus substantially limiting in scope the possible disclosure mandated by DR 7-102(B). The principle requiring lawyer-client confidentiality is revered because it is recognized as serving important societal purposes. Attempts to circumvent or undermine the privilege, when properly invoked, are carefully scrutinized and exceptions narrowly construed. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383 (1981) (defining the scope of a corporate attorney's attorney/client privilege in light of important purposes served by the privilege).

The prohibition against disclosure of confidences extends to information which is protected by the attorney/client privilege. The existence of the attorney-client privilege in Colorado is established in C.R.S. § 13-90-107(1)(b) (1987 Repl. Vol.). A frequently quoted definition of the privilege is also found in *United States v. United Shoe Machine Corp.*, 89 F.Supp. 357, 358 (D. Mass. 1950):

> The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the Bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.
>
> *See also* 8 Wigmore, *Evidence* § 2292 (1961).

While the term "confidence" includes privileged attorney/client communications, DR 4-101(A) broadly defines "secret" to refer to "other information gained in the professional relationship that the client

has requested be held inviolate or the disclosure of which would likely be detrimental to the client." Despite the broad scope of confidentiality established by the Code, the law recognizes that the rules of confidentiality may not be used to further a fraudulent or illegal purpose or to engage in conduct that would violate the Code. *See Re Antitrust Grand Jury*, 805 F.2d 155 (6th Cir. 1986); *Caldwell v. District Court of Denver*, 644 P.2d 26 (Colo. 1982); *United States v. Bartlett*, 449 F.2d 700 (8th Cir. 1971), *cert. denied*, 405 U.S. 832 (1972); *United States v. Friedman*, 445 F.2d 1076 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971); *United States v. Mackey*, 405 F.Supp. 854, 860 (E.D.N.Y. 1975); *In the Matter of Callan*, 300 A.2d 868, 878 (N.J. Super. Ct. Ch. Div. 1973); *In re Selser*, 105 A.2d 395 (N.J. 1954); DR 7-102(A)(3) and (7); DR 7-102(B)(1); DR 4-101(C)(2). This legal concept is varyingly described as either an exception to the confidentiality rules or a matter outside the scope of the rules. Under either formulation, the result is the same: The confidentiality rules may be superseded by the policy of preventing conduct which is fraudulent, illegal or violates the disciplinary rules.

The facts giving rise to the instant inquiry — the discovery that Buyer or Buyer's Attorney has made an error in the closing settlement statement benefitting Seller — involve information that the Committee considers a "secret" under Rule DR 4-101(A). Seller's Attorney obtained the information about the error while performing work on behalf of a client. Moreover, it appears that the client does not wish the attorney to disclose the information. Accordingly, before disclosure can be required of Seller's Attorney, an exception to the confidentiality rules must be found to be applicable.

Analysis

An attorney's duties in any situation depend to some extent on the facts, circumstances and reasonable expectations of the parties. The setting here is the closing of the sale and purchase of a business. An important reality in any closing is that the parties already have struck a contract and the closing is to consummate that previous agreement. Under these circumstances, the parties reasonably expect that each is there to act fairly and in good faith to fulfill the ends of the agreement. See, for example, *Restatement (Second) of Contracts* § 205 (1979) and C.R.S. § 4-1-203. In this context certain actions have generally accepted meanings. For example, transfer documents are to transfer property under the terms and conditions required by the agreement. Similarly, closing settlement statements are intended in part to assist the parties in assuring each other that the agreement has been fulfilled to each party's satisfaction. In such a setting, approval or disapproval, acceptance or rejection and affirmation or negation are the corroborative proof by which the parties measure performance. In such a setting, the attorney is a key participant and his actions, reactions or inactions may have material meaning. And, in such a setting, silence may be meaningful conduct, a form of communication indicating approval or acceptance regarding the accuracy and conformity of documents and deliveries in the transaction.

Under these circumstances rules requiring honesty have a plain meaning. C.R.C.P. 241(B)(4) requires attorneys to act in accord with the highest standards of honesty, justice and morality. DR 1-102(A)(4) prohibits conduct involving dishonesty, fraud, deceit or misrepresentation. A simple hypothetical illustrates the point. Two parties agree that in exchange for a painting, $10 will be given. The Committee concludes it would be dishonest for the artist's lawyer to knowingly accept, without disclosure, a $100 bill if mistakenly delivered by the buyer instead of a $10 bill.

In this case, the Committee assumes, the calculation and allocation of the purchase price are basic and undisputed elements of the contract between the parties. The closing was to fulfill the agreements of the parties in the contract. Given the facts in the instant case, the Committee concludes it would be dishonest for Z and Seller's attorney to continue with the closing, to not point out the error in the closing settlement statement and to accept the overpayment.

In reaching this conclusion, the Committee also recognizes the common law standard of good faith adopted by Colorado courts. In *Ruff v. Yuma County Transp. Co.*, 690 P.2d 1296, 1298 (Colo. App. 1984), the Colorado Court of Appeals adopted *Restatement (Second) of Contracts* § 205 (1981) which requires that parties dealing with one another in business transactions act in good faith. *See also* related U.C.C. provisions at C.R.S. §§ 4-1-203, 4-2-103 and 4-1-201, adopting standards of good faith and fair dealing.

Similarly, under tort law, Colorado has adopted the provisions of the *Restatement (Second) of Torts* § 551 (1965) which provide in part:

> (2) one party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
>
> . . . .
>
> (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Bair v. Public Service Employees Credit Union, 709 P.2d 961, 962 (Colo. App. 1985). The same ideals are recognized by the Code. The Code requires honesty and truthfulness in dealing with third parties. *See, e.g.*, DR 1-102(A)(4); DR 7-102(a)(3) and (5). *See also, People v. Berge*, 620 P.2d 23 (Colo. 1980).

Depending on the actual facts and circumstances in this or a similar situation, other provisions of the Code may apply as well. For example, DR 7-102(A)(7) prohibits a lawyer from counseling or assisting his client in conduct that the lawyer knows to be illegal or fraudulent. The Committee is of the view that "illegal conduct" means conduct in violation of the criminal laws. *See*, American Bar Foundation, *Annotated Code of Professional Responsibility* 11 (1979). The Committee assumes that Seller's conduct in not rectifying the Buyer's mistake is not criminal. The question remains whether such conduct is fraudulent. Such a determination involves deciding issues of fact and substantive law. The Code gives no guidance in applying the rule. In any event, the Committee does not make decisions of substantive law. The Committee makes no decision whether the facts involve fraud by Seller or Seller's Attorney. However, the Committee's research indicates almost a total absence of analytical examples of interpreting and applying Code provisions which by their terms depend on determinations of substantive law. Therefore, the Committee believes that a general summary of some of the possibly applicable principles of substantive law would by illustration assist the bar in interpreting and applying such Code provisions.

In Colorado the well-recognized, elementary constituents of fraud in a contractual relationship include concealment of a material existing fact, that in equity and good conscience should be disclosed. *Morrison v. Goodspeed*, 68 P.2d 458, 462 (Colo. 1937). Colorado recognizes that nondisclosure of a fact may result in fraudulent misrepresentation. For example, *Cahill v. Readon*, 273 P. 653 (Colo. 1929); *Bohe v. Scott*, 265 P. 694 (Colo. 1929); CJI-Civ.2d 19:2, 19:5 (1980); Restatement (Second) of Contracts §§ 159 and 161 (1981). In resolving the question of whether nondisclosure of a material fact is fraudulent, the Colorado Supreme Court has stated:

> . . . fraud may be committed by the suppression of truth as well as the suggestion of falsehood. *The test of liability for failure to disclose facts material to the transaction is some duty, legal or equitable, arising from the relations of the parties, such as that of trust or confidence, or superior knowledge or means of knowledge*. When in the circumstances of the particular case such duty is present, failure to disclose a material fact with intention to mislead or defraud is equivalent to a fraudulent concealment of the fact, and stands no better than the affirmation of material misrepresentation. (Emphasis in original.)

In re Cisneros, 430 P.2d 86, 89 (Colo. 1967) quoting with approval from *Newell Bros. v. Hanson*, 97 Vt. 297, 304, 123 A. 208, 210 (1924).

Similarly, in a tort action for misrepresentation the plaintiff must prove: (1) a false representation by the defendant; (2) the defendant's knowledge that the representation was false; (3) plaintiff's ignorance as to the falsity of the representation; (4) defendant made the representation with the intent that plaintiff should act on it; and (5) damage to the plaintiff. *Morrison v. Goodspeed*, 68 P.2d 458, 462 (Colo. 1937). *See also* W. Prosser, *Torts* § 105 (4th Ed. 1971). Also, a false representation may be the failure to disclose a material existing fact which in equity and good conscience should have been disclosed. *Schnell v. Gustafson*, 638 P.2d 850 (Colo. App. 1981) citing *McNeill v. Allen*, 534 P.2d 813, 818 (Colo. App. 1975). *See also Morrison, supra* at 462.

Determining the existence of fraud also may depend on other factors such as Buyer's or Buyer's Attorney's possible negligence in committing the error in the first instance and possibly related issues of justifiable reliance.

Summarizing, the critical choices for Seller's Attorney involve determining how to protect his client's confidences and secrets while not engaging in prohibited conduct in advancing the client's interests in the third party relationships with Buyer. Generally, prohibited conduct in this context would mean conduct which violates the provisions of DR 1-102(A)(4) or DR 7-102(A).

Conclusion

A. *Resolution During the Closing*

Based on the foregoing, how should Seller's Attorney proceed? Realizing that continued participation in the closing without disclosure would involve dishonesty and assisting his client in possibly fraudulent conduct, Seller's Attorney should explain to Z why disclosure is required and the possible practical and legal effects of failure to disclose. On this basis, Seller's Attorney should advise Z to point out the error in the closing settlement statement. Based on the collective experience of its members, the Committee believes most instances of this sort would be resolved at this juncture based on the attorney's professional stature and ability to influence a client to do at least what the law requires and what people reasonably expect as requirements of good faith and fair dealing.

If Z refuses and instructs Seller's Attorney not to disclose the error, Seller's Attorney must decline to do so. If Z persists, Seller's Attorney must withdraw from representation and decline to participate further in the closing. Withdrawal is mandatory under DR 2-110(B)(2) because continued representation clearly involving dishonest conduct by the lawyer would violate DR 1-102(A)(4). Depending on the facts, withdrawal also could be required if continued representation would result in violation of any of DR 7-102(A)(3), (5), (7) and (8). These provisions prohibit such conduct as knowingly failing to disclose that which is required by law to reveal, knowingly making a false statement of fact and knowingly engaging in other conduct contrary to a Disciplinary Rule.

Whether, in addition to withdrawing from representation, Seller's Attorney also is permitted or even may be required to disclose the error depends on the facts, particularly Seller's Attorney's own statements or other conduct prior to withdrawing. For example, if such conduct by Seller's Attorney was equivalent to a representation that the closing settlement statement was accurate, and Seller's Attorney knows that to be the case, disclosure is permitted under DR 4-101(c)(2) and required by DR 7-102(A)(3), (5) or (8). These rules requiring disclosure where the lawyer's own conduct is the critical question are recognized exceptions to the strict duty of confidentiality regarding communications and information.

B. *Resolution Following the Closing*

Finally, the Committee turns to the question of Seller's Attorney's duties in the event of a completed closing, without disclosure, and delivery of the overpayment.

In this case Seller's Attorney arguably acted in good faith in proceeding with the closing without disclosure at the request of his client because he was not certain how to balance the apparently conflicting duties. Z and Seller's Attorney had a common law duty of honesty and fair dealing which may have been breached by the failure to disclose the error. Also, Seller's Attorney's conduct appears to have been inconsistent with his obligation not to engage in conduct involving dishonesty or misrepresentation insofar as he knew the truth of the error and refrained from comment, albeit only at the client's request. Under such apparent circumstances, the Committee concludes an attorney may rectify the error.

Since there may now exist differing interests between Seller and Z on the one hand and Seller's Attorney on the other hand, Seller's Attorney should so inform Z and Seller, but do so in calling upon Seller and Z to rectify the overpayment. If Seller declines, Seller's Attorney is permitted to disclose the overpayment to Buyer under DR 4-102(C)(2). The Committee reaches this conclusion for several reasons. Seller's Attorney still owes a duty of loyalty to Seller. However, withdrawal no longer is a viable means of

Seller's Attorney's honoring loyalty to his client while not otherwise engaging in unethical conduct himself. The Committee recognizes that the information is a "secret" under Canon 4. However, keeping the secret "confidential" places the attorney in the possible position of a continuing violation of DR 1-102(A)(4) and DR 7-102(A)(8) and possibly DR 7-102(A)(3).

If the actual facts surrounding nondisclosure were determined to be fraudulent conduct by Seller's Attorney, the Committee's view is that disclosure would be permissible under DR 4-101(C)(2) and required by DR 7-102(A)(5). DR 7-102(A)(5) prohibits a lawyer from "knowingly mak[ing] a false statement of law or fact." Since lawyers must not engage in deliberate deception, DR 4-101 does not prevent a lawyer from correcting intentionally false or misleading statements made in violation of Rule 7-102(A)(5).

Afterword

In view of this opinion's introductory remarks emphasizing how a change in the lawyer's role or function may alter the analysis and require results different than disclosure of confidential information, two additional illustrations are offered.

The first example involves a defense lawyer's representation in a criminal case. In *People v. Schultheis*, 638 P.2d 8 (Colo. 1981), the defendant had insisted upon presenting perjured testimony through alibi witnesses. The trial court refused the defense attorney's request to withdraw. Defense counsel proceeded with the defense but refused to call the alibi witnesses. After conviction of murder in the first degree, the defendant appealed. He claimed that he was deprived of his constitutional right to effective assistance of counsel because defense counsel refused to present the testimony of the alibi witnesses.

In affirming the conviction, Justice Erickson, on behalf of a unanimous Court, illuminated the course for an attorney's resolving the difficult conflict between loyalty to the client and candor to the tribunal under these circumstances. As its beginning principle, in the interest of preserving the integrity of the American adversary system of criminal justice, the Court held that a lawyer may not offer testimony of a witness which the lawyer knows is false, fraudulent or perjured. DR 7-102(A)(4), (7) and (8). When serious disagreement occurs between defense counsel and the accused, and counsel is unable to dissuade the client from insisting that fabricated testimony be presented by a witness, counsel should request permission to withdraw from the case. DR 2-110(C)(l)(c). In making the request, the lawyer should not reveal to the trial judge the specific reason for the motion to withdraw. Rather, counsel should only state, in support of the motion to withdraw, that there exists an irreconcilable conflict with his client. If the motion to withdraw is denied, counsel must continue to serve as defense counsel, but must not present the perjured testimony. The attorney's refusal to call particular witnesses, because obedience to ethical standards prohibits presentation of fabricated testimony, does not constitute ineffective assistance of counsel. EC 7-26. This case illustrates how, in an adversarial situation, an attorney should seek to maintain client confidences while not, by his own conduct, presenting false evidence.

The second example involves a tax lawyer who, in reviewing the past tax returns of a new client, discovers that some time in the past on a concluded matter the government had made a $100,000 error, to the client's benefit, in calculating the client's tax liability. The Chicago Bar Association Professional Responsibility Committee considered this situation in its Opinion 864 (updated). That committee opined that a lawyer whose client benefitted financially from the government's erroneous calculation of the client's tax liability is not ethically required to disclose the error to the government unless the lawyer's failure to disclose the error would perpetrate a fraud *by the lawyer* (and not the client) on the government. The lawyer may, but is not required to, disclose the government's error if the client consents to such disclosure or if disclosure is required by law. The analysis in Opinion 864 of the Chicago Bar Association Professional Responsibility Committee is consistent with the Committee's analysis in the present opinion. While the attorney should not reveal confidential information about the client's past affairs, the attorney may not, by his own conduct, engage in dishonest, fraudulent or misleading behavior.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.2 (regarding scope of representation); Rule 1.2(d) (which prohibits a lawyer from engaging in or assisting a client in conduct that the lawyer knows is fraudulent); Rule 1.2(e) (regarding the requirement that the lawyer shall consult with the client regarding limitations on the lawyer's conduct regarding assistance not permitted by the Rules of Professional Conduct or other law); Rule 1.6 (confidentiality of information); Rule 1.16 (declining or terminating representation); Rule 3.4 (regarding fairness to opposing party and counsel); Rule 4.1 (regarding truthfulness in statements to others); Rule 4.3 (regarding dealing with unrepresented person); Rule 8.4 (regarding misconduct) and 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation).

81 LAWYER'S PARTICIPATION IN PREPAID LEGAL SERVICE PLANS

Adopted March 18, 1989.

Introduction and Scope

Over the past few years, the Committee has received a number of inquiries regarding the propriety of lawyers' participation in various prepaid legal service plans. It is presently estimated that 13.5 million people nationwide are enrolled in prepaid plans, and of those only 2.3 million people are participants in union or association funded plans. Aggregate Legal Services Plan Statistics, National Resource Center for Consumers of Legal Services, Legal Plan Letter, No. 147 (March 8, 1988); *ABA/ BNA Lawyers' Manual on Professional Conduct*, 81.2505. The purpose of this opinion is to aid Colorado lawyers in assessing the propriety of their participation in prepaid legal plans, or in their representation of clients who are members of such plans. In achieving this purpose, this opinion sets forth criteria for prepaid plans in which it is ethically permissible for an attorney to participate.

Syllabus

A lawyer may not accept employment through a prepaid legal service plan if the lawyer knows or should know that said plan is in violation of applicable laws, rules of court, other legal requirements that govern its legal services operations, or any Disciplinary Rule. DR 2-103(E). A lawyer may accept work from a *non-profit closed panel*[1] provider, so long as a member or beneficiary may select his or her own counsel when representation by the provided counsel would be unethical, improper or inadequate. A lawyer may accept work from a *for profit* panel provider so long as (1) it is an *open panel* plan; *or* (2) it is a *closed panel* plan *and* the organization providing the plan "bears ultimate liability of its member or beneficiary," *and*, further, a member or beneficiary may select his or her own counsel when representation by the provided counsel would be unethical, improper or inadequate. DR 2-103(D)(4)(a) and (e). The plan must provide that the plan member or beneficiary, and not the plan, be recognized as the client. DR 2-103(D)(4)(d). Further, the plan must allow the participating lawyer to exercise independent professional judgment, to maintain client confidences, to practice competently, and to avoid conflicts of interest. Finally, the plan must advertise and solicit plan members within the ambit of DR 2-101.

General Discussion

A. *DR 2-103: Participation in Prepaid Legal Service Plans*

Disciplinary Rule 2-103 permits attorneys to participate in certain types of prepaid legal service plans. That rule provides in pertinent part:

> DR 2-103 Recommendation of Professional Employment
>
> . . .
>
> (B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D) . . .
>
> . . .
>
> (D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm except as permitted in DR 2-101. However, this does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from being recommended, employed or paid by, or cooperating

with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

. . .

(4) Any bona fide organization that recommends, furnishes, or pays for legal services to its members or beneficiaries *provided all of the following conditions are satisfied*:

(a) *Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised, or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.*

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate, or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services recommended, furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that recommended, furnished or paid for by the organization for the particular matter involved. *The legal service plan of such organization must contain a reasonable procedure enabling a member or beneficiary to obtain alternate counsel, under similar terms, when representation by the counsel recommended, furnished or paid for by the plan would be unethical, improper, or inadequate under the circumstances.*

(f) Such organization has filed in duplicate with the Clerk of the Colorado Supreme Court at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities.

(Emphasis supplied).

B. *Non-Profit vs. For Profit Plans, and Open Panel vs. Closed Panel Plans*

Opponents of closed panel plans (where the plan chooses the members' attorney) argue that such panels foster improper solicitation, threaten attorney-client relationships, result in poorer work quality, and foster a conflict of interest between the client-member and the plan hiring the attorney. *See generally* Comment, *State Prohibition on Closed Panels – the Constitutional Question*, 27 Baylor L. Rev. 590 (1975). *See, e.g.*, Alabama Ethics Opinion 87-104 (1/4/88) (lawyer who is a shareholder, officer or director for a prepaid legal service plan may also represent clients under the plan, but may not sell plan memberships, or use plan as a solicitation tool); Michigan Ethics Opinion CI-1180 (1/18/88) (lawyers may participate in plan which does not select lawyers for clients, and does not exercise control over lawyers' delivery of legal services). At least one court has held that restrictions requiring that for-profit plans be open panel plans *are* constitutional, on the ground that a profit-motivated organization deserves only commercial speech protection, and not the broader associational freedom protection. *Cuyahoga County Bar Association v. Gold Shield, Inc.*, 52 Ohio Misc. 105, 369 N.E.2d 1232, 1236 (Ohio Ct. Common Pleas 1975) (group legal services corporation not constitutionally protected because primary purpose was to "provide monetary profits for the corporation," and "making legal services available to its members was only incidental.").

On the other hand, proponents of for-profit closed panel plans argue that restrictions on such plans violate the freedom of association guaranteed under the First and Fourteenth Amendments to the United

States Constitution. *See Student Government, University of North Carolina at Chapel Hill v. Council, North Carolina State Bar*, No. C-C-76-346 (W.D.N.C. 1977) (provision restricting all prepaid plans in North Carolina to open panels found to violate First and Fourteenth Amendment rights of plan members). *See generally, Great Western Cities v. Binstein*, 476 F. Supp. 827, 834 (N.D. Ill. 1979), *aff'd* 614 F.2d 775 (7th Cir. 1979) (association of defrauded lot owners had First Amendment protection to enable its members to engage legal representation).

As DR 2-103(D)(4)(a) now stands, *non-profit closed panel plans are permitted*, so long as a member or beneficiary actually has the opportunity to select his or her own counsel when representation by the provided counsel would be "unethical, improper, or inadequate under the circumstances." However, *for-profit plans must be open panel plans*, except where the organization providing the plan "bears ultimate liability of its member or beneficiary."[2]

C. *Additional Ethical Issues*

A variety of ethical issues confront lawyers who participate in for-profit prepaid legal service plans. It is the participating lawyer's responsibility to insure that the plan complies with the Colorado Code of Professional Responsibility ("Code"). A lawyer who participates in a plan that violates the Code may violate a number of disciplinary rules, including DR 2-103(E), which provides

> (E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule or when such lawyer knows or has cause to know that a legal assistance organization (including a qualified legal assistance organization), through which such a lawyer accepts employment, is in violation of applicable laws, rules of court, and other legal requirements that govern its legal services operations.[3]

While this Opinion does not purport to be an exhaustive review of all potential ethical problems associated with for-profit prepaid legal service plans, the following ethical issues arise in many, if not all, plans and must be resolved before a lawyer ethically may participate in the plan. *See* American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 87-355 (12/14/87).

1. Professional Independence

DR 2-103(D)(4)(d) requires that the plan member or beneficiary, and not the plan itself, be recognized "as the client of the lawyer in the matter." Further, DR 5-107 states that "[a] lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." Thus, a lawyer may not permit a plan to interfere with his or her exercise of independent judgment. Once a legal matter has been referred to a lawyer, the member or beneficiary becomes the lawyer's client, and it would be improper for the plan to oversee, direct or interfere with the legal matter in any way.

The ABA's Formal Opinion 87-355, entitled Lawyers' Participation in For-Profit Prepaid Legal Service Plan, points out potential problems which might arise in the area of lawyers' independence:

> . . . For example, there is certainly the potential for economic control of a lawyer who is sufficiently involved in a plan to become financially dependent upon it. Therefore, the precise relationship between the participating lawyer and the plan sponsor is an important consideration. To the extent that the participating lawyer or law firm's practice is exclusively or predominantly dependent upon the plan, the issue of assuring the independence of the lawyer's professional judgment becomes more serious. It is, of course, a question of fact as to whether the lawyer's financial dependence upon the plan's sponsor is so extensive that it affects the lawyer's judgment

Other requirements in the plan also may present a potential for improper control by the plan sponsor of the lawyer's conduct. No provision may interfere with the lawyer's professional judgment. For

example, if the plan undertakes to set limits on the amount of time a lawyer may spend with each client's case, or to fix the number of cases which must be handled by a lawyer, or to require the lawyer to commit to the plan that the lawyer will not represent a client beyond the scope of the agreement in the plan, the plan may interfere with the lawyer's independent professional judgment.

The agreement entered into between the plan and the participating lawyer should be in writing, and make clear that the participating lawyer shall use his or her independent professional judgment, and that the plan sponsor will not attempt to interfere in the exercise of that judgment.

Those plans that limit the amount of lawyer time provided or establish fixed or arbitrary allocations of lawyer time between "trial" time on the one hand and "preparation or pre-trial time" on the other hand, have a serious potential for violation of DR 5-107(B). It is obvious that a lawyer cannot provide "preparation adequate in the circumstances" when the lawyer is limited to two or three hours of preparation in a substantial civil or criminal case. While it is true that the lawyer may spend the necessary preparation time (and not get paid by the plan for the necessary preparation time), human nature is such that a serious question will be raised as to whether under such circumstances, the required "preparation adequate in the circumstances," has been provided. DR 6-101(A)(2).

It may be possible for the participating lawyer to enter into a supplemental fee agreement directly with the client to provide that the client will be liable for the necessary lawyer time that is not paid by the plan. Nonetheless, in cases where the lawyer determines that the legal matter cannot be competently handled under the time constraints of the plan, and the lawyer determines that no satisfactory supplemental fee agreement can be reached, the lawyer must decline the employment.

Finally, certain plans may exclude from coverage claims, defenses, or positions which, in the opinion of the attorney handling the case, or in closed panel plans the "provider attorney,"[4] will not prevail in court. Any such provision creates an obvious conflict between the client's right to zealous representation and the attorney's financial interests. For instance, if in the course of handling a piece of litigation an attorney concludes that he or she has less than a fifty percent chance of prevailing at trial, the lawyer may be inclined to urge settlement in order to insure that he or she will get paid.

2. Competence

DR 6-101(A)(1) requires that a lawyer not handle a legal matter which he or she knows or should know the lawyer is not competent to handle. Further DR 6-101(A)(2) requires that a lawyer not handle a legal matter without adequate preparation. Therefore, a plan must not require a lawyer to take a case which he or she is not competent to handle; and the plan must not be structured in such a way as to encourage or require inadequate preparation (such as by paying for lengthy trial time, but a minuscule amount of trial preparation time). *See* ABA Formal Opinion 87-355; District of Columbia Ethics Opinion 170 (4/15/86) (lawyer may participate in plan, provided any advertising complies with Code provisions prohibiting misleading advertising and solicitation).

3. Confidentiality

DR 4-101 prohibits a lawyer from revealing a client's confidence or secret; using a client's confidence or secret to the client's disadvantage; or using a client's confidence or secret for the lawyer's or a third person's advantage, unless the client consents after full disclosure. Thus, plan quality control mechanisms or other features which would require an attorney to disclose client confidences or secrets would require a lawyer *not* to participate in such a plan.

4. Conflicts of Interest

DR 5-105, DR 5-106 and DR 5-107 require lawyers to avoid conflicts of interest. A lawyer should be wary of plans which impose any restrictions upon a lawyer's ability to represent a member or beneficiary once they become clients. Further, some plans attempt to prohibit a participating lawyer from bringing certain causes of action against the plan or other plan members. In such a case, an attorney rejecting such a

matter should advise the client to consult with other counsel, so that the member-client is not inadvertently misled into believing that the action has no merit. *See* ABA Formal Opinion 87-355.

5. Advertising and Solicitation

A lawyer should not participate in or perform work for a legal services plan which engages in false or misleading advertising, or involves undue influence, intimidation, invasion of privacy or harassing or vexatious conduct. DR 2-101. In particular, DR 2-101(B) provides:

> (B) Without limitation, and by way of example only, a false, fraudulent, misleading, or deceptive statement or claim includes a statement or claim which:
>
> (1) Contains a material misrepresentation;
>
> (2) Omits to state any material fact necessary to make the statement, in light of all circumstances, not misleading;
>
> (3) Is intended or is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate any disciplinary rule or other law;
>
> (4) States or implies that a lawyer is a certified or recognized specialist other than as permitted by rules of the Colorado Supreme Court;
>
> (5) Is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official;
>
> (6) Contains a representation or implication that is likely to cause a reasonable person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make the representation or implication not deceptive

Thus, a participating lawyer must assure that all advertising is accurate, and that it does not mislead or create unjustified expectations. *See* District of Columbia Bar Ethics Opinion 170 (4/15/86); Kentucky Bar Association Ethics Opinion 312 (8/86).

A plan that advertises that a subscriber may use the services of a lawyer of the subscriber's choice, but fails to establish reasonable and effective procedures to enable the subscriber to do so is misleading. Also misleading is a plan that is advertised as providing adequate legal representation in substantial litigation matters, when the plan limits preparation time to an amount of time that is manifestly insufficient.

Finally, a lawyer may not initiate or promote a legal services plan for the primary purpose of "providing financial or other benefit" to the lawyer, or his or her firm, DR 2-103(D)(4)(b); and a plan may not be operated "for the purpose of providing legal work or financial benefit for any lawyer. . . ." DR 1-103(D)(4)(c). *See Cuyahoga County Bar Association v. Gold Shield, Inc.*, 52 Ohio Misc. 105, 369 N.E.2d 1232, 1236 (Ohio Ct. Common Pleas 1975).

NOTES

1. An *open panel* prepaid legal service plan permits members or beneficiaries to choose their own attorneys. A *closed panel* plan permits members or beneficiaries to use only those attorneys designated by the plan.

2. Rule 7.3 of the ABA Model Rules abandoned the distinction between open and closed panel plans, in order to encourage the development of group legal services. As of 1988, Alaska, Colorado, Iowa, Kentucky, New York, Ohio, Texas and Tennessee retained the distinction in DR 2-103(D)(4)(a). BNA *Lawyers' Manual on Professional Conduct*, 81:2504.

3. This opinion discusses only issues dealing with ethical concerns. It does not discuss other potential legal issues arising out of prepaid legal service plans. For instance, it is not clear whether the plans are, or are not, insurance. At least one court has held that they are not. *Feinstein v. Attorney-General*, 36 N.Y.2d 199, 326 N.E.2d 288 (N.Y. App. 1975) (interpreting New York insurance code). Colorado law is not clear. *See* C.R.S. §§ 10-1-102(7) and 10-3-1102(2) (1973). In 1979, then Colorado Insurance Commissioner Barnes issued a letter to a provider saying that the contract then offered was not insurance. The Committee is informed, however, that the Colorado Insurance Commissioner is presently

revisiting the entire issue, but no final decision has been reached. Further, certain potential aspects of setting minimum or maximum fees, the vertical integration of closed panel plans, discrimination or boycotts against competing plans, and exclusive dealing arrangements pose the risk of violation of the antitrust laws. Meeks, "Antitrust Aspects of Prepaid Legal Service Plans," 1976 ABF Research Journal 855; Annot., "Prepaid Legal Services Plans," 93 A.L.R.3d 199.

4. A "provider attorney" in a closed panel plan is the attorney or firm selected by the plan sponsor to perform the members' work.

82 ASSERTION OF ATTORNEY'S RETAINING LIEN ON CLIENT'S PAPERS

Adopted April 15, 1989.
Addendum issued 1995.

Introduction and Scope

Assertion of Attorney's Retaining Lien on Client's Papers

The Ethics Committee of the Colorado Bar Association has been requested to provide guidance to many Colorado attorneys regarding ethical considerations in asserting a retaining lien on clients' papers in their possession under C.R.S. § 12-5-120 (1973). This opinion discusses situations in which it may *not* be ethically permissible to assert such a lien.

Syllabus

A lawyer may ethically assert a retaining lien on a client's papers, thereby keeping the papers, when the client is financially able to pay outstanding fees, but fails or refuses to do so. If, however, one or more of the following circumstances is present, then a lien may *not* be asserted: (1) there is no legal basis for the assertion of the lien; (2) the lawyer has been suspended or disbarred; (3) the lawyer is guilty of misconduct in the particular matter; (4) the representation is in a contingency fee case prior to completion of the case; (5) the client furnishes adequate security; (6) the client's papers are essential to the preservation of an important personal liberty interest; (7) the lawyer has withdrawn without just cause or reasonable notice; (8) the lawyer is validly discharged for professional misconduct or conduct prohibited by the Code of Professional Responsibility; and (9) the client is financially unable to post a bond or pay the fees, unless the client's inability to pay or post bond is a result of fraud or gross imposition by the client.

General Discussion

A. *C.R.S. § 12-5-120: The Retaining Lien on Client's Papers*

> C.R.S. § 12-5-120 (1973) states in pertinent part that:
>
> An attorney has a lien for a general balance of compensation upon any papers of his client which have come into his possession in the course of his professional employment . . . from the time of giving notice of the lien to that party.[1] Attorneys are permitted to acquire interests in causes of action or the subject matters of litigation they are conducting for clients in order to protect their rights to collect fees by the assertion of legally permissible liens. DR 5-103(A)(l); EC 5-7.

B. *General Legal Limitations on the Assertion of Retaining Liens on Clients' Documents*

A lawyer's right to assert a retaining lien is not absolute. The right may be limited by legal and ethical considerations.[2] In Colorado, there is no common law attorney's lien, and no lien exists except under the statute. *Donaldson v. Gaudio*, 260 F.2d 333 (10th Cir. 1958). In order for an attorney to assert a retaining lien, the client must owe the attorney a general balance of compensation. *People v. Garnett*, 725 P.2d 1149, 1154 (Colo. 1986) (*en banc*); *People ex rel. Goldberg v. Gordon*, 199 Colo. 296, 609 P.2d 995, 997 (1980) (*en banc*). The retaining lien, as a passive possessory lien, may be lost if the lawyer voluntarily relinquishes possession of the items to which the lien has attached. *See, In re Southwest Restaurant Systems, Inc.*, 607 F.2d 1243 (9th Cir.), *cert. denied*, 444 U.S. 1080 (1979); *Attorney Grievance Commission v. McIntire*, 286 Md. 87, 405 A.2d 273 (1979); 7 Am.Jur.2d Attorneys at Law §§ 315 and 322. Moreover, if a lawyer sues a client to recover fees and expenses, the lawyer forfeits the right to exclusive possession of the client's papers relevant to the fee dispute, and the lawyer can be required to produce them for inspection pursuant to

C.R.C.P. Rule 26(b)(1). *Jenkins v. District Court*, 676 P.2d 1201, 1204-05 (Colo. 1984). *See, Intaglio Service Corp. v. J.L. Williams & Co.*, 112 Ill. App.3d 824, 445 N.E.2d 1200, 1201-1204 (1st Dist. 1983); "Attorney's Retaining Lien as Affected by Action to Collect Legal Fees," 45 A.L.R. 4th 199; Klein and Todd, "The Treatment of Attorney's Liens in Colorado," 16 *The Colorado Lawyer* 623, 624 (April 1987).

Finally, an attorney who has asserted a lien may be compelled to produce documents to the client's adversary, since it would be inequitable to deny a litigant access to relevant and perhaps essential proof, merely because the opposing party had failed to pay attorney's fees. *Lucky-Goldstar International (America), Inc. v. International Mfg. Sales Co.*, 636 F.Supp. 1059, 1064-65 (N.D.Ill. 1986); *Tri-Ex Enterprises v. Marzon Guar. Trust Co.*, 583 F.Supp. 1116, 1118 (S.D.N.Y. 1984).

C. *Ethical Limitations on the Assertion of Retaining Liens*

In *Jenkins v. District Court*, 676 P.2d at 1204, the Colorado Supreme Court stated:

> There is little doubt that an attorney who withdraws from a case for justifiable reason, or is terminated by his client without cause, may recover compensation for his services. In such situations the attorney has the right to a retaining lien upon the books, papers, securities, and money of his client in his possession.

Nonetheless, the ethical propriety of asserting a retaining lien is not absolute under the Code of Professional Responsibility. An attorney must be guided by high ethical standards. *MacFarlane v. Harthun*, 195 Colo. 38, 581 P.2d 718 (Colo. 1978) (*en banc*). *See, Miller v. Paul*, 615 P.2d 615, 619 (Alaska 1980); *Saucier v. Hayes Dairy Products, Inc.*, 373 So.2d 102, 116-117 (La. 1979) (*on reh'g*). An attorney must also refrain from "conduct that is prejudicial to the administration of justice." DR l-102(A)(5).

Further, DR 7-101(A)(2) requires that a lawyer shall not intentionally fail to carry out a contract of employment entered into with a client, although a lawyer may withdraw as permitted under DR 2-110, DR 5-102, and 5-105. When a client "deliberately disregards an agreement or obligation to the lawyer as to expenses or fees," the lawyer may cease representing the client. DR 2-110(C)(1)(f). The lawyer must nonetheless take "reasonable steps to avoid foreseeable prejudice to the rights of his client, including . . . delivering to the client all papers and property to which the client is entitled. . . ." DR 2-110(A)(2). Ethical Consideration 2-32 also states in part:

> A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm.

Various court decisions and bar association ethics opinions have stated that an attorney may not ethically assert a retaining lien in the circumstances described below:

1. There is no legal basis for the assertion of the lien. *See, Garnett*, 725 P.2d at 1154-55 (Colo. 1986) (*en banc*) (client did not yet owe any fees); *People v. Razatos*, 636 P.2d 666, 669-671 (Colo. 1981) (*en banc*) (attorney had "uncertain claim to the fee on which the purported lien was founded").

2. A lawyer has been suspended or disbarred. In this situation, the lawyer may not assert a retaining lien with respect to any matter. This result is because "[t]he foundation of our profession is based upon honor, trust and the highest standards of integrity . . ." *MacFarlane v. Harthun, supra*, 581 P.2d at 718-19.

3. A lawyer is guilty of misconduct in the particular matter. Even if the lawyer is not suspended or disbarred, the lawyer may not assert the lien in that matter, but may assert the lien in other matters in which there has been no misconduct. *MacFarlane v. Harthun, supra*, 581 P.2d at 718.

4. In a contingency fee case, prior to the completion of the case. *People v. Radinsky*, 182 Colo. 259, 512 P.2d 627 (1973) (*en banc*).

5. A client who can not pay the fees furnishes adequate security, or posts an adequate bond. *See, e.g., Jenkins v. District Court, supra*; *Morse v. Eighth Judicial Court*, 65 Nev. 275, 195 P.2d 199 (1949);

Steiner v. Stein, 141 N.J. Eq. 478, 58 A.2d 102 (1948); District of Columbia Bar Association Opinion No. 191 (4/19/88) (a lawyer may not withhold a client's file during a fee dispute if the client has offered adequate security, such as a bond or a letter of credit).

6. The client's papers are essential to preserve an important personal liberty interest, or defense of a criminal charge. *See, e.g. Jenkins v. District Court, supra*, 676 P.2d at 1204, n. 3; *Jenkins v. Weinshienk*, 670 F.2d 915, 919-20 (10th Cir. 1982); *Hauptmann v. Fawcett*, 243 A.D. 613, 276 N.Y.S. 523, modified, 243 A.D. 616, 277 N.Y.S. 631 (App. Div. 1935); ABA Informal Opinion No. 1461.

7. The lawyer has withdrawn without just cause or reasonable notice. *Jenkins v. Weinshienk, supra*, 670 F.2d at 920.

8. The lawyer is validly discharged for professional misconduct, or conduct prohibited by the Code of Professional Responsibility. *See*, Note, "Attorney's Retaining Lien Over Former Client's Papers," 65 *Colum. L. Rev.* 296 (1965); *Miller v. Paul*, 615 P.2d at 620 (Alaska 1980).

9. "[W]hen the client is financially unable to post a bond or pay, unless the client's inability to pay or post bond is a result of fraud or gross imposition by the client." *Jenkins v. Weinshienk, supra*, 670 F.2d at 920.

ABA Informal Opinion No.1461 states:[3]

> . . . Financial inability of the client to pay the amount owing should also cause the lawyer to forego the lien because the failure to pay the fee is not deliberate and thus does not constitute fraud or gross imposition by the client. The lawyer should forgo the lien if he knew of the client's financial inability at the beginning or if he failed to assure agreement as to the amount or method of calculating the fee.

In sum, absent the exceptions stated above, a lawyer may ethically assert a retaining lien on a client's papers when the client is financially able to pay fees, but fails or refuses to do so.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.8(j) (providing the same exception to the prohibition against a lawyer acquiring a proprietary interest in a client's cause of action or subject matter of litigation that was provided in DR 5-103(A)(1)) and Rule 1.16(d) (requiring lawyers to take, upon termination of representation, {take} steps to the extent reasonably practicable to protect a client's interests such as surrendering papers and property to which the client is entitled).

NOTES

1. This opinion does not deal with retaining liens asserted on funds under C.R.S. § 12-5-120, or with charging liens asserted under C.R.S. § 12-5-119 (1973).

2. This opinion does not discuss the effect of bankruptcy on attorneys' liens. *See* Klein and Todd, "The Treatment of Attorney's Liens in Colorado," 16 *The Colorado Lawyer* 623, 624 (April 1987). *See also*, *In re Oiltech, Inc.*, 38 Bankr. 484 (Bankr. D. Nev. 1984); *In re Life Imaging Corp.*, 31 Bankr. 101 (Bankr. D. Colo. 1983); *In re Ranes*, 31 Bankr. 70 (Bankr. D. Colo. 1983). This opinion also does not discuss potential constitutional considerations which might affect the assertion of retaining liens. For instance, one commentator has opined that: "The retaining lien should not be an absolute right that can be asserted in an *ex parte* manner. Otherwise, an attorney asserting a questionable fee claim could deny a client his/her property without due process of law . . ." Dubin, "The Retaining Lien: An Ethical Trap for the Unwary Lawyer," 63 *Michigan Bar Journal* 257, 258 (March 1984).

3. Ethical Consideration 2-23 requires a lawyer to "be zealous in his efforts to avoid controversies over fees with clients," and not to "sue a client for a fee unless necessary to prevent fraud or gross imposition by the client." The same standard should be applied in determining whether to exercise a retaining lien. American Bar Association Informal Opinion No. 1461 (11/11/80); Tennessee Ethics Opinion No. 86-F-106 (9/26/86) (a retaining lien should be asserted only when necessary to prevent fraud or gross imposition by the client); Pennsylvania Bar Association Ethics Opinion No. 81-7 (undated) (a lawyer should assert a lien on client property only as a matter of last resort when necessary to prevent fraud by the client, and when other reasonable methods have failed).

83 LAWYER ADVERTISING, SOLICITATION AND PUBLICITY

Adopted November 18, 1989.
Addendum issued July 24, 1993.
Withdrawn September 21, 2013.

WITHDRAWN

Introduction

The Committee has received a substantial number of inquiries from the bar regarding ethical issues relating to advertising, solicitation and publicity by lawyers. While some constitutional issues regarding lawyer advertising, solicitation and publicity remain undecided, the law has crystallized to the point where the Committee believes that a general ethical guide to lawyer advertising (including group advertising), solicitation and publicity would be helpful to the Colorado Bar.

Scope of This Formal Opinion

The first substantive part of this Opinion will discuss the rules generally applicable to all lawyer advertising, solicitation and publicity. The second substantive part of this Opinion will discuss specific types of advertising, solicitation and publicity. That part is not a complete catalog of all types of advertising, solicitation and publicity; rather, the Committee has elected to address those types of advertising, solicitation and publicity which appear to raise the most substantial and frequent ethical questions.

Rules Applicable to All Types of Lawyer Advertising, Solicitation and Publicity

A. *Advertising vs. Solicitation vs. Publicity*

The first task for the lawyer considering taking any steps to publicize his or her services is to determine whether the proposed device constitutes "advertising," "solicitation" or "publicity" or some combination of these concepts. "Solicitation" is a defined term in the Colorado Code of Professional Responsibility ("Code"). "Advertising" and "publicity" are not. Solicitation is defined in the Code as:

> Any unrequested communication to a non-lawyer, directly or indirectly, initiated by a lawyer which indicates or implies that it is transmitted for the purpose of seeking or obtaining professional legal employment for the lawyer, the lawyer's partner or the lawyer's firm. "Solicitation" does not include advertising in or through any public communication. Code, Definitions, ¶ 1.

The distinction that one should distinguish between advertising, solicitation and publicity is that solicitation is governed by more restrictive rules than advertising and publicity.

Usually it is easy to determine the category into which the proposed device falls. There is no question that written advertisements published in newspapers or magazines of general circulation or radio and television broadcasts are advertising. It is equally clear that promotional videotapes mailed to accident victims constitute solicitation. Publicity includes other mechanisms which put the lawyer's name before the public.

B. *The General Rule*

DR 2-101(A) contains the basic regulation of all types of advertising, solicitation and publicity. DR 2-101(A) provides:

> (A) A lawyer shall not, on behalf of himself, his partner, associate, or any other lawyer affiliated with him or his firm, use or participate in the use of any form of advertising, solicitation or publicity containing a false, fraudulent, misleading, deceptive, or unfair statement or claim. No solicitation shall be transmitted in any manner involving undue influence, intimidation, invasion of privacy or harassing or vexatious conduct.

Generally, individual lawyer or law firm advertising is permitted if the advertising does not contain a false, fraudulent, misleading, deceptive or unfair statement or claim, and otherwise complies with all of the other requirements (mainly procedural in nature) of DR 2-101. Group advertising, however, poses special problems, discussed below. Most types of "publicity" generally are permitted, provided they do not contain a false, fraudulent, misleading, deceptive or unfair statement or claim, but certain substantive restrictions are contained in DR 2-101(J), DR 2-103, DR 2-104 and DR 7-107.

The Code takes a different approach to "solicitation." Unless expressly authorized in the Code, solicitation is prohibited. DR 2-101(E). See discussion of solicitation rules, *infra*.

1. *Statements Prohibited on a Per Se Basis*. Certain types of statements are prohibited by the Code on a *per se* basis whether those statements are contained in advertising, solicitation or publicity. DR 2-101(B). Prohibited is any statement which:

(1) Contains a material misrepresentation;

(2) Omits to state any material fact necessary to make the statement, in light of all circumstances, not misleading;

(3) Is intended or is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate any disciplinary rule or other law;

(4) States or implies that a lawyer is a certified or recognized specialist other than as permitted by rules of the Colorado Supreme Court;

(5) Is intended or is likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal or other public body or official;

(6) Contains a representation or implication that is likely to cause a reasonable person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make the representation or implication not deceptive.

DR 2-101(B) makes it clear that these listed prohibitions are by way of example only and do not constitute the only false or misleading statements.[1]

Moreover, DR 2-101(C) provides further restrictions on advertising, solicitation and publicity, prohibiting any statement which:

(1) Is intended or is likely to result in legal action or a legal position being asserted merely to harass or maliciously injure another;

(2) Contains statistical data or other information based on past performance or prediction of future success;

(3) Contains a testimonial about or endorsement of a lawyer;

(4) Contains a statement or opinion as to the quality of the lawyer or of the lawyer's services which cannot be factually substantiated; or

(5) Appeals primarily to fear, greed, desire for revenge or similar emotion.

C. *Permitted Statements – The "Safe Harbor"*

DR 2-101(D) provides a "safe harbor" of the types of disclosure that *are* permissible. Like the list of proscribed conduct contained in DR 2-101(B) and 2-101(C), this list is illustrative only, and does not preclude other truthful, non-deceptive statements.[2]

D. *"Dignified Manner" Requirement*

DR 2-101(D) also contains a requirement that advertising and publicity (but curiously, not solicitation) which is otherwise permitted by the Code be "presented in a 'dignified manner.'" "Dignified manner" is not a defined term in the Code, and no satisfactory definition of that term is available elsewhere. The constitutionality of the "dignified manner" requirement was placed in doubt by the United States Supreme Court in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), where the Court stated:

WITHDRAWN

> More fundamentally, although the state undoubtedly has a substantial interest in ensuring that its attorneys behave with dignity and decorum in the courtroom, we are unsure that the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgment of their First Amendment rights

However, neither the U.S. Supreme Court nor any state supreme court has expressly declared a "dignified manner" requirement unconstitutional and at least one court has upheld it from a constitutional attack. In enacting the Model Rules of Professional Conduct, the American Bar Association discarded the "dignified manner" requirement stating in the Comments: "Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment." Model Rule 7.2, Comments (1983).

Nevertheless, the "dignified manner" requirement remains part of the Colorado Code. Perhaps the best guidance that can be given as to what constitutes "undignified" advertising or publicity is Justice Stewart's statement with respect to obscenity: "I know it when I see it."

Special Rules Applicable to Solicitation

A. *Targeted Direct Mail Solicitation*

In June 1988, the United States Supreme Court issued its opinion in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed 2d 475 (1988). The Court held that states may not, consistent with the First Amendment, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and non-deceptive letters to potential clients known to face particular legal problems. Because it then became clear that the portion of DR 2-101(E) prohibiting truthful, targeted, direct-mail solicitation was unconstitutional, the Colorado Supreme Court appointed a Committee to study the matter and recommend to the Supreme Court changes to bring it into compliance with *Shapero*. Based on the report of that Committee, the Colorado Supreme Court approved amendments to DR 2-101(E) which became effective January 1, 1990. Amended Rule 2-101(E) reads as follows

> (E) Unless expressly authorized in these rules, solicitation is prohibited. Where pecuniary gain is a significant motive for the solicitation, a lawyer may engage in solicitation if the solicitation is in writing, OR IS A RECORDED COMMUNICATION. Solicitation is permitted, and need not be limited to written OR RECORDED solicitation, if pecuniary gain is not a significant motive for the solicitation. EVERY WRITTEN OR RECORDED COMMUNICATION FROM A LAWYER SOLICITING PROFESSIONAL EMPLOYMENT FROM A PROSPECTIVE CLIENT KNOWN TO BE IN NEED OF LEGAL SERVICES IN A PARTICULAR MATTER SHALL INCLUDE THE WORDS "ADVERTISING MATERIAL" ON THE OUTSIDE ENVELOPE, ON THE FIRST PAGE OF ANY WRITTEN COMMUNICATION, AND AT THE BEGINNING AND ENDING OF ANY RECORDED COMMUNICATION

Thus, beginning January 1, 1990, DR 2-101(E) permits recorded as well as written solicitations and certain previously prohibited targeted direct mail solicitations are permitted. Presumably, the Colorado Supreme Court concluded that recorded communications could be stopped or turned off by a recipient just as easily as a recipient could drop a solicitation letter in the waste basket. The risks of overreaching lawyers badgering prospective clients by means of a recorded or written message would seem to be minimal. Moreover, all solicitations, whether written or recorded are subject to the strictures of DR 2-101(A) both as to the substance of the message and the manner in which the message is expressed.[3]

Accordingly, beginning January 1, 1990, as long as the written or recorded solicitation is truthful and non-deceptive, conforms to DR 2-101(A), (B) and (C), and includes the required description of the solicitation as "Advertising Material," the fact that the prospective clients are known to be in need of legal services in a particular matter will no longer bar written or recorded communications from a lawyer soliciting professional employment from prospective clients. If the mailing or recording is not targeted to recipients known to be in need of legal services in a particular matter, the labeling of the solicitation as "Advertising Material" is not required.

WITHDRAWN

B. *In-Person Solicitation*

In-person solicitation of non-lawyers where pecuniary gain is a significant motive for the solicitation continues to be prohibited by DR 2-101(E). In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 98 S.Ct. 1912 (1978), the United States Supreme Court upheld over a First Amendment challenge a blanket prohibition of in-person solicitation by lawyers. *Ohralik* remains in full force after *Shapero*.

In-person solicitation of *lawyers*, as opposed to non-lawyers, is not prohibited by DR 2-101(E) nor is it prohibited by the amended rule because by definition such communications do not constitute "solicitation" under the Code.

One part of the Code expressly permits in-person solicitation and discussion of a prospective client's need for legal services. DR 2-104(A) provides:

> (A) A lawyer who has given unsolicited advice orally to a non-lawyer that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that a lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

C. *Telephone Solicitation*

Telephone solicitation in which a lawyer seeking legal work personally calls a non-lawyer is prohibited by the Code. Although the Code does not expressly address telephone solicitation, the framework of DR 2-101(E) is that all solicitation is prohibited except as expressly authorized by the Code. Nothing in the Code authorizes live telephone solicitation, and a strong argument can be made that live telephone solicitation is sufficiently similar to in-person solicitation to justify the prophylactic ban upheld by the Supreme Court in *Ohralik*. The Model Rules of Professional Conduct expressly prohibit live telephone solicitation. Rule 7.3(a) (1989).

D. *Manner of Solicitation*

DR 2-101(A) prohibits any solicitation which is "transmitted in any manner involving undue influence, intimidation, invasion of privacy or harassing or vexatious conduct." It seems clear that if a recipient of a solicitation advises the lawyer that he or she does not want to receive any further communications from the lawyer, the lawyer's failure to comply would violate DR 2-101(A). It is equally clear that targeted direct mail solicitation which is permitted by the *Shapero* decision cannot be prohibited on a *per se* basis under DR 2-101(A).

E. *Solicitations in Which Pecuniary Gain Is Not a Significant Motive*

Solicitation is expressly authorized and need not be limited to general or written or recorded messages if pecuniary gain is not a significant motive for the solicitation. *See* DR 2-101(E) in both its present and amended forms. Thus, where pecuniary gain is not a significant motive, the communication may be made to lawyers and non-lawyers alike, may be written, recorded, in-person by telephone or face to face. Again, however, the substance of the communication as well as the manner in which it is delivered must conform to the requirements of DR 2-101(A), (B) and (C). In the Committee's view, pecuniary gain will be a significant motive in most cases in which the lawyer charges a fee.

Application of the Rules to Specific Types of Advertising, Solicitation and Publicity

A. *Seminars and Brochures*

Legal seminars, the audiences of which include prospective clients, can be viewed as both a form of public speaking and solicitation. As noted above, DR 2-101(E) prohibits "in-person" solicitation where "pecuniary gain is a significant motive." Although "pecuniary gain" may be the ultimate goal of many seminar speakers, seminar speaking is permitted and would not be deemed to be in-person solicitation barred by DR 2-101(E) provided the requirements of DR 2-104(B) are met. DR 2-104(B) requires that:

> (1) The lawyer does not emphasize his own professional experience or reputation or that of his firm or any other lawyer affiliated with him; and

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(2) The lawyer does not undertake to give individual advice.

The manner in which the seminar is conducted, therefore, will be critical to whether the lawyer has complied with the Code. If the requirements of DR 2-104(B) are not complied with, the seminar presentation may constitute in-person solicitation still prohibited by amended DR 2-101(E).

Brochures are ethically permissible, provided they comply with the requirements of DR 2-101 and 103. *See also, Zauderer v. Office of Disciplinary Council*, 105 S.Ct. 2265 (1985). *See* Colorado Bar Association Ethics Committee Formal Opinion No. 74 (1986) which discusses lawyer newsletters.

B. *Testimonials and Endorsements; Solicitations by Third Parties*

1. Testimonials and Endorsements. The Code expressly prohibits the use of any form of advertising, solicitation or publicity which "[c]ontains a testimonial about or endorsement of a lawyer." DR 2-101(C)(3).

Testimonials and endorsements are prohibited because they tend to mislead the recipient into believing that similar results can be achieved for them. *ABA/BNA Law. Man. Prof. Conduct*, ¶ 81:304. Endorsements and testimonials are also likely to contain "information based on past performance or prediction of future success," which is expressly forbidden by DR 2-101(C)(2). Finally, testimonials and endorsements may involve unverifiable claims about the quality of the lawyer's legal services. *ABA/BNA Law. Man. Prof. Conduct, supra*.

2. Solicitation by Third Parties. Generally a lawyer may not request another person or organization to solicit prospective clients. DR 2-103(C). Nor may a lawyer pay a third party to make referrals, or reward a third party for making a recommendation that results in employment. *See In re Perl*, 407 N.W.2d 678, 682 (Minn. 1987) (payment of referral fees to non-lawyer employees is unethical even in the absence of over-reaching, deception, or harassment of vulnerable persons).

A few exceptions to this prohibition have been specified in the Code. The exceptions allow a lawyer to obtain referrals from a referral service operated, sponsored or approved by a bar association, from legal aid and public defender offices, military legal assistance offices, and, under certain circumstances, organizations which recommend, furnish or pay for legal services for their members (prepaid legal service plans). DR 2-103(C) and (D).

Even if third parties, such as approved lawyer referral agencies, are utilized by a lawyer, their solicitation of prospective clients must comply with the requirements and restrictions of DR 2-101. DR 2-103(D). Thus a lawyer cannot avoid the prohibition against in-person solicitation by hiring a non-lawyer to do what the lawyer himself or herself may not do. *Ohralik v. Ohio State Bar Ass'n, supra*, at 464, n. 22. *See*, DR 1-102(A)(2), which allows circumvention of a disciplinary rule through the actions of another. Thus, because in-person solicitation of prospective clients by a lawyer is not permitted (DR 2-103(A), DR 2-101(E), DR 2-[illegible]), third parties may not engage in such solicitation on behalf of the lawyer.

C. *Professional Notices, Signs, Publications and Talk Shows*

1. Professional Notices and Signs. Professional notices, such as lawyer announcements, business cards, signs, letterheads, telephone directory listings, law lists and legal directory listings, are subject to the requirements of DR 2-101(A), (B) and (C). DR 2-102(A).

Professional notices containing a trade name, or a name which is misleading as to the identity of the lawyers practicing under the name, are prohibited. DR 2-102(B). The names of deceased or retired members of the firm or of a predecessor firm in a continuing line of succession may be used.

The name of an attorney who assumes a judicial, legislative, or public executive or administrative post may not remain in the name of the firm or be used in professional notices of the firm "during any significant period in which he is not actively and regularly practicing law as a member of the firm." *Id.* Nevertheless, an attorney returning from government practice may indicate his or her immediate prior government position in an announcement which otherwise meets the requirements of DR 2-101(A) through (C).

WITHDRAWN

A firm may be identified as a "legal clinic" only if it meets each of the criteria listed in the definitions to the Code. DR 2-102(B).

Partnerships between attorneys licensed in different jurisdictions are permitted, but only if all listings of the members and associates of the firm on letterhead and other permissible listing "make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions . . . ." DR 2-102(D).

Professional notices may state the fields in which an attorney or law firm practices or that the practice is limited to one or more fields of law. DR 2-101(D)(3). A lawyer may also permit his name to be listed in lawyer referral services offices according to fields of law in which he will accept referrals. DR 2-105(A)(2). An attorney may not, however, hold him or herself out publicly as a "specialist" unless he or she has been so certified by the Colorado Supreme Court. DR 2-105(A)(4).[4] Attorneys who are admitted to practice before the U.S. Patent Office, and attorneys who are engaged in trademark or admiralty practice, may, however, designate themselves as a "patent attorney," "trademark attorney," or "admiralty lawyer" (or use slight variations of these titles as prescribed in the Code), without violating the restriction against holding oneself out as a specialist. *See* DR 2- 105(A)(l).

2. Publications and Talk Shows. An attorney is not prohibited from authoring or writing articles on the law or appearing as a host or guest on a radio or television program. DR 2-104(B) provides, however:

> A lawyer may accept employment that results from speaking publicly or writing for a publication on legal topics, or participating in activities designed to educate non-lawyers to recognize problems, to make intelligent selection of counsel, or to utilize available legal services, whether or not such activities are sponsored by the lawyer or the lawyer's firm, if (1) the lawyer does not emphasize his own professional experience or reputation or that of his firm or any other law firm affiliated with him, and (2) the lawyer does not undertake to give individual advice.

The attorney may be identified as an author, but must not imply or suggest that he or she is a specialist in the area which is the subject of the article or the discussion, except to the extent permitted by DR 2-105.[5]

Because a careful and accurate legal analysis of any situation is dependent upon review of numerous facts, including documents which are usually unavailable to an attorney acting as a host or a guest on a live, broadcast, or recorded audience participation program, and because of the limited amount of time generally available to discuss a particular audience member's specific legal problem, an attorney should always caution that his or her remarks are generalizations of the law, and that an individual with a specific legal problem related to the general area of discussion should not rely upon the general discussion to evaluate his or her particular situation, but rather should consult with an attorney in private.

D. *Complaint Filing Publicity*

Often times publicity surrounds the filing of a civil or criminal complaint, or the return of a criminal indictment. On many occasions an attorney forwards the complaint or the indictment to the press. As a general guideline it has been suggested that an attorney should not provide a complaint or indictment to the media unless specifically requested by the media. ABA Comm. on Ethics and Prof. Resp., Informal Ops. 1172 (1971), 1230 (1972) and 1345 (1975).[6]

E. *Group Advertising*

The Code contains no blanket prohibition on group advertising by lawyers. However, there are several potential violations of the Code which must be avoided by a lawyer engaging in group advertising.

For purposes of this Opinion, a "group" is defined as two or more lawyers (or law firms) who are not partners or otherwise associated in practice, who share the cost of an advertising program in which responses to the advertisements are directed to a person or entity other than the advertising attorneys themselves.

WITHDRAWN

"Group advertising" is defined as an advertising mechanism or program whereby the members of the "group" pay some third party to prepare and place the ads, receive and/or screen responses and direct potential clients to some member of the group.

1. Disciplinary Rules That Are Applicable to Group Advertising. A number of disciplinary rules are applicable to group advertising. Among the disciplinary rules that must be considered by a lawyer engaging in group advertising are DR 2-103(D) (restrictions on lawyer referral services); DR 3-101 (practice of law by a lay person); DR 3-102(A) (sharing of legal fees with non-lawyer); DR 2-103(B) (compensating a person or organization to recommend or secure employment for lawyer prohibited); DR 4-101 (lawyer must preserve the confidence of client); and DR 2-101(B) (lawyer may not practice under a trade name).

While the variations on group advertising are probably limitless, the Committee has selected three prototypes of group advertising to illustrate the applicability of these disciplinary rules.

2. Group Advertising Prototypes.

(a) A for-profit third-party, non-lawyer (individual or other entity) promotes group advertising by lawyers within a given community. Attorneys may designate one or more areas of concentration and are assigned a designated geographic area (by zip code or otherwise). A general advertisement is placed which calls from prospective clients who are in need of legal services. The lawyer participants are not identified in the ads, but prospective clients are advised in the ad that they will be put in touch with a lawyer who can provide assistance with a particular problem.

Calls are screened by the employees of the advertising entity according to the service needed and referred to the appropriate attorney who has contracted from that geographic area. Lawyers pay: (a) a flat fee for participation and/or (b) a flat fee per case referred and/or (c) a contingent percentage of the fee generated by the case.

Perceived ethical considerations relating to Prototype A fall into three categories. First is whether the operation constitutes a legal referral service contrary to the provisions of DR 2-103(D).

Second is whether the information which the prospective client must transmit to the advertising entity to allow the referral impinges upon the confidential attorney-client relationship as considered under DR 4-101. Also of concern is whether the screening process constitutes the practice of law by a lay person in violation of DR 3-101.

The third problem relates to DR 3-102 which prohibits sharing legal fees with a non-lawyer.

The Committee believes that the for-profit advertising entity or similar entities are, in effect, referral services. As such they would require appropriate bar association approval or sponsorship. *See* DR 2-103(D). Measures should be taken to meet the goals of EC 2-8.

To the extent that lay persons are conducting the screening of potential clients for referral purposes, the participating attorneys are responsible for assuring that such personnel are properly trained to perform the work and that they do, in fact, comply with the DR 4-101 requirements. Any improprieties or errors are the attorney's ultimate responsibility. *See* EC 3-4.

Because the described entity is for profit, DR 3-102(A) is implicated. None of the exceptions appear to apply to the group advertising situation outlined under Prototype A. While the payment of a flat fee for participation in the advertising/referral program might well avoid the pitfalls of DR 3-102(A), the per case payments (flat fee or contingent) are, in the opinion of the Committee, ethically improper. *See* EC 3-1, EC 3-2 (which implicates DR 5-101), DR 2-103(B) and Formal Opinion 38.

Recently the Alabama Bar Association in its Opinion 89-18, adopted February 17, 1989, has determined that "Injury Helpline" and operations similar to that described in Prototype A are not ethical. Other jurisdictions have expressed prohibitions or reservations about such operations.

A recent Cleveland Ethics Opinion (87-1, July 31, 1987) interpreting DR 2-103(D)(3) held that a lawyer may participate only in Bar sponsored referral services and only if there is no interference with the lawyer's independent judgment.

ABA Formal Opinion 87-355 precludes lawyer participation in for-profit prepaid legal service plans which involve telephone or in-person solicitation by plan representatives. The opinion also states that

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a participating lawyer must assure that all advertising is accurate and does not mislead or create unjustified expectations.

South Carolina Opinion 86-13(B) (October 9, 1986) holds that a lawyer cannot participate in a lawyer referral service operated by a private corporation for profit.

Nebraska Opinion 87-2 allows private referral service participation only if there is no fee paid for the referral.

Alabama Opinion 86-78 (August 14, 1986) authorized participation in a referral service created by the legislature which was a non-profit operation.

While opinions from other jurisdictions appear to permit either flat per case fees or even contingent fees to referral services, these are invariably bar-sponsored services, with the funds tied directly to operational expenses. *See e.g.*:

(i) ABA Informal Opinion 1076 (1968);
(ii) California Bar Opinion 1983-70 (1983);
(iii) Kentucky Bar Opinion F288 (1984);
(iv) Maryland Bar Opinion 81-11(1980);
(v) Maru 12116 (NJ Bar Opinion 393, 1978); and
(vi) Maru 10914 (Ill. Bar Opinion 506, 1975).

A question may arise under DR 2-102(B) as to whether the use of a "trade name" in the advertising violates the DR. The Committee does not believe that the use of a trade name in the group advertising without more, is violative of the DR, unless the lawyers or firms otherwise practice under the trade name.

In summary, while the Committee would not rule out the possibility of the concept embodied in Prototype A being permissible, the ethical problems inherent appear to make such schemes unethical and impermissible under the Code.

(b) A group of lawyers sharing the same area of concentration combine to advertise. The ads are prepared by a separate company and directed to persons in need of services related to the area of concentration. Callers responding to the ads (which include a "trade name") are referred to participating lawyers on a rotating basis, without screening or matching of the client with a particular lawyer.

Cost for participation is a flat fee.

The same ethical considerations discussed above apply to this prototype. However, if there are no per case fees, and if the costs of participating in the program are related directly to the costs of advertising, and if there is to be no profit distribution among the participating attorneys, then it would appear that the program may avoid the ethical pitfalls of Prototype A.

Since the group will share the same area of concentration, and participation is based upon concentration in the field the provisions of EC 2-8 and EC 2-15 would appear to have been complied with.

To the extent that the concept may be identified as a referral service, appropriate bar association approval should be sought. The Committee does not, in this Opinion, purport to define what constitutes a Bar Association as contemplated by DR 2-103(D).

The same concerns regarding client confidences and the same lawyer responsibility under DR 4-101 apply to this Prototype, but it would appear that compliance would be easier due to the more limited inquiry to be made of the prospective client, *i.e.*, is the problem within the scope of the participants' area of concentration.

In summary, the Committee believes that careful structuring of the concept can bring it within all applicable rules.

(c) A group of lawyers share the actual cost of advertising which lists their separate names, addresses, phone numbers and advertising copy, otherwise consistent with DR 2-101. Incoming calls are accepted by a receptionist or answering service paid by the firms or lawyers involved.

The Committee believes that the type of advertising contemplated under this Prototype C meets existing ethical guidelines. It allows a prospective client to make a decision based upon acceptable information (*see* DR 2-101) as to who the lawyer will be.

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There is no third party referral involved, no actual or potential fee splitting and no potential breach of client confidence involved, since the receptionist will merely be rerouting a call to the lawyer selected by the client.

While certain forms of group advertising can be structured to meet all current ethical requirements, there are some, primarily related to Prototype A above, which raise serious and probably insurmountable ethical obstacles for potential participants. Attorneys in Colorado should explore participation in such programs with extreme caution.

1993 Addendum

On January 1, 1993, the Colorado Rules of Professional Conduct took effect, replacing the Code of Professional Responsibility cited in this opinion. Although there are some distinctions between the exact language of the rules relating to Information about Legal Services, Rules 7.1 through 7.5, and the Code provisions cited in this opinion, the Ethics Committee considers this opinion to continue to provide the principles to guide attorneys in the area of lawyer newsletters, lawyer advertising guidelines, lawyer advertising, solicitation and publicity.

WITHDRAWN

NOTES

1. On July 3, 1989, the United States Supreme Court granted certiorari to review the Illinois Supreme Court's decision that Illinois' disciplinary rule (like Colorado's) that prohibits a lawyer from holding himself out as a specialist does not violate the First Amendment. *Peel v. Attorney Registration and Disciplinary Commission of Illinois*, 57 L. W. 3851 (U.S. 1989).

2. The language of DR 2-101(D) possibly can be read to say that these statements are the only ones that can be made. So construed, DR 2-101(D) probably is inconsistent with the First Amendment. The Committee is informed by the draftsperson of DR 2-101(D) that it was intended as a "safe harbor," and not an exhaustive listing of permissible statements.

3. And, like written and recorded advertisements, such written or recorded solicitations must be maintained by the lawyer for three (3) years and must be provided upon five (5) days' notice to the Colorado Supreme Court, a justice thereof, or the Grievance Committee. DR 2-101(F). The lawyer also must maintain a record and "retain in written form for a period of three (3) years information describing the method of transmittal of all solicitations and the name and address of each person solicited." DR 2-101(F).

4. The Colorado Supreme Court has prescribed no rules permitting an attorney to be certified as a specialist. *See*, note 1, *supra*.

5. Colorado Bar Association Ethics Committee Formal Opinion 3 and Informal Opinion M express a contrary view. They were issued prior to the United States Supreme Court's constitutional decisions regarding lawyer advertising. The opinions are not squared with current law and they hereby are withdrawn.

6. Firm publicity, which is extensively regulated by DR 7-107, is beyond the scope of this Formal Opinion.

84 LISTING OF SUPPORT PERSONNEL NAMES ON LETTERHEAD AND BUSINESS CARDS

Adopted February 26, 1990.
Addendum issued 1995.

Syllabus

A law firm may provide nonlawyer employees with business cards and list such employees' names on its letterhead, provided such business cards and letterhead listings clearly reveal the employee is not a lawyer and the information on such business cards and letterheads is not otherwise false, fraudulent, misleading or deceptive. A law firm providing business cards to nonlawyer employees or placing nonlawyers' names on its letterhead is responsible for the use to which nonlawyer employees put such business cards or letterhead.

Opinion

On August 24, 1974, the Colorado Bar Ethics Committee issued Informal Opinion X. This Informal Opinion stated that it is improper for a law firm to list nonlawyer employees on a professional card or letterhead. Prior to the United States Supreme Court's decision in *Bates v. State Bar of Arizona*, 340 U.S. 350 (1977), the views expressed in Informal Opinion X were the universal standard. The American Bar Association Standing Committee on Ethics and Professional Responsibility (ABA Ethics Committee) issued similar opinions on the subject. [*See*: ABA Informal Opinion 1000, October 16, 1977 (Staff Investigator); Informal Opinion 845, April 26, 1965 (Office Manager); and Informal Opinion 619, Dec.28, 1962 (Secretary)].

Effective April 1, 1985, the Colorado Supreme Court amended Canon 2 of the Colorado Code of Professional Responsibility (Code) to comply with the holding of *Bates* [14 *The Colorado Lawyer* 67 (Jan. 1986)]. Prior to being amended in 1985, the Code's DR 2-102 contained specific limitations that only the names of lawyers and associates could appear on business cards [DR 2-102(A)(1)] and letterhead [DR 2-102(A)(4)]. In amending Canon 2, the Colorado Supreme Court deleted these sections. Instead, the Court modified DR 2-102(A) to read that a lawyer could not use a business card or letterhead, ". . . if it includes a statement or claim that is false, fraudulent, misleading or deceptive within the meaning of DR 2-101(B) or that violates DR 2-101(C)."

Following *Bates*, the United States Supreme Court further limited the restrictions a state could place on lawyer advertising in the cases of *In re R.M.J.*, 455 U.S. 191 (1982); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 625 (1985) and *Shapero v. Kentucky Bar Ass'n*, 100 L.Ed.2d 475 (1988). As a result of these cases, restrictions on lawyer advertising are generally limited to preventing false, fraudulent, misleading or deceptive advertising and face-to-face solicitations. In light of these United States Supreme Court cases, the ABA Ethics Committee withdrew its previous opinions restricting the use of business cards by nonlawyer support personnel and placing the names of such personnel on a firm's letterhead and issued a new opinion permitting such practice [Informal Opinion 89-1527 (Feb. 22, 1989)]. While the ABA Ethics Committee, in issuing Informal Opinion 89-1527, was interpreting the ABA Model Rules of Professional Conduct, it also said, "The listing of nonlawyer support personnel on lawyers' letterheads is not prohibited by these or any other Rules so long as the listing is not false or misleading." The opinion also extended similar reasoning to business cards issued to support personnel. The Colorado Bar Ethics Committee withdrew Informal Opinion X on April 15, 1989, but did not issue a formal opinion permitting such practices.

The Committee has received requests to clarify its position on such practices. The matter was further confused by the issuance of the Guidelines for the Utilization of Legal Assistants (Guidelines) by the Legal Assistants Committee of the Colorado Bar Association in November 1989 [*see*, "Guidelines for the Utilization of Legal Assistants," 18 *The Colorado Lawyer* 2097 (Nov. 1989)]. Part of those Guidelines provided as follows:

3. A legal assistant may have a business card with the firm name appearing on it so long as the status of the legal assistant is disclosed. However, the name of the legal assistant may not appear on the letterhead of the firm.

While the Guidelines were correct when drafted, delay in the publication of the Guidelines has rendered this provision partially invalid.

Because of the confusion in this area and the increasing requests for clarification, the Colorado Bar Ethics Committee believes that it should issue this Formal Opinion to aid practitioners of law in this state with this problem.

The Committee believes it is permissible under the Colorado Code of Professional Responsibility to list the names of nonlawyer support personnel on a law firm's letterhead and for a law firm to issue business cards to such personnel, so long as the listing or the contents of the letterhead or business card are not false, fraudulent, misleading or deceptive. In assuring themselves that the contents of a letterhead or business card are not false, fraudulent, misleading or deceptive, the listed nonlawyer's status must be made clear to the public.

In addition, attorneys should review with their nonlawyer personnel the ethical use of letterhead and business cards. A lawyer may not avoid his or her ethical responsibility by claiming the violation was the responsibility of a nonlawyer employee. A lawyer is responsible for the ethical conduct of such personnel [DR 3-101(A) and Colorado Ethics Opinion 61 (October 23, 1982)]. In reviewing the uses for which such letterhead and business cards may be employed, lawyers should, at a minimum, review with their nonlawyer personnel the advertising rules in DR 2-101, DR 2-103, DR 2-104 and Colorado Bar Association Ethics Committee Formal Opinion 83 on Lawyer Advertising, Solicitation and Publicity.

Additionally, nonlawyer personnel should be carefully instructed that the Code can be violated by the misuse of letterhead or business cards which would otherwise meet the criteria of this Opinion. To illustrate, if a nonlawyer, in signing a letter with his or her name on the letterhead, does not clearly indicate his or her position in the signature block and the public is thereby misled, the otherwise conforming letterhead will not prevent a violation of the Code. By the same token, if a nonlawyer employee does not make his or her position clear in an interview, the presentation of a business card revealing the employee's true position will not necessarily prevent a violation. Nonlawyer personnel should be instructed that care should always be taken to reveal clearly the true nature of their positions, especially where their names appear on a firm's letterhead or on a business card with the firm's name.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rules 5.3 (regarding responsibilities for nonlawyer assistants); 7.5(a) (prohibiting use of firm names, letterhead or other professional designation which are false or misleading) and 7.1 (prohibiting a lawyer from making false or misleading communications concerning a lawyer's services). Although the language of Rules 7.5(a) and 7.1 is somewhat different from their predecessors, DR 2-102(A), DR 2-101(B) and DR 2-101(C), the effect of these provisions remains the same. The Rules, like the Code of Professional Responsibility, permit listing of non-lawyer support personnel on firm letterhead and issuing of business cards to such personnel as long as the content of such items is not misleading or false.

85 RELEASE AND SETTLEMENT OF LEGAL MALPRACTICE CLAIMS

Adopted May 19, 1990.
Addendum issued 1995.
Addendum issued 1998.

Introduction and Scope

The Colorado Bar Association Ethics Committee ("Committee") is aware that difficulties often arise in attempting to harmonize DR 6-102(A), which prohibits an attempt by a lawyer to exonerate himself or herself from or limit his or her liability to a client for the lawyer's personal malpractice, with the public policy which favors the settlement of legal disputes. A strict reading of DR 6-102(A) might lead to the conclusion that a legal malpractice claim by a client or former client can never be settled short of a trial. On the other hand, the respective interests of the client, the lawyer and the judicial system often are best served by an out-of-court settlement of a legal malpractice claim.

The purpose of this opinion is to provide guidance to the members of the bar regarding the nature of the conduct proscribed by DR 6-102(A) and the circumstances under which a legal malpractice claim may permissibly be settled.

Syllabus

A lawyer may negotiate and enter into a release and settlement agreement of a client's legal malpractice claim against the lawyer only if the following conditions are met:

(1) The lawyer must disclose to the client the facts and circumstances underlying the client's potential malpractice claim against the lawyer and the nature and extent of the claim;
(2) The lawyer must advise the client, preferably in writing, to retain independent counsel to represent the client in the negotiation and consummation of the settlement and release;
(3) The terms of the settlement and release must be fair and reasonable; and
(4) The settlement and release can relate only to past, and not future, conduct of the lawyer

In addition, if the attorney-client relationship still exists as of the time the settlement is contemplated, and if both lawyer and client desire that the attorney continue to represent the client thereafter, the lawyer should carefully consider whether, under the specific circumstances, the lawyer can ethically negotiate a settlement and release of a past malpractice claim without first withdrawing from the representation.

A lawyer may not engage in any conduct intended to conceal the facts and circumstances relating to the client's potential malpractice claim against the lawyer. The lawyer may not insist on a release from liability or an agreement to arbitration of a malpractice claim as a prerequisite to the lawyer's returning papers and property the client is entitled to receive, or to the lawyer's completing the employment or providing additional legal services for the client, or to the lawyer's withdrawal from the representation. A lawyer cannot require a client to refrain from filing or to withdraw a grievance as a condition of settling a dispute with the client.

Opinion

It is unethical for a lawyer to attempt to exonerate himself or herself from or limit his or her liability for personal malpractice prospectively. *People v. Foster*, 716 P.2d 1069 (Colo. 1986); DR 6-102(A). If a potential claim for malpractice arises in the course of a lawyer's representation of a client, however, DR 6-102(A) should not be construed to prohibit the lawyer from settling the malpractice claim, provided certain conditions are met for the protection of the client.

A lawyer may not, at any time, engage in any conduct to conceal the facts and circumstances relating to the client's potential malpractice claim against the lawyer. DR l-102(A)(4); Colorado Bar

Association Ethics Committee, Informal Opinion V (April 27, 1974). Therefore, prior to negotiating a settlement or release, the lawyer must disclose to the client all the facts and circumstances relating to the client's potential malpractice claim, and inform the client as to the nature and extent of such claim, so that any settlement agreement is entered into by the client knowingly. *See, Matter of Christian*, 709 P.2d 987 (Kan. 1985); *Matter of Discipline of Schmidt*, 402 N.W.2d 544 (Minn. 1987).

Furthermore, prior to entering into any negotiations or settlement agreement regarding a client's potential or existing malpractice claim, the lawyer must advise the client, preferably in writing, to retain independent counsel to represent the client in the negotiation and consummation of the settlement.

The terms of the settlement must be reasonable and fair. The settlement should be negotiated and consummated with the client's full knowledge and understanding of the claims being released, for adequate consideration, and with an opportunity to seek independent legal advice.

A lawyer may include a refund or credit for fees paid or owed to the lawyer by the client as part of the resolution of a malpractice claim or potential malpractice claim. A lawyer may not, however, insist on the client's releasing the lawyer from liability for malpractice as a prerequisite to a refund or credit, or to the return of any property of the client. DR 9-102(B)(4); *People v. Good*, 195 Colo. 177, 576 P.2d 1020 (1978). The withdrawing or discharged lawyer should return to the client all papers and property the client is entitled to receive. *See, In re Preston*, 523 P.2d 1303 (Ariz. 1974); *Matter of Darby*, 426 N.E.2d 683 (Ind. 1981).

It is improper for a lawyer to require a client to refrain from filing or to withdraw a grievance against the lawyer, or to refuse to cooperate with the disciplinary proceedings, as a condition of settlement of a malpractice claim. Colorado Bar Association Ethics Committee, Formal Opinion No. 56 (March 22, 1980); *Matter of Goldberg*, 82 A.D.2d 572, 442 N.Y.S.2d 551 (1981).

A lawyer cannot ethically condition the provision of legal services for a client on the client's agreement to waive any claims the client may have or acquire against the lawyer for malpractice. Thus, a lawyer should not require, in a retainer agreement or other contract with a client, or in connection with any legal services performed for a client, the client to agree to exonerate the lawyer or limit the lawyer's liability for malpractice claims which may arise in the future. *People v. Foster; supra.*

In most situations, at the time a settlement of a pending or potential malpractice claim is contemplated, the lawyer will no longer be representing the client in the matter which is the subject of the settlement. However, there may be circumstances when the lawyer and the client both desire for the attorney to continue to represent the client in that matter, or in other matters, and both are willing to enter into a settlement and release of a potential malpractice claim which has arisen in the course of the past representation. In these circumstances, the lawyer must consider carefully whether such a settlement and release can ethically be negotiated and entered into while the attorney-client relationship continues to exist.

The Committee on Professional Ethics of the New York State Bar Association, in Opinion 591 (May 1988), concluded that an attorney may negotiate ethically with a client for a settlement or release of potential malpractice claims arising from past conduct of the lawyer, but only after the lawyer takes the following specific steps to ensure that the negotiations are fair:

(1) The client must be fully apprised of the facts pertaining to the representation that may give rise to specific claims against the lawyer;
(2) The lawyer has been discharged or must withdraw from the representation in accordance with DR 2-110; and
(3) The lawyer must advise the client, preferably in writing, to secure independent counsel in the negotiation and consummation of such an agreement.

See also, Matter of Tallon, 86 A.D.2d 897, 447 N.Y.S.2d 50 (1982).

This Committee can envision circumstances where mandatory withdrawal from representation of the client, as required by the New York ethics opinion, might frustrate the needs or desires of the client. On the other hand, if the attorney has not completed the representation in the matter giving rise to the potential malpractice claim, the possibility of undue pressures on the client in the negotiation and consummation of a

settlement or release is increased. In addition, a purported settlement and release of such a claim might be both ineffectual and unethical as implicating a release of future claims against the lawyer in that matter. *See, People v. Foster; supra.*

In considering whether withdrawal from representing the client is necessary prior to negotiating and entering into a settlement and release of a potential malpractice claim, the lawyer should bear in mind that a principal purpose of DR 6-102(A) is the protection of the client from unfairness. It is clear that a lawyer cannot ethically attempt to make a release from potential malpractice claims a condition or prerequisite to the lawyer's withdrawal from the representation or a condition of the lawyer's continuing to represent the client in that or any other matter. *People v. Dwyer*, 652 P.2d 1074 (Colo. 1982), *The Florida Bar v. Cohen*, 331 So.2d 306 (Fla. 1976).

Further, the lawyer who continues to represent the client during and after the negotiation of a settlement or release of a potential malpractice claim should consider whether such negotiations ethically may be undertaken at all in the absence of independent counsel to represent the client in the negotiation and consummation of the settlement and release. *See, e.g.*, DR 5-104(A); *see also, State v. Tadych*, 230 N.W.2d 162 (Wis. 1975).

To avoid the possibility of undue influence or unfairness to the client in the negotiation and consummation of a settlement or release of a potential malpractice claim, in any circumstances where both lawyer and client desire that the attorney continue to represent the client, the lawyer should carefully consider whether protection of the client demands that the lawyer forego negotiating and entering into such a settlement and release until the attorney's representation of the client, at least in the matter which is the subject of the settlement and release, has been concluded.

Conclusion

A lawyer may settle a potential or asserted malpractice claim against the lawyer only under circumstances where (1) the client is fully informed of the facts and circumstances underlying the claim and the nature and extent of the claim, (2) the client is advised to seek independent legal advice regarding the settlement of the claim and (3) the settlement is fair and reasonable. The lawyer should carefully consider, under the particular circumstances, whether it is ethical to negotiate or agree to a release of malpractice claims while the attorney-client relationship continues to exist with respect to the matter giving rise to the malpractice claim, or other matters. The lawyer may not require settlement of a malpractice claim as a prerequisite to the lawyer's withdrawal from the representation, return of property, reduction of fees or continuing to provide legal services, nor may the lawyer require the client to withdraw or refrain from filing a grievance.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.8(h) (prohibiting prospective limitations on a lawyer's liability to a client for malpractice unless otherwise permitted); Rule 1.15(b) (which replaced and expanded DR 9-102(B)(4) concerning prompt delivery and accounting of funds held by lawyer); Rule 1.15(c) (disputes over property or funds held by lawyer); Rule 1.16(a) (concerning mandatory withdrawal); Rule 1.8(a) (concerning business transactions with a client); and Rule 8.4(c) (prohibiting lawyer dishonesty, fraud, deceit or misrepresentation).

1998 Addendum

Effective November 21, 1998, the Ethics Committee adopted an addendum to Formal Opinion 56 stating that it is not a violation of any Colorado Rule of Professional Conduct for an attorney to seek or obtain the resolution of all pending or contemplated civil disputes between the attorney and a former client, including legal fee and malpractice disputes, as part of a settlement reached in a grievance mediation held under C.R.C.P. 241.4(c)(11) [to be repealed and reenacted as C.R.C.P. 251.3 (c)(11), effective January 1, 1999] and 251.13 [effective July 1, 1998]. That Addendum modifies this Formal Opinion 85 as well.

86 USE OF SUBPOENAS IN CIVIL ACTIONS AND PROCEEDINGS

Revision adopted January 17, 1998.
Withdrawn March 16, 2013.

WITHDRAWN

Introduction

This Opinion addresses problems that have been brought to the attention of the Ethics Committee (the "Committee") related to the use of subpoenas *duces tecum* in civil actions and proceedings. The Committee has been made aware of instances when lawyers have used subpoenas *duces tecum* in civil actions to obtain privileged information without complying with the Rules of Civil Procedure. In other instances, subpoenas *duces tecum* have been used in civil actions to obtain an exclusive review of documents or other physical evidence, or a review before opposing counsel or an unrepresented defendant, because no notice has been given to the adversary party. In still other instances, the witness or custodian of records on whom a subpoena *duces tecum* has been served is knowingly misled into disclosing privileged or confidential information that the witness would not be required to reveal. Finally, the Committee has been made aware of instances when lawyers have received privileged or confidential documents or other tangible things pursuant to a subpoena *duces tecum*, because the witness subject to the subpoena inadvertently delivered those privileged or confidential materials.

Syllabus

In a civil action in Colorado state court or federal court[1] a lawyer may not issue or cause to be issued a subpoena *duces tecum* for production of documents or other tangible things at a deposition without giving notice to every other party to the action, and the designation of the materials to be produced pursuant to the subpoena must be attached to or included in the notice, unless a court order provides otherwise. Similarly, in a civil action in federal court, a lawyer may not issue or cause to be issued a subpoena *duces tecum* for production of documents or other tangible things or inspection of premises before trial without giving notice to every other party to the action. Also, in a civil action in Colorado state court, a lawyer may not issue or cause to be issued a subpoena *duces tecum* for production of documents or other tangible things except at a deposition, hearing or trial, unless the parties agree otherwise or a court order provides otherwise. It is the Committee's opinion that knowingly violating these requirements is unethical.

Further, in the course of a civil proceeding,[2] if a lawyer communicates with a witness on whom a subpoena has been served, it is unethical for a lawyer knowingly to mislead the witness during any communication as to disclosing privileged or confidential information or documents that the witness would not otherwise know to reveal or be compelled to reveal.

Finally, in the course of a civil proceeding, if a witness on whom a subpoena has been served inadvertently delivers to the lawyer issuing the subpoena documents that the lawyer knows to be, or that appear on their face to be, privileged or confidential,[3] then the lawyer receiving such documents has an ethical obligation to refrain from reviewing the material further after becoming aware of the privileged or confidential nature of the material. The attorney receiving such documents also has an ethical obligation to notify the adverse party if unrepresented or the adverse party's lawyer and the producing witness and to take reasonable steps to notify the person entitled to invoke the privilege with respect to the documents that he or she possesses such materials and either to follow the instructions of the person who is entitled to invoke the privilege with respect to the documents or to refrain from using the documents until a definitive resolution is obtained from the court.

Opinion

Procedural Requirements under the Federal and Colorado Rules of Civil Procedure

The function of a subpoena is to compel the attendance of witnesses and/or the production of documents and other tangible things, so the court may have access to all relevant information to decide the cases before it. *See generally* 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2451 (1995). There are two types of subpoenas. A subpoena *ad testificandum* compels the attendance of a witness to testify, and a subpoena *duces tecum* compels the production of documents and other tangible things. *Id*. Both kinds of subpoena may be issued either for a hearing or trial or as part of the pretrial discovery process. *Id.,* §§ 2451, 2452.

Significantly, the Federal Rules of Civil Procedure differ from the Colorado Rules of Civil Procedure in certain respects regarding subpoenas *duces tecum*. One such difference is whether a subpoena *duces tecum* may be used to compel the production of documents only, like a request for production under Rule 34, or whether the production of documents pursuant to a subpoena *duces tecum* must be at a deposition, hearing, or trial.[4] Following the 1991 amendments, the Federal Rules expressly authorize the issuance of a subpoena *duces tecum* to produce and permit inspection and copying of designated documents or tangible things at trial, a hearing, or a deposition *or independently*, like a request for production under Rule 34. Fed. R. Civ. P. 34(c), 45(a)(1). *See* Advisory Committee Note to 1991 amendments to Fed. R. Civ. P. 34 and 45, *reprinted in* 134 F.R.D. 668, 670. *See also* David D. Siegel, *Federal Subpoena Practice under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197, 205-207 (1992). In contrast, Colorado Rule of Civil Procedure 45 only authorizes the production of documents pursuant to a subpoena *duces tecum* "at a deposition, hearing or trial." C.R.C.P. 45.

Thus, in a civil action in Colorado state court, a lawyer who only wishes to review documents in the possession of a non-party but who is faced with a refusal by that non-party to disclose the documents must schedule a deposition of that non-party and subpoena the documents. *See* R. Haydock & D. Herr, *Discovery Practice* at 200 (1988). In such a civil action, after notice of the deposition has been served on all parties and the subpoena *duces tecum* has been served on the non-party witness, the parties may agree to waive the need for a court reporter. The "deposition" at these stipulated "depositions" is not examined, but essentially acts as a messenger who delivers the documents to the requesting lawyer for review. These stipulated "depositions" are consistent with Colorado Rules of Civil Procedure 30 and 45 and are ethically permissible. On the other hand, in a civil action in federal court, a lawyer who wishes only to review documents in the possession of a non-party and who is faced with a refusal by that non-party to disclose the documents may issue a subpoena *duces tecum* for production, inspection, and copying of the documents, without the need for a deposition. Fed. R. Civ. P. 34(c), 45(a)(1), (c)(2)(A). *See* 8A Charles A. Wright, Arthur R. Miller, and Richard L. Marcus, *Federal Practice and Procedure*, § 2209 at 392-393 (1994); David D. Siegel, *supra*, 135 F.R.D. at 205-207.

Likewise, the Federal Rules of Civil Procedure and the Colorado Rules of Civil Procedure differ in certain respects regarding notice of subpoenas. Effective January 1, 1998, if the subpoena compels the attendance of a witness at a hearing or trial in a civil action in Colorado state court, the Colorado Rules of Civil Procedure require the party issuing the subpoena to serve a copy of the subpoena, including a complete list of documents and things to be provided pursuant to the subpoena, upon all parties of record in the manner prescribed by Colorado Rule of Civil Procedure 5(b) promptly after the service of the subpoena upon the person named therein. C.R.C.P. 45(c). In contrast, the Federal Rules of Civil Procedure do not require notice of a subpoena compelling the attendance of a witness, with or without documents, at a hearing or trial. *See* Fed. R. Civ. P. 45. Likewise, the Federal Rules of Civil Procedure require a party issuing a subpoena *duces tecum* to produce and permit inspection and copying of designated documents or tangible things independent of a deposition, hearing, or trial or to inspect premises before trial must give prior notice of the commanded production of documents or inspection of premises on each party in the manner prescribed by Federal Rule 5(b). Fed. R. Civ. P. 45(b)(1). *See* Advisory Committee Note to 1991 amendments to Fed. R. Civ. P. 45, *reprinted in* 134 F.R.D. at 670. *See also* David D. Siegel, *supra*, 135

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F.R.D. at 207. In contrast, as discussed above, the Colorado Rules of Civil Procedure do not authorize the issuance of a subpoena *duces tecum* for the production of documents other than at a deposition, hearing, or trial.

However, the Federal Rules of Civil Procedure and the Colorado Rules of Civil Procedure are similar regarding notice of subpoenas for deposition on oral examination. Under both the Federal and Colorado Rules of Civil Procedure, if the subpoena is for a deposition on oral examination and/or the production of documents at such a deposition, then the party desiring to take the deposition must give reasonable notice in writing to every other party to the action, and the designation of the materials to be produced as set forth in the subpoena must be attached to or included in the notice. Fed. R. Civ. P. 30(b)(1); C.R.C.P. 30(b)(1).

Rules 30 and 45 of the Federal and Colorado Rules of Civil Procedure confer vital protections on the witness subject to the subpoena as well as the other parties to the civil action. It is only through the requirement of notice that the other parties to the civil action are able to inspect and copy the documents sought in the subpoena. Similarly, if an adverse party claims some personal right or privilege with regard to the documents sought (for example, that the documents belong to that party and are privileged or protected work product), it is only through the requirement of notice that the adverse party is able to seek appropriate relief from the court, such as an order quashing or modifying the subpoena or a protective order. Fed. R. Civ. P. 26(c), 45(c)(3)(A), (B); C.R.C.P. 26(c), 45(b), (d)(1). *See* 9A Charles Wright & Arthur R. Miller, *Federal Practice and Procedure,* §§ 2458, 2459.

Knowingly violating the requirement in Colorado Rule of Civil Procedure 45(a) that documents responsive to a subpoena be produced only at a deposition, hearing, or trial; the requirement in Federal and Colorado Rule of Civil Procedure 30(d)(1) to give notice of deposition subpoenas; or the requirement in Federal Rule of Civil Procedure 45(b)(1) to give notice of any subpoena requiring only the production of documents or inspection of premises before trial; or the requirement in Colorado Rule of Civil Procedure 45(c) to give notice of subpoenas for hearing or trial, violates the Rules of Civil Procedure, may deprive a party or witness of vital protections, and is unethical. *See* Colo. RPC 3.4, Comment [1] (evidence in a case is to be marshaled fairly, even if competitively, by the contending parties); 3.4(c) (knowing disobedience of rules of tribunal); 4.1 (misrepresentation); 4.3 (dealings with unrepresented persons); 4.4 (respect for rights of third persons); and 8.4(c) (lawyer shall not engage in dishonesty, fraud, deceit or misrepresentation). *See also* Kentucky Bar Association Ethics Opinion E-304 (1985 as amended) (an attempt to circumvent the Civil Rules as written or customarily applied in the particular forum, with a view to dispensing with notice to an opponent or securing some unfair advantage, is unethical); Georgia State Bar Disciplinary Board, Opinion 40 (1984) ("subpoena issued pursuant to Rule 45 of the Civil Practice Act should be issued only for depositions that have actually been scheduled by agreement between the parties or where a notice of deposition has been served upon all parties and should not be issued when no deposition has been scheduled"). In certain cases such action may also constitute criminal conduct. *See* C.R.S. § 18-4-412 (class 6 felony to obtain medical record or medical information without proper authorization).

Two important points should be noted in this regard. First, not every violation of the Rules of Civil Procedure constitutes a violation of the Rules of Professional Conduct. *See* Colo. RPC 3.4(c). Rather, as indicated above, it is the knowing violation of the requirements in the Rules of Civil Procedure that is unethical. Second, the Rules of Civil Procedure are subject to change, including the Rules of Civil Procedure on which this Revised Formal Opinion are based. As such, lawyers confronting the issues addressed in this Revised Formal Opinion should determine whether the applicable Rules of Civil Procedure have changed since this Opinion was issued.

Communications with Subpoenaed Witnesses

Pursuant to the Rules of Civil Procedure, the witness on whom a subpoena is served is not required to disclose the information or documents for which he or she has been subpoenaed until the proceeding at which the witness has been commanded to appear. Nevertheless, a lawyer in preparing a case may want to communicate with a subpoenaed witness in advance of the proceeding. As the Committee discussed in

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Formal Opinion 65, these interviews are ethically permissible and encouraged if the witness is informed that there is no legal obligation to submit to the interview and no other legal or ethical impediment exists. *See* Colo. RPC 4.1 and 4.3 (truthfulness in statements to others and dealing with unrepresented persons).

However, if a lawyer intends to communicate with a nonparty witness subsequent to the witness being served the subpoena, but prior to the document production, deposition, hearing or trial referred to in the subpoena, that lawyer should not, during the course of any communication with the non-party witness, knowingly mislead the witness into disclosing privileged or confidential information.

During any communication with a non-party witness, a lawyer should keep in mind that the imbalance in knowledge and skill between a lawyer and a lay witness may cause even well intentioned acts of the lawyer to have a coercive impact on the witness and induce the witness to disclose privileged or confidential information. Therefore, whenever a lawyer communicates with a non-party witness, he or she should clearly identify himself or herself and state the reason for the communication.

Inadvertent Delivery of Privileged Or Confidential Material

The Committee recognizes that, despite giving the appropriate admonitions no[illegible]ve[illegible]d even in the absence of any direct communication with the witness on whom a subpoena d[illegible]*ces tecum* has been served, a witness may simply send documents or other tangible things sought [illegible] the subpoe[illegible] to the lawyer requesting them in an attempt to obtain a release from the subpoena and an appearance at a proceeding.

Under such circumstances, a lawyer who receives documents or o[illegible]r tangible things that the lawyer knows to be, or that appear on their face to be, privileged o[illegible]nfidentia[illegible]ould refrain from reviewing the material further after becoming aware of the privileged or confidential nature of the material. The lawyer receiving such documents also should notify the adverse party if unrepresented or the adverse party's lawyer and the producing witness and should take reasonable steps to notify the person entitled to invoke the privilege with respect to the documents that he or she possesses such materials, and that lawyer should either follow the instructions of the person entitled to invoke the privilege with respect to the materials or refrain from using them until a definitive resolution is obtained from the court or other tribunal. *See* ABA Formal Opinion 94-382, Unsolicited Receipt of Privileged or Confidential Materials (July 5, 1994); ABA Formal Opinion 92-368, Inadvertent Disclosure of Confidential Materials (November 10, 1992).

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Conclusion

The use of a subpoena *duces tecum* in discovery in a civil action to obtain documents or other tangible things from a witness without notice to the other parties or their counsel knowingly in violation of the Rules of Civil Procedure violates the Rules of Professional Conduct and is unethical. Similarly, the use of a subpoena *duces tecum* in a civil action in Colorado state court to obtain documents or other tangible things other than at a deposition, hearing, or trial knowingly in violation of the Colorado Rules of Civil Procedure without the agreement of the other parties to the action or by court order violates the Rules of Professional Conduct and is unethical. Likewise, it is unethical in any civil proceeding knowingly to mislead a witness on whom a subpoena has been served into disclosing privileged or confidential information or documents that the witness would not be required to reveal. Finally, in any civil proceeding, if a witness on whom a subpoena has been served inadvertently delivers to the lawyer issuing the subpoena documents that the lawyer knows to be, or that appear on their face to be, privileged or confidential, the lawyer receiving such documents should notify the adverse party if unrepresented or the adverse party's lawyer and the producing witness and should take reasonable steps to notify the person entitled to invoke the privilege with respect to the documents that he or she possesses such materials, and the lawyer receiving such documents should either follow the instructions of the person entitled to invoke the privilege with respect to the documents or refrain from using them until a definitive resolution is obtained from the court or tribunal.

NOTES

1. Under the Colorado and Federal Rules of Civil Procedure, there is one form of action known as a "civil action," which includes all actions, suits and proceedings of a civil nature, whether cognizable as cases at law or in equity or admiralty and in all special statutory proceedings, with the exceptions stated in Rule 81. Fed. R. Civ. P. 1, 2; C.R.C.P. 1(a), 2.

2. The term "civil proceedings" is broader than the term "civil actions." For purposes of this Opinion, "civil proceedings" includes not only "civil actions" as defined in Federal and Colorado Rules of Civil Procedure 1 and 2, but also the cases and special statutory proceedings excepted from the definition of civil actions in Rule 81 of the Federal and Colorado Rules of Civil Procedure and civil administrative proceedings in which subpoenas are allowed.

3. For purposes of this Opinion, "confidential" documents are those that are subject to a legally recognized exemption from discovery and use in a civil action or proceeding, even if they are not "privileged" *per se*. Examples of such confidential documents may include those subject to the work product doctrine, *e.g.*, Fed. R. Civ. P. 26(b)(3); C.R.C.P. 26(b)(3); documents subject to a protective order that discovery not be had, that certain matters not be inquired into, or that the documents not be revealed or be revealed only in a designated way, Fed. R. Civ. P. 26(c)(1), (4), (7); C.R.C.P. 26(c)(1), (4), (7); records of services to the mentally ill pursuant to Article 10 of the Colorado Revised Statutes, § 27-10-120(1), C.R.S.; reports of child abuse or neglect, § 19-1-307(1), C.R.S.; reports of AIDS or HIV-related illness, § 25-4-1404(1), C.R.S.; and records of a professional review committee or the committee on anticompetitive conduct of the Colorado State Board of Medical Examiners or governing board of any organization of health care providers which has authority to take final action regarding the recommendations of any authorized professional review committee, § 12-36.5-104(10)(a), C.R.S. In contrast, for purposes of this Opinion, "confidential" documents do *not* include documents as to which some person has an expectation of privacy or confidentiality, but which are not subject to a legally recognized exemption from discovery or use in a civil action or proceeding, such as research, development or commercial information and personal correspondence or diaries (assuming that some other privilege does not otherwise attach to the letters or diaries, such as the attorney-client privilege or the Fifth Amendment privilege against self-incrimination).

4. Federal Rule of Civil Procedure 45 provides, in relevant part:

> Every subpoena shall
>
> (A) state the name of the court from which it is issued; and
>
> (B) state the title of the action, the name of the court in which it is pending, and its civil action number; and
>
> (C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and set forth the text of subdivisions (c) and (d) of this rule.
>
> *A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.*

Fed. R. Civ. P. 45(a)(1) (*emphasis added*).

Similarly, Federal Rule of Civil Procedure 34 provides, in relevant part:

> A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45.

Fed. R. Civ. P. 34.

In contrast, Colorado Rule of Civil Procedure 45 provides, in relevant part:

> For Attendance of Witnesses; Form; Issue. *Subpoenas may be issued under Rule 45 only to compel attendance of witnesses, with or without documentary evidence, at a deposition, hearing or trial.* Every subpoena shall state the name of the court, and the title of the action; and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified.
>
> (b) For Production of Documentary Evidence. A subpoena may *also* command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein . . .
>
> (d) Subpoena for Taking Depositions; Place of Examination
>
> (1) A deposition subpoena, upon notice to all parties to the action, may require the production of documentary evidence which is within the scope of discovery permitted by Rule 26.

C.R.C.P. 45(a), (b), (d)(1) (*emphasis added*).

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87 COLLABORATION WITH NON-LAWYERS IN PREPARATION AND MARKETING OF ESTATE PLANNING DOCUMENTS

Adopted July 14, 1990.
Revised December 14, 1991.
Addendum issued 1995.

Introduction and Scope

The Committee has received inquiries addressing several facets of lawyer involvement in the preparation and marketing by non-lawyers of estate planning documents, such as living trust "packages." In particular, the Committee has considered the following scenarios:

1. A non-lawyer (such as a financial planner or life insurance agent) markets a living trust package, gathers family and asset information from the consumer, and forwards the information to a central "factory," which generates the living trust documents. The non-lawyer then delivers the documents to the consumer for signature. While an attorney, either in-state or out-of-state, may assist in preparation and review of documents at the "factory," the consumer has no personal contact with that attorney. In instructions accompanying the living trust package, the consumer is advised to contact independent legal counsel for assistance in clarifying the trust terms and funding the trust. The consumer remits a fee for the living trust documents directly to the non-lawyer, payable to the "factory," out of which the non-lawyer receives a sales commission.

2. A publishing house markets living trust "kits" to the public through direct mail advertising. The consumer makes a payment to the company and receives a living trust kit in return. The kit includes the name of a local attorney, with a recommendation that the consumer contact this attorney for assistance in review of the documents and funding requirements. If the consumer does so, he or she then enters into a fee agreement with the attorney which is independent of the consumer's arrangement with the publishing house.

3. A non-lawyer solicits a customer, collects relevant information, delivers that information to a local attorney, and schedules an appointment for the customer to meet with the attorney. The attorney then prepares a living trust package and arranges for execution of the documents at a subsequent meeting, at which the lawyer supervises those funding tasks characterized as "legal" in nature, including assignment of business interests and preparation of deeds for real estate passing to the trust. The non-lawyer assists the client with funding tasks characterized as "non-legal," such as changing beneficiary designations, bank account titles, and stock account titles. In this scenario, there are several conceivable options for collecting and distributing the client's payment for these services. For example, the client might pay a fee for all services to the non-lawyer, from which the attorney is paid for his services according to a pre-arranged "split" of the fee, and the non-lawyer retains the remainder of the fee as compensation for gathering the information and assisting with the "non-legal" funding. As another possibility, the client could pay the entire fee to the lawyer, who would then pay the non-lawyer according to a pre-arranged split which is based on the relative "value" of the lawyer's and non-lawyer's efforts and responsibilities, e.g., one third to the non-lawyer and two-thirds to the lawyer.

4. In other possible variations on the third scenario, compensation could be provided in some manner other than a "split" of fees between the lawyer and non-lawyer. The consumer could make one payment to the non-lawyer for the information gathering and "non-legal" assistance, and a second payment to the attorney for preparation of the documents and other legal services. The division of fees would reflect a percentage breakdown of the total charge for the living trust package and would be fully disclosed by the non-lawyer to the consumer. In another variation, the attorney, after receiving the entire fee from the consumer, might pay a fee to the non-lawyer off the non-lawyer's invoice, which would reflect an hourly fee for information gathering and "non-legal" funding.

5. Educational seminars on estate planning are sponsored and financed by non-lawyers (such as insurance agents, accountants, or financial planners) and are marketed by newspaper advertisement or direct mail. An attorney addresses certain topics as a guest speaker, but does not share seminar costs or split fees with the seminar sponsors. At the conclusion of the seminar, attendees are asked to complete evaluation forms on which they may request a free interview with the attorney, to be coordinated through the seminar sponsor. A non-lawyer representative of the seminar sponsor would then accompany the attendee to the lawyer's office, where the attorney and the attendee determine whether representation is appropriate. If so, the attorney and client agree to the appropriate legal work and fee.

This Opinion addresses violations of the Code of Professional Responsibility and related ethical considerations in each of the above scenarios. The Opinion does not address related issues with respect to what may constitute the unauthorized practice of law by a non-lawyer, except insofar as those issues have already been decided by the Colorado Supreme Court.

Syllabus

The scenarios described above raise several issues bearing on the appropriate relationships between lawyers and non-lawyers.

By knowingly affiliating or collaborating with a non-lawyer person or entity who prepares and markets legal documents used in estate planning, a lawyer violates DR 3-101(A) of the Code of Professional Responsibility. This principle, which is clear from decisions of the Colorado Supreme Court, applies to the "factory" lawyer in the first scenario and the lawyer whose name is used in connection with the publishing-house kits in the second scenario described above.

A lawyer violates DR 3-102 by sharing a client's payment for preparation of estate planning and funding documents with a non-lawyer. Where the non-lawyer's activities include soliciting customers or marketing these services, the lawyer also violates DR 2-103(B) and (D).

Whenever a lawyer and a non-lawyer collaborate to prepare estate planning and funding documents, there is a danger that the non-lawyer may impermissibly interfere with the lawyer's exercise of independent professional judgment on behalf of the client. Where the lawyer is not in a position to exercise control over the non-lawyer, the non-lawyer solicits the client, and tasks are allocated between the lawyer and non-lawyer based on their mutual agreement as to which tasks are "legal" or "nonlegal" in nature, the lawyer violates DR 5-107 and also may violate DR 3-101(A), DR 3-103, and DR 2-103(D). This applies to the third and fourth scenarios described above.

A lawyer may participate in an educational seminar at which attendees are asked to complete evaluation forms whereby they may request individual consultation with the attorney, but must fully comply with all applicable disciplinary rules.

In all of the scenarios described in this Opinion, the lawyer's collaboration with a non-lawyer raises serious questions of aiding in the unauthorized practice of law, partnership or division of fees with non-lawyers, solicitation, interference with the attorney's independent professional judgment, preservation of client confidences, and competent representation of the client. In undertaking any collaboration with a non-lawyer, the lawyer must assure his or her compliance with all applicable disciplinary rules.

Opinion

A. *Aiding the Unauthorized Practice of Law*

DR 3-101(A) prohibits a lawyer from aiding a non-lawyer in the unauthorized practice of law. This Rule protects the public in its need for and reliance on the integrity and competence of those who undertake to render legal services, recognizing that competent professional judgment is the product of a trained familiarity with law and legal process and a disciplined, analytical approach to legal problems coupled with a firm ethical commitment. *See*, EC 3-1 and 3-2. As recognized in EC 3-5, while there is no single, specific definition of what constitutes the practice of law, it involves the rendition of services for others that call for the professional knowledge and judgment of a lawyer. *See*, Formal Opinion No. 79, adopted by the Ethics Committee on February 18, 1989.

Determining what acts do or do not constitute the practice of law is a function of the Colorado Supreme Court and falls outside the responsibilities of the Ethics Committee.[1] What constitutes the unlawful practice of law is not precisely defined, but is judged by the court in each circumstance. *See, Denver Bar Assn. v. Public Utilities Comm.*, 154 Colo. 273, 391 P.2d 467 (1964). Generally, the practice of law includes counseling, advising, and assisting others in connection with their legal rights and duties. *Id.*; *see also* Formal Opinion No. 79, *supra*.

The Colorado Supreme Court has held that the preparation and marketing of living trust documents by a non-lawyer or a corporation constitutes the unauthorized practice of law. *People v. Schmitt*, 126 Colo. 546, 251 P.2d 915 (1952). The Court also has suspended attorneys for their participation in such ventures. In *People v. Macy*, 789 P.2d 188 (Colo. 1990), an attorney was suspended for reviewing living trust packages prepared by non-lawyers for individuals, answering questions addressed to him by non-lawyer salespersons regarding individual customers' concerns and accepting an hourly fee from a non-lawyer salesperson for those services. In *People v. Boyls*, 197 Colo. 242, 591 P.2d 1315 (1979), a lawyer was suspended for working with non-lawyer salesmen to answer clients' questions regarding individual trusts, prepare promotional materials for trusts and assist purchasers in formulating effective trusts.

The lawyer's involvement in the first scenario appears legally indistinguishable from the *Boyls* and *Macy* cases. Both the "factory" and its non-lawyer salesperson are engaged in the practice of law by preparing and marketing living trust packages, and the attorney's assistance to the factory is an integral part of this process. A lawyer may not assist a non-lawyer corporation which provides legal services to third parties. *See*, Formal Opinion No. 63, adopted by the Ethics Committee on February 19, 1983.

In the second scenario, the publishing house's marketing and preparation of living trust "kits" constitutes the unauthorized practice of law as decided in *Schmitt, supra*. While we hesitate to say that any attorney would violate DR 3-101(A) by representing a client who had obtained such a living trust kit, an attorney who willingly associated himself or herself with such an enterprise, allowing his or her name to be given out in the living trust kits, would certainly violate the rule.

The third and fourth scenarios also may involve, to some extent, the unauthorized practice of law since in each case, a living trust package is marketed and perhaps prepared in part by a non-lawyer. It is quite possible that the non-lawyer will analyze and resolve legal issues, problems or planning possibilities (or worse, fail to recognize such issues, problems or possibilities) without the benefit of a lawyer's legal training and professional judgment. Further, the lawyer's involvement may lead the consumer to assume, perhaps incorrectly, that such training and judgment will be applied for the consumer's benefit. A related danger is the likely impairment of the lawyer's independent professional judgment in such circumstances, which is discussed in greater detail below.

In the fifth scenario, the lawyer should assure that the non-lawyer's participation does not constitute the practice of law as discussed herein. If the lawyer is aware that the non-lawyer will use the seminar presentation and follow-up to engage in the unauthorized practice of law, the lawyer may violate DR 3-101(A) even by lending his or her name to the venture as a guest speaker.

B. *Fee Splitting or Partnership with a Non-Lawyer*

DR 3-102 prohibits a lawyer or law firm from sharing legal fees with a non-lawyer, except in certain limited circumstances which are outside the scope of this Opinion. Similarly, DR 3-103 prohibits a lawyer from forming a partnership with a non-lawyer "if any of the activities of the partnership consist of the practice of law." Also related is DR 5-107(A)(1), which provides that a lawyer shall not accept compensation for his or her legal services from one other than the lawyer's client, except with the consent of the client after full disclosure.

As the American Bar Association has recognized, the purpose of the fee-sharing prohibition is to avoid the possibility of non-lawyer interference with the exercise of the lawyer's independent professional judgment in representing a client, and to ensure that the total fee paid by the client is not unreasonably high. ABA Formal Ethics Opinions 88-356 (Dec. 16, 1988) and 87-355 (Dec. 5, 1987). While a lawyer may employ a non-lawyer to provide services, payment for those services may not be based on a percentage of

the lawyer's fee. ABA Informal Ethics Opinion 86-1519 (April 18, 1986). The lawyer-client relationship should be direct and personal, without intermediaries, and any compensation paid by the client to the lawyer should be agreed on with, and paid directly to, the lawyer. ABA Informal Ethics Opinion 1212 (Feb. 9, 1972).

Past opinions of this Committee have also addressed the fee-splitting prohibition. A lawyer violates DR 3-102 if, with the lawyer's knowledge and consent, a non-lawyer retains any part of the fee charged to a customer for legal services. Formal Opinion No. 12, adopted by the Ethics Committee on March 26, 1960. It is impermissible for a non-lawyer entity to collect the client's payment for legal services, pay part of it to the lawyer, and keep the other part for itself. Formal Opinion No. 63, *supra*.

In the first scenario, if the living trust "factory" is a lawyer or law firm, it violates DR 3-102 by paying a commission to the non-lawyer salesperson. The second scenario does not raise any issue of fee sharing or partnership, since the customer's fee agreement with the attorney is independent of any payment to the publishing house.

In the third scenario, the pre-arranged "split" of the fee for services between the lawyer and the non-lawyer violates DR 3-102, much like the traffic clinic discussed in Formal Opinion No. 63, *supra*. The methods of compensation in the fourth scenario do not violate DR 3-102 or DR 5- 107(A)(1), but the lawyer's fee must not be excessive under DR 2-106. Even if the fee arrangement is permissible, the lawyer's conduct may be prohibited by DR 3-103 as a partnership with a non-lawyer whose activities include the practice of law, particularly if the lawyer and non-lawyer share clients, rather than each being selected independently, if they jointly advertise or solicit clients, or if they share fees and expenses like a partnership. This determination would necessarily be based on principles of partnership law, which are outside the scope of this opinion, and on the particular facts and circumstances of each case.

C. *Solicitation*

DR 2-103(B) prohibits "feeder operations":

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client. . . .

In general, a lawyer may not request another person or organization to solicit prospective clients, DR 2-103(C), or knowingly assist a person or organization that recommends legal services to others to promote the use of his or her services, DR 2-103(D). *See also*, Formal Opinion No. 83 (Part V.B.2), adopted by the Ethics Committee on November 18, 1989. The exceptions to DR 2-103(C) and (D) are outside the scope of this Opinion.

Any otherwise permitted solicitation by non-lawyers is also limited by the restrictions on lawyer solicitation in DR 2-101. *See*, Formal Opinion No. 83, *supra*. Thus, a lawyer cannot avoid the prohibition against in-person solicitation, DR 2-101(E), by associating with a non-lawyer who engages in such conduct. In-person solicitation of prospective clients by a non-lawyer acting on behalf of a lawyer, where pecuniary gain is a significant motive, is prohibited. *See*, Formal Opinion No. 83, *supra*. DR 2-101(A) also prohibits the transmission of a solicitation "in any manner involving undue influence."

If the living trust "factory" in the first scenario is a lawyer or law firm, it violates DR 2-103(B) by paying a sales commission to the non-lawyer salesperson. In the second scenario, the living trust "kit" includes the name of a single local attorney whom the customer is encouraged to contact. Such a solicitation, while not made in person, may involve "undue influence" in violation of DR 2-101(A), since a consumer who has already purchased the living trust kit will likely be unduly influenced to follow the specific recommendation contained in the instructions for the kit.

The arrangements described in the third and fourth scenarios may be "feeder operations" prohibited by DR 2-103(B), (C), and (D). While the non-lawyer's compensation is purportedly based on his or her role in information-gathering and non-legal funding, it is not merely coincidental that the same person who "sold" the trust package is retained to perform these tasks as well. Therefore, the lawyer's sharing compensation with a non-lawyer in the third scenario may violate DR 2-103(B) as well as DR 3-102. In the

fourth scenario, if the non-lawyer is paid an hourly fee for his or her "non-legal" services, the compensation would be prohibited by DR 2-103(B) if it is in fact a disguised form of compensation for referral rather than a reasonable and fair compensation for services actually provided to the client. Moreover, even where the non-lawyer's compensation is independent of the lawyer's, the lawyer may violate DR 2-103(D) by knowingly assisting a non-lawyer to promote the use of the lawyer's services, and may vicariously violate DR 2-101(E) to the extent that the non-lawyer recommends the lawyer's services to the client in person.

Solicitation through an educational seminar, as in the fifth scenario, also raises issues under DR 2-101(E), which prohibits in-person solicitation where pecuniary gain is a significant motive for the solicitation. The evaluation form described in this scenario allows the attendee to request an interview with the attorney. An attorney participating in an educational seminar must, to avoid the prohibitions against solicitation, comply with DR 2-104(B). This rule prohibits the lawyer from emphasizing his or her own professional experience or reputation or that of his or her firm or any other affiliated lawyer, and from undertaking to give any individual advice.

The distribution to all seminar attendees of an evaluation form which, among other things, offers a free interview with the participating attorney, does not in itself constitute prohibited solicitation. The offer must be extended to a general group rather than a specific person, and must not be referred to or communicated orally at the seminar. There must be no pressure on the seminar participants to accept the offer. The evaluation form offering an attorney interview is subject to the requirements of DR 2-101(E) and (F) for written solicitation, including the label "advertising material." Moreover, attorneys participating in seminars, particularly where follow-up interviews are offered to attendees, must comply scrupulously with the standards set forth in all applicable disciplinary rules, including DR 2-101, DR 2-103, and DR 2-104(A) and (B). *See*, Formal Opinion No. 83, *supra.*

D. *Independent Professional Judgment*

DR 5-107 states that a lawyer "shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal service." EC 5-1 recognizes that a lawyer's professional judgment should be exercised "solely for the benefit of his client and free of compromising influences and loyalties," and the "desires of third persons" should not be permitted to dilute the lawyer's loyalty to the client. A lawyer "must decline to accept direction of his professional judgment from any layman." EC 5-24.

The arrangement described in the third and fourth scenarios involves essentially a triangular relationship among the lawyer, non-lawyer and consumer, as opposed to the usual direct relationship between lawyer and client. By mutual agreement, part of the responsibilities are delegated to the lawyer and other responsibilities to the non-lawyer. The Committee recognizes that a multi-professional "team" approach is often appropriately used in the estate planning process. However, a lawyer involved in such a team must take great care to ensure that such an arrangement does not limit or preclude the lawyer's exercise of independent professional judgment, either with regard to matters delegated to the non-lawyer, or particularly in advising the client as to whether a living trust is appropriate at all.

The fee arrangement in these scenarios also may tend to restrict the lawyer's exercise of independent professional judgment for the client's benefit. The lawyer apparently is compensated as part of a "sale" of a living trust package, which may deter the lawyer from questioning whether a living trust is the most appropriate estate planning vehicle for the client.

The American Bar Association has recognized that to draft a will appropriate for an individual, a lawyer must determine what facts are relevant, obtain all relevant facts and determine the appropriate type of will. If any of these tasks is performed without the lawyer's involvement, the lawyer's exercise of independent professional judgment is restricted, and the lawyer may be aiding a non-lawyer in the unauthorized practice of law. ABA Informal Ethics Opinion 1254 (Dec. 15, 1972). The lawyer's role in preparing trust documents is just as central as in drafting wills, and the lawyer must perform this task free from any influence of non-lawyer third parties.

This Committee's past opinions have recognized that any "intermediary" between lawyer and client, particularly where the lawyer's business depends in part on the intermediary, may restrict impermissibly the exercise of the lawyer's independent professional judgment. *See*, Formal Opinion No. 12, *supra*, and Formal Opinion No. 17, adopted by the Ethics Committee on January 20, 1961. In each of the scenarios described herein, the non-lawyer acts in some manner as an intermediary between lawyer and client, at least in the initial stages. The lawyer must assure that the intermediary does not subject the lawyer to economic or other pressures, particularly in an ongoing relationship, and thereby be in a position to restrict or influence the lawyer's exercise of professional judgment.

E. *Other Ethical Concerns*

A lawyer has the duty to preserve a client's confidences and secrets. DR 4-101. In each of the above scenarios, the client may desire and assume that the information communicated to both the lawyer and the non-lawyer will be treated as privileged and confidential. Any information communicated in the non-lawyer's presence or through the non-lawyer as intermediary may not be privileged [*see*, *Denver Tramway Co. v. Owens*, 20 Colo. 107, 36 P. 848 (1894)], so the client should be fully informed before waiving any privilege by communicating in this manner. Absent a fully informed waiver by the client, the lawyer may violate DR 4-101 by gathering information from the client in this manner. This danger is one justification for the prohibitions against the unauthorized practice of law by non-lawyers. *See*, EC 3-3 and 3-4.

A lawyer also must act competently in representing a client. DR 6-101. When a lawyer shares his or her responsibilities with a non-lawyer, the lawyer must assure that the client is competently advised and represented. *See*, Formal Opinion No. 79, *supra*.[2] This may be difficult in all of the scenarios described above.

1995 Addendum

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 5.4(a) and (b) (regarding fee splitting and partnership with a non-lawyer); Rules 7.1, 7.2, and 7.3 (regarding solicitation and related issues); Rule 1.5(e) (prohibiting referral fees); Rules 1.7(b), 1.8(f), 2.1 and 5.4(c) (requiring the lawyer's exercise of independent professional judgment); Rule 1.6(a) (regarding confidentiality); Rule 1.1 (requiring competent representation) and Rule 5.5(b) (regarding the unauthorized practice of law). For further discussion of issues considered in this opinion, attorneys may wish to read *People v. Cassidy*, 884 P.2d 309 (Colo. 1994).

NOTES

1. The Ethics Committee's responsibilities do, however, include interpreting DR 3-101(A), which prohibits aiding a non-lawyer in the unauthorized practice of law.

2. As noted above and in Formal Opinion No. 79, duties constituting the practice of law may not be delegated to a non-lawyer.

88 USE AND MISUSE OF "CONFIDENTIALITY WALLS"

Adopted May 18, 1991.
Amended April 18, 1992.
Withdrawn July 2008.

WITHDRAWN

Introduction

DR 5-105(D) of the Code of Professional Responsibility ("CPR") provides:

> If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate or any other lawyer affiliated with him or his firm may accept or continue such employment.

Rule 1.10(a) of the proposed Model Rules of Professional Conduct[1] ("MRPC") similarly provides:

> While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8(c), 1.9 or 2.2.

As written, these ethical precepts are simple and far-reaching. Unfortunately, they have proven to be too far-reaching; and for years courts and ethics commentators have struggled to reconcile the unyielding language quoted above with other societal goals and with the realities of law practice.

In an effort to avoid imputed disqualification, law firms in both public and private settings have attempted to create a screen or "Confidentiality Wall"[3] around one or more attorneys who themselves would be ethically prohibited from working on a given matter. Over the past few years, the CBA Ethics Committee has received an increasing number of inquiries as to when construction of a Confidentiality Wall is proper and what factors to consider in constructing such a Wall. We attempt in this Formal Opinion to provide some overall guidance on these issues.

At the outset, the Committee notes that these issues implicate a number of important legal and social considerations (which at times may conflict) such as a person's right to counsel of his or her choice, a client's right to confidentiality and loyalty in his or her relationship with legal counsel, and the right of attorneys to move from job to job. *E.g., Manning v. Waring, Cox, James, Sklar and Allen*, 849 F.2d 222, 224 (6th Cir. 1988); *Nemours Foundation v. Gilbane, Aetna, Federal Insurance Co.*, 632 F.Supp. 418, 425 (D. Del. 1986); *Parker v. Volkswagenwerk Aktiengesellschaft*, 245 Kan. 580, 781 P.2d 1099, 1104 (1989) (all discussing the various factors to consider in analyzing whether a Confidentiality Wall can avoid a firm's imputed disqualification). Moreover, these issues oftentimes arise in the context of a contested motion to disqualify an opposing party's law firm, and thus are frequently analyzed in a highly charged setting in which the moving party's motives are just as much a matter for judicial scrutiny as the subject attorney's behavior.[4] *See Manning*, 849 F.2d at 224 (reporting that motions to disqualify opposing counsel are "becoming an increasingly popular litigation technique."); *cf.* this Committee's Ethics Opinion No. 78 (adopted June 1, 1988) (regarding the ethical considerations to bear in mind in seeking to disqualify opposing counsel by listing counsel as a fact witness at trial).

For these reasons, it is difficult to set forth black letter principles in this area. The authorities on point are at times difficult to reconcile, and are in any event quite fact-specific.

Nevertheless, while the law is still developing in this area, the authorities do provide some general ethical guidance. The Committee, like the Colorado Supreme Court, *see, Osborn v. District Court*, 619 P.2d 41, 46 (Colo. 1980), is "aware of the current trends regarding the erection of a so-called 'Confidentiality Wall' . . . ." By its analysis of various informal requests for ethical guidance, the Committee is also aware of a number of areas in which some members of the bar fail to appreciate the limited circumstances in which a Confidentiality Wall is appropriate. Accordingly, the Committee believes that it is in a position to provide some useful information to the bar by analyzing these authorities and describing where Confidentiality Walls have been permitted, where they have been found ineffective, and what factors to consider (where a Confidentiality Wall is otherwise proper) in constructing one effectively.

Summary of Opinion

The following discussion may be summarized as follows:

Confidentiality Walls have been permitted in limited circumstances only, as a way of minimizing the risk of inadvertent disclosure of a client's confidences and secrets. The main situation in which a Confidentiality Wall may serve to avoid the otherwise strict rule of imputed disqualification is where an attorney moves from one employer (which represents a certain client) to another employer (representing a different client who might be deemed to have a competing or adverse interest to the client of the first employer). Under proper circumstances set forth below, a Confidentiality Wall may enable the new employer to undertake or continue an engagement which the attorney would not be able to handle on his or her own.

Confidentiality Walls are not permitted as a way of avoiding an attorney's or law firm's duty of undivided loyalty to a client. Accordingly, subject to § 1(b) below, a Confidentiality Wall may not be constructed within a single law firm — no matter how large and diffuse that firm may be — so as to permit that firm simultaneously to represent clients whose interests are adverse in the same or a substantially related matter.

Under those limited circumstances where Confidentiality Walls are permitted, the Wall must be erected in a way which promptly and meaningfully screens the attorney from any contact with the matter at issue.

Analysis

The Colorado Appellate Courts have suggested that a Confidentiality Wall may serve to avoid the imputed disqualification of a public law firm such as a district attorney's or public defender's office. *See, McCall v. District Court*, 783 P.2d 1223 at 1228, n. 6 ("…may be possible for the state public defender to minimize disqualification" by creating a Confidentiality Wall which will prevent one employee's access to information as to the actions of certain co-employees"); *Ranum v. Colorado Real Estate Commission*, 713 P.2d 418, 420 (Colo. App. 1985) (approving a Confidentiality Wall within the Attorney General's office, separating attorneys who serve as counsel to various regulatory commissions and attorneys who prosecute charges before hearing officers of those commissions). These cases reflect the Colorado courts' willingness (similar in nature to many other courts and ethics authorities which have addressed the issue) to apply the rule of imputed disqualification in a pragmatic (sometimes referred to as a "functional"), rather than a literal, manner. *See, e.g., Lanning*, 849 P.2d at 225 (recognizing, in the context of an imputed disqualification motion under the CPR, the "new realities" of modern law practice, including "law firms employing hundreds of lawyers engaging in a plethora of specialities," "law film mergers," and the frequent movement of attorneys from firm to firm); *Nemours Foundation*, 632 F.Supp. at 425 (recognizing the "philosophy of pragmatism" in the MRPC regarding imputed disqualification, "which balances the expectations of confidentiality of a former client against the importance of allowing a client the representation of his choice and promoting the mobility of attorneys, particularly associates, from one private law firm to another").

While *McCall* and *Ranum* were limited to lawyers in the public sector, the *McCall* Court relied on authorities which, in turn, would permit the erection of a Confidentiality Wall under certain circumstances in private law firm settings.[5] Authorities from other states, interpreting the CPR, have extended to private law firms the opportunity under appropriate circumstances to avoid imputed disqualification in certain cases by erecting Confidentiality Walls.[6] The Committee concludes that for at least as long as the CPR remains in force, a similar rule should apply in Colorado.[7]

1. *The interests that may justify imputed disqualification in a Confidentiality Wall context.*

In order to evaluate whether a Confidentiality Wall may be effective in avoiding imputed disqualification, it is useful at the outset to identify the concerns that might justify such disqualification in the first place.

WITHDRAWN

Three principal concerns basic to the existence of the attorney-client relationship and the accepted role of lawyers in American society may be implicated by allowing a law firm to represent a given client where one lawyer in that firm is unable to do so:

(a) A lawyer's duty to preserve a client's confidences.

The first concern is confidentiality. Canon 4 of the CPR states: "A lawyer should preserve the confidences and secrets of a client."

To the same effect, Model Rule 1.6(a) provides: "A lawyer shall not reveal information relating to representation of a client. . . ." and Model Rule 1.8(b) provides: "A lawyer shall not use information relating to representation of a client to the disadvantage of the client. . . ."

Confidentiality is a basic tenet of the attorney-client relationship. Unless a client has reasonable assurance that his or her lawyer will not reveal the client's confidences, the client may be unwilling to disclose them to the attorney. This could well affect the attorney's ability to provide proper legal representation.

Confidentiality Walls have succeeded where they have served to minimize the risk of inadvertent disclosure of certain protected information within a public or private law firm.[8] *E.g., Grand Jury Subpoena of Ford v. United States*, 756 F.2d 249, 254 (2d Cir. 1985) (Confidentiality Wall approved within a U.S. Attorney's office, such that one prosecutor may conduct a grand jury investigation of a target defendant while another, properly screened, prosecutor may question the target defendant's husband about his wife's alleged co-conspirators); *Ranum*, 713 P.2d at 420 (discussed in a prophylactic manner); *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720, 731-732 (Minn. 1983) (court approved Confidentiality Wall in private law firm representing a defendant, where attorney who joined the firm had previously worked for another private law firm which had represented plaintiff in "at least arguably" a substantially related matter). Under proper circumstances discussed below, a Confidentiality Wall may serve to rebut the presumption that a lawyer has shared client confidences with his or her professional colleagues. *E.g., Manning*, 849 F.2d at 225-226; *INA Underwriters Insurance Co. v. Rubin*, 67 F.R.D. at 4-5.[9] In that way, a law firm may continue to represent a client in a given matter even though (a) one lawyer in the firm is unable to work on it and (b) a client of another firm may be unaffected by the arrangement. *Id.*[10]

(b) A lawyer's duty of undivided loyalty to a client.

The second concern is loyalty. The nature of the attorney-client relationship is such that the lawyer must remain loyal to the client. This interest is the subject of Canon 5 of the CPR, which provides: "A lawyer should exercise independent professional judgment on behalf of a client."

Rule 1.7(b) of the NYRPC similarly provides: "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests. . . ."

In order for the legal system to operate properly, a client must have confidence that his or her lawyer is acting solely in the client's interests.

Private law firms have attempted to create a Confidentiality Wall between two sets of attorneys who simultaneously represented competing client interests in the same or a substantially related matter. Such efforts have uniformly failed. Thus, in *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2d Cir. 1977), a law firm which was regional counsel to a national accounting firm was engaged to represent a client whose interests conflicted with the accounting firm's. Under these circumstances, the law firm was not permitted to create a Confidentiality Wall between the attorneys who regularly represented the accounting firm and those attorneys who were simultaneously engaged to represent the adverse client in the same or a substantially related matter. *Id.*, at 229, n. 10 ("No such 'Confidentiality Wall' could be created in a single firm."). The reason for this is simple: A lawyer simply cannot, and cannot be expected to, give undivided loyalty to a client if his or her professional colleagues are simultaneously representing (and presumably giving their undivided loyalty to) another client with adverse interests in the same or a substantially related matter.[11] *See also, Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1267-1268

WITHDRAWN

(7th Cir. 1983) (Confidentiality Wall does not permit a law firm, having been engaged by defendant in a matter, to later represent plaintiff in a substantially related matter); *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1320-1321 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978) (law firm operating out of two cities cannot permit its attorneys in the two separate offices to simultaneously represent adverse interests in a substantially related matter by creating a Confidentiality Wall between the two offices); *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386-1387 (2d Cir. 1976) (where attorney is simultaneously a partner in two separate firms, located in two different cities, one firm cannot represent plaintiff in a lawsuit if the other firm is representing the defendant in a different, but "somewhat similar," matter).[12]

A public law firm is generally prohibited from simultaneously representing conflicting interests in the same or a substantially related matter. While this may be less of a practical problem within a prosecutor's office [whose "attorneys (generally) represent only one 'client,'" *Grand Jury Subpoena of Ford*, 756 F.2d at 254] than in a public defender's office [which may be called upon, consistent with its Sixth Amendment duties, occasionally to assume conflicting litigation positions (*see, Osborn*, 719 P.2d at 41, involving one public defender's challenge to the efficacy of the representation provided by another public defender)], all public law firms are still generally subject to this ethical prohibition. However, in *Ranum*, 713 P.2d at 420, the Colorado Court of Appeals permitted one set of attorneys within the Attorney General's office to represent an administrative agency while another set of attorneys in that office prosecuted charges before that agency, so long as an effective Confidentiality Wall was in place.

(c) Avoiding the appearance of impropriety.

The third interest is set forth in Canon 9 of the CPR, which provides: "A lawyer should avoid even the appearance of professional impropriety."

Some courts have expressed *in dicta* the position that disqualification may occur in a Confidentiality Wall context solely because of violation of Canon 9. *E.g., Sierra Vista Hospital, Inc. v. United States*, 639 F.2d 749, 754 (Ct. Cl. 1981); *INA Underwriters Insurance Co.*, 635 F.Supp. at 5. Other courts have based their ruling that a firm must be disqualified (notwithstanding its timely erection of a Confidentiality Wall) on Canon 9. *E.g., Cinema 5*, 528 F.2d at 1386-1387; *Petroleum Wholesale, Inc. v. Marshall*, 751 S.W.2d 295 (Tex. Ct. App. 1988). However, in every such case where disqualification has been ordered in ostensible reliance on Canon 9, there has also been a violation shown of other Canons. The Committee knows of no decision in a Confidentiality Wall context where a lawyer was disciplined or a firm was disqualified solely because of a subjective failure to avoid the "appearance of professional impropriety" but where the attorney or firm complied with every other Disciplinary Rule. *Cf. Food Brokers, Inc. v. Great Western Sugar Co.*, 680 P.2d 857, 859 (Colo. App. 1984) (disqualification of private attorneys under Canon 9 requires some "specific identifiable impropriety" such as a violation of Canon 4). Indeed, the difficulty in applying the subjective dictates of Canon 9's "appearance of impropriety" standard has led to its omission from the MRPC.

Accordingly, in analyzing the issue of Confidentiality Walls in the context of the CPR, the Committee does not believe that Canon 9, by itself, is an adequate reason to erect a Confidentiality Wall or to seek disqualification of opposing counsel for failing to erect one; and the absence of any "appearance of impropriety" standard in the MRPC obviates any need to analyze Confidentiality Walls in that context.

2. *The framework for analyzing when Confidentiality Walls are permitted as a way of avoiding a law firm's imputed disqualification.*

In Section 1, the Committee explained, in general terms, that a Confidentiality Wall will enable a law firm to avoid imputed disqualification only in the context of preventing the inadvertent disclosure of confidential information. The Committee now addresses a series of more specific fact patterns. In this way, we hope to provide further guidance as to when a Confidentiality Wall is likely to succeed or fail. For, as the authorities show, the mere establishment of a Confidentiality Wall will not, *per se*, cause a court or disciplinary authority to conclude that there is no risk of an inadvertent disclosure of client confidences.

WITHDRAWN

As discussed above, in determining whether a Confidentiality Wall can be erected, a firm (and a court in the context of a motion to disqualify) is called upon to balance certain conflicting interests, including the client's right to counsel of his or her choice, the lawyer's duty to preserve a client's confidences and to remain loyal to the client, the risk of inadvertent disclosure of client confidences, and a lawyer's ability to move from job to job.[13] Depending on the facts of a given case, one of these factors may assume heightened importance.

For purposes of the following discussion, we shall assume that an attorney ("Attorney") leaves one employer ("First Firm"), which represented one client ("First Firm's Client") in a certain lawsuit ("Lawsuit 1"),[14] to join another employer ("Second Firm") which represents another client ("Second Firm's Client"), whose litigation interests in Lawsuit 1 or a different lawsuit ("Lawsuit 2"), are somehow adverse to those of the First Firm's Client.[15] We assume further that the First Firm's Client does not give his or her consent to the Attorney's new position at the Second Firm. *See*, nn. 10-11, *supra*.

Under these circumstances, the Second Firm is obligated at the outset to determine whether it can continue to serve as the Second Firm's Client's attorney in light of the authorities discussed in this Opinion. If the Second Firm believes that it can so remain as counsel, it risks a motion to disqualify [illegible] out of concern that it has not taken adequate steps to prevent an inadvertent disclosure of the First Firm's Client's confidences.

With the foregoing fact pattern in mind, where there is no relationship whatsoever between the circumstances of Lawsuit 1 and Lawsuit 2 and where the Second Firm is not involved in Lawsuit 1, there is no need for the Second Firm to erect a Confidentiality Wall. *See, [illegible] v. Wha[illegible]* 757 F.2d at 1100; *INA Underwriters Insurance Co. v. Nalibotsky*, 594 F.Supp. 1199, 1210-211[illegible] (E.D. Pa. 1984). If Lawsuit 1 is not related to Lawsuit 2, there is little reason to believe that the Attorney has received any secrets or confidences of the First Firm's Client which might unfairly advantage the Second Firm's representation of the Second Firm's Client. *See also, Osborn*, 619 P.2d at [illegible]8.

However, it may be difficult to show that there is no relationship whatsoever between those engagements. As an example, even if the factual and issue matters do not overlap from one case to another, it may well be that a litigant's overall litigation strategy (either one of extreme aggressiveness or one evincing a willingness to settle on the eve of trial) may itself be deemed a "confidence" in need of protection. *See, e.g., Novo Terapeutisk Laboratorium A/S v. Buffalo Travenol Laboratories, Inc.*, 607 F.2d 186, 188-189 (7th Cir. 1979) (rejecting a "mathematical evaluation" as the test of a substantial relationship and concluding that that test "involves a realistic appraisal of the possibility that confidences had been disclosed in the one matter which may be harmful to the client in the other."); *Chugach Electric Association v. District Court*, 370 F.2d 441, 443 (9th Cir. 1966), *cert. denied*, 389 U.S. 820 (1967) (disqualification ordered where plaintiff's counsel, who had served as defendant's in-house counsel, "was in a position to acquire knowledge casting light on the purposes of later acts and agreements" undertaken after the attorney left defendant's employ). The Committee urges the bar to err on the side of cautiousness in erecting Confidentiality Walls where there is even the slightest reason to believe that a relationship exists between the two Lawsuits.

Where there is any relationship between the two Lawsuits, a Confidentiality Wall should be constructed around an attorney who did not work on the First Firm's Client's legal matters. *See, Chambers v. Superior Court*, 121 Cal.App.3d 893, 175 Cal Rptr. 575, 580 (1981) (no showing that high-ranking government attorney acquired confidential information about the matters in dispute; hence, properly constructed Confidentiality Wall will avoid the Second Firm's disqualification); *Ross v. Canino*, 93 N.J. 402, 461 A.2d 585, 589 (1983) (same); *Jenson*, 335 N.W.2d at 732 (same, but in the context where the First Firm was a private law firm). Where the Attorney did not work on the First Firm's Client's legal matters, there is little risk of prejudice to the First Firm's Client arising from any inadvertent disclosure of that Client's confidences. In those circumstances, the courts generally will defer to considerations of the Attorney's rights of job mobility and the Second Firm's Client's right to select counsel of his or her choice, and permit the Second Firm to remain as counsel upon its proper construction of a Confidentiality Wall.

However, a different situation exists where the Attorney, while at the First Firm, performed legal services for the First Firm's Client. Such a situation poses a great risk of harm to the First Firm's Client

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from an inadvertent disclosure of that Client's confidences. The risk is indeed great enough that, in many instances, the Second Firm cannot remain as counsel of record even if it timely constructs a Confidentiality Wall.

For instance, if in the course of Lawsuit 1, the Attorney leaves the First Firm (which represents one litigant) to join the Second Firm (which represents the adverse litigant), the key question in determining whether a Confidentiality Wall will succeed in avoiding the Second Firm's imputed disqualification is whether the Attorney was privy to the First Firm's Client's confidences. Under circumstances where the Attorney actually worked on the matter in dispute (and was thus presumed to have received client confidences bearing on the matter, *see*, note 9, *supra*), courts have regularly found that even a properly constructed Confidentiality Wall at the Second Firm will not avoid the risk of improper disclosure of the First Firm's Client's confidences and, thus, have disqualified the Second Firm. *E.g., Cheng v. GAF Corp.*, 631 F.2d 1052 at 1058; *United States v. Uzzi*, 549 F.Supp. 979, 983-984 (S.D.N.Y. 1982); *State of Nebraska ex rel. Freezer Services, Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245, 253 (1990); *Petrole[illegible] Wholesale*, 751 S.W.2d at 300; *Edward J. DeBartolo Corp.*, 516 So.2d at 7; *see also, Manning*, 849 F.2d a[illegible]27 (appellate court remands the matter to trial court to see if the Attorney actually worked [illegible]or[illegible]sing party in the same case; if so, the Second Firm would be disqualified despite properly con[illegible]ucting a Confidentiality Wall).

Let us say, instead, that the Attorney leaves the First Firm after Lawsu[illegible] included, but during the pendency of a second lawsuit, Lawsuit 2, involving the First Firm's Cl[illegible]t. The risk of prejudice to the First Firm's Client from any inadvertent disclosure of that Client's [illegible]fidences may or may not be great, depending on the relationship between the two Lawsuits.

As the relationship between the two Lawsuits bec[illegible] incr[illegible]gly "substantial," the risk increases (if the Attorney was privy to the First Firm's Client's c[illegible]iden[illegible]s, *see* note 9, *supra*) that the First Firm's Client will be prejudiced by any inadvertent disclosure [illegible]t[illegible]'s confidences; and the less likely it is that even a properly constructed Confidentiality [illegible]wou[illegible] suffice under those circumstances. *See, e.g., Haagen-Dazs Co., Inc. v. Perche No! Gelat[illegible]nc.*, 63[illegible] Sup[illegible] 282 at 287 (disqualification where "substantial relationship" found betwee[illegible]two [illegible]suits). Where there is a "substantial relationship" between the two Lawsuits,[16] then – as with the abo[illegible] exa[illegible]l[illegible] the Attorney moving from the First Firm to the Second Firm during the pendency [illegible]La[illegible]u[illegible] – the risk is great that the First Firm's Client's confidences inadvertently may be disclos[illegible]. Certa[illegible]y if the Second Firm fails to establish a Confidentiality Wall, it should be disqualified fr[illegible]a[illegible] further [illegible]volvement in Lawsuit 2 under circumstances where Lawsuit 1 and Lawsuit 2 are substa[illegible]lly rela[illegible]. *E.g., Smith v. Whatcott*, 757 F.2d at 1101; *EZ Paintr Corp. v. Padco, Inc.*, 746 F.2d 145[illegible]14[illegible] (Fed. C[illegible] 1984).

Wha[illegible]is or [illegible]not a "substantial relationship" may, of course, be a difficult question in any given instance. In s[illegible]s[illegible] particularly where the Attorney and the First Firm performed extensive services for the First Firm's Client[illegible]er a sustained period of time, the term "substantial relationship" may require a far more search[illegible]alysis than where the Attorney and the First Firm represented the First Firm's Client only briefly, in an isol[illegible]ed matter. *See*, note 16, *supra*.

3. *Factors to consider in constructing a Confidentiality Wall.*

We have discussed a series of circumstances under which a Confidentiality Wall may be constructed. But even in those circumstances, the Second Firm may remain as counsel of record only if it establishes a Confidentiality Wall in the proper way. *E.g., Atasi Corp. v. Seagate Technology*, 847 F.2d 826, 831 (Fed. Cir. 1988) (disqualifying the Second Firm where that Firm undertook to create a Confidentiality Wall, but failed to do so effectively).

The Committee is in no position to investigate or comment upon the effectiveness of any given Confidentiality Wall; nor is this Opinion intended to identify the sole factors to consider in constructing one. However, the authorities set forth certain general characteristics of a properly constructed Confidentiality Wall, which any given law firm should consider in the course of determining whether and how it might construct one effectively.

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The first factor is timeliness. A firm's best chance of erecting an effective Confidentiality Wall depends in great part on the speed with which the Wall is established. Before the Attorney is hired by the Second Firm, the Attorney and the Second Firm should identify all instances as to which the Attorney's work at the First Firm might give rise to the need for a Confidentiality Wall at the Second Firm. The Second Firm should critically assess whether it may continue to serve as counsel of record in Lawsuit 1 or Lawsuit 2, even upon erecting a Confidentiality Wall around the Attorney. Then, if the Second Firm concludes that it can continue to serve as counsel of record in Lawsuit 1 or Lawsuit 2 by erecting a Confidentiality Wall, the Second Firm should construct the Wall in advance of the Attorney's arrival. In this regard, *see, Papanicolaou v. Chase Manhattan Bank, N.A.*, 720 F.Supp. 1080 at 1087 (Confidentiality Wall ineffective when created in response to a motion for disqualification); *Haagen-Dazs*, 639 F.Supp. at 287 (disqualification ordered where undue delay in creating Confidentiality Wall).

Second, the Attorney must be excluded from all relevant files, participation in the representation at issue, and discussion with any employee in the office about the matter being screened. The files of the matter in question should be moved from any central filing area to a separate room which the Attorney should be instructed not to enter. Where the Second Firm has a firm-wide computer network, any data on the network should be protected in some manner from the Attorney's inadvertent access. Telephone messages, intraoffice memoranda, and any documents regarding the matter that are not of record should be kept from the Attorney. In this regard, *see, Nemours Foundation*, 632 F.Supp. at 42[illegible]; *City of Hoquiam v. Public Employment Relations Committee*, 29 Wash.App. 319, 628 P.2d 13[illegible]-1323 (1986), *rev'd on other grounds*, 97 Wash.2d 481, 646 P.2d 129 (1982); *Petroleum Wholesale*, [illegible] W.2d at 297.

Third, all employees of the Second Firm should be warned not to discuss any facet of the subject engagement with the Attorney, or even to discuss the matter in his or her presence. Thus, in *Atasi*, 847 F.2d at 831, the court rejected a Confidentiality Wall and disqualified the Second Firm where only the Attorney, and not the remainder of the Firm, was made aware of the screenment. *See also, City of Hoquiam*, 628 P.2d at 1322-1323.

Fourth, the firm should segregate attorneys earned from the matter in question, so that the Attorney does not reap any direct financial benefit from it. *See, Kapacevic v. Fair Automotive Repair*, 641 F.Supp. 237, 244 (N.D. Ill. 1986); Model Rule 1.1[illegible](1). This may not be possible in the case of an associate who receives a fixed salary, *see, Armstrong v. McAlpin*, 606 F.2d 28, 34 (2d Cir. 1979), *rev'd en banc*, 625 F.2d 433 (2d Cir. 1980), *vacated on procedural grounds*, 449 U.S. 1106 (1981) (describing *in dictum* the practical difficulties of awarding a sharing of fees in this context), but is feasible in the case of partners.

Finally, courts have examined the size of the firm in determining whether a Confidentiality Wall can be effective. *Compare Cheng*, [illegible]31 F.2d at 1058 (35-attorney firm is a "relatively small firm" by New York standards such that "it is unclear . . . how disclosures, admittedly inadvertent, can be prevented throughout the course of this representation.") *with Higdon v. Superior Court*, 227 Cal.App.3d 167, 278 Cal.Rptr. [illegible]28, [illegible]5 (1[illegible] (mere fact that firm was composed of only two attorneys would not, by itself, invalidate an otherwise effective Confidentiality Wall). In deciding whether a Confidentiality Wall can be effective, the Second Firm must give careful consideration to its own physical configuration.

Conclusion

The effective use of Confidentiality Walls in proper circumstances can facilitate the movement of attorneys and non-lawyers from employer to employer, while minimizing the risk of inadvertent disclosure of any client confidences learned at the previous job. However, the circumstances where Confidentiality Walls will be permitted are limited, and a Confidentiality Wall, to be effective, must be established timely and must meaningfully prevent the risk of such inadvertent disclosure.

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NOTES

1. The Colorado Supreme Court has adopted the Colorado Rules of Professional Conduct effective January 1, 1993.

2. The Committee, in its Formal Opinion No. 75 (adopted June 20, 1987) [16 *The Colorado Lawyer* 1429 (Aug. 1987)], noted that it is impossible to reconcile a strict reading of the imputed disqualification rule not only with the Committee's own conclusions about ethical conduct but also with similar conclusions reached by courts and disciplinary authorities.

3. For a further description of Confidentiality Walls and some of the circumstances in which they have been utilized, *see, e.g., McCall v. District Court*, 783 P.2d 1223, 1228 n. 6 (Colo. 1989); Mullins & Hutchins, "The 'Chinese Wall' in Colorado," 19 *The Colorado Lawyer* 429 (March 1990); Note, "The Chinese Wall Defense to Law-Firm Disqualification," 128 *U. Pa. L.Rev.* 677 (1980); Merrick, "Government Service and the Chinese Wall: An Accommodation Founded on Practicality," 52 *U. Colo. L.Rev.* 499 (1981); Wine-Banks, "Ethics of Switching Sides—II," 16 *Loyola U. Chi. L.J.* 516 (1985).

4. It is not so much the Committee's purpose to provide the bar with a road map to avoid disqualification as it is to provide ethical guidance. The Committee cautions that a lawyer and law firm will not be deemed to have acted ethically merely by winning a contested motion to disqualify. In this regard, *see, Roth v. Roth*, 84 Ill.App.3d 240, 405 N.E.2d 851, 854 (1980) (court refuses to disqualify firm where no prejudice to moving party is shown but proceeds to "note[] that we do not pass upon the question whether disciplinary action would be appropriate"); *Armstrong v. McAlpin*, 625 F.2d 433, 444, 446 (2d Cir. 1980) (*en banc*), *vacated on procedural grounds*, 449 U.S. 1106 (1981) ("The current uncertainty over what is 'ethical' underscores . . . the wisdom . . . of adopting a restrained approach that focuses primarily on preserving the integrity of the trial process . . . [and leaves ethical questions to be] addressed by the 'comprehensive disciplinary machinery' of the state and federal bar").

5. *See, Weglarz v. Bruck*, 128 Ill. App.3d 1, 470 N.E.2d 21 (1984), *cited in, McCall, supra*, note 3 at 1228 n. 6, in which the court's discussion of Confidentiality Walls involved solely the behavior of private practitioners. While the *Weglarz* court rejected the Confidentiality Wall under the facts before it, the court upheld *in dictum* the use of Confidentiality Walls "where the attorney can clearly and affectively show that he had no knowledge of the confidences and secrets of the client." *Weglarz* at 24. *See also* Note, "The Chinese Wall Defense to Law-Firm Disqualification," 128 *U. Pa. L.Rev.* 677 (1980), also cited in that same footnote in *McCall*, which, in turn, cited other cases in which private firms avoided disqualification due to their timely creation of Confidentiality Walls.

6. These rules likewise apply to in-house corporate legal staffs. *E.g.*, Miller and Warren, "Conflicts of Interest and Ethical Issues for the Inside and Outside Counsel," 40 *Bus.Law.* 631, 638-640, 644-646 (1985); *Haagen-Dazs Co., Inc. v. Perche No! Gelato, Inc.*, 639 F.Supp. 282, 286-287 (N.D. Cal. 1986) (lawyer's knowledge gained while serving as in-house counsel to a corporate litigant requires disqualification of firm representing the corporation's adversary, notwithstanding firm's creation of a Confidentiality Wall, where the attorney left the corporation for that firm).

7. The authorities differ under the MRPC as to when a Confidentiality Wall would be proper in a private law firm setting. While a consensus exists that private firms can avoid imputed disqualification by erecting a Confidentiality Wall around an attorney who has left the public sector for that firm, *see*, Model Rule 1.11(a), some courts, interpreting the MRPC, have rejected the effectiveness of a Confidentiality Wall where an attorney moves from one private law firm to another. *E.g., Parker v. Volkswagenwerk Aktiengesellschaft*, 781 P.2d 1099 at 1106 (1989); *Edward J. DeBartolo Corp. v. Petrin*, 516 So.2d 6, 8 (Fla. App. 1987); *Roberts v. Hutchins*, 572 So.2d 1231, 1234 n. 3 (Ala. 1990). These courts have based their rulings on the fact that Model Rule 1.11 expressly authorizes the use of a Confidentiality Wall where an attorney moves from public to private employment, whereas no similar enabling language appears elsewhere in the Model Rules addressing an attorney's movement from one private firm to another. This reasoning has been sharply criticized by commentators, *e.g.*, Goldberg, "The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly," 72 *U. Minn. L.Rev.* 227, 278-281 (1987), and has been flatly rejected by other courts interpreting the MRPC. *See, e.g., Nemours Foundation v. Gilbane, Aetna, Fed. Ins.*, 632 F.Supp. 418 at 428 (D.Del. 1986) ("Once it is admitted that a Chinese Wall can rebut the presumption of imputed knowledge in former government attorney cases, it becomes difficult to insist that the presumption is irrebuttable when the disqualified attorney's previous employment was private and not public. To hold fast to such a proposition would logically require a belief that privately employed attorneys are inherently incapable of being effectively screened, as though they were less trustworthy or more voluble than their ex-Government counterparts. If former government attorneys can be screened effectively, it follows that former private attorneys can too. . . ." [quoting from *INA Underwriters Insurance Co. v. Rubin*, 635 F.Supp. 1, 5 (E.D. Pa. 1983), which in turn quoted from Note, "The Chinese Wall Defense to Law Firm Disqualification," 128 *U. Pa. L.Rev.* 677, 701(1980)]). Even the Comments to the MRPC

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seem to conflict on the point, for on the one hand they criticize "the concept of imputation [of disqualification] with unqualified rigor," *see*, Comment to Model Rule 1.9 – which would appear to permit at least the same type of Confidentiality Wall rules that exist under the CPR where an attorney leaves one private firm for another – while on the other hand those same Comments call for "different provisions . . . for the movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. *See*, Comment to Model Rule 1.10. The Committee does not believe there should be different Confidentiality Wall rules for similarly situated public and private sector attorneys; yet the Committee is currently in no position to predict how the MRPC will be applied on this point in Colorado, in the event the MRPC is adopted here.

8. Obviously, a Confidentiality Wall, no matter how elaborate, cannot prevent an intentional disclosure of client confidences. *See*, Goldberg, "The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly," 72 *U. Minn. L.Rev.* 227, 279-281 (1987). But general ethical principles are not established with the kind of paranoia that would require protection against such intentional wrongdoing. The Committee assumes that attorneys will try to act honorably. Ample sanctions already exist to deal with any attorney who might intentionally seek to disclose a client's confidences in violation of the CPR and MRPC.

9. Some courts, in Confidentiality Wall contexts, have distinguished (the Committee believes effectively) two different presumptions regarding client confidences. *E.g., Jenson* and *INA*, cited in the text above; *see also Smith v. Whatcott*, 757 F.2d 1098, 1100 (10th Cir. 1985); *Cheng v. GAF Corp.*, 631 F.2d 1052, 1056 (2d Cir. 1980); *vacated on procedural grounds*, 450 U.S. 903 (1981). The first presumption is that where an attorney performs legal services directly for a client, the attorney is presumed to have received confidential information from the client relating to the subject of the representation. Under this line of authority, this first presumption is irrebuttable, in order to avoid disputes (which might themselves undermine the client's rights of confidentiality) as to what the client did and didn't disclose to the attorney. *Cf. Osborn v. District Court*, 619 P.2d 41 (Colo. 1980) at 46 (recognizing the presumption that the client reposed confidences in the attorney, although not in a Confidentiality Wall setting). The second presumption is that an attorney who has obtained client confidences has shared them with all or her professional colleagues within the law firm. It is this second presumption which has been held, under proper circumstances, to be rebuttable through the establishment of an effective Confidentiality Wall. An exception to the irrebuttable nature of the first presumption may exist in the case of junior associates or law clerks who may be able to show that their involvement in a given matter was so limited that they learned no client confidences whatsoever. *E.g., Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 753-754, 755 (2d Cir. 1975) (cited approvingly in *Osborn*); New Jersey Ethics Opinion 633 (issued November 2, 1989).

10. Inasmuch as a client can consent to any disclosure of confidential information, *see*, DR 4-101(C)(1); Model Rule 1.6(a), the issuance of such consent would obviate the need for a Confidentiality Wall. A client should also have the prerogative to withhold such consent unless an effective Confidentiality Wall is established. A law firm may conclude that it is prudent under the circumstances to promptly disclose, to the attorney's former employer, the reasons for erecting a Confidentiality Wall and the content of the Wall so erected. In this way, counsel might work together to avoid any risk of inadvertent disclosure of a client's confidences and to maintain public confidence in the legal system. (Such disclosure is indeed required under certain circumstances. *See*, MRPC 1.11(a).) The Committee encourages all counsel to avoid controversy wherever possible as to whether a client's confidences are truly at risk of being inadvertently disclosed, where a firm creates an effective Confidentiality Wall around the affected attorney. It is improper for a lawyer to counsel a client to withhold such consent merely to secure some tactical advantage. *E.g.*, DR 7-102(A)(1); Model Rule 3.1, Comments to Model Rule 3.4 (recognizing the need for "fair competition in the adversary system"); *Manning v. Waring, Cox, James, Sklar and Allen*, 849 F.2d 222 (6th Cir. 1988) at 224; the Committee's Formal Opinion No. 78 (adopted June 18, 1988).

11. Of course, a client may consent, after full disclosure, to some arrangements in which the attorney's independent professional judgment is at risk of being impaired. *See*, DR 5-101(A); DR 5-105(C); Model Rule 1.7; *see also*, note 10 *supra*.

12. Confidentiality Walls have also been deemed ineffective in permitting a law firm to remain as counsel of record in a given lawsuit, where an attorney in that firm violated rules of professional conduct in a way which was deemed to have an impact in the overall conduct of that case. Thus, in *Papanicolaou v. Chase Manhattan Bank, N.A.*, 720 F.Supp. 1080, 1087 (S.D.N.Y. 1989), where an attorney for defendant spoke directly with plaintiff (in violation of DR 7-104 and Model Rule 4.2) and proceeded to disparage plaintiff's attorney, the wrongdoing attorney's law firm was not permitted to remain as defendant's counsel even after creating a Confidentiality Wall around the wrongdoer.

13. At the same time, a firm should attempt to avoid imposing a "substantial hardship" on the client from having to engage new counsel. *Cf.* DR 5-101(B)(4); Model Rule 3.7(a)(3) (regarding disqualification in the context of an attorney serving as a witness). This factor is one which courts have used only sparingly in denying disqualification motions in a Confidentiality Wall context, and is one which law firms should not rely on as a sole basis for remaining

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as a litigant's counsel of record. An example of how this factor is generally applied is in *Jenson v. Touche Ross & Co.*, 355 N.W.2d 720 (Minn. 1983) at 732. There, the court, in permitting a law firm to remain involved as counsel of record, considered the fact that the lawsuit was years old when the attorney left one firm (representing one litigant) for another (representing the opposing litigant). But the court appears to have given at least as much (if not greater) weight to the facts that the attorney's contacts with the lawsuit were minimal and that the client of the first firm could not demonstrate any true harm arising from the attorney's job switch, so long as an effective Confidentiality Wall was in place at the second firm. *See also, Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980) at 1057-1058, where a law firm was disqualified (despite its erection of a Confidentiality Wall) from a lawsuit which was pending for over two years by the time the firm hired an attorney who had previously worked for the law firm representing the adverse party. The Committee cautions that before any firm proceeds to hire an attorney under these circumstances, the firm give serious consideration to the risk of its own disqualification and the consequential harm which may befall its own client.

14. The Committee has selected a litigation context for illustrative purposes only. There is just as much need for a Confidentiality Wall in a business setting (where an attorney who has worked at a firm representing one party to a transaction joins another firm representing the other party to that transaction) or any other setting where the risk exists of an inadvertent disclosure of client confidences.

15. The need for a Confidentiality Wall applies as well in the case of non-lawyer employees who move from job to job. *See, e.g.*, DR 4-101(D) (regarding an attorney's duty to cause his or her non-lawyer employees to preserve a client's confidences); Model Rule 5.3 (same); ABA Informal Opinion 88-1526 (regarding erection of Confidentiality Walls around non-lawyer employees); *Kapco Manufacturing Co. v. C & O Enterprises, Inc.*, 637 F.Supp. 1231, 1238-1239 (N.D. Ill. 1985) (law firm avoids disqualification by screening office manager/secretary who was privy to confidential information while employed at another law firm). A non-lawyer may have access to such sensitive information at one job that a second employer, upon hiring the non-lawyer, may have to withdraw (or be disqualified) from representing a client with interests which conflict with those of the first employer's Client even if the Second Firm erects a Confidentiality Wall. Certainly, if the non-lawyer proceeds to disclose the First Firm's Client's confidences to employees at the Second Firm, that Firm should withdraw (or be disqualified) from any matter as to which the First Firm's Client may be injured from the improper disclosure. *See, e.g., Williams v. Trans World Airlines, Inc.*, 588 F.Supp. 1037, 1044-1045 (W.D. Mo. 1984) (Second Firm disqualified where attorney disclosed the First Firm's Client's confidences).

16. In *Osborn v. District Court, supra*, note 9 at 4[illegible]. 10[illegible]e Colorado Supreme Court defined a "substantially related" matter by referring to its holding in *Roberts v. People*, 11 Colo. 213, 17 P. 637 (1888), in which it used the phrase "facts of which are somewhat interwoven". *See also, Food Brokers v. Great Western Sugar Co.*, 680 P.2d 857 (Colo. App. 1984) at 858 ("In determining whether there is a substantial relationship, similarities between the two factual situations and the legal questions posed must be considered."). However, there is nothing in *Osborn* or *Food Brokers* to suggest that the Colorado Supreme Court has limited its definition of "substantial relationship" to these two tests; and as discussed in the text, there is reason to believe that a broader definition could be applied.

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89 OFFICE SHARING AND VIRTUAL OFFICES

Adopted September 21, 1991.
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Introduction and Scope

Sharing office space is a common, time-honored method of association among practicing lawyers. It may provide reduced operating costs, collegiality among lawyers, and a convenient source of lawyers to fill in for one another when one is sick or on vacation. At the same time, office-sharing arrangements allow lawyers to retain the financial independence and control over their practices valued by sole practitioners not sharing offices. Recently, lawyers have been utilizing "virtual" offices, in which an attorney performs most work from a home office or other location while renting or using other shared spaces to, for instance, meet with clients or take depositions. Using offices in executive-suite-style facilities has also become popular among lawyers. While deriving benefits from these arrangements, lawyers should be aware of the potential ethical problems they may present.

Syllabus

This opinion addresses the following ethical issues that can arise in office-sharing arrangements under the Colorado Rules of Professional Conduct (Colo. RPC or the Rules): conflicts of interest in violation of the duty of loyalty to clients; preservation of client confidences; and use of letterheads and names. Factual patterns illustrating common problems are included to demonstrate the application of general ethical principles to specific areas of concern.

Lawyers sharing offices may represent clients with conflicting interests only if the representation does not violate the rules governing conflicts. For example, the financial, business, and operating relationships among the lawyers must not create conflicting interests that could violate the current-client and former-client conflict rules. Whether a conflict exists will often turn on whether office-sharing lawyers are deemed to be practicing in a single "firm," so that their conflicts are imputed to each other. Where there is a conflict that is imputed to office-sharing lawyers, they may nevertheless represent clients with conflicting interests if each lawyer can adequately represent the interest of the client, and if each client gives informed consent, confirmed in writing, to the representation.

Office-sharing lawyers must take precautions to avoid disclosure of client confidences and information related to the representation of clients in all matters. Office-sharing lawyers should be particularly attentive when they or their employees have access to each other's file storage and/or have shared reception areas, staff, computer, or telephone equipment. Important factors to consider in protecting confidentiality are sharing of staff and equipment and the overlap in the areas of practice between the lawyers. The more shared equipment and staff or the larger the overlap in areas of practice, the greater the potential for inadvertent disclosure of client confidences and secrets.

Finally, office-sharing lawyers must scrupulously avoid any representation to the public that there is a professional corporation, partnership, associate, or other law firm or employment relationship between or among them when no such relationship exists. Otherwise, an office-sharing lawyer may mislead the public that the other lawyer in the office bears some additional responsibility for the office-sharing lawyer's legal services.

Analysis

I. Conflicts of Interest

The Rules require that lawyers be loyal to their clients and that the lawyers be free from influences that may affect such loyalty. Colo. RPC 1.7; Colo. RPC 1.8; Colo. RPC 1.9; *Allen v. Dist. Court*, 519 P.2d 351 (Colo. 1974). Comment 1 to Colo. RPC 1.7 notes that "[l]oyalty and independent judgment are essential elements in the lawyer's relationship to a client."

A. Imputed Disqualification

Rule 1.0(c) defines a "firm" as including "a partnership, professional company, or other entity or a sole proprietorship through which a lawyer or lawyers render legal services." Comment [2] to that rule addresses office-sharing lawyers:

> Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

Colo. RPC 1.10 governs imputation of conflicts of interest to lawyers in a firm. Colo. RPC 1.10(a) states that no lawyers who are currently associated in a firm "shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." Comment [3] to Colo. RPC 1.10 notes:

> The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case [is] owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

Ethics opinions issued by other states have relied upon rules of imputed disqualification to disqualify one office-sharing lawyer from representing a particular client when another lawyer in the same suite of offices represents the adverse party. *See generally* "Sharing Office Space," Laws. Man. on Prof. Conduct (ABA/BNA) § 91:607 (2017).

Accordingly, office-sharing attorneys generally should avoid representing clients with actual or potential conflicting interests to each other. Rule 1.7(a)(1) prohibits a lawyer from representing a client that is directly adverse to another client. Under Colo. RPC 1.7(a)(2), a lawyer may not represent a client if there is a concurrent conflict of interest, which includes "a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." These rules require a lawyer to decline proffered employment unless each affected client waives the actual or potential conflict after giving informed consent, confirmed in writing. Colo. RPC 1.7(b). Rule 1.9(a) requires a lawyer who has represented a former client to decline employment from a "person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." While the representation of adverse or formerly adverse parties in an office-sharing situation may not violate the Rules, lawyers should recognize that representation in such circumstances is fraught with ethical pitfalls. The lawyer also must consider the conflict concerns expressed in Colo. RPC 1.7(a)(2).

In order to avoid ethically impermissible conflicts of interest, lawyers in office-sharing situations should take several precautionary steps. First, they should ascertain, to the extent possible, the nature of the practices of other lawyers sharing the same suite to determine whether any actual or potential conflicts are likely to arise.[1] In some office-sharing situations, the lawyers represent different types of clients because the lawyers practice in different areas of law and there is little if any chance of a conflict arising. If the office-sharing lawyer determines that areas of conflict may exist,[2] the lawyer can decline employment in all cases of possible conflict or can take certain precautions to ensure that the office-sharing arrangement will not be considered an "affiliation" or "firm" for purposes of imputed disqualification. The more lawyers in an office-sharing arrangement present themselves to the public in a way suggesting they are a firm, the more likely the vicarious disqualification rules will apply.

To reduce the likelihood of being viewed as a firm, the office-sharing lawyer should take various measures to ensure that his or her practice is completely separate and distinct from that of other lawyers in the shared office and that there are no unnecessary financial entanglements. A lawyer must restrict access to client files and information from other office-sharing lawyers. If, however, the lawyer wants another lawyer in the suite to provide temporary coverage during absences from the office, then restricted access might not be possible; in that event, the clients should consent to the temporary coverage arrangement and restricted access may not be necessary. Additionally, the lawyers should protect client information from disclosure by restricting computer, telephone, fax machine, and copier access. When there is a reasonable possibility of a conflict of interest arising, the lawyer also may wish to discuss the office-sharing situation with the client and inform the client in writing of specific procedures the lawyer has taken to ensure there will be no actual conflict of interest.

Notwithstanding these precautions, the lawyer should be aware that there is a substantial risk of disqualification if, in fact, he or she is "too closely involved with" the other office-sharing lawyers or their clients. *Dean v. Am. Sec. Ins. Co.*, 429 F. Supp. 3 (N.D. Ga. 1976), *aff'd mem.*, 559 F.2d 1214 (5th Cir.), *rev'd on other grounds*, 559 F.2d 1036 (5th Cir. 1977); *see also McMahon v. Seitzinger Bros. Leasing, Inc.*, 506 F. Supp. 618, 619 (E.D. Pa. 1981) (lawyer disqualified from representing plaintiff where lawyer shares office space with a law firm that represented defendant in a substantially related matter); CBA Informal Opinion I, "Office Sharing with County Attorney" (1972) (inappropriate for lawyer to appear before the Board of County Commissioners if he shares office space with County Attorney).

B. Financial Arrangements and the Exercise of Independent Judgment

When lawyers share office space, they usually have financial relationships with each other. Examples of such financial relationships include:

- A young lawyer beginning a practice may commit to work a certain number of hours each month for an established attorney who provides free office space and services in exchange;
- Office-sharing lawyers may be jointly liable on a lease and may share other overhead costs as well; and
- One lawyer may own or rent offices that he or she rents to a second lawyer.

Shared financial arrangements between and among office-sharing lawyers can be advantageous to all of the lawyers involved. However, these financial arrangements can create potential leverage that one lawyer may use against the other, especially in situations where the attorneys represent clients with actual or potential conflicting interests. And "a lawyer may not allow related business interests to affect representation." Colo. RPC 1.7, cmt. [10].

Each lawyer must evaluate whether these or other office-sharing-related financial arrangements may impair her or his loyalty and independent judgment to the client; depending on the answer, the lawyer might need to decline to represent the client or might need to obtain the client's informed consent, confirmed in writing, in order to proceed with the representation. Colo. RPC 1.7(b)(4). Even with disclosure and consent, office-sharing lawyers who represent clients with conflicting interests must be certain that the common financial arrangements will not interfere with their exercise of independent professional judgment,

and will not adversely affect their duty of loyalty to their respective clients. Colo. RPC 1.7(a)(2). If each lawyer properly determines that his or her independent professional judgment reasonably will not be affected by the financial arrangement, and the other issues regarding conflicts and confidentiality have been satisfactorily addressed, the lawyers may represent the clients.

II. Preservation of Information Related to the Representation

An office-sharing lawyer, like all lawyers, must 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 one of the exceptions listed in the rules. Colo. RPC 1.6(a). Office-sharing arrangements often include situations where lawyers share or have access to one another's file cabinets, reception area, conference room, law library, staff, computers, telephones, or fax machines. In each of these situations, there is an opportunity for inadvertent disclosure of client confidences or secrets. To ensure confidentiality, the office-sharing lawyer may need to take certain measures in addition to restricting access to files, such as restricting access between the telephone systems of the separate practices; arranging the reception area and office space such that one lawyer's secretary is not able to overhear information related to the representation of another lawyer's clients; not leaving confidential materials in the copier area or library for potential inspection by other lawyers; using security devices to restrict access to computers and other electronic devices; avoiding sharing of staff, particularly secretaries and paralegals, to the extent possible; and informing clients of the space-sharing arrangement and of measures undertaken to avoid any compromise of confidentiality. *See* Ind. State Bar Ass'n Ethics Op. 8 of 1985 (Ind. Op. 8) (office sharing lawyers should use separate phone systems, avoid client communications in areas of office where other lawyers can hear, take care to ensure no client information is available to other lawyers or staff, and inform clients of office sharing arrangement). Similar preventative measures may be necessary for a lawyer practicing in a "virtual" environment if family members or other persons have access to the lawyer's practice space.

To minimize inadvertent disclosure, each office-sharing lawyer must "make reasonable efforts to ensure that [the conduct of nonlawyers employed or retained by or associated with a lawyer] is compatible with the professional obligations of the lawyer." Colo. RPC 5.3(b); *see also* Colo. RPC 5.3, cmt. [2] ("A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client[.]").

III. Names and Letterheads

Colo. RPC. 7.5(d) prohibits lawyers from stating or implying that they practice in a partnership or other organization unless "that is the fact." Comment 2 to this Rule states that "lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, 'Smith and Jones,' for that title suggests that they are practicing law together in a firm."

This Committee has concluded that "[i]t is improper to use the term 'associates' to describe lawyers, not employees, who share office space and some costs but do not share in responsibility and liability for each other's acts.." CBA Formal Op. 50, "Definition of Associates as Applied to Lawyers" (1972; addendum issued 1995); *see also* CBA Formal Op. 8, "Office Sharing – Associates" (1959; addendum issued 1995); CBA Formal Op. 9, "Office Sharing – Associates" (1959; addendum issued 1995). Under Colo. RPC 7.1(a), "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services." Colo. RPC 7.5(a) prohibits a lawyer from using a firm name that violates Rule 7.1.

In some cases, ethics committees have approved a list of lawyers on a sign outside a suite of offices, when the sign states "law offices," followed by the statement "not a partnership, professional corporation, or professional association." *See, e.g.*, Dallas Bar Ass'n Legal Ethics Op. 1983-3 (1983); Ind. Op. 8. The Committee believes that such a designation may be helpful in appropriate circumstances to ensure that members of the public do not believe that office-sharing lawyers in fact are practicing in a partnership or professional corporation. However, the Committee also believes that lawyers may list their

names on a sign outside an office suite under the term "law offices," as long as there is otherwise no indication that the lawyers in that suite are practicing in a partnership or professional corporation.

Colo. RPC 7.5(a) extends the prohibition against false and misleading names to letterhead or other professional designations. As with firm names, office-sharing lawyers must take care to ensure that their letterheads, business cards, and directory listings do not falsely or misleadingly suggest to the public that a partnership exists. Thus, office-sharing lawyers should not use joint letterheads, business cards, or directory listings that state, for example, "Alice B. Smith, Attorney at Law, and Harry R. Jones, Attorney at Law," which could easily be interpreted as suggesting the existence of a partnership. Laws. Man. on Prof. Conduct, § 91: 601-603. And lawyers using virtual offices must take care to ensure that their letterheads, business card, and directory listings do not falsely or misleadingly suggest to the public that the lawyer is regularly present at or regularly staffs a physical office that the lawyer in fact rarely uses.

Illustrations

To facilitate the analysis of the application of these rules to office-sharing situations, the Committee considers four scenarios:

Scenario One

The office-sharing lawyers have the same area of practice, namely, domestic relations. One lawyer represents the husband, while the other seeks to represent the wife in the same divorce action. In this situation, there is a heightened likelihood of a conflict of interest arising. The lawyers must disclose the office-sharing arrangement to the clients, and allow the clients the opportunity to decide whether to waive an actual or potential conflict. In order for each client to intelligently waive any actual or potential conflict, the client must be given adequate information about material risks regarding the conflict and the safeguards for preservation of information related to the representation of the client. If adequate safeguards are in place, as discussed below, the second office-sharing lawyer may be able to exercise independent professional judgment on behalf of the wife. On the other hand, if adequate safeguards are not in place, the office-sharing lawyers may be considered "affiliated" or "a firm" for imputed disqualification purposes. In that event, the second office-sharing lawyer must refrain from representing the wife. If the office-sharing lawyers have taken steps to restrict access to each other's client files, telephone calls, and fax transmissions,. and the lawyers do not share the same staff, there is a reduced likelihood of access to confidential information.

In sum, where office-sharing lawyers are practicing in the same or similar areas, the risk of conflicts of interest and disclosure of client information is greatest.

Scenario Two

The office-sharing lawyers have completely different types of practices, but share staff, phone lines, and equipment, like copy and fax machines. But the office-sharing lawyers discover after the commencement of representation that they are representing clients with directly adverse interests. Here, the attorneys must disclose this fact immediately to the clients. The clients then would need to consent to the disclosed conflict, or the lawyers would be forced to withdraw. In this situation, it is still important that the lawyers establish procedures to avoid disclosure of information related to the representation of a client.

Scenario Three

The office-sharing lawyers practice in the same or similar areas. Because each is a sole practitioner, they agree to fill in for one another when the other is sick, on vacation, or out of town. The need for conflict checks in this situation is heightened because (a) the lawyers will necessarily have access to at least some information relating to the representation of each other's clients, and (b) their agreement to fill in for one another strongly suggests that, at least for some purposes, these lawyers are operating as "a firm," and thus are subject to the rules of imputed disqualification. A conflict check system is advisable to ensure that other lawyers in the suite are not representing clients with actual or potential conflicts.

Moreover, the office-sharing lawyers must include a provision in retainer agreements or otherwise obtain each client's informed consent that other office-sharing lawyers may substitute for the retained lawyer when necessary, and, therefore, that information related to the representation of the client may be revealed. By virtue of such an arrangement, the client thereby consents to representation by his or her retained lawyer and by the other office-sharing lawyers. The effect of such a provision in the retainer agreement would be to extend the notion of "a firm" and to authorize the office-sharing lawyer to disclose the client's identity and otherwise share information concerning the client's legal matter with other office-sharing lawyers.

Scenario Four

The office-sharing lawyer leases space from another office-sharing lawyer. The two lawyers represent clients with an actual or potential conflict with the other. In this scenario, as discussed above, if a conflict arises, the office-sharing lawyer may be required either to decline employment or to provide full disclosure to the client, accompanied by the client's consent, because either lawyer's independent professional judgment could be compromised by the existence of the landlord-tenant relationship. Thus, if the lawyer-landlord were to threaten the lawyer-tenant, directly or indirectly, with unfavorable treatment under the lease relationship in the event of an unsuccessful outcome for the landlord's client, the lawyer-tenant might not be able to exercise his or her professional judgment properly on behalf of the client. Similarly, a lawyer-landlord might not be able to properly exercise professional judgment on the client's behalf if the lawyer-tenant threatened to move out in the event his or her client didn't fare wellIn these situations, it is proper for each lawyer to disclose the lease relationship and its implications for the representation to the client so that the client may intelligently decide whether to continue the representation and give informed consent, confirmed in writing, to the representation.

Conclusion

Office sharing is a common way for lawyers to share facilities, to reduce operating overhead, and to foster collegiality. However, lawyers should be vigilant about the ethical issues inherent in office-sharing situations, particularly conflicts of interest, protection of information related to the representation of a client, and the potential for misleading clients and others. Because of the variety of office-sharing relationships, the different client interests at stake in each instance, and the interplay of these several ethical duties, lawyers should thoroughly analyze the facts in each situation as they determine the proper course of conduct.

NOTES

1. If office-sharing lawyers have the same type of practices, they may wish to consider establishing a regular conflict check procedure in order to ascertain whether an actual or potential conflict exists. If this were done, however, office-sharing lawyers should obtain from each of their respective clients consent to disclosure of the client's identity so that such a conflict check could occur. Colo. RPC 1.6; CBA Formal Op. 99, "Use of Credit Cards to Pay for Legal Services" (1997) (confirming that even a client's identity may be information related to the representation under Rule 1.6(a)).

2. Given the circumstances of office-sharing lawyers, the Committee believes that the practice of doing conflict checks in and of itself should not be construed as making them more like a firm for purposes of imputed disqualification.

90 PRESERVATION OF CLIENT CONFIDENCES IN VIEW OF MODERN COMMUNICATIONS TECHNOLOGY

Adopted November 14, 1992.
Revised July 12, 2018.

Introduction

In recent years, there have been significant advances in communications technology. In addition, the cost of many modern communications methods and devices has been decreasing such that the use of email and of smartphones and other hand-held devices to communicate has become commonplace. It can be expected that new and improved communications methods and devices will continue to be developed.[1] A lawyer's use of these communications methods and devices carries the increased risk of inadvertent or unauthorized disclosure of information relating to the representation of a client. Therefore, lawyers must be mindful of their duty under Rule 1.6 of the Colorado Rules of Professional Conduct (Colo. RPC) "to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

Summary of Opinion

A lawyer's duty to make reasonable efforts to prevent misuse of client information extends to the exercise of reasonable care when selecting and using communications methods and devices.

Analysis

One of the most basic and time-honored precepts of the practice of law is that communications between a lawyer and a client are confidential. Colo. RPC 1.6, cmt. [2]. It necessarily follows that a lawyer has a duty use reasonable efforts to protect the confidentiality of such communications from inadvertent or unauthorized disclosure, or unauthorized access; and this duty is codified in Colo. RPC 1.6(c), which states: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Comment [18] to Colo. RPC 1.6 explains: "The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure." The comment adds: "Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.*, by making a device or important piece of software excessively difficult to use)."

Ever-increasing varieties of communications methods and devices are available for a lawyer's use, such as cloud-based email and smartphones. It is reasonable to expect that, in the future, there will continue to be technological advances that will both facilitate the communication of information and increase the possibility of inadvertent or unauthorized disclosure of, or unauthorized access to, such communications, as well as technological advances that will enhance a lawyer's ability to protect against such disclosure.

For instance, emails are now in widespread use. The American Bar Association Standing Committee on Ethics and Professional Responsibility (the ABA Standing Committee) has determined that using unencrypted email for professional correspondence is acceptable because it poses no greater risks than other communication modes that lawyers commonly use. ABA Comm. on Ethics and Prof. Resp., Formal Op. 99-413,"Protecting the Confidentiality of Unencrypted E-Mail" (1999). Various state ethics opinions have similarly concluded that, ordinarily, a lawyer's transmission of confidential information by unencrypted email does not *per se* violate the lawyer's duty to maintain client confidentiality. *See, e.g.*, DC. Bar Ass'n, Ethics Op. 281, "Transmission of Confidential Information by Electronic Mail" (1998); Pa. Bar

Ass'n Comm. on Legal Ethics and Prof. Resp., Op. 2011-200,"Ethical Obligations for Attorneys Using Cloud Computing/Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property" (2011).

In 2017 the ABA Standing Committee issued a new opinion updating its Opinion 99-413. It found that unencrypted emails continue to be acceptable if a lawyer "has implemented basic and reasonably available methods of common electronic security measures," but added that "particularly strong protective measures, like encryption, are warranted in some circumstances." The Committee said that lawyers must use "a fact-specific approach to business security obligations that requires a 'process' to assess risks, identify and implement appropriate security measures responsive to those risks, verify that they are effectively implemented, and ensure that they are continually updated in response to new developments." ABA Comm. on Ethics and Prof. Resp., Formal Op. 477R,"Securing Communication of Protected Client Information" (2017).[2]

This Committee agrees that transmission of confidential information by unencrypted email does not *per se* violate Colo. RPC 1.6(c). As Comment [19] to that rule explains, the duty to take reasonable precautions to prevent confidential information from coming into the hands of unintended recipients "does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of [confidentiality]." Because email communications methods ordinarily afford a reasonable expectation of confidentiality, a lawyer's use of email for routine communications with clients does not *per se* violate Rule 1.6, if the lawyer has implemented basic and reasonably available methods of common electronic security measures.[3] Special circumstances, however, may warrant special precautions: For example, in appropriate circumstances lawyers who email highly sensitive confidential information should encrypt the communication. *See* Colo. RPC 1.6, cmts. [18], [19].

Smartphones have also become ubiquitous. As with email, because the use of smartphones usually affords a reasonable expectation of confidentiality, the mere use of a smartphone to have a voice conversation relating to the representation of a client does not violate Rule 1.6(c). *See* State Bar of Ariz. Comm. on Rules of Prof'l Conduct, Formal Op. 95-11,"Confidentiality; Cellular Phones" (1995) ("[T]he time has not yet come when a lawyer's mere use of a cellular phone to communicate with the client constitutes an ethical breach."); Del. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2001-2, (2001) (finding that use of a mobile phone is permissible unless "extraordinary circumstances" make disclosure likely); Minn. Law. Prof'l Resp. Bd., Op. 19,"Using Technology to Communicate Confidential Information to Clients" (1999) (opining that use of digital cordless and cellular phones or e-mail, even unencrypted, is permissible).

While the use of email or of smartphones and other such devices does not *per se* violate Rule 1.6(c), lawyers who take advantage of these communications technologies must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, communications containing confidential client information, including adopting processes to assess and address cyber risks. For example, lawyers who access email on their laptops or smartphones using insecure or vulnerable public wireless Internet connections or in public places must take reasonable precautions to prevent the information from coming into the hands of unintended recipients, possibly including precautions such as encryption and strong password protection, as well as device disablement in the event their devices are hacked, lost, or stolen.

While the measures necessary to protect confidential information will vary based upon the technologies and infrastructures that each lawyer uses, and while the Committee acknowledges that the advances in technology make it difficult to provide specific standards that will apply to every lawyer, nevertheless there are common procedures and safeguards that lawyers should employ. Reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client may include the following: (i) "documentation of security practices and controls to instill a culture of security" within a law firm;[4] (ii) periodic inspection of the lawyer's and, if applicable, the firm's email system for signs of cyber attacks and data theft; (iii) the use of basic

cybersecurity measures, including using up-to-date virus scanners and firewalls,[5] installing patches and updates, using strong passwords updated from time to time, and eschewing the use of public cloud providers or file-sharing services for sharing documents; and (iv) the adoption of training protocols for lawyers and staff within a law firm.[6] *See* Colo. RPC 5.1, 5.3.

The frequency of advances in technology notwithstanding, Colorado lawyers "should keep abreast of . . . changes in communications and other relevant technologies," Colo. RPC 1.1 cmt. [8], so that they can make reasonable efforts to prevent inadvertent or unauthorized disclosure of, or unauthorized access to, confidential information as result of their use of communications technology. Lawyers have always had a duty to select modes and devices for communication that maintain the confidential nature of information related to the representation of clients. Just as a lawyer would not use a megaphone to communicate confidential information across a crowded intersection, so must the lawyer use reasonable care in selecting and using any mode of telecommunication in order not to unreasonably compromise representation-related information.

Lawyers using email, smartphones, or other electronic communications methods or devices should be aware of the risk that unauthorized persons may access confidential communications transmitted over those devices unless reasonable care is employed in their use. The mere inclusion of a "confidentiality notice," as is typically added to email messages, is not a substitute for reasonable care in ascertaining the correct email address of the intended recipient and accurately typing into an email's "send to" field to guard against unintended transmission to the wrong person. Similarly, when leaving a land-line or cell-phone message containing representation-related information, a lawyer must exercise reasonable care to ensure that the message has been left for the intended recipient and that only the intended recipient will have access to it.

In the context of their duty to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of their clients, lawyers must carefully consider the methods they, their associates, and their staff members utilize for the communication of representation-related information. Some new communications methods or devices may not provide a reasonable expectation of confidentiality. The lawyer has a duty to select communication methods and devices that are not likely to result in the unintentional disclosure of protected information. Moreover, when the lawyer knows or has reason to know that the client (or anyone else conveying confidential information to the lawyer or receiving it from the lawyer with respect to a client) has initiated a communication via a medium that is subject to relatively easy interception, Rule 1.6 might require the lawyer to warn that person about the risk of unintended disclosure. Further, lawyers should exercise care in using mobile devices such as smartphones and laptops in public places where others may easily overhear their conversations or see their transmissions.

Rule 1.4 directs a lawyer to promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by the Colorado Rules of Professional Conduct, to reasonably consult with the client about the means by which the client's objectives are to be accomplished, and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Colo. RPC 1.4(a)(1), (a)(2), (b). While it is not necessary to communicate every minute detail related to a client's representation,"[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued" (Colo. RPC 1.4, cmt. [5]); and this duty to communicate and explain may apply to communications technology employed in the representation. Comment [18] to Rule 1.6 states, "A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule." For example, some highly sensitive matters may necessitate discussing the risks of public wireless connections with the client if the lawyer intends to utilize such connections or, in the alternative, avoiding their use altogether. *See* Cal. Op. 2010-179.[7]

Conclusion

It is impossible to predict how technological advances will affect the confidentiality of client-lawyer communications effected by electronic means. However, regardless of technological developments, the lawyer must make reasonable efforts to guard against the risk that the medium of the communication the lawyer or the client employs may somehow compromise the confidential nature of the information being communicated.

NOTES

1. This opinion is not intended to be a technical guide, and lawyers are encouraged to conduct their own research into the security of their communications devices before using them in the course of confidential communications.

2. *See generally*, Eli Wald, "Legal Ethics' Next Frontier: Lawyers and Cybersecurity," 19 Chapman L. Rev. 501, 508-511 (2016) (discussing cybersecurity plans).

3. ABA Opinion 477R includes a useful discussion of "basic and reasonably available methods of common electronic security measures" as of 2017, when that opinion was issued.

4. Kenneth N. Rashbaum, "Cybersecurity for Law Firms: Business Imperatives Update 2017," N.Y.L.J., vol. 257, no. 42, p. 14, Mar. 6, 2017.

5. Cal. State Bar Comm. on Prof. Resp. and Conduct, Formal Op. 2010-179,"Confidentiality and Technology" (2010) (an attorney using public wireless connections to conduct research and send e-mails should use precautions, such as personal firewalls and encrypting files and transmissions, or else risk violating his or her confidentiality and competence obligations).

6. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Resp., Formal Op. 2011-200,"Ethical Obligations for Attorneys Using Cloud Computing/Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property" (2011).

7. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as Colorado and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, e.g., Colorado's Data Breach Law, C.R.S. § 6-1-716, is beyond the scope of this opinion.

91 ETHICAL DUTIES OF ATTORNEY SELECTED BY INSURER TO REPRESENT ITS INSURED

Adopted January 16, 1993.
Addendum issued February 23, 2013.

Syllabus

A lawyer retained by a liability insurance carrier to defend a claim against the company's insured must represent the insured with undivided fidelity. For purposes of this opinion, that retention does not create an attorney-client relationship between the lawyer and the carrier. *See*, CBA Ethics Opinion 43 (December 13, 1969), which is supplemented by this opinion. The lawyer cannot ethically take any position which is potentially disadvantageous to the insured (or contrary to the insured's wishes even though not disadvantageous to the insured), even though that position may be advantageous to the carrier, except in situations that might exist by virtue of the insurance contract which may give the insurance company the right to control the defense or disposition of a claim.

Background

An attorney retained by an insurance company to represent its insured in the defense of a claim by a third party is typically paid by the insurance company. Nonetheless, the insured is the client to whom the lawyer's duty of loyalty is owed, regardless of the terms of any retention agreement the lawyer may have with the carrier.

The insurance company nevertheless requires from the attorney certain information about the insured and the facts of the case in order to exercise its decision-making powers in the handling of the defense. Thus, the attorney has an obligation to the carrier on behalf of the insured. This opinion does not address situations where the attorney is retained to represent the insurance company itself, except in those circumstances where the rights of an insured are involved.

The carrier controls the "purse-string" decisions, including what expenditures will be allowed for case preparation, settlement and cost of defense, including attorney fees. While the insured and the insurance company in general have a common interest, *i.e.*, the successful defense of a third- party claim, there may be times when the interests of the carrier and the insured diverge. Such differing interests may be found, for example, with respect to certain settlement negotiations, when the insured is represented under a reservation of rights, when the insured has a counterclaim against the third party, when some claims against the insured are covered by insurance and others are not, or when damages are sought in excess of policy limits.

The attorney's ethical duty is to assure that the interests of the insured are protected, while at the same time fulfilling the insured's contractual obligations to the carrier against a backdrop where the insurance company, by virtue of financing the defense, may effectively control the result and may have its own interests at stake.

The ethical issues raised by this unique relationship become even more complex when the retained attorney has an ongoing relationship with the carrier, is employed by the insurance company, or has certain fee agreements with the carrier whereby the lawyer's profitability is affected by the effort expended on the case. The individual insured, in contrast, usually requires relatively short-term representation.

Opinion

I. Introduction to the Tripartite Relationship

An insurance company which is contractually bound to provide its insured a defense to a claim typically retains the attorney of its choice to defend that claim. "By virtue of the insurance contract, the insurer retains the absolute right to control the defense of actions brought against the insured. . . ." *Farmers*

Group, Inc. v. Trimble, 691 P.2d 1138, 1141 (Colo. 1984). Such a contractual provision has been construed as constituting consent by the insured for the carrier to select counsel for the defense. *Houston General Insurance Co. v. Superior Court*, 108 Cal.App.3d 958, 166 Cal.Rptr. 904 (1980). Notwithstanding these contractual rights of the carrier, the attorneys relationship to the insured is clear:

> The intrusion of the insurance contract does not alter the fact that the relationship with the insured is that of attorney and client. Defense counsel owes the same unqualified loyalty as if he had been personally retained by the insured. . . . There is no diminishment in the ethical obligations and standard of care applicable to insurance defense counsel.

Mallen & Smith, *Legal Malpractice* (3d ed. 1989), § 23.3 at 365-367.

The nature of the relationship between the attorney and the insurance company is less clear. Some authorities hold there is no attorney-client relationship, while others hold that the carrier is a client of the attorney along with the insured. CBA Ethics Opinion 43 (December 13, 1969) makes clear that the insured is the client to whom the attorney's duty of loyalty is owed. The Colorado courts to date and the Colorado Rules of Professional Conduct ("the Rules") have not made clear whether the attorney represents both the insured and the carrier, or the insured alone. This Committee has concluded that in the context of this tripartite relationship, the better rule is that the lawyer's client is the insured and not the carrier.

ABA Informal Opinion 1476 (1981) asserts that "[w]hen a liability insurer retains a lawyer to defend an insured, the insured is the lawyers client." On the other hand, ABA Formal Opinion 282 (1950) claims that both the insured and the insurance company are clients (*i.e.*, the attorney is ethically obligated to represent the interests of each), but makes clear that the insured is the "primary" client. Under either analysis, if differing interests arise between the insurance company and the insured, the lawyer's ethical duty of undivided loyalty is owed only to the insured. *See*, B. Wunnicke, "The Eternal Triangle: Standards of Ethical Representation by the Insurance Defense Lawyer," *For the Defense* (Feb. 1989) at 9.

While there may be a split of authorities, under either approach the insured is unquestionably a client to whom the attorney owes the ethical duties owed to any client. The duties most significant to this opinion are the duty of loyalty, the duty to preserve the confidentiality of client information and the duty to advise the client concerning the client's legal interests.

Although the carrier is not a client simply by retaining the attorney to defend its insured, the lawyer has obligations to the insurance company on behalf of the insured arising out of the insurance contract and, where applicable, the Rules of Professional Conduct. The attorney may have a formal or informal retention agreement with the insurer. The attorney should honor the terms of that agreement to the extent it does not conflict with the attorney's ethical duties.

At the beginning of the representation, insurance defense counsel should make the nature and scope of the relationship clear (preferably in writing) to the carrier and the insured.

II. Duties to the Insured

A. *Duty of Loyalty.* It is well recognized that as a part of the attorney-client relationship, the attorney must represent the insured with undivided loyalty.

Rule 1.7(b) states:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. . . .

Rule 1.8(f) prohibits the lawyer from accepting compensation for legal services from anyone other than the client without the client's consent after full disclosure. Rule 1.8(f) also protects the insured's interests by requiring that a lawyer assure that the party paying the legal fees does not interfere with the lawyer's responsibility to exercise independent professional judgment or with the attorney-client relationship with the insured. Additionally, information relating to representation of the client must remain confidential as required by Rule 1.6.

Rule 5.4(c) provides that a lawyer shall not permit one who employs or pays the lawyer to represent another to "direct or regulate the lawyer's professional judgment in rendering such legal services."

The lawyer's duty of loyalty and duty to exercise independent professional judgment on behalf of the insured may compel defense counsel to disagree with the insurer regarding the strategy or procedures to be followed in the case, even though the insurer is paying defense costs.

1. Restrictions on Defense Costs. The insurance company may attempt to restrict the amount of discovery conducted by the lawyer, refuse to authorize the retention of expert witnesses, or refuse to authorize other work in order to reduce litigation costs. If the attorney believes that some particular action is reasonably necessary to protect the interests of the insured, the attorney must so advise the insurer and request authority from the insurer to take the requested action and incur the related fees and costs. If the insurer declines, the attorney must advise the insured of the insurer's decision and why the action is necessary or recommended. If the insured nevertheless requests the attorney to take such action, the attorney may request payment of the legal fees and costs from the insured and should advise the insured to seek independent counsel. If the insured and the insurer are unwilling or unable to make satisfactory arrangements, the attorney should determine whether it is permissible or mandatory to withdraw.

States which seemingly adopt the view that the insured and the carrier are both clients may require withdrawal in such circumstances. Alabama Ethics Opinion 87-146; North Carolina Ethics Opinion 112; Kentucky Ethics Opinion E-331 (September 1988).

In states where it is recognized that the attorney's duty of loyalty is to the insured, even when the insurance contract provides that the carrier will control the insured's defense, the attorney's ethical duty is to inform the insured about proposed courses of action. Absent objection by the insured after a reasonable period of time, the insured is deemed to have given tacit consent to the express terms of the contract and proposed course of action. If the insured objects, the attorney is obligated to inform the insured of possible ramifications of taking the chosen position, including impact on coverage, and to follow the insured's wishes. Alaska Ethics Opinion 90-2.

2. Flat Fee Agreements. In the context of the tripartite relationship, a discussion of the attorney's loyalty to the insured is not complete without addressing flat fee arrangements between the carrier and the attorney. Typically, these agreements fall into two categories: (1) flat fee per case, and (2) flat annual retainer for all of a company's work regardless of the number of cases. While the Rules do not prohibit these arrangements, attorneys entering into them must be mindful to comply with the Colorado Rules of Professional Conduct, specifically Rule 1.5 requiring that the fees be reasonable, Rule 1.8(e) requiring that costs remain ultimately the responsibility of the client (here, to be paid by the carrier under the insurance contract), and Rules 1.7 and 5.4(c) requiring that the lawyer maintain independent judgment with regard to representation of the client.

The Rules prohibit fee agreements "whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest." Comment to Colorado Rules of Professional Conduct, Rule 1.5 ("Fees"). Therefore, the lawyer cannot ethically limit representation of the insured in a way that promotes the insurance company's interests to the detriment of the insured's best interests. Although the lawyer working on a flat fee basis may have a financial interest in disposing of any given case as quickly as possible with the minimum amount of time and effort, this alone does not require withdrawal. The lawyer is required to withdraw only if that interest affects the lawyer's independent judgment to the detriment of the insured.

B. *Duty to Maintain the Confidentiality of Client Information.* Rule 1.6 prohibits the attorney from revealing "information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation. . . ." The comment to this rule indicates that it applies "not merely to matters communicated in confidence by the client but also to all information relating to the representation, *whatever its source*." [Emphasis added].

While Rule 1.8 allows payment of fees by one other than a client, Section (f)(3) of the rule specifically requires the same protection of information relating to representation as that required by Rule 1.6.

The goal of Rule 1.6 is to assure that the client has confidential access to his or her attorney in order to facilitate communication and the successful disposition of the case. Whether or not information regarding the insured coincides with the interests of the carrier, the attorney's duty to preserve the confidentiality of that information requires the attorney to refuse to disclose certain information to the insurance company absent the insured's consent. *See, State Farm Mutual Ins. Co. v. Walker*, 382 F.2d 548, 552 (7th Cir. 1967); *Moritz v. Medical Protective Co.*, 428 F.Supp. 865 (W.D. Wis. 1977). *See also*, Morris, *Conflicts of Interest in Defending under Liability Insurance Policies*, 1981 Utah L.Rev. 457, 478-83. The principle supporting this view "is that the attorney does represent the insured and assumes all of the duties imposed by the attorney-client relationship." *Rogers v. Robson, Masters, Ryan, Brumund and Belom*, 74 Ill.App.3d 467, 392 N.E.2d 1365, 1372 (1979), *aff'd* 81 Ill.2d 201, 407 N.E.2d 47 (1980).

1. Disclosures Made Within the Attorney-Client Relationship. Where the insured discloses information to the attorney within the attorney-client relationship, the attorney cannot disclose that information to the carrier without the insured's express or implied consent. *See*, Rule 1.6(a). For example, an attorney retained by an insurance company to defend the insured against a third-party claim cannot disclose to the carrier facts that would eliminate the insured's coverage. Philadelphia Ethics Opinion 90-14. The attorney cannot risk disclosure of the insured's confidential information by allowing an employee of the insurance company to attend the attorney's interviews with the insured without the insured's informed consent. *See*, Kentucky Ethics Opinion E-340 (July 1990).

A more complex situation was the subject of New York County Ethics Opinion 669 (May 17, 1989). In that opinion, an attorney was retained by the carrier to represent both the insured-owner and the driver of an automobile. The opinion states that on learning that the driver did not have the owner's prior permission to drive the car [and assuming the exceptions cited in Rule 1.6(b) and (c) do not apply], the attorney may not disclose such information to the carrier absent the client's consent. However, according to the opinion, the attorney has an ethical duty to the owner to advise disclosure since failure to disclose may affect the owner's coverage under a cooperation clause. If the owner refuses to make the disclosure, the opinion states that the attorney should withdraw from representation of the owner since it would be impossible to adequately represent the owner's interests, but the attorney may not tell the carrier the reason for withdrawal.

2. Fraudulent Conduct. Even if the disclosed information involves perpetration of a fraud on the insurance company, the insured is still the client and the lawyer cannot disclose the information to the insurance company. However, the lawyer may neither assist the insured in fraudulent conduct [Rule 1.2(d)], nor use false evidence [Rule 3.3(a)(4)]. If the lawyer's services will be used to violate the Rules, withdrawal is mandatory pursuant to Rule 1.16(a)(1). The comment to Rule 1.6 states that the duty to maintain the confidentiality of the client's information continues even after the representation is terminated.[1]

3. Disclosure of Information that is a Matter of Record. A more difficult situation arises when the attorney learns of information necessary to the carrier's evaluation of the case through the course of discovery, *i.e.*, the information becomes a matter of record not subject to the attorney-client privilege. The information may or may not be detrimental to the insured's coverage interests. Although the information may no longer be confidential, the attorney's duty of loyalty may limit disclosure.

a. *Information Detrimental to Insured's Coverage.* Where disclosure of the information is detrimental to the insured's coverage interests, but the failure to disclose may jeopardize coverage because of the insured's duty to cooperate in the defense of the lawsuit, the attorney must so advise the insured. If the insured consents, disclosure to the carrier should be limited to reporting the information or facts without advising the carrier of the potential effect on coverage. *See*, Oregon Ethics Opinion 1992-1.

If the insured does not consent to disclosure, the attorney should recommend that the insured retain separate counsel as to representation on the coverage issues. If separate representation is not obtained by the insured, the attorney cannot disclose the information without the insured's consent, even if the information is necessary to the carrier's evaluation of the case. Should the independent judgment of the attorney be compromised by the continued representation of the insured, the attorney should withdraw. Under certain

circumstances the attorney may find it necessary to disclose certain information to the insurer without the consent of the insured, such as the fact that the insured cannot be located.

b. *Information Not Detrimental to Insured's Coverage.* The attorney must decide whether or not disclosure of the information is "impliedly authorized to carry out the representation" under the insurance contract and, therefore, permitted unless the insured objects. The attorney may have an ethical duty to advise the insured of the intent to disclose the information to the carrier, along with any potential ramifications to the insured. Absent objection of the insured after a reasonable period of time, disclosure is permitted under Rule 1.6(a).

C. *Duty to Advise and Inform the Insured About Matters That May Affect the Insured's Interests, Rights and Obligations.* The lawyer's duty to inform the insured derives from the general rule stated in Rule 1.4:

> (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Even when the insured delegates authority in certain matters to the lawyer, the lawyer should advise the insured of the status of the matter, including legal ramifications of various courses of action or strategies. Comment to Rule 1.4. On request of the insured, the attorney should provide a copy of all correspondence between the attorney and the carrier concerning the case. North Carolina Ethics Opinion 90.

There are four situations where it is particularly important to inform and advise the insured:

1. Settlement Offers. The insured may be precluded by the insurance contract from interfering with settlement negotiations. *Farmers Group, Inc. v. Trimble, supra*. However, this does not abrogate the attorney's ethical duty to fully advise the insured of settlement negotiations and their ramifications. *Tank v. State Farm*, 105 Wash.2d 381, 715 P.2d 1133, 1138 (1986). Even if the attorney limits representation of the insured to those areas in which the insured has rights under the insurance contract and so advises the insured in advance, the insured should be advised of all settlement offers so that he or she can assert whatever rights or reputational interests may exist. *Compare*, Michigan Ethics Opinion CI-876 (June 9, 1983) (attorney need not communicate settlement offers to the insured if the insurance contract provides otherwise).

Certain insurance contracts give the insured the right to refuse or approve settlement. This is often the case with professional liability coverage, where there may be reputational or licensure ramifications of settlement. Where the insurance contract so provides, the attorney has an ethical duty to obtain specific authority from the insured to make, accept or refuse any settlement offer or demand.

The attorney's duty to maintain his or her independent judgment applies to settlement. The attorney may advise the insured and the insurer of the attorney's evaluation of the exposure and settlement value of the case. Although there may be potential ramifications for the insurance company, the attorney is well advised to document such advice in the interest of the insured. Where the insured wants the attorney to make a demand on the insurance company to pay policy limits where there is no basis to do so, the attorney should so advise the insured and advise the insured to seek independent counsel on that issue.

Other states' ethics opinions have addressed the role of the insurer in conducting settlement negotiations. In South Carolina, where the insurance company does not authorize the attorney to negotiate settlement, the attorney does not violate Rule 1.8(f) and Rule 5.4(c) by leaving settlement negotiations in the hands of the insurer so long as the negotiations are within policy limits. South Carolina Ethics Opinion 90-44. Kansas Ethics Opinion 91-05 (Dec. 10, 1991) imposes additional requirements that (1) the insured's interests must be known to and protected by the adjuster, (2) there are no known actual or potential conflicts of interest between the carrier and the insured, and (3) the insurance contract gives the insured no right to participate in or approve settlement offers. If these requirements are not met and the insured does not consent, the opinion states that counsel must advise the insured to retain separate counsel. If the insured fails to do so, according to the Kansas opinion, the attorney must follow the insured's directions, so inform

the carrier and keep the insured advised; continued refusal of the insurance company to honor the insured's wishes requires that the attorney withdraw.

Where there is uninsured exposure, the insured has a direct economic interest in the success of settlement negotiations. When there are significant issues of uninsured exposure (such as damages sought in excess of policy limits or uncovered claims), the defense counsel should so advise the insured and inform the insured that he or she has the right to retain independent counsel. The issues may be significant enough that counsel should recommend hiring independent counsel. *See*, North Carolina Ethics Opinion, No. 91. The insured should be advised that the issue of who pays for independent counsel should be discussed with independent counsel. Defense counsel should inform the insured regarding the carriers position on such payment, if known to the lawyer.

2. Potential Counterclaims. To avoid loss of a counterclaim, insurance defense counsel should inform the insured about potential counterclaims to the extent necessary so the insured can decide whether to seek independent counsel.

Vermont Ethics Opinion 81-3 allows a plaintiff's attorney to defend the plaintiff's insurance company in a counterclaim filed by the defendant so long as careful attention is paid to DR 5-106 and EC 5-14 through EC 5-16.

Note that Rule 1.2(c) allows a lawyer to "limit the objectives of the representation if the client consents after consultation." The comment to this rule addressing representation of an insured states "[w]hen a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage." A proper engagement letter with the insured could, under Model Rule 1.2(c) disclose that the attorney will not represent the insured on any counterclaims the insured may have.

Insurance defense counsel should, in most cases, recommend that another attorney pursue the counterclaim on the insured's behalf because of the potential for conflict between the insured and the insurance company. For example, if the insurance company desires to settle the case, but the insured wishes to pursue the counterclaim, a conflict would arise.

In dealing with separate counsel handling the counterclaim, the attorney defending the original claim should not take any action that is detrimental to the insured's interest in the counterclaim except that which is required to fulfill the insured's obligations under the insurance contract, unless the insured consents. If the insured does not consent to a proposed course of action after being advised of the potential ramifications under the policy, the attorney must follow the direction of the insured, or withdraw [*see*, Maryland Ethics Opinion 90-42 (July 2, 1990)].

3. Duties Where There are Multiple Covered and Non-Covered Claims or a Reservation of Rights. Often an attorney is retained by an insurance company to represent the insured in a case in which there is an issue as to coverage. Or, there may be multiple claims for relief, some of which might not be covered by insurance. Typically the insurance company advises the insured that it is providing a defense subject to a reservation of its rights to deny coverage as to those claims which may not be covered by the policy.

a. *Divergent Interests.* Defense counsel must be alert to ethical duties which prohibit actions by the attorney which favor the non-coverage interests of the carrier over the interests of the insured to establish coverage. Rules 1.7 and 5.4(c).

> Rule 1.7(b) of the Colorado Rules of Professional Conduct states the general rule as follows:
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The existence of a coverage question should not be allowed to interfere with the lawyer's duty to exercise independent professional judgment on behalf of the insured. Rules 1.8(f) and 5.4(c). Should a potential

coverage issue arise, the attorney owes to the insured, as the client, full advice as to the potential conflict and its ramifications. *Tank v. State Farm, supra*, at 1137. This duty would include providing information to the insured that liability limits under the policy include defense costs and the amount of such costs incurred to date, if the policy so provides. Reporting to the insured about the status of settlement negotiations may be particularly critical when the insured is a professional corporation with a liability limit which includes defense costs; the shareholders may incur unexpected personal liability exposure because of depletion of indemnity coverage through expenditure of defense costs.

The attorney retained by the carrier may not defend the insured and at the same time exploit the attorney-client relationship in order to build a case of non-coverage. *See*, Ashley, *Bad Faith Action: Liability and Damages*, § 10:51 at 65 (1984); *Allstate Ins. Co. v. Keller*, 17 Ill.App.2d 44, 149 N.E.2d 482, 486 (1958). Where a declaratory judgment action and the third party claim are pending simultaneously, the interests of the insured must be protected. What action is appropriate, if any, depends on the circumstances of the case.

Whether a coverage question creates a conflict of interest depends on an assessment of the facts of each particular case. If the attorney determines that the interests of the insured and insurer "will be directly adverse to one another" or that the lawyer's representation of the insured "may be materially limited" by the lawyer's responsibilities to the insurance company, the lawyer would be prohibited from representing both the insured and the insurer and should recommend that both retain separate counsel on the coverage issue.

The duty to the client is always of primary concern. Thus, where the insurer has a duty to defend and pay on one claim only, the attorney cannot file a motion to dismiss or for summary judgment on the only covered claim, effectively leaving the insured without coverage on the remaining claim(s). *See, Farmers Group, Inc. v. Trimble, supra*; Oregon Ethics Opinion 1991-121 [*citing, Arana v. Koerner*, 735 S.W.2d 729, 733 (Mo. App. 1987); *Barmat v. John and Jane Doe Partners A-D*, 155 Ariz. 519, 747 P.2d 1218 (1987)]. Neither can the attorney resist an amendment to the pleadings which would increase exposure within liability limits but improve the insured's chance for coverage under the policy, unless the insured consents after full disclosure.

b. *Mutuality of Interest.* In most situations the objectives of the insurance company and the insured are parallel, *i.e.*, a successful defense of the lawsuit. This mutuality of interest has been extended to permit simultaneous representation of both the insured and the subrogated interests of the carrier in personal injury claims against third parties. Alabama Ethics Opinion 84-03.

4. Disclosures Required if Attorney's Firm is Retained by a Carrier on Numerous Cases or is Employed by Carrier. No conflict exists where attorneys handle a number of cases for insureds of one carrier. *See*, Iowa Ethics Opinion 90-48. However, a lawyer who has represented or is representing the insurance company in other matters must evaluate on a case-by-case basis whether the facts of the case present sufficient danger of a conflict of interest between the insured and the carrier to warrant disclosure to the insured. See, Rule 1.7(b). An attorney should be careful not to take any action that misleads the insured into believing that the attorney has a relationship with the insurer other than that which actually exists.

In making the decision whether to disclose such other work performed for the insurer, the attorney should consider the factors set forth in this opinion, including the possibility of a judgment over the policy limits, the likelihood of conflict over terms of settlement and the likelihood of disputes over the scope of discovery. The duty to disclose may arise at any point in the representation, and the disclosure must be made by the attorney at the earliest possible time. *7 CJS, Attorney and Client*, § 151; *Allstate Ins. Co. v. Keller, supra*; *Hawkins v. State Bar*, 23 Cal. App. 3d 622, 591 P.2d 524, 153 Cal. Rptr. 234 (1979); *Employers Casualty Co. v. Tilley*, 496 S.W.2d 552 (Texas 1973). The attorney's duty is to inform the insured not only of the facts giving rise to the potential conflict of interest, but also the legal implications of the conflict, including the possibility that the attorney will be required to withdraw from representation.

Disclosure of the attorney's relationship to the insurer is particularly important for in-house counsel. The term in-house counsel includes attorneys who are salaried employees of an insurer, whether or not the attorneys hold themselves out as a separate law firm. The ethical duties established by the Rules do not prevent representation of insureds by in-house attorneys employed by the insurer. *See*, California Ethics

Opinion 1987-91, Connecticut Informal Ethics Opinion 87-13, Illinois Ethics Opinion 89-17, Iowa Ethics Opinion 88-14 and Philadelphia Ethics Opinion 86-108. However, the same ethical considerations and potential conflicts exist for in-house defense counsel as for private defense counsel. Both private and in-house defense counsel must defend the insured with undivided loyalty and must preserve the confidences of the insured. *See generally*, Mallen & Smith, *Legal Malpractice* (3d ed. 1989), § 23.7; Mallen, *A New Definition of Insurance Defense Counsel, Insurance Counsel Journal*, Jan. 1986 at 108; Edwards, *Survey of Developments in North Carolina Law*, 1986; *Professional Responsibility*, 65 N.C. L.Rev. (Aug. 1987) at 1422; *In re Allstate Insurance Co.*, 722 S.W.2d 947 (Mo. 1987); *Coscia v. Cunningham*, 250 Ga. 521, 299 S.E.2d 880 (1983); *Seiberg-Oxidermo v. Shields*, 430 N.E.2d 401 (Ind. App. 1982), *aff'd* 446 N.E. 2d 332 (Ind. 1983); *In re Rules Governing Conduct of Attorneys in Florida*, 220 So.2d 6 (Fla. 1969); and *Joplin v. Denver-Chicago Trucking Co.*, 329 F.2d 396 (8th Cir. 1964). In-house counsel should not, for example, advise the insurer regarding coverage and simultaneously defend the insured. *See generally*, Mallen, *supra*; Edwards, *supra*; *Professional Responsibility, supra*; *In re: Allstate Insurance Company, supra*; *Coscia v. Cunningham, supra*; *Seiberg-Oxidermo v. Shields, supra*; *In re: Rules Governing Conduct of Attorneys in Florida, supra*; and *Joplin v. Denver-Chicago Trucking Co., supra*.

With the exception of the Supreme Court of North Carolina, *Gardner v. North Carolina State Bar*, 341 S.E.2d 517 (N.C. 1986), the courts which have analyzed the role of in-house counsel in defending insureds have concluded that such representation is permissible, within certain limits. The corporate environment must not restrict or imperil the ability of staff counsel to comport with the ethical requirements. *Mallen & Smith, supra*, at 380; Mich. St. B. Comm. on Prof. and Judicial Ethics, Opinion CI 1146 (June 1986). The structure of the staff counsel department should be designed to achieve an independence of judgment comparable to that of outside counsel.

An ethical opinion in Virginia has imposed the affirmative duty on in-house counsel to inform the insured of the employment relationship with the insurer and to obtain the insured's consent to the representation. Virginia St. B. Standing Comm. on Legal Ethics, Opinion 598 (1985). Although not stating the analysis in terms of the ethical duties of the in-house lawyer, the court in *Kaudern v. Allstate*, 277 F.Supp. 83, 91 (D.N.J. 1967), criticized the insurer's failure to disclose to the insured that the defense was being provided by the insurer's house counsel. The Supreme Court of Georgia in *Coscia v. Cunningham, supra*, at 881, n. 1, also implicitly criticized the failure to advise the insured of the method by which the attorney was compensated by the insurer.

For the purposes of this opinion a law firm whose practice consists exclusively of defense work for one insurance company is bound by the same ethical rules as in-house counsel. Additionally, these firms must take care to comply with Rules 7.1 and 7.5, which prohibit misleading communications with respect to the lawyer's services and the use of letterhead. California Ethics Opinion 1987-91 and Nassau County, New York Bar Association Ethics Opinion 89-41 equate this type of law firm with an "in-house counsel" arrangement.

It should be noted that the Supreme Court of Missouri expressly limited its approval of the use of house counsel to situations where "there is no question of coverage and when the claim is within the policy limits." *In re Allstate, supra*, at 951. The court concluded that the assignment of house counsel to defend claims against the insured would not introduce impermissible conflicts of interest, but limited that approval to situations where "only the insurer's money is involved." If house counsel were used in other situations, the court commented that such activity "could be challenged in appropriate proceedings." 722 S.W.2d at 952. The court went on to confirm that "employed lawyers are bound by the same rules of professional conduct as are independent practitioners. . . . There is no basis for a conclusion that employed lawyers have less regard for the rules of professional conduct than private practitioners do." 722 S.W.2d at 953. *See also*, Iowa Ethics Opinion 88-14.

III. Waiver or Consent to Certain Conflicts

Some conflicts of interest can be waived by the insured after full disclosure. As discussed in Section II(B) above, an informed insured may consent to disclosure of matters which otherwise would be

protected under Rule 1.6(a) of the Colorado Rules of Professional Conduct. *See, Matter of Farr*, 340 N.E.2d 777 (Ind. 1976). *Fulton v. Woodford*, 545 P.2d 979 (Ariz.App. 1976) holds that representation under a reservation of rights is a conflict that may be waived by informed client consent. *Compare*, Oregon Ethics Opinion 1991-77 (an attorney who offered an opinion to the carrier that it could defend under a reservation of rights cannot subsequently represent the insured).

One area where significant problems may arise is when a lawyer is asked both to render a coverage opinion and to defend an insured in the tort case. The lawyer cannot ethically perform both services at the same time, since the insured's representation may be materially limited by the lawyer's responsibilities to the carrier. Rule 1.7(b). If the lawyer is first asked only to analyze coverage and finds that there is coverage for some or all of the claims, then after that coverage analysis is concluded the lawyer may defend the insured at the request of the carrier, provided both the insured and the carrier consent after consultation. Once the coverage analysis concludes, the carrier becomes a "former client" regarding that analysis, and the restrictions of Rule 1.9 apply. In all situations where the lawyer first analyzes coverage and later is asked to defend the insured, the lawyer must determine that the defense of the insured is not "materially limited by the lawyer's responsibilities" to the carrier as a result of doing the earlier work on coverage.

The lawyer may obtain the consent of the insured to proceed with the representation notwithstanding a conflict, but in some situations even a waiver will not solve the ethical concern. An insured may not waive a conflict and allow continued representation if the attorney recognizes a divided duty of loyalty between an insured and the insurer.

Rule 1.7(c) states the general rule as to non-waivable conflicts as follows:

> (c) For the purpose of this Rule, a client's consent cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to representation under the circumstances of the particular situation.

In these situations, the lawyer is obligated to decline representation or, if representation has already been commenced, to withdraw. Rule 1.16. *See*, Nassau County, New York Ethics Opinion 90-29 (attorney cannot represent the carrier in a subrogation matter and in a separate no-fault action against the insured, who is the real party in interest in the subrogation matter). Where there is actual adversity, one attorney cannot adequately represent the interests of the insured. *Sapienza v. New York News, Inc.*, 481 F.Supp. 676 (S.D.N.Y. 1979).

For example, when the insurer has filed a declaratory judgment action seeking to establish lack of coverage, the attorney defending the insured in the third-party claim cannot ethically represent the insurer in the declaratory judgment action. *See*, New Jersey Ethics Opinion 502 (September 23, 1982). In these circumstances, it is clear that the attorney *cannot* adequately represent the interests of the insured. Moreover, in the course of representing the insured, the attorney may have come into possession of information that would affect the insured's coverage. Regardless of whether the source of the information is the insured or the attorney's own investigation, such information cannot be later divulged by the attorney to justify non-coverage. *See, Parsons v. Continental Nat'l American Group*, 550 P.2d 94 (Ariz. 1976).

If a non-waivable conflict arises, the insurance defense attorney must withdraw. In addition, if the consent of both the insured and insurer cannot be obtained where a waivable conflict exists, the attorney must withdraw from representing the insured. *Hamilton v. State Farm Ins. Co.*, 9 Wash.App. 180, 511 P.2d 1020 (1973); *aff'd* 83 Wash.2d 787, 523 P.2d 193 (1974).

IV. Limited Exceptions by Virtue of the Insurance Contract

Absent a provision in the insurance contract to the contrary, the insurance company has the right to control the defense of a third party claim against its insured. *Farmers Group, Inc. v. Trimble, supra*. It is the insurance contract which guides the attorney in determining what obligations are owed to the insurance company on behalf of the insured. Typically, these obligations derive from general clauses found in most insurance policies, such as the insured's agreement to cooperate with the insurance company in the defense of the case. There may be other more specific clauses which either create an obligation for the insured or grant specific rights to the carrier which the insured has waived. *See, e.g.*, North Carolina Ethics Opinion

118 (the attorney is permitted to grant an extension of the statute of limitation without consent of the insured if the insurance contract specifically gives the carrier the authority to waive affirmative defenses).

If the scope of the attorney's representation of the insured is limited pursuant to Rule 1.2 to those issues arising out of the insurance contract, the attorney's duty is to inform the insured of all significant matters which are the subject of the attorney's correspondence with the insurance company and the proposed course of action, along with the ramifications of such actions. Absent objection from the insured after a reasonable period of time, the attorney may embark on the disclosed course of action since the insured has assented that these are objectives of the representation as set forth in Rule 1.2 or has "impliedly" consented to a proposed disclosure as addressed in Rule 1.6.

Other duties owed to the insurance company derive directly from the Colorado Rules of Professional Conduct concerning the lawyer's duties to third parties. Rule 4.1 requires that the lawyer be truthful in statements to the insurer. Rule 1.5 requires that the lawyer's fees be reasonable and for work necessary to the representation.

Thus, the lawyer's utmost concern is the ethical representation of the insured, who is the client. Nonetheless, the lawyer must also be mindful of his or her obligations to the insurance company, whether they derive on behalf of the insured out of the insurance contract or from the Colorado Rules of Professional Conduct.

Addendum

Following the issuance of Opinion 91, the Supreme Court repealed and reenacted all of the Colorado Rules of Conduct (Colo. RPC or Rules), effective January 1, 2008. Fundamentally, the reenacted Rules do not change the duties an attorney owes to the client, and perhaps to the third-party payor. The current Rules, however, do make some important changes relative to what constitutes "informed consent" and the process of securing a client's consent within this tripartite relationship. The current Rules use the term "informed consent" instead of "consent after consultation." Under the repealed Rules, "consultation" required only "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Although the American Bar Association Ethics 2000 Committee has stated that it intended no substantive change by replacing "consent after consultation" with "informed consent," the current requirement of "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." Colo. RPC 1.0(e).

As discussed in the original Opinion, obtaining the client's consent (now informed consent) is of paramount importance within the tripartite relationship of insurer, insured, and counsel. For example, the lawyer must obtain the client's informed consent in order to accept fees from the insurance company or third party, Colo. RPC 1.8(f); to represent the client on less than all the issues in a particular litigation, Colo. RPC 1.2(c); to disclose client information to the insurance company or third–party payor, Colo. RPC 1.6(b); and to deal with conflicting or divergent interest between the paying party and the client regarding settlement or other issues, Colo. RPC 1.7(b).

Comment [6] to Rule 1.0 indicates that the crux of "informed consent" is that "the lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision." Current Rule 1.4(a)(1) also requires the lawyer to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required[.]" In circumstances where the Rules require informed consent, the mere communication of information by the lawyer is not sufficient; the client must actually give the required informed consent. And if the representation involves a concurrent conflict of interest between the client and the insurer or other third-party payor, the consent must be confirmed in writing. Colo. RPC 1.7(b)(4). These rule changes emphasize the need for full communication and candid explanation.

Additionally, the original Opinion states: "Even if the disclosed information involves perpetration of a fraud on the insurance company, the insured is still the client and the lawyer cannot disclose the

information to the insurance company." However, current Rule 1.6 recognizes circumstances under which a lawyer may disclose fraudulent conduct of the client to the insurance company. In particular, Rule 1.6(b)(3) authorizes (but does not require) a lawyer to reveal information relating to the representation of the client which the lawyer "reasonably believes [is] necessary . . . 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 [including an insurance company] and in furtherance of which the client has used or is using the lawyer's services." Rule 1.6(b)(4) provides that a lawyer may reveal information relating to the representation of the client which the lawyer "reasonably believes [is] necessary . . . to prevent, mitigate or rectify substantial injury to the financial interests or property of another [including an insurance company] 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." Similarly, a lawyer may be required to disclose to a tribunal information that would otherwise be protected by Colo. RPC 1.6 in order to remedy a prior offering of false evidence. *See* Colo. RPC 3.3(a)(3); CBA Formal Op. 123, "Candor to the Tribunal and Remedial Measures in Civil Proceedings" (2011).

NOTE

1. *Compare*, Alabama Ethics Opinion 90-99, where the policy was procured by fraudulent conduct of the insured and a third party after the occurrence of the event triggering coverage. According to the opinion, the attorney, who was considered to represent both the insured and the insurer, must withdraw pursuant to Rule 1.16 if the client refuses to disclose the fraudulent act or the lawyer does not make limited disclosure. The Alabama opinion stated that under Rule 1.6 the lawyer is "impliedly" authorized to disclose the existence of an insurance question and to request separate counsel for the insured with regard to coverage.

92 PRACTICE RESTRICTIONS IN SETTLEMENT AGREEMENTS

Adopted June 19, 1993.

Syllabus

A lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer's right to practice is part of a settlement of a controversy or suit. Rule 5.6(b), Colorado Rules of Professional Conduct. This prohibition includes but is not limited to settlement agreements barring the lawyer representing the settling claimant from representing other claimants against the party defending the claim. Other restrictions impeding the lawyer's ability to represent effectively other claimants against the settling party defending the claim may also be unethical. A claimant's attorney should not agree to a settlement restriction giving the attorney significantly less discretion in the prosecution of a claim than an attorney independent of the agreement would have. Such improper restrictions may include conditioning settlement on an agreement by the claimant's attorney not to subpoena specified documents or persons in the course of his or her representation of non-settling claimants, barring the settling lawyer from using certain expert witnesses in future cases, imposing forum or venue limitations in future cases brought by the settling lawyer, and prohibiting his or her referral of potential clients to other counsel.

Opinion

Rule 5.6(b) of the Colorado Rules of Professional Conduct provides in pertinent part: "A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of a settlement of a controversy or suit."

This provision is a continuation of the prohibition contained in DR 2-108(B) of the Colorado Code of Professional Responsibility, which stated: "In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his [or her] right to practice law."

The rationale for this rule is that restrictions of this kind placed on a settling claimant's[1] lawyer would be contrary to the meaning and spirit of former Canon 2, which urged lawyers to make legal counsel available. *Annotated Code of Professional Responsibility* 115 (1979). Similarly, as the Chair of American Bar Association Committee on Ethics and Professional Responsibility explained to the ABA House of Delegates in 1970:

> [A] covenant of that type would, in effect, restrict . . . a lawyer's ability to engage in the practice of law by agreeing in advance before he had considered any of the merits, that he would not represent certain types of clients. Secondly, we [the Committee] felt that a covenant of that type would inevitably involve a conflict of interests.

Id. See also ABA Comm. on Professional Ethics, Informal Op. 1039 (1968) (unethical to accompany settlements in private antitrust litigation with covenants not to sue or aid anyone in suit against the settling defendants), which predated the ABA Code of Professional Responsibility.

Rule 5.6(b) and its predecessor, DR 2-108(B), generally have been understood to hold unethical any settlement provision that requires a lawyer to decline future representation against a party defending the claim that is being settled. *Annotated Model Rules of Professional Conduct* 475-76 (2d ed. 1992). Case law and ethics opinions are virtually unanimous on this point. *See, e.g., Cohen v. Graham*, 44 Wash. App. 712, 722 P.2d 1388, 1390-91 (1986); ABA Standing Comm. on Ethics and Prof. Resp., Formal Op. 93-371 (Apr. 16, 1993); Oregon State Bar, Legal Ethics Comm., Formal Opinion No. 1991-47 (July 1991). The Comment to Rule 5.6 recognizes that paragraph (b) "prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client." The Colorado Committee Comment goes on to note that Rule 5.6 is "substantially similar to DR 2-108, but it properly extends the proscriptions contained in the Disciplinary Rule to offers as well as actual agreements."

Practice restrictions of the kind prohibited in Rule 5.6(b) are clearly overbroad and antithetical to a lawyer's ability to practice. Where the lawyer is representing contemporaneously settling and non-settling claimants, such restrictions could create an irreconcilable conflict of interest. *See* Michigan Committee on Professional and Judicial Ethics, Op. CI-1165 (1986) (a settlement that requires a lawyer to withdraw from concurrent representation of other clients against the same defendant improperly restricts an individual's right to retain counsel of choice). Such a contractual restriction also creates a conflict of interest between the lawyer and future clients, contrary to Rules 1.7(b) and 1.9(a) of the Colorado Rules of Professional Conduct, and has been deemed to be in contravention of public policy. *See, e.g., Jarvis v. Jarvis*, 12 Kan. App.2d 799, 758 P.2d 244, 247(1988).

Other types of restrictions less onerous than a complete prohibition against subsequent representation of clients against a settling party defending a claim may similarly violate Rule 5.6(b). Ethics committees in other jurisdictions have recognized the impropriety of practice restrictions that fall short of an outright bar to future or ongoing representation. *See, e.g.*, New Mexico Ethics Comm. Op. 1985-5 (unethical as a condition of settlement for plaintiff's counsel in wrongful death action to be required to turn over attorney work product without which the lawyer's ability to practice law would be restricted); District of Columbia Bar Op. No. 35 (1977) (unethical for an attorney as part of a settlement to agree not to refer a potential client to another attorney if that potential client has a claim against the defendant involved in the settlement); Ariz. Op. No. 90-6 (7/18/90) (lawyer who represents several franchisees against a franchisor may not enter into a settlement agreement that provides that the lawyer will disclose the names of all franchisees who have contacted the lawyer regarding potential representation against the defendant).

The rationale for the prohibition against such lesser restrictions is that they too are "restriction[s] on the lawyer's right to practice" precluded by Rule 5.6(b). In the words of the New Mexico Ethics Committee in declaring that the turning over of needed attorney work product as a condition of settlement is prohibited: "If this were to occur, defense counsel would accomplish indirectly what they cannot accomplish directly. . . . The lawyer cannot agree to any condition that restricts her right to practice law." Opinion 1985-5, quoted in Pitulla, "Co-opting the Competition Beware of Unethical Restrictions in Settlement Agreements," 78 A.B.A.J. 101 (Aug. 1992). Prohibited restrictions may include barring a lawyer representing a settling claimant from subpoenaing certain records or fact witnesses in future actions against the defending party, preventing the settling claimants lawyer from using a certain expert witness in future cases, and imposing forum or venue limitations in future cases brought on behalf of non-settling claimants.

In the opinion of this Committee, the test of the propriety of a settlement provision under Rule 5.6(b) is whether it would restrain a lawyer's exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitation. Material restrictions obtained with an eye towards thwarting a non-settling claimant from obtaining counsel of choice fail this test. Although public policy favors fair settlements, the public policy favoring full access to legal assistance should prevail. *See* Dallas Legal Ethics Committee, Opinion 1982-5, ABA/BNA *Lawyer's Manual on Professional Conduct* 801: 8406 (1982).

Not all settlement arrangements affecting a lawyer are improper. A lawyer may enter into a settlement agreement conditioned upon nondisclosure of the amount and terms of the settlement, provided this information is not already a matter of public record. *See* New Mexico Ethics Comm. Op. No. 1985-5. Similarly, it is "close, but permissible" for a lawyer defending a class action lawsuit to ask the plaintiffs' lawyer for settlement purposes to state that he or she has no present intention of filing suit against the defendant in similar cases. Philadelphia Op. 86-121 (9/11/86), ABA/BNA *Lawyer's Manual on Professional Conduct* 901:7508 (1987). Such conditions do not materially restrict a lawyer's ability to practice law. Other such conditions and limitations may well survive scrutiny under Rule 5.6(b) if they legitimately bear on the claim being compromised by the settling claimant and are not a facade for creating an actual or potential conflict of interest between the settling claimant's lawyer and his or her non-settling clients, present or future. Thus, for example, a settlement requirement that a lawyer return documents obtained in discovery as a condition of settlement is not unethical in proper circumstances.

As Rule 5.6(b) notes explicitly, its mandate applies not only to agreements restricting practice, but extends even to a lawyer's offer of one. For good reason. As one ethics commentator has stated: "When restrictions on the practice of law become bargaining chips between parties, the integrity of the profession is threatened." *Pitulla, supra*, 78 A.B.A.J. at 101.

NOTE

1. Usually the settling plaintiff's counsel is the one who may be subjected to such attempted restrictions. This Opinion refers generically to "claimant's counsel," however, because the same ethical considerations apply to restrictions on counsel asserting counterclaims, cross-claims and third-party claims.

93 *EX PARTE* CONTACTS WITH GOVERNMENT OFFICIALS

Adopted October 16, 1993.
Amended February 2016.

Introduction and Scope

The Ethics Committee of the Colorado Bar Association (Committee) has received inquiries concerning the scope of the ethical prohibition on *ex parte* contacts with a government organization represented by counsel. Situations frequently arise in and outside of litigation where a lawyer may wish to contact public officials, public bodies, agency employees, and other government personnel about governmental decisions or conduct.

Several years ago, in the broader context of *ex parte* contacts with an organizational party, the Committee issued its Formal Opinion 69, "Propriety of Communicating With Employee of an Adverse Party Organization" (1987, Addendum issued 1995, Revised 2010) (Opinion 69). This opinion supplements Opinion 69 and provides more particular guidance with respect to contacts with government organizations under Rule 4.2 of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules). Because there is a relative dearth of case law on this subject, the Committee has analyzed and relied upon ethics opinions from other state bar associations that have considered the propriety of *ex parte* contacts with a government organization, in addition to the few reported decisions.

Syllabus

In general, the ethical rule prohibiting *ex parte* contacts with an organization represented by counsel in a particular matter about the subject matter of that representation applies with equal force to a government organization. As in the case of a non-government organization, an attorney may make *ex parte* contact with an employee or official who is not "a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter," or who does not have "authority to obligate the organization with respect to that matter." *See* Colo. RPC 4.2, cmt. [7]. The individuals who may be contacted despite representation of the organization are sometimes incorrectly referred to as "bystander witnesses." Opinion 69 provides greater detail on this distinction, but in general the lawyer may not contact those who, with respect to the subject matter of the representation, have the authority to commit the government organization to a position, whose acts or omissions can be imputed to the government, or whose statements may be admissible against the government organization.

The fundamental constitutional rights to speak and to petition one's government for the redress of grievances may in some circumstances conflict with this general ethical rule. In order to balance these competing concerns, an attorney may make *ex parte* contact with that more limited group of government employees or elected officials whose statements may be admissible against the government organization, but who are not in positions of authority and whose conduct is not at issue in contemplated or commenced litigation or other proceedings. In addition, in the context of a legislative determination or rulemaking by an agency, *ex parte* contact with the members of the legislative body or agency is permissible even though they would otherwise fall under Rule 4.2, unless the *ex parte* contact is specifically prohibited by law. It is important to keep in mind that in any setting *ex parte* contacts are permissible with the prior consent of the attorney representing the government entity.

Analysis

The ethical principle at issue is codified in Rule 4.2, which provides as follows:

Rule 4.2 - Communication with Person Represented by Counsel.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the

matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

For the purpose of addressing the narrower issues raised when the organization is a government body, the Committee does not believe it is necessary to restate the substance of Opinion 69. Nevertheless, it should be noted that Opinion 69 analyzed the issue in terms of Rule 4.2's four constituent parts: (1) a "communication"; (2) concerning the "subject of the representation"; (3) made to a person whom the attorney "knows" to be "represented" by counsel in the matter; unless (4) the attorney is "authorized by law or by court order" to communicate with the person without prior consent.

On its face, Rule 4.2 does not distinguish between governmental and nongovernmental organizations, although several of the comments draw some distinction. In general, Rule 4.2 applies to an attorney's communications with a government organization through its employees and elected and other public officials. *See* ABA Formal Op. 97-408, "Communication with Government Agency Represented by Counsel" (1997) (ABA Op. 97-408) (discussing whether a lawyer representing a private party may communicate about the matter with responsible government officials without prior consent from government counsel); Conn. Bar Ass'n Prof'l Ethics Comm., Informal Op. 01-17, "Application of No Contact Rule to Government Officials and Agencies" (2001) (Rule 4.2 permits contact with a represented party if authorized by law, and a comment recognizes that communications authorized by law include the right to speak with government officials about a matter); N.C. State Bar, 2005 Formal Ethics Op. 5, "Communication With Government Entity Represented by Counsel" (2006) (exploring the extent to which a lawyer may communicate with employees or officials of a represented government entity); Ohio S. Ct. Bd. of Comm'rs on Grievances and Discipline, Op. 92-7 (1992); Utah State Bar Ethics Advisory Op. Comm. Op. 115R (1994); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Jud. Ethics, Formal Op. 1991-4 (1991) (NYSBA Op. 1991-4). An attorney's ethical obligations in this regard are not altered when a government employee or official initiates the direct contact with the attorney. Nevertheless, because of the unique issues at stake when the government is a party, in some situations *ex parte* contacts are nonetheless "authorized by law," and, thus, permissible.

This opinion attempts to define the scope of the "authorized by law" exception in addressing the constitutional rights at issue, but it is not intended to be all encompassing. For example, the Committee does not specifically address the ethical issues involved when a prosecuting attorney attempts to make *ex parte* contact with a criminal defendant. Nor has the Committee attempted to list or discuss specific federal, state, or local laws, rules, or regulations that may specifically authorize direct contact between an attorney and a government employee or official. The Committee believes that a narrower reading of the prohibition on *ex parte* contacts is required to balance properly the salutary purpose of Rule 4.2—shielding a represented party from improper approaches—with the fundamental First Amendment rights at stake when dealing with a governmental organization.

Although the scope of Rule 4.2 is not limited to the litigation setting, the issue of *ex parte* contacts arises most frequently in the context of threatened or existing lawsuits or adversarial administrative proceedings. *See* Ellen J. Bennett, *et al.*, ABA Ctr. for Prof'l Resp., *Communication with Person Represented by Counsel: "Parties versus Persons*, *"* Ann. Mod. Rules Prof'l Cond. (8th ed. 2015) (explaining that the language of ABA Model Rule 4.2 was changed from "party" to "person" in 1995 to clarify that the rule applies to "anyone known to be represented regarding the subject of the intended communication"). Because Rule 4.2 is not so limited, this opinion also addresses its scope in non-litigation settings, such as lobbying efforts and business transactions with governmental bodies.

When is the Organization Represented by Counsel?

As stated in Opinion 69, an attorney must "know" that an organization is represented by counsel in the matter for the *ex parte* prohibition to apply. Under the Rules, to "know" is defined as having "actual knowledge of the fact in question." However, knowledge may be inferred from circumstances." Colo. RPC 1.0 ("Terminology").

An organization, whether it is a private entity or a government body, is not "represented by [a] lawyer" in every matter, adversarial or not, simply because the organization has counsel on general retainer or has an in-house counsel staff. An organization must have taken affirmative steps to retain counsel in a specific matter or referred the matter to its in-house counsel before it is "represented" under Rule 4.2. *See* Opinion 69; ABA Comm. on Ethics and Prof'l Resp., Formal Op. 95-396, "Communications with Represented Persons" (1995) (Model Rule 4.2, "does not contemplate that a lawyer representing the entity can invoke the rule's prohibition to cover all employees of the entity, by asserting a blanket representation of all of them"; rather, the subject matter of the representation needs to have crystallized between the client and the lawyer); N.C. State Bar RPC 132 "Communications with Government Officials" (1992) (lawyer representing defaulting borrower may contact city loan officer without knowledge or consent of city attorney because lawyer has not received notice that city attorney is participating in this matter); *see also, e.g.*, *Terra Int'l, Inc. v. Miss. Chem. Corp.*, 913 F. Supp. 1306, 1317 (N.D. Iowa 1996) (rejecting "automatic representation" of all plant employees and permitting *ex parte* interviews of employees); *Carter-Herman v. Philadelphia*, 897 F. Supp. 899, 903 (E.D. Pa. 1995) (rejecting "the notion that every city employee is automatically a represented party simply by virtue of his or her employment without any initiative on the part of the employee to obtain legal help from the City"); *Patriarca v. Ctr. for Living & Working, Inc*., 778 N.E.2d 877, 880 (Mass. 2002) (organization may not assert a preemptive and exclusive representation by the organization's lawyer of all current (or former) employees as a means to invoke Rule 4.2 and insulate them all from *ex parte* communication with the lawyers of potential adversary parties).

For example, the federal government is generally represented by the Justice Department, the State of Colorado by the Attorney General, and a municipality by its city attorney. If this definition of representation were applied to the governmental organization in both adversarial and non-adversarial matters, it would stultify even ordinary communications with the government. In addition, it may not be obvious to an attorney that the government body is represented by counsel in that matter. Therefore, at the outset of a permissible *ex parte* contact, an attorney should identify himself or herself as such and should state the purpose of the inquiry. This procedure is consistent with Rule 4.3, which addresses contact with unrepresented persons. If an attorney remains in doubt about counsel's involvement in a particular matter, it would be prudent for the lawyer to make inquiries of the government organization's regular counsel to determine whether the organization is "represented" in the particular matter. *See* Op. 69.

"Authorized by Law" Exception

Comment [5] to Rule 4.2 contains a broad statement about the "authorized by law" exception to the *ex parte* prohibition: "Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government." If this statement were taken literally, it might vitiate the Rule. At face value, this comment could permit *ex parte* contacts in litigation with a government decision maker or a government employee named in the suit. However, the Committee does not believe that this comment was intended to support *ex parte* contacts with managerial government employees or with government employees whose conduct is at issue in a matter that is in active litigation or in an adversarial administrative proceeding. *See* Op. 69; ABA Comm. on Ethics & Prof'l Resp., Informal Op. 1377 (1977) (ABA Informal Op. 1377) (where city is defendant in property damage suit arising from allegedly defective sewer system, plaintiff's counsel may not interview the building marshal *ex parte*; because of his authority to enforce the building code, he is the city's alter ego).

Beyond these groups, however, counsel is free to make *ex parte* contact with government employees. Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n Op. 94, "Communication With an Employee or Official of a Municipality" (1989) (attorney may contact any municipal employee who does not make decisions about the litigation, is not responsible for seeking legal advice for the city or informing city council about policy matters, and does not direct staff preparation for the litigation); State Bar of Mich. Standing Comm. on Prof'l & Jud. Ethics Op. RI-316 (1999) (lawyer may communicate with government caseworker for the family independence agency and may discuss matters without the Attorney General's

consent); State Bar of Mont. Ethics Op. 940430, "Witness (Ex Parte Contact)" (1994) (an attorney may conduct *ex parte* interviews with state government employees provided the employees lack authority to bind the government and settle disputes); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 652, "Communications with Adverse Party; Governmental Entity" (1993) (an attorney may communicate with an official or employee of a governmental entity in connection with pending litigation provided the employees contacted lack the power to bind the entity); State Bar Ass'n of N.D. Ethics Comm. Op. 95-06 (1995) (government agencies are included in Rule 4.2's meaning of a party; attorney representing workers compensation claimant may contact employees of worker's compensation bureau); Or. State Bar Bd. of Governors, Formal Ethics Op. 2005-152, "Communicating with Represented Persons: Current and Former Employees of State Agency" (2005) (lawyer may not speak to a current employee at state agency if the conduct of the current employee is at issue in the matter or the current employee is part of agency management); s*ee also, e.g.*, *Hammond v. City of Junction City*, 167 F. Supp. 2d 1271, 1284-85 (D. Kan. 2001) (individual managerial employees are considered to be "parties" for purposes of prior version of Rule 4.2; law firm was prohibited from communicating with city employees with managerial responsibility, whose acts or omissions may be imputed to the city, or whose statements may constitute an admission on the part of the city); *Rivera v. Rowland*, 1996 WL 753943, *5 (Conn. Super. Ct. 1996) (assistant public defenders and other non-managerial employees should be considered "fact witnesses" and not "parties"; plaintiffs' counsel should have unrestricted access because limiting access might choke off the flow of information or diminish willingness of those to be interviewed, to talk freely); *B.H. v. Johnson*, 128 F.R.D. 659, 663 (N.D. Ill. 1989) (rejecting the application of DR 7-104(A)(1) (predecessor to Rule 4.2) to low-level employees whose statements may be deemed admissions and, as a counterbalance, refusing to allow informal *ex parte* statements by such employees to be admitted); *Frey v. Dep't of Health & Human Servs.*, 106 F.R.D. 32, 36 (E.D.N.Y. 1985) (to include non-managerial employees within term "party" under DR 7-104(A) would conflict with goal of broad access to witnesses to uncover and present all relevant evidence); *Vega v. Bloomsburgh*, 427 F. Supp. 593, 595 (D. Mass. 1977) (the interest of state officials who were parties to an action in being protected from the statements of their employees in informal *ex parte* interviews is outweighed by the First Amendment right of those employees to speak if they wish).

The Committee believes that a balancing test favoring *ex parte* contacts in close cases is appropriate, based on the fundamental right to petition the government for a redress of grievances under both the First Amendment of the United States Constitution and Article II, Section 24, of the Colorado Constitution. This is particularly true in a legislative, regulatory, or administrative setting. The First Amendment right at issue constitutes "an authorized by law" exception to Rule 4.2. *See Am. Canoe Ass'n v. St. Albans*, 18 F. Supp. 2d 620, 621-22 (S.D. W. Va. 1998) (right to contact and communicate with government officials is right of citizenship); *Camden v. State of Md.*, 910 F. Supp. 1115, 1118 n.8 (D. Md. 1996) ("Insofar as a party's right to speak with government officials about a controversy is concerned, Rule 4.2 has been uniformly interpreted to be inapplicable."); Ala. State Bar Off. of Gen. Counsel Op. 88-84 (1989) (attorney for plaintiff homeowners in suit against county officials for reconsideration of zoning decision may meet with defendants *ex parte* because plaintiffs have constitutional right to petition elected officials for redress of grievances); Iowa Sup. Ct. Bd. of Prof'l Ethics & Conduct Op. 87-29, "Witnesses: Interviewing City Council Members" (1988) (attorney of potential defendant in proposed suit by city council may contact council members to lobby against filing of suit without knowledge or consent of city attorney); Kan. Bar Ass'n Ethics Advisory Comm. Op. 00-06, "Communicating with a Government Official While Representing a Client" (2000) (lawyer for zoning applicant may contact city officials about client's application despite city attorney's contrary directive because "a citizen must always have access to his or her government"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 812, "Communication with a Represented Party" (2007) (a lawyer may communicate with individual town planning board members because the proposed communications fall within the protection of the First Amendment right to petition); State Bar of S.D., Ethics Op. 98-9, "Contact with Represented Persons; Municipal Officials" (1998) (attorney's lobbying efforts to members of the city council and mayor regarding the passage of an ordinance does not require the city attorney's permission under "authorized by law" exception).

The "authorized by law" exception also applies to federal, state, and local statutes that specifically permit a lawyer to contact a represented party directly. For example, Rule 4 of the Colorado or Federal Rules of Civil Procedure permits service directly on a party. Another example would be where parents are given the right to attend planning and placement team meetings of the local school board, the parent's lawyer may communicate with the school board employees present at the meeting. Conn. Bar Ass'n Informal Op. 87-15, "Propriety of Opposing Counsel Having Discussions with Government Employees without the Consent of Counsel for the Government" (1988).

There appears to be little case law concerning the right to petition one's government; nonetheless it is a freedom protected by the Bill of Rights and the Supreme Court has been loathe to impute to any legislative or rulemaking body, executive agency, or court an intent to curtail this freedom. *See, e.g.*, *Calif. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 510 (1972); *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). Rule 3.4(f) states: "A lawyer shall not . . . (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client and the lawyer is not prohibited by other law from making such request; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."

Both courts and bar associations troubled by the potential breadth of the "authorized by law" exception have imposed common sense constraints on *ex parte* contacts in order to give government attorneys some notice of the contact. Consistent with Opinion 69, in *Frey*, 106 F.R.D. at 38, and *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 19-20 (D. Mass. 1989), the courts conditioned *ex parte* interviews on counsel's disclosing to the employee immediately (at the initial contact) counsel's position and the purpose of the contact. *See also* ABA Op. 97-408 (the lawyer must give government counsel "reasonable advance notice of intent to communicate"); *In re Anonymous*, 729 N.E.2d 566, 568 (Ind. 2000) (attorney's *ex parte* communication seeking emergency relief for the transfer of child custody without providing notice or an opportunity to contest was impermissible); *Hammond v. City of Junction City*, 2002 WL 169370, *6 (D. Kan. January 23, 2002) (unpublished) (court granted protection order prohibiting *ex parte* communications because city did not receive any notice of communications).

The Committee notes that, in balancing the First Amendment rights at issue with the government's right to the protections of Rule 4.2 or DR 7104(A)(1), several courts have permitted *ex parte* contacts conditioned upon a form of "Miranda" warning. *E.g.*, *Frey*, 106 F.R.D. at 38; *Morrison*, 125 F.R.D. at 19-29 (the person to be contacted was to be told he or she had the right to refuse the interview or to have the interview conducted in the presence of the public body's attorney or his or her personal attorney).

The Committee also notes that several bar associations have taken a slightly different tack and required prior or subsequent notice to the government's attorney of the *ex parte* contact. For example, the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics has reconciled the competing concerns by permitting counsel to send written comments about an agency decision directly to the government decision maker, but requiring the commenting lawyer to (a) notify the official that the matter is in litigation and that the official may want to consult counsel before responding, and (b) provide a copy of the letter to the government's counsel. NYSBA Op. 1991-4. *See also* Ill. State Bar Ass'n Advisory Op. on Prof'l Conduct 94-07, "*Ex Parte* Communications" (1994) (attorney did not provide "timely notice" to opposing counsel when judge initiated *ex parte* communication); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Jud. Ethics Formal Op. 1988-8 (1988); Phil. Bar Ass'n Prof'l Guidance Comm., Op. 98-15 (1999) (copying opposing counsel on a letter to a judge removes the objection that it is an *ex parte* communication, provided the letter is received by opposing counsel at the same time or before it is received by a judge; *Bublitz v. E.I. duPont de Nemours & Co.*, 196 F.R.D. 545, 549 (S.D. Iowa 2000) (any communication by the defendant to the putative class members—all current managerial employees of the defendant—relating to the merits or settlement of the action or participation in the action must be in writing with a copy of the writing filed with the court); *Summers v. Rockwell Int'l Corp.*, No. C-2-92-301, slip op. at 6 (S.D. Ohio Apr. 9, 1993) (magistrate permitted *ex parte* contact with former employees under conditions

that the plaintiff's counsel would provide written notice making certain disclosures to former employees in advance of the interview and would obtain the employees' consent); .

In summary, the First Amendment right to petition one's government should not be read into every contact with a government employee, which would otherwise negate Rule 4.2 in every instance. *See, e.g.*, ABA Informal Op. 1377, Va. State Bar Ass'n Op. 777, "Communicating with One of Adverse Interest" (1986); Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n Op. 90, "Written Communication with Amicus Curiae Regarding Matter in Litigation" (1988). In general, as stated above, when the government is a party it is entitled to the benefits of Rule 4.2.

Non-Litigation Settings

As noted above, Rule 4.2 is not limited to formal adversarial settings such as litigation, arbitration, or adjudicative proceedings before an administrative body. In any transaction—such as the negotiation of a contract or a lease with a government entity; or a public meeting, hearing, or colloquy with public officials or employees that could lead to litigation—Rule 4.2 remains applicable. This does not mean, however, that the *ex parte* contact is necessarily prohibited. For example, the "authorized by law" exception generally applies to an attorney's communications with public officials at a public meeting. *See* Ohio S. Ct. Bd. of Comm'rs on Grievances & Discipline, Op. 92-7 (1992). It is important to keep in mind that regardless of the setting, for the *ex parte* contact to be prohibited, all of the elements of the Rule discussed above and in Opinion 69 must be met.

Judicial and Quasi-Judicial Settings

The issue of *ex parte* contacts with a government official also can arise when an attorney appears before a decision maker, whether an individual or a public body, in a judicial or quasi-judicial setting. Such situations would include a zoning proceeding before a city council or board of county commissioners or a licensing or permit application to a federal, state, or local body or administrative agency. In these settings, in addition to Rule 4.2, Rule 3.5(b) applies. Rule 3.5(b) states: "A lawyer shall not . . . communicate *ex parte* with [a judge or other official] during the proceeding unless authorized to do so by law or court order." *See also* N.J. Advisory Comm. on Prof'l Ethics Op. 583, "*Ex Parte* Communications with Professional Boards in Disciplinary Proceedings" (1986) (deputy attorney general prosecuting matter before agency may not contact head of agency *ex parte* to determine acceptability of settlement to agency). Due process protections dictate a similar result. *See* Or. State Bar Bd. of Governors, Formal Ethics Op. 2005-83, "Ex Parte Contact with Administrative Law Judge" (discussing Rule 3.5 and explaining that *ex parte* communications with county employees who are also *quasi*-judicial decision makers are generally prohibited—but such communications may be permissible in administrative law proceedings under Oregon law if they are disclosed and other parties have the opportunity to rebut the substance of the communications); N.C. State Bar Formal Ethics Op. 15, "Ex Parte Communication With a Judge When Permitted by Law" (2001) (a lawyer may not engage in an *ex parte* communication with a judge or other official unless permitted by law through statute or case law; authorization may not be inferred by notice to the adverse party or counsel prior to *ex parte* communication); Ala. State Bar Off. of Gen. Couns. Op. 2003-03, "Communication With Represented Government Officials Permitted" (2003) (lawyer defending employees and officials of state board of education in suit by county board of education may communicate directly with county board members only to discuss settlement). *See also, e.g.*, *Weissman v. Bd. of Educ. of Jefferson Cnty. Sch. Dist. No. R-1*, 547 P.2d 1267, 1276 (Colo. 1976); *Worman Enters. v. Boone Cnty. Solid Waste Mgmt. Dist.*, 805 N.E.2d 369, 375-76 (Ind. 2004) (consideration of permit application by board of county solid waste management district was hybrid function of adjudication and legislation, and thus *ex parte* communications by board members with public citizens regarding the application was proper; board was local agency expected to be open and to respond to concerns of its constituents, and board was expected to receive input in less formalized manner than court proceeding); *Cooper v. Parrish*, 203 F.3d 937, 945-46 (6th Cir. 2000) (chancellor acting in his judicial capacity did not violate constitutional rights when he engaged in *ex parte* contact with prosecutors and gave them legal advice regarding their case).

Officials of an agency governed by the state Administrative Procedure Act (APA) who are acting in a judicial or quasi-judicial capacity may not receive or consider *ex parte* materials or representations. C.R.S. § 24-4-105(14). *See Wells v. Del Norte Sch. Dist. C7*, 753 P.2d 770, 772 (Colo. App. 1987). An attorney's *ex parte* contact in such a situation is both an ethical violation and, potentially, cause for invalidating the agency's decision. *See, e.g.*, *Peoples Natural Gas Div. of N. Natural Gas Co. v. Public Utils. Comm'n*, 626 P.2d 159, 163-64 (Colo. 1981). In the context of agency rulemaking or adjudications governed by the federal APA, Congress has restricted *ex parte* communications in "on the record" proceedings, 5 U.S.C. § 557(d)(l), rendering Rule 4.2's "authorized by law" exception unavailable.

The Validity of a Blanket Prohibition on Government Employee's Contact With Opposing Counsel

The Committee is aware of instances where government bodies have directed their employees not to discuss matters in litigation or administrative proceedings with counsel for the opposing party. At first blush such an admonition may appear reasonable and within the bounds of Rule 3.4(f). However, several courts and state ethics opinions have deemed such "gag" rules to be ethically impermissible either because they would violate First Amendment rights or would pre-empt counsel's right to approach certain employees *ex parte*. This Committee concludes that as a general matter, such "gag" rules are impermissible. Limited exceptions do exist, for example, where a public employee speaks out on matters of personal interest, as opposed to matters of public concern. *See Connick v. Myers*, 461 U.S. 138 (1983).

In *Vega*, the Deputy Commissioner of the Department of Public Welfare issued a memorandum to his employees responsible for the Medicaid program at issue, instructing them not to meet with plaintiffs' attorneys without specific approval of the Department's attorney, at the risk of disciplinary action. The court found the memorandum violative of the First Amendment rights of those department employees who wished to speak with plaintiffs' counsel. 427 F. Supp. at 595; *see also Rodriguez v. Percell*, 391 F. Supp. 38, 41-43 (S.D.N.Y. 1975) (directive by Chancellor of New York City school district pursuant to city charter prohibiting teachers from making statements in suit on behalf of Spanish-speaking children violated First and Fourteenth Amendments); Ohio S. Ct. Bd. of Comm'rs on Grievances & Discipline, Op. 92-7 (1992) (under the First Amendment, a government department, agency, or its counsel may not forbid employees' communications with an adversary's attorney unless the government's attorney is present); *cf. Wright v. Group Health Hosp.*, 691 P.2d 564 (Wash. 1984) (under DR 7-104 (A)(1), hospital corporation may not prohibit current employees from participating in *ex parte* interviews with plaintiffs' attorneys).

Conclusion

When the organizational party is a government entity, Rule 4.2's prohibition on *ex parte* contacts is both broader and narrower in scope than Comment [5] to the Rule might suggest. Notwithstanding the comment's statement that the "authorized by law" exception permits *ex parte* contacts with government officials about a controversy with a government agency, in general, Rule 4.2 prohibits such contacts with "a constituent of the [governmental] organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter," or one who has "authority to obligate the [governmental] organization with respect to that matter," absent the consent of counsel who is representing the organization in the matter.

Nevertheless, because of the "authorized by law" exception, the Rule does not prohibit *ex parte* contacts with any government official or employee acting in a legislative or rulemaking capacity (except when specifically prohibited by law). Nor does it prohibit contact with government employees or officials whose statements could be deemed admissions against the governmental organization under the applicable rule of evidence. In addition, where a specific statute, rule, ordinance, or court order permits contact with the government employee or official, counsel may proceed *ex parte* without notifying the government's counsel.

94 ETHICAL DUTIES RELATING TO A CLIENT'S PROPERTY HELD BY A LAWYER IN WHICH A THIRD PARTY HAS AN INTEREST

Adopted November 20, 1993.
Addendum issued 2006.

Introduction and Scope

This opinion addresses the ethical issues faced by a lawyer holding client funds to which a third party claims entitlement. Although the problem can arise in many contexts, it typically arises where a lawyer recovers funds as a result of a client's personal injury and a medical provider claims some right to those funds. Often the third party has had some contact with the lawyer which may place additional responsibilities on the lawyer.

Syllabus

1. Where the third party does not hold an interest as a result of a statutory lien[1] or a contract[2] or a court order, the property should be promptly distributed to the client.

2. Where the third party holds an undisputed interest as a result of a statutory lien, contract, or court order, the property should be distributed in accordance with the terms of the statutory lien, contract or court order.

3. If the validity or amount of the third party's claim is subject to dispute, any undisputed portion should be promptly distributed to the client, or if appropriate, to the third party in accordance with the terms of the lien, contract or court order. The balance should be subject to a negotiated settlement or a court proceeding.

4. Where the third party has been induced by the conduct of the lawyer to believe the third party will be paid from the property held by the lawyer, but the client disputes the third party's entitlement, the lawyer should advise the client and the third party to attempt to resolve the dispute. The lawyer should distribute the undisputed portions of the property. If the client and the third party are unable to resolve their dispute, the lawyer should file an interpleader action with regard to the portion in dispute.

5. (a) Where there is a statutory lien or court order and the client demands that the lawyer not disclose the fact that the lawyer is holding the property, Rule 1.15(b) requires the lawyer to distribute the funds in accordance with the statutory lien or court order, notwithstanding the client's wishes.

(b) Where the third party holds an interest pursuant to a contract with the client, but the client disputes the validity of the contract or the amount of the third party's claim and further demands that the lawyer not disclose that the lawyer is holding the property, the lawyer should maintain the confidentiality of the information, pursuant to Rule 1.6(a) and distribute the property to the client pursuant to Rules 1.2(a) and 1.15(b).

(c) Where the circumstances exist as described in (b) above, but in addition the third party has been induced by the lawyer to believe that the contract will be honored, the lawyer should attempt to have the client consent to disclosure and should further advise the client to attempt to resolve the dispute. If the client refuses, pursuant to Rule 1.15(b), the lawyer should interplead the disputed portion of the property, notwithstanding the client's request for confidentiality.

Discussion: Overview of Lawyer's Duty

A lawyer holding property on behalf of a client can be faced with ethical issues when a third party makes a claim to that property.[3] The ethical dilemma is compounded where the client "directs" the lawyer not to reveal the existence of the property to the third party and to distribute the property pursuant to the client's instructions. Rule 1.15(b) (concerning distribution of client's property), Rule 1.6 (concerning confidentiality of information) and Rule 1.2 (concerning scope of representation) of the Colorado Rules of Professional Conduct guide the lawyer's ethical conduct in these situations.

When a lawyer receives property on behalf of the client, the lawyer's duty (absent other agreement or law) is to *promptly* deliver the property to the client and/or third parties who (1) have an interest,[4] and (2) who are entitled to receive the property. Rule 1.15(b) provides:

> Upon receiving funds or other property in which a client or third person *has an interest,* a lawyer *shall promptly* or otherwise as permitted by law or by agreement with the client, deliver to the client or third person any funds or other property that the client or third person is *entitled to receive* and, upon request by the client or third person, render a full accounting regarding such property. (Emphasis added).

With respect to the client's property in a lawyer's possession, a lawyer's duty is generally to the client and not to third parties. *See, e.g., Klancke v. Smith,* 829 P.2d 464 (Colo. App. 1991) (lawyer's duty is to act in the best interest of the client; in the absence of fraud or malice, a lawyer is not liable to third parties for distribution of funds to the client). This general rule may be altered by statute, contract, or by court order.

With regard to confidentiality, Rule 1.6(a) provides that:

> A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, *except for disclosures that are impliedly authorized in order to carry out the representation,* and except as stated in paragraphs (b) and (c). (Emphasis added).

With regard to scope of representation, Rule 1.2(d) provides that:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that a 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.

1. *Distribution where the third party does not hold an interest as a result of a statutory lien, a contract or a court order.*

Distribution to the client should be made promptly where the third party does not hold an interest as a result of a statutory lien, contract or court order. Rule 1.15(b) obligates the lawyer to distribute the funds or property only to parties "entitled to receive" the property. The Alaska Bar Association Ethics Committee has noted that under Rule 1.15(b), a lawyer has no duty to third parties unless there is either "[1] a valid assignment on its face or [2] a statutory lien which has been brought to the lawyer's attention." Alaska Bar Association Ethics Committee Opinion 92-3 (6/1/92).

Further, the lawyer is not required to allow the third party time to obtain a court order before delivering the property to the client. California State Bar Standing Committee on Professional Responsibility and Conduct, Opinion 1988-101; and *Klancke,* 829 P.2d at 464. In the absence of a statutory lien, contract or court order, the lawyer must distribute the property to the client, and the lawyer cannot rely on how a future court will view the strength of the third party's claim.[5]

2. *Distribution where the third person holds an undisputed interest as a result of a statutory lien, contract or a court order.*

Where the third person holds an undisputed interest as a result of a statutory lien, contract or court order, the lawyer is required to abide by Rule 1.15(b). The existence of a statutory lien or a contract creates a presumption that the client is not entitled to the property.[6] The lawyer should promptly deliver the property to the third person in accordance with the statutory lien, contract or order, and deliver the balance to the client.

3. *Distribution where there is a dispute about the validity or amount of the third party's claim.*

Where there is a dispute as to the validity or amount of the third party's claim, the lawyer should promptly distribute the undisputed portions. The balance should then be subject to a negotiated settlement between the client and the third party. The lawyer, however, should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* Committee Comment to Rule 1.15. The lawyer should encourage the client and the third party to resolve their differences promptly and amicably.

The lawyer cannot unilaterally hold the disputed property without the permission of the client and the third party.[7] Where the client and third party consent, the lawyer may retain the disputed property in a trust account pending resolution of the dispute between the client and third party. If the client and the third party cannot reach an agreement, the lawyer should interplead the property for disposition by the court. Filing fees and costs of service may be deducted from the property in dispute.

4. *Distribution to a third party where the lawyer has induced reliance by the third party, when there is no statutory lien, or court order.*

A lawyer may be contacted by a third party asserting a claim to the client's property. The lawyer should not engage in conduct which induces a third party to expect to share in the property and then later distribute the property solely to the client. The lawyer's conduct which may induce reliance can be explicit, *i.e.,* an express acceptance of the third party claim by the lawyer, or reliance can be induced by the lawyer's silence; *i.e.,* an implicit or tacit acceptance of the third party claim either by the lawyer's actions or inaction.

The Colorado Supreme Court privately censured a lawyer for inducing a third party to rely on the lawyer's assurance that her claim would be paid and then later distributing the property solely to the client. The client had provided a written assignment to the third party of a portion of his expected personal injury proceeds. The lawyer explained the workings of the assignment to the third party. When the third party became concerned about whether the assignment would be honored, she had her lawyer write a letter inquiring whether the client intended to be bound by the assignment. The client's lawyer did not respond, and instead, disbursed the proceeds of the personal injury claim to the client.

The Colorado Supreme Court concluded that the lawyer knew that the third party "was relying on the lawyer's representations that the assignment would be honored." 19 Colo. Law. 268 (Feb. 1990). The lawyer's conduct constituted "conduct involving dishonesty" in violation of the then applicable Code of Professional Responsibility.[8]

The Alaska Bar Association Ethics Committee has concluded that it is improper for a lawyer to induce such reliance, and that the lawyer had an affirmative duty to respond in a clear, unequivocal manner to a third party's inquiry. The Alaska Opinion 92-3, *supra,* noted that "it is inappropriate for the lawyer to remain silent after having received notice of such a potential claim." The Alaska Bar Association Ethics Committee suggested that the lawyer respond to a third party's lien claim by affirmatively stating that (1) the issue is one between the third party and the client, and (2) the lawyer will not assume responsibility for payment of the client's obligations.

This Committee agrees that a lawyer may not stand mute in response to a third party's claim to client funds. The lawyer should discuss the third party's claim with the client and decide what response should be made. The third party should then be informed of the client's decision with regard to the claim. Regardless of the client's decision, unless the lawyer intends to be personally responsible, the third party should be informed that the lawyer will not assume responsibility for payment of the client's obligations.

A situation such as this may also arise where the client has entered into a contract with a third party, and the client then instructs the lawyer to disregard the contract when the property or funds are received by the lawyer. If the lawyer has either explicitly or implicitly led the third party to believe that the property will be distributed pursuant to the contract between the client and the third party, the lawyer should advise the client and the third party to resolve the dispute. The lawyer should distribute the undisputed portions. Where the client and the third party consent, the disputed property may be retained in the lawyer's trust account pending resolution of the dispute between the client and third party. If the client and third party do not agree to place the property in a trust account or are unable to resolve their dispute, the lawyer should file an interpleader action with regard to the portion in dispute.

5. *Distribution where the client demands that the lawyer not disclose the existence of the funds to the third party.*

a. Where a third party has an interest in the property a result of a statutory lien or court order, and the client demands that the lawyer not disclose to the third party that the lawyer is holding the property,

Rule 1.15(b) requires the lawyer to distribute the funds to the third party notwithstanding the client's instructions. Because the third party is legally entitled to receive the property, Rule 1.15(b) requires the lawyer promptly to distribute the property to the third party, and to render an accounting, if requested. The lawyer's duties under Rule 1.15(b) may conflict with the lawyer's duty of confidentiality under Rule 1.6. Under the circumstances discussed in this subsection, however, the Committee believes that the objectives of Rule 1.15(b) take precedence; thus the lawyer should distribute the property notwithstanding the client's request for confidentiality.[9]

b. Where the third party holds an interest pursuant to a contract with the client, but the client disputes the validity of the contract or amount of the third party's claim under the contract, and the third party has not been induced by the lawyer's conduct to believe that the third party will be paid from the property held by the lawyer, the lawyer should maintain the confidentiality of the existence of the property and distribute the property to the client, pursuant to Rules 1.2(a) and 1.6(a).[10] Even though the lawyer may be aware of potential liability which may be incurred by the client with regard to the third party, this Committee does not believe this vitiates the client's entitlement to the property under normal circumstances. However, the lawyer may not distribute the property to the client if to do so would be to engage in or assist the client in conduct that the lawyer knows is criminal or fraudulent in violation of Rule 1.2(d) or is otherwise not permitted by the Rules of Professional Conduct in violation of Rule 1.2(e). Under the latter circumstances, the lawyer should move to interplead the property. *See* Section 5(c) below and Rule 4.1(b).

c. Where there is a contract and the third party has been induced by the lawyer to believe the contract will be honored and the client disputes the validity of the contract or the amount of the third party's claim and demands that the lawyer not disclose that the lawyer is holding the property, the lawyer should attempt to have the client permit disclosure regarding the property's existence. The lawyer should also advise the client to attempt to resolve the dispute. If the client refuses to allow disclosure of the property, the lawyer must interplead the property, naming both the client and the third party as necessary parties.

The interpleader action will disclose the existence of the property. However, this Committee believes that where the lawyer's duties under Rules 1.15(b) and 1.2(d) or (e) conflict with the duties under Rule 1.6, the confidentiality provision must be read in the context of the overall purpose of the Rules.

The ABA Committee on Ethics and Professional Responsibility noted that Rule 1.6(a)'s confidentiality provision can give way to Rules 1.16 and 1.2(d):

> While is it also true that neither Rule [1.16 or 1.2(d)] contains language explicitly overriding the confidentiality requirement of Rule 1.6 (as do Rules 3.3 and, of course, Rule 1.6 itself), the absence from their text of a preemption clause does not seem to us necessarily determinative of the proper course of conduct in a situation where compliance with Rules 1.16(a)(1) and 1.2(d) appears to require conduct that may have the collateral consequence of disclosing client confidences. In the absence of a clear textual indication of how such a conflict should be resolved, the Committee believes that the confidentiality requirement of Rule 1.6 should not be interpreted so rigidly as to prevent the lawyer from undertaking to the limited extent necessary that which is required to avoid a violation of Rules 1.2(d) and 1.16(a)(1).
>
> The exception here (if 'exception' is an appropriate term to describe the inevitable consequences of one rule's operation upon another) simply results from a recognition that fulfillment of the lawyer's obligations . . . may have the collateral effect of inferentially revealing a confidence. ABA Formal Opinion 92-366 at pp. 10-11 (*but see* Dissent to the Formal Opinion).

By analogy, the Committee believes that, although an interpleader action may have the collateral effect of revealing a client confidence (here, the existence of the property), Rule 1.15(b) does not permit a lawyer who has induced reliance to either retain the property or to ignore the interests of third parties who are relying on a contract which, unbeknownst to them, has been challenged or disputed by the client.

Conclusion

Distribution of property should be addressed with the client when the lawyer first learns of the statutory lien, contract or court order to prevent disputes from arising upon receipt of the funds by the lawyer. Early recognition of the potential for disputes between the client and the third party can avoid many of the complications discussed above.

2006 Addendum

A question may arise as to whether the lawyer may distribute the disputed property to the client where the statute of limitations has run. The Committee believes that it is proper for the lawyer to distribute the property if it is clear that the statute has run. However, if there is a question as to whether the statute of limitations has run, then the lawyer has an obligation to notify the third party and ask the third party whether he or she is making a claim to the property, giving the third party a reasonable time to state his or her position. If the third party makes a claim, then the lawyer should proceed in accordance with Section 3 above, which deals with distribution where there is a dispute as to the validity of the claim. If the lawyer does not receive a meaningful response from the third party, and the lawyer believes the statute of limitations has run, the lawyer may distribute the property to the client. In accordance with Section 4 above, the lawyer should be aware that if the lawyer has induced a third party to believe that he or she will be paid or that his or her interest will be protected whether or not a statute of limitations has run, and the lawyer fails to act in accordance therewith, the lawyer may be subject to discipline.

NOTES

1. For example, Colorado statutes provide for a lien in favor of a hospital. C.R.S. § 38-27-101. Statutory liens also include those liens created by C.R.S. § 26-4-403 which provides for recovery for certain payments made by the Medicaid Program and liens created by § 1862 of the Social Security Act, codified at 42 U.S.C. § 1395, which provides for recovery of certain payments made by the Medicare program. In some cases, a lawyer can be held personally liable for a distribution which is contrary to a statute. *See* C.R.S. § 26-4-403.

2. An oral or written agreement between the client and a third party, granting the third party a right to receive funds which are expected to come under the control of the lawyer on behalf of the client as a result of that agreement, including by way of example: an assignment by the client, an agreement between a health care provider and the client for health care services, agreements between the client and an employer, a landlord, or an insurer.

3. Recent amendments to the Supreme Court Rule regarding contingency fees (Chapter 23.3, effective January 31, 1992) provide that the effect of third party liens shall be disclosed to the client in writing. It is advisable that this be discussed with the client whether or not a contingent fee agreement is in place.

4. The term "interest" is used to denote a right, claim or legal share in property, such as the right a third party has to property by virtue of a statutory lien, contract or court order.

5. Cleveland Bar Association Professional Ethics Committee Opinion 87-3 (3/29/88).

6. Alaska Bar Association Ethics Committee Opinion 92-3 (6/1/92).

7. California State Bar Standing Committee on Professional Responsibility and Conduct Opinion 1988-101.

8. Where the attorney personally executes the "lien," the attorney subjects himself or herself to personal liability *(Conyers v. Lee,* 511 P.2d 506 (Colo. App. 1973)) and potentially violates the Rules of Professional Conduct *(see* first tab, this book) by failing to honor the lien.

9. This section assumes that the client has taken no court action to challenge the validity or amount of the statutory lien or court order. If such action has been taken, resolution of the dispute should be accomplished in a fashion similar to that set forth in Section 3 above.

10. Rule 1.2(a) provides:

> A lawyer shall abide by a client's decision concerning the objectives of representation, subject to paragraphs c, d, and e, and shall consult with the client as to the means by which they are to be pursued.

Rule 1.6(a) provides that:

> A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and except as stated in paragraphs (b) and (c).

The fact that client property is being held by the lawyer constitutes "information relating to representation of a client," as described in Rule 1.6(a). While the fact that such property exists may not rise to the level of information protected by the attorney-client privilege, the confidentiality requirement of Rule 1.6(a) is not limited to only privileged information. Rather, the Rule prohibits disclosure of any information relating to the lawyer's representation of that client.

95 FUNDS OF MISSING CLIENTS

Adopted November 20, 1993.
Withdrawn May 21, 2016.

WITHDRAWN

Introduction and Scope

The Ethics Committee of the Colorado Bar Association has been asked to provide guidance to Colorado attorneys concerning ethical considerations regarding disposition of funds held in the lawyer's trust account when the client's whereabouts are no longer known to the attorney. Generally, the issue arises after a lawyer has begun representing a client, a nominal amount of the client's funds remains in the lawyer's trust account, and the client no longer can be located. For the purpose of this opinion, we are assuming that the lawyer properly placed the funds in an account authorized by Rule 1.15(e) of the Colorado Rules of Professional Conduct (providing for the Colorado Lawyers Trust Account Foundation (COLTAF)).

Syllabus

A lawyer may request in advance, as part of a written retainer agreement, that client consent to the donation of unexpended funds if the client subsequently cannot be located provided that such consent is given freely and without any pressure exerted upon the client. In the alternative, a lawyer may ethically permit nominal amounts of client funds to remain in his or her COLTAF account. The lawyer may make reasonable expenditures from the fund to attempt to locate the client. If such efforts are unavailing, the lawyer may hold indefinitely in the COLTAF account funds which are nominal in amount. Alternatively, the lawyer may proceed under the Unclaimed Property Act, C.R.S. § 38-13-101, *et seq.*, to have the funds be considered as abandoned property and delivered to the Colorado state treasurer. In the case of funds which are not nominal but are expected to be held for a short period of time, the lawyer may be required to proceed under the Unclaimed Property Act.

Analysis

Rule 1.15 sets forth the lawyer's obligation to preserve client funds. Rule 1.15(a) provides, in pertinent part, that a lawyer shall hold property of clients or third persons that is in a lawyer's possession separate from the lawyer's own property and in a separate account. The lawyer must also maintain complete records of such account funds for a period of six years after termination of the representation. Rule 1.15(b) requires that "upon receiving funds in which a client or third person has an interest, a lawyer shall promptly or otherwise as permitted by law or agreement with the client, deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, render a full accounting regarding such property."

Additionally, Rule 1.15(e) provides that, with certain exceptions, a lawyer must place funds of clients or third persons "which are nominal in amount or are expected to be held for a short period of time" in a COLTAF account. Rule 1.15 is substantially similar to DR 9-102 of the former Code of Professional Responsibility. Neither the Colorado Rules nor the former Colorado code specifically sets forth the obligations of an attorney with regard to the property of a missing client, nor has the Colorado Supreme Court addressed this issue.

A lawyer is also obligated to comply with C.R.S. §§ 15-1-501, *et seq.,* concerning fiduciary responsibilities; and under certain circumstances the Colorado Unclaimed Property Act, C.R.S. §§ 38-13-101, *et seq.,* may apply.

A. *Provision in Retainer Agreement*

The lawyer may address the possible ethical problem in dealing with funds of a client whose whereabouts are unknown through the terms of the written retainer agreement. Rule 1.5(b) states that when

the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. In Informal Opinion 1391 (1977), the American Bar Association Committee on Ethics and Professional Responsibility concluded that it would not be unethical for a legal services program for the poor to request in advance a client's consent to the donation of unexpended funds to the program if the client cannot subsequently be located, provided that ". . . a full explanation is given to the client and no pressure is exerted to secure the consent." That opinion also recommends that the funds be held for a reasonable time before transfer from the client trust account to the program funds and that reasonable efforts be made to locate the client. The committee concludes that this rationale is consistent with the Rules of Professional Conduct, particularly Rule 1.15.

Consistent with the Rules, a lawyer may provide in a retainer agreement that if the client cannot be located after reasonable efforts, that unexpended client funds may be donated to a legal services program for the poor. ABA Informal Opinion 1391, *supra*. A retainer agreement may similarly provide that if the client's whereabouts remain unknown, the client may designate another beneficiary of the expended funds, such as another nonprofit organization, or a friend or relative of the client. *See* Rule 1.15(b). Or the retainer agreement could specify COLTAF as a beneficiary of the unexpended funds if the client cannot be located.

The retainer agreement may provide that a reasonable amount of the client's unexpended funds may be used on efforts to locate the client.[1]

Furthermore, Rule 1.15(a) requires a lawyer to maintain *complete records* of trust account funds and preserve them for six years after termination of the representation. Presumably this requires the lawyer to maintain the client's address and telephone number or some other means of contacting the client. *See* Michigan State Bar Committee on Professional and Judicial Ethics, Opinion RI-58 (September 5, 1990).

B. *No Provision in Retainer Agreement*

What are the attorney's responsibilities where there is no provision in the retainer agreement specifying the distribution of unexpended funds when a client's whereabouts are no longer known? There are two viable alternatives.

First, if the funds are nominal in amount, the attorney may keep the unexpended funds in his or her COLTAF account. In this situation, there is no provision in Rule 1.15 that would require the lawyer to remove the money from his or her COLTAF account if the client's whereabouts are unknown. Accordingly, the lawyer would satisfy his or her ethical responsibilities simply by leaving the unexpended funds in the COLTAF account.[2]

Second, the lawyer may consider whether the provisions of the Unclaimed Property Act provide an alternative means of disposition of unexpended funds.[3] Generally speaking, the Unclaimed Property Act applies to amounts of money greater than $50 in circumstances where the owner of the money cannot be found. See C.R.S. § 38-13-110(5)(c). The Act appears to be applicable to attorneys, since C.R.S. § 38-13-108 applies to property held by agents and fiduciaries.[4] That statute requires that "intangible property and any income or increment derived therefrom held in a fiduciary capacity for the benefit of another person is presumed abandoned unless the owner, within three years after it has become payable or distributable, has increased or decreased the principal, accepted payment of principal or income, communicated concerning the property, or otherwise indicated an interest by a memorandum or other record on file prepared by the fiduciary."

In some circumstances it may not be clear when the three year presumed abandonment period begins to run. Accordingly, once an attorney determines that a client's whereabouts are unknown, the attorney could start the running of the presumed abandonment period by contacting the client in writing at the client's last known address notifying the client that the attorney has unexpended client funds and that they are payable or distributable to the client. Utilizing these procedures would be optional for nominal amounts of client funds, unless it is clear from the circumstances of the case that the unexpended funds are payable or distributable to the client.

WITHDRAWN

However, in the case of COLTAF funds expected to be held for a short period of time, the client would reasonably expect that those funds would be "payable or distributable" once that short period of time has expired. Thus, in this situation, resort to the provisions of the Unclaimed Property Act might be mandatory.

Under the Unclaimed Property Act, the attorney would then have to wait three years before the client's unexpended funds would be presumed abandoned. After the three years, the attorney could follow the procedures in the Unclaimed Property Act which would result in delivering the money to the Colorado state treasurer if the client's whereabouts remain unknown. Following this procedure would enable the attorney to satisfy his or her obligations under Rule 1.15, especially since the Unclaimed Property Act allows the property owner, upon presentation of the proper proof, to reclaim funds from the Colorado state treasurer's office.

Ethics committees in other jurisdictions have approved the practice of following state unclaimed property laws to dispose of funds of clients whose whereabouts are unknown after reasonable efforts have been made to locate them. *See* Maryland Opinion 90-25 (February 22, 1990) (lawyer who receives check for a client's claim and who is unable to locate the client after reasonable efforts must dispose of the check according to the Maryland Uniform Disposition of Abandoned Property Act); North Carolina Opinion 89 (April 12, 1990) (lawyer holding client trust funds for a client who has disappeared may deem the funds abandoned and pay the money into the escheat fund pursuant to the state statute on unclaimed property after five years when certain conditions are met); Vermont Opinion 87-9 (August 1987) (lawyer who owes an unearned portion of a retainer to a client who cannot be located despite a diligent search for seven years may dispose of the funds by taking steps in state unclaimed property law).

Conclusion

To avoid an ethical problem concerning unexpended funds of a client whose whereabouts are unknown, a lawyer may make proper provision in a written retainer agreement, provided that the client's consent to the disposition set out in the retainer agreement was freely and knowingly given. Pursuant to Rule 1.15, if unexpended client funds are nominal in amount the lawyer may maintain such funds indefinitely in his or her COLTAF account. The lawyer may also expend a reasonable amount of the client's funds in an effort to locate the client. Alternatively, the lawyer may follow the procedures of the Colorado Unclaimed Property Act for nominal amounts and take necessary measures to deliver the client's unexpended funds to the Colorado state treasurer pursuant to that act. In the case of client funds expected to be held for a short period of time, the Unclaimed Property Act may be mandatory after the expiration of the short time period.

WITHDRAWN

NOTES

1. Even without such a provision in a retainer agreement, a lawyer may expend a reasonable amount of the client's unexpended funds in order to locate the client. *See* Rule 1.15(b) (lawyer may take steps "permitted by law" to deliver funds to client).

2. Although not required to do so, the lawyer could follow the procedures discussed below under the Unclaimed Property Act for unexpended funds of nominal amount.

3. Lawyers should consider whether any changes to this statute by the legislature or by judicial interpretation might affect this analysis.

4. In rare circumstances, compliance by a lawyer with the disclosure and turnover requirements of the Unclaimed Property Act could violate the lawyer's duty under Rule 1.6(a) to maintain the confidentiality of "information relating to representation of a client." To the extent that a lawyer's duties under the Rules of Professional Conduct conflict with the Unclaimed Property Act, questions may arise as to the constitutionality of the statute as applied to lawyers because of the Colorado Supreme Court's exclusive constitutional authority to regulate the practice of law. The resolution of any such conflict, however, is beyond the scope of this Opinion.

96 *EX PARTE* COMMUNICATIONS WITH REPRESENTED PERSONS DURING CRIMINAL AND CIVIL REGULATORY/INVESTIGATIONS AND PROCEEDINGS

Adopted July 15, 1994.
Revised March 17, 2012.

Introduction

Police and other law enforcement agents historically have possessed broad powers, within constitutional limits, to investigate alleged violations of criminal and civil regulatory laws. These powers include the authority to conduct pre-arrest and pre-indictment investigations, including undercover operations. During these pre-arrest and pre-indictment investigations, police and other law enforcement agents are entitled to interview witnesses, potential suspects, and even the accused if he or she waives his or her constitutional rights to remain silent.

After a person has been taken into custody and/or is charged in an adversarial proceeding, these broad police powers are significantly restricted by the Fifth and Sixth Amendments to the U.S. Constitution. The Fifth Amendment prohibits law enforcement personnel, in the absence of a waiver, from conducting custodial interrogations of the accused. The Sixth Amendment substantially restricts the ability of law enforcement personnel to communicate *ex parte* with criminal defendants once adversarial proceedings have been initiated.

In recent years, prosecutors and other lawyers charged with enforcing criminal and civil regulatory laws have begun to play a larger role in pre-arrest and pre-indictment investigations. This trend has been viewed positively by the general public and the bar because of the perception that a lawyer's involvement in a criminal or civil regulatory investigation may help ensure that the criminal and/or civil regulatory investigation complies with constitutional constraints, as well as high professional and ethical standards.

This expansion of the traditional prosecutorial responsibility for trying and disposing of cases to organizing and supervising criminal and civil regulatory investigations, however, has created considerable uncertainty in the law as to whether ethical rules of conduct should restrain lawyers engaged in criminal and civil regulatory investigations from contacts with persons known to be represented by counsel beyond those restrictions provided for by the U.S. and Colorado Constitutions. The overwhelming preponderance of federal and state court decisions holds that the restriction on contacts with a represented person contained in Rule 4.2 of the Colorado Rules of Professional Conduct (Colorado Rules or Colo. RPC) does not apply during the investigative stage of criminal proceedings and prior to arrest or indictment, but does apply once adversarial proceedings have begun. *See United States v. Talao*, 222 F.3d 1133, 1138-41 (9th Cir. 2000) (applying California's version of Rule 4.2); *United States v. Ryans*, 903 F.2d 731, 735-36 (10th Cir.) (discussing cases decided under predecessor rule DR 7-104(A)(1)), *cert. denied*, 498 U.S. 855 (1990); *United States v. Lemonakis*, 485 F.2d 941, 955-56 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974); *United States v. Grass*, 239 F.Supp.2d 535, 539-46 (M.D.Pa. 2003) (applying Pennsylvania's version of Rule 4.2).[1] Authorities similarly hold that Rule 4.2's restriction does not apply during the investigative stage of civil enforcement proceedings, but does apply once adversarial proceedings have begun. *See* Colo. RPC 4.2, Comment [5] (noting that "[c]ommunications authorized by law may also include investigative activities of lawyers representing governmental entities . . . prior to the commencement of . . . civil enforcement proceedings"); *United States v. Teeven*, 1990 WL 599373 at *2-*4 (D.Del. Sept. 28, 1990) (finding that *ex parte* interviews by government attorneys conducting civil False Claims Act investigation did not violate Delaware's version of Rule 4.2); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995).

The CBA Ethics Committee (Committee) issued an earlier version of this formal opinion based on DR 7-104(A)(1) of the Colorado Code of Professional Responsibility. The Committee believes that it is appropriate at this time to issue a revised opinion based on the current Colorado Rules and, particularly, on

Rule 4.2's use of the term "represented person" rather than "represented party." Because members of the bar relied on an earlier version of this opinion, in large part this opinion tracks the organization of the earlier version. The Committee has removed discussion of issues that were clarified or changed under the Colorado Rules.

Scope

The purpose of this opinion is to provide guidance to lawyers in evaluating the ethical propriety of *ex parte* communications with persons known to be represented by counsel. The Committee recognizes that there are a variety of strongly held and cogently articulated positions on the application of Colo. RPC 4.2 to prosecutors and other lawyers involved in enforcing criminal and regulatory laws. The Committee is aware that as a result of this divergence of opinion, prosecutors and other members of the bar need guidance on the applicability of Colo. RPC 4.2 to their contacts with parties known to be represented by counsel during criminal and civil regulatory enforcement proceedings.

Syllabus

Established case law and the Colorado Rules permit communications with represented persons during the investigative stage of criminal and civil regulatory enforcement proceedings, and prohibit such communications once formal proceedings have commenced, subject to several well-defined exceptions.

Analysis

Colo. RPC 4.2, entitled "Communications with Person Represented by Counsel," governs lawyers' *ex parte* communications with parties represented by counsel and provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

The rule generally applies if (1) the person has retained a lawyer or obtained court appointed counsel, (2) the representation concerns the subject matter in question, and (3) the opposing lawyer "knows" the person is represented by counsel concerning the subject matter of the communication. *See generally People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991) (describing conditions in which attorney–client relationship exists); *People v. Morley*, 725 P.2d 510, 517-18 (Colo. 1986) (same); *Klancke v. Smith*, 829 P.2d 464, 466 (Colo.App. 1991) (same). As explained in Comment [8] to Colo. RPC 4.2, the opposing lawyer is required to have actual knowledge that the person is represented, but the opposing lawyer "cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious."

Underlying Colo. RPC 4.2 is the recognition that when two parties in a legal proceeding are represented, it is unfair for a lawyer to circumvent opposing counsel and employ superior skills and legal training to take advantage of the opposing party. Disciplinary authorities in all fifty states and the District of Columbia have enacted some version of Colo. RPC 4.2 or other similar prohibitory rules. The prohibition embodied in Colo. RPC 4.2 against communication with a represented party recognizes the inherent danger in a layperson conducting negotiations with an opposing lawyer and the likelihood that such negotiations would destroy the confidence essential to the attorney–client relationship and hamper the subsequent performance of the represented party's counsel. *United States v. Batchelor*, 484 F.Supp. 812, 813 (E.D.Pa. 1980).

A. *Communications With a Person Represented by Counsel Made During the Course of Investigations or Other Proceedings Into Alleged Unlawful Conduct*

In the course of criminal and civil regulatory enforcement investigations, a prosecuting attorney or government lawyer may communicate, or cause another to communicate, with a represented person concerning the subject matter of the representation if the communication is made in the course of an investigation into possible unlawful conduct. Except in those situations described in section C below, the communication must occur prior to the attachment of the Fifth and Sixth Amendment rights to counsel with

respect to charges against the person arising out of the criminal activity that is the subject of the investigation or other proceeding. *See United States v. Heinz*, 983 F.2d 609, 613 (5th Cir. 1993); *United States v. Ryans*, 903 F.2d at 739; *United States v. Sutton*, 801 F.2d 1346, 1365-66 (D.C. Cir. 1986); *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir. 1983), *cert. denied*, 464 U.S. 852 (1983); *United States v. Lemonakis*, 485 F.2d at 955-56; *People v. Hyun Soo Son*, 723 P.2d 1337, 1339-42 (Colo. 1986); *People v. Rubanowitz*, 688 P.2d 231, 247 (Colo. 1984).[2]

Such contact may take the form of attempts to interview the suspect about the matter being investigated, interviews, undercover activity designed to elicit information from the suspect, or simple observation of the allegedly unlawful behavior. On the other hand, a prosecuting attorney or government lawyer may not engage in deceit or misrepresent the lawyer's role in the matter. *In re Pautler*, 47 P.3d 1175, 1180-81 (Colo. 2002);[3] Colo. RPC 8.4(c).

Most courts interpreting Colo. RPC 4.2 or its predecessor, DR 7-104(A)(1), have reached the conclusion that a lawyer's actions as described above are "authorized by law." For example, in *United States v. Ryans*, the Tenth Circuit held that the use of an informant, on instructions from the prosecutor, to surreptitiously record incriminating conversations with suspects who had retained counsel, but who had not been either arrested or indicted, did not violate DR 7-104(A)(1). *Ryans*, 903 F.2d at 740. *See also United States v. Balter*, 91 F.3d 427, 436 (3d Cir. 1996); *United States v. Powe*, 9 F.3d 68, 69 (9th Cir. 1993); *Sutton*, 801 F.2d at 1366; *Fitterer*, 710 F.2d at 1333.

The rationale for the court's conclusion in *Ryans* and in similar cases is that prosecutors, by the very nature of the office they hold, are required to investigate possible criminal conduct and, thus, their actions in directing or supervising such investigations are "author ized by law." *Ryans*, 903 F.2d at 738.

A district attorney is a member of the Executive Branch of government and is obligated to perform duties as are provided by law. Colo. Const. art. VI, § 13; *People v. District Court*, 767 P.2d 239, 241 (Colo. 1989); *Beacom v. Board of County Comm'rs*, 657 P.2d 440, 445 (Colo. 1983); *People v. District Court*, 186 Colo. 335, 338, 527 P.2d 50, 52 (1974). A district attorney has the power to investigate and determine who should be prosecuted. *People v. Schwartz*, 678 P.2d 1000, 1007-08 (Colo. 1984); *People v. District Court*, 632 P.2d 1022, 1024 (Colo. 1981). Statutorily, district attorneys are required to appear on behalf of the state, counties, or judicial districts, CRS § 20-1-102(1), to employ necessary investigators, CRS § 20-1-209, and to render advice to law enforcement officers concerning preparation and review of affidavits for search warrants, CRS § 20-1-106.1.

District attorneys are classified as peace officers and are empowered to enforce state laws while acting within the scope of their authority and in the performance of their duties. CRS § 16-2.5-132. By way of example, district attorneys not only prosecute violations of law, they are also required to assist grand juries in their investigations, CRS § 20-1-106; conduct investigations into organized crime, CRS § 18-17-107; and investigate consumer fraud, CRS § 6-1-107. Federal prosecutors also have statutory or similar authority to prosecute federal crimes, *see* 28 USC § 547, and to participate in federal criminal investigations, *see* Fed.R.Crim.P. 6.

On previous occasions, we have defined what "authorized by law" means in other areas of professional conduct. *See* CBA Formal Ethics Op. 69 (2010 Revision);[4] CBA Formal Ethics Op. 93. The Colorado Supreme Court has offered guidance as to what "authorized by law" means as applied to public servants. In *People v. Buckallew*, 848 P.2d 904, 908 (Colo. 1993), the Court stated:

> A public servant is authorized by law to perform particular acts if there is a legislative enactment, a legally adopted administrative rule or regulation, or a judicial pronouncement which defines his duties. . . . Moreover, a county official is "authorized by law" to perform any other acts necessary to carry out these express responsibilities.

See also Gomez v. United States, 490 U.S. 858, 864 (1989) (noting that any additional duties performed pursuant to a general authorization in a statute should reasonably bear some relation to the specified duties). Thus, "authorized by law" may be authorization by way of legislative enactment, administrative rule or regulation, or judicial decisions. Additionally, prosecutors may rely on fundamental decisions of law in the areas of criminal law and procedure, as discussed below.

B. Ex Parte *Communications With Represented Persons Concerning Pending Criminal Matters*

After attachment of a person's Fifth and Sixth Amendment rights to counsel, a lawyer may not communicate, or cause another to communicate, with a represented party. *See Dickerson v. United States*, 530 U.S. 428, 432 (2000); *Maine v. Moulton*, 474 U.S. 159, 180 (1985); *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966); *Massiah v. United States*, 377 U.S. 201, 206-07 (1964); *People v. Martinez*, 789 P.2d 420, 422 (Colo. 1990). Consequently, it is improper and unethical for a lawyer to direct or approve police or informer contacts designed to elicit information from a represented party that would violate the suspect's rights under the Fifth and Sixth Amendments. Thus, in situations where it would be improper under the Fifth and Sixth Amendments for a police officer or a police informant acting at the direction of the police to attempt to elicit incriminating information from a represented suspect, it would be unlawful and unethical for a lawyer to direct or participate in such conduct. *See United States v. Henry*, 447 U.S. 264, 274-75 (1980); *Brewer v. Williams*, 430 U.S. 387, 400-01 (1977); *Massiah*, 377 U.S. at 206-07. *See also* Colo. RPC 4.4(a), 8.4(a).

C. *Exceptions to the General Prohibition of Ex Parte Communications With Represented Persons Concerning Pending Criminal Matters*

There are certain well-recognized exceptions to the general rule against *ex parte* contacts with a represented party that permit a lawyer to communicate, or cause another to communicate, with a represented person concerning the subject matter of the representation after the attachment of the Fifth and Sixth Amendments rights to counsel. These exceptions are applicable when:

1. The purpose of the communication is to determine whether the person is in fact represented by counsel. *See, e.g.*, CRS § 16-7-301; *Edwards*, 451 U.S. 490 (Powell, J. concurring).
2. Counsel for the represented person is given notice of the communication and consents to it. *See, e.g.*, *Gennings v. People*, 808 P.2d 839, 845 (Colo. 1991).
3. The communication is made pursuant to discovery procedures, or judicial or administrative process, including but not limited to the service of subpoenas. *See, e.g.*, Colo.R.Crim.P. 16, 41.1.
4. The communication is made in the course of an investigation of new or additional criminal activity to which the Sixth Amendment right to counsel has not attached, and the new or additional criminal activity may include:
    a. Criminal activity that is separate from the criminal activity that is the subject of the pending criminal charges;
    b. Criminal activity that is intended to impede or evade the administration of justice as to the pending charges, such as obstruction of justice; subornation of perjury; jury tampering; murder, assault, or intimidation of a witness; bail jumping; or unlawful flight to avoid prosecution; and
    c. Criminal activity that represents a continuation, after the filing of an information or indictment, of criminal activity that is the subject of pending criminal charges, such as the continuation of a conspiracy or scheme to defraud after the filing of an information or indictment. *See People v. Hyun Soo Sun*, 723 P.2d 1339-42; *People v. Rubanowitz*, 688 P.2d 247.
5. The prosecutor reasonably believes that there is an imminent threat to the safety or life of any person, the purpose of the communication is to obtain information to protect against the risk of serious injury or death, and the communication is reasonably necessary to protect against such risk. *But see Pautler*, 47 P.3d 1180 (rejecting argument that imminent public safety exception applies if a prosecutor has available alternatives that do not involve violating the Colorado Rules). If circumstances permit, it is preferable for a prosecutor to seek a court order to engage in communication with a represented person.[5]

Conclusion

The Committee recognizes that in the context of criminal and civil enforcement proceedings, lawyers may perform duties that are distinctly different from those performed in the private practice of law. Recognizing those distinctions, we interpret Colo. RPC 4.2 and the case law to permit communications by prosecutors and government lawyers with parties represented by counsel during the investigative stage of criminal and civil proceedings, and to prohibit such communications, subject to several well-defined exceptions, once formal proceedings have commenced.

NOTES

1. Articles discussing issues related to contacts between prosecutors and targets of criminal or civil enforcement proceedings under the current versions of ABA Model Rule of Professional Conduct 4.2 (which is substantially identical to Colo. RPC 4.2) include Richmond, "Deceptive Lawyering," 74 *U. Cinn. L.Rev.* 577 (2005), and Joy and McMunigal, "Anti-Contact Rule in Criminal Investigations," 16 *Wtr. Crim. Just.* 44 (2002). These issues also are discussed in a three-part article by Carl A. Pierce, the reporter for the ABA committee that issued the updated version of ABA Model Rule 4.2, entitled "Variations on a Theme: Revisiting the ABA's Revision of Model Rule 4.2," 70 *Tenn. L.Rev.* 121 (2002) (Part 1), 70 *Tenn. L.Rev.* 321 (2003) (Part 2), and 70 *Tenn. L.Rev.* 643 (2003) (Part 3).

2. The Second Circuit has suggested that Disciplinary Rule 7-104(A)(1) (and by analogy Colo. RPC 4.2) may prohibit certain conduct by law enforcement agents and lawyers even before arrest or indictment. *See United States v. Hammad*, 858 F.2d 834, 838-39 (2d Cir. 1988); *United States v. Pinto*, 850 F.2d 927, 935 (2d Cir.), *cert. denied*, 488 U.S. 867 (1988); *United States v. Sam Goody, Inc.*, 518 F.Supp. 1223, 1224-25 n.3 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982).

In *Hammad*, the defendant sought to suppress statements obtained by an informant sent by the prosecutor to obtain a statement from the suspect. The prosecutor had issued a grand jury subpoena to the informant as a pretense to help the informant gain the suspect's trust so as to elicit the admissions from the suspect. Starting from the premise that DR 7-104(A)(1) (and consequently Colo. RPC 4.2) generally is inapplicable to prosecutors because the investigation of possible criminal activities, even as to suspects who have retained counsel, fits within the "authorized by law" exception to DR 7-104(A)(1), the Second Circuit went on to hold that DR 7-104(A)(1) applied on the facts of the case to render the contact improper. The court concluded that the prosecutor had overstepped the already broad powers of the prosecutor's office and thus the prosecutor's conduct was not "authorized by law."

Hammad gives little guidance to prosecutors as to which actions would be viewed as not "authorized by law" under Colo. RPC 4.2. The Second Circuit has since affirmed, however, that the "authorized by law" exception applies to legitimate investigative techniques such as using informants to record conversations with charged defendants about other, uncharged conduct. *See United States v. DeVillio*, 983 F.2d 1185, 1192 (2d Cir. 1993). Given the fact-intensive nature of these determinations, the Committee believes that a lawyer contemplating *ex parte* contacts between law enforcement agents or government informants and persons who have retained counsel prior to the attachment of the Fifth and Sixth Amendment should be careful not to overstep the lawyer's authority.

3. *Pautler*'s application to prosecutors who are not themselves engaged in deceit or making misrepresentations is unclear. Prosecutors should consider the application of *Pautler* when advising law enforcement officers about communicating with represented persons in specific circumstances.

4. All CBA Ethics Committee Formal Ethics Opinions are available at www.cobar.org/index.cfm/ID/386/CETH/Formal-Ethics-Opinions.

5. In other circumstances where a prosecutor, acting in good faith, has a reason to believe that contact with a represented person is necessary to prevent the obstruction of justice or other interference with the proper functioning of the legal system, a prosecutor should seek a court order authorizing communication with the person. *See* Colo. RPC 4.2, Comment [6]. These circumstances could include, for example, a situation in which an organization's constituent, whom a lawyer has claimed to represent in the constituent's individual capacity, initiates a communication for the purpose of disclosing attempts by the organization or other organizational constituents to suborn perjury or obstruct justice.

97 ETHICAL CONSIDERATIONS WHERE AN ATTORNEY OR THE ATTORNEY'S PARTNER SERVES ON THE BOARD OF A PUBLIC ENTITY

Adopted June 17, 1995.

Introduction and Scope

The Ethics Committee of the CBA ("Committee") has been asked to provide guidance to lawyers and their firms concerning the ethical propriety of a lawyer's (or the lawyer's firm's) representation of clients before a governmental entity having quasi-judicial functions ("Board"),[1] when the lawyer serves on the Board. This Opinion addresses only the ethical issues raised by the Colorado Rules of Professional Conduct ("Rules") and does not address the applicability of the Colorado Code of Judicial Conduct, the Colorado Code of Ethics, C.R.S. §§ 24-18-101, *et seq.*, or any conflict of interest rules a governmental entity or agency may have promulgated.

Syllabus

It is improper for an attorney who serves as a member of a Board to represent clients in matters over which the Board has jurisdiction. In most instances, it is likewise improper for the lawyer's firm to accept employment for clients in a quasi-judicial matter over which a Board of which the lawyer is a member has jurisdiction. The Committee recognizes that in some fact-specific circumstances, it may be possible to satisfy the applicable Rules allowing such representation by others in the Board member's firm.

Facts

A lawyer is a member of a Board that makes regulatory decisions and performs quasi-judicial functions. Board members serve as public officers. Staff members make recommendations about issues before the Board, but the Board may or may not have authority to hire, fire or make other personnel decisions regarding such staff. The staff's recommendations may be vigorously disputed by local groups, and/or the party requesting government action by the Board. The Board's decisions do not always follow the recommendations of the staff.

Analysis

The Rules do not directly address the ethical problems that a lawyer encounters when serving in dual roles: one as a lawyer representing a client before a Board and the other as a member of the same Board. An analysis of Rules 1.7(b) and 8.4(e) provides the basis for the Committee's conclusion that a lawyer cannot ethically represent a client before the Board on which the lawyer serves.

Rule 1.7(b) states:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

A lawyer who serves on a Board has obligations and responsibilities to that Board, to his or her Board colleagues and to the public. (See comments to Rule 1.7 and Rule 8.4.) Those responsibilities will be hampered if the lawyer is permitted to represent clients before the Board since (1) the possibility that the government's interests will be fundamentally antagonistic to the client's interests is great, (2) the lawyer will be materially limited by the obligations and responsibilities he or she owes to the Board and (3) the lawyer will be materially limited by the reciprocal courtesy (and lobbying) required of members of a deliberative body.

Rule 8.4(e) states:

It is professional misconduct for a lawyer to: . . .

(e) state or imply an ability to influence improperly a judge, judicial officer, government agency or official.

Lawyers who serve on Boards must be mindful of the public's perception of their ability to influence government. A lawyer is not permitted to engage in conduct which implies that the lawyer is able to influence improperly a governmental agency or official. Under these facts, where the lawyer is both a Board member and an attorney acting on behalf of a client in a matter before the Board, a great risk exists of public mistrust and public belief that improper influence has or will occur because of the lawyer's dual roles. The lawyer's involvement on the Board, even if the lawyer recuses himself or herself, may imply that the lawyer is able to influence favorably the other members of the Board with whom that lawyer interacts on a regular basis. Furthermore, in situations where the staff makes recommendations to the Board, the staff may feel pressured to act more favorably to the client's request because of the staff's relationship with the lawyer. As stated by the Iowa Supreme Court, the problem is the lawyer's

> . . . conflicting loyalties when acting as a public servant as well as a private advocate [and]
>
> . . . the real potential for public misunderstanding and mistrust when attorneys serve in those dual roles.[2]

For these reasons, the Committee concludes that it would be improper for the lawyer to represent clients in matters before the Board and therefore a violation of Rules 1.7(b) and 8.4(e).

Since the lawyer is disqualified from representing a client before a Board, the question arises whether, under Rule 1.10, the lawyer's partners and associates are also precluded from such representation.

Rule 1.10 provides:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8(c), 1.9 or 2.2.

. . .

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

Although the Committee believes that in most circumstances, the firm would be disqualified from representing the client before the Board under Rule 1.10(a) because the lawyer/member is disqualified, the Committee recognizes that, especially if the conflict is minor and the firm is large, it may be possible to erect a confidentiality wall, obtain appropriate consent (where possible) and take other action to avoid the conflict.[3] Nevertheless, even if the firm were successful in avoiding the conflict under Rule 1.10, the Committee concludes that, in most circumstances, the firm is precluded by Rule 8.4(e) from representing the client.

The concern raised by Rule 8.4(e) about the lawyer's own conduct similarly applies to the representation of clients by other lawyers in the lawyer's firm. The law firm's representation of a client inherently creates the implication that by hiring the law firm, the client will obtain treatment more favorable than that which the client would otherwise receive. Such an implication disqualifies the firm even if the lawyer/ Board member is recused from any participation (either in discussions with the staff or directly with any Board members) in the matter. While it is conceivable that, under some circumstances, there would be no implied or actual ability to influence the Board's decision, the Committee nonetheless believes these circumstances are very limited. Other jurisdictions which have addressed this issue have reached the conclusion that the law firm is prohibited from representation of clients on matters before the Board. [*See* Maryland Ethics Opinion 91-15 (addressing ethical issues when a lawyer serves on municipal board of appeals) and Iowa Ethics Opinion 91-49;[4] *see also* CBA Ethics Opinion 48.[5]]

The Committee recognizes that in limited circumstances, the conflict under Rules 1.7(b) and 1.10 may be waivable, and the implication of improper influence under Rule 8.4(e) (raised by the lawyer serving on the Board and the lawyer's partner appearing before that Board) may be overcome. These circumstances would be unique to the specific facts at issue.

NOTES

1. Examples of the types of governmental boards include planning commissions, liquor license boards, city councils, boards of county commissioners and boards of adjustment. This is not an all inclusive list.

2. Iowa Ethics Opinion 91-49, page 324.

3. The Comment to Rule 1.11 recognizes that statutes and government regulations "may circumscribe the extent to which [a] government agency may give consent" in potential conflict situations. The client's consent is also needed under Rule 1.7. *See also* CBA Ethics Opinion 88 for a complete discussion of confidentiality walls ["Use and Misuse of 'Chinese Walls,'" 21 *Colo. Law.* 1371 (July 1991)].

4. Iowa Ethics Opinion 91-49 analyzes the lawyer's conduct and the issue of the firm's imputed disqualification under various provisions of the Code of Professional Responsibility rather than Rules 1.7(b), 8.4(e) and 1.10. Nevertheless, the Opinion provides useful guidance because it specifically addresses a factual situation similar to the one raised in this matter. The Opinion concludes that representation of a client by a law firm in matters before a governmental entity on which one of the members of the law firm serves violates both DR 5-105(A) because the lawyer's loyalties associated with public office could dilute the firm's loyalty to the firm's client and DR 8-101(A)(2), since it could be implied that the lawyer holding public office is using that position to influence the board in favor of the firm's client.

5. 1 *Colo. Law.* 19 (Aug. 1972). This opinion concluded, based on various provisions of the Colorado Code of Professional Responsibility, that neither the lawyer nor the lawyer's firm may ethically represent a client before a governmental entity whom the lawyer represents. Although the facts in CBA Ethics Opinion 48 differ from the facts discussed herein, the opinion recognizes that a grave danger exists if the lawyer could influence the governmental entity he or she serves, in order to assist the firm's client.

On January 1, 2008, substantial amendments to the Colorado Rules of Professional Conduct became effective. The text of Colo. RPC 1.7, *Conflict of Interest: Current Clients*, was significantly modified. However, the ABA Ethics 2000 Commission reported that it intended no substantive changes in the rule, and that the changes were intended for clarification purposes only. The Committee agrees that the changes to Rule 1.7 are not substantive and do not alter the conflict analysis. Rather, the changes to Rule 1.7 merely alter the procedure through which informed consent must be obtained. Accordingly, the changes to Rule 1.7 do not alter the analysis or conclusions contained in this Formal Opinion.

The Subcommittee recommends appending this legend to the following Formal Opinions: 45 (Representation of client by part-time judge), 46 (Municipal attorney, representation of defendants), 58 (Water rights, representation of multiple clients), 97 (Ethics considerations where an attorney or the attorney's partner serves on the board of a public entity), 98 (Ethical Responsibilities of Lawyers who Engage in other Business), 109 (Acquiring an ownership interest in a client), 115 (Collaborative Law).

With the changes effective January 1, 2008, the term "consent after consultation" was changed to "informed consent." "Consultation" only required "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Despite the fact that the American Bar Association Ethics 2000 committee indicated that no substantive change was intended by the change to "informed consent," its definition now "denotes the agreement by a person to a proposed course if conduct after the lawyer has communication adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." *See* Rule 1.0 Comment [6] to Rule 1.0 indicates that the crux of this requirement is that "the lawyer must make reasonable efforts to ensure that the client or the other person possesses information reasonably

adequate to make an informed decision." Thus, the lawyer's duty is not just to explain the significance of the decision, but also to make sure the client is sufficiently informed to consider available options and risks prior to making that decision. The Subcommittee recommends appending this legend to the following Formal Opinions: 29 (representation of seller, buyer or borrower by lender's counsel); 58 (water rights representation, multiple clients), 97 (service on board of public entity), 107 (Third-Party Auditors), 115 (collaborative law).

98 ETHICAL RESPONSIBILITIES OF LAWYERS WHO ENGAGE IN OTHER BUSINESSES

Adopted January 17, 2015.

Introduction

In the increasingly complex and interrelated economy that lawyers face, it has become common for lawyers in private practice to engage in another business in addition to providing legal services in a firm or solo practice.

In this opinion, the CBA Ethics Committee (Committee) considers the ethical responsibilities of a lawyer engaged in private practice and in another business. The Committee specifically evaluates the ethical responsibilities owed by a lawyer who is engaged in a business that provides law-related services. In such a case, the lawyer generally is subject to the Rules of Professional Conduct (Colo. RPC or Rules) in their entirety, unless the lawyer takes reasonable measures to keep the law practice and the law-related business separate. This opinion does not address the ethical obligations of in-house lawyers engaged in another business.

Syllabus

The starting point for analyzing the ethical considerations applicable to a lawyer engaged in another business is to determine whether the other business is "law-related," which is a term of art. If the business is not law-related, such as operating a dry cleaning store or a family restaurant, then a lawyer still has ethical responsibilities, but they are limited to those that apply to all lawyers at all times, including particularly the prohibition against conduct involving dishonesty, fraud, deceit, or misrepresentation. Colo. RPC 5.7, cmts. [2], [11]. If, however, the lawyer's other business provides a law-related service, such as title insurance, accounting, or dispute mediation services, then the lawyer may have a number of additional ethical responsibilities. This opinion includes a diagram that demonstrates the analytical path for considering these additional ethical responsibilities.

A lawyer who practices law and is engaged in another business always has ethical responsibilities with respect to the legal services the lawyer provides. For example, the lawyer has a duty to maintain the confidentiality of client information and segregate that information from the lawyer's other business (Colo. RPC 1.6), and to avoid conflicts of interest if there is a significant risk that the lawyer's personal interests in the business will materially limit the lawyer's ability to represent a client (Colo. RPC 1.7(a)).

Rule 5.7 addresses the ethical responsibilities potentially applicable to a lawyer engaged in a law-related business. Generally stated, the Rules apply in their entirety to the lawyer's provision of law-related services *unless* the lawyer takes certain precautions. First, the lawyer must provide the law-related services in a way that readily distinguishes such law-related services from the lawyer's legal services. Colo. RPC 5.7(a)(1). Second, the lawyer must take "reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client–lawyer relationship do not exist." Colo. RPC 5.7(a)(2). These precautions are required whether the lawyer provides the law-related services directly or through a separate entity that the lawyer controls.

Utilizing the framework of Rule 5.7, this opinion discusses specific issues relating to a lawyer's provision of law-related services, including what services constitute law-related services and what reasonable measures a lawyer should take to avoid confusion about whether a lawyer–client relationship exists when a lawyer is providing law-related services. This opinion also discusses the potential applicability of Rule 5.7 in the context of lawyers who provide mediation, arbitration, or expert witness services.

Finally, this opinion examines the substantial ethical responsibilities applicable to the lawyer when he or she provides law-related services in circumstances that are not distinct from the lawyer's provision of legal services, or where the lawyer has not taken reasonable measures to assure that the recipient of the law-

related business services knows that no client–lawyer relationship exists. Generally, most of the Rules apply to a lawyer in such a circumstance, including those relating to conflicts of interest (Colo. RPC 1.7, 1.8, 1.9, and 1.10); disclosure of confidential information (Colo. RPC 1.6); reasonable fees (Colo. RPC 1.5); sharing legal fees or forming a partnership with nonlawyers (Colo. RPC 5.4(a) through (d)); and lawyer advertising, solicitation, and communication about legal services (Colo. RPC 7.1, 7.2, and 7.3). Although a lawyer's obligations necessarily will depend on the factual setting—whether the law-related services are being provided in a sufficiently distinct manner and whether the lawyer has taken reasonable measures to avoid confusion about whether a client- lawyer relationship exists—any lawyer engaged in a law-related business should take care to follow the strictures of Colo. RPC 5.7(a)(1) through (2).

Analysis

Analysis of Colo. RPC 5.7

Rule 5.7 provides:

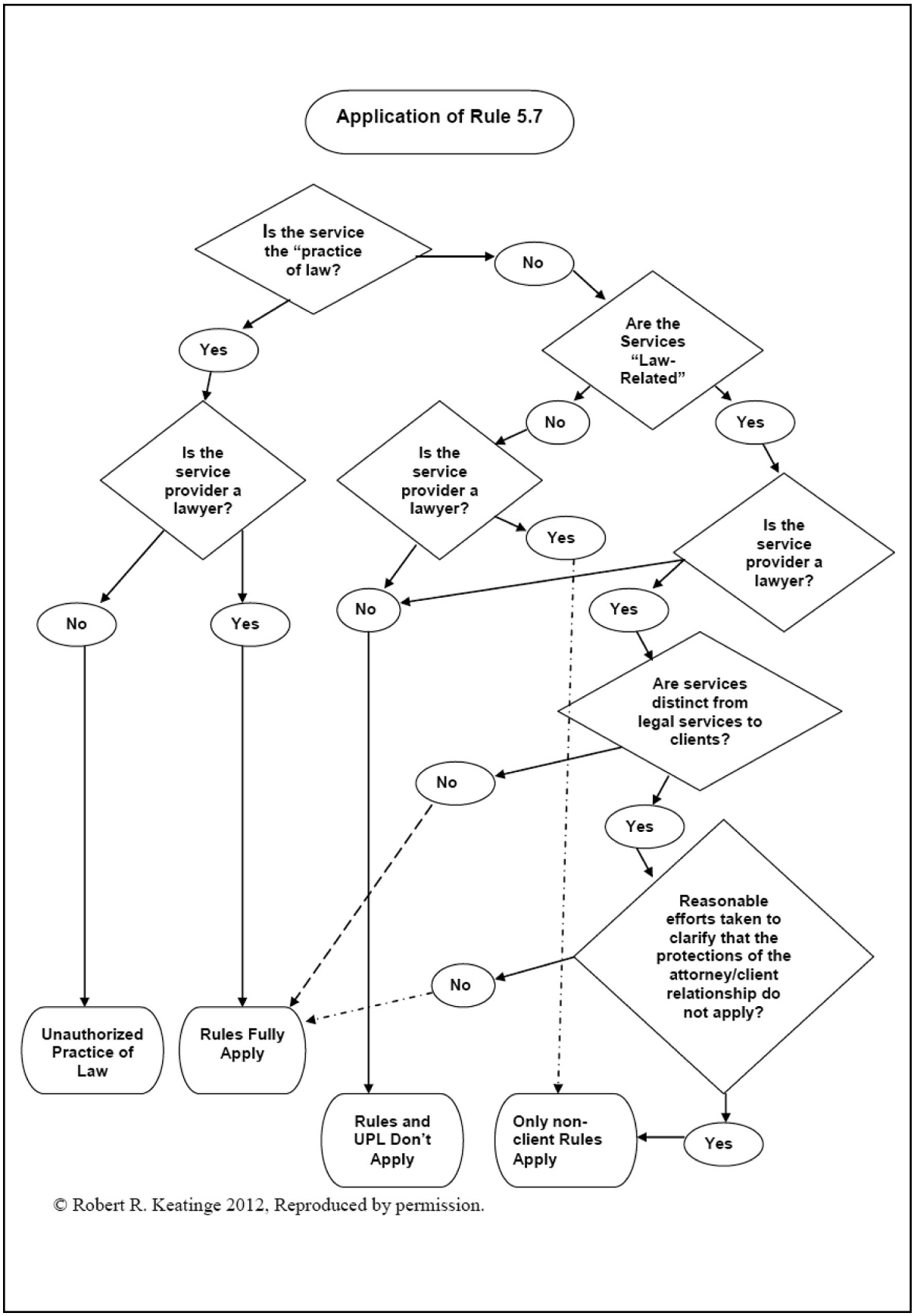
(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:
    (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
    (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Rule 5.7 determines whether the Rules in their entirety will apply to a lawyer when someone receives law-related services from the lawyer or from an entity controlled by the lawyer. If the services provided by the lawyer (or an entity controlled by the lawyer) are *not* law-related, and are the only services provided, then the only Rules that govern the lawyer's conduct are those that apply to lawyers regardless of whether they are providing legal services to a client. These include, for example, Colo. RPC 8.4(c), which prohibits conduct involving fraud, dishonesty, deceit, or misrepresentation. *E.g.*, *People v. Rishel,* 50 P.3d 938 (Colo. PDJ July 8, 2002) (lawyer's dishonest handling of pool of funds used for Colorado Rockies season tickets, unrelated to the provision of legal services, violated Rules 8.4(b) (prohibiting "criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects"), 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation), and 1.15(b) (requiring lawyers to deliver and account for funds and property)). A lawyer may be subject to discipline for engaging in conduct prejudicial to the administration of justice, in violation of Rule 8.4(d), for purely private conduct. *E.g.*, *In re Foster*, 253 P.3d 1244 (Colo. 2011) (lawyer's reassertion of argument that judge was biased against lawyer in lawyer's sixth appeal in his own divorce case). *See Attorney Grievance Comm'n v. Link*, 844 A.2d 1197, 1211-12 (Md. 2004) ("Only when such purely private conduct is criminal or so egregious as to make the harm, or potential harm, flowing from it patent will that conduct be considered as prejudicing, or being prejudicial to, the administration of justice.").

If the services provided by the lawyer or an entity he or she controls *are* law-related, the Rules will not apply in their entirety to the lawyer's provision of the law-related services if the lawyer takes (a) steps to distinguish the law-related services from the lawyer's legal services, and (b) "reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist." Colo. RPC 5.7(a).[1]

The diagram on the facing page is a useful visual guide to the analytical framework of Rule 5.7.


Application of Rule 5.7
Is the service the "practice of law?
No
Yes
Are the Services "Law-Related"
No
Yes
Is the service provider a lawyer?
Is the service provider a lawyer?
Yes
Is the service provider a lawyer?
No
Yes
No
Yes
Are services distinct from legal services to clients?
No
Yes
Reasonable efforts taken to clarify that the protections of the attorney/client relationship do not apply?
No
Yes
Unauthorized Practice of Law
Rules Fully Apply
Rules and UPL Don't Apply
Only non-client Rules Apply
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1. *Are the business services "law-related"?*

Rule 5.7(b) defines "law-related services" as "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer." Comment [9] to Rule 5.7 gives as examples of law-related services "providing title insurance, financial planning, accounting, trust services, real estate, counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting." *See, e.g.*, *In re Rost*, 211 P.3d 145, 155 (Kan. 2009) (accounting services and business advice held to be law-related services under same definition). Mediation and arbitration services, discussed separately below, are other examples of law-related services. *E.g.*, N.D. RPC 5.7, cmt. [7] (including "ADR services" among examples of law-related services).

2. *What are "circumstances that are not distinct from the lawyer's provision of legal services to clients"?*

The Rules will apply in their entirety to the provision of law-related services if the circumstances "are not distinct from the lawyer's provision of legal services to clients," as stated in Rule 5.7(a)(1). The comments to Rule 5.7 provide no guidance on when the circumstances surrounding a lawyer's provision of law-related services are "not distinct from the lawyer's provision of legal services to clients."

The Committee concludes that a number of facts tend to show distinctness, including: (1) providing the law-related services from a separate office or facility; (2) using separate advertising, business cards, signage, telephone reception services, Internet domain names, websites, and all other forms of communication to and with potential customers, vendors, creditors, service suppliers, and the public at large; (3) the nature of the other services provided, such as mediation; (4) offering the law-related services through a distinct entity with distinct support staff from the entity through which the lawyer practices law; and (5) avoiding the providing of both legal services and law-related services in the same matter. These factors are not exhaustive. A variety of other facts, in appropriate circumstances, may tend to show that a lawyer's law-related services and legal services are distinct.

Comment [8] to Rule 5.7 states that "[u]nder some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other." "The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter." *Id.* In other words, there will be specific occasions when no amount of disclosure and consultation will avoid the application of the entirety of the Rules to the lawyer's business services. A lawyer's services when acting as a guardian *ad litem* may be an example of such circumstances. Indeed, Chief Justice Directive 04-06 states that a lawyer acting as a guardian *ad litem* for a child or a child's representative is bound by the Rules, presumably without regard to steps the lawyer might take to distinguish the law-related services from the lawyer's provision of legal services.

3. *What are "reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist"?*

In addition to keeping the lawyer's legal services and law-related businesses distinct from each other, the lawyer must take "reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply." Colo. RPC 5.7(a)(2). The comments to Rule 5.7 offer some guidance in this respect. Comment [6] states that a lawyer

> should communicate to the person receiving the law-related services . . . that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

Comment [7] states that the "burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding," and that the depth of the explanation will vary depending on the sophistication of the consumer of the law-related services.

A Philadelphia ethics opinion states that to ensure that the recipient of the law-related services "understands that the ancillary business services are distinct from legal services, and therefore not subject to

the protections of the rules," the lawyer "must communicate, preferably in writing, to the person receiving the ancillary business services that the services will not be provided under the protections of the client-lawyer relationship." Phil. Bar Ass'n Prof. Guidance Comm., Formal Op. 2003-16 (2004).

Oklahoma modified a comment to its identical version of Rule 5.7 to offer guidance about the "reasonable measures" a lawyer might take, depending on the facts and circumstances:

> (1) providing written notice of the lawyer's interest in the entity before providing the law-related services, with written acknowledgment of the notice by the person;
> (2) keeping the offices of the lawyer and the law-related business physically separate;
> (3) providing disclaimers in any marketing or advertising; and
> (4) maintaining separate letterhead, or providing clear notices of the relationship between the lawyer and the entity. Okla. RPC 5.7, cmt [6].

By contrast, in a case in which a lawyer opened a "consulting" business after disciplinary problems forced his early retirement, the Kansas Supreme Court observed:

> If an attorney continues to perform the same law-related services, for the same clients, from the same location, with the same staff as was done when those services were not distinct from the attorney's provision of legal services, the burden to show the requisite client understanding that the lawyer-client relationship had ceased would appear to be onerous, at best.

In re Rost, 211 P.3d 145, 156 (Kan. 2009).

As the Oklahoma comment to Rule 5.7 notes, what reasonable measures need to be taken to assure client understanding may vary depending on the circumstances. Of course, if the legal services and law-related services are "so closely entwined that they cannot be distinguished from each other" (Colo. RPC 5.7, cmt. [8]), there are no measures that a lawyer providing law-related services may take that will relieve the lawyer from being subject to the Rules in their entirety.

4. *When will an entity providing business services be deemed to be "controlled by the lawyer individually or with others"?*

If a lawyer is associated by ownership or otherwise with an entity that provides law-related services that are distinct from the lawyer's law practice, the lawyer will not be subject to the Rules in their entirety when the entity provides the services, unless the entity is "controlled by the lawyer individually or with others." Colo. RPC 5.7(a)(2). Comment [4] explains that a "lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case." A Pennsylvania ethics opinion concluded that Rule 5.7 would not apply to a lawyer who, together with his law partners, owned 49% of an insurance agency, where their firm's involvement in the operation of the agency would be "almost nil." Pa. Bar Ass'n Comm. Leg. Ethics and Prof. Resp., Formal Op. 2002-07, "Minority Ownership of Insurance Agency by Law Partners" (2002). *Cf. In re Griffith*, 748 P.2d 86, 115 (Ore. 1987) (notwithstanding other extensive misconduct, where company owned by lawyer and three other people entered into series of loans with clients of lawyer's law firm, lawyer did not violate rule regulating business transactions with clients because he did not personally enter into business relationships with clients).

5. *Application of Rule 5.7 to arbitration, mediation, and expert witness services*

Many lawyers in Colorado provide arbitration and mediation services. The Committee believes that a lawyer's services as a mediator or arbitrator are law-related services within the meaning of Colo. RPC 5.7.

Rule 2.4 addresses lawyers serving as "third-party neutrals," including as mediators and arbitrators. Similar to Colo. RPC 5.7, Comment [3] to Rule 2.4(b) recognizes that the "potential for confusion is significant when the parties are unrepresented in the process." Therefore, Colo. RPC 2.4(b) requires a lawyer serving as a third-party neutral to "inform unrepresented parties that the lawyer is not representing them," and, if the lawyer knows or reasonably should know the party does not understand the lawyer's role, to "explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client." Where appropriate, the lawyer's explanation should include the "inapplicability of the attorney-client evidentiary privilege." Colo. RPC 2.4, cmt [3].

By definition, a lawyer serving as a third-party neutral who provides the information required by Colo. RPC 2.4(b) also will satisfy Colo. RPC 5.7. The required information can be provided in the written contract for mediation or arbitration services. Colo. RPC 2.4(b) expressly does not require lawyer–third-party neutrals to inform *represented* parties that such lawyer–third-party neutrals are not acting as the represented parties' lawyer. Likewise, the parties' legal representation by other lawyers in the proceeding will obviate the arbitrator/mediator lawyer's need to take further steps to "assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist." Colo. RPC 5.7(a)(2).

Similarly, many lawyers in Colorado provide services as expert witnesses. There are generally two types of lawyer–experts: testifying expert witnesses and non-testifying consulting experts. As noted in American Bar Association (ABA) Formal Opinion 97-407, a testifying expert is obligated to provide independent, objective testimony. Emphasizing that a testifying expert rarely provides services directly to a client, the ABA opinion concludes that the services of a testifying expert are not law-related services under Model Rule 5.7. ABA Comm. on Ethics and Prof. Resp., Formal Op. 97-407, "Lawyer as Expert Witness or Expert Consultant" (1997). In contrast, the ABA opinion concludes that a consulting expert "occupies the role of co-counsel" and, as such, is subject to all of the Model Rules of Professional Conduct. *Id.*

The Committee believes that whether a lawyer acting as a testifying expert witness or a consulting expert, or both, forms a client–lawyer relationship with either the engaging lawyer or with the client of that lawyer depends on the facts and circumstances. *See generally* D. Richmond, "Lawyers as Witnesses," 36 *N.M. L.Rev.* 47, 65-72 (Winter 2006). It is also an issue that requires the application of principles of law, not legal ethics, which the Committee does not address and which lawyers must decide for themselves.

If a lawyer who acts as a testifying or consulting expert, or both, concludes that he or she *in fact* has formed or will form a client–lawyer relationship with either the engaging lawyer or the client of that lawyer, then the Rules in their entirety apply to the lawyer–expert, just as they would in any legal representation. In that event, Rule 5.7 is irrelevant.

But, if there is no client–lawyer relationship, then Rule 5.7 is applicable, because the lawyer's services are "law-related." The Committee disagrees with ABA Formal Opinion 97-407 that the services of a lawyer acting as a testifying expert witness are inherently not law-related. A lawyer–expert may avoid the application of all of the Rules by compliance with Rule 5.7, for example, by clarifying the lawyer's role in a written engagement agreement signed at least by the engaging lawyer and, preferably, also by the engaging lawyer's client. In addition, lawyers with litigation experience are likely to understand the distinction between a lawyer–expert's legal services and his or her expert services, and, at least in the context of a testifying expert, that the protections of the client–lawyer relationship do not exist.

However, communications between lawyers and their consulting experts are generally protected from discovery by rules of civil procedure rather than by the attorney–client privilege. *See* CRCP 26(b)(4)(B); FRCP 26(b)(4)(D). A client may not understand the difference. In contrast, communications between lawyers and their testifying experts are generally subject to discovery under Colorado procedural rules. CRCP 26(b)(4). *But cf.* FRCP 26(b)(3) and (4) (testifying expert witness subject to discovery except for drafts of expert's report and communications with party's attorney).

Because consulting experts' communications are generally protected from discovery like those of a retained advocate lawyer, and the role of a consulting expert is often similar to that of an advocate lawyer, a client may not understand that the consulting expert's services are not legal services and that the protections of the client–lawyer relationship do not exist. Clients are less likely to fall prey to these misunderstandings with respect to lawyers serving as testifying expert witnesses because their role is so unlike that of the advocate lawyer. These distinctions may blur in the client's mind when a lawyer serves as both a consulting expert and a testifying expert witness in the same case, either in chronological sequence or contemporaneously. Lawyers, in contrast, are unlikely to be confused by the role of a consulting or testifying expert.

Significance of Applicability of the Rules to Law-Related Services

General Background

As noted in a 1972 ABA formal opinion, the applicability of the Rules to a lawyer's provision of business services is a substantial obligation. ABA Comm. on Ethics and Prof. Resp., Formal Op. 328 (1972). It means that the lawyer will be required to treat customers of the law-related business as if they were law firm clients. Comment [10] to Rule 5.7 advises the lawyer to pay particular attention to "the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f))," as well as Rule 1.6 regarding confidentiality.

But this is not an exclusive listing. The fees and expenses charged by the lawyer or the lawyer's entity for the law-related service must be reasonable, as required by Rule 1.5(a); other subsections of Rule 1.5 are applicable, as well. The lawyer also must comply with various provisions of Rule 5.4, and the lawyer's communications regarding the law-related service, including advertising and solicitation of customers, must comply with Rules 7.1 through 7.3. The application of some of the most significant Rules to the provision of law-related services is discussed below.

Colo. RPC 1.5: Fees

When the Colo. RPC are applicable to the services provided by a lawyer's law-related business, Rule 1.5(a) requires the fees of the law-related business to be reasonable. Also, Rule 1.5(b) requires the lawyer to confirm the basis or rate of the fee in writing for all clients whom the lawyer has not "regularly represented." If the fee is contingent on the outcome of the law-related service, Rule 1.5(c) requires the lawyer to comply with the Rules Governing Contingent Fees, CRCP Chap. 23.3.

The fees charged for some law-related services—for example, percentage-based commissions—may seem exorbitant when measured by one of the traditional methods of charging legal services, such as hourly or fixed fees. A California ethics opinion addressed an inquiry from a lawyer/real estate broker who proposed to charge his client a brokerage commission if the transaction closed and his normal hourly rate as a lawyer if it did not. The opinion concluded:

> [The] fee payable in the circumstance that the transaction is successfully consummated is likely to appear shockingly large when compared to the attorney's normal hourly rate charges. On the other hand, the overall fee arrangement is quite advantageous to the client since the client obtains the services of both an attorney and a broker at no additional cost (indeed, at no cost in most cases where the buyer's and seller's broker split fees payable by the seller). Accordingly, the fee arrangement proposed should not be viewed as objectionable under [the California equivalent of Rule 1.5(a)].

State Bar of Cal. Standing Comm. on Prof. Resp. and Conduct, Formal Op. 1982-69 (1982).

In addition, Rule 1.5(e) prohibits referral fees. It proscribes a lawyer from paying *and receiving* referral fees. CBA Formal Ethics Op. 106, "Referral Fees and Networking Organizations" (1999). When the Rules apply to a lawyer providing business services, the lawyer or the entity he or she controls may not pay or receive referral fees in connection with that business operation. For example, in an informal opinion, the Committee concluded that Colo. RPC 1.5(e) prohibited a lawyer from receiving a fee from a broker-dealer/registered investment advisor for referring clients to it for a "fee-based asset management program." CBA Ethics Comm. Response to Letter Inquiry, Abstract 96/97-13, www.cobar.org/index.cfm/ID/20280/subID/2101/CETH/96/97-13.

Colo. RPC 1.5(f) requires a lawyer to deposit any advance payment of fees in the lawyer's trust account until earned. A Tennessee ethics opinion concluded that trust account requirements apply to law-related businesses operated by lawyers, including mediation and arbitration services. Tenn. Sup. Ct. Bd. of Prof. Resp., Formal Op. 94-F-135 (1994). Colo. RPC 1.5(g) prohibits nonrefundable fees or retainers and any agreement that "unreasonably restricts a client's right to obtain a refund of unearned or unreasonable fees." Colo. RPC 1.5(g).

Colo. RPC 1.6: Confidentiality of Information

Colo. RPC 1.6(a) requires a lawyer to maintain the confidentiality of "information relating to the representation." When the Rules apply to the provision of law-related services, the lawyer will be required to protect information relating to the services provided by the law-related business to the same extent as the lawyer must protect information relating to the representation of clients. This obligation would extend to (a) segregating information related to law-related services from information related to legal work for the lawyer's clients, (b) preventing access to information related to law-related services by individuals who do not work for the law-related business, and (c) preventing access to information related to the lawyer's legal work for clients by individuals who do not work for the lawyer in the provision of legal services.

With limited exceptions, Rule 1.8(b) prohibits a lawyer from using information protected under Rule 1.6(a) to the disadvantage of a client. Comment [10] to Rule 5.7 specifically mentions Rule 1.8(b) as a rule to heed when the Rules apply to the provision of law-related services.

Colo. RPC 1.7(a)(2): Conflict of Interest—Current Clients

In relevant part, Rule 1.7(a)(2) states that a lawyer shall not represent a client if there is a "significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." When the Rules apply to the provision of law-related services, a lawyer providing such services will be deemed to "represent" the person receiving those services. Thus, among other considerations, the lawyer must ensure that his or her provision of law-related services is not limited by the lawyer's personal, including pecuniary, interests in providing those services, or by the lawyer's obligations to other clients or other customers of the law-related business.

When the Rules apply to the provision of law-related services, the law firm and the business will be treated as a single law firm for purposes of conflicts of interest. The conflicts of each lawyer will be imputed to all lawyers in the joint enterprise. *Cf.* ABA Comm. on Ethics and Prof. Resp., Formal Op. 90-357, "Use of Designation 'Of Counsel'" (1990) ("The effect of two or more firms sharing an of counsel lawyer is to make them all effectively a single firm, for purposes of attribution of disqualifications."). When undertaking a new law-related matter or a new legal matter, the lawyer will be required to conduct a check for conflicts of interest that includes all law firm clients, as well as all customers of the law-related business, and their respective related and adverse persons.

When a lawyer provides both legal services and law-related services to a client–customer, and if relations sour between the lawyer and the client–customer relative to the law-related services—perhaps because the client–customer is dissatisfied with the services or is not current on its account—the lawyer side of the relationship may suffer. The lawyer's anticipation of such a problem may rise to the level of a "significant risk" that representation of the client will be limited. However, an anticipated or actual limitation on the lawyer's legal representation must be material before it creates a conflict of interest under Rule 1.7(a)(2).

If such a conflict arises, the lawyer must either decline or withdraw from the representation or seek to obtain the client's informed consent[2] to undertake or continue the representation despite the conflict, if the conflict is consentable under Rule 1.7(b).[3]

A lawyer may not be able to obtain client consent when he or she provides legal services and law-related services in the same transaction and the customer has agreed to pay a commission for the law-related services. In some jurisdictions, a lawyer representing a party in a real estate transaction may not serve as a real estate broker in the same transaction due to an inherent and irreconcilable conflict between the broker's personal interest in receiving a commission upon consummation of the sale and the lawyer's interest in protecting a client even if it means advising against the sale. *See In re Roth*, 577 A.2d 490 (N.J. 1990); New York State Op. 752 (Feb. 22, 2002); N.Y. Cnty. Lawyers Ass'n Comm. on Prof. Ethics Question No. 685, "Dual Practice: Conflict of Interest" (1991); R.I. Ethics Advisory Panel Op. 96-29 (Nov. 14, 1996). *But see* Wis. Op. E-86-3 (undated) (with client's informed consent, lawyer may receive both legal fee and real estate brokerage fee for services in same transaction).

The Committee believes that in limited circumstances, a lawyer may act as a lawyer and a broker in the same transaction. To do so, however, the lawyer would have to (a) act as lawyer and broker for the same party; (b) reasonably believe that he or she will be able to provide competent and diligent representation to the client; and (c) obtain the client's informed consent, confirmed in writing, consistent with the requirements of Colo. RPC 1.7(b). The lawyer also would have to comply with Rule 1.8(a), discussed below. *See, e.g.*, S.C. Bar Ethics Advisory Op. 95-04 (1995).

Colo. RPC 1.8(a): Business Transactions With a Client

As stated above, Colo. RPC 1.8(a) regulates "business transactions" between a lawyer and a client. Comment [5] to Rule 5.7 states:

> When a client–lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

Rule 1.8(a) will be applicable whether or not the services provided by the lawyer to the client in the other business are law-related services and, thus, whether or not the lawyer is otherwise subject to the Rules.

Colo. RPC 1.8(f): Accepting Compensation From a Third Party

Rule 1.8(f) prohibits a lawyer from accepting payment for representing a client from anyone other than a 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.

Comment [10] to Rule 5.7 calls attention to Rule 1.8(f) as a rule that must be considered and followed when the Rules apply to the provision of law-related services.

Colo. RPC 5.4: Professional Independence of a Lawyer

Rule 5.4(a) prohibits a lawyer or law firm[4] from sharing legal fees with a nonlawyer, except, as relevant here, by means of a law firm compensation or retirement plan. When, under the preceding analysis, a lawyer is subject to the Rules in respect to the provision of law-related services, the revenue generated by the business is considered legal fees, and the lawyer may not directly share it with a nonlawyer except through a compensation or retirement plan.

Similarly, Rule 5.4(b) prohibits a lawyer from forming a "partnership" with a nonlawyer "if any of the activities of the partnership consist of the practice of law." Although the Rules do not define the term "partnership" as used in Rule 5.4(b), other jurisdictions have interpreted the term expansively in this context to include entities in addition to partnerships. Ariz. Op. No. 93-01 (1993) (term "partnership" construed broadly); S.C. Bar Ethics Advisory Op. 93-05 (1993) ("Rule 5.4(b) applies not only to partnerships, but also to other organizations that lawyers are involved in managing."). Accordingly, if a lawyer is subject to the entirety of the Rules when providing law-related services, the lawyer may not form a partnership with a nonlawyer that includes the provision of law-related services.

Further, Rule 5.4(d) prohibits a nonlawyer from owning an interest in a law firm operated as a "professional company," as that term is defined in Colorado Rule of Civil Procedure 265(e). When a lawyer is subject to the Colo. RPC in providing law-related services, the law-related business is considered a professional company and, in these circumstances, a lawyer may not permit a nonlawyer to own any part of that business.

Colo. RPC 7.1–7.3: Information About Legal Services, Including Advertising and Solicitation

When a lawyer is subject to the Rules with respect to law-related services, communications regarding those law-related services must comply with Rules 7.1, 7.2, and 7.3. *See* Colo. RPC 5.7, cmt. [10] (specifically mentioning the applicability of these Rules). In these circumstances, the Rules treat communications about the law-related business as though they were communications about a lawyer's legal services.

Rule 7.1(a) would prohibit a lawyer providing law-related services from making false and misleading communications, including communications that (a) are misleading because of omitted information, (b) compare the law-related services with the services of other businesses in ways that cannot be substantiated, and (c) are likely to create unjustified expectations about the services provided by the law-related business. Rule 7.1(c) contains proscriptions on the method and appearance of written communications mailed to prospective clients.

Rule 7.2(b) prohibits a lawyer from "giv[ing] anything of value to a person for recommending the lawyer's services," except for reasonable advertising costs and other exceptions not relevant here. In addition to Rule 1.5(e), discussed above, Rule 7.2(b) prohibits a lawyer operating a law-related business from paying referral fees.

Rule 7.3 regulates lawyer solicitation of individual prospective clients. If a lawyer who provides law-related services has not succeeded, under Rule 5.7, in avoiding the application of the Rules to those services, the lawyer will be prohibited from soliciting prospective customers in person, or by telephone or "real-time" electronic contact such as a chat room, unless the prospective client is a lawyer, a family member, or someone with whom the lawyer had a "prior professional relationship." *Accord Busby v. JRHBW Realty, Inc.*, Civil No. 2:04-CV-2799-VEH, 2006 WL 5325733 * 7 (N.D.Ala., July 20, 2006). Rule 7.3(c) and (d) will restrict the lawyer's written, recorded, or electronic solicitation activities within thirty days of a related personal injury or death and will require the lawyer to designate such communications as advertising material.

NOTES

1. Read literally, Rule 5.7(a)(1) refers to the provision of law-related services by a "lawyer," while Rule 5.7(a)(2) refers to the provision of law-related services "in other circumstances by an entity controlled by the lawyer individually or with others." This distinction leads to the inference that subsection (1) is not applicable if the law-related services are provided by an entity controlled by the lawyer, and, conversely, that subsection (2) is applicable only when the law-related services are provided by the lawyer individually or through a law firm. However, Comment [3] to Rule 5.7 indicates that both subsections apply regardless of whether the law-related services are provided by the lawyer or his or her law firm, or by an entity (other than the law firm) that the lawyer controls. The "legislative history" of Model Rule 5.7 supports the interpretation in Comment [3]. Ethics 2000, February 2002 Report, "Reporter's Explanation of Changes," www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_57_202.html. The Committee believes that Comment [3] reflects the intent of the rule and interprets it accordingly, such that to avoid the application of the Rules in their entirety to the provision of the law-related services, a lawyer must satisfy each subsection of Rule 5.7(a), regardless of whether the law-related services are provided by the lawyer or his or her law firm, or by an entity (other than the law firm) that the lawyer controls.

2. "'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." Colo. RPC 1.0(e).

3. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

4. Rule 1.0(c) defines "law firm" as "denot[ing] a partnership, professional company, or other entity or a sole proprietorship through which a lawyer or lawyers render legal services; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." Although only individual lawyers are subject to professional discipline for Colo. RPC violations, and the Rules generally impose obligations only on individual lawyers, Rule 5.4(a) expressly includes law firms in its prohibition against sharing fees with nonlawyers.

On January 1, 2008, substantial amendments to the Colorado Rules of Professional Conduct became effective. The text of Colo. RPC 1.7, *Conflict of Interest: Current Clients*, was significantly modified. However, the ABA Ethics 2000 Commission reported that it intended no substantive changes in the rule, and that the changes were intended for clarification purposes only. The Committee agrees that the changes to Rule 1.7 are not substantive and do not alter the conflict analysis. Rather, the changes to Rule 1.7 merely alter the procedure through which informed consent must be obtained. Accordingly, the changes to Rule 1.7 do not alter the analysis or conclusions contained in this Formal Opinion.

The Subcommittee recommends appending this legend to the following Formal Opinions: 45 (Representation of client by part-time judge), 46 (Municipal attorney, representation of defendants), 58 (Water rights, representation of multiple clients), 97 (Ethics considerations where an attorney or the attorney's partner serves on the board of a public entity), 98 (Ethical Responsibilities of Lawyers who Engage in other Business), 109 (Acquiring an ownership interest in a client), 115 (Collaborative Law).

99 USE OF CREDIT CARDS TO PAY FOR LEGAL SERVICES

Adopted May 10, 1997.

Summary of Opinion

The acceptance of payment for legal services and expenses from a client when made by credit card is permitted under the Colorado Rules of Professional Conduct provided that certain protective measures are implemented by the lawyer and further provided that the lawyer consults with the client prior to the acceptance of payment by credit card.

Analysis

Lawyers are currently accepting payments by credit cards to pay for fees and expenses incurred. Credit cards are also used to pay for services yet to be rendered. Lawyers have entered into contracts with their clients where fees and expenses are charged to a client's credit card when a client's account becomes delinquent. Finance companies have created credit cards specifically for the payment of legal fees and expenses. The purpose of this opinion is to provide general guidance to attorneys with respect to the use of credit cards. It is not intended to address each and every one of the numerous ways in which credit cards can be used to pay for a lawyer's services.

The use of credit cards for the payment of legal services and expenses was deemed permissible by the American Bar Association in 1974 in Formal Opinion 338. The Colorado Bar Association Ethics Committee issued a parallel Informal Opinion Y, but withdrew that opinion in 1991. Several other state ethics opinions have followed Formal Opinion 338. Some of these opinions may be found in the *ABA/BNA Manual on Professional Conduct*. *See Alabama Opinion* 93-19 at 1001:1013, *Kentucky, Formal Opinion* E-370 at 1001:3904, *Michigan Formal Opinion RI* - 168 at 1001:4768, *Nebraska Formal Opinion* 95-4 at 1001:5504, *New Hampshire Formal Opinion* 1993-94/18 at 1001:5707, *New York Formal Opinion* 690 at 1001:6502, *Ohio Formal Opinion* 94-8 at 1001:6861, *Pennsylvania Formal Opinion* 94-30 at 1001:7337 and *South Dakota Opinion* 92-2 at 1001:8002. Several ethics opinions approve of the use of credit cards conditionally, although there is not uniformity among the states as to what those conditions should be. This opinion draws from the ABA and other states' opinions to alert lawyers to the more significant ethical issues that this committee believes should be considered in connection with accepting payments by credit card.

Confidentiality

A lawyer accepting payment by credit card must take care to maintain client confidentiality. Colo. RPC 1.6(a) requires that a lawyer not reveal any information relating to the representation of a client unless the client consents after consultation. "Consultation" means that information be communicated in a reasonably sufficient manner to permit the client to appreciate the significance of the matter in question. Colo. RPC Preamble, Scope and Terminology. A lawyer cannot assume that a client who is paying a bill by credit card has impliedly authorized the attorney to disclose otherwise confidential information. The mere fact of the representation or the identity of the client may itself be confidential or privileged information that the client would not want revealed. The lawyer should explain to a client that the use of a credit card necessarily involves some disclosure of confidential information, and should explain what information relating to the representation will be disclosed.

While every credit card company has its own internal policies, which the lawyer using credit cards should review, generally credit card companies require the merchant (i.e., the lawyer) to provide on the charge slip a brief description of the nature of the product or service for which the charge is made. Any person who later handles the charge slip may become aware of any information contained on the slip. A lawyer should so advise the client and obtain from the client the client's knowing consent to such disclosure. A lawyer can further better preserve client confidences if the description on the charge slip goes no

further than to state that the charges are made for "services and expenses," "fees and expenses" or some other general description.

Some agreements require the merchant to cooperate with the credit card company or bank and to provide them with any information about the services the lawyer performed in the event of a dispute with the client. A lawyer cannot divulge confidential information to the credit card company for this purpose except in compliance with Colo. RPC 1.6(c).

Under Colo. RPC 1.6(d), "A lawyer shall exercise reasonable care to prevent . . . others whose services are utilized by the lawyer from disclosing or using such [confidential] information . . . ." It is questionable whether any measures employed by the lawyer will always protect the client from disclosures that could be made by employees of the credit card company or banks who handle the charge slips. Consequently, there may be some instances where there is such heightened need for confidentiality that a credit card should not be used to pay the lawyer.[1]

Conflicts of Interest and Professional Independence

Colo. RPC 1.7(b) states that "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation."

Generally, in connection with the representation of a client, the lawyer's personal interest is to be paid. This fact, in and of itself does not constitute a conflict of interest.

Colo. RPC 1.8(f) states that "A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client consent 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." By its express terms, Rule 1.8(f) applies to a lawyer who accepts payments by credit card, and the lawyer must comply with it.

Without in any way intending to create an exhaustive list, the committee would alert lawyers to other situations where conflicts or other ethical issues may exist and a lawyer's independence may be compromised.

Where a lawyer has the right to charge a client's account in the event the client is delinquent on payments, the provisions of both Colo. RPC 1.8(a) and 1.8(b) are implicated.

Second, the lawyer must know and understand the terms of the lawyer's contract with the credit card company.[2] Some credit card companies' standard form agreements have provisions stating, among other things, that services must have been rendered prior to the submission of the charge, which would prohibit the lawyer from using the credit card for a "retainer"[3] for services yet to be rendered. As a practical matter, it may be difficult if not impossible, for a lawyer to use credit cards as payment for services yet to be rendered under the terms of many credit card agreements.

Some agreement prohibit a lawyer from reimbursing any unused fees paid by credit card in the form of cash and instead require the refund to take the form of a non-cash credit draft. Some agreements also require that any payments made to the lawyer by the company be made through an approved Settlement Account over which the credit card company has substantial control, including the right to make withdrawals, deposits and other adjustments. In that event, the lawyer may be advised to maintain a separate trust account for credit card payments to comply with Rule 1.15(a).

Operating regulations of some credit card companies provide the client with "chargeback rights" for enumerated reasons which may include "services not performed" or similar reasons. These operating regulations usually provide for some arbitration process, as between the card issuing bank and the acquiring bank, to determine the merits of the chargeback. A lawyer electing to accept the client's use of a credit card cannot attempt to assert such arbitration or other provisions of the credit card company's operating regulations as a means of limiting the lawyer's liability to the client without full compliance with Rule 1.8(h).

In addition to being familiar with the credit card agreement and operating regulations, a lawyer accepting credit cards should also be aware of federal and state consumer credit laws which may be

applicable to credit card transactions. It is beyond the scope of this committee's authority to advise lawyers as to legal, rather than ethical issues, but lawyers should be aware that the acceptance of credit cards poses legal as well as ethical issues.

In connection with a representation, a lawyer shall hold property of clients separate from the lawyer's own property. Rule 1.15(a). The credit card payment, if a payment for services rendered or reimbursement for expenses, may be placed into the attorney's own account. If, however, it is an advance fee payment, the funds must be placed into a separate account as the same is defined in Colo. RPC 1.15(d). If the charged amount is placed into a COLTAF account, Rule 1.15(e)(1) seems to allow for the charging fee (the percentage of the total transaction deducted by the charging institution as profit) to be deducted by the bank from the full charge. If placed into the lawyer's account, however, or a separate, interest bearing account for the client, the issue of payment of charging fees is one which the lawyer and client will need to address to avoid misunderstandings.

The limitations on sharing of legal fees with nonlawyers set forth in Rule 5.4 are designed to protect the lawyer's professional independence of judgment on behalf of the client. Because no partnership involving the practice of law has been formed with the issuing institution, the lawyer may comply with Rule 5.4(b) so long as the card issuer is not permitted to direct or regulate the lawyer's professional judgment in rendering legal services to the client.

Advertising

Just as the right of a lawyer to advertise has been the subject of controversy, so has the right of a lawyer to advertise the acceptance of credit cards. Different ethics opinions have expressed conflicting views as to the circumstances under which acceptance of credit cards may be advertised, if at all.

The committee is of the view that many of these opinions are of limited utility today. Commencing with the seminal case of *Bates v. Arizona State Bar Association*, 433 U.S. 350 (1977), the ability of professional governing bodies to regulate advertising has been limited, and the law in this area continues to evolve. The issue of lawyers advertising has been previously addressed by this committee in its Formal Opinion No. 76 ["Lawyer Advertising Guidelines," 16 *The Colorado Lawyer* 2205 (Dec. 1987)] and the committee believes that advertising the acceptance of credit cards is governed by the same principles as other forms of lawyer advertising.

Rule 7.1 disallows any false or misleading communications about a lawyer or the lawyer's services. Such communications are false or misleading if they contain material misrepresentations of fact or law or omit facts necessary to make the statement, when considered as a whole, not materially misleading; when they are likely to create unjustified expectations; or when they compare the lawyer's services with those of another lawyer unless the comparison can be factually substantiated.

Pursuant to Rule 7.2, and court decisions related thereto, advertising should have, as its purpose, the provision to the public of information regarding available legal services. The dissemination of information concerning lawyer's fees, including prices for specific services, as well as payment and credit arrangements for the same, help expand the public's knowledge concerning such information. So long as the requirements of Rules 7.1 and 7.2 are met, advertising the acceptance of credit cards as payment for legal services is permitted.

NOTES

1. A lawyer's duty to maintain confidentiality applies irrespective of the method of payment used. Many of the issues discussed herein are also implicated when payment is made by check or electronic funds transfer.

2. It is customary that all merchants who utilize credit cards for payment, including lawyers, enter into detailed, standardized agreements with the credit card company. These standardized agreements usually incorporate the credit card company's operating regulations.

3. The committee is not defining what constitutes a "retainer."

100 USE OF CONVERSION CLAUSES IN CONTINGENT FEE AGREEMENTS

Adopted June 21, 1997.

Introduction

This opinion addresses the use of conversion clauses in contingent fee agreements. For purposes of this opinion, a conversion clause is a provision that converts the fee due from the primary contingent fee amount set forth in the contract to an alternate fee, if the agreement is terminated before the contingency occurs. The alternate fee set under a conversion clause could be (a) a lodestar fee, derived from the lawyer's hourly rate multiplied by the number of hours devoted to the case, (b) a percentage of the highest settlement amount offered before termination, (c) a fee to be determined under *quantum meruit* principles, or (d) some other fee formulation.

Based on reported Colorado decisions and on inquiries received by the Ethics Committee, the Committee believes that attorneys frequently use conversion clauses in their contingent fee agreements. The Committee is issuing this opinion to assist attorneys in determining whether to include such clauses and in drafting such clauses to comply with the Colorado Rules of Professional Conduct (the "Rules").

Syllabus

The Rules do not *per se* prohibit the use of conversion clauses in contingent fee agreements. Rather, whether such clauses comply with the Rules must be evaluated on a case-by-case basis. Depending on the overall circumstances of an engagement and the terms used in a particular agreement, the conversion clause might interfere impermissibly with the client's absolute right to terminate the lawyer's services, as recognized by the Colorado Supreme Court and set forth in Rule 1.16(a)(3) and the comments to Rules 1.2 and 1.16. In addition, again depending on the particular circumstances and contract language, a conversion clause might result in an unreasonable fee in violation of Rule 1.5, or might cause the fee agreement not to comply with the requirements of the Rules Governing Contingent Fees, which are incorporated in Rule 1.5(c).

Relevant factors in assessing whether a particular fee agreement violates the Rules include the following: (1) whether the clause provides for conversion even if the client terminates the contingent fee agreement with cause or if the attorney terminates the agreement without cause; (2) whether the clause provides for conversion to fees based on *quantum meruit* principles or defines the alternate basis for fees, *e.g.*, a fixed amount, a lodestar fee, a percentage of the highest settlement offer, or some other basis; (3) whether the fees computed on the alternative basis are unreasonable in amount, either facially or under the circumstances that develop in the particular case; (4) whether the clause provides for immediate payment on an alternate basis, before the contingency occurs and even in the absence of the contingency occurring; (5) whether the clause provides for a cap, under which the alternate basis for fees cannot exceed the contingent fee amount; and (6) the sophistication of the client.

Due to the specific nature of the inquiry, attorneys should not unthinkingly use a form conversion clause in their contingent fee agreements. Instead, attorneys should tailor conversion clauses to the circumstances involved in the particular engagement.

Analysis

I. Background

Rule 1.5(c) permits the use of contingent fee agreements so long as those agreements comply with the Rules Governing Contingent Fee Agreements, C.R.C.P. ch. 23.3. Contingent fee agreements provide two principal benefits to clients:

> (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a *res* out of which the fee can be paid.

Colo. Code Prof. Resp. EC 2-20; *see also Anderson v. Kenelly*, 37 Colo. App. 217, 547 P.2d 260, 261 (1976) ("such fee arrangements are frequently the only way in which people of modest means may secure legal representation in certain types of litigation").

Historically, contingent fee agreements were used almost exclusively in the context of plaintiff's personal injury representation. The vast majority of contingent fee contracts continues to be for the representation of individuals in personal injury actions. Many of these clients are relatively unsophisticated in the law and many lack the resources to pay an attorney except through the proceeds of the underlying claim.

However, in recent years, there has been an increased use of contingent fee agreements in contexts other than plaintiffs' personal injury cases. For example, attorneys representing civil defendants employ reverse contingent fee agreements, under which their fee is based upon an agreed percentage of the amount the client saves. *See* ABA Comm. On Ethics And Professional Responsibility, Formal Op. 93-373 (1993) (approving concept of reverse contingent fee agreements). As another example, contingent fee agreements are no longer limited to litigation matters; fees in the mergers and acquisition, public offering, and lending areas frequently are tied to the successful consummation and amount of the transaction. *See* ABA Formal Op. 94-389 (1994) (recognizing trend). Traditionally, contingent fee agreements were used almost exclusively where the client could not afford to pay the attorney's fee on an hourly basis if there was no recovery. However, today more sophisticated clients with the ability to pay fees on an hourly basis increasingly opt to employ contingent fee agreements. *See* P. Zeughauser, *The Use of Alternative Fee Arrangements to Achieve Smart Results and Improve Outside Counsel Relationships*, 871 PLI/Corp 47 (1994) (according to ABA and Price Waterhouse surveys, the number of in-house corporate attorneys using contingent fee arrangements increased from 26% to 41% between 1984 and 1992). In light of these developments, a stereotyped view of unsophisticated individual clients entering into contingent fee agreements is unwarranted.

Contingent fee agreements shift some of the risk inherent in litigation from clients to attorneys. If the client does not recover, the attorney does not receive a fee. If the client does recover, the attorney's percentage-based fee might exceed the fee that would have been due under an hourly fee contract. The potential premium in the event of success is viewed as acceptable in light of the potential for no recovery (and no fees) at all. *See* J. Fleming, The American Tort Process, p. 195 (1988); S. Jay, *The Dilemmas of Attorney Contingent Fees*, 2 Geo. J. Legal Ethics 813, 815-16 (1989); M. Schwartz and D. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 Stanford L. Rev. 1125 (1970). The potential premium also compensates the attorney for the delay in payment of the attorney's fee. *Id.* Thus, a fee that might appear excessive if calculated under a lodestar method might not be excessive if based on a contingent fee agreement.

Because of the enhanced potential for conflicts of interest and overreaching that inhere in contingent fee agreements, *People v. Nutt*, 696 P.2d 242, 247-48 (Colo. 1984), the Colorado Supreme Court has imposed specific limitations on the use and content of such agreements, in order to protect clients. *See* C.R.C.P. ch. 23.3; Colo. RPC 1.5(c). "Under its general supervisory power over attorneys as officers of the court, a court may and should scrutinize contingent fee contracts and determine the reasonableness of their terms." *Nutt*, 696 P.2d at 248 (citation omitted); *see also Brillhart v. Hudson*, 169 Colo. 329, 455 P.2d 878, 881 (1969).

The Rules Governing Contingent Fee Agreements require the contingent fee agreement to contain "a statement of the contingency upon which the client is to be liable to pay compensation otherwise than from amounts collected for him by the attorney." C.R.C.P. ch. 23.3, Rule 5(d); *Elliott v. Joyce*, 889 P.2d 43, 46 (Colo. 1994) (denying recovery in *quantum meruit* where contingent fee agreement did not specifically set forth the basis for recovery if the attorney terminated the representation, in violation of C.R.C.P. ch. 23.3, Rule 5(d)); *but c.f., Law Offices of J.E. Losavio, Jr. v. Law Firm of Michael W. McDivitt, P.C.*, 865

P.2d 934, 936 (Colo. App. 1993) (permitting *quantum meruit* recovery even though contingent fee agreement did not include clause converting basis for payment to *quantum meruit* if client terminated relationship). The form contingent fee agreement included in those rules contains sample language setting forth a percentage-based fee. C.R.C.P. ch. 23.3, Form 2, §§ 3, 4. However, neither the Rules Governing Contingent Fee Agreements nor the form agreement contains any language that attempts to set the attorney's fee in the event that the contingent fee contract is terminated before the contingency occurs.

This opinion does not purport to speak to the legal enforceability of conversion clauses, as opposed to whether conversion clauses comply with the ethics rules. Although inquiry into the legal enforceability and the ethical propriety of a particular conversion clause generally will yield the same result, the Committee recognizes that in some situations a court might refuse to enforce even an ethically permissible conversion clause. This opinion also does not address what may be a reasonable range of contingent fees, either in the abstract or in particular types of cases. Finally, this opinion does not consider issues relating to retaining liens in contingent fee matters. *See* CBA Ethics Comm. Formal Op. 82 (1989).

II. Relevant Ethics Rules and Considerations

Conversion clauses implicate the following ethical considerations:

The client's absolute right to discharge counsel. The Rules confirm that a client has an absolute right to discharge its attorney. Colo. RPC 1.2, comm. ("the client may not be asked . . . to surrender the right to terminate the lawyer's services . . ."); Colo. RPC 1.16(a)(3) ("a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the lawyer is discharged"); *id.*, comm. ("A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services."). "In order to assure no compulsion to retain an attorney where trust between attorney and client has been broken, and to further guarantee a client may always be confident with such representation, a client must, and does, have the right to discharge the attorney at any time and for whatever reason." *Olsen and Brown v. City of Englewood*, 889 P.2d 673, 676 (Colo. 1995). A conversion clause is improper if it operates as a penalty upon termination and thereby chills the client's exercise of this inherent right to discharge counsel. *Florida Bar v. Doe*, 550 So.2d 1111, 1113 (Fla. 1989) ("An attorney cannot exact a penalty for a right of discharge.").

The requirement that fees be reasonable. Rule 1.5(a) requires a lawyer's fee to be reasonable and states eight factors to be considered in determining reasonableness.[1] Rule 1.5(d) provides that"[a division of a fee between lawyers who are not in the same firm may be made only if . . . the total fee is reasonable." A conversion clause that results in an unreasonable fee is improper.

The attorney's duty to make reasonable efforts to ensure that the client understands the fee agreement. An attorney has a duty to make reasonable efforts to advise the client of the nature and terms of the fee agreement. Colo. RPC 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); Colo. RPC 1.5(b) (". . . the basis or rate of the fee shall be communicated to the client. . ."); 2 ABA/BNA Lawyers' Manual On Professional Conduct 41:313 (1994) ("Whoever the client and whatever the subject of the representation, a lawyer should be guided by this rule: *Make sure the client understands the fee arrangement and agrees to it.*") (emphasis in original).

III. Conversion Clauses Are Not *Per Se* Unethical

No provision of the Rules or the Rules Governing Contingent Fees renders conversion clauses *per se* unethical. Although the Colorado Supreme Court has not considered this issue, it has reviewed contingent fee agreements containing conversion clauses, yet has not stated any general objection to those clauses. *See Feiger, Collison & Killmer v. Jones*, 926 P.2d 1244, 1252-53 (Colo. 1996) (contingent fee agreement that converted to lodestar rate if firm withdrew for contract-defined cause "does not facially reflect a clear-cut public policy violation"); *Elliott*, 889 P.2d at 44 (Court did not comment on conversion clause that converted to lodestar rate if client terminated attorney).

Indeed, in the *Elliott* case, the Court applied Rules 5(d) and 6 of the Rules Governing Contingent Fees as *requiring* the contingent fee agreement to include a conversion clause in order for the attorney to seek payment under *quantum meruit* principles when the attorney withdraws without cause. Because the agreement was silent as to how the attorney would be paid if the attorney unilaterally terminated the agreement, the attorney was denied any recovery on his *quantum meruit* claim. Under *Elliott*, the contingent fee agreement presumably should have advised the client that, if the attorney terminated the representation, he could seek fees under *quantum meruit* principles. *See also* Monroe Cty. (N.Y.) Bar Ass'n Op. 86-2 at 5-6 (1986) ("It is preferable that clients learn at the outset of a lawyer-client relationship of an attorney's legal remedies in the event of abandonment of the cause.").

Although the Committee concludes that conversion clauses, as broadly defined in this opinion, are not *per se* unethical, case law has established that certain provisions attempting to restrict a client's rights are against public policy. For example, a contingent fee agreement that converts to an alternate fee if the client settles a claim (or refuses to accept a settlement) contrary to the attorney's advice is void. *Nichols v. Orr*, 63 Colo. 333, 166 P. 561, 562 (1917); *Jones v. Feiger, Collison & Killmer*, 903 P.2d 27, 34-35 (Colo. App. 1995), *rev'd on other grounds*, 926 P.2d 1244 (Colo. 1996). A number of ethics opinions have reached the same conclusion. *E.g.*, Neb. Advisory Op. 95-1 (1995); Phil. Bar Ass'n Prof. Guidance Op. 88-16 (1988); Wash. Formal Ethics Op. 191 (1994); *but see* Ore. State Bar Formal Op. 1991-54 (1991) (noting potential ethical problems in conversion clauses triggered by client's failure to follow attorney's advice regarding settlement, but declining to treat all such clauses as necessarily violating ethics rules).

IV. Factors Affecting Whether Conversion Clauses Are Ethical

Whether a conversion clause is ethical in a particular case will depend on a variety of circumstances, including the following: (1) whether the clause provides for conversion even if the client terminates the contingent fee agreement with cause or if the attorney terminates the agreement without cause; (2) whether the clause provides for conversion to fees based on *quantum meruit* principles or defines the alternate basis for fees, *e.g.*, a fixed amount or a lodestar fee; (3) whether the fees computed on the alternative basis are unreasonable in amount, either facially or under the circumstances that develop in the particular case; (4) whether the clause provides for immediate payment on an alternate basis, before the contingency occurs or even in the absence of the contingency occurring; (5) whether the clause provides for a cap, under which the alternate basis for fees cannot exceed the contingent fee amount; and (6) the sophistication of the client. This list of factors is not exhaustive, but these are the most important considerations identified by the Committee.

Whether the clause provides for conversion even if the client terminates the contingent fee agreement with cause or if the attorney terminates the agreement without cause. The Committee believes that most attorneys who include conversion clauses in their contingent fee agreement do so for a simple reason: to protect themselves in case the client terminates the agreement after the attorney has devoted substantial time and effort to the case, in the hope of depriving the attorney of the percentage fee provided for in the fee agreement. For example, an attorney who has handled a case for a number of years and has negotiated a pretrial settlement might be entitled to a percentage-based fee that exceeds the attorney's fees under a lodestar calculation; if the client is able to discharge the lawyer on the eve of settlement and if the contingent fee agreement does not include a conversion clause, the client might be able to limit the attorney's recovery to a lodestar rate or under *quantum meruit* principles and thereby greatly reduce the attorney's share of the recovery. *See* Kan. Bar Ass'n Op. 93-03 at 2 & n.2 (1993) ("An underground system of lay advisory books suggests clients hire lawyers to negotiate recoveries for them on a contingency, then once an offer is made discharge the lawyer and either try to collect the entire offered recovery by themselves, or pay the *quantum meruit* fee in hopes it will be less than the contracted contingent fee."). However, if the fee agreement includes a conversion clause, the lawyer might obtain some protection from a bad faith termination by the client.

Just as a conversion clause can protect an attorney who is discharged without cause, it can protect an attorney who has good cause to withdraw from the representation, yet has invested substantial and

valuable time and effort in the matter. Rule 1.16(b) (1) and (2) sets forth a series of circumstances that justify withdrawal.[2] For example, if the client "personally intends to pursue an illegal course of conduct," the attorney may move to withdraw. Colo. RPC 1.16(b)(1)(B). Under this rule, if the client informs her counsel that she intends to commit perjury on the witness stand, the attorney may seek court permission to terminate the relationship. Assuming the court approves the withdrawal, and further assuming that the case is relatively close to a valuable settlement as a result of the attorney's efforts, a conversion clause could protect the lawyer from losing a portion of the percentage-based fee as a result of the client's misconduct and the lawyer's withdrawal for cause.[3]

On the other hand, where the attorney is not performing satisfactorily and the client has good cause for termination, a conversion clause could impermissibly interfere with the client's right to discharge the attorney. Similarly, where the attorney terminates the agreement without cause, a conversion clause could make it difficult, if not impossible, for the client to find successor counsel.

In light of these considerations, the Committee concludes that conversion clauses should be drafted to limit their application to client terminations without cause and attorney terminations with cause. The Committee recognizes that "cause" and "without cause" are not precise terms. The parties, however, can take steps to define terminations for cause in the agreement.[4] *See, e.g.,* Annotation, *Circumstances Under Which Attorney Retains Right To Compensation Notwithstanding Voluntary Withdrawal From Case*, 88 A.L.R.3d 239 (1978).

The Committee recognizes that the client's right to discharge the attorney is absolute, even if without cause or in bad faith. The Committee does not believe that a conversion clause that applies to such terminations necessarily will chill the exercise of that absolute right; it will simply require the client to pay the discharged attorney a reasonable fee if the client acts without good cause. *See Cohen v. Radio-Electronics Officers Union*, 146 N.J. 140, 679 A.2d 1188, 1198 (1996) (notice requirement that operates as limit on client's right to discharge counsel will withstand ethical scrutiny if it is "fair, reasonable, and [does] not unduly burden the client's right to choose its counsel"); *Taylor v. Shigaki*, 84 Wash. App. 723, 930 P.2d 340, 344 (1997) ("We agree that Taylor had the right to discharge his attorney at any time, with or without cause. But although a client may fire his attorney at any time, the client has no right to pay less than the attorney has earned.") (citations omitted).

Whether the clause provides for conversion to fees based on *quantum meruit* principles or defines the alternate basis for fees. Under Colorado law, a discharged attorney generally may recover the reasonable value of services rendered under *quantum meruit* principles. *Nutt*, 696 P.2d at 248. A conversion clause that states no more than that the client will be liable to pay the attorney's fees under *quantum meruit* in the event of termination of the fee agreement is permissible. That is the sort of provision that the Supreme Court faulted the attorney for *not* including in the fee agreement in the *Elliott* case. *See also* Miss. State Bar Op. 144 at 3, 5 (March 11, 1988) (clause that converts fee to *quantum meruit* upon lawyer's discharge would be an ethical "safe harbor").

The Colorado courts have long assumed that *quantum meruit* principles govern in the absence of a conversion clause in a disputed or invalid contingent fee agreement. *See Nutt*, 696 P.2d at 248; *Bryant v. Hand*, 158 Colo. 56, 404 P.2d 521, 523 (1965). However, the Colorado courts have not ruled out alternative bases for fees if they are clearly set forth in the contingent fee agreement. Therefore, conversion clauses that provide for alternate fee arrangements other than under *quantum meruit* principles are not *per se* unethical as against public policy. However, because many such alternate fee structures have a strong potential to penalize clients, counsel should use them with care and attention to the particular circumstances of a given engagement.

The most common type of conversion clause provides for conversion to a lodestar rate based on the attorney's normal hourly rate, as defined in the agreement, and the number of hours devoted to the matter. Whether such a provision is ethical in a given case will turn largely on the remaining factors discussed in this opinion.

A clause that provides for conversion to a fixed fee upon discharge will be inherently suspect. Because it is impossible to predict when during the course of the matter the agreement might be terminated,

such a provision necessarily would be arbitrary. It would result in an unreasonable fee until such time as the value of the attorney's services equaled or exceeded the fixed fee amount. The unreasonable nature of the fee until that point in time would impinge improperly upon the client's free exercise of the right to discharge counsel.

Some conversion clauses provide for conversion to (a) a percentage of the last settlement offer received or (b) a percentage of the total recovery reduced, as appropriate, to reflect the contribution of successor counsel. Assuming that the percentages are reasonable, this type of clause generally will be permissible. If the client received a particular settlement offer while represented by the attorney, then the lawyer likely contributed services of value to the client; a reasonable percentage of that settlement offer generally will represent reasonable compensation under a percentage-based contingent fee agreement. *But see* Monroe Cty. Op. 86-2 at 6 ("Tying the fee to a percentage of a previous offer will likely impair the client in his unfettered discretion whether to accept the offer."). Similarly, an agreement that provides that discharged and substitute counsel will divide the total attorneys' fees between them in proportion to their respective contributions to the case will neither chill the client's exercise of the right to discharge counsel nor result in an unreasonable fee (assuming, of course, that the total fees represent a reasonable percentage of the client's recovery).

Whether the fees computed on the alternate basis are unreasonable in amount, either facially or under the circumstances that develop in the particular case. Attorneys should consider the reasonableness of the fees under a conversion clause both at the outset of the engagement and when the fee agreement is enforced. A conversion clause that appears ethical on its face might become unethical as enforced in a particular situation. *See* Ore. Op. 1991-54 at 1 ("[I]t may happen that subsequent events make it improper for an attorney to charge or collect the full amount of an agreed-upon fee [under a conversion clause] that turns out to be excessive even though it did not appear to be excessive at the outset."); *see also Anderson*, 547 P.2d at 261 (scrutinizing reasonableness of facially reasonable, one-third contingent fee percentage in light of work actually performed).

A clause that provides for conversion to a lodestar fee will be unethical if the hourly rate employed is unreasonable. *E.g., Florida Bar v. Doe*, 550 So.2d at 1111-13 ($350 per hour "converted" fee deemed excessive). Even where the attorney's hourly rate as stated in the contingent fee agreement is reasonable, *i.e.*, where the lodestar rate appears facially reasonable, the total fees may be unreasonably high. This may occur because the attorney has devoted too many hours to the case in light of the tasks that were required. It may occur because, although both the hourly rate and total hours were reasonable, the result obtained cannot justify the fees. For example, if the fees computed on a lodestar basis exceed the fees that would have been recoverable under the contract's percentage-based fee provision, those fees probably would be unreasonable. *See* discussion *infra* of cap provision in agreement.[5]

Implicit in the requirement that fees be reasonable is that, when more than one firm handles a client's case, the aggregate fee for both firms must be reasonable. *See* Colo. RPC 1.5(d)(3); Kan. Op. 93-03 at 3, 6. Thus, the first attorney should not include or enforce a conversion clause that effectively leaves the client unable to retain new counsel because the alternate fee is expected to be too high to render retention of new counsel economically feasible. Successor counsel should inquire about the first attorney's fee arrangement in order to ensure that the overall fee is reasonable, and should make reasonable efforts to ensure that the client understands the fee arrangements with both original and successor counsel. *Id.* at 11-12. On the other hand, a fee that would be unreasonable if paid to one attorney might not be unreasonable if paid to two attorneys through no fault of the attorneys. Thus, for example, if the client opts without cause to replace counsel who has done substantial work on a matter, and new counsel must duplicate much of the original lawyer's work in order to competently represent the client, then it may be reasonable to impose additional attorneys' fees on the client, rather than to expect the two attorneys to divide the original contingent fee.

Whether the clause provides for immediate payment on an alternate basis, before the contingency occurs and even in the absence of the contingency occurring. In the typical contingent fee matter, the client lacks the resources required to fund the litigation except out of the proceeds of the case.

For these clients, a conversion clause that requires payment of the alternate fee immediately upon termination and regardless of the occurrence of the contingency would operate as a severe disincentive to discharging counsel. It would function as a double penalty by, *first*, requiring immediate payment and, *second*, requiring payment of fees even if the client recovers little or nothing. *Fracasse v. Brent*, 6 Cal.3d 784, 100 Cal. Rptr. 385, 390 (1972); *Florida Bar v. Spann*, 682 So.2d 1070, 1072-73 (Fla. 1996); *Reid, Johnson, Downes, Andrachik & Webster v. Lansberry*, 38 Ohio St. 3d 570, 629 N.E.2d 431, 436 (1994). The Committee views such language as presumptively improper, unless the client is relatively sophisticated, has the demonstrated means to pay counsel's fees even before the occurrence of the contingency, and has specifically negotiated the conversion clause.

Whether the clause provides for a "cap," under which the alternate basis for fees cannot exceed the contingent fee amount. An unrestricted conversion clause, which includes no cap on fees calculated on a lodestar basis, could improperly impinge upon the client's right to discharge counsel and also could result in an unreasonable fee:

> [T]he *quantum meruit* recovery of a discharged attorney should be limited to the amount provided for in the disavowed contingent fee agreement. . . . 'This limitation is believed necessary to provide client freedom to substitute attorneys without economic penalty. Without such a limitation, a client's right to discharge an attorney may be illusory and the client may in effect be penalized for exercising a right.'

Reid, Johnson, 629 N.E.2d at 436 (citations omitted). The Colorado Court of Appeals has assumed that fees recoverable under a contingent fee agreement set a ceiling on the fees computed on an alternate basis. *Law Offices of J. E. Losavio*, 865 P.2d at 936. However, where the client is in a position to absorb and fully understands and accepts the potential risk of an uncapped conversion provision, such a clause might withstand ethical scrutiny.

The sophistication of the client. As observed above, the use of contingent fee agreements has expanded significantly in recent years. Whereas those agreements originally were used almost exclusively in the representation of relatively unsophisticated individual clients with limited resources to fund litigation, today a sophisticated corporate client might opt to employ a contingent fee agreement as an alternative to a traditional hours-based fee arrangement. *See* Jay, 2 Geo. J. Legal Ethics at 852-53 (among clients who choose contingent fee arrangements, "there are a considerable number who not only appreciate the risks involved and the efforts expended by their lawyers, but . . . also are satisfied that a contingent percentage is the superior way to maximize their gain"). In that circumstance, a conversion clause might not operate to encumber the client's right to discharge counsel. Rather, the clause might be a negotiated and freely-accepted provision of the contingent fee agreement. So long as the rate provided for under the conversion clause is not unreasonable, it would not be unethical. *See Feiger*, 926 P.2d at 1252-53 (noting the relative sophistication of client as relevant to Court's conclusion that conversion clause does not facially reflect a public policy violation: "Jones was, or at least, should have been, well aware of the implications of the representation agreement."); *Cohen*, 679 A.2d at 1199 ("Sophisticated clients who bargain with their lawyers from positions of substantial parity are less susceptible to overreaching."); Phil. Op. 88-16, at 2 (if client is "a person or entity of substantial means, [conversion clause] might be reasonable so long as it did not create a 'hammer' to be used to overcome the client's independent determination . . .").

By contrast, a contingent fee agreement with an unsophisticated client with limited resources (the presumed client under the Rules Governing Contingent Fees) requires greater scrutiny.

Conclusion

Counsel should not use a conversion clause that, as a practical matter, is likely to restrict the client's ability to terminate the representation. Consistent with the factors discussed above, the conversion clause should fairly set forth the client's obligations upon termination, and should ensure that those obligations are not unreasonable in light of the work performed and the relief ultimately obtained by the client.

NOTES

1. The rule makes clear that its list of factors is not intended to be exhaustive.

2. The rule recognizes that court approval is required for matters in litigation, and that a lawyer should not materially impair the client's interests upon withdrawal.

3. The Committee emphasizes that the fact that an attorney later determines that a case is not as profitable on a contingent fee basis as originally projected is *not* good cause for termination. A conversion clause that permits or is enforced to yield this result would be improper. Colo. RPC 1.5, comm. ("An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client . . ."); *Florida Bar v. Hollander*, 607 So.2d 412, 415 (Fla. 1992).

4. One ethics committee has mandated a definition in the agreement: "The agreement should give, or refer to, a reasonable definition of 'cause,' as it applies to the lawyer's conduct. . ." N.M. State Bar Advisory Op. 1995-2, at 4 (Sept. 9, 1995). This Committee concludes that a definition of "cause" is not mandatory.

5. A clause converting the fee to a lodestar fee will work to the attorney's disadvantage in some circumstances. If the lodestar fee calculation results in a fee less than the contingent fee calculation, it may create an incentive for the client to discharge the attorney and pay on the reduced lodestar basis.

101 UNBUNDLED/LIMITED SCOPE REPRESENTATION

Approved May 21, 2016.

Introduction

In 1998, the Colorado Bar Association Ethics Committee (Committee) adopted Formal Opinion 101, entitled "Unbundled Legal Services." Since then, the use of unbundling (also known as limited scope representation) has become more widespread in Colorado and throughout the country. (In this opinion, we use the terms unbundling and limited scope representation interchangeably.) Originally conceived as a means to encourage pro bono service by attorneys who would agree to participate in only part of a case, limited scope representation is now used as a means of providing legal representation in both pro bono cases and cases in which private attorneys charge a fee. Many private attorneys have found that providing limited scope representation is a useful means to provide some legal representation to modest means clients who could not otherwise afford to hire an attorney for full representation. This use of limited scope representation has been driven, in part, by the increasing number of pro se litigants. For example, statistics for fiscal year 2015 from the Colorado judicial branch indicate that 75% of all litigants in domestic relations cases are proceeding pro se.[1] Some of these pro se litigants have sought limited scope representation from attorneys to enable them to better litigate their cases.

The term "unbundling" was coined by Forrest Mosten, an attorney, mediator, and professor, in a 1994 law review article.[2] As noted in the original Formal Opinion 101, Mosten described the "full bundle" of representation in litigation as consisting of gathering facts, advising the client, discovering the facts of the opposing party, performing legal research, drafting correspondence and documents, negotiating, and representing the client in court.[3] Before this term was coined, many attorneys provided limited scope representation by providing only non-litigation advice to a client or by limiting their services to the drafting of correspondence.

Since Mosten's article was published, attention has turned to providing limited scope representation in judicial proceedings. Accordingly, in 1999, following the adoption of Formal Opinion 101, the Colorado Supreme Court amended Rule 1.2(c) of the Colorado Rules of Professional Conduct (Colo. RPC) to provide expressly that lawyers may limit the scope of their representation. This change was accompanied by amendments to Rules 11(b) and 311(b) of the Colorado Rules of Civil Procedure (C.R.C.P.) to allow lawyers to "ghostwrite" pleadings for self-represented litigants without entering a formal appearance in, respectively, Colorado district court and county court cases.

In 2011, the Colorado Supreme Court adopted C.R.C.P. 121, § 1-1(5), which required that attorneys file a notice of limited appearance and a notice of completion of limited appearance when providing limited scope representation in a court case. In 2012, the Colorado Supreme Court adopted Colorado Appellate Rule 5(e) to allow for unbundling in appellate proceedings in specific instances. The Supreme Court adopted all of these changes to encourage lawyers to engage in unbundling.

During the past decade, most states have amended their equivalent of Colo. RPC 1.2(c) to allow for limited scope representation. Similarly, many states' ethics committees have promulgated opinions regarding different aspects of unbundling.[4] Significantly, in 2013, the American Bar Association (ABA) House of Delegates approved Resolution 108, which, among other things, "encourages practitioners, when appropriate, to consider limiting the scope of their representation, including the unbundling of legal services as a means of increasing access to legal services."[5]

Currently, limited scope representation takes four forms: (1) providing limited litigation assistance to self-represented litigants in court cases; (2) ghostwriting pleadings or briefs for self-represented litigants; (3) providing non-litigation advice to self-represented litigants; and (4) transactional assistance.

Outside the courtroom, unbundled legal services are both commonplace and traditional. For example, clients often negotiate their own agreements, but before the negotiation, ask a lawyer for advice

on issues that are expected to arise. Sometimes, a lawyer's only role is to draft a document reflecting an arrangement reached entirely without the lawyer's involvement. Clients involved in administrative hearings (such as zoning or licensing matters) may ask their lawyer to help them to prepare for the hearing, but not to appear at the hearing. In each of these situations, the lawyer is asked to provide discrete legal services, rather than handle all aspects of the total project.

Syllabus

As noted, the Colorado Supreme Court amended Colo. RPC 1.2(c) to provide expressly for limited scope representation. This opinion discusses the provisions of that rule and related rules that enable lawyers to provide limited scope representation in court cases and to ghostwrite pleadings and briefs for self-represented litigants. This opinion also addresses other rules of professional conduct that lawyers engaged in limited scope representation must follow.[6]

I. Limited Scope Representation Authorized by Colo. RPC 1.2(c)

The Colo. RPC and C.R.C.P. permit limited scope representation. Under Colo. RPC 1.2(c), "[1] [a] lawyer may limit the scope or objectives, or both, of the representation if [2] the limitation is reasonable under the circumstances and [3] the client gives informed consent."

Colo. RPC 1.2(c)'s provision that a lawyer may limit the scope of the representation means that in either a litigation or a non-litigation context, a lawyer may represent a client in only part of a case, transaction, or other legal matter. As discussed below, the better practice is that a lawyer should set forth the specific scope of the limited representation in a written fee agreement or other writing.

Additionally, attorneys must analyze each case or transaction to ensure it is appropriate for limited scope representation. There may be circumstances where the case is of a level, or other circumstances are present, such that the attorney should conclude that providing unbundled services is not reasonable. In those instances, the attorney, at the very least, must advise the client of that conclusion, and potentially, should decline to represent the client on a limited scope basis.

Colo. RPC 1.2(c) also requires that the limited scope representation be reasonable based on the facts of the particular case. For example, it may be reasonable for a lawyer to represent a client in a post-decree dissolution of marriage case on an issue concerning modification of child support. In a landlord-tenant case, it may be reasonable to represent the client on the issue of possession or damages. However, in a dissolution of marriage case, it would not be reasonable to represent the client only on the issue of maintenance, because courts have held that issues concerning the division of marital property, maintenance, and attorney fees are intertwined.

Similarly, it may be reasonable to provide limited representation in a specified part of a court case. For example, it may be reasonable to represent a client with respect to a motion for summary judgment or a motion to dismiss, even if the client does not want representation on subsequent trial proceedings if either motion is denied.

Colo. RPC 1.2(c) also requires a client to give informed consent before a lawyer provides limited scope representation. 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." *See* Colo. RPC 1.0(e). The crux of this requirement is that "[t]he lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision." Colo. RPC 1.0, cmt. [6]. Thus, the lawyer must do more than explain the significance of the decision to hire an attorney for limited scope representation; the lawyer also must make sure the client is sufficiently informed to be able to consider available options and risks prior to making that decision.

The lawyer's explanation should include advising the client that proceeding with full representation may be desirable because the client will be represented for the entire case, but that such representation is likely to be more costly. The explanation also should advise the client that it would be less expensive, at least

in the short term, to proceed without legal representation and that proceeding without any representation may lead to mistakes that could be expensive to fix later or mistakes that might not be fixable.

Further, informed consent requires that the lawyer advise the client of potential legal pitfalls that might result from choosing to limit the scope of representation and the likelihood that the client will need additional legal advice later. For example, the attorney should inform the client when, after the conclusion of the limited scope representation, a pending discovery request may require greater client effort to follow up without legal assistance. *See* L.A. Cty. Bar Ass's Prof. Resp. & Ethics Comm., Formal Op. 502, "Lawyers' Duties When Preparing Pleadings or Negotiating Settlement for in Pro Per Litigant" (1999).

In the case of limited scope representation, a prerequisite to a client's informed consent is an explanation of exactly which legal services the lawyer will provide and a discussion of additional legal issues that might arise after the completion of the limited scope representation. *See* Colo. RPC 1.4(a)(2) ("A lawyer shall . . . reasonably consult with the client about the means by which the client's objectives are to be accomplished."). ABA Formal Comm. on Ethics & Prof. Resp., Formal Op. 472, "Communication With Person Receiving Limited-Scope Legal Services" (2015) (ABA Op. 472), recommends that lawyers providing limited scope representation confirm with the client the scope of the representation — including the tasks the lawyer will perform and not perform — in a written document that the client can read, understand, and refer to later.

Additionally, a lawyer who provides limited services as part of a legal clinic, legal advice hotline or pro se counseling program, must obtain the client's consent to limited scope representation and advise the client of the potential need for further legal assistance after the initial consultation. *See* Colo. RPC 6.5, cmt. [2].

Under C.R.C.P. 11(b) and 311(b), a pleading or paper drafted by an attorney for a pro se party must provide the attorney's name, address, telephone number, and registration number. In providing such assistance, the attorney certifies that, to the best of the attorney's knowledge, information, and belief, the pleading or paper (1) is well-grounded in fact based on a reasonable inquiry, (2) is warranted by existing law or good faith arguments for the extension of the law, and (3) is not being used to harass, cause unnecessary delay, or needlessly increase the cost of litigation. However, drafting the pleading under C.R.C.P. 11(b) or C.R.C.P. 311(b) does not constitute an entry of appearance by the attorney.

Alternatively, a client who wishes to appear pro se can find many forms on the Colorado Judicial Branch website that can be used to file motions, stipulations, or complaints with the courts. *See* https://www.courts.state.co.us/Forms/Index.cfm. Forms are available for topics including adoption, appeals, criminal matters, divorce and other family matters, eviction and foreclosure, identity theft, small claims, and trusts, wills, and estates. An attorney whose client seeks limited scope representation in order to appear pro se should be familiar with these forms to properly advise the client about these free resources. Limited scope representation can include advising the client on how and when to fill out and submit these forms. Under C.R.C.P. Rule 11(b) and 311(b), an attorney who helps a client complete these forms is not required to put his or her name, address, and registration number on the forms.

Perhaps the most commonly known form of unbundled legal services is the practice of ghostwriting pleadings, motions, and other documents. With the ever-growing number of pro se litigants and the corresponding need for low, or lower, cost legal services, clients and consumers are seeking more options, and lawyers are finding a way to fill this demand through ghostwriting, or providing documents written by lawyers for use by pro se parties in litigation.

In amending Colo. RPC 1.2(c), the Colorado Supreme Court expressly permitted ghostwriting and limited scope representation, and therefore does not share the candor concerns — when unbundled representation is handled properly — expressed in some states' ethics opinions and by the federal district court in Colorado.[7]

Many states have cited the duties of candor to the tribunal and fairness to opposing parties and counsel as the bases for concerns with regard to ghostwriting and limited scope representation generally.[8] Some state ethics opinions have gone so far as to conclude that ghostwriting is automatically a fraud upon the court. Other states have determined that ghostwriting may be permissible without restrictions.

Unbundling is not permitted in the federal district court in Colorado, with one limited exception. *See Johnson v. Bd. of Cty. Comm'rs*, 868 F. Supp. 1226, 1232 (D. Colo. 1993) (unbundling prohibited); D.C. COLO. LAttyR. 2(b)(1) (declining to adopt Colo. RPC 1.2(c) and 6.5 "except, that if ordered, an attorney may provide limited representation to a prisoner in civil actions"); D.C. COLO. LAttyR. 2(b)(5) (declining to adopt Colo. RPC 6.5).

II. Applicability of All Rules of Professional Conduct

Attorneys practicing in the area of limited scope representation should be aware of the ethics rules governing such practice and ensure they are compliant given the activities they propose to undertake. Doing so should ensure the attorney can accomplish the dual goals of providing assistance to people who may need a lesser amount of assistance, or who cannot afford full case representation, while still maintaining compliance with all applicable Colo. RPC.

Attorneys must be aware that, even in the context of limited scope representation, all of the Colorado Rules of Professional Conduct apply, and the limited scope case should be conducted consistent with the attorney's professional obligations. An attorney's responsibilities remain the same — whether he or she represents a client for an entire case, or only on a limited basis for a specific portion of a case.

An agreement to limit legal representation does not exempt a lawyer from the duty to provide competent representation under Colo. RPC 1.1. A lawyer must ensure that the limited scope representation is sufficient for the client to meet his or her legal objective. *See* Colo. RPC 1.2, cmt. [7]. For example, a lawyer should not agree to limit the time allotted to the client's case such that the lawyer could not provide sufficient advice upon which the client could rely.

Attorneys engaging in limited scope representation must communicate with their clients to the extent necessary to keep the client reasonably informed regarding the representation and to provide legally sound advice to the client, as stated in Colo. RPC 1.4. Additionally, the fee charged must be reasonable for the work performed, based on what the attorney will actually do for the client, consistent with Colo. RPC 1.5. Attorneys also must ensure there are no conflicts in the representation, pursuant to Colo. RPC 1.7.

III. Fee Agreements

Given that the arguments in favor of limited scope representation often center on the issue of affordability and access to justice, attorneys should give careful thought to the fees charged for various tasks and must make sure that the fees are reasonable under the circumstances. *See* Colo. RPC 1.5(a).

A lawyer providing limited representation to a new or only occasional client also must comply with Colo. RPC 1.5(b), which states that, "[w]hen the lawyer has not regularly represented the client, the basis or rate of the fee and expenses shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation." Although Rule 1.5(b) requires only a written statement of the basis or rate of the fee and expenses, it is desirable for attorneys to include in their written communication the terms of limited scope representation, including the particular limited services that the attorney will render. Such written communication may be in the form of a written fee agreement. ABA Op. 472 recommends that in accord with Model Rule 1.5(b), lawyers providing limited scope representation confirm with the client the scope of the representation "in writing that the client can read, understand, and refer to later." Providing such information in writing will help provide clarity to both the attorney and the client regarding the nature of the limited scope representation.

In some circumstances, as the case progresses, a client may wish to retain the lawyer to do more than originally agreed or to provide full representation. In that instance, the lawyer should confirm in writing any changes in the basis and rate of the fee. This written confirmation may be in the form of an addendum to the original fee agreement or an amended fee agreement. *See* Colo. RPC 1.5(b). The new or amended written communication should define the scope of the additional representation, outlining the work to be undertaken and the new fee to be charged, whether flat or hourly. As with any contract for legal services, an attorney may not seek to prospectively limit his or her liability in the agreement. *See* Colo. RPC 1.8(h)(1).

IV. Unbundled Services and Candor to the Tribunal

When a lawyer provides limited or unbundled representation to a client who has a matter before a tribunal, the lawyer's conduct may implicate Colo. RPC 3.3, which requires candor to the tribunal.[9] Colo. RPC 3.3(a)(1) provides that "[a] lawyer shall not knowingly . . . (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." This duty would be triggered if a client who is receiving limited representation before a court, typically through filings, gives the court the misimpression that the client is proceeding pro se, without any attorney assistance. In these and similar circumstances, the lawyer must correct any misapprehension that the court may have by disclosing the fact that he or she is providing limited representation.

Problems regarding an attorney's duty of candor to the court are likely to be minimized by C.R.C.P. 121, § 1-1(5), which requires lawyers engaged in limited scope representation to file and serve with the court, other parties, and any attorneys a notice of appearance of limited scope representation and a notice of completion of the limited scope representation. *See* Judicial Department Forms (JDF) 630, 631, and 632 (civil matters); JDF 640, 641, and 642 (appeals); JDF 1334, 1335, and 1336 (family law matters). The purpose of this provision is to implement C.R.C.P. 11(b) and 311(b) in accordance with Colo. RPC 1.2. *See* C.R.C.P. 121, § 1-1(5) (Comm. Cmt.). *See* https://www.courts.state.co.us/forms/Index.cfm. Nevertheless, in some circumstances, a lawyer may need to advise the court and opposing counsel of his or her entry of limited scope representation in the event that the court or the opposing counsel has not received or does not appear to have read those documents. C.R.C.P. 121, § 1-1(5). Ordinarily, if a ghostwriting lawyer complies with C.R.C.P. 11(b) or 311(b), as discussed above, that will satisfy Colo. RPC 3.3, too.

Additionally, Colo. RPC 3.4(c) provides that "[a] lawyer shall not . . . knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." Accordingly, unlike the situations considered by the minority of other ethics committees cited above, C.R.C.P. 11(b)'s and C.R.C.P. 311(b)'s express requirement that the lawyer disclose his or her participation in providing ghostwriting services, combined with Colo. RPC 3.4(c)'s mandate that a lawyer follow the rules of a tribunal, makes it clear that a lawyer owes an ethical obligation to disclose his or her participation in providing unbundled services, unless the lawyer assists a pro se party in "filling out pre-printed and electronically published forms that are issued by the judicial branch for use in court." *See* C.R.C.P. 11(b) and 311(b).

A lawyer providing limited representation in court should inform the client that the lawyer will be required to disclose the limited representation to the court and opposing counsel. *See* C.R.C.P. 121, § 1-1(5); *see also* ABA Op. 472 ("These issues would best be resolved at the inception of the client-lawyer relationship by the client giving the lawyer providing limited scope representation informed consent to reveal to opposing counsel what issues should be discussed with counsel and what issues can be discussed with the client directly."). However, when a lawyer provides only consultation, the lawyer's involvement need not be disclosed to opposing counsel.

V. Advertising

An additional consideration is whether a lawyer may advertise or market the fact that he or she provides unbundled legal services. For example, a number of lawyers have used Internet-based platforms to advertise and even supply unbundled legal services for many years. *See* William Hornsby, *Improving the Delivery of Affordable Legal Services Through the Internet: A Blueprint for the Shift to a Digital Paradigm* (1999), at 4 ("Innovative uses of the Internet, or the adaptation of digital strategies, are being employed to overcome operational inefficiencies in personal plight representation in both full-service models and unbundled services."); N.C. Formal Eth. Op. 2005-10, "Virtual Law Practice and Unbundled Legal Services" (2006) (N.C. Op. 2005-10) (opining on a virtual law firm's desire to "offer and deliver its services exclusively over the internet," including advertising and providing unbundled legal services).

Colo. RPC 7.2(a) permits a lawyer to "advertise services through written, recorded or electronic communication, including public media." If a lawyer providing unbundling services elects to advertise that

fact, he or she may do so as long as he or she ensures compliance with Colo. RPC 7.2(b) – (c), which concerns the costs of advertising, referral agreements, and including the name and office address of at least one lawyer or law firm responsible for advertising content. Additionally, the lawyer's advertisements or communications about the unbundled services must not be false or misleading. *See* Colo. RPC 7.1(a). Further, the lawyer may not provide communications or advertisements in a form that resembles a legal pleading or formal legal document, to avoid being misleading or creating a misapprehension by the recipient. *See* Colo. RPC 7.1(c). When describing unbundled services, the lawyer should be clear and accurate about what fees and costs may be charged and should avoid using terms that are likely to be misleading if they cannot be substantiated. *See* Colo. RPC 7.1, cmt. [5] ("Characterizations of a lawyer's fees such as 'cut-rate,' 'lowest,' and 'cheap' are likely to be misleading if those statements cannot be factually substantiated.").

Further, a lawyer who advertises on the Internet the provision of unbundled services should be clear to limit the statements to legal matters in Colorado or other states where the lawyer is licensed so that the lawyer is not unwittingly advertising services that cannot be performed because of unauthorized practice of law (UPL) concerns. *See* Colo. RPC 5.5 (addressing UPL); *see also* N.C. Op. 2005-10 (discussing UPL and other advertising concerns).

Colo. RPC 7.3(a) provides that 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." Given the nature of unbundled legal services, it is difficult to imagine that the lawyer's "significant motive for" the contact would be "the lawyer's pecuniary gain," but a lawyer who provides, or intends to provide, unbundled services to clients and communicates those facts to prospective clients should take care to ensure compliance with Colo. RPC 7.3(a)-(c).

Finally, in any context, including the provision of unbundled legal services, a lawyer must ensure that he or she does not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Colo. RPC 8.4(c).

VI. Dealing With an Opposing Party Who Uses Unbundled Legal Services

In certain cases, questions will arise as to the duties of a lawyer who knows that an opposing lawyer providing unbundled legal services is assisting the opposing party. *See* ABA Op. 472. These questions will most likely arise when an opposing lawyer providing unbundled legal services is assisting with drafting pleadings or other court documents for the opposing party. ABA Opinion 472 addresses the interplay between Model Rules 1.2(c), 4.2 (prohibiting a lawyer from communicating with a person represented by counsel), and 4.3 (governing a lawyer's interactions with unrepresented persons). The opinion notes that the opposing lawyer providing limited scope legal services generally has no basis to object to communications between the client receiving those services and the lawyer on any matter outside the scope of the limited representation. The opinion recommends that, if asked by the lawyer, the opposing lawyer providing limited scope services should identify the issues on which he or she provided representation and on which the lawyer could not communicate directly with the client.

If the lawyer is told that the opposing lawyer initially providing unbundled legal services is now representing his or her client on *all* communications about a matter, the inquiring lawyer must comply with Colo. RPC 4.2 and communicate only with the opposing lawyer. *See* ABA Op. 472. However, under Colo. RPC 4.2, the lawyer may ask the court for permission to communicate directly with the client receiving unbundled services in defined areas outside the presence of the opposing lawyer providing those services. For example, during a hearing, issues may arise that the court asks the parties to address during a recess. If the court approves a lawyer's direct communication with an opposing party receiving unbundled services, then the lawyer may do so, keeping in mind any limits that the court has put on this communication. *See generally* ABA Op. 472.

When a lawyer knows that the opposing lawyer is drafting pleadings or other court documents for an opposing party but the opposing lawyer is performing no other services for that party, the first lawyer does not have a duty to communicate with the opposing lawyer providing those unbundled services and instead may communicate directly with the client receiving the unbundled services. In this situation, the opposing lawyer's assistance in drafting court documents is not considered representation in the matter as contemplated by Colo. RPC 4.2. *See* C.R.C.P. 11(b) and 311(b). Under comment [9A] of Colo. RPC 4.2, a pro se party to whom limited representation has been provided in accordance with C.R.C.P. 11(b) or C.R.C.P. 311(b) and Colo. RPC 1.2 is considered to be unrepresented for purposes of Colo. RPC 4.2, unless the lawyer has knowledge to the contrary.[10] Nevertheless, while a lawyer is providing ghostwriting services, an attorney-client relationship undoubtedly exists. However, principles of substantive law, not the Colorado Rules of Professional Conduct, "determine whether a client-lawyer relationship exists." *See* Colo. RPC, Preamble and Scope, ¶ [17]; *People v. Gabriesheski*, 262 P.3d 653, 658 (Colo. 2011).

Therefore, in responding to motions filed by a party who is assisted, but not represented, by a ghostwriting, opposing lawyer, the lawyer may respond directly to the opposing party receiving unbundled services both formally and informally. The lawyer may confer about motions with the party receiving unbundled services and may serve motions and pleadings on that party without communicating with the ghostwriting, opposing lawyer. Until the lawyer has information that the party receiving unbundled services is being represented in the matter by the opposing lawyer who previously was only ghostwriting pleadings, the lawyer does not need to comply with Colo. RPC 4.2.

A lawyer also may provide unbundled services in negotiations or mediation. When a lawyer knows that a party is represented by an opposing lawyer providing unbundled services in settlement negotiations or mediation, then, pursuant to Colo. RPC 4.2, the lawyer should communicate only with the opposing lawyer providing unbundled services, and not the client, about settlement or mediation issues. If the case does not settle or resolve, and the lawyer has no reason to believe the representation by the opposing lawyer is continuing, then the lawyer may deal directly with the party on other issues. Further, if the lawyer has questions about whether he or she can communicate directly with the party who received unbundled services in the context of mediation or settlement negotiation, the lawyer should seek clarification or, if necessary, permission from the opposing lawyer who provided the unbundled services to communicate directly with that lawyer's client.

In most circumstances, a lawyer whose client is adverse to a party using the services of an opposing lawyer providing unbundled services will need to follow Colo. RPC 4.3, which governs dealing with an unrepresented person. The lawyer needs to be careful not to give legal advice to the party receiving unbundled services, and to make certain, if it is not apparent, that that party understands the lawyer's role in the matter.

VII. Fairness to Opposing Parties

Issues in ensuring fairness to opposing parties may arise in domestic relations cases, especially if both parties request assistance from one attorney. A lawyer should not mediate a divorce agreement between unrepresented parties and also prepare a proposed judgment of dissolution of marriage, a marriage separation agreement, or a joint parenting agreement. When a lawyer drafts these formal documents after mediating between the adverse parties, the lawyer goes beyond the role of mediator and takes on the role of representing both parties, which creates a nonwaivable conflict of interest. *See* Ill. State Bar Ass'n Op. 04-03 (2004). Under Colo. RPC 1.7(b), a lawyer cannot represent a client if that representation would be materially limited by the representation of another client. In the situation explained here, the mediating lawyer who prepares official documents would be effectively representing two adverse parties in one proceeding. *See* CBA Formal Op. 47, "Attorney Representation in Dissolution of Marriage" (1972, Addendum 1995) ("[C]onflicting interests will nearly always exist in dissolution of marriage cases, whether or not one or both clients know or agree that their interests are conflicting[.]"). Alternatively, the mediating lawyer can help the parties draft an informal agreement or a memorandum of understanding and then recommend that each party obtain independent and separate legal counsel to draft the final documents for the court.

During a limited scope representation, the lawyer should advise the client to decide whether the client wants legal representation at settlement. Then, in fairness to opposing counsel, the lawyer should inform opposing counsel whether opposing counsel should or can communicate with the individual. *See* D.C. Ethics Opinion 330 (2005). On the other hand, if the lawyer believes that the client will not be prepared to negotiate alone or without having to consult with the lawyer, the lawyer may recommend that the client retain the lawyer for settlement negotiations to avoid unreasonable delay. *See* State Bar of Ariz. Ethics Op. 06-03, "Limited Scope Representation; Confidentiality; Coaching; Ghost Writing" (2006).

NOTES

1. *See* "Cases and Parties without Attorney Representation in Civil Cases," Fiscal Year 2015, at 2, https://www.courts.state.co.us/Administration/Unit.cfm?Unit=annrep.

2. *See* Forrest S. Mosten, "Unbundling of Legal Services and the Family Lawyer," 28 *Fam. L.Q.* 421 (1994). Much has been written about unbundling in Colorado. *See* Molly M. Jennings and D. James Greiner, "The Evolution of Unbundling in Litigation Matters: Three Case Studies and a Literature Review," 89 *Denver U. L. Rev.* 825 (2012); Adam J. Espinosa and Daniel M. Taubman, "Limited Scope Representation Under the Proposed Amendment to C.R.C.P. 121, §1-1," 40 *The Colorado Lawyer* 89 (Nov. 2011); Adam J. Espinosa, "Ethical Considerations When Providing Unbundled Legal Services," 40 *The Colorado Lawyer* 75 (2011); Raymond P. Micklewright, "Discrete Task Representation a/k/a Unbundled Legal Services," 29 *The Colorado Lawyer* 5 (Jan. 2000).

3. Mosten, supra, note 2 at 423.

4. ABA Standing Comm. on Delivery of Legal Services, Pro Se/Unbundling Resource Center, Ethics Opinions, *available at* http://apps.americanbar.org/legalservices/delivery/delunbundethics.html.

5. *See* Forrest Mosten, "Unbundling Legal Services in 2014, Recommendations for the Courts," 53 *Judges' Journal* No. 1, at 10, 11 (2014).

6. Limited legal representation also may arise where the lawyer represents a client in the insurance context through agreement with the insurance provider. This opinion is not intended to provide an in-depth analysis regarding ethical issues involved in insurance-defense representation or the nuances of the tripartite relationship, which are addressed in the Committee's Formal Opinion 91, "Ethical Duties of Attorney Selected by Insurer to Represent Its Insured," (1993, Addendum 2013).

7. As noted, some ethics committees have opined that it is permissible under their rules of professional conduct to provide limited representation and ghostwrite pleadings or court filings. *See* Alaska Bar Ass'n Ethics Comm., Op. 93-1, "Preparation of a Client's Legal Pleadings in a Civil Action Without Filing an Entry of Appearance" (1993); L.A. Cty. Bar Ass's Prof. Resp. & Ethics Comm., Formal Op. 502, "Lawyers' Duties When Preparing Pleadings or Negotiating Settlement for in Pro Per Litigant" (1999) (L.A. Cty. Op. 502); L.A. Cty. Bar Ass'n Prof'l Resp. & Ethics Comm., Formal Op. 483 (1995); *State Bar of Mich. Standing Comm. on Prof. & Jud. Ethics*, Op. RI-347 (2010) ("Unless there is an affirmative misrepresentation that a pro se litigant has not been assisted by a lawyer, assistance by a lawyer need not be disclosed to the tribunal under the Michigan Rules of Professional Conduct."). The ABA Standing Committee on Ethics and Professional Responsibility and the clear majority opinion among state and local bar ethics committees require some disclosure to the court when the attorney provides assistance to the client in some way that is not complete representation. *See* ABA Standing Comm. on Ethics & Prof'l Resp., Op. 07-446, "Undisclosed Legal Assistance to Pro Se Litigants" (2007); Conn. Bar Ass'n Comm. on Prof'l Ethics, Op. 98-5, "Duties to the Court Owed by a Lawyer Assisting a Pro Se Litigant" (1998); Del. State Bar Ass'n Comm. on Prof'l Ethics, Op. 1994-2 (1994); Fla. State Bar Ass'n Comm. on Prof'l Ethics, Op. 79-7 (Reconsideration) (2000); Ky. Bar Ass'n, Op. E-343 (1991); Mass. Bar Ass'n Comm. on Prof'l Ethics, Op. 98-1 (1998); N.H. Bar Ass'n Ethics Comm., "Unbundled Services – Assisting the Pro Se Litigant" (May 12, 1999); N.Y. Cty. Lawyers Ass'n Comm. on Prof'l Ethics, Op. 742, at 1 (2010); Tenn. Bd. of Prof. Resp. Formal Ethics Op. 2007-F-153, "Ghost Writing for Pro Se Litigant" (2007); Utah State Bar Ethics Advisory Comm., Op. 74 (1981); Va. State Bar Standing Comm. on Legal Ethics, Op. 1127, "Attorney-Client Relationship – Pro Se Litigant: Rendering Legal Assistance" (1988).

8. *See* State Bar of Ariz., Ethics Op. 05-06 "Limited Scope Representation; Candor to the Tribunal; Fees" (2005), for a well-written, detailed discussion of the candor concerns. *See also* Part IV infra.

9. *See* CBA Formal Op. 123, "Candor to the Tribunal and Remedial Measures in Civil Proceedings" (2011); *see also* Kan. Bar Assn. Ethics Advisory Comm., Op. 09-01 (2009).

10. *See* Ore. State Bar Formal Ethics Op. 2011-183, "Scope of Representation; Limiting the Scope" (2011); L.A. Cty. Op. 502; Wash. D.C. Bar Ass'n Ethics Op. 330, "Unbundling Legal Services" (2005). Florida Rule of Professional Conduct 4-4.2 (b) covers this issue explicitly: "An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating The Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of the time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation."

102 USE OF SUBPOENAS IN CRIMINAL PROCEEDINGS

Adopted March 21, 1998.

Introduction

This opinion addresses problems related to the misuse of subpoenas *duces tecum* in criminal proceedings.[1] Effective October 31, 1996, Rule 17(c) of the Colorado Rules of Criminal Procedure was modified to require the subpoenaing party forthwith provide a copy of a subpoena *duces tecum* to opposing counsel (or directly to the defendant if unrepresented) upon issuance. The rule change was deemed necessary, in part, because some attorneys have misused subpoenas *duces tecum* in criminal proceedings to obtain exclusive reviews of information, documents, photographs and other objects or reviews earlier than opposing counsel or an unrepresented defendant.

Syllabus

In a criminal proceeding, a lawyer may not issue or cause to be issued a subpoena for production of information, documents, photographs or other objects designated therein (a subpoena *duces tecum*) without providing a copy of the subpoena to opposing counsel or an unrepresented defendant when and as required by the applicable Rules of Criminal Procedure and governing law, unless a valid court order provides otherwise. Any attempt at subterfuge to knowingly violate the requirements of applicable rules to obtain an exclusive review of information, documents, photographs or other objects or a review earlier than other counsel or an unrepresented defendant is unethical.

It also is unethical for a lawyer to knowingly mislead the person upon whom a subpoena *duces tecum* has been served into disclosing privileged or confidential information that the witness would not otherwise knowingly reveal or be compelled to reveal except at the designated criminal proceeding and under judicial scrutiny.

If information, documents, photographs or other objects are inadvertently received from a witness on whom a subpoena *duces tecum* has been served that the lawyer knows to be, or that appear on its face to be privileged or confidential,[2] then the lawyer receiving such information has an ethical obligation to refrain from reviewing the information after becoming aware of the privileged or confidential nature of the information. The lawyer then has an ethical duty to notify the adverse party, if unrepresented, or the adverse party's lawyer and the producing witness. A lawyer must also take reasonable steps to notify the person entitled to invoke the privilege with respect to the information that the lawyer possesses such information and either follow the instructions of the person who is entitled to invoke the privilege with respect to the information or refrain from reviewing the information until a definitive resolution is obtained from the court or other tribunal.

Opinion

Rule 17(c) of the Colorado and Federal Rules of Criminal Procedure confers upon a witness subject to a subpoena *duces tecum* certain procedural and substantive rights.[3] For instance, if the person upon whom the subpoena *duces tecum* is served thinks it is unreasonable or oppressive, he or she may apply to the court to quash the subpoena. So, too, may a party to the proceeding. Because the notice requirements of Rule 17(c) were designed to protect procedural and substantive rights of a witness and/or party, any attempt at subterfuge to knowingly violate the requirements of Rule 17(c) deprives a witness or party of procedural and substantive rights, is unethical, and may also constitute criminal conduct.[4] *See* Colo. RPC 3.4, Comment [1] (evidence in a case is to be marshalled fairly, even if competitively, by the contending parties); 3.4(c) (a lawyer shall not knowingly disobey the rules of a tribunal); 4.1 (misrepresentation); 4.3 (dealings with unrepresented persons); 4.4 (respect for rights of third persons); and 8.4 (lawyers shall not engage in dishonesty, fraud, deceit or misrepresentation).

The purpose of a subpoena *duces tecum* in a criminal proceeding is to secure jurisdiction over a witness to obtain testimony, documents and/or other tangible things. Rule 17(c) subpoenas may be issued by prosecuting attorneys, counsels for defendants, or courts and compel a witness to produce documents or other physical evidence at a criminal proceeding. A party may also issue a Rule 17(c) subpoena to obtain a pretrial review of information, documents, photographs or other objects.

Colorado Rule 17(c), as amended, authorizes the issuance of a subpoena for the production of information, documents, photographs or other objects only after notice *forthwith* to all other parties to the proceeding. Federal Rule 17(c) requires notice to all other parties to the proceeding, except where the subpoena requests production at trial. *See United States v. Hart*, 826 F. Supp. 380, 381 (D. Colo. 1993) (citing authorities); *United States v. Urlacher*, 136 F.R.D. 550, 555-56 (W.D.N.Y. 1991) (citing authorities).

In the past, some prosecuting[5] and defense[6] attorneys have used, or attempted to use, subpoenas in criminal proceedings to conduct secret pretrial discovery, obtaining or attempting to obtain an exclusive review of information, documents, photographs or other objects or an earlier review than other parties. This is clearly a misuse of Rule 17(c) subpoenas, the primary purpose of which is to expedite criminal proceedings or trials by providing a time and place *before* the proceeding or trial for all the parties and their attorneys to inspect material which may be used as evidence.[7]

Communications with Subpoenaed Witnesses

In a criminal proceeding, the witness on whom a subpoena *duces tecum* is served is not required to disclose the information for which he or she has been subpoenaed except at the proceeding at which the witness has been commanded to appear. Nevertheless, a lawyer in preparing a case may want to communicate with a subpoenaed witness in advance of the proceeding. As the Committee discussed in Formal Opinion 65 and Formal Opinion 86 (Revised) [27 *The Colorado Lawyer* 93 (June 1998)], these communications are ethically permissible and encouraged if the witness is informed that there is no legal obligation to submit to the interview and no other legal or ethical impediment exists. *See* Colo. RPC 4.1 and 4.3 (dealing with truthfulness in statements to others and dealing with unrepresented persons). Consequently, it may be unethical to obtain information from a witness on whom a Rule 17(c) subpoena has been served by simply attaching a letter to the subpoena which, in effect, states that the witness need not appear at the criminal proceeding if the witness will simply deliver to the attorney by mail or otherwise the documents, records, or other information requested.

As we pointed out in Formal Opinion 86 (Revised):

> . . . if a lawyer intends to communicate with a non-party witness subsequent to the witness being served the subpoena, but prior to the document production, deposition, hearing or trial referred to in the subpoena, that lawyer should not, during the course of any communication with the nonparty witness, knowingly mislead the witness into disclosing privileged or confidential information.

During any communication with a non-party witness, a lawyer should keep in mind that the imbalance in knowledge and skill between a lawyer and a lay witness may cause even well intentioned acts of the lawyer to have a coercive impact on the witness and induce the witness to disclose privileged or confidential information. Therefore, whenever a lawyer communicates with a non-party witness, he or she should clearly identify himself or herself and state the reason for the communication. [27 *The Colorado Lawyer* 93 (June 1998).]

Inadvertent Delivery of Privileged Or Confidential Material

Despite a lawyer's giving the appropriate admonitions noted above and even in the absence of any direct communication with the witness on whom a subpoena *duces tecum* has been served, a witness may simply send documents, records, or other information sought by the subpoena to the lawyer requesting them in an attempt to obtain a release from the subpoena and an appearance at the proceeding.

Under such circumstances, a lawyer who receives documents, records, or other information that the lawyer knows to be, or that appear on its face to be, privileged or confidential should not review the

materials further after becoming aware of its privileged or confidential nature, and should notify the adverse party, if unrepresented, or the adverse party's lawyer and the producing witness. A lawyer also must take reasonable steps to notify the person entitled to invoke the privilege with respect to the information that the lawyer possesses such information and either follow the instructions of the person who is entitled to invoke the privilege with respect to the information, or refrain from reviewing the information until a definitive resolution is obtained from the court or other tribunal. *See* ABA Formal Opinion 94-382, "Unsolicited Receipt of Privileged or Confidential Materials" (July 5, 1994) and ABA Formal Opinion 92-368, "Inadvertent Disclosure of Confidential Materials" (November 10, 1992).

Conclusion

The use of a subpoena *duces tecum* to knowingly obtain information or other tangible things from a witness without notice to other parties or their counsel as required by the Rules of Criminal Procedure or order of the court is unethical. It is also unethical to knowingly mislead a witness on whom a subpoena *duces tecum* has been served into disclosing privileged or confidential information that the witness would not otherwise reveal or be compelled to reveal except at the designated criminal proceeding and under judicial scrutiny. Finally, in the event an attorney inadvertently receives information from a witness on whom a subpoena has been served that the lawyer knows to be, or that appears on its face to be, privileged or confidential, the lawyer receiving such information should notify the adverse party, if unrepresented, or the adverse party's lawyer and the producing witness. A lawyer also must take reasonable steps to notify the person entitled to invoke the privilege with respect to the information that the lawyer possesses such information and either follow the instructions of the person entitled to invoke the privilege with respect to the information or refrain from reviewing the information until a definitive resolution is obtained from the court or other tribunal.

NOTES

1. A criminal proceeding includes not only trials, but all phases of the case, including post-conviction proceedings. *Bresnahan v. District Court*, 164 Colo. 263, 434 P.2d 419 (1967).

2. For purposes of this Opinion, "confidential" documents are those that are subject to a legally recognized exemption from discovery and use in a criminal action or proceeding, even if they are not "privileged" *per se*. Examples of such confidential documents may include those subject to the work product doctrine; documents subject to a protective order that discovery not be had, that certain matters not be inquired into, or that the documents not be revealed or be revealed only in a designated way; records of services to the mentally ill pursuant to Article 10 of Title 27 of the Colorado Revised Statutes, § 27-10-120(1), C.R.S.; reports of child abuse or neglect, § 19-1-307(1)(a), C.R.S.; reports of AIDS or HIV-related illness, § 25-4-1404(1) C.R.S.; and records of the professional review committee or the committee on anticompetitive conduct of the Colorado State Board of Medical Examiners or a governing board of any organization of health care providers which has authority to take final action regarding the recommendations of any authorized professional review committee, § 12-36.5-104(10)(a), C.R.S. In contrast, for purposes of this Opinion, "confidential" documents do *not* include documents as to which some person has an expectation of privacy or confidentiality, but which are not subject to a legally recognized exemption from discovery or use in a criminal action or proceeding, such as research, development or commercial information; and personal correspondence or diaries (assuming that some other privilege does not otherwise attach to the letters or diaries, such as the attorney-client privilege or the Fifth Amendment privilege against self-incrimination).

3. Rule 17(c) of the Colorado Rules of Criminal Procedure states that "[a] subpoena may also command the person to whom it is directed to produce books, papers, documents, photographs, or other objects designated therein" and adds the requirement: "[*T]he subpoenaing party shall forthwith provide a copy of the subpoena to opposing counsel (or directly to the defendant if unrepresented) upon issuance.* The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents, photographs, or objects designated in the subpoena be produced before the court at a time prior to trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers,

documents, photographs, or objects or portions thereof to be inspected by the parties and their attorneys." (*New language emphasized*.)

Rule 17(c) of the Federal Rules of Criminal Procedures provides for production of documentary evidence and of objects: "A subpoena may also command the person to whom it is directed to produce the books, papers, documents, photographs, or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents, photographs, or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents, photographs, or objects or portions thereof to be inspected by the parties and their attorneys."

4. *See also* C.R.S. § 18-4-412 (class 6 felony to obtain a medical record or medical information without proper authorization).

5. *See United States v. LaFuente*, 991 F.2d 1406, 1411 (8th Cir. 1993) ("The practice of using trial subpoenas to compel witnesses to attend pretrial conferences is improper under Rule 17 of the Federal Rules of Criminal Procedure."), *appeal after remand*, 54 F.3d 457 (8th Cir.), *cert. denied*, 116 S. Ct. 264 (1995); *United States v. Keen*, 509 F.2d 1273, 1274 (6th Cir. 1975) ("highly improper" for prosecutor to use subpoenas to compel attendance at pretrial interviews); *United States v. Hedge*, 462 F.2d 220, 222-223 (5th Cir. 1972) (use of subpoenas to compel attendance at pretrial conference is "irregularity" not authorized by Rule 17(a)); *United States v. Standard Oil Co.*, 316 F.2d 884, 897 (7th Cir. 1963) (same); *cf. United States v. DiGilio*, 538 F.2d 972, 985 (3d Cir. 1976) ("Rule 17 does not . . . authorize the use of grand jury subpoenas as a ploy for the facilitation of office interrogation."), *cert. denied sub nom. Lupon v. United States,* 429 U.S. 1038 (1977).

6. *United States v. Hart*, 826 F.Supp. 380 (D. Colo. 1993) (no *ex parte* procedure for issuing subpoenas for production of documents authorized by Rule 17(c)); *United States v. Urlacher*, 136 F.R.D. 550 (W.D.N.Y. 1991) (Rule 17(c) does not support *ex parte* procedures for or issuance of subpoena *duces tecum*).

7. Normally, under a subpoena *duces tecum* the documents and other things called for would be brought into court at the time of the hearing or trial. Rule 17(c) provides that in the proper case, a court may direct that in advance of the time that they are offered into evidence, they may be inspected in court, unless the court directs otherwise, to enable the requesting party to see whether the evidence can be used and whether he or she wants to use it. Proceedings of the Institute on Federal Rules of Criminal Procedure (New York University School of Law, Institute Proceedings, Vol. VI, 1946), pp. 167-168.

103 PROPRIETY OF COMPENSATING A NON-EXPERT WITNESS IN A CIVIL ACTION

Replaces Formal Opinion 44.
Adopted December 19, 1998.

Introduction and Scope

Attorneys routinely compensate expert witnesses in civil actions for expenses incurred by the experts in preparing for and testifying at trials, hearings and depositions and for the experts' time expended in testifying and preparing to testify. Often, non-expert witnesses in civil actions also ask to be compensated for their expenses incurred and for their time expended in testifying and preparing to testify. This opinion addresses the issue of whether an attorney ethically may compensate a non-expert witness in a civil action for the expenses incurred by the witness in testifying at a trial, hearing or deposition and for the time expended by the witness in testifying and preparing to testify at a trial, hearing or deposition in a civil action. This opinion does not address the issue of witness compensation in a criminal case.

Syllabus

An attorney ethically may reimburse a non-expert witness in a civil action not only for expenses incurred in testifying at a trial, hearing or deposition, but also for the reasonable value of the witness's time expended in testifying and in preparing to testify, so long as such reimbursement is not contingent upon the content of the witness's testimony or the outcome of the case and is not prohibited by law. The amount of such compensation must be reasonable based on all relevant circumstances, determined on a case-by-case basis.

Analysis

Rule 3.4(b) of the Colorado Rules of Professional Conduct provides that a lawyer shall not "falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."

Comment [3] to this Rule states:

> With regard to paragraph (b), it is not improper to pay a witness' expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

This Colorado Rule and its Comment [3] track Rule 3.4(b) of the Model Rules of Professional Conduct (1983, as amended) and its Comment [3] identically on this issue. The American Bar Association Standing Committee on Ethics and Professional Responsibility has published a formal ethics opinion interpreting Model Rule 3.4(b). ABA Formal Opinion 96-402 (8/2/96). In that opinion, the ABA reasoned as follows:

> Reading Comment [3] literally, compensating a witness for loss of time which he could have devoted to other pursuits does not constitute payment of an "expense" incurred by the witness. Nor, on the other hand, does compensating a witness for his loss of time amount to paying him a "fee for testifying." Indeed, the precursor of Model Rule 3.4, DR 7-109 of the Model Code of Professional Responsibility, expressly permitted "reasonable compensation to a witness for his loss of time in attending or testifying," [footnote omitted] and there is nothing in the history of Rule 3.4 to indicate that the drafters of the Model Rules intended to negate this concept by using the language that they did. In addition, such compensation is implicitly authorized by certain statutes and court decisions. See, for example, 18 U.S.C. Section 201 (j), which provides that payment to lay witnesses for "the reasonable value of time lost in attendance at any such trial, hearing or proceeding" do not violate federal bribery

> statutes. The Committee therefore concludes that payment for loss of time is not prohibited by Model Rule 3.4.

The Colorado Bar Association Ethics Committee agrees with the reasoning of the ABA.

The precursor of the Colorado Rules of Professional Conduct, the Colorado Code of Professional Responsibility, was identical on this issue to the Model Code cited in the ABA Opinion. DR 7-109(C) stated:

> A lawyer shall not pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:
>
> 1) Expenses reasonably incurred by a witness in attending or testifying.
>
> 2) Reasonable compensation to a witness for his loss of time in attending or testifying.
>
> 3) A reasonable fee for the professional services of an expert witness.

Colorado statutes specifically provide for the payment of fees and mileage expenses to witnesses. C.R.S. §§ 13-33-102(1) through 102(3) set forth fees that witnesses shall receive for their attendance in various courts in Colorado. C.R.S. § 13-22-102(4) provides that witnesses called to testify regarding opinions founded on special study or experience in any branch of science or to make scientific or professional examinations and state the result thereof shall receive additional compensation. C.R.S. § 13-33-103 sets forth mileage fees that witnesses shall receive. These statutes do not prohibit compensation to witnesses in excess of the amounts specified.

Furthermore, compensating a witness for a reasonable amount of time spent preparing to testify, such as time spent reviewing and researching records that are germane to his or her testimony or time spent in pretrial interviews, is not prohibited by Rule 3.4, so long as it is made clear to the witness that the compensation is not for the substance or efficacy of the witness's testimony, but solely to compensate the witness for the time he or she expended in order to give testimony. ABA Formal Opinion 96-402 (8/2/96); State Bar of Arizona Committee on the Rules of Professional Conduct, Formal Opinion 97-07 (10/31/97); State Bar of Michigan Standing Committee on Professional and Judicial Ethics, Opinion RI-117 (2/24/92); Illinois State Bar Association, Advisory Opinion 87-5 (1/29/88). *Compare* Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Opinion 95-126 (9/26/95) (disfavoring compensation to non-expert witnesses for time invested in preparing for testimony).

There are, however, ethical limitations on compensating witnesses. Rule 3.4 explicitly prevents an attorney from offering an inducement to a witness that is prohibited by law. Furthermore, compensation paid to a witness must be reasonable so as to avoid affecting, even unintentionally, the content of the witness's testimony. ABA Formal Opinion 96-402 (8/2/96).

In *People v. Attorney A*, 861 P.2d 705 (Colo. 1993), an attorney, in an effort to save his client's privilege to drive, improperly offered to have his client plead guilty in a criminal case to the original charge of driving under the influence of alcohol, rather than the lesser charge of driving while ability impaired, if the arresting officer would agree not to appear at a license revocation hearing arising from the client's refusal to submit to a blood-alcohol test. The Colorado Supreme Court ruled that the attorney should be disciplined because his conduct was prejudicial to the administration of justice, in violation of DR 1-102(A)(5) of the former Code of Professional Responsibility.

In *People v. Belfor*, 591 P.2d 585 (Colo. 1979), the Colorado Supreme Court suspended an attorney for one year for paying a judgment that had been entered against a witness in a separate civil action as either a gift to the witness to induce him to provide testimony favorable to the attorney's client, or a loan with a contingency that it would be forgiven if the witness testified favorably. The Court found that the attorney's conduct violated DR 7-109(C), as well as several other provisions, of the former Code of Professional Responsibility.

Colorado statutes also make it a crime to bribe a witness, intimidate a witness or tamper with a witness. *See* C.R.S. §§ 18-8-701 through 18-18-708.

Other jurisdictions have held that in certain circumstances the compensation paid to non-expert witnesses was improper. In *Committee on Legal Ethics of the West Virginia State Bar v. Sheatsley*, 452

S.E.2d 75 (W. Va. 1994), the court publicly reprimanded an attorney for acquiescing in the payment of money to a witness in a racial discrimination case if the case was decided favorably to the attorney's client, or if all proceedings were voluntarily withdrawn by the complainant.

In *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Association*, 865 F.Supp. 1516 (S.D. Fla. 1994), the court held that an insurer's attorneys violated Rule 3.4(b) by acquiescing in and actively assisting in the payment of substantial sums to two fact witnesses in a case involving insurance coverage for the theft of over $9 million worth of gold. One witness negotiated payments totaling $260,000 for his participation in the civil action, including $95,000 for giving two depositions, $65,000 for living expenses, and $100,000 as a reward for original information. The other witness was paid $25,000 for giving a deposition, $25,000 for original information, $22,000 for living expenses, and $72,000 for agreeing to appear to testify at a criminal trial. Payment was contingent on three conditions: (1) the testimony had to be truthful; (2) the testimony had to be material; and (3) the testimony had to be helpful to the insurer in the defense of the civil action. *Id*. at 1524-25. The court stated that Rule 3.4(b) clearly prohibits a lawyer from "paying or offering to pay money or other rewards to witnesses in return for their testimony, be it truthful or not, because it violates the integrity of the justice system and undermines the proper administration of justice." *Id*. at 1526. The court concluded that the insurer's repeated payments of substantial sums of money to the witnesses had an effect on the testimony they gave. That the insurer's willingness to pay was contingent on the condition that the testimony had to be helpful to the insurer in its defense of the civil action made "even more pronounced the subversive and egregious nature" of the insurer's and its counsel's actions. *Id*. at 1526.

In *Wagner v. Lehman Brothers Kuhn Loeb Incorporated*, 646 F. Supp 643 (N.D. Ill. 1986), the court ruled that an attorney violated DR 7-109(C) of the Code of Professional Responsibility by acquiescing in his client's agreement to pay a witness up to 20 percent of his potential recovery in return for the witness's testimony. *Id.* at 656.

In determining the reasonableness of the compensation paid to a witness, the attorney must determine each situation on an individual basis, based on all relevant circumstances. ABA Formal Opinion 96-402 (8/2/96). As stated by the New York State Bar Association Committee on Professional Ethics:

> We must attempt to draw the line between compensation that enhances the truth seeking process by easing the burden of testifying witnesses, and compensation that serves to hinder the truth seeking process because it tends to "influence" witnesses to "remember" things in a way favorable to the side paying them.

New York State Bar Association Committee on Professional Ethics, Opinion 668 (6/3/94). For this reason, compensation to a witness ethically may not be contingent upon the content of the witness's testimony or the outcome of the case.

What is a reasonable amount may be determined easily for a witness who is paid on an hourly basis and who actually has lost wages due to time away from work. If the witness is salaried and is paid by his or her employer despite missing time from work, the attorney paying the compensation should attempt to determine if the employer, rather than the witness, should be reimbursed for the witness's time away from work.

The determination of reasonableness may be more difficult where the witness is self-employed, retired, or unemployed. This Committee will not attempt to define what is reasonable compensation in all circumstances, as that is a fact-specific determination that will vary from case to case. Ethics opinions from other jurisdictions, however, provide some guidance on the matter. "Possible objective bases upon which to determine reasonable compensation might include the witness' rate of pay if currently employed, what the witness last earned if currently unemployed, or what others earn for comparable activity." California State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion 1997-149 (1997). Reasonable compensation may be determined by considering what the individual could expect to be paid in the ordinary course of his or her profession or business. New York State Bar Association Committee on Professional Ethics, Opinion 668 (6/3/94). However, "a fee that is too high will tend to appear as an improper, unethical inducement," and "a fee may appear unreasonable if the fee is so high that the witness is

'better off' than she would have been if she spent the time otherwise earning an income rather than testifying or preparing to testify." State Bar of Arizona Committee on the Rules of Professional Conduct, Formal Opinion 97-07 (10/31/97).

An attorney should keep in mind that compensation paid to a witness may be discoverable in the course of the litigation, and evidence thereof may be admissible at trial. Even though compensating a witness ethically may be permissible in a civil action, such compensation is not necessarily advisable in any and all circumstances. Furthermore, this committee expresses no opinion on the legal question of whether compensation paid to a non-expert witness is recoverable as an item of costs. *See Cherry Creek School District v. Voelker*, 859 P.2d 805, 812-14 (Colo. 1993); *Crawford v. French*, 633 P.2d 526 (Colo. App. 1981).

104 SURRENDER OF PAPERS TO THE CLIENT UPON TERMINATION OF THE REPRESENTATION

Adopted April 17, 1999.

Introduction and Scope

The Ethics Committee has received numerous inquiries concerning the responsibility of the lawyer to surrender papers and property to the client upon termination of the representation. These inquiries generally relate to the obligations of the lawyer to deliver the documents and involve discussion of which papers and property the client is entitled to receive. Such debates can be especially difficult when the client's newly-retained counsel seeks delivery of the file from the terminated lawyer, and the steps taken in the course of representation in the past are being challenged or questioned. The purpose of this opinion is to address the general obligations of lawyers to surrender the file upon demand after termination and to discuss what does, or does not, constitute the papers and property to which the client is entitled.

This opinion does not address those situations where a lawyer has not been fully paid and the lawyer is asserting a retaining lien on client papers. For a discussion of the lawyer's duties in these circumstances, see, CBA Ethics Committee Formal Opinion 82, "Assertion of Attorney's Retaining Lien on Client's Papers," (April 15, 1989, addendum issued, 1995).[1] For purposes of this opinion, the Committee assumes the lawyer has not asserted a retaining lien upon the papers.

This opinion also does not address the specific obligations of the lawyer to retain and preserve files after closure of the representation.[2] See, "Coping with the Avalanche: A Survey on the Disposition of Client Files" by Doris Truhlar and Joseph de Raismes, *The Colorado Lawyer*, October 1987.[3] Finally, this opinion does not address whether and under what circumstances all or any part of a lawyer's file may be subject to disclosure or discovery in civil and criminal proceedings pursuant to applicable law and rules of court.

Syllabus

The primary ethical obligation of a lawyer upon termination of the representation is to take the steps necessary, to the extent reasonably practicable, to protect the client's interests. One of these steps involves the lawyer's duty to surrender papers and property to which the client is entitled. Lawyers consistently have been disciplined for blanket refusals to surrender the file to the client upon demand. Since the client may be uninformed about what is, or is not, contained in the file, the lawyer may inquire as to the needs of the client; however the lawyer should understand that it may be difficult for the client to define what is required. Interrelated with the obligation to protect the client's interests is the lawyer duty to define the client's needs liberally. In this context, the client's entitlement is not completely defined by traditional concepts of property and ownership. Rather, the entitlement is based on the client's right to access to the documents related to the representation to enable continued protection of the client's interests.

There are two primary areas in which the lawyer properly retains papers and documents which do not constitute papers and property to which the client is entitled. One includes documents, used by the attorney to prepare initial documents for the client, in which a third party, e.g., another client, has a right to non-disclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the present client. However, the product drafted by the lawyer may not be withheld.

A second area involves those documents that would be considered personal attorney-work product, and not papers and property to which the client is entitled. 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.

Detailed definition of this second category is difficult. The distinction in this area is factually specific to each situation and must be determined by the lawyer, realizing that the lawyer has a duty to take those steps reasonably practicable to protect the client's interests by surrendering the necessary information. Generally, such duty favors production.

In the event that personal attorney-work product is intertwined with information that should be surrendered, the lawyer should produce factual information in the form of a summary or with personal impressions redacted if necessary. Given the variety of factual circumstances that may arise and the fact that Colorado courts have not addressed this area, the Committee provides its own analysis together with a summary of authorities from other jurisdictions to assist the lawyer in analyzing the particular situation which the lawyer may face. In the event of a dispute regarding production of documents in the context of litigation, a review of the documents *in camera* may be necessary.

Under Colo. RPC 1.16(d), all papers and property to which the client is entitled must be surrendered upon demand within a reasonable time, regardless of duplication costs. In the event that the lawyer decides to retain a copy of these papers and property for the lawyer's own purposes, the duplication costs for these items are not properly billed to the client. However, in the event that the lawyer voluntarily produces personal attorney-work product, it is appropriate for the attorney to charge the duplication costs of these documents to the client.

It is undecided under Colorado law whether an agreement between the lawyer and the client regarding duplication costs is binding as a matter of contract. While the payment of such charges may be purely a contractual matter, the Committee believes that the terms of such an agreement must be reasonable and otherwise must not violate the Colorado Rules of Professional Conduct. However, retention of papers and property to which the client is entitled until such costs have been paid is subject to the same exceptions to the right of retention as under a properly asserted retaining lien. *See* CBA Ethics Committee Formal Opinion 82.

Discussion of the Lawyer's General Obligations

Colo. RPC 1.16(d) states:

> 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 that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law. (Emphasis added.)

The Colorado Supreme Court consistently has recognized the client's right to the prompt delivery of papers and property to which the client is entitled upon termination of the representation, and the Court consistently has disciplined lawyers for failure to do so. *See People v. Rishel*, 956 P.2d 542 (Colo. 1998); *People v. Holmes*, 951 P.2d 477 (Colo. 1998); *People v. Davis*, 950 P.2d 596 (Colo. 1998); *People v. Kuntz*, 942 P.2d 1206 (Colo. 1997); *People v. McKee*, 942 P.2d 494 (Colo. 1997); *People v. Mannix*, 936 P.2d 1285 (Colo. 1997); *People v. Wallace*, 936 P.2d 1282 (Colo. 1997); *People v. Reynolds*, 933 P.2d 1295 (Colo. 1997); *People v. Ebbert*, 925 P.2d 274 (Colo. 1996); *People v. Damkar*, 908 P.2d 1113 (Colo. 1996); *People v. Kuntz*, 908 P.2d 1110 (Colo. 1996); *People v. Jamrozek*, 914 P.2d 350 (Colo. 1996); *People v. Sigley*, 917 P.2d 1253 (Colo. 1996); *People v. Crews*, 901 P.2d 472 (Colo. 1995); *People v. Tucker*, 904 P.2d 1321 (Colo. 1995); *People v. Retru*, 884 P.2d 721 (Colo. 1994); *People v. Johnson*, 881 P.2d 1205 (Colo. 1994); *People v. Felker*, 770 P.2d 402 (Colo. 1989). In each of these cases, the lawyer was disciplined for refusing or failing to deliver, after client request, papers to which the client was entitled. The emphasis has been on recognizing the lawyer's duty to protect the client's interests rather than in defining in detail what constitutes the "papers and property to which the client is entitled" under Rule 1.16(d).

Since Rule 1.16(d) does not define what constitutes the "papers and property to which the client is entitled," such definition must be derived from the purpose of the rule, which is furtherance of the lawyer's principal ethical duty reasonably to protect the client's interests: "[u]pon termination of the representation, a

lawyer shall take steps to the extent reasonably practicable to protect a client's interest . . ." In this context, it is the Committee's opinion that the papers and property to which the client is entitled are not necessarily defined by traditional concepts of property and ownership. Rather, the entitlement is based on the client's right to access to the files related to the representation as a means to enable continuing protection of the client's interests.

Therefore, upon termination of the attorney-client relationship, except where there is a validly asserted retaining lien, the client should be provided those documents and other property provided by the client and such originals and copies of other documents possessed by the lawyer relating to the representation that the client reasonably needs to protect the client's interests. This duty is subject to consideration of the narrow qualifications outlined below.

This position is consistent with the majority of cases and ethics opinions that conclude that upon termination of the attorney-client relationship, the client has the right to full access to the file on the represented matter, subject to a few qualifications discussed below. For a discussion of situations where these concerns have been addressed, *see In the Matter of Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn, L.L.P.*, 91 N.Y.2d 30, 689 N.E.2d 879, 666 N.Y.S.2d 985 (1997), citing *Resolution Trust Corp. v. H. P.C.*, 128 F.R.D. 647 (N.D. Tex. 1989); State Bar of Georgia, Formal Advisory Op. No. 87-5; Massachusetts Rules of Court, Rule 3.07, DR 2-110[A][4] (West, 1997); Ohio Supreme Ct. Bd. Of Comm'rs On Grievances and Discipline, Op. No. 92-8; *Maleski v. Corporate Life Ins. Co.*, 163 Pa. 36, 641 A.2d 1 (Pa. Commw. 1994); State Bd. of California Standing Committee On Professional Responsibility and Conduct, Formal Op. No. 1992-127; Connecticut Bar Ass'n Committee On Professional Ethics, Op. No. 94-1; State Bar of Michigan Commission on Professional and Judicial Ethics, Syllabus CI-926 (1983); Oregon State Bar Ass'n, Op. No. 1991-125. The lawyer must deliver originals and copies of other documents that the lawyer has which relate to the representation and which the client reasonably needs. *See* Restatement (Third) of the Law Governing Lawyers, American Law Institute, § 58(3), comment d (1998).

The Committee notes that Rule 1.16(d) requires the lawyer, to the extent reasonably practicable to protect the client's interest, to "surrender" all papers and property to which the client is entitled. The use of this term is intentional and establishes an affirmative obligation upon the lawyer to relinquish possession after demand. While it is appropriate for a lawyer to request a reasonable period to produce the file, a lawyer may not ignore or refuse a client's request for such papers and property.

An ambiguous request should be met with some inquiry by the lawyer. *See Dubose v. Shelnutt*, 566 So.2d 921 (Fla. App. 5 Dist. 1990)(client request for "depositions of following witnesses" placed a duty on the lawyer to call the client and find out exactly what the client needed.) *See also Matter of Struthers*, 877 P.2d 789 (Ariz. 1994); *Finch v. State Bar of California*, 170 Cal. Rptr. 629, 621 P.2d 253 (Cal. 1981); *People v. Damkar*, 908 P.2d 1113 (Colo. 1995); *Matter of Kelly*, 655 N.E.2d 1220 (Ind. 1995); *Comm. on Prof. Ethics & Conduct v. Leed*, 477 N.W.2d 390 (Iowa 1991); *Matter of England*, 894 P.2d 177 (Kan. 1995); *Kentucky Bar Ass'n v. Delahanty*, 878 S.W.2d 795 (Ky. 1994); *In re Turissini*, 655 So.2d 327 (La. 1995), *In re Disciplinary Action Against Cowan*, 540 N.W.2d 825 (Minn. 1995); *Matter of DePietropolo*, 603 A.2d 951 (N.J. 1992); *Cleveland Bar Ass'n v. Bancsi*, 651 N.E.2d 949 (Ohio 1995); *Matter of Meeder*, 463 S.E.2d 312 (S.C. 1995); *In re McCarty*, 665 A.2d 885 (Vt. 1995); *State Bar Committee on Legal Ethics v. Karl*, 449 S.E.2d 277 (W. Va. 1994); *but see Matter of Curtis*, 908 P.2d 472 (Ariz. 1995) (lawyer did not violate prompt return provision where the client had retained originals and had given the lawyer copies).

Numerous questions may arise concerning the costs of duplication of the papers and property at the time of delivery. Generally, consistent with recognition that the file must be surrendered to the client, absent agreement to the contrary, it is the lawyer's responsibility to bear duplication costs if the lawyer believes that the lawyer should retain a copy.[4] The fact that copies of documents may have been provided to the client previously does not eliminate the responsibility of the lawyer to provide the client with the file. If the lawyer wishes to keep copies of the documents to which the client is entitled, the lawyer can do so at the lawyer's own expense.

Unless there is a valid agreement to the contrary, refusal to provide the papers and property contained in the file until the client pays duplication costs restricts the client's right to the file and is

improper. *See McKim v. State*, 528 N.E.2d 484 (Ind. App., 1 Dist. 1988) (attorney could not refuse to relinquish documents contingent upon client payment of copying costs); *In re Admonition Issued in Panel File No. 94-24*, 533 N.W.2d 852 (Minn. 1995); *In re X.Y.*, 529 N.W.2d 688 (Minn. 1995); Alaska Ethics Opinion 95-6 (1995); Kansas Ethics Opinion 92-05 (1992); Michigan Ethics Opinion RI-203 (1994). Note, however, that this responsibility would not necessarily apply to those categories of documents to which the client is not entitled as further discussed in this opinion in the event that the lawyer voluntarily decides to make these documents available to the client.

The Committee is aware that many fee agreements seek specifically to establish the obligations of the lawyer and client for payment of duplication costs. While the payment of such charges may be purely a contractual matter, *see,e.g.*, ABA Informal Op. 1376 (Feb. 18, 1977), the Committee believes that such terms must be reasonable and otherwise must not violate the Colorado Rules of Professional Conduct. Retention of documents contingent upon payment of duplication costs is subject to the same exceptions that apply to a properly asserted retaining lien as discussed more completely by the Committee in CBA Ethics Committee Formal Opinion 82. *See Kallsen v. Big Horn Harvestore Systems, Inc.*, 761 P.2d 292 (Colo. App. 1988).

Documents to Which the Client is Not Entitled

Documents Protected from Disclosure Based Upon Third Party Interests

The client is not entitled to the production of documents obtained from or prepared for a third party, most commonly another client, that are used by the lawyer as guides or models in the current representation. The lawyer is not required to disclose documents that may violate the duty of confidentiality and nondisclosure owed to some third party, or otherwise imposed by law.[5] In the event that a pleading from a file related to the representation of a third party was used as a draft for the requesting client, it properly may be withheld. However, the pleading that was drafted for the requesting client from that model is not within this exception. Drafts of pleadings, if maintained in the file and not destroyed in the normal course of the representation, should be produced.

Personal Attorney-Work Product

Authorities differ as to the responsibility of the lawyer to produce personal attorney-work product that is contained in the file.[6] These discussions focus on varying definitions of what constitutes personal attorney-work product and the lawyer's responsibilities related to various portions of documents identified as personal attorney-work product.

Virtually all authority that has discussed this category recognizes that personal attorney-work product does not include documents belonging to the client or documents which are the "end product" of the attorney's services. These documents must be produced to the client. End product items include pleadings filed in the action, correspondence with the client, opposing counsel and witnesses, and final versions of contracts, wills, corporate records and similar records prepared for the client's actual use. *See*, *e.g.*, Illinois State Bar Ass'n, Op. No. 94-13.

While there is some authority to the contrary,[7] the majority of authority asserts that preliminary drafts, legal research, and legal research memoranda are not properly retained by the attorney as personal attorney-work product and must be surrendered. The Committee agrees with this view.[8]

Internal firm administration documents, such as conflicts checks and personnel assignments, properly are retained as personal attorney-work product. The lawyer may withhold certain firm documents that were intended for law office management or use. Production would not be needed to protect the client's interests in the matter.

It is much more difficult to address personal lawyer notes, especially those notes containing personal impressions and comments. While recognizing that clear direction in this area depends on the specific facts encountered by a lawyer, the Committee reminds lawyers that the client's interests must be protected to the extent reasonably practicable. For example, if certain lawyer notes contain factual

information, such as the content of client interviews, the information in those notes should be delivered to the client. In the event that certain personal impressions are intertwined with such factual information, those notes could be redacted or summarized to protect the interests of both the client and the lawyer.

Some authority has applied definitions in this area that do not mirror the opinion of the Committee stated in this opinion. Various definitions of "work product" and accompanying discussions can be found in: *In the Matter of Sage Realty Corp.*, *supra*, ("documents containing a firm attorney's general or other assessment of the client, or tentative preliminary impressions of the legal or factual issues presented in the representation, recorded primarily for the purposes of giving internal direction to facilitate performance of the legal services entailed in that representation"); ABA Informal Opinion 1376 (Feb. 18, 1977) ("lawyer need not deliver [to client] his internal notes and memos which have been generated primarily for his own purpose in working on the client's problem"); Arizona Ethics Opinion No. 81-32 (papers and documents belonging to client do not include "attorney's own notes and memos to himself; nor his myriad scratchings on note sheets; nor records of passing thoughts dictated to a machine or a secretary and placed in the file; nor ideas, plans or outlines as to the course the attorney's representation is to take"); Delaware Ethics Opinion 1997-5 (Nov. 5, 1997) ("lawyer's working notes, impressions and draft documents"); Illinois Ethics Opinion No. 94-13 (Jan. 1995) ("lawyer's notes, drafts, internal memoranda, legal research and factual research materials, including investigative reports, prepared by or for the lawyer for use of the lawyer in the representation"); Kansas Ethics Opinion 92-05 (July 30, 1992) (includes attorney's "recorded mental impressions, research notes, legal theories, and unfiled pleadings included in the client's file"); ABA/BNA Lawyer's Manual on Professional Conduct 31:1206 (examples of lawyer's work product include "recorded mental impressions, research notes, legal theories, and unfiled draft documents").

The lawyer should err on the side of production. If documentation is retained and production requests persist, disputes concerning access to documents which the lawyer perceives to be personal attorney-work product may need to be resolved by a court after judicial inspection of the documents *in camera*. *See, e.g.*, *People v. Salazar*, 835 P.2d 592 (Colo. App. 1992).

NOTES

1. CBA Formal Ethics Opinion 82 recognizes that a lawyer ethically may assert a retaining lien on a client's papers, thereby keeping the papers, when the client is financially able to pay outstanding fees, but fails or refuses to do so. If, however, one or more of the following circumstances is present, then a lien may not be asserted: (1) there is no legal basis for the assertion of the lien; (2) the lawyer has been suspended or disbarred; (3) the lawyer is guilty of misconduct in the particular matter; (4) the representation is in a contingency fee case prior to completion of the case; (5) the client furnishes adequate security; (6) the client's papers are essential to the preservation of an important personal liberty interest; (7) the lawyer has withdrawn without just cause or reasonable notice; (8) the lawyer is validly discharged for professional misconduct or conduct prohibited by the Colorado Rules of Professional Conduct; and (9) the client is financially unable to post a bond or pay the fees, unless the client's inability to pay or post bond is a result of fraud or gross imposition by the client.

2. The Committee notes that the duty to surrender papers to the client to the extent reasonably practicable to protect the client's interests is not identical to the obligations of the lawyer to preserve the file. While certain documents might be withheld since they are contained in one of the exceptions addressed in this opinion, the fact that the lawyer has retained these documents does not diminish the obligation to preserve the file as that obligation is defined by agreement or by law. Discussion of this obligation is beyond the scope of this opinion.

3. Consistent with the suggestions raised by the authors of the cited article, the Committee encourages lawyers to address matters concerning file disposition in the initial retention letter or fee agreement, or in writing upon completion of representation in the matter.

4. The Committee notes that there are certain circumstances in which the lawyer is required to maintain copies of certain documents for a period of time regardless of production to the client. *See, e.g.,* C.R.C.P., Chapter 23.3, Rules Governing Contingent Fees, Rule 4(b) (retention of a copy of each contingent fee agreement for a period of six years); Colo. RPC 1.15(a), (complete records of [trust] account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation).

5. In certain areas of practice, lawyers are subject to court orders that prohibit the disclosure of certain documents or certain information to the client. This opinion does not address documents covered by such court orders.

6. The authorities that discuss this issue unfortunately use the term "work product." The Committee emphasizes that this term may be misleading in that it could be confused with "work product" which is protected against discovery because it relates to mental impressions, conclusions, opinions, or legal theories of an attorney concerning a matter in litigation. For purposes of this opinion, "personal attorney-work product" relates to that portion of the file, such as firm administrative documents, conflicts checks, personnel assignments, and personal lawyer notes reflecting attorney impressions, that is not needed to protect the client's interests and, therefore, need not be produced pursuant to RPC 1.16(d).

7. *See Federal Land Bank v. Federal Intermediate Credit Bank*, 127 F.R.D. 473, mod. 128 F.R.D. 182 (S.D. Miss. 1989); *Corrigan v. Armstrong, et. al.*, 824 S.W.2d 92 (Mo. App. 1992); Alabama State Bar, Formal Ethics Opinion RO-86-02; Arizona State Bar Committee on Rules of Professional Conduct, Opinion No. 92-1; Illinois State Bar Ass'n, Opinion No 94-13; North Carolina State Bar Ethics Committee, RPC 178 (1994); Rhode Island Supreme Ct. Ethics Advisory Panel, Opinion No. 92-88 (1993). The Committee disagrees with these authorities to the extent they state that the client is required to establish some specific need for the documents since it may be especially difficult for the client to establish that need when the client is unaware of what the file contains.

8. Preservation of drafts of documents in the ordinary course of the attorney's business is not a matter addressed by this opinion. However, if a lawyer does retain such drafts, they generally are papers to which the client is entitled.

105 OPINION ON TEMPORARY LAWYERS

Adopted May 22, 1999.

Introduction and Scope

The provision of legal services to clients and the public has undergone changes in recent years due to rapidly changing technology and economic factors affecting the supply and demand for lawyers' services. These changes include significant increases in the number of attorneys admitted to practice, increasing specialization of lawyers, increased and sometimes prohibitive costs of legal services and resulting pressures to reduce costs and expenses, technology that permits attorneys to work outside of the traditional office setting with greater ease, and the desire of many lawyers to achieve flexibility in their working schedules. As a result, alternative methods of practice have emerged; these include lawyers offering their services as "temporary" lawyers to other lawyers, law firms, or corporate or other institutional legal departments to work or assist on specific projects or matters.[1] The temporary lawyer may offer his or her services individually or through the auspices of a placement agency.[2]

The use of the services of temporary lawyers as a means of providing legal services to clients warrants consideration of the ethical problems or issues that might be encountered by both the temporary lawyer and the lawyer or firm utilizing such services. Considering the myriad of possible arrangements by which temporary legal services can be provided or utilized, this opinion does not attempt to comment on the ethical considerations implicated in every possible arrangement. Rather, this opinion addresses certain general ethical principles involved in the provision of legal services or assistance by temporary lawyers who are not otherwise regularly employed by the employing lawyer or law firm.[3]

This opinion is based on the premise that an attorney-client relationship exists between the temporary lawyer and the client(s) represented by the engaging law firm for whom the temporary lawyer provides services. While this opinion attempts to address certain key ethical issues facing both the temporary lawyer and the engaging law firm, the temporary lawyer must consider and observe all ethical duties arising from the attorney-client relationship. Among these are the duty to provide competent representation under Colo. RPC 1.1; to act with reasonable diligence under Colo. RPC 1.3; to protect the confidentiality of information relating to the representation under Colo. RPC 1.6; and to exercise independent professional judgment under Colo. RPC 2.1. In short, the temporary lawyer must observe all duties owing from lawyer to client, notwithstanding the temporary nature of the relationship or the interposition of the law firm.

Syllabus

A temporary lawyer represents the client of the employing lawyer or law firm, and the application of various provisions of the Colorado Rules of Professional Conduct is determined based upon such attorney-client relationship. The proscriptions of the Rules of Professional Conduct relating to conflicts of interest apply to the temporary lawyer regardless of the extent or duration of his or her representation of the client. Conflicts of interest of the temporary lawyer or the engaging lawyer or law firm may be imputed, one to the other, depending upon whether the circumstances surrounding the engagement establish that the temporary lawyer is associated with the engaging lawyer or with other lawyers in the engaging law firm. Whether such an association exists involves a functional analysis of, *inter alia,* the degree to which the temporary lawyer or the firm has access to information regarding each other's other clients. Prior to the employment, both the engaging lawyer or law firm and the temporary lawyer have the responsibility to identify actual or potential conflicts of interest and to take appropriate measures to insure against imputed disqualification. Such responsibilities cannot be delegated to a placement agency.

Whether the financial arrangement between the temporary lawyer and the engaging lawyer or law firm constitutes a division of fees, implicating the requirements of Colo. RPC 1.5(d), depends on whether

the temporary lawyer's compensation is directly tied to or dependent upon the client's payment of fees to the engaging lawyer or law firm. If the temporary lawyer's fees are tied to, or dependent upon, payment by the client, there is a division of fees. If the temporary lawyer is entitled (and the engaging lawyer or firm is obligated) to payment of his or her fees irrespective of payment by the client, the arrangement does not constitute a division of fees. Even if there is no division of fees requiring disclosure to and consent of the client, other applicable rules may require disclosure of the arrangement to the client under the circumstances.

Where the services of a placement agency are employed, both the temporary lawyer and engaging lawyer or law firm must insure that the financial arrangements do not involve the sharing of legal fees with non-lawyers in violation of Colo. RPC 5.4(a), and that contractual arrangements with the placement agency do not constitute an unreasonable restriction on the right of a lawyer to practice after termination of the contract with the agency contrary to Colo. RPC 5.6.

Conflicts

A temporary lawyer who performs work for a client represents that client, regardless of the scope or duration of the work.[4] Therefore, in all instances involving clients for whom the temporary lawyer is working or actually has worked, the lawyer must adhere to the conflict rules regarding current and former clients. *See* Colo. RPC 1.7, 1.9. In practical terms, this means that, absent effective client consent,[5] the temporary lawyer must not work on any matter in which (a) the representation will be directly adverse to a client for whom the temporary lawyer is doing work at another firm, even if the two matters are unrelated, (b) the representation of a client may be materially limited by the temporary lawyer's responsibilities to another client for whom the temporary lawyer has performed work,[6] or (c) the client's interests are materially adverse to the interests of a former client for whom the temporary lawyer did work at another firm, if the two matters are substantially related.

The more difficult conflict question involves other clients of the engaging firm or lawyer for whom the temporary lawyer provides no services. Colo. RPC 1.10(a) provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2." The key question is whether a temporary lawyer is "associated in a firm." If yes, then the rule of imputation set forth in Colo. RPC 1.10(a) applies, and all of the clients (and conflicts) of the lawyer or firm employing the temporary lawyer are deemed to be the temporary lawyer's clients (and conflicts), and *vice versa.* If the temporary lawyer is *not* associated in a firm under Colo. RPC 1.10(a), then the firm's other present or former clients for whom the temporary lawyer has not performed work are not deemed to be present or former clients of the temporary lawyer, and conflicts are not imputed one to the other.

The question of imputation is critical in determining whether a conflict exists, particularly where the temporary lawyer works for more than one firm. If the temporary lawyer is deemed to be "associated" with each of the firms for whom he or she does work, then the current and former clients of each firm might be deemed the current and former clients of the temporary lawyer *and* of all the other firms with which the temporary lawyer is associated. In that situation, a firm could face disqualification if one of its clients were adverse to a client of another firm with whom the temporary lawyer is associated, even if the temporary lawyer did not work on any matter for either client. *Cf.,* ABA Formal Op. 90-357 (May 10, 1990) (potential for conflicts will put a practical limit on the number of "of counsel" relationships undertaken by individual attorney: because "of counsel" attorney is associated with firm under Rule 1.10(a), "there is attribution to the lawyer who is of counsel of all the disqualifications of each firm, and, correspondingly, attribution from the of counsel lawyer to each firm, of each of those disqualifications. . . . In consequence, the effect of two or more firms sharing an of counsel lawyer is to make them all effectively a single firm, for purposes of attribution of disqualifications.").

The Colorado Rules of Professional Conduct do not define "associated in a firm." However, the comment to Colo. RPC 1.10(a) provides some guidance:

> Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved.

In a formal opinion issued in 1988, the American Bar Association Standing Committee on Ethics and Professional Responsibility adopted a "functional analysis of the facts and circumstances involved in the relationship between the temporary lawyer and the firm." ABA Formal Op. 88-356 (Dec. 16, 1988). The ABA opinion focused primarily on the extent to which the temporary lawyer has access to information regarding other clients of the firm:

> Ultimately, whether a temporary lawyer is treated as being "associated with a firm" while working on a matter for the firm depends on whether the nature of the relationship is such that the temporary lawyer has access to information relating to the representation of firm clients other than the client on whose matters the lawyer is working and the consequent risk of improper disclosure or misuse of information relating to representation of other clients of the firm. For example, a temporary lawyer who works for a firm, in the firm office, on a number of matters for different clients, under circumstances where the temporary lawyer is likely to have access to information relating to the representation of other firm clients, may well be deemed to be "associated with" the firm generally under Rule 1.10 as to all other clients of the firm, unless the firm, through accurate records or otherwise, can demonstrate that the temporary lawyer had access to information relating to the representation only of certain other clients. If such limited access can be demonstrated, then the temporary lawyer should not be deemed to be "associated with" the firm under Rule 1.10. Also, if a temporary lawyer works with a firm only on a single matter under circumstances like the collaboration of two independent firms on a single case, where the temporary lawyer has no access to information relating to the representation of other firm clients, the temporary lawyer should not be deemed "associated with" the firm generally for purposes of application of Rule 1.10. This is particularly true where the temporary lawyer has no ongoing relationship with the firm and does not regularly work in the firm's office under circumstances likely to result in disclosure of information relating to the representation of other firm clients. *Id.*

Several state ethics opinions have adopted the approach of the ABA opinion to conflict issues confronting temporary employees and hiring employers. *See, e.g.*, N.J. Op. 632 (Oct. 12, 1989); Pa. Informal Op. 94-164 (Feb. 22, 1995); Va. Legal Ethics Op. 1712 (July 22, 1998) (agreeing with ABA's functional analysis but "caution[ing], however, that the screening measures recommended in ABA Formal Op. 88-356 will not always be practical or possible. . ." or effective). *See also*, *Oliver v. Board of Governors, Kentucky Bar Assn.*, 779 S.W.2d 212, 216-19 (Ky. 1989); *but see* Restatement (Third) Of The Law Governing Lawyers § 203, Comment c(i) (stating general rule instead of functional analysis: Section 203, "imputing conflicts to all lawyers associated in a firm, generally applies to such lawyer temporaries").

This Committee concurs with the ABA opinion's "functional analysis." *See* Colo. RPC 1.10, comm. ("Whether two or more lawyers constitute a firm . . . can depend on the specific facts."); *cf.*, *People ex rel. Peters v. District Court*, 951 P.2d 926, 932 (Colo. 1998) (whether office-sharing attorneys were "associated in a firm" under Rule 1.10(a) "depends on factual questions"). The Committee agrees with the ABA opinion that the temporary lawyer's access to information regarding the firm's other clients is the key factor in determining whether the temporary lawyer is associated with the firm under Colo. RPC 1.10(a).

Temporary lawyers and firms that wish to avoid imputation of conflicts, and minimize the risk of disqualification, should screen temporary lawyers from all information relating to other firm clients for

whom the temporary lawyer is not working. In particular, the temporary lawyer should not have access to the firm's files for other clients, should not have access to the firm's computer network unless documents related to other clients are password-protected, and should not be exposed to meetings, discussions or other communications where matters of other clients are discussed. To position themselves to defend claims of imputed disqualification, temporary lawyers and firms should maintain accurate records of all clients for whom the temporary lawyer has performed work, and of the measures taken to ensure that the temporary lawyer has not had access to information relating to other clients of the firm. *See* ABA Op. *supra*; Calif. Formal Op. 1982-126 (1992); N.J. Op. 632; C. Pennington, "So You Want To Be A 'Temp': Ethics And Temporary Attorney Relationships," 24 *The Colorado Lawyer* 805, 806-07 (April 1995); *see also* CBA Formal Op. 88 (Use and Misuse of "Confidentiality Walls," May 1991, amended April 1992); CBA Formal Op. 89 (Office Sharing, September 1991).

Beyond the question of access to information regarding other clients of the firm, this Committee believes that the manner in which the temporary lawyer is presented to and perceived by clients, courts and third-parties is another important factor in determining whether the temporary lawyer is associated with the firm under Colo. RPC 1.10(a). Specifically, if a temporary lawyer is expressly or implicitly identified as "an associate" or "employee" of the firm — whether in correspondence to the client or third-parties, in pleadings, during depositions or hearings, or otherwise — that designation will tend to indicate that the temporary lawyer is associated with the firm, even if the firm has adequately screened the temporary lawyer from information regarding its other clients. *See* Colo. RPC 1.10, comment ("If [attorneys] present themselves to the public in a way suggesting they are a firm or conduct themselves as a firm, they should be regarded as a firm for the purposes of the Rules."); Pennington, 24 *The Colorado Lawyer* at 806 ("[A] public holding out of a relationship between temporary attorneys and firms may be a giant step toward establishing an association that creates the imputed disqualification problem."). By contrast, where the firm discloses that the temporary lawyer is an independent contractor working for the firm on a limited basis, that disclosure will further help avoid imputation.[7]

Temporary lawyers and firms should consider the possibility of imputation and conflicts of interest *before* the attorney is hired and begins performing work for clients of the firm. Failure to do so could result in an irreversible taint and disqualification even if the firm and the temporary lawyer ultimately take steps to screen the temporary lawyer from contact with other clients of the firm. Where temporary lawyers secure employment through placement agencies, it remains the responsibility of the temporary lawyers themselves and the hiring firms — not the agency — to identify and address actual or potential conflicts of interest, and to take steps to minimize the possibility of imputation under Colo. RPC 1.10(a). *See* Cal. Formal Op. 1982-126; Fla. Op. 88-12 (Aug. 1, 1988); N.J. Op. 632.

The nature and extent of the conflict-checking process may vary depending on the circumstances, including whether the temporary lawyer will be "associated in" the firm under the standards discussed above. In addition, in performing conflicts checks, both the hiring firm and the temporary lawyer must comply with Colo. RPC 1.6. In some circumstances Rule 1.6 could limit or prevent the disclosure of client identities or other information necessary to perform the conflicts check, absent effective client consent.

Division of Fees and Disclosure

Financial arrangements regarding a temporary lawyer's services raise a number of ethics considerations. The hiring firm and the temporary lawyer should be especially aware of the rules regarding a division of fees between lawyers, improper fee-splitting with non-lawyers, and the reasonableness of fees charged to clients.

The hiring firm's disclosure obligations to its client primarily turn on whether Colo. RPC 1.5(d), which governs a division of fees between lawyers who are not in the same firm (also known as fee-splitting), applies. Rule 1.5(d) states:

> 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.

In most circumstances, Colo. RPC 1.5(d) will apply to temporary lawyers and the firms that engage them. The Terminology section of the Colorado Rules of Professional Conduct defines a "firm" as "a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization." The comment to Colo. RPC 1.10 notes that "whether two or more lawyers constitute a firm within this definition can depend on the specific facts."[8]

Neither the Colorado Rules of Professional Conduct nor the comments provide specific guidance on whether temporary lawyers and the lawyers who hire them are "in the same firm" for purposes of Colo. RPC 1.5(d). The comment to Rule 1.5(d), however, states: "The fee splitting provisions of Model Rule 1.5(e), now 1.5(d), have been revised to resemble more closely DR 2-107(A) and to tighten up the client consent requirements." DR 2-107(A) prohibited the "division of fees with another lawyer who is not the partner or associate of the lawyer" unless certain requirements were met. DR 2-107(A) thus clearly encompassed arrangements between hiring firms and temporary lawyers. *See* City of N.Y. Formal Op. 1996-8 (July 15, 1996); *see also* Cal. Formal Op. 1994-138 (1994) (California's fee-splitting rule governs lawyers who are not partners, shareholders or associates of the same firm). Because temporary lawyers, by definition, are engaged only for a limited period of time, in most circumstances they will not be "in the same firm" as the hiring lawyers for purposes of Rule 1.5(d).

Assuming that the hiring firm and temporary lawyer are not "in the same firm", the firm and the temporary lawyer must determine if their financial arrangement constitutes a division of fees. Neither the Colorado nor the Model Rules of Professional Conduct define a "division" of a fee. The comment to Colo. RPC 1.5 states:

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist.

An arrangement between a firm and a temporary lawyer constitutes a division of fees if the gross fee that the client pays the firm is shared with the temporary lawyer. ABA Formal Op. 88-356. Generally, this kind of sharing occurs if the temporary lawyer's compensation is directly tied to or dependent on the client's payment of fees. *See* Cal. Ethics Op. 1994-138. For example, if the firm agrees to pay the temporary lawyer a portion of a contingent fee that may be received in connection with the case, the temporary lawyer's compensation would be dependent on the client's payment of fees.[9] Similarly, if the firm agrees to pay the temporary lawyer a percentage of a non-contingent fee (such as a fixed fee or an hourly rate based fee), the temporary lawyer's compensation would be directly tied to the client's payment of fees. In such circumstances, there is a "single billing" to the client that covers both the firm's and the temporary lawyer's fees and, consequently, the firm and the temporary lawyer must comply with Colo. RPC 1.5(d).

In contrast, an arrangement generally does not constitute a division of fees if (1) the firm is responsible for paying the temporary lawyer regardless of whether the firm ever receives any payment from the client, and (2) the temporary lawyer's compensation is not a percentage of or otherwise directly tied to the amount paid by the client. *See* ABA Op. 88-356; Cal. Formal Op. 1994-138; *In re Marriage of Ziemann*, 574 N.E.2d 767 (Ill. App. 1991) (firm's payment to a non-employee lawyer of a flat hourly rate based on hours worked and not dependent on whether the firm received payment from the client did not constitute a division of fees). Under these arrangements, the firm and the temporary lawyer are not providing a "single billing" to the client and the concerns surrounding referral or forwarding fees that justify regulation of fee splitting do not arise.

Examples of arrangements that do not constitute fee-splitting include the following: (1) the firm agrees to pay the temporary lawyer an hourly rate for the temporary lawyer's services; (2) the firm agrees to

pay the temporary lawyer a flat rate per day or week; (3) the firm agrees to pay the temporary lawyer a fixed fee for a project.[10] Typically, the temporary lawyer submits an invoice to the firm for services performed. If the firm has an hourly rate fee agreement with the client, the firm's invoice to the client may include time entries submitted by the temporary lawyer for the services performed along with the time entries by lawyers in the firm, calculate the value of the temporary lawyer's time (either at the rate charged by the temporary lawyer to the firm or at a higher rate, as discussed further below), and disclose the name of the temporary lawyer. This is analogous to the method by which firms generally bill clients for work done by associates. As long as the firm, rather than the client, is directly responsible for the compensation paid to the temporary lawyer (as is the case with associates), the arrangement does not constitute a division of fees.

This type of disclosure generally will satisfy the firm's duty to disclose the basis for the amount charged to the client, just as this type of disclosure normally suffices in connection with fees arising out of services performed by associates. *See* ABA Formal Op. 93-379 (1993). This is so even if the firm bills the client for the temporary lawyer's time at a higher rate than that paid by the firm to the temporary lawyer. This differential, or mark-up, is analogous to that between compensation paid by the firm to its employees (including associates and paralegals) and amounts charged to clients for those employees' time. A firm generally charges more for its employees' time than it pays to those employees, to both cover overhead and earn a profit. Just as the firm does not have any duty under the Rules of Professional Conduct to disclose to the client the amount of profit it makes from the use of associates or paralegals, the firm does not have a duty to disclose to the client the amount paid to the temporary lawyer or the profits made from using the temporary lawyer as long as the financial arrangement does not constitute fee-splitting under Colo. RPC 1.5(d).[11]

Even if the financial arrangement between the firm and the temporary lawyer does not constitute a division of fees under Colo. RPC 1.5(d), the firm is limited in what it may charge the client under other provisions of Rule 1.5. Colo. RPC 1.5(a) requires that the fee charged to the client be reasonable and lists factors for determining the reasonableness of a fee.[12] Rule 1.5(a) applies to fees charged by the firm for services provided by a temporary lawyer. When setting the hourly rate charged to the client for the temporary lawyer's time, the firm should consider the terms of the fee agreement with the client that may affect the appropriate rate as well as factors similar to those considered in setting hourly rates charged for an associate's time, such as the nature of the services provided, the experience and skill of the person providing the services, and the range of rates charged in the community for similar services. *See* Alaska Bar Assn. Eth. Comm. Op. 96-1 (1996); *Ethics and the Contract Lawyer*, 57 Oregon State Bar Bull. 15 (Aug./Sept. 1997).

In addition to Colo. RPC 1.5(d), other provisions of the Colorado Rules of Professional Conduct relating to disclosure may be implicated by temporary lawyer arrangements: Colo. RPC 1.2(a) (lawyer shall consult with the client as to means by which objectives of representation are to be pursued);Colo. RPC 1.4 (lawyer shall keep client reasonably informed and explain matter to extent reasonably necessary to permit client's informed decisions regarding representation); and Colo. RPC 7.5 (lawyers shall not use or participate in the use of firm name or other professional designation that violates Colo. RPC 7.1 or state or imply that they practice in a partnership or other organization unless such is a fact).

Thus where the temporary lawyer works without the close supervision of a lawyer associated with the hiring firm or organization, the client must be informed of the arrangement and client consent obtained. "This is so because the client, by retaining the firm, cannot reasonably be deemed to have consented to the involvement of an independent lawyer." ABA Formal Op. 88-356. Conversely, where the temporary lawyer is under the direct supervision of a lawyer associated with the hiring firm or organization, the client ordinarily need not be informed that the temporary lawyer is working on the matter. Nevertheless, where circumstances are such that the proposed use of a temporary lawyer to perform work on the client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations, the client should be advised and client consent obtained. D.C. Bar Opinion No. 284, Sept. 15, 1998.

Placement Agencies

When the law firm and temporary lawyer use a placement agency, the propriety of the relationship depends on the nature of the financial arrangement. Lawyers may not share legal fees with nonlawyers. Colo. RPC 5.4(a). In contrast to the situation involving fee splitting among lawyers, fee-splitting with nonlawyers is prohibited regardless of any disclosure to the client.

Whether an arrangement constitutes fee splitting turns on the considerations discussed above concerning direct arrangements between the law firm and temporary lawyer. As one example of an appropriate arrangement, the law firm may pay the temporary lawyer on a fixed dollar or an hourly rate basis and separately pay the placement agency either a fixed dollar amount or a percentage of the temporary lawyer's compensation. *See* ABA Formal Op. 88-356; N.J. Eth. Op. 632 (1989). Because the agency provides services, including locating, recruiting, screening, and placing temporary lawyers, the compensation paid by the law firm to the agency is not a legal fee. *See* ABA Formal Op. 88-356; N.Y. C. Comm. on Pro. and Judicial Eth. Formal Op. 1989-2 (1989).

Likewise, the law firm may pay a total amount to the agency that then is split between the temporary lawyer and the placement agency. As long as the law firm is obligated to pay the agency regardless of any amounts actually paid by the client to the law firm, the fee that is being split is not a "legal fee." ABA Formal Op. 93-379; Texas Prof. Eth. Com. Op. 515 (1996).

Although this type of arrangement has been questioned because of a concern that the agency may improperly attempt to control the temporary lawyer and affect the temporary lawyer's judgment (*see, e.g.*, Rockas, *"Lawyers for Hire and Associations of Lawyers: Arrangements that are Changing The Way Law Is Practiced*", 40 Boston Bar J. 8 (Nov./Dec. 1996)), that concern does not render the arrangement fee-splitting. Nonetheless, law firms and temporary lawyers entering into such a relationship need to consider all of the circumstances and safeguard against any intrusion upon the temporary lawyer's independent, professional judgment that may result from the financial arrangement or any other aspect of the relationship. *See* Colo. RPC 1.7(b), 5.4(c).

Colo. RPC 5.6(a) provides that a lawyer "shall not participate in offering or making. . . a[n] employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement . . ." Placement agency contracts frequently include provisions that require the firm or the temporary lawyer to give notice to the placement agency or to pay the placement agency a fee in the event that the temporary lawyer accepts permanent employment with a firm at which the agency placed the temporary lawyer. A literal application of Rule 5.6(a) would prohibit a lawyer from entering into such an agreement (and indirectly prohibit an agency from including such provisions in their contracts) because such provisions could restrict the right of the temporary lawyer to practice after termination of his or her relationship with the agency. The Committee believes, however, that Rule 5.6(a) was not intended to apply so as to absolutely bar such provisions in placement agency contracts. The comment to Rule 5.6(a) reflects that the rule was intended to apply to agreements restricting a lawyer's right to practice "after leaving a firm." The Committee does not believe that the rule was intended to apply literally to such provisions in placement agency contracts for temporary lawyers, provided they are reasonable in nature.[13]

The Colorado Rules of Professional Conduct are "rules of reason" that "should be interpreted with reference to the purposes of legal representation . . ." Colo. RPC, Scope. The comment to Colo. RPC 5.6 indicates two purposes underlying Rule 5.6(a): protection of (a) an attorney's professional autonomy, and (b) a client's choice of counsel. At first blush, a restriction in a placement agency contract might seem to limit a temporary lawyer's mobility and freedom to accept permanent employment with a firm, but the Committee believes that banning reasonable provisions altogether would harm the ability of temporary lawyers and hiring firms to utilize the services of agencies in making placements. Reasonable restrictions in agency contracts are necessary to preclude firms from depriving agencies of agreed upon fees by directly hiring temporary lawyers. If Rule 5.6(a) were read literally to prohibit reasonable restrictions in agency contracts with temporary lawyers, the agency would have no means of protecting its interest in agreed upon placement fees. Placement agencies can provide a useful vehicle through which firms can provide the

necessary resources, in certain circumstances, to better serve their clients, and temporary lawyers can make their services available where needed. Such a reading of the rule could serve to restrict, rather than enhance, the ability of the profession to provide legal services to clients.

The second purpose of Colo. RPC 5.6(a), that of protecting a client's choice of counsel, generally will not be affected by agency contracts that reasonably restrict a firm's ability to hire directly a temporary lawyer. The firm is the client of the placement agency, but it generally is not the ultimate "client" contemplated by the comment to Rule 5.6. In some circumstances, however, where the "firm" is a corporate legal department, the firm *is* the ultimate client; in those circumstances, the restrictions in the agency contract must be carefully scrutinized to insure they are reasonable.

In general, in the Committee's view, a placement agency contract should not violate Colo. RPC 5.6(a) if its restrictions are reasonable (in both duration and the amount of fees payable to the agency), if the hiring restrictions appear in the contract with the firm rather than the contract with the temporary lawyer, and if the firm rather than the temporary lawyer is responsible for payment of any hiring fees to the agency.

Supervisory Responsibility

Lawyers with supervisory responsibility have a duty to ensure that lawyers under their supervision act with competence and adhere to the Rules of Professional Conduct. *See* Colo. RPC 1.1 & 5.1(b). Clients are entitled to look to the law firm or supervisory lawyer to provide adequate supervision of temporary lawyers. *See* C. Pennington, *"So You Want To Be A 'Temp,' Ethics and Temporary Attorney Relationship,"* 24 *The Colorado Lawyer* 805, 808 (April 1995).

The duty to supervise includes the duty to select and hire competent temporary lawyers. *See* D. Guyol, *"Ethics and the Contract Lawyer, How to Approach Ethics Issues in Contract Lawyer Relationships - and Solve Them,"* 57 Or. St. B. Bull. 15, 20 (August/September 1997). In addition, the firm must take care to provide adequate supervision over a temporary lawyer in order to ensure that the client is provided competent representation and that the temporary lawyer conforms to ethical standards applicable to the representation.

NOTES

1. As used in this opinion the term "temporary lawyer" means a lawyer who is engaged by a law firm for a limited period or purpose, either directly or through the services of a lawyer placement agency. The term does not include a lawyer, who is a part time employee of a firm or one who is employed full time but without contemplation of permanent employment, who works only for the employing firm. Such relationships are more akin to that of an associate of the firm. Similarly, "temporary lawyer" does not include a lawyer who has an "of counsel" relationship with a law firm or one who is retained in a matter as independent associated counsel.

2. This opinion assumes that placement agency clients are lawyers (i.e. law firms, corporate legal departments or law departments of governmental entities) and not lay individuals or entities represented by lay individuals. Referral of lay clients to lawyers (and *vice versa*) is governed by Colo. RPC 7.2(c) and is outside the scope of this opinion.

3. For purposes of this opinion the terms "law firm" or "firm" are used as defined in the Terminology section of the Colorado Rules of Professional Conduct as denoting a "...lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization."

4. This opinion is not intended to address those instances in which an attorney is specially engaged as counsel to advise or consult with a law firm or another lawyer with respect to particular areas of law without receiving information relating to the law firm's or lawyer's client protected under Colo. RPC 1.6. *See* ABA Formal Op. 98-411 (Aug. 30, 1998) (addressing ethical implications of attorney consultations with other attorneys on client matters).

5. Colo. RPC 1.7(c) limits effective client consent to those instances in which a "disinterested lawyer" would conclude that the client should agree to the representation under the circumstances.

6. Colo. RPC 1.7(b) additionally provides that representation of a client must not be undertaken, absent effective client consent, where the representation may be materially limited by the lawyer's own interests or responsibilities to a third person.

7. If, under the functional analysis adopted in this opinion, an attorney is deemed "associated in a firm," then the rule of imputation set forth in Colo. RPC 1.10(a) generally will apply. However, a number of courts have held that the presumption of imputation is rebuttable where the conflict involves a *former* client. *See, e.g., Smith v. Whatcott*, 757 F.2d 1098, 1101 (10th Cir. 1985) (applying former Code of Professional Responsibility); *English Feedlot, Inc. v. Norden Laboratories, Inc.*, 833 F. Supp. 1498, 1507 (D. Colo. 1993); *see also* M. Glenn, *"Conflict Issues When Attorneys Switch Jobs,"* 27 *The Colorado Lawyer* 49, 50 & nn.10-11 (May 1998). The Colorado courts have not decided and this opinion does not address the rebuttability question. *See Peters*, 951 P.2d at 930 n.6 ("The question of whether this presumption [of imputation] is rebuttable is beyond the scope of this opinion.").

8. The comment also notes that lawyers may be considered to be a firm for purposes of one rule but not for another, and that the purposes underlying the rule at issue may be relevant to the determination. Thus, a temporary lawyer may not be part of the hiring firm for purposes of Colo. RPC 1.5(d), but may be "associated" with that firm for purposes of Colo. RPC 1.10.

9. *See* Chapter 23.3, Colorado Court Rules governing contingent fees for disclosure requirements relating to "associated counsel" in contingent fee matters.

10. Cal. Formal Op. 1994-138 discusses a situation in which the temporary lawyer is paid the amount billed to the client as the fees are paid by the client, and finds that there is no division because the firm does not receive any portion of the fee but merely acts as a clearing house for billing and collection functions. Acting as a clearinghouse, however, would not relieve the firm of other obligations, such as those concerning supervision, conflicts of interest, and confidentiality, discussed elsewhere in this opinion. Moreover, since this type of arrangement appears analogous to treating the temporary lawyer's compensation as a disbursement, the firm should consider the ethics ramifications regarding disbursements discussed in ABA Formal Op. 93-379.

11. Colo. RPC 1.5(b) requires that the basis or rate of the fee be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation "when the lawyer has not regularly represented the client." The Committee is of the opinion that the requirements of Rule 1.5(b) do not apply to a temporary lawyer who is under the close supervision and direction of the hiring lawyer or a lawyer or lawyers associated with the engaging lawyer or law firm.

12. Colo. RPC 1.5(a) sets forth the following factors:

(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.

13. The Committee has discovered almost no authority on this Rule 5.6 issue. The absence of authority, including in ABA Formal Opinion 88-356 (which specifically addresses other issues related to placement agencies), suggests that most ethics committees have not considered Rule 5.6 relevant in the context of placement agency contract provisions. *But see* Texas Prof. Eth. Com. Op 515 (July 1996)(applying Texas version of Rule 5.6 literally to prohibit placement agency contract provision that required temporary lawyer to give notice to agency before performing work directly for an agency client).

106 REFERRAL FEES AND NETWORKING ORGANIZATIONS

Adopted June 19, 1999.
Revised October 21, 2013.

Introduction and Scope

As a general rule, a Colorado lawyer may not pay or accept a referral fee. However, lawyers may pay the "usual charges" of a not-for-profit lawyer referral service or legal service organization. Lawyers and law firms also may engage in cooperative marketing with other firms and may refer clients to each other informally. Law firms may represent clients jointly and share the fees under appropriate circumstances. This opinion is designed to help the lawyer determine the permitted scope of participation in referral services, legal service organizations, and cooperative marketing arrangements with lawyers outside the lawyer's firm. This opinion does not address cooperative marketing arrangements between lawyers and nonlawyers outside of the referral service context. Internet-based lawyer marketing programs are discussed in CBA Formal Ethics Opinion 122, (March 10, 2010, rev. October 16, 2010).

Syllabus

Rule 1.5(e) of the Colorado Rules of Professional Conduct (Colo. RPC or Rules) prohibits referral fees. Therefore, a Colorado lawyer may neither pay nor accept a referral fee. A lawyer may not give anything of value to a person for recommending the lawyer's services in most circumstances, although certain exceptions exist. Colo. RPC 7.2(b)(2) sets forth the longstanding exception permitting a lawyer to pay the usual charges of a not-for-profit lawyer referral service or legal service organization. The Colorado Supreme Court has not clearly defined a "not-for-profit lawyer referral service." Therefore, the lawyer must determine whether a referral service in fact is a legitimate not-for-profit referral organization. A "legal service organization" generally is considered to be a legal aid society or prepaid legal service plan.

The lawyer must evaluate a referral service or legal service organization to assure that the lawyer can represent referred clients competently and must decline representation if necessary to comply with the Rules. The lawyer also must ensure that the lawyer's professional judgment remains independent, that confidentiality requirements are not compromised, and that conflicts of interest are avoided. Furthermore, the lawyer's payment of fees to a referral service must not result in unreasonable fee payments by clients or improper division of fees, either between lawyers or between lawyers and nonlawyers. The lawyer also must use reasonable efforts to ensure that companies purporting to provide advertising of the lawyer's services are not in fact improper referral agencies and that any advertising of the lawyer's services complies with the Rules.

Discussion

A Colorado lawyer may neither pay nor accept a referral fee. Colo. RPC 1.5(e) explicitly prohibits referral fees. The Colorado Bar Association Ethics Committee (Committee) has opined informally that an attorney licensed to practice law in Colorado may not accept a referral fee from a lawyer in another state that permits such fees. CBA Ethics Comm. Abstract, Second Inquiry, 24 *The Colorado Lawyer* 755 (April 1995). Nor may a lawyer accept a referral fee from a nonlawyer such as a bank that offers to pay "a percentage of commissions generated" when a client invests funds with the bank on the lawyer's recommendation.

Furthermore, a lawyer may not pay or offer to pay a referral fee. Colo. RPC 7.2(b) provides:

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 cost 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.

Comment 5 to Colo. RPC 7.2(b) explains that:

> [l]awyers are not permitted to pay others for channeling professional work. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising. Colo. RPC 7.2.

The comments further explain that:

> [a] lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists prospective clients to secure legal representation. Colo.RPC 7.2, cmt. [6].

What Is a "Lawyer Referral Service"?

Although not defined in the Rules, a "lawyer referral service" has been described in other states as an individual or entity that operates for the direct or indirect purpose of referring potential clients to lawyers, regardless of whether the term "referral service" is used. *See* Cal. Bus. and Prof. Code, § 6155; Tex. Rev. Civ. Stat. art. 320d.

An advertising arrangement may be, in fact, a referral service. For instance, if an advertising company offers to provide a lawyer with all personal injury referrals within a particular geographic area in return for a monthly fee, the fee may well be an impermissible referral fee rather than a permissible publication cost. The lawyer must examine such arrangements carefully and assure himself or herself that they are not referral services, or, if they are, that the lawyer may participate without violating any ethical rules.

This Committee informally concluded that a marketing service that published periodic newsletters in which participating lawyers could publish articles, arranged meetings attended by members of business groups to whom participating lawyers could speak, placed ads for participating lawyers in business-related publications, and referred calls to participating lawyers, was a for-profit referral agency. Therefore, a lawyer's payment of an annual membership fee actually was a prohibited payment to a for-profit legal referral service in violation of Rule 7.2(c) and Rule 1.5. CBA Ethics Comm. Abstract, Second Inquiry, 26 *The Colorado Lawyer* 69 (July 1997).

For-Profit Lawyer Referral Service

Colo. RPC 7.2(b)(2) prohibits a lawyer from giving anything of value to a for-profit organization for recommending the lawyer's services. *See People v. Zimmermann*, 938 P.2d 131 (Colo. 1997) (lawyer admitted making payments for referrals to unapproved for-profit referral service in violation of Rule 7.2(c)); *People v. Carpenter*, 893 P.2d 777 (Colo. 1995) (lawyer who charged other lawyers $50-$75 per month for referrals admitted he operated an unapproved for-profit lawyer referral service, in violation of then-applicable DR 2-103(D)). However, the American Bar Association (ABA) Committee on Ethics and Professional Responsibility concluded that a lawyer's participation in a for-profit lawyer referral service without payment of a fee to the referral service did not violate then Model Rule 7.2(c)(current Model Rule 7.2(b)), inasmuch as the lawyer did not give anything of value for the referral, even though the referral organization itself was a for-profit business funded by the recipients of its services. ABA Informal Op. 85-1510 (1985).

The Colorado Rules do not expressly prohibit a lawyer's participation in a for-profit lawyer referral service that does not require payment from the lawyer, and it is the opinion of this Committee that a lawyer may participate in such a service, so long as the lawyer's participation does not otherwise violate any of the Colorado Rules.

Not-for-Profit Lawyer Referral Service

Historically, state and local bar associations have operated not-for-profit lawyer referral services, and such services long were considered both ethical and admirable, even before lawyers were permitted to advertise. *See* ABA Comm. on Prof. Ethics and Grievances, Formal Op. 291 (1956). Colorado's predecessor to Colo. RPC 7.2(b), Disciplinary Rule (DR) 2-103 of the Colorado Code of Professional Responsibility, while prohibiting referral fees generally, permitted a lawyer to pay the usual and reasonable fees or dues charged by certain listed organizations, including "a lawyer referral service operated, sponsored or approved by a bar association." In *People v. Taylor*, 799 P.2d 930 (Colo. 1990), the Colorado Supreme Court implicitly held that the Metropolitan Lawyer Referral Service, a non-profit referral organization operated by the Denver Bar Association, to be a proper source of referrals.

Colo. RPC 7.2(b) does not retain the requirement that the lawyer referral service be operated, sponsored, or approved by a bar association, leaving unclear exactly what constitutes a "not-for-profit lawyer referral service."

Colo. RPC 7.2 includes no requirement that a non-profit lawyer referral service be a tax-exempt organization or be operated for a charitable purpose.

If a referral service is not a permissible online directory or other permitted advertising service, a lawyer who intends to use a purportedly not-for-profit referral service not sponsored by a bar association should make reasonable inquiry to verify that the service is in fact a legitimate not-for-profit organization and that it is not a profit-making enterprise masquerading as a non-profit entity.

ABA Informal Opinion 85-1512 (1985) approved a proposal for a not-for-profit lawyer referral service not sponsored by a bar association. ABA Comm. on Ethics and Prof. Resp. Informal Op. 85-1512 (1985). In that opinion, the ABA Committee determined that a lawyer's participation in a proposed not-for-profit Christian religious organization, to be administered by an attorney in private practice, would not violate then-Model Rule 7.2(c) (now Model Rule 7.2(b)). The organization, all of whose members would be lawyers, planned to establish a network of members interested in providing legal services to mission agencies, missionaries, and their dependents. The members of the organization would be required to pay a nominal membership fee, and could elect to register for referrals. No registration fee would be charged, but a registered lawyer would agree to provide an initial consultation at no charge, and to prepare general law-related information materials to be distributed to targeted potential clients.

The organization proposed to contact various mission agencies throughout the country to advertise its services. A prospective client would be given the names, addresses, and telephone numbers of registered attorney members in the client's geographical area. The lawyer referred by the organization would not be obligated to accept the representation, and the organization would not share in any portion of the fee received. Moreover, the organization would not in any way regulate the lawyer or interfere with the lawyer's independent professional judgment. The Informal Opinion concluded that Model Rule 7.2 would not prohibit the lawyer's participation in this referral program.

The Committee believes that Colo. RPC 7.2 permits a lawyer to participate in a duly-organized, not-for-profit private lawyer referral service, as well as a bar-sponsored referral organization, so long as the private referral agency does not require lawyers to accept referred clients, is not compensated on the basis of fees paid by a referred client, does not interfere with the lawyer's independent professional judgment, and otherwise allows the lawyer to comply with the Rules.

Cooperative Arrangements Among Law Firms

Some law firms have affiliations or relationships with other firms that result in inter-firm referrals. *See* ABA Formal Op. 94-388 (1994) (discussing various examples of such relationships). Relationships between firms with different expertise, or located in different geographical areas, allow lawyers to make their services available to a broader range of clients. Reciprocal referral agreements are permissible if the reciprocal referral agreement is not exclusive" and "the client is informed of the existence and nature of the agreement." Colo. RPC 7.2(b)(4). *See* Colo. RPC 7.2, cmt. [8].

Such law firm relationships must "avoid running afoul of [then-] Model Rule 7.2(c)'s [current Model Rule 7.2(b)'s] prohibition on giving something of value for referrals." ABA Formal Op. 94-388. In general, this means that firms may not contract to refer business to one another (even if they are affiliated") because the exchange of binding promises would itself constitute giving something of value for referrals in violation of current Model Rule 7.2(b). *Id*. However, firms may agree to consider each other for appropriate referrals, and may engage in cooperative marketing that otherwise complies with the Rules. Where affiliated firms agree to undertake joint representation of clients (for example, where one firm handles the client's tax matters and another firm handles its litigation), conflicts, confidentiality, and disqualification rules also must be considered. Iowa Bar Ass'n Ethics Op. 89-1 (1989).

What Is a Legal Service Organization?

The Rules do not define "legal service organization." However, a Comment to Colo. RPC 7.2 indicates that "legal service organization" is meant to encompass legal aid societies and prepaid legal service plans. Colo. RPC 7.2, cmt. [6].

Legal aid societies are entities that provide legal services to the indigent in civil cases. They typically are not-for-profit organizations supported by public funds or funds raised by bar associations or foundations. Legal aid agencies that receive government funding typically are subject to restrictions on the income level of clients and on the types of legal services that may be performed. The Committee is not aware of any attorneys who either pay or receive fees for participating in legal aid societies.

However, a legal service organization, unlike a referral service, may be a for-profit entity. In fact, for-profit organizations generally operate prepaid legal service plans. *See* ABA Comm. on Ethics and Prof. Resp. Formal Op. 87-355 (1987) (then-Model Rule 7.2(c) (current Model Rule 7.2(b)) permits the lawyer to pay fees to a for-profit legal service plan in which members pay monthly fees to plan sponsors, part of which the sponsor keeps for overhead and profit, and part of which the sponsor pays to participating attorneys for plan-covered services); CBA Ethics Comm. Formal Op. 81 (permitting Colorado lawyers to participate in for-profit prepaid legal service plans that can be operated in compliance with applicable ethical rules). A lawyer's participation in a legal service organization must comport with all applicable ethical requirements or the lawyer's participation may be unethical. For example, ABA Informal Opinion 1392 (1977) found unethical a prepaid legal service arrangement whereby a firm sought to form a national network of "resident associates" who would accept referrals and assignments of prepaid legal clients in accordance with a fee schedule. ABA Comm. on Ethics and Prof. Resp. Informal Op. 1392 (1977). The firm required each "associate" to pay a uniform 10 percent fee for each referral, regardless of allocation of work or responsibility. The opinion concluded that notwithstanding the denomination of the referred attorneys as "associates," the relationship was not, in fact, that of members of the same firm sharing fees, so the fee division, being unrelated to each lawyer's work or responsibility, was unethical under then-applicable DR 2-107(A)(2), the predecessor to Rule 1.5(d).

What Are "Usual Charges"?

The Rules do not define the phrase "usual charges" in Rule 7.2(c). Conn. Informal Opinion 87-9 (1987) states that the phrase means "fees which are openly promulgated and uniformly applied." Conn. Bar Ass'n Prof. Ethics Comm. Informal Op. 87-9 (1987). The opinion stated a very broad definition in the context of analyzing fee arrangements for a bar-sponsored lawyer referral service. The definition alone does not address the numerous issues surrounding referral fees that must factor into determination of an appropriate "usual charge."

Reasonableness Issues

A lawyer's fee always must be "reasonable." Colo. RPC 1.5(a). Typically, referral agencies and legal service plans require the lawyer participant to agree to limit his or her fees in some manner, such as by providing a free initial consultation or a reduced hourly rate. The issue usually is not excessive fees, but rather whether the lawyer can provide the thorough, competent representation required by Colo. RPC 1.1

within the required fee parameters. If the lawyer cannot do so, even by appropriately limiting the scope of representation as permitted by Colo. RPC 1.2(c), the lawyer should not participate in the referral organization or the legal service organization.

Fee Division Issues

Colo. RPC 5.4(a) strictly prohibits division of fees between lawyers and nonlawyers. Colo. RPC 1.5(d) governs division of fees between lawyers not in the same firm, and prescribes the manner in which fees may be divided. It prohibits such divisions unless the client consents to the employment of an additional lawyer after a full disclosure of the division of fees to be made, the total fee is reasonable, and the division is set forth in writing and signed by the lawyers and by the client with informed consent. If referral fees or fees paid to a legal service organization are based on fees generated by representation of a referred client, one of these rules may be implicated.

Early lawyer referral arrangements typically were bar-sponsored lawyer referral plans, financed by reasonable registration charges to lawyers participating in the plan, or by a reasonable percentage of fees collected by participating lawyers from plan referrals. ABA Comm. on Prof. Ethics, Formal Op. 291 (1956). (Note that Formal Opinion 291 simply stated, without authority, that a percentage fee payment to a bar-sponsored lawyer referral service would not violate the prohibition against fee division.) ABA Comm. on Professional Ethics, Informal Opinion 1076 (October 8, 1968) endorsed Formal Opinion 291 and permitted, in addition, the return of all or part of the lawyer's initial consultation fee to support the referral service. Many state ethics opinions over the years have relied on ABA Formal Opinion 291 to conclude that a percentage fee arrangement is a proper and ethical way to finance a bar-sponsored lawyer referral program. *See* Conn. Bar Ass'n Prof. Ethics Comm. Informal Op. 87-9; Maine Bar Ethics Comm. Op. No. 133 (1993); New York State Bar Ass'n Ethics Op. 651 (1993); Tenn. Bd. of Prof. Resp. Op. 88-F-115 (1988); Wisconsin Comm. on Prof. Ethics Formal Op. E-88-8 (1988).

According to one commentator, the term "usual charges" as used in former Model Rule 7.2(c)(2) (current Model Rule 7.2(b)) "incorporated the various methods for compensating lawyer referral services then in existence and included flat enrollment charges as well as percentage fees. . . ." Franck, "Percentage Fees: Available and Ethical," 6 *Lawyer Referral Network* 1 (Spring 1993). Therefore, one could argue that a percentage fee payment to a referral service is proper, notwithstanding the prohibitions of Colo. RPC 5.4(a) and 1.5(d). However, this Committee believes that payment of a percentage fee to a non-bar-sponsored lawyer referral service is problematic. Neither the Colorado legislature nor the Colorado Supreme Court has exercised regulatory authority over lawyer referral services, and, in the Committee's view there likely are more opportunities for impropriety with private referral agencies than with bar-sponsored referral agencies.

Other Ethical Considerations

A lawyer who wishes to participate in a lawyer referral service or a legal service organization also must ensure that participation will not result in the lawyer's violation of any other ethical rules. The lawyer's nondelegable ethical responsibility to protect the client's interests requires that the lawyer give particular consideration to the rules involving confidentiality, competence, independence of professional judgment, conflicts of interest, and advertising.

Confidentiality Issues

Colo. RPC 1.6 requires the lawyer to maintain in confidence information relating to the representation of a client. The lawyer should scrutinize carefully a referral agency's intake procedures in this regard. The information disclosed to the referral service at intake should be limited to facts necessary for the referral.

Furthermore, it is not uncommon for a legal service organization to collect legal fees from the client and remit them to the lawyer after deducting the organization's fees, or for a referral agency to request documentation of fees in order to verify the percentage fee owed by a participating lawyer. The lawyer must be cognizant of circumstances in which a referral service or legal service organization may obtain

confidential client information in connection with billing information or other reporting requirements. *But see* Maine Bar Ethics Op. 133, in which the limited disclosure to a bar-sponsored referral agency of fees charged to a referred client was found not to violate the requirement that client confidences and secrets be protected because the percentage fee arrangement is a "usual and reasonable" way of funding a bar association referral service. The Maine opinion assumes that the bar association referral service, as a matter of institutional policy, maintains the confidentiality of the fee amounts reported to it, and that these arrangements are disclosed to prospective clients.

Competence and Independent Professional Judgment

As discussed above, a lawyer who accepts referrals or participates in a legal service organization must be competent to handle the legal problems referred to him or her. The lawyer, therefore, must have the necessary legal knowledge and skill and be able to provide competent representation (Colo. RPC 1.1) even if the scope of the representation is limited pursuant to Colo. RPC 1.2(c).

Implicit in Colo. RPC 7.2(b), and explicit in various opinions such as ABA Informal Opinion 85-1512, is that a referral agency or legal service organization may not interfere with the lawyer's professional judgment in rendering legal services to the client. Because a lawyer may not allow interference with professional judgment, the lawyer may not participate in a referral agency or legal services organization that attempts such interference. Colo. RPC 5.4(c). For this reason, the lawyer should be wary of attempts to limit or audit the lawyer's fees which could adversely impact the lawyer's independent professional judgment.

Conflicts of Interest

A conflict of interest can arise if a lawyer's representation of a client may be materially impaired by the lawyer's responsibilities to a third person, in this case the referral service or legal service organization from which the lawyer anticipates future business. Colo. RPC 1.7(b). The conflict may be waivable if the lawyer reasonably believes the representation will not be adversely affected and the client gives informed consent confirmed in writing. Colo. RPC 1.7(b). In order to obtain informed consent, it may be necessary to disclose to the client the relationship between the referral agency or legal service organization and the lawyer's firm.

This type of conflict also may arise when firms make informal referrals to each other, or belong to a "network" of firms that cross-refer matters on an ad-hoc basis. Where there is no sharing of clients, confidences, fees, or professional engagements, the relationship between the firms would not, as a general proposition, materially limit the client representation, even where the firms advertise their relationship to each other. ABA Comm. on Ethics and Prof. Resp. Formal Op. 94-388. However, where the firms share clients, or have close business or financial ties that might materially limit the ability of one firm to oppose the other firm's clients, the conflict potential increases, as do the obligations of disclosure to the clients.

Advertising

Colo. RPC 7.1(a) prohibits a lawyer from making false or misleading communications about the lawyer or the lawyer's services. Colo. RPC 7.1(e) requires the lawyer to refrain from knowingly permitting, encouraging, or assisting others to make communications in violation of Colo. RPC 7.1 and the other advertising rules, Colo. RPCs 7.2 through 7.4. Therefore, any lawyer who uses a referral service or is a member of a legal service organization must take reasonable steps to assure that the referral service or legal service organization does not engage in false or misleading communications about the lawyer or the lawyer's services.

ABA Formal Opinion 94-388 advises that law firms involved in an "affiliation" or "network" must provide certain information to avoid misleading the client about the nature of the relationship between the firms. The opinion requires the firm to give the following information to clients and prospects for whom the relationship between firms is relevant:

(a) whether any professional personnel from the other law firm(s) may be involved in providing the professional services;

(b) whether any part of the fee the client pays will be shared with the other firm(s);
(c) whether profits of the firm the client originally retained will be shared with the other firm(s);
(d) whether the law firms in the relationship conduct common training programs and/or share strategies or expertise; and
(e) whether the firms in the relationship conduct any other common operations or, by contrast, the relationship simply is a common marketing device.

Conclusion

Lawyer referral services perform the laudable tasks of providing information to potential clients about available legal services and helping clients locate competent counsel to assist them with their legal problems. Similarly, legal service organizations make legal services more widely available to clients. Although these arrangements may cause ethical dilemmas, careful design and implementation of referral programs and legal service organizations should enable lawyers to participate ethically.

107 THIRD-PARTY AUDITORS

Adopted September 18, 1999.

Introduction and Scope

The Colorado Bar Association Ethics Committee has received a number of inquiries from attorneys concerning ethical issues raised by insurance companies' use of outside audit agencies to review bills submitted by insurance defense attorneys. Based upon these inquiries, the Ethics Committee understands that the use of "third-party auditors" has become a common practice in the insurance industry. Under this practice insurance companies routinely submit legal billing statements or ask insurance defense counsel to submit legal billing statements directly to third-party auditors. The statements often contain detailed information concerning the representation of an insured that may be confidential, privileged, or both.

In addition, third-party auditors often promulgate "billing guidelines" that provide detailed instructions regarding the insured's defense. The billing guidelines typically notify insurance defense counsel of items that will not be paid for by the insurer and provide limits on time and personnel for certain activities.

These practices raise a variety of ethical issues. In particular, counsel should consider how these practices implicate the attorney's duties of confidentiality and independent professional judgment. The ultimate analysis of these issues turns on key questions of law that remain undecided in Colorado and are beyond the province of the Ethics Committee. Accordingly, this opinion seeks only to assist attorneys in recognizing certain benchmarks for ethical conduct when dealing with third-party auditors.[1]

General Discussion

The Use of Auditing Firms

The Ethics Committee has reviewed a variety of sources to determine the factual contexts in which an attorney may be faced with ethical issues pertaining to use of third-party auditors. Generally, insurers engage auditing firms to review legal bills for efficiency and accuracy. Debra Baker, "You Charged How Much?," *ABA J.* (Feb. 1999) at 20. Third-party auditors search for billing errors, abuses and inefficiencies attributable to insurance defense counsel. Accountability Services, "Management Analysis of Legal Services Rendered to ABC Insurance Company," 561 *Prac. L. Inst./Litig*., at 99, 158 (1997).

Legal auditing firms often employ both attorneys and accountants to review bills. William G. Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys*, 223 (Caroline Academic Press 1996). Typically, legal auditing firms are paid by the hour or according to some formula relative to the amount of savings that are realized by their clients, the insurers.

Third-party auditors' methodology for reviewing and reporting their findings may vary. Some third-party auditors seek the submission of highly detailed information in the legal billing statements, including the scope and purpose of research, the subject matter of correspondence and the substance of communications with witnesses or the insured. *See* Indiana Ethics Op. No. 4, at 1-2 (1998). Some third-party auditors seek to compile and use a database or guidebook that attempts to analyze the efficiency of the legal work submitted for payment. *See* Alabama Ethics Op. RO-98-02, at 4 (Oct. 1998). This opinion assumes that the third-party auditors seek to obtain a broad range of detailed information relating to the matter at issue and the representation of the insured. Further, this opinion assumes that the billing guidelines provide detailed instructions regarding the scope of work and personnel that will be considered appropriate for payment.

CBA Ethics Opinion 91

CBA Ethics Opinion 91 ("Opinion 91") addresses at length the "tripartite relationship" among insurer, attorney, and insured. *See* CBA Formal Ethics Opinion 91, *Colorado Ethics Handbook* ("*Handbook*"), III-325 (CLECI) (Jan. 16, 1993) or 22 *The Colorado Lawyer* (*"TCL"*), 497 (March 1993). Opinion 91 provides extensive analysis of the attorney's ethical duties arising from that unique relationship. This opinion incorporates and supplements the analysis set forth in Opinion 91. This opinion should not be construed as minimizing the importance or relevance of other portions of Opinion 91 not expressly republished herein. Accordingly, the entire text of Opinion 91 should be read in conjunction with this opinion.

Opinion 91 makes clear that the attorney's primary duty in the tripartite relationship is to the insured. Opinion 91 at *Handbook*, III-326; *TCL,* 498. *See also Rose Med. Ctr. v. State Farm Mut. Ins. Co.*, 903 P.2d 15, 17 (Colo. App. 1995) (recognizing that "defense counsel is not counsel to the insurance company" and citing Opinion 91). The duties to exercise independent professional judgment and to maintain confidentiality are of central concern in this analysis.

Duty of Independent Judgment

Rules 1.8(f) and 2.1, Colo. RPC, require attorneys to maintain and exercise their independent professional judgment. Additionally, Rule 5.4(c) provides that an attorney shall not permit one who employs or pays the lawyer to represent another to "direct or regulate the lawyer's professional judgment in rendering such legal services." Colo. RPC 5.4(c). Opinion 91 confirms the attorney's duty to maintain independent professional judgment within the confines of the tripartite relationship:

> The lawyer's duty of loyalty and duty to exercise independent professional judgment on behalf of the insured may compel defense counsel to disagree with the insurer regarding the strategy or procedures to be followed in the case, even though the insurer is paying defense costs.
>
> 1. *Restrictions on Defense Costs*. The insurance company may attempt to restrict the amount of discovery conducted by the lawyer, refuse to authorize the retention of expert witnesses, or refuse to authorize other work in order to reduce litigation costs. If the attorney believes that some particular action is reasonably necessary to protect the interests of the insured, the attorney must so advise the insurer and request authority from the insurer to take the requested action and incur the related fees and costs. If the insurer declines, the attorney must advise the insured of the insurer's decision and why the action is necessary or recommended. If the insured nevertheless requests the attorney to take such action, the attorney may request payment of the legal fees and costs from the insured and should advise the insured to seek independent counsel. If the insured and the insurer are unwilling or unable to make satisfactory arrangements, the attorney should determine whether it is permissible or mandatory to withdraw.

Opinion 91 at *Handbook*, III-327; *TCL*, 498.

In short, the attorney may not allow the insurer directly to control or restrict actions that the attorney believes are necessary to protect the insured's interests. Therefore, it follows that the attorney may not allow the insurer, via a third-party auditor, indirectly to interfere with his or her independent professional judgment.

Duty of Confidentiality

Likewise, the attorney may not allow the insurer or the third-party auditor to compromise privileged and/or confidential material. According to Opinion 91:

> B. *Duty to Maintain the Confidentiality of Client Information*.
>
> Rule 1.6 prohibits the attorney from revealing "information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation. . . ." The comment to this rule indicates

> that it applies "not merely to matter communicated in confidence by the client but also to all information relating to the representation, *whatever its source*."
>
> While Rule 1.8 allows payment of fees by one other than a client, Section (f)(3) of the rule specifically requires the same protection of information relating to representation as that required by Rule 1.6.
>
> The goal of Rule 1.6 is to assure that the client has confidential access to his or her attorney in order to facilitate communication and the successful disposition of the case. **Whether or not information regarding the insured coincides with the interests of the carrier, the attorney's duty to preserve the confidentiality of that information requires the attorney to refuse to disclose certain information to the insurance company absent the insured's consent.** The principle supporting this view "is that the attorney does represent the insured and assumes all of the duties imposed by the attorney-client relationship."

Opinion 91 at *Handbook*, III-328; *TCL*, 500 (*italics supplied in Opinion 91, bold emphasis added*) *(internal citations omitted*).

The Ethics Committee recognizes that the insurer has a legitimate interest in obtaining information needed to monitor the costs of defense. But the attorney may not allow the interests of the insurer to interfere with the interests of the insured. Accordingly, the attorney must ensure that any communication with the insurer or the third-party auditor does not breach the duty of confidentiality owed to the insured.

Authority from Other States

Many state ethics committees have addressed the usage of third-party auditors by insurance companies. *See, e.g.*, Alabama Office of General Counsel Opinion Letter (June 1998); Alabama Ethics Op. RO-98-02 (Oct. 1998); Alaska Bar Ass'n Ethics Op. 99-1 (1999); District of Columbia Bar Legal Ethics Comm. Op. 290 (Apr. 20, 1999); Florida Bar Staff Op. 20591 (Dec. 31, 1997), Hawaii Office of Disciplinary Counsel Formal Op. No. 36 (March 25, 1999); Indiana Ethics Op. No. 4 of 1998; Kentucky Ethics Op. E-368 (1994); Kentucky Ethics Op. E-404 (June 1998); Maryland State Bar Ass'n Comm. on Ethics Op. 99-2 (Dec. 1998); Massachusetts Ethics Op. 1997-T53 (1997); Missouri Ethics Informal Op. 980124 (1998); New York State Bar Ass'n Op. 716 (Dec. 1998); North Carolina State Bar Formal Ethics Op. 98-10 (July 16, 1998); Ohio Ethics Op. 97-5 (Oct. 1997); Oregon State Bar Legal Ethics Comm. Formal Op. 1999-157 (June 1999); South Carolina Ethics Op. 97-22 (1997), Tennessee Formal Ethics Op. 99-F-143 (June 14, 1999); Utah Ethics Op. 98-03 (April 17, 1998); Vermont Bar Op. 98-7 (1998); Virginia Ethics Op. 1723 (Nov. 1998); Washington State Bar Ass'n Formal Op. 195 (1999); and, Washington State Bar Ass'n Informal Op. Re: Inquiry No. 1758 (April 1997); Wisconsin State Bar Comm. on Professional Ethics Formal Op. E-99-1 (1999).

Without exception, these authorities indicate the need for caution before an attorney submits potentially confidential and/or privileged information, directly or indirectly, to a third-party auditor. These authorities also address the dangers inherent in the use of detailed billing guidelines and they caution insurance defense counsel to maintain their independent professional judgment.

Balance of Interests

The need for caution arises from the delicate balance of interests inherent in the tripartite relationship. The attorney's duties to exercise independent professional judgment and to maintain confidences stem from the attorney's overall duty of undivided loyalty to the client. *See Model Rules of Professional Conduct*, Rule 1.7(b) Comment. The duty of loyalty requires that counsel hold as sacrosanct the attorney-client relationship. *Id.* The attorney's conduct is governed by how his or her dealings or relationships with other parties may impact the relationship with the insured, the client.

The attorney in the tripartite relationship owes his or her primary duty to the insured. Opinion 91 at *Handbook*, III-326; *TCL*, 498. But the attorney also must abide by other obligations on the insured's behalf that derive from the insurance contract. *Id*. Further, the attorney, as always, also is governed by the Rules of Professional Conduct. The attorney therefore must ensure that these multiple obligations do not interfere

with the attorney-client relationship. *See Rose Med. Ctr*., 903 P.2d at 17 (recognizing "inherent tension in the tripartite relationship").

These obligations must be understood in the context of the differing arrangements between the interested parties. The relationship between the insurer and the third-party auditor can range from an ongoing contractual relationship to a matter-by-matter engagement. In contrast, the third-party auditor does not have any direct relationship with the insured and does not provide any service that inures directly to the benefit of the insured. *See* Indiana Ethics Op. No. 4, at 2; Virginia Ethics Op. 1723. Further, the third-party auditor and the attorney operate from positions that potentially are antagonistic to each other's economic interests. As such, they may find themselves at cross-purposes in a given matter. The attorney therefore must consider the third-party auditor to be an outsider to the attorney-client relationship and even as a potentially adverse party to the attorney.

Ethical Duties

Adherence to the duties to exercise independent judgment and to preserve client confidentiality requires a separate analysis and separate precautions. In many cases, the attorney can take steps, independent of the insured, to protect his or her independent professional judgment. But the issues surrounding client confidentiality require consultation with the insured. Therefore, the attorney must be careful to take steps that address the ethical concerns while respecting the confines of the tripartite relationship.

Adherence to Billing Guidelines

The Colorado Rules of Professional Conduct preclude an attorney from allowing anyone to "direct or regulate the lawyer's professional judgment." Colo. RPC 5.4(c). Billing guidelines or any other requirement or restriction imposed by the insurer that unreasonably impair or influence the unfettered exercise of the attorney's independent professional judgment therefore are impermissible. Colo. RPC 5.4(c); *see also* Alabama RO-98-02. The Rules also prohibit fee agreements "whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interests." Colo. RPC 1.5 Comment.

The Ethics Committee does not find there to be any bright line that can be used to distinguish the point where the attorney's professional judgment is compromised. The attorney, however, is cautioned against agreeing to guidelines prior to evaluating how they would apply to foreseeable situations in the cases to which the guidelines would apply. As long as the guidelines are in effect, the attorney should continue to monitor whether the guidelines as applied are interfering with the attorney's independent professional judgment. In particular, billing guidelines that arbitrarily and unreasonably restrict compensation for time spent by counsel performing services deemed necessary by counsel or that impose arbitrary rates for specific services may discourage the performance of such services. *See* Washington State Bar Ass'n Formal Op. 195.

The attorney may comply with billing guidelines that do not compromise his or her independent professional judgment. But if the attorney believes that a particular set of billing guidelines or an individual billing guideline unreasonably interferes with his or her independent professional judgment, the attorney must either: (1) obtain the insurer's permission not to follow the guideline(s); (2) decline to abide by the guideline(s) and withdraw; (3) obtain the insured's permission, after consultation, to forego action that is contrary to the guideline(s); or (4) seek payment directly from the insured. *See* Opinion 91, at *Handbook*, III-327; *TCL*, 498. Alternatively, the attorney could choose to complete the work without seeking compensation.

Disclosure of Billing Statements

The Colorado Rules of Professional Conduct preclude an attorney from revealing confidential information absent the client's informed consent. In particular, Rule 1.6(a) provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation. . . .

Colo. RPC 1.6(a). Legal billing statements often include detailed information relating to the representation of a client. This material and the substantive information therein clearly is within the ambit of Rule 1.6(a) and may be privileged. Consequently, the attorney may not reveal the information without the client's informed consent. *Id*.

Disclosure to the Insurer

Since most insurance contracts include a "cooperation clause" whereby the insured agrees to cooperate in its defense under the insurance agreement, there exists an implied authorization for disclosure directly to the insurer of information necessary to accomplish the representation by the attorney. *See* Kentucky Ethics Op. E-404. Colorado Rule of Civil Procedure 26(b)(3) recognizes this principle by extending the work product privilege to include disclosures made to an insurer. Arguably, the third-party auditor, as the insurer's agent, could fall within the same protection. *See* Stephen Gillers, *Ethical Issues in Monitoring Insurance Defense Fees: Confidentiality, Privilege and Billing Guidelines*, 11 (Law Audit Services, Inc. 1998). But no Colorado authority exists for the principle of extending this implied authorization to a third-party auditor. (There also is no Colorado authority that determines whether the auditor is indeed the insurer's agent.)

To the contrary, recent cases have determined that voluntary disclosure of confidential and privileged material to an outside auditor destroys the privileged nature of the material. *See United States v. Massachusetts Inst. of Tech*., 129 F.3d 681, 684 (1st Cir. 1997); *United States v. South Chicago Bank*, No. 97 CR 849-1, 2, 1998 U.S. Dist. LEXIS 17445, *7 (E.D. Ill. 1998). In *South Chicago Bank*, the court held that "auditors are not generally part of the circle of persons, including secretaries and interpreters, for example, with whom confidential information may be shared without destroying the privilege." *Id*., 97 CR 849-1,2, 1998 U.S. Dist. LEXIS 17445, *7; *see also Gottlieb v. Wiles*, 143 F.R.D. 241, 246 (D. Colo. 1992) (finding that disclosure to "outsiders" may destroy the confidential nature of documents and result in a waiver of privilege).

Whether particular material is privileged is a question of law and fact. *See D.A.S. v. People*, 863 P.2d 291, 295 (Colo. 1996) (analyzing the applicability of the attorney-client privilege under the facts at issue). Therefore, that analysis is beyond the scope of this opinion. But considering the risk to the client posed by disclosure to a third-party auditor, and the duty to maintain confidentiality of information whether or not it is privileged, prudence and the Rules of Professional Conduct require that the attorney obtain the client's informed consent prior to disclosing, or allowing a disclosure of, confidential and/or privileged material or information to a party, such as an auditor, that has no direct relationship to the insured.

Informed Consent

The informed consent could take many forms. But the attorney must ensure that the insured has been made aware of the risks posed by disclosure. *See* Colo. RPC 1.4(b). At a minimum, the potential risks discussed with the insured should include the risk that information disclosed to a third-party auditor may (1) result in a waiver of evidentiary privileges, (2) become available to adverse parties or third parties, and (3) be used adversely to the client's interests.

The attorney should be careful to avoid a conflict of interest between the insurer and the insured. If the insured's informed consent to disclose to the third-party auditor information in the billing statements is not obtained or if it is withdrawn in the course of representation, the attorney should not disclose the refusal or withdrawal of consent unless the insured expressly authorizes the attorney to do so. If such authorization is not obtained or is withdrawn and the attorney cannot make satisfactory alternative arrangements with the insurer regarding disclosure of information in the billing statements, the attorney should request that the insured, with or without independent counsel, resolve the conflict directly with the insurer. If, after this, the matter is not resolved, then the attorney should determine whether it is permissible or mandatory to withdraw.

Before the attorney communicates with the insured regarding the risks of disclosure to the third-party auditor, the attorney should inquire of the insurer and consider whether there are ways to limit the information disclosed, and to obtain confirmation that internal confidentiality procedures are employed by the third-party auditors. *See* Massachusetts Ethics Op. 1997-T53; Virginia Ethics Op. 1723. If the attorney is not satisfied regarding the existence of these safeguards, the attorney should consider whether he or she ethically can even seek the insured's informed consent. *See* Colo. RPC 1.1 (competence), 1.3 (diligence), and 1.4(b) (communication). In any event, the attorney is advised to designate any information disclosed to the third-party auditors as "Privileged and/or Confidential, for internal use only."

The Ethics Committee does not express an opinion on whether the informed consent must be in writing. Nor does the Ethics Committee express an opinion on whether a "cooperation clause" or some other provision in the original insurance agreement relating to informed consent for the use of a third-party auditor is sufficient to compel the insured's consent to disclosure. The effectiveness of an informed consent is a question of law that turns on the particular facts of the case. *People v. McDowell*, 718 P.2d 541, 545 (Colo. 1986). But, in any event, the attorney should be mindful of his or her duty to use independent professional judgment in the decision to seek the insured's informed consent *and* in the decision to disclose. Colo. RPC 2.1.

Direct Versus Indirect Disclosures

The Ethics Committee does not recognize a distinction between direct (lawyer to auditor) and indirect (lawyer to insurer to auditor) disclosure of confidential and/or privileged material. If the attorney knows or reasonably should know that the insurer intends to submit its bills to a third-party auditor, the attorney still must seek the informed consent of the insured prior to releasing the material. *See* Maryland Op. 99-7 (requiring the attorney to request that an insurer not forward confidential material to a third-party auditor). The Rules of Professional Conduct, in particular the duties of loyalty, communication and competence, do not allow an attorney tacitly to participate in conduct that may jeopardize his or her client's legal interests. *See People v. Doherty*, 908 P.2d 1120, 1121 (Colo. 1996) (discussing positive duty to keep client reasonably informed about matter); *People v. Kuntz*, 908 P.2d 1110, 1111 (Colo. 1996) (discussing positive duty to keep client updated about matter); *see also* Colo. RPC 1.3 (diligence), 2.1 (exercise of independent judgment).

Conclusion

The attorney always must maintain his or her independent professional judgment. Therefore, attorneys ethically may not adhere to billing guidelines that unreasonably restrict their ability to perform services that are in the best interest of their clients, the insureds.

Colorado courts have not taken a position on the extension of any privilege or other protection to information disclosed to a third-party auditor. The risk posed to the insured by the disclosure of privileged material to a third-party auditor triggers the attorney's duty to seek the client's informed consent prior to disclosure. Furthermore, the Rules of Professional Conduct preclude the disclosure of confidential material absent the client's informed consent prior to disclosure.

NOTE

1. This opinion contains some general analyses regarding the duties of confidentiality and independent professional judgment. While this analysis may be helpful for a variety of practitioners, the conclusions herein are intended to apply only in the context of insurance defense practice.

With the changes effective January 1, 2008, the term "consent after consultation" was changed to "informed consent." "Consultation" only required "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Despite the fact that the American Bar Association Ethics 2000 committee indicated that no substantive change was intended by the change to "informed consent," its definition now "denotes the agreement by a person to a proposed course if conduct after the lawyer has communication adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." *See* Rule 1.0 Comment [6] to Rule 1.0 indicates that the crux of this requirement is that "the lawyer must make reasonable efforts to ensure that the client or the other person possesses information reasonably adequate to make an informed decision." Thus, the lawyer's duty is not just to explain the significance of the decision, but also to make sure the client is sufficiently informed to consider available options and risks prior to making that decision. The Subcommittee recommends appending this legend to the following Formal Opinions: 29 (representation of seller, buyer or borrower by lender's counsel); 58 (water rights representation, multiple clients), 97 (service on board of public entity), 107 (Third-Party Auditors), 115 (collaborative law).

108 INADVERTENT DISCLOSURE OF PRIVILEGED OR CONFIDENTIAL DOCUMENTS

Adopted May 20, 2000.

Introduction

This opinion addresses the ethical obligations of a lawyer who receives from an adverse party or an adverse party's lawyer documents that are privileged or confidential and that were inadvertently disclosed, whether in a civil, criminal, or administrative proceeding or in a context that does not involve litigation. This opinion does not purport to address all the situations in which a lawyer receives privileged or confidential documents belonging to a person other than his or her client.[1] For purposes of this opinion, "confidential" documents are those that are subject to a legally recognized exemption from discovery and use in a civil, criminal, or administrative action or proceeding, even if they are not "privileged" *per se*.[2]

Syllabus

The ethical obligations of a lawyer who receives from an adverse party or an adverse party's lawyer documents that are privileged or confidential and that were inadvertently disclosed depends on whether the receiving lawyer knows of the inadvertence of the disclosure before examining the documents.

A lawyer who receives documents from an adverse party or an adverse party's lawyer ("sending lawyer") that on their face appear to be privileged or confidential has an ethical duty, upon recognizing their privileged or confidential nature, to notify the sending lawyer that he or she has the documents, unless the receiving lawyer knows that the adverse party has intentionally waived privilege and confidentiality. Although the receiving lawyer's only ethical obligation in this situation is to give notice, other considerations also come into play, including professionalism and the applicable substantive and procedural law. Once the receiving lawyer has notified the sending lawyer, the lawyers may, as a matter of professionalism, discuss whether 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 documents, based on the substantive law of waiver.[3]

However, the receiving lawyer has additional duties if he or she actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents, for example, if the sending lawyer discovers the error and notifies the receiving lawyer before he or she has examined the documents. In this situation, as a matter of ethics, in addition to the duty of notice discussed above, the receiving lawyer must not examine the documents and must abide by the sending lawyer's instructions as to their disposition.

Opinion

Although the Colorado Rules of Professional Conduct do not expressly address these issues, the Committee concludes that Rule 8.4(d) requires a lawyer to respect the privileged and confidential status of documents belonging to non-clients in order to ensure the orderly administration of justice. Colo. RPC 8.4(d). *See* CBA Formal Ethics Ops. 86, 102; *see also State Compensation Ins. Fund v. WPS, Inc.*, 82 Cal. Rptr. 2d 799, 808 (Cal.Ct. App. 1994); Utah State Bar Ethics Op. 99-01 (1999). As the California Court of Appeals concluded:

> The conclusion we reach is fundamentally based on the importance which the attorney-client privilege holds in the jurisprudence of this state. Without it, full disclosure by clients to their counsel would not occur, with the result that the ends of justice would not be properly served. We believe a client should not enter the attorney-client relationship fearful that an inadvertent error by its counsel could result in the waiver of privileged information or the retention of the privileged information by an adversary who might abuse and disseminate the information

> with impunity. In addition, it has long been recognized that "[a]n attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice."

WPS, 82 Cal.Rptr.2d at 808 (citations omitted).

Typically, an inadvertent disclosure of privileged or confidential documents occurs in two situations. One situation is where a lawyer receives documents that appear on their face to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear that the materials were not intended for the receiving lawyer. This may occur because the document is addressed to the sending lawyer's client, but it is inadvertently sent to the physical address, facsimile transmission number, or e-mail address of the receiving lawyer, his or her adversary. Another situation is where one party inadvertently produces documents that are privileged or confidential to the adverse party in a civil, criminal, or administrative proceeding or in a context that does not involve litigation, such as a business transaction.

The facts in these situations are critical and vary widely. Accordingly, the courts and bar associations that have addressed the ethical obligations applicable to these situations have taken slightly different approaches. Almost all require the receiving lawyer to notify the sending lawyer that documents which appear on their face to be privileged or confidential have been disclosed. *American Express v. Accu-Weather, Inc.*, 1996 WL 346388 at *2 (S.D.N.Y. 1996); *Transportation Equip. Sales Corp. v. BMY Wheeled Vehicles*, 930 F. Supp. 1187 (N.D.Ohio 1996); *Resolution Trust Corp. v. First of Am. Bank*, 868 F.Supp. 217, 219-20 (W.D.Mich. 1994); *WPS*, 82 Cal.Rptr.2d at 807-08; ABA Formal Op. 92-368 (1992); Utah State Bar Op. 99-01; North Carolina Bar Ass'n, Proposed RPC 252 (1997); Maine Advisory Op. 146 (1994); Florida Bar Ass'n Op. 93-3 (1993); *but see In Re Meador*, 968 S.W. 2d 346, 352 (Tex. 1998) (*dictum*).

The authorities differ, however, as to the receiving lawyer's obligations beyond giving notice. In a seminal opinion, the Standing Committee on Ethics and Professional Responsibility of the ABA addressed the situation where a lawyer inadvertently sends a document that is privileged or confidential to his or her adversary instead of the intended recipient, such as by a misdirected fax. [ABA Formal Op. 92-368.] In this situation, the ABA Committee concluded that the receiving lawyer should not examine the documents once the inadvertence is discovered, should notify the sending lawyer of their receipt, and should abide by the sending lawyer's instructions as to their disposition. *Id*. Several courts have followed ABA Formal Opinion 92-368. *American Express*, 1996 WL 346388 at *2; *First of Am. Bank*, 868 F.Supp. at 219-20; *WPS*, 82 Cal.Rptr.2d 799 at 807-08.

However, ABA Formal Opinion 92-368 is not universally followed. *See*, *e.g.*, Ohio Bar Ass'n Op. 93-11 (1993); Philadelphia Bar Ass'n Op. 94-3 (1994); *see also* Florida Bar Ass'n Op. 93-3 (requires only notice, but does not cite or analyze ABA Formal Opinion 92-368); *cf.*, D.C. Bar Ass'n Op. 256 (1995) (following ABA Formal Opinion 92-368 in part; receiving lawyer's duties depend on whether he or she knows of the inadvertence of the disclosure before examining the documents). Indeed, the Ethics 2000 Commission of the ABA has recently proposed for comment a new Model Rule of Professional Conduct that would depart dramatically from the approach in ABA Formal Opinion 92-368. Ethics 2000 Comm., Proposed Rule 4.4 (Public Discussion Draft) (Nov. 15, 1999). As proposed by the Ethics 2000 Commission, the new rule would require the receiving lawyer only to notify the sending lawyer that the document was inadvertently disclosed and would not prohibit the receiving lawyer from reviewing the document or require the receiving lawyer to abide by the sending lawyer's instruction as to its disposition. *Id*.

Further, where one party inadvertently produces documents that are privileged or confidential to an adverse party in a civil, criminal, or administrative proceeding, courts that have considered the ethical issues, rather than simply the evidentiary issue of waiver of privilege or confidentiality, have required the receiving lawyer to either follow the instruction of the adverse party's lawyer with respect to the disposition of the documents or refrain from using them until a definitive resolution is obtained from a court regarding their proper disposition. *Transportation Equip. Sales*, 930 F.Supp. at 1187; *WPS*, 82 Cal.Rptr. 2d at 807-08; *cf*., *In re United Mine Workers of America Employee Benefit Plans Litigation*, 156 F.R.D. 507 (D.D.C. 1994) (motion to reconsider magistrate judge's order compelling production of documents, including privileged and confidential documents that were inadvertently released for inspection by adverse parties;

district court acknowledged the ethical issue, noted ABA Formal Opinion 92-368, but decided the motion based solely on the evidentiary issue of waiver of privilege and confidentiality).

In contrast, bar association ethics opinions are less stringent in this situation. The Utah State Bar concluded that once notice of the disclosure has been given, the lawyers can assess whether a waiver has occurred; that in some instances the lawyers may be able to agree how to handle the disclosure; but that in other instances, "it may be necessary to seek judicial resolution of the legal issues." Utah State Bar Op. 99-01. Similarly, the Florida Bar Association concluded that after the receiving lawyer has notified the sending lawyer, "[i]t is then up to the sender to take any further action." Florida Bar Ass'n Op. 93-3; *accord* Maine Advisory Op. 146 (a lawyer who receives documents that are privileged or confidential from an adverse party as part of a production of documents in a litigation should notify the producing lawyer of the disclosure and provide a copy of the documents to the producing lawyer if requested, but the receiving lawyer may use the documents in any way allowed under the rules of procedure and evidence). In this situation, too, the new rule proposed by the ABA Ethics 2000 Commission would require only notification. Ethics 2000 Comm., Proposed Rule 4.4 (Public Discussion Draft).

It is the opinion of the Committee that a lawyer who receives documents from an adverse party or an adverse party's lawyer that on their face appear to be privileged or confidential has an ethical duty, upon recognizing their privileged or confidential nature, to notify the sending lawyer that he or she has the documents unless the receiving lawyer knows that the adverse party has intentionally waived privilege and confidentiality. Although the only ethical obligation of the receiving lawyer in this situation is to give notice, other considerations also come into play, including professionalism and the applicable substantive and procedural law. Once the receiving lawyer has notified the sending lawyer, the attorneys may, as a matter of professionalism, discuss whether 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 documents, based on the substantive law of waiver.

The Committee is aware that, where an agreement is not reached and the matter is litigated, the receiving lawyer may misconstrue this opinion as a license to take advantage of the inadvertent disclosure in an effort to support a determination of waiver or to embarrass the sending lawyer, for example, by filing the arguably privileged or confidential documents in the public court file as attachments to a pleading or paper, or by quoting the content of the documents in pleadings or papers filed in the public court file. Although not prohibited as a matter of legal ethics, the Committee does not condone such practices. In this situation, both parties can litigate the matter without publicly disclosing the documents or their contents, for example, by filing the documents under seal or submitting them for *in camera* review and by referring to the content of the documents generally.

However, the receiving lawyer has additional duties if he or she actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents. This includes the situation where the sending lawyer discovers the error and notifies the receiving lawyer before he or she has examined the documents. In this situation, it is the opinion of the Committee that, as a matter of legal ethics, in addition to the duty of notice discussed above, the receiving lawyer must not examine the documents and must abide by the sending lawyer's instructions as to their disposition. *E.g.*, *American Express*, 1996 WL 346388 at *2 (S.D.N.Y. 1996); D.C. Bar Ass'n Op. 256; *see also* ABA Formal Op. 92-368.

The receiving lawyer who actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents has these additional duties for two reasons. First, in this situation, the receiving lawyer knows that the documents which were inadvertently sent are not his or her property; therefore, the receiving lawyer has a duty to safeguard the documents as property belonging to others under Rule 1.15(a), and to notify the sending lawyer and return the documents if requested under Rule 1.15(b). Second, the receiving lawyer is prohibited from acting dishonestly under Rule 8.4(c), and in this situation it would be dishonest for the receiving lawyer to examine the privileged or confidential documents knowing that the documents were sent inadvertently. As the District of Columbia Bar Association noted in this regard:

> Reading the materials under these circumstances should be treated as the equivalent of a lawyer opening the closed file folder of his adversary in a conference room, while the adversary was out of the room. Such conduct has been found in other jurisdictions to be dishonest. *See, e.g., Lipin v. Bender*, 644 N.E.2d 1300 (N.Y. 1994).

D.C. Bar Ass'n Op. 256 (footnote omitted).

Myriad situations will arise between these two extremes, where the receiving lawyer knows of the inadvertence of the disclosure before examining the documents and where the receiving lawyer does not know of the inadvertence before examining the documents. In these situations, there may be conflicting indications on the face of the document or in the overall context whether the disclosure was inadvertent or intentional. For instance, a letter meant for the sending lawyer's client might be put in an envelope addressed to the receiving lawyer or sent with a facsimile transmission sheet directed to the receiving lawyer, and the letter itself might be ambiguous whether it was meant for the receiving lawyer or the sending lawyer's client. *See, e.g.,* Philadelphia Bar Ass'n Op. 94-3. Whether the receiving lawyer "knows" of the inadvertence of the disclosure before examining the documents depends on the specific facts and circumstances in each case. D.C. Bar Ass'n Op. 256. For this purpose, knowledge "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Colo. RPC, Terminology.

By requiring the receiving lawyer at least to give notice to the sending lawyer, as a matter of legal ethics, the interests in privilege and confidentiality that are so essential to the administration of justice will be protected, because the sending lawyer will be able to take protective measures. Moreover, as the Utah State Bar concluded, this approach has the virtue of separating the legal merits regarding waiver from the ethical determination of what an attorney ought to do. Utah State Bar Op. 99-01.

In this regard, it should be noted that these issues of legal ethics are separate and distinct from the evidentiary issue of waiver of privilege or confidentiality. A substantial body of law exists in the field of evidence regarding the waiver of attorney-client privilege and work product protection by inadvertent production. *See*, *e.g.*, *Alldread v. City of Granada*, 988 F.2d 1425 (5th Cir. 1993); *United States v. de la Jara*, 973 F.2d 746 (9th Cir. 1992); *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 329-30 (N.D.Cal. 1985); *Floyd v. Coors Brewing Co.*, 952 P.2d 797 (Colo. App. 1997). *See generally*, *e.g.*, Section of Litigation, American Bar Association, *The Attorney-Client Privilege and the Work Product Doctrine* at 193-96 (3d ed. 1997).

Conclusion

The ethical obligations of a lawyer who receives from an adverse party or an adverse party's lawyer documents that are privileged or confidential and that were inadvertently disclosed depend on whether the receiving lawyer knows of the inadvertence of the disclosure before examining the documents.

In the situation where a party or a sending lawyer inadvertently discloses to an adverse party or an adverse party's lawyer documents that on their face appear to be privileged or confidential, the Committee concludes that the receiving lawyer, upon recognizing their privileged or confidential nature, has an ethical duty to notify the sending lawyer that he or she has the documents. Although the only ethical obligation of the receiving lawyer in this situation is to give notice, other considerations also come into play, including professionalism and the applicable substantive and procedural law. Once the receiving lawyer has notified the sending lawyer, the lawyers may, as a matter of professionalism, discuss whether 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 documents, based on the substantive law of waiver.

However, the receiving lawyer has additional duties if he or she actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents. In this situation, as a matter of legal ethics, the receiving lawyer also must not examine the documents and must abide by the sending lawyer's instructions as to their disposition.

NOTES

1. For example, this opinion does not address the ethical obligations of a lawyer who receives documents that are privileged or confidential from a non-party witness pursuant to a subpoena *duces tecum* in a civil or criminal action or proceeding. Instead, these obligations are addressed in Revised Formal Opinion 86 and Formal Opinion 102 of the Ethics Committee of the Colorado Bar Association.

Similarly, this opinion does not address the ethical obligations of a lawyer who purposefully obtains such documents from an adverse party directly or through his or her agent, such as the practice referred to colloquially as "dumpster diving" — that is, rifling through the garbage of an adverse party or an adverse party's lawyer in an effort to find documents that might be helpful to the rifling party's case. *See*, *e.g.*, *McCafferty's, Inc. v. The Bank of Glen Burnie*, 179 F.R.D. 163 (D.Md. 1998); *Suburban Sew 'n Sweep, Inc. v. Swiss-Bernina, Inc.*, 91 F.R.D. 254 (N.D.Ill. 1981). *See generally* Solovy & Byman, "Federal Practice/Discovery: Fighting Those Who Dive Into Hi-Tech 'Dumpsters,'" *The National Law Journal* (Dec. 21, 1998).

In addition, this opinion does not address the ethical obligations of a lawyer who obtains such documents from his or her client.

2. Examples of such confidential documents may include those subject to the work product doctrine, *e.g.*, Fed. R. Civ. P. 26(b)(3); C.R.C.P. 26(b)(3); documents subject to a protective order that discovery not be had, that certain matters not be inquired into, or that the documents not be revealed or be revealed only in a designated way, Fed. R. Civ. P. 26(c)(1), (4), (7); C.R.C.P. 26(c)(1), (4), (7); records of services to the mentally ill, § 27-10-120(1), C.R.S.; reports of child abuse or neglect, § 19-1-307(1)(a), C.R.S.; and reports of AIDS or HIV-related illness, § 25-4-1404(1), C.R.S. In contrast, for purposes of this opinion, "confidential" documents do *not* include documents as to which some person has an expectation of privacy or confidentiality, but which are not subject to a legally recognized exemption from discovery or use in a civil action or proceeding, such as research, development or commercial information and personal correspondence or diaries (assuming that some other privilege does not otherwise attach to the letters or diaries, such as the attorney-client privilege or the Fifth Amendment privilege against self-incrimination). *See* CBA Formal Ethics Ops. 86 (revised 1998), 102 (1998).

3. The Committee is aware that, where an agreement is not reached and the matter is litigated, the receiving lawyer may misconstrue this opinion as a license to take advantage of the inadvertent disclosure, in an effort to support a determination of waiver or to embarrass the sending lawyer. Although such practices are not prohibited as a matter of legal ethics, the Committee does not condone them.

109 ACQUIRING AN OWNERSHIP INTEREST IN A CLIENT

Adopted May 19, 2001.
Annotated June 20, 2009.
Annotated August 6, 2015.

Introduction and Scope

For many years, some lawyers have acquired an ownership interest in certain of their clients in connection with performing legal services, either by taking equity in lieu of cash fees or simply by investing money in return for equity.[1],[2] An increasing number of start-up companies are in need of legal services, often with little or no money to do anything but develop their core product. In addition, there is a concomitantly increasing number of published reports of law firms making large amounts of money on their client-investment portfolios. The result is that, despite the ebb and flow of the equity markets, more lawyers and law firms are open to, or actively seeking, investment in their clients, either through direct equity ownership or by options or warrants to acquire equity. Indeed, at least one law firm representing exclusively start-up companies reportedly insists on being allowed to participate in the company's early-stage equity growth.[3]

Members of the bar and bar organizations have raised questions about the legal and ethical implications of a lawyer investing in a client. In 1986, the American Bar Association (ABA) Commission on Professionalism, in identifying potential problem areas in lawyer professionalism, voiced concern that while lawyers investing in clients, "may make the client's financing efforts easier, it creates a potential or actual conflict of interest, changing the lawyer-client relationship in a very fundamental way."[4] More currently, and more bluntly, the ABA/BNA Lawyer's Manual on Professional Conduct identifies as the primary risk in this practice the conflict that the business relationship creates due to "the position of influence that lawyers have over their clients, and the possibility that lawyers could use their position to take advantage of their clients in business dealings."[5]

Those who insure lawyers against malpractice claims have joined in the concern. The Attorneys Liability Assurance Society (ALAS) in its Loss Prevention Manual cautions that, "[I]t is not an overstatement to say that lawyers' increasing involvement in client-related . . . activities [those arising out of some form of transaction with a client of the lawyer] is threatening to become an unmanageable crisis within the legal profession. * * * The fundamental problem with lawyers' client-related activities is the risk that the lawyer's independence, objectivity and judgment will be—or will be perceived to be—compromised."[6]

Nevertheless, the ABA Standing Committee on Ethics and Professional Responsibility, in Formal Opinion 00-418,[7] has concluded that the Model Rules of Professional Conduct do not prohibit a lawyer from acquiring an ownership interest in a client, either in lieu of a cash fee for providing legal services or as an investment opportunity in connection with such services, as long as the lawyer complies with applicable ethical rules. ABA Formal Opinion 00-418 is attached to this Opinion.

In Colorado, lawyers also must consider the implications of *In the Matter of Sather*, 3 P.3d 403 (Colo. 2000), regarding the circumstances under which a fee paid in advance may be considered earned and the reasonableness of that fee.

Syllabus

Subject to the limitations and additions comprising the balance of this Opinion, the Ethics Committee of the Colorado Bar Association (Committee) endorses ABA Formal Opinion 00-418 as the correct statement of the ethical considerations applicable to a lawyer or law firm acquiring an ownership interest in a client.

The Colorado Rules of Professional Conduct (Colo. RPC or Rules) do not prohibit a lawyer from acquiring an ownership interest in a client, either in lieu of a cash fee for providing legal services or other

benefit to the client or by accepting an investment opportunity, as long as the lawyer complies with Colo. RPC 1.7(b) and (c) regarding representation that may be materially limited by the lawyer's own interests, Colo. RPC 1.8(a) governing business transactions with clients[8] and, where the lawyer acquires the interest in lieu of cash fees, Colo. RPC 1.5(a) requiring that a fee for legal services be reasonable. The investing lawyer also must comply with other applicable rules discussed in this Opinion.

Discussion

Despite the potential conflicts that inevitably are present when a lawyer owns an equity interest in a client, such investments under some circumstances may have merit in promoting access to legal services. A lawyer's willingness to accept an equity interest in lieu of a cash fee may be the only way for a client with minimal uncommitted cash resources to obtain competent legal advice.

The Committee perceives no significant difference in the Rules' treatment of the acquisition by a lawyer of an ownership interest in the lawyer's client, whether the lawyer receives direct payment of fees through receipt of an ownership interest in the client entity or receives the opportunity to acquire such interest for cash, if that opportunity would not have been offered had the lawyer not also undertaken to perform legal services for the entity. Further, the same ethical issues must be addressed whether the ownership interest is acquired directly by the lawyer, the lawyer's firm, or (in taking advantage of an investment opportunity offered to the lawyer) an investment partnership controlled by the lawyer or by members of the lawyer's firm.[9] [*omitted as no longer applicable]*

Conflicts of Interest

To comply with Colo. RPC 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 the terms of the transaction must be transmitted to the client in writing in a manner that the client can reasonably understand. The lawyer also must inform the client in writing that the advice of independent counsel is desirable[10] and must give the client a reasonable opportunity to seek the advice of such independent counsel in the transaction. The client must consent to the transaction in writing.

[*Rule 1.8(a)(2) requires that the client be "advised in writing of the desirability of seeking . . . the advice of independent legal counsel on the transaction." Rule 1.8(a)(3) requires that "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." In addition, Comments [1] through [4] to Rule 1.8 discuss the application of the rule to business transactions between a lawyer and client and should be reviewed.*

[*In Rule 1.0, Terminology, Rule 1.0(e) states that "[i]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." Comments [6] and [7] provide a detailed commentary on "informed consent", including a comment that relevant factors in determining whether the information and explanation communicated to the client are reasonably adequate include the experience of the client in legal matters generally and in making decisions of the type involved and whether or not the client has the benefit of independent counsel in determining whether to consent.*

[*Rule 1.0(e) defines both a "writing" and a "signed" writing.*]

In determining the effect of such an investment on the lawyer's representation of the client in which the lawyer invests, the lawyer must comply with Colo. RPC 1.7(b) and (c) governing situations in which the representation of a client may be materially limited by the lawyer's own interests.

[*Rule 1.7(b)(4) requires informed consent, confirmed in writing. Although the Rule no longer states that the client's consent could not be validly obtained where a disinterested lawyer would conclude that the client should not consent under the circumstances, the lawyer should consider carefully whether she or he "reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" as required by Rule 1.7(b)(1), and that the interests of the clients will be adequately*

protected, Rule 1.7, cmt. [15]. One standard of reasonableness that a lawyer may use in this analysis is whether a disinterested lawyer would advise against consent under the circumstances.

[*Lawyers should review Comments [18] and [19] (Informed Consent), [20] (Consent Confirmed in Writing), [21] (Revoking Consent), and [22] (Consent to Future Conflict). In addition, Comments [34] and [35] address Organizational Clients, with Comment [35] addressing in a more detailed manner the position and obligations of a lawyer who serves on the organization's board of directors or equivalent governing body.*]

The lawyer also must comply with Colo. RPC 2.1 requiring that a lawyer exercise independent professional judgment and render candid advice in representing a client. If such an investment is made, the lawyer should give careful attention to Colo. RPC 1.13 regarding representation of an organization as the client. In addition, the lawyer must consider potential circumstances that might result in the lawyer using information relating to representation of a client to the disadvantage of the client in violation of Colo. RPC 1.8(b).

The potential conflicts of interest between a lawyer who is both counsel to and an equity owner in a client are myriad. As one example, a lawyer advising the board of directors of an acquisition target may find a direct conflict between her or his desire to maximize the present value of the client company's stock (and the lawyer's investment) as represented by the would-be acquirer's offer and the board's desire to maximize longer term value by remaining independent. This is a classic example of a situation in which the "business judgment rule" may apply to protect directors acting in accordance with the rule from liability to the company's owners, even though their actions do not result in immediately maximized value to those owners. In another example, a lawyer advising the board of directors of a company on disclosure issues in connection with a public offering of securities may be influenced by her or his desire to maximize the return on the lawyer's investment in the company. In each case, the question remains whether the board is receiving objective advice from counsel. That is, is the lawyer's own interest in her or his equity investment so in conflict with the interests of the client as to make it unreasonable to believe that "the representation will not be adversely affected" (Colo. RPC 1.7(b)(1)) or that the lawyer can "exercise independent professional judgment and render candid advice" (Colo. RPC 2.1)?

There are no bright-line guides to answering these questions, and the examples above (and, in the Committee's opinion, examples contained in ABA Formal Opinion 00-418) are not meant to establish such bright lines. Each set of facts must be analyzed on its own merit. Among the many things a lawyer must take into consideration in attempting to answer these questions are the amount of the lawyer's investment relative to his or her net worth and the amount of the investment relative to the capitalization of the client. How much financial pressure is on the lawyer with respect to the investment? How much control or influence can the lawyer exert by virtue of his or her equity interest relative to the total outstanding (or voting) equity?

A separate concern in this analysis is whether or not the investing lawyer is free to vote that equity interest in the lawyer's own self-interest under any or all circumstances, even if, under the particular circumstances at the time of the vote, the lawyer's vote may defeat the purposes of the client. Here again, there are no bright-line guides to addressing this concern. However, the lawyer must constantly reanalyze the changing circumstances in the course of the representation for potential conflicts of interest that may adversely affect the representation (Colo. RPC 1.7(b)(1)), or impair his or her ability to exercise independent professional judgment and render candid advice (Colo. RPC 2.1).

The Committee believes that it is strongly advisable that the lawyer include in the disclosure made to the client prior to consummation of the investment transaction the following:

- that there are potential conflicts of interest that may arise resulting from the lawyer's investment and/or actions as an equity owner;
- that such conflicts may under certain circumstances require the lawyer to withdraw from the representation if those conflicts rise to the level that continued representation would violate the Rules (Colo. RPC 1.16(a)); and

- that as an equity owner, the lawyer may in the future vote her or his equity interest as she or he sees fit in the lawyer's own self-interest, regardless of the wishes of the management of the client.[11]

The rules regarding conflicts of interest apply equally to all clients, regardless of their level of sophistication. It is the lawyer's duty to recognize the conflict of interest and comply with the rule.

"No matter what the sophistication level of a client, it is never the client's duty to recognize the conflicts of interest nor is it the client's duty to seek out such information. No matter what the education level or the sophistication of a client, it is always the attorney's duty to fully disclose the existence or potential for conflict of interest, to avoid such conflicts, and to obtain, if necessary, a full waiver of such conflict." *In the Matter of Breen*, 830 P.2d 462 (Ariz. 1992).

Reasonableness of Fees; Valuation

"Attorney fees are always subject to refund if they are excessive or unearned." *Sather,* 3 P.3d at 413. Compliance with Colo. RPC 1.5 requires that the fees paid by means of equity be of reasonable value in light of the legal services or other benefit to the client for which they are charged. The comment to that rule acknowledges that a lawyer may accept property, such as an equity interest, in payment of fees.[12] Although there is no clear guidance on the subject in Colorado case law, ABA Formal Opinion 00-418 and other authorities suggest that the circumstances to be considered in determining the value of the equity received and the reasonableness of that value as a fee for legal services or other benefit to the client are those circumstances reasonably ascertainable at the time of the transaction (the time at which a definitive agreement is made with the client regarding the lawyer's investment).[13],[14]

[*Rule 1.5(b) states, "Except as provided in a written fee agreement, any material changes to the basis or rate of the fee or expenses are subject to the provisions of Rule 1.8(a)." A subsequent change in the value of equity that the lawyer receives as a fee will not trigger this requirement, provided the requirements of Rule 1.8(a) were satisfied at the date of the agreement under which the lawyer took equity as a fee. As stated in ABA Formal Opinion 00-418, that date is the point of valuation of the equity for purposes of assessing the reasonableness of the lawyer's fee.*

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. Indus. Claim Appeals Office*, 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 Issue of Advance Fees

Receipt by a lawyer of an ownership interest in a client in lieu of cash fees is equivalent to receipt of advance fees, in whole or in part, if the services for which the ownership interest is given have not yet been performed or the client does not receive some benefit in return for the ownership interest at the time the interest is received. Under Colo. RPC 1.15B(a)(1) and the Colorado Supreme Court's holding in the *Sather* case, advance fees remain property of the client until earned.

In structuring an arrangement under which a lawyer receives an ownership interest in a client before performing the legal services for which the ownership interest is given, the lawyer must determine, with the client's consent, whether some portion or all of the equity interest has been earned at the time the engagement is entered into. The justification for such a decision and the manner in which it is memorialized should comply with the requirements in *Sather* for dealing with a cash payment that qualifies as an "earned retainer." If the equity interest is not intended as an earned retainer and does not meet the test under *Sather*, it remains the property of the client. In that case, if the equity interest takes the form of, for example, certificated securities, the lawyer must keep them in a safe deposit box or another appropriate location of

safekeeping separate from the lawyer's own property (see Colo. RPC 1.15A(a) and Comments [4-6] to Colo. RPC 1.15A).[15]

If the investment in the client is not intended or does not qualify as an "earned retainer," as described in *Sather*, the lawyer must consider the additional complications that result from determining the time period over which, and the legal services to be rendered for which, the equity investment is earned by the lawyer and the manner in which all or a portion of the equity investment will be returned to the client if the representation is terminated prior to completion of the representation, whether by the client or the attorney. There is a dearth of case law in this area, but the Committee believes that the writing called for under Colo. RPC 1.8(a) should describe how the equity interest will be earned, e.g., by valuing the ownership interest at the time it is granted and considering it earned in proportion to the hourly rate the lawyer charges or to specific legal services to be provided by the lawyer, and the conditions under which it could be returned to the client.

Related Non-Ethical Issues

Apart from the ethical implications of investing in a client, a lawyer contemplating such an investment should give serious consideration to other significant implications of such action. The burden of proof is on the lawyer to show that the terms of both a business transaction and a compensation agreement with a client were fair and reasonable and that the client was fully informed.[16]

Issues deserving of scrutiny include potential civil liability claims based in securities law (e.g., shareholder derivative suits), compliance with applicable securities laws (e.g., insider trading rules), the circumstances in which a lawyer should disclose her or his equity interest in a client to others involved in a transaction with the client, the fiduciary duties the lawyer may owe to the client, the lawyer's duty of loyalty under the law of agency,[17] the extent of and relevant exclusions from the lawyer's or firm's professional liability insurance, and the need for clear, thorough firm policies regarding investing in clients. These implications are beyond the scope of this Opinion, but are of substantial importance to a lawyer dealing with the question of whether or how to invest in a client.[18]

NOTES

1. Debra Baker, *Who Wants to be a Millionaire?*, ABA Journal, February 2000, at 36.

2. For purposes of this opinion, "equity" and "an ownership interest" are used synonymously and include the right to receive future equity, e.g., options or warrants. For ease of reference, the Committee refers to this practice as "investing in clients."

3. Richard B. Schmitt, *Little Law Firm Scores Big by Taking Stake in Clients*, Wall Street Journal, at B1 (Mar. 22, 2000).

4. ABA Comm'n on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* (1986).

5. Lawyer's Manual on Professional Conduct, 51:502 (ABA/BNA) (Lawyer's Manual).

6. *1999 Loss Prevention Manual*, Tab III.A at 3 (ALAS).

7. Lawyer's Manual, at 1101:207.

8. ABA Formal Op. 00-418, Section A, *Compliance with Rules 1.8(a) and 1.5(a) When Acquiring Ownership in a Client* ("In our opinion, a lawyer who acquires stock in her client corporation in lieu of or in addition to a cash fee for her services enters into a business transaction with a client such that the requirements of Model Rule 1.8(a) must be satisfied.") (citing, *inter alia*, Restatement (Third) of the Law Governing Lawyers (Restatement or Rest.), §126, cmt. a, and G.C. Hazard and W.W. Hodes, *The Law of Lawyering*, §1.8:202, *et seq.* (2d ed. 1998), and noting that Rule 1.8(a) does not apply to open market purchases or in other circumstances not involving direct client intervention).

9. [*Omitted as no longer applicable.]*

10. In reading ABA Formal Opinion 00-418, Colorado lawyers should note that Colo. RPC 1.8(a)(2) requires that the client be informed that the use of independent counsel "*may be advisable."* This differs from the Model Rules of Professional Conduct, cited in the ABA Opinion, that require only "*a reasonable opportunity to seek the advice of*

independent counsel," and also differs from the recommendation under §126 of the Restatement that the client consent "*after being encouraged*" to seek independent legal advice.

11. Even with this disclosure, the lawyer should proceed cautiously in exercising her or his right to vote the equity interest in a manner that could be adverse to the best interest of the client or the wishes of client's governing body (e.g., board of directors). Such action could lead to allegations of a violation of Rule 1.7(b) regarding the representation itself.

12. Colo. RPC 1.5, Comment, *Terms of Payment*, states: "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."

13. ABA Formal Op. 00-418 n.9.

14. Rest., §126, cmt. e ("The requirement that the transaction be fair from the perspective of an objective observer derives from the general fiduciary requirement of fair dealing with a client. [Citation omitted]. Unintended overreaching is a possibility in transactions involving lawyers and their clients. Accordingly, a lawyer must overcome a presumption that overreaching has occurred by demonstrating the fairness of the transaction. Fairness is determined based on the facts that reasonably could be known at the time of the transaction, not as the facts later develop. The relative ability of the lawyer and client to foresee how the facts might develop, however, is relevant in determining fairness. An appropriate test is whether a disinterested lawyer would have advised the client not to enter the transaction with some other party.").

15. The lawyer also must deal with questions regarding the extent to which, if at all, the lawyer may exercise the rights of ownership of the equity interest, e.g., voting rights, the right to receive dividends or liquidation distributions, and the right as an equity owner to corporate information.

16.See *Howard v. Hester,* 338 P.2d 106, 109 (Colo. 1959) ("Lawyers and real estate men stand in a confidential relation to their clients and principals, and extreme care must be exercised by them to see that their transactions bear the searching light of fair and above-board dealing.") *Bryant v. Hand,* 404 P.2d 521, 523 (Colo. 1965) ("Where after the relationship has been established, an attorney and client enter into an agreement in reference to the attorney's compensation, *** the burden is on him to prove that the agreement was fairly and openly made, was supported by adequate consideration, and that he gave the client full knowledge of the facts and of his legal rights, when he entered into the agreement, and that the services to be performed were reasonably worth the amount stated in the agreement.; ***.") (quoting *Rupp v. Cool*, 362 P.2d 396 (Colo. 1961) (quoting 7 C.J.S., Attorney and Client §204a(2)) (internal quotation marks omitted). See also *Cupeiro v. Baron*, 555 So.2d 370 (Fla. App 3 Dist. 1989) (burden of proof clear and convincing evidence); *Cleery v. Cleery*, 692 N.E.2d 955 (Mass. 1998); accord *The Florida Bar v. Simonds*, 376 So.2d 853 (Fla. 1979); *Bauermeister v. Mc Reynolds*, 575 N.W.2d 354 (Neb. 1998)).

17. The duties of loyalty in general prohibit the lawyer from harming the client. *Rest.*, §16, cmt. e.

18. For additional guidance in identifying and dealing with some of these areas of concern, see the report of the ABA's Litigation Task Force on the Independent Lawyer, *Lawyers Doing Business With Their Clients: Identifying and Avoiding Legal and Ethical Dangers* (ABA 2001).

On January 1, 2008, substantial amendments to the Colorado Rules of Professional Conduct became effective. The text of Colo. RPC 1.7, *Conflict of Interest: Current Clients*, was significantly modified. However, the ABA Ethics 2000 Commission reported that it intended no substantive changes in the rule, and that the changes were intended for clarification purposes only. The Committee agrees that the changes to Rule 1.7 are not substantive and do not alter the conflict analysis. Rather, the changes to Rule 1.7 merely alter the procedure through which informed consent must be obtained. Accordingly, the changes to Rule 1.7 do not alter the analysis or conclusions contained in this Formal Opinion.

The Subcommittee recommends appending this legend to the following Formal Opinions: 45 (Representation of client by part-time judge), 46 (Municipal attorney, representation of defendants), 58 (Water rights, representation of multiple clients), 97 (Ethics considerations where an attorney or the attorney's partner serves on the board of a public entity), 98 (Ethical Responsibilities of Lawyers who Engage in other Business), 109 (Acquiring an ownership interest in a client), 115 (Collaborative Law).

110 ASSERTION OF ATTORNEY'S CHARGING LIEN/ SECURITY INTEREST IN PROPERTY

Adopted January 19, 2002.
Amended May 19, 2002.

Scope

This opinion discusses the situations when it is permissible to assert a charging lien, the limitations on asserting such liens, and the ethical requirements for taking a security interest in client property.[1]

Syllabus

A lawyer may ethically assert a charging lien for payment of legal services the lawyer has rendered, against property or funds the lawyer has assisted or is assisting the client to obtain. Colo. RPC 1.8(j) and C.R.S. § 12-5-119 (2001). A lawyer may take a security interest in client property for payment of fees so long as the lawyer complies with Colo. RPC 1.8(a).

Discussion

Charging Liens

Colo. RPC 1.8(j) prohibits a lawyer from acquiring a proprietary interest in a cause of action or the subject matter of litigation except that the lawyer may have a lien permitted by law in order to secure the lawyer's fees or expenses. In Colorado, the right to a charging lien arises by statute only, C.R.S. § 12-5-119 (2001), since no common law right to a lien exists. *People v. Brown*, 840 P.2d 1085 (Colo. 1992). The right to a lien accrues when the lawyer begins the representation, *In re Marriage of Berkand*, 762 P.2d 779 (Colo. App. 1988). A lawyer may ethically assert a charging lien for payment of legal services the lawyer has rendered, provided the lawyer complies with the statute.

Colo. RPC 1.8(j) provides:

> 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 granted 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.

The lien statute, C.R.S. § 12-5-119 (2001), provides in pertinent part:

> All attorneys and counselors-at-law shall have a lien on any money, property, choses in action, or claims and demands in their hands, on any judgment they may have obtained or assisted in obtaining, in whole or in part, and on any and all claims and demands in suit for any fees or balance of fees due or to become due from any client. In the case of demands in suit and in the case of judgments obtained in whole or in part by any attorney, such attorney may file, with the clerk of the court wherein such cause is pending, notice of his client as lienor, setting forth specifically the agreement of compensation between such attorney and his client, which notice, duly entered of record, shall be noticed to all persons and to all parties, including the judgment creditor. . . . Such lien may be enforced by the proper civil action.

The purpose of the charging lien statute is to enable a lawyer to preserve the lawyer's right to payment and to place others on notice that the attorney is asserting an interest in property or in a judgment that is subject to the lien. Since this right arises from statute, strict compliance is required. *Telluride Real Estate Co. v. Penthouse Affiliates LLC*, 996 P.2d 151, 154 (Colo. App. 1999) (statute in derogation of common law strictly construed).

The lien is notice to third parties that the lawyer has a claim in some or all of the property that is the subject of the litigation. Once the lien is reduced to judgment, the attorney is then entitled to enforce it.

In re Marriage of Weydert, 703 P.2d 1336 (Colo. App. 1985); *In re The Marriage of Smith*, 687 P.2d 519 (Colo. App. 1994). Until the lien is reduced to judgment, funds held by a lawyer remain the property of the client. *See People v. Gray*, 2001 Colo. Discipl. Lexis 49 (June 6, 2001). When a lawyer enforces the lien can become important to determine whether the conduct is ethical. If, for example, the lawyer attempts to enforce the lien during the pendency of the litigation, it may be necessary that the lawyer withdraw from the representation pursuant to Colo. RPC 1.16.

In the situation where a lawyer holds funds subject to a claim of a charging lien by another lawyer, it is unethical to disburse the funds without making appropriate provision for the charging lien. *People v. Egbune*, 28 Colo. Law. 129 (Colo. PDJ 1999) (lawyer suspended for disbursing funds subject to a charging lien and then failing to disclose information about the settlement to the lawyer claiming the lien). *See also* Colo. RPC 1.15, which requires an attorney to hold property separate from the attorney's property if a third party claims an interest in such property.

Although lawyers are permitted to assert a charging lien pursuant to Colo. RPC 1.8(j), that right is limited by ethical considerations. An unfounded claim of a lien or an improper assertion violates the professional responsibility rules. *See People v. Razatos*, 636 P.2d 666 (Colo. 1981), *appeal dismissed*, 455 U.S. 930, 102 S.Ct. 1415, 71 L.Ed. 2d. 639 (1982) (lawyer cannot assert charging lien against proceeds from a sale that was not the basis of the cause of action); *People v. Smith*, 830 P.2d 1003 (Colo. 1992); and *People v. Mills*, 861 P.2d 708 (Colo. 1993) (decided under DR-102(A)(5)) (lawyer cannot ethically assert a charging lien for services unrelated to the case in which the attorney is representing the client); *see also* Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Ethical Considerations in Attorney Liens, Formal Opinion 94-35 (Charging liens are permitted but there are ethical limitations such as not asserting a lien for more than the judgment or property obtained). Colorado courts in non disciplinary cases have held that child support is generally exempt from imposition of an attorney's lien as a matter of public policy, *see Marriage of Etcheverry and Pratt*, 921 P.2d 82 (Colo. App. 1996), which construes C.R.S. § 13-54-102.5(1).

Lawyers who do not assist in obtaining proceeds or property for a client may not assert a charging lien. For example, a charging lien would be inappropriate if asserted by a special advocate, guardian *ad litem* or a criminal defense attorney and the matter that is the subject of the representation does not involve obtaining property or proceeds for the client. Accordingly, lawyers in these situations may not ethically assert a charging lien.

Assuming an agreement for compensation between the attorney and the client exists and an action is pending, the Ethics Committee believes that it is unnecessary to comply with Colo. RPC 1.8(a) when filing a lien because the mere filing of a lien in the litigation is neither a business transaction with a client nor acquiring a security interest in the subject matter. Two other jurisdictions that have addressed this issue also concluded that Rule 1.8(a) does not apply. *See* Utah State Bar Ethics Advisory Opinion Committee Opinion No. 01-01 approved January 26, 2001 (Utah Ethics Committee concluded that Utah's Rule 1.8(a) is not applicable to the statutory lien situation); *Shapiro, Lifschitz & Schram, P.C. v. Hazard*, 24 F. Supp. 2d. 66 (D.C. 1998) (the court concludes that Rule 1.8 does not apply to the creation of an attorney's lien); *but see* Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, Ethical Considerations in Attorney Liens, Formal Opinion 94-35 (lawyers must advise the client to obtain independent counsel and give the client the opportunity to obtain counsel before enforcing the lien).

An attorney's lien provides persons notice that the attorney claims an interest in the property; it is not commencement of a civil action pursuant to the charging lien statute. *People v. Gray*, *supra*; *In re the Marriage of Mitchell*, 2002 Colo. App. Lexis 162 (Colo.App., Feb. 14, 2002); 31 Colo.Law 153 (April 2002). Accordingly, a charging lien for fees pertaining to services rendered in that particular matter may be enforced in that matter or in a separate lawsuit; *see Gee v. Crabtree*, 192 Colo. 550, 560 P.2d 835 (1997). The attorney asserting the lien has the burden to show that the lawyer comes within the purview of the statute; *In re Mitchell*.

However, mere assertion of the lien in most situations will be insufficient to give the attorney the right to record the notice of lien against real property. The lawyer must first comply with the statutory

requirements. *In People v. Smith*, *supra* (Colo. 1992), an attorney who represented a client in a dissolution of marriage action that he neglected, filed a notice of lien. He recorded it in the real estate records against the marital property after his services were terminated. He refused to remove the recorded lien. The court held that the charging lien statute did not authorize such recording because the attorney was not entitled to the lien in the first place. Smith violated the prior Code of Professional Responsibility, disciplinary rules, DR-102(A)(5), DR-102(A)(6), and DR5-103(A)(1), which are now Colo. RPC 8.4(d), 8.4(h), and 1.8(j).

Dolan v. Flett, 582 P.2d 694 (Colo.App. 1978), upheld an attorney's right of redemption after the attorney obtained a judgment for the client that nullified a note and deed of trust on the client's real property, and the client consented to the amount of the attorney's lien without the attorney first obtaining a judgment. *Dolan v. Flett* was decided before *People v. Smith*, a disciplinary case. Given the unresolved issues and factual distinctions between a civil case (*Dolan v. Flett*, *supra*) and the disciplinary case (*People v. Smith*, *supra*), which contains prohibitive language, attorneys should exercise care to follow the requirements of the charging lien statute prior to recording a lien.

The amount of an attorney's lien should comply with the requirements for fees as established by Colo. RPC 1.5.

Taking a Security Interest In Property Owned By The Client

Colo. RPC 1.8(a) allows lawyers to take a security interest in client property for payment of fees if the conditions set forth in the rule are met: the terms of the transaction must be fair and disclosed in writing; the client must be informed that independent counsel may be advisable; and the lawyer must obtain written consent from the client.

There are three common situations in which lawyers require security for payment of fees. The first involves the situation where a client is in need of legal services and owns property, including real property, that could be used as security for payment of legal services. The second scenario involves a client providing security for payment of the retainer. The third scenario involves a client who has failed to pay fully the outstanding bills for the legal services rendered as the matter progresses and the lawyer wishes to secure the payment of the past due legal fees by a promissory note and a deed of trust or some other security instrument.

Colo. RPC 1.8(a) provides:

> 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 the client unless:
>
> (1) The transaction terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
>
> (2) The client is informed that the use of independent counsel may be advisable and is given a reasonable opportunity to seek the advice of such independent counsel and the transaction; and
>
> (3) The client consents in writing thereto.

(Emphasis added).

A lawyer may require security for payment of past or future fees or for a retainer.[2] However, because of differing interests, conflicts between the lawyer and client can exist. Although the client is certainly interested in having the legal services rendered, the client may not understand the ramifications of providing a security interest in property the client owns or in which the client has an interest. It is the lawyer's responsibility to be certain the client has been made aware of the protections of Colo. RPC 1.8(a). Courts in other states have also required that the lawyer explain the transaction to the client and that the terms of such transaction are fair. *See Read v. State Bar,* 53 Cal.3d 394, 410, 807 P.2d 1047, 1052 (Cal. 1991), modified at 53 Cal.3d 1009a; and *Hawk v. State Bar*, 45 Cal.3d 589, 754 P.2d 1096, 247 Cal. Rpt. 599 (1988); *see also* The Restatement of the Law Governing Lawyers, 3rd, § 43(4). Therefore, before a lawyer enters into such an arrangement, the lawyer must comply with Colo. RPC 1.8(a).

Other ethics committees have concluded that an attorney may accept a security interest for payment of fees upon compliance with Rule 1.8(a).[3] *See* Connecticut Bar Association Committee on Professional Ethics, Informal Opinion 97-4, March 4, 1997 (Rule 1.8(a) is applicable to a lawyer's acquisition of a security interest taken in client property for security of a payment for fees); Los Angeles County Bar Association Professional Responsibility in Ethics Committee, Opinion No. 492 (January 26, 1998) (lawyer is required to comply with Rule 3-300 of the California Rules of Professional Conduct when accepting a security interest in real property to ensure the payment of the lawyer's fees, whether the client owns or has an interest in the property).

If a lawyer takes a security interest in property for more than the fees actually earned, *e.g.* for a retainer, the lawyer must take steps to release that portion of the security that is in excess of the earned fees. For example, when a lawyer takes a security interest against the client's real property for $100,000 because she believes the fees for the commercial litigation matter will be that amount, the lawyer must file a partial satisfaction or otherwise credit the amounts not earned when the case is concluded or the representation is terminated, so the property is not encumbered for more than the fees actually earned.

Rule 1.7(b)

Even if the lawyer complies with Colo. RPC 1.8(a) when taking a security interest, or Colo. RPC 1.8(j) when filing a charging lien, the lawyer must also comply with the provisions of Colo. RPC 1.7. The lawyer must ensure that his or her own interest in getting paid does not have an adverse effect on the representation of the client. Colo. RPC 1.7(b). This is especially true if the attorney attempts to enforce the lien or foreclose on the security interest while the attorney is representing the client. If the lawyer's responsibilities to that client are materially limited by the lawyer's own interest, because the lawyer wants to ensure that he or she is paid, then the lawyer may have to withdraw pursuant to Colo. RPC 1.16. Lawyers have been disciplined for violating Colo. RPC 1.7(b) when a lawyer has taken property in lieu of fees. *See People v. Mason*, 938 P.2d 133 (Colo. 1997) (Obtaining a transfer of property from a client in lieu of a previously earned legal fee and then representing the client in a suit by the holder of the security interest in the transferred property violates Colo. RPC 1.8(j) and Colo. RPC 1.7(b)).

NOTES

1. This Opinion does not address attorneys' liens on property held in the name of multiple owners, some of whom are not the clients of the lawyer.

2. Normally, when a lawyer is taking a security interest, the lawyer is not taking title to or actual possession of the client's property. In those circumstances where the lawyer actually takes possession of the security, *e.g.*, stocks and bonds, then the attorney must comply with Colo. RPC 1.15 by safeguarding the property.

3. This section of the Opinion applies to security interests only; it does not apply to charging liens as permitted by C.R.S. § 12-5-119 (2001).

111 COMMUNICATING WITH REPRESENTED PERSON FOR THE PURPOSE OF PROVIDING A "SECOND OPINION"

Adopted January 19, 2002.

Introduction

The Colorado Bar Association Ethics Committee (the "Committee") has received inquiries from members of the bar regarding the ethical conduct of a lawyer ("Lawyer No. 2") who is contacted by a person (the "Client") Lawyer No. 2 knows is represented by counsel ("Lawyer No. 1"), when the Client requests a second legal opinion.

The issues stated below will be discussed within the context of the ethical questions raised in the following circumstance: The Client, who is currently represented by Lawyer No. 1 in connection with a pending or contemplated legal proceeding, transaction or other situation involving legal representation (the "Matter") initiates communication with other counsel, Lawyer No. 2, in order to obtain advice or a second opinion concerning the Matter or a review of Lawyer No. 1's representation of the Client in the Matter (collectively, the "Second Opinion").

Issues

(1) Whether Lawyer No. 2 is ethically required to obtain the consent of Lawyer No. 1 before communicating with the Client about the Matter or before providing the Client with a Second Opinion; and

(2) Whether Lawyer No. 2 is ethically required to decline (or discontinue) representation of the Client regarding the Matter if the Client refuses to authorize Lawyer No. 2 to contact Lawyer No. 1 to discuss Lawyer No. 1's representation of the Matter.

Scope and Purpose

The purpose of this opinion is to provide guidance to attorneys in evaluating the ethical propriety of communications with the Client where the communications are initiated by the Client for the purpose of obtaining a Second Opinion, and to identify the ethical issues that may confront Lawyer No. 2. This opinion does not purport to address considerations of professionalism or professional standards which may or may not apply to the circumstances presented in the Introduction noted above.

Syllabus

Rule 4.2 of the Colorado Rules of Professional Conduct ("Colo. RPC") does not require Lawyer No. 2 to obtain the consent of Lawyer No. 1 in order to communicate with the Client concerning the Matter where the Client initiates the communication for the purpose of obtaining a Second Opinion. Colo. RPC Rule 4.2 does not apply to the circumstances presented in the Introduction of this Opinion. Lawyer No. 2, however, must take measures required to (i) avoid any conflicts of interest, and (ii) provide competent representation to the Client in extending a Second Opinion, considering any limitations on his knowledge of relevant facts.

Opinion

Rule 4.2 of the Colorado Rules of Professional Conduct

Rule 4.2 of the Colo. RPC governs attorneys' communications with persons represented by counsel. Colo. RPC 4.2, "Communications with Person Represented by Counsel" provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Colo. RPC 4.2 prohibits a lawyer, in the course of representing a client, from communicating about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, without the consent of the other lawyer. The essential purpose of the Rule is to prohibit *ex parte* contacts or communications between lawyers representing clients and persons or parties known to be represented in the matter by counsel unless such counsel consents. The Rule does not apply to the circumstance described in the Introduction. The Committee believes that Colo. RPC 4.2, by its terms, does not apply to the situation presented by the Client's request for a Second Opinion, because the party protected by Colo. RPC 4.2 is a person other than the Client.

The Committee further believes that an extension of the prohibitions of Colo. RPC 4.2 to the Second Opinion situations would infringe upon the Client's inherent right to seek advice or representation from counsel of the Client's choosing. The Committee believes the Client should be free to seek other or additional advice or opinions on the Matter, including opinions on the merit of previous advice or the competency of Lawyer No. 1's representation. Thus, it is the opinion of the Committee that it is not necessary for Lawyer No. 2 to obtain the consent of Lawyer No. 1 to communicate or consult with the Client for the purpose of providing a Second Opinion.

Colo. RPC 1.7 – Conflicts of Interest

In accepting employment by the Client for the purposes of rendering a Second Opinion, Lawyer No. 2 must, as in all cases, comply with the proscriptions of Colo. RPC 1.7 relating to conflicts of interest. In particular, Lawyer No. 2 must be careful to maintain his or her professional independence such that Lawyer No. 2's own interests in the possible representation of the Client in the Matter do not influence the nature of the advice or the Second Opinion.

If the Client contacts Lawyer No. 2 to discuss the Client's concerns about the competence of Lawyer No. 1's representation, Lawyer No. 2 may discuss these concerns with the Client without first obtaining the consent of Lawyer No. 1. Lawyer No. 2 should be careful to clarify the analyses and conclusions of the Client pertaining to Lawyer No. 1's conduct. Lawyer No. 2 should be familiar with the facts of the underlying matter as a means for clarifying analyses and conclusions reached by the Client regarding Lawyer No. 1's conduct and representation.

Colo. RPC 1.1 – Competence

Lawyer No. 2 also should be cognizant of, and give deference to, the requirements of Colo. RPC 1.1 that require Lawyer No. 2 to provide competent representation to the Client in providing the Second Opinion. Competent representation requires Lawyer No. 2 to possess the requisite legal knowledge and skill, and to employ the thoroughness and preparation reasonably necessary to extend the Second Opinion to the Client. Thus, Lawyer No. 2 must consider and evaluate the nature of the Second Opinion sought by the Client and whether, or to what extent, communication with Lawyer No. 1 concerning the Matter may be necessary or advisable in order to render a Second Opinion competently, pursuant to Colo. RPC 1.1.

For example, where Lawyer No. 2 is asked to provide a Second Opinion on the merits of a settlement offer made in pending litigation, or the soundness of the advice Lawyer No. 1 has given with respect to a settlement offer, Lawyer No. 2 must consider issues of liability, applicable defenses to liability, availability and admissibility of evidence, credibility of witnesses, recoverable damages and costs of trial, as well as other factors in rendering an opinion. It would be extremely difficult, if not impossible, to make such an evaluation and render a competent Second Opinion without communication and consultation with Lawyer No. 1 concerning the Matter and the basis for Lawyer No. 1's advice relating to the settlement offer. Likewise, Lawyer No. 2 may be unable to render a Second Opinion competently regarding a transaction such as the merger of two businesses or the acquisition of a business or real property without first discussing with Lawyer No. 1 the facts and support for decisions made by Lawyer No.1 prior to the Client contacting Lawyer No. 2. When the Client, for whatever reason, refuses to authorize Lawyer No. 2's contact or communication with Lawyer No. 1 concerning the Matter for which the Second Opinion is sought, it may be impossible for Lawyer No. 2 to consider fully all relevant facts and circumstances necessary to render

competent representation required by Colo. RPC 1.1 in providing a Second Opinion. In such a case Lawyer No. 2 must either refrain from extending a Second Opinion, or clearly limit the scope of the Second Opinion to the facts and circumstances Lawyer No. 2 was able to obtain.

On the other hand, when the Second Opinion requested by a Client relates to a review of the legal issues involved in the Matter, Lawyer No. 2 may competently discuss the Matter with the Client and render a Second Opinion without obtaining the prior consent of Lawyer No. 1. For example, if Lawyer No. 1 told the Client that the law governing a particular tort action or business transaction allows or disallows a particular cause of action or course of conduct, and the Client does not like the governing law, Lawyer No. 2 may render an opinion regarding the existence and scope of such law. Such an opinion may not require extensive knowledge of the facts related to the underlying case when the issue presented is sufficiently objective and related to the existence of governing law.

112 SURREPTITIOUS RECORDING OF CONVERSATIONS OR STATEMENTS

Adopted July 19, 2003.

Syllabus

Surreptitious recording of a conversation or statement occurs where one party to the conversation (the recording party) has consented to the recordation but at least one other party to the conversation or statement is not aware of the recording. Because surreptitious recording of conversations or statements by an attorney may involve an element of trickery or deceit, it is generally improper for an attorney to engage in surreptitious recording even if the recording is legal under state law. For the same reason, a lawyer generally may not direct or even authorize an agent to surreptitiously record conversations, and may not use the "fruit" of such improper recordings. However, where a client lawfully and independently records conversations, the lawyer is not required to advise the client to cease its recording, nor to decline to use the lawfully- and independently-obtained recording.

The Committee believes that, assuming that relevant law does not prohibit the recording,[1] there are two categories of circumstances in which attorneys generally should be ethically permitted to engage in surreptitious recording or to direct surreptitious recording by another: (a) in connection with actual or potential criminal matters, for the purpose of gathering admissible evidence; and (b) in matters unrelated to a lawyer's representation of a client or the practice of law, but instead related exclusively to the lawyer's private life. The bases for the Committee's recognition of a "criminal law exception" are the widespread historical practice of surreptitious recording in criminal matters, coupled with the Committee's belief that attorney involvement in the process will best protect the rights of criminal defendants. The Committee recognizes a "private conduct exception" because persons dealing with a lawyer exclusively in his or her private capacity have diminished expectations of privacy in connection with those conversations; therefore, in the opinion of the Committee, purely private surreptitious recording is not ordinarily deceitful. However, the Colorado Supreme Court has not recognized either of these exceptions to the general prohibition against surreptitious recording by lawyers.

Issues

Under what circumstances, if any, may an attorney surreptitiously record or direct another to surreptitiously record an in-person or telephone conversation with another person? Do the ethics rules recognize distinctions between surreptitious recording by attorneys in civil and criminal matters? Do the rules recognize distinctions between attorneys who surreptitiously record conversations in the course of representing clients or otherwise acting in a professional capacity, versus attorneys acting in a purely private capacity?

This opinion does not address non-consensual recording, *i.e.*, wiretapping, in which a non-party to the conversation engages in surreptitious recording. It also does not address the circumstances, if any, in which lawyers may use false pretenses to gather evidence, for example in investigating claims of housing discrimination and trademark infringement.

Existing Legal Authority

The Committee does not write on a clean slate. In its Formal Opinion 22 ("CBA 22"), originally issued on January 26, 1962, the Committee considered the broad question of whether "[a] lawyer, by means of a mechanical or electronic device, [may] record conversations with and statements by other persons." The Committee resolved the issue under the then-applicable Colorado Canons of Professional Ethics (the predecessor to the Colorado Code of Professional Responsibility ("Colorado Code") that, in turn, preceded the Colorado Rules of Professional Conduct ("Colorado Rules")). The Committee concluded:

> One of the principal purposes of the Canons of Ethics is to increase public confidence in the legal profession. This end can be achieved only if individual members of the Bar earn a reputation as men of honor, integrity and fair dealing. Conversely, every deceptive practice and resort to artifice by an attorney must necessarily demean the Bar as a whole in addition to the particular attorney involved.
>
> . . .
>
> [W]e believe that the large majority of persons would not suspect that a conversation with an attorney was being surreptitiously recorded. Moreover, one reason for an attorney intentionally not disclosing that a particular conversation or statement is being recorded may be a belief that the person whose conversation is being recorded would choose his words more carefully, or speak less freely, or not at all, if such knowledge were imparted to him.
>
> . . .
>
> [T]here is inherent in the undisclosed use of a recording device under these circumstances an element of deception, artifice or trickery which falls below the standard of candor and fairness which all attorneys are bound to uphold.

In 1974, the American Bar Association ("ABA") reached a similar result in its Formal Opinion 337 ("ABA 337"), concluding that under the ABA Model Code of Professional Responsibility, with a possible exception for conduct by law enforcement officials, a lawyer may not engage in undisclosed recording of any conversation.

The Colorado Supreme Court relied on CBA 22 and ABA 337 in *People v. Selby*, 198 Colo. 386, 606 P.2d 45 (1979), an attorney disciplinary case, as support for the following broad statements: "A lawyer may not secretly record any conversation he has with another lawyer or person. Candor is required between attorneys and judges. Surreptitious recording suggests trickery and deceit." 606 P.2d at 47. *Selby* involved a criminal defense attorney who surreptitiously recorded an in-chambers conference with the trial judge and the prosecutor, then used partial quotations out of context from the surreptitiously-recorded conference, and testified falsely before the Grievance Committee concerning the circumstances of the taping. Under those circumstances, the Court ordered disbarment. *See also People v. Wallin*, 621 P.2d 330, 331 (Colo. 1981) (citing *Selby*, disciplining attorney for, *inter alia*, surreptitious recording of telephone conversation with witness).

In *People v. Smith*, 778 P.2d 685 (Colo. 1989), the Colorado Supreme Court suspended an attorney for his involvement in undercover activities related to a criminal investigation of a former client. Acting at the request of the Colorado Bureau of Investigation, the lawyer surreptitiously recorded an in-person conversation in which the former client sold illegal drugs to the attorney. The Court cited *Selby* for the general rule that "[t]he undisclosed use of a recording device necessarily involves elements of deception and trickery which do not comport with the high standards of candor and fairness to which all attorneys are bound." *Id.* at 687. The Court also recognized the potential for a "prosecutorial exception to the general rule that the standards for prohibiting deceit, dishonesty and fraud preclude attorneys from surreptitiously recording communications with clients and others," *id.*, but it found that potential exception inapplicable where the respondent was a private, not prosecuting, attorney: "We do not agree that the above-described policy considerations [in favor of law enforcement objectives] permit private counsel to deal dishonestly and deceitfully with clients, former clients and others. To hold otherwise would fatally undermine the foundation of trust and confidentiality that is essential to the attorney-client relationship in the context of civil as well as criminal proceedings." *Id.* The Colorado Supreme Court cited neither CBA 22 nor ABA 337 in *Smith*. *See also Sequa Corp. v. Lititech, Inc.*, 807 F.Supp. 653, 663 (D.Colo. 1992) (in *dictum*, recognizing existence of "'prosecuting attorney' exception," but limiting it to law enforcement authorities, not private attorneys).

CBA 22 relied on Canon 22 of the old Colorado Canons for its conclusion that surreptitious recording is inherently unethical. That canon stated that a lawyer's conduct "should be characterized by candor and fairness." ABA 337, *Selby*, *Wallin* and *Smith* relied on DR 1-102 of the ABA Model Code and the Colorado Code, which prohibits a lawyer from engaging "in conduct involving dishonesty, fraud, deceit,

or misrepresentation," and "any other conduct that adversely reflects on his fitness to practice law." ABA 337; *Smith*, 778 P.2d at 686-87; *Wallin*, 621 P.2d at 331; *Selby*, 606 P.2d at 46.

The Colorado Rules took effect on January 1, 1993. Colorado Rule 8.4(c) maintains the prohibition against "conduct involving dishonesty, fraud, deceit or misrepresentation." Colorado Rule 4.4 addresses "respect for rights of third persons," and proscribes "means [of representation of a client] that have no substantial purpose other than to embarrass, delay or burden a third person," and "methods of obtaining evidence that violate the legal rights of such a person." Colorado Rule 4.1 prohibits making false or misleading statements of facts to third persons, but does not require disclosure of material facts to third persons unless disclosure is necessary to avoid assisting a client in a criminal or fraudulent act. No published Colorado decision has considered the issue of surreptitious recording under the Colorado Rules.

On June 24, 2001, the ABA issued its Formal Opinion 01-422 ("ABA 422"), which abandoned ABA 337's general prohibition on surreptitious recording of conversations by attorneys. In its place, ABA 422 recognized a general rule that, where state law permits surreptitious recording of conversations, a lawyer may do so without violating the ABA Model Rules. However, ABA 422 further concluded that a lawyer may not misrepresent that the conversation is not being recorded and that the surreptitious recording of conversations with clients is, at the least, inadvisable. ABA 422 relied on multiple considerations, including the fact that surreptitious recording of conversations is now a more widespread, accepted and expected practice than it was in 1974 (when ABA 337 was issued); hence, ABA 422 concluded that it should no longer be treated as inherently deceitful. The opinion further identified the numerous exceptions that had developed to the general rule against surreptitious recording as stated in ABA 337; the opinion concluded that a better approach would be to substitute a general rule *permitting* such conduct except "where it is accompanied by other circumstances that make it unethical." Finally, to support that conclusion, ABA 422 relied on differences between the Model Rules and the predecessor Model Code: the Model Rules do not include the prohibition on "even the appearance of impropriety" that had appeared in the Model Code, and Model Rule 4.4 directly addresses the circumstances under which a lawyer may gather evidence from third parties, in terms that are broad enough to encompass surreptitious recording. Based on all of those factors, ABA 422 concluded that a general prohibition of surreptitious taping is no longer appropriate.

Analysis

Surreptitious Recording is Generally Deceitful and, Therefore, Prohibited

The Committee believes that the reasoning of CBA 22 remains sound, *i.e.*, that despite advances in technology and reduced expectations of privacy, "the large majority of persons would not suspect that a conversation with an attorney was being surreptitiously recorded," and, therefore, that "there is inherent in the undisclosed use of a recording device . . . an element of deception, artifice or trickery which falls below the standard of candor and fairness which all attorneys are bound to uphold." Canon 22, which was the basis for CBA 22, required lawyer conduct to be "characterized by candor and fairness." Colorado Rule 8.4(c), like prior DR 1-102, prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." As a result, for the same reason that CBA 22 and the Colorado Supreme Court concluded that it is improper for an attorney to surreptitiously record conversations or statements, the Committee reaches the conclusion under the Colorado Rules that, generally, a lawyer may not surreptitiously record conversations with a third person.

For the same reasons, it is also generally improper for an attorney to direct or even authorize another, such as an investigator or legal assistant, to record conversations surreptitiously. *See* Colo. RPC 5.3 (lawyer may not direct or ratify conduct of nonlawyer who is employed or retained by or associated with the lawyer if that conduct would violate the Colorado Rules); Colo. RPC 8.4(a) (it is misconduct for lawyer to violate rules through the act of another); *e.g.*, CBA Ethics Comm. Abstract 98/99-05 (where private investigator retained by an attorney surreptitiously recorded a witness interview without the lawyer's prior knowledge or approval, the attorney should not listen to or use the tape without the witness' permission). On the other hand, the general prohibition applicable to a lawyer does not preclude a client or third party acting

on the client's behalf from independently engaging in surreptitious recording. For example, if a client has recorded conversations with others before hiring a lawyer, the lawyer should not be required to advise the client to cease recording conversations and should be able to use those recordings; an opposite result would limit the rights the client otherwise would have simply because the client hired a lawyer. However, if the lawyer learns facts indicating that the client's past recording was improper under the law, the lawyer has a duty not to use the unlawful recording. *See* Colo. RPC 1.2(d) (lawyer may not assist or counsel client to engage in fraudulent conduct); Ariz. Op. 88-08 at 8 (lawyer was barred from using client's secret tape recording, made during deposition break, of conversation between opposing counsel and his client; permitting use of the tape would "come too close to assisting the client in the underlying improper conduct," in violation of Arizona's identical version of Rule 1.2(d)). If a client asks the lawyer if prospective recording by the client would be permissible, the lawyer should be permitted to advise the client of the legal (as distinguished from ethical) parameters that apply to surreptitious recording, and then to leave the decision to the client.

The Committee Believes that There Should Be Limited and Discrete Exceptions to the General Rule Against Surreptitious Recording

The prohibition articulated in CBA 22 is broad and absolute: "It is improper for an attorney to record by means of a mechanical or electronic device conversations or statements without disclosing that the conversations or statements are being recorded." In the view of the current Committee, CBA 22 stated the prohibition *too* broadly. The Committee identifies two circumstances in which attorneys generally should be ethically permitted to engage in surreptitious recording or to direct surreptitious recording by another: (a) in connection with actual or potential criminal matters; and (b) in matters unrelated to a lawyer's representation of a client or the practice of law, but instead related exclusively to the lawyer's private life.

The Committee recognizes that the Colorado Supreme Court has yet to recognize either of these exceptions to the general rule against surreptitious recording, and that the Committee's endorsement of the exceptions arguably is inconsistent with the Court's decisions in *Selby* and *Smith*.[2] As a result, attorneys should exercise particular care in relying on this ethics opinion, which, like all CBA ethics opinions, is advisory only.

The Criminal Law Exception

With regard to surreptitious recordings, criminal law materially differs from civil law for two reasons. First, the practice of criminal law regularly implicates fundamental constitutional rights that generally are absent from the everyday practice of civil law. Second, surreptitious recordings are and have long been commonplace in criminal law, where conversations with witnesses, subjects, targets, law enforcement officers and others often are recorded surreptitiously in an effort to gather evidence for trial. *See People v. Velasquez*, 641 P.2d 943, 949 (Colo. 1982). Surreptitious recordings are a powerful tool for both law enforcement and defense counsel. Not surprisingly, courts have long sanctioned surreptitious recording as an appropriate, effective means of gathering evidence in the criminal arena. *See People v. Morley*, 725 P.2d 510, 515 (Colo. 1986) ("while the undercover operation was itself built on deceit [and surreptitious recordings], governmental activity in the pursuit of crime 'is not confined to behavior suitable for the drawing room'") (*quoting United States v. Murphy*, 768 F.2d 1518, 1529 (7th Cir. 1985)). This is because, as the Supreme Court has recognized for more than forty years, the United States Constitution offers no protection for "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa v. United States*, 385 U.S. 293, 302 (1966) (quoting *Lopez v. United States*, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting)). Any analysis of the ethical propriety of surreptitious recording in the criminal context must include a careful consideration of the implications for both the defense and prosecution, and, ultimately, of the constitutional rights of the defendant.

The Committee further recognizes that surreptitious recording as a method to gather evidence in criminal matters will continue regardless of whether attorneys may ethically participate in such recording.

In other words, investigative agents will act independently in surreptitiously recording conversations for the prosecution or defense, regardless of whether attorneys have a role in the process. An absolute prohibition against attorney involvement simply would remove attorneys from the activity, but would not stop the activity itself. The absence of attorney involvement presents its own risks in light of the constitutional implications of surreptitious recordings. The Committee believes that without the input of lawyers, investigators lacking formal legal training might surreptitiously record conversations under circumstances that could be unconstitutional or otherwise unlawful. The Committee concludes that it is preferable to promote substantive involvement of attorneys, rather than to create an ethical bar to such participation.

Therefore, based on the historical and court-approved practice of surreptitious recording in criminal matters, and to encourage attorney oversight of such recording, the Committee draws a bright-line distinction between criminal and civil law and adopts the reasoning set forth in ABA 422 for the criminal law setting. The Committee's approach also finds support in court and ethics opinions in other states.[3]

In the opinion of the Committee, an attorney may surreptitiously record, and may direct a third party to surreptitiously record conversations or statements for the purpose of gathering admissible evidence in a criminal matter. By way of example, the Committee identifies three common situations in which an attorney may actively participate in surreptitiously recording a conversation in a criminal matter without violating his or her ethical obligations:

A prosecutor or criminal defense attorney may legally advise investigative agents to surreptitiously record conversations for the purpose of gathering admissible evidence, or to participate in the execution of a court-issued wire-tap or other order permitting surreptitious recording. For example, a prosecutor may direct a law enforcement officer or government informant to surreptitiously record a conversation during a drug deal.

A prosecutor or criminal defense attorney may counsel his or her client to surreptitiously record a conversation for the purpose of gathering admissible evidence. For example, this might occur when a defense attorney has determined that it is in his or her client's best interest to cooperate with the prosecution as a government informant.

An attorney acting as an investigative agent, with no role as an attorney on the case, may surreptitiously record a conversation for the purpose of gathering admissible evidence. This situation might arise when a law enforcement officer also is a licensed attorney, or when the attorney himself or herself is the subject or target of an investigation. However, an attorney who surreptitiously records a conversation as an investigative agent may not thereafter act as an attorney in the case.

The criminal law exception that the Committee recognizes is not unlimited. A prosecutor or criminal defense attorney may not surreptitiously record conversations where the law prohibits such recording. Nor may a prosecutor or criminal defense attorney participate in surreptitious recordings, either himself or herself or through others, where such conversations are for purposes other than gathering admissible evidence. For example, conversations among attorneys or *pro se* parties concerning trial preparation, plea negotiations, or proffers are not for the purposes of gathering admissible evidence, and an attorney therefore could not ethically record such conversations surreptitiously.

The Private Conduct Exception

Colorado Rule 8.4 applies to a lawyer's conduct both in the representation of clients and in the lawyer's private life. Lawyers may be subject to discipline under that rule for conduct arising in their private lives, outside of an attorney-client relationship. *See, e.g., In re Hickox*, 57 P.3d 403, 405 (Colo. 2002) (disturbing the peace, assault, and domestic violence); *People v. Reaves*, 943 P.2d 460 (Colo. 1997) (driving while impaired, harassment, and disorderly conduct); *People v. Nelson*, 941 P.2d 922 (Colo. 1997) (third-degree assault); *People v. McGuire*, 935 P.2d 22, 24 (Colo. 1997) (disturbing the peace and damaging private property); *see generally* Patrick O'Rourke, *Discipline Against Lawyers for Conduct Outside the Practice of Law*, 32 *The Colorado Lawyer* 75, 76-78 (April 2003). Specifically, the ban under Colorado Rule 8.4(c) on conduct involving dishonesty, deceit, fraud or misrepresentation applies to both professional and private activities. *See, e.g., People v. Rishel*, 50 P.3d 938, 942 (Colo. O.P.D.J.) (attorney disbarred for

converting season-ticket-pool money); *but see* David B. Isbell and Lucantino N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 *Georgetown J. Legal Ethics* 791, 816 (1995) (acknowledging that Model Rule 8.4(c) applies regardless of whether attorney is acting in professional or private capacity, but arguing that rule applies to private conduct only when it is so grave as to call into question the lawyer's fitness to practice law).

The Committee has found no controlling law in Colorado as to whether legally but surreptitiously recording a conversation in one's private capacity constitutes dishonesty, fraud, deceit or misrepresentation.[4] There is authority from outside Colorado that permits surreptitious recording by a lawyer acting as a private citizen rather than in a professional capacity. *See, e.g.*, ABA 422; *In re Hunter Studios, Inc.*, 164 B.R. 431, 439 (Bankr. E.D.N.Y. 1994) (conclusion that a lawyer may not surreptitiously record conversations does not apply in the context of an attorney acting in a purely private capacity: "The unfavorable characteristics of the action when taken by an attorney engaged in the representation of someone other than her or himself, are not present when taken by a layperson or non-engaged attorney. The non-engaged attorney should have the same rights as the layperson . . ."); Ariz. Op. 75-13 (June 11, 1975) (attorney may document threats, obscene calls, etc.); *cf.*, New York City Ethics Op. 2003-2 (2003) (lawyer may surreptitiously tape a conversation "if the lawyer has a reasonable basis for concluding that disclosure of the taping would significantly impair pursuit of a generally accepted societal good," including to preserve evidence of threats made against the lawyer or a client).[5]

The Committee concludes that purely private surreptitious recording is not necessarily deceitful. In the opinion of the Committee, the logic underlying CBA 22, ABA 337, *Selby*, and *Smith* is that third persons expect lawyers not to record conversations—and, thus, it is inherently deceitful to surreptitiously record conversations—*when those third parties are speaking with lawyers in their professional capacity as lawyers.* The Committee notes that Canon 22, on which the Committee principally relied when it issued CBA 22, addressed only "[t]he conduct of the lawyer *before the Court and with other lawyers*" (emphasis added), rather than *all* of a lawyer's conduct, including his or her purely private conduct. *See also Smith*, 778 P.2d at 687 (permitting surreptitious recording of conversations with former client "would fatally undermine the foundation of trust and confidentiality that is essential to the attorney-client relationship . . ."); *Selby*, 606 P.2d at 47 ("[A] lawyer has a very special responsibility for candor and fairness in all of his dealings with a court. Absent mutual trust and confidence between a judge and a lawyer—an officer of the court—the judicial process will be impeded and the administration of justice frustrated.").

When the surreptitiously-recorded conversation does not relate to the representation of clients, there is no heightened expectation of privacy or "honor, integrity and fair dealing"; indeed, the third person might not even know that he or she is communicating with an attorney. For these reasons, the Committee believes that a lawyer's recording of a private conversation is not necessarily deceitful. Therefore, for example, if a lawyer is subject to harassing telephone calls or threats of harm having no relationship to his or her representation of clients or professional activities, Rule 8.4(c) should not apply to prohibit that activity.

NOTES

1. As in many other states, under Colorado law, it is lawful for a person, whether a lawyer or a non-lawyer, to surreptitiously record telephone and in-person conversations with another person if the recording person is a participant in the conversation. CRS § 18-9-304. In addition, as discussed below, a large body of constitutional law in the criminal realm bears on the ethical limits of surreptitious recording of conversations by or at the direction of prosecutors and criminal defense attorneys.

2. On the other hand, an argument can be made that, because *Selby* did not need to address the existence of either a criminal law or private conduct exception, its broad language constitutes *dictum* when applied beyond the narrow fact pattern that existed in the case. Similarly, although the respondent in *Smith* received discipline for

surreptitious recordings at the request of law enforcement personnel, that outcome arguably flowed from the fact that the lawyer recorded conversations with a former client rather than with a third person.

3. *E.g.*, Supreme Court of Ohio, Board of Commissioners on Grievances and Discipline Op. 97-3 (1997) (recognizing exception to prohibition against secret recording for prosecutors and criminal defense attorneys); Arizona State Bar Association Ethics Committee Op. 90-02 (1990) (recognizing exception for recording of witness statements in connection with investigation of criminal conduct or defense of criminal case); Supreme Court of Tennessee Board of Professional Responsibility Formal Ethics Opinion 86-F-14(a) (allowing surreptitious recordings of witness interviews in investigation of criminal conduct or defense of criminal case); Kentucky Bar Association Ethics Opinion KBA E-279 (1984) (allowing attorneys defending criminal charges to surreptitiously record conversations with witnesses); Association of the City Bar of New York Opinion 80-95 (1980) (ethical prohibition on surreptitious recordings does not apply to lawyers working on criminal cases).

4. *But c.f., Matters Resulting in Diversion*, 29 *The Colorado Lawyer* 117, 118 (Oct. 2000) (attorney agreed to participate in diversion program for surreptitiously recording a telephone conversation with a former client in an attempt to collect her bill) (citing Colo. RPC 8.4(c)).

5. The Committee does not rely on a "good cause" exception to operation of the ethics rules as the basis for its analysis. *See People v. Pautler*, 47 P.3d 1175, 1181 (Colo. 2002) (rejecting "greater good" justification for prosecutor's violations of Colorado Rules 4.3 and 8.4(c)); *see also* Isbell and Salvi, 8 *Georgetown J. Legal Ethics* at 807 ("There is no valid ethical distinction to be drawn that turns on whether the deception serves a larger social purpose.").

113 ETHICAL DUTY OF ATTORNEY TO DISCLOSE ERRORS TO CLIENT

Adopted November 19, 2005.
Modified July 18, 2015 soley to reflect January 1, 2008 changes in the Rules of Professional Conduct.

Syllabus

As part of the general ethical duty to keep a client reasonably informed about the status of a matter, a lawyer should fully and promptly inform the client of significant developments, Colo. RPC 1.4. including those developments resulting from the lawyer's own errors. As part of this broad duty to report, a lawyer has an ethical duty to make prompt and specific disclosure to a client of the lawyer's error if the error is material. A material error is one that will likely result in prejudice to a client's right or claim. In these circumstances, the lawyer should inform the client that it may be advisable for the client to consult with independent counsel regarding the error, which may include advice regarding the statute of limitations on a claim for legal malpractice. Colo. RPC 1.4(b).The lawyer need not and should not inform the client that a legal malpractice claim against the lawyer actually exists or has merit, or of the desirability of terminating the lawyer's representation. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

A lawyer may continue to represent the client in these circumstances only in compliance with Colo. RPC 1.7(a) and (b). 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. Continued representation may not be permissible if the lawyer might be influenced to pursue a strategy that would avoid liability for the lawyer at the expense of the success of the representation, or if there is a significant risk that the representation of the client will be materially limited by the lawyer's personal interest. Finally, the lawyer may not obtain a release of liability except in compliance with Colo. RPC 1.8(h).

This opinion addresses the lawyer's ethical duty to advise the client of relevant developments resulting from the lawyer's own errors. This opinion does not address whether the failure to disclose an error itself gives rise to a cause of action against the lawyer. See Colo. RPC, Scope, ("Violation of a Rule should not in and of itself give rise to a cause of action nor should it create a presumption that a legal duty has been breached.").

The lawyer should also consider the impact of disclosure of the error to the client on the lawyer's malpractice insurance coverage. The lawyer should review and consider any applicable malpractice insurance contract provisions, including notice to the insurer of potential claims, disclosure on applications for insurance, and "cooperation clauses" in the lawyer's policy.

Analysis

Basis for the Duty in the Rules of Professional Conduct

Lawyers must keep clients "reasonably informed about the status of a matter." Colo. RPC 1.4(a)(2). The lawyer's explanation must be "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Colo. RPC 1.4(b). The ethical duty to inform the client extends to keeping the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation. Comment, Colo. RPC 1.4. Additionally, "[a] lawyer may not withhold information to serve the lawyer's own interests . . ." Comment, Colo. RPC 1.4. Significant developments include matters adverse to the client's interests and those resulting from the lawyer's own actions, if the lawyer's actions are likely to result in prejudice to a client's rights or claim. In addition, failing to disclose an error to a client may rise to the level of conduct involving dishonesty, fraud, deceit or misrepresentation under Colo. RPC 8.4(c). Colo. RPC 8.4(c) may apply if the lawyer actively and intentionally conceals the facts and circumstances of the error from the client,[1] or misrepresents facts about

the error, and the client loses a valuable right, such as a right of appeal,[2] or releases a claim against the lawyer for legal malpractice.[3]

In the context of this opinion, a breach of a duty of care that will likely result in prejudice to a client's right or claim will be referred to as an "error," and disclosing an error to a client will mean drawing a client's attention to an error and not simply relying on the flow of paperwork sent to the client in the ordinary course of a representation. When, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client's right or claim, the lawyer must promptly disclose the error to the client. "Error," as used in this opinion, is not meant to include an act or omission that a reasonable lawyer would conclude would not likely result in prejudice to a client's right or claim.

Various jurisdictions that have considered the issue have reached similar conclusions.[4] Some legal authorities rely on the lawyer's obligation under the equivalent of Colo. RPC 1.4(b) to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Colo. RPC 1.4(b).[5] Other authorities cite the lawyer's obligation under the conflict of interest rules to obtain the client's informed consent to continued representation, on the basis that the lawyer's own interest in avoiding liability may materially limit the lawyer's representation of the client.[6] The conflict of interest rules would not apply, obviously, if the representation does not continue following the error.

Nature of Conduct that Triggers the Duty to Disclose

The more difficult determination is whether a particular error triggers an ethical duty to disclose it to the client. This determination is important because an overbroad interpretation of the ethical duty to disclose may needlessly undermine the trust and confidence essential to a healthy attorney-client relationship.[7] Also, the ethical duty to disclose should remain primarily a basis for a lawyer's self-assessment, not another arrow in the quiver of tactics employed in legal malpractice cases.[8] Whether a particular error gives rise to an ethical duty to disclose depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim and that the lawyer, therefore, has an ethical responsibility to disclose the error. The failure to disclose an error does not (and should not), in and of itself, give rise to a cause of action against the lawyer, nor does it (or should it) create a presumption that a legal duty has been breached.

Professional errors exist along a spectrum. At one end are errors that, as stated above, will likely prejudice a client's right or claim. Examples of these kinds of errors are the loss of a claim for failure to file it within a statutory limitations period or a failure to serve a notice of claim within a statutory time period. The lawyer must promptly inform the client of an error of this kind, if a disinterested lawyer would conclude there was an ethical duty to do so, because the client must decide whether to appeal the dismissal of the claim or pursue a legal malpractice action.[9] Another example is the loss of a right of appeal for failure to file a timely notice of appeal. However, as discussed more fully below, the lawyer should be given an opportunity to remedy the error before disclosing it to the client.

At the other end of the spectrum are errors and possible errors that may never cause harm to the client, either because any resulting harm is not reasonably foreseeable, there is no prejudice to a client's right or claim, or the lawyer takes corrective measures that are reasonably likely to avoid any such prejudice. For example, missing a nonjurisdictional deadline, a potentially fruitful area of discovery, or a theory of liability or defense may, upon discovery, prompt regretful frustration, but not an ethical duty to disclose to the client. As one commentator remarked regarding similar circumstances, "Unless there are steps that can be taken now to avoid the possibility of future harm, there is probably no immediate duty to disclose the mere possibility of lawyer error or omission."[10] Lawyers should be given the opportunity to remedy any error before disclosing the error to the client. The later assertion of a legal malpractice claim does not mean that the allegedly negligent lawyer breached a duty to disclose the error to the client. Nor should the failure to disclose the error be construed as an independent claim against the lawyer.[11] Whether a lawyer has an ethical duty to disclose depends on the facts and circumstances known to the lawyer once he or she has realized the error, not those that appear only through the prism of hindsight.

In between these two ends of the spectrum are innumerable errors that do not fall neatly into either end of the spectrum and must be analyzed on an individual basis. For example, it is ordinarily not necessary to disclose questions of professional judgment where the law was unsettled on an issue or the attorney "made a tactical decision from among equally viable alternatives."[12] Under the doctrine of "judgmental immunity," these types of decisions are not, as a matter of law, considered errors, below the applicable standard of care, or negligent conduct. When reasonable lawyers may disagree about whether the state of the law was unsettled or the available alternatives were equally viable, however, the lawyer should err on the side of discussing the available alternatives with the client before pursuing a course of action.[13] The lawyer's choice between equally viable alternatives should not be considered an error as defined in this opinion. Examples of potential errors that may give rise to an ethical duty to disclose include the failure to request a jury in a pleading (or pay the jury fee), the failure to include an acceleration provision in a promissory note, and the failure to give timely notice under a contract or statute. The Committee agrees with the New York State Bar Association that "whether an attorney has an obligation to disclose a mistake to a client will depend on the nature of the lawyer's possible error or omission, whether it is possible to correct it in the pending proceeding, the extent of the harm resulting from the possible error or omission, and the likelihood that the lawyer's conduct would be deemed unreasonable and therefore give rise to a colorable malpractice claim."[14]

What to Tell the Client

Although it can be difficult to determine whether a lawyer must call a client's attention to an error, it is relatively easy to describe what to say to the client when the lawyer has made the decision to disclose. Candor is a given. The result may be a surprisingly appreciative and understanding client. The lawyer need not advise the client about whether a valid claim for malpractice exists, and indeed the lawyer's conflicting interest in avoiding liability makes it improper for the lawyer to do so.[15] The lawyer need not, and should not, make an admission of liability. What must be disclosed are the facts that surround the error, and the lawyer should inform the client that it may be advisable to consult with an independent lawyer with respect to the potential impact of the error on the client's rights or claims.

It may be advisable, however, to inform the client that it may be prudent to consult with independent counsel regarding the statute of limitations on a claim for legal malpractice, especially if, notwithstanding the disclosure, the attorney-client relationship continues in the matter giving rise to the potential claim. The lawyer need not, however, advise the client of the viability of a legal malpractice claim, but simply inform the client that it may be appropriate to seek independent advice from a disinterested lawyer.

The Rules of Professional Conduct do not require the disclosure to be in writing, but failing to make a written record of it is imprudent and potentially defeating of one of the purposes of the disclosure: protection of the lawyer. The letter informing the client of the error should also recommend that the client consult independent counsel to discuss the consequences of the error. This notice may itself trigger the accrual of a legal malpractice claim and, hence, the relevant statute of limitations.[16] Even if the lawyer genuinely believes that it is in the client's best interests to continue the representation despite the error, the lawyer's own interests prohibit him or her from advising the client on this issue.[17] The lawyer should also consider the impact of disclosure of the error to the client on the lawyer's malpractice insurance coverage. The lawyer should review and consider any applicable malpractice insurance contract provisions, including notice to the insurer of potential claims, disclosure on applications for insurance, and "cooperation clauses" in the lawyer's policy.

Conflicts of Interest in Continuing the Representation

Continuing the representation is not an option if (a) the client terminates it, (b) the error effectively concludes it, or (c) the lawyer withdraws because the error creates a nonwaivable conflict of interest. If both lawyer and client desire to continue the representation, Colo. RPC 1.7(a)(2) requires the lawyer to consider whether the lawyer's own interests in avoiding liability may materially limit the representation. If the

lawyer concludes that the lawyer's own interests may materially limit the representation, continued representation is permissible only if the lawyer "reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client." Colo. RPC 1.7(b)(1).[18] Additionally, in order for representation to continue, each affected client must give "informed consent, confirmed in writing." Colo. RPC 1.7(b)(4).

Whether or not continued representation is permissible, either because there is no potential conflict or the potential conflict is waivable, depends on the nature of the error. 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.[19] Withdrawal is typically not required if the error likely can be corrected during the course of the representation; the error is not likely to result in harm to the client's cause; the error does not prejudice the client's right or claim, or the error does not necessarily constitute an error at all.[20] As one court stated:

> Many errors by a lawyer may involve a low risk of harm to the client or low risk of ultimate liability for the lawyer, thereby vitiating the danger that the lawyer's own interests will endanger his or her exercise of professional judgment on behalf of the client. Even if the risk of some harm to the client is high, the actual effect of that harm may be minimal, or, if an error does occur, it may be remedied with little or no harm to the client. In those circumstances, it is possible for a lawyer to continue to exercise his or her professional judgment on behalf of the client without placing the quality of representation at risk.[21]

In any event, a lawyer may not procure a release of liability from the client except in compliance with Colo. RPC 1.8(h). That rule prohibits a lawyer from making "an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or 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 association therewith."[22] Colo. RPC 1.8(h)(1) and (2). Colo. RPC 1.8(h) would be applicable, for example, if a lawyer agreed to handle the client's appeal free of charge in exchange for a release of liability.[23]

In other situations, a client cannot give informed consent, confirmed in writing, within the meaning of Colo. RPC 1.7(b)(4), because the lawyer's own interest in avoiding liability may materially limit the lawyer's representation of the client, within the meaning of Colo. RPC 1.7(a)(2)), by influencing the lawyer's strategy. For example, in a personal injury case arising from an automobile accident involving a Regional Transportation District bus, the plaintiff's lawyer fails to give RTD timely notice of a potential claim against it as required by the Colorado Governmental Immunity Act. The plaintiff's lawyer files an action against another driver, who is uninsured. The uninsured driver files a notice of nonparty at fault, identifying RTD. At trial, the plaintiff's lawyer emphasizes the evidence against the uninsured driver and downplays the evidence against RTD. The jury returns a verdict assigning 75% fault against the uninsured driver and 25% against RTD. The judgment against the uninsured driver is uncollectible, and the plaintiff's lawyer's liability to his client is limited to 25% of the total damages. Another lawyer representing the plaintiff might have emphasized the evidence against RTD or proceeded directly to an action against the plaintiff's lawyer for malpractice.

The plaintiff's lawyer thus violated Colo. RPC 1.7(a)(2). His interest in limiting his liability to the client in a future legal malpractice claim caused him to adopt a litigation strategy that emphasized evidence that increased the fault attributable to the uninsured driver, thereby reducing the lawyer's liability exposure to the client and increasing the uncollectible portion of the judgment. Another lawyer representing the plaintiff would have emphasized evidence that decreased the fault attributable to the uninsured driver, thereby increasing the lawyer's liability exposure to the client and decreasing the uncollectible portion of the judgment. Under the circumstances, the plaintiff's consent to the conflict was not validly obtained.

It is seldom so clear that a lawyer's independent judgment is materially limited by his or her interest in avoiding or reducing liability to a client. Indeed, the opposite problem may be more likely. To avoid the appearance of self-interest, a lawyer may be hesitant to adopt strategies that could leave that

impression, including strategies that the lawyer genuinely believes to be in the client's best interests. A lawyer should consider this complication in deciding whether or not he or she wishes to continue the representation. If the representation continues, the lawyer may be able to avoid the appearance of self-interest by conferring with another lawyer about strategies that may, in the hindsight of a legal malpractice action, be labeled self-serving. The lawyer may also suggest the retention of co-counsel.

NOTES

1. CBA Formal Ethics Opinion 85, "Release and Settlement of Legal Malpractice Claims" (May 19, 1995).

2. *E.g., Kentucky Bar Ass'n v. Cowden,* 727 S.W.2d 403, 404-05 (Ken. 1987).

3. CBA Formal Ethics Opinion 85, "Release and Settlement of Legal Malpractice Claims" (May 19, 1995). Accord *In re Tallon,* 447 N.Y.S.2d 50, 51 (App. Div. 1982); *see also People v. Good,* 576 P.2d 1020, 1022 (Colo. 1978) (finding violation of former Code equivalent of Colo. RPC 1.8(h) where lawyer refunded retainer with check containing restrictive endorsement releasing claims against lawyer).

4. *See Circle Chevrolet Co. v. Giordano, Halleran & Ciesla,* 662 A.2d 509, 514 (N.J. 1995), *relevant holding confirmed but decision abrogated on other grounds, Olds v. Donnelly,* 696 A.2d 633, 642 (N.J. 1997); *In re Tallon,* 447 N.Y.S.2d 50 (App. Div. 1982); New Jersey Supreme Court Advisory Committee on Professional Ethics 684 (March 9, 1998); N.Y. State Bar Association Opinion 734 (Nov. 1, 2000); Association of the Bar of the City of New York Formal Opinion 1995-2 (Feb. 22, 1995).

5. *See Circle Chevrolet, supra* (New Jersey Rule 1.4); N.Y. State Bar Association Opinion 734 (Nov. 1, 2000) (New York equivalent of Colo. RPC 1.4); Pennsylvania Bar Association Informal Opinion 97-56 (June 6, 1997) (Pennsylvania equivalent of Colo. RPC 1.4). *Accord* Restatement (Third) of the Law Governing Lawyers § 20, Comment c; American Bar Association Informal Opinion 1010 (Nov. 18, 1967).

6. *E.g., Circle Chevrolet, supra,* 662 A.2d at 514.

7. *See* N. Moore, "Implications of *Circle Chevrolet* for Attorney Malpractice and Attorney Ethics," 28 *Rutgers L.J.* 57, 75 n. 85 (Autumn 1996) (suggesting that clients of lawyer, like patients of physician, do not want to "know every time the physician has doubts or second thoughts about any aspect of some ongoing treatment") (hereinafter "Moore").

8. *See* Preamble, Scope and Terminology, Colo. RPC (purpose of Rules of Professional Conduct "can be subverted when they are invoked by opposing parties as procedural weapons"; "nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty"); Colo. RPC 4.5(a) (lawyer shall not threaten or present, or participate in presenting, disciplinary charges to gain advantage in a civil matter); *see also Weiss v. Manfredi,* 639 N.E.2d 1122, 1124, 616 N.Y.S.2d 325, 327 (N.Y. 1994) (attorney's failure to disclose malpractice does not give rise to fraud claim separate from customary malpractice action).

9. Moore*, supra* n. 7, at 73. *See Cowden,* supra, 727 S.W.2d at 404-05 (lawyer's failure to advise client of dismissal of action for failure to file prior to expiration of statute of limitations was particularly important because dismissal may have been erroneous).

10. Moore, *supra* n. 7, at 74.

11. E.g., *In re Knappenberger,* 90 P.3d 614 (Ore. 2004) (attorney had no immediate duty to alert client regarding potential malpractice claim arising from opposing party's filing of motion to dismiss appeal as untimely where lawyer reasonably believed motion had little chance of success).

12. *Merchant v. Kelly, Haglund, Garnsey & Kahn,* 874 F. Supp. 300, 304 (D. Colo. 1995); *Myers v. Beem,* 712 P.2d 1092, 1094 (Colo. App. 1985).

13. *See* Cmt., *Withholding Information*, Colo. RPC 1.4 (lawyer "may not withhold information to serve the lawyer's own interest or convenience").

14. N.Y. State Bar Association Opinion 734 (Nov. 1, 2000).

15. New York City Opinion 1995-2 (Feb. 22, 1995); S. O'Neal, "If You Make a Mistake, When and What Should You Tell Your Client?," *2000-FEB W. Va. Law.* 24, 25 (Feb. 2000) (hereinafter, "O'Neal").

16. O'Neal, *supra* n. 15, at 25; *see* New York State Opinion 275 (1972) (upon withdrawing from representation, lawyer should recommend that client obtain other counsel) (cited with approval in New York State Opinion 734 (Nov. 1, 2000).

17. O'Neal, *supra* n. 15, at 25.

18. *See In re Lawrence*, 31 P.3d 1078, 1084 (Or. 2001) (lawyer violated conflict of interest rule by failing to inform client in writing of potential conflict of interest caused by continuing representation of client in domestic relations matter following entry of default against client due to attorney's neglect).

19. *See* D. Karpman, "A Twilight Zone of Inharmonic Convergence," *California Bar Journal* 20 (February 2004) ("it is doubtful that any other lawyer in the entire world would be as motivated to make sure the client is successful" than the one who commits malpractice and continues the representation); Pennsylvania Informal Opinion No. 97-56 (June 6, 1997) (law firm's interest and motivation in trying to win appeal from dismissal of case based on law firm's negligence are same as client's interest and motivation in trying to win appeal).

20. N.Y. State Bar Association Opinion 734 (Nov. 1, 2000).

21. *In re Knappenberger,* 90 P.3d 614, 622 (Or. 2004).

22. Colo. RPC 1.8(h).

23. Formal Ethics Opinion 85, "Release and Settlement of Legal Malpractice Claims" (May 19, 1995).

114 RESPONSIBILITIES OF RESPONDENT PARENTS' ATTORNEYS IN DEPENDENCY AND NEGLECT PROCEEDINGS

Adopted October 14, 2006.
Revised June 19, 2010.

This opinion addresses attorneys' ethical responsibilities to clients in the dependency and neglect[1] and other[1] juvenile arenas. Many of these attorneys are appointed attorneys, paid by the state, representing unsophisticated clients, and facing unusual challenges. Although it is clear that the Rules of Professional Conduct apply to respondent parents' attorneys, the Committee addresses the application of those rules to recurring dependency and neglect issues.

Issues

1. How does an appointed attorney pursue the client's objectives when the client fails to attend court hearings and provide direction to the attorney?
2. May an attorney provide a written statement advising the client that presentation of evidence is conditioned on the client's continued communication with the attorney and attendance at court hearings?
3. May the attorney stipulate to offers of proof or otherwise bind the client in the client's absence?
4. In a Title 19 dependency and neglect matter, is the respondent parent's attorney required to file a notice of appeal if an appeal under C.A.R. 3.4 is groundless or frivolous?

Summary of Opinion

Court-appointed attorneys must assure that there is a written communication to each new client that the attorney has been appointed to provide representation without cost to the client.

The attorney should communicate in writing the nature of the representation. That writing may outline what happens if the client doesn't come to court and doesn't communicate with the attorney. However, the attorney may not decline to advocate for the client simply because the client does not come to hearings or provide direction.

The attorney may agree to, or not object to, presentation of evidence by offers of proof if the client does not attend a hearing.

The attorney must file a notice of appeal from termination of parental rights upon request of the client even if the attorney believes the merits of the appeal are groundless or frivolous.

Analysis

There is no bright line in attorney–client representation that delineates how an attorney must represent his or her client at hearings or at trials. Each representation is different depending on the agreement of the client and attorney, or if there is no formal agreement, by the disclosure by the attorney to the client as to how the attorney will provide representation. Generally, the client determines trial scope and objectives.[2] With a few exceptions, the attorney decides the tactics of hearings and trials.[3]

Colorado Rule of Professional Conduct (Colo. RPC) 1.5(b) requires that the basis of the fee agreement shall be communicated to the client before commencing or within a reasonable time of commencing the representation. The writing need not be formal and need not be signed by the client.[4] There is nothing in the rule or its comments that excludes from this requirement either a *pro bono* fee agreement or payment by the state or other third party on behalf of the client.[5] In fact, the client with an appointed attorney must agree, after consultation, to the attorney being paid by the state,[6] though the circumstances of the unique court-appointed, third-party-paid representation generally assure the client's implicit agreement.[7]

Pursuing the Objectives of an Uncooperative Client

Unsophisticated clients, especially clients with appointed attorneys, may easily misunderstand the nature of the relationship and the nature of the fee. A writing early in an attorney–client relationship must at least briefly communicate the nature of the fee,[8] but also may present to the attorney the opportunity to detail the nature of the representation, and give the client something to refresh his or her memory at a later time.[9] When an attorney is appointed, there may not be a meeting of minds as to the client's expectations of the attorney. The client may have unreasonable expectations of the attorney.

One method to present the required writing, for attorneys who regularly take court appointments, may be to present to the client a standard form, which may be modified as necessary, and may be presented to the client at the time of appointment. Often, clients of attorneys practicing in these areas of the law are transient and difficult to reach. An immediate writing can outline for the remainder of the case what happens if the client doesn't come to court and doesn't communicate. The writing may state that, should the attorney not be in contact with the client, the attorney will follow the client's most recent instructions, or alternately may state that the attorney will use his or her best judgment in making decisions for the client.

In creating a standard or individual writing, appointed attorneys should remember that to a certain extent the nature of this unusual attorney–client relationship is fixed. Clients with appointed attorneys cannot initially negotiate the terms of the representation prior to selecting an attorney, nor in any case choose whom to select and, thus, the attorney may not unreasonably limit the terms of the representation. For instance, while Colo. RPC 1.2(c) allows an attorney to limit the scope or objectives of the representation with the client's consent after consultation, because the client with an appointed attorney cannot negotiate at arms length, it would be an unusual circumstance when the attorney could limit the general nature of the defense, no matter how repugnant the nature of the defense to the appointed attorney,[10] or limit a client's unreasonable desire to reach a certain goal.[11]

Even if the respondent parent does not attend court hearings or provide direction to the attorney beyond that originally discussed, the attorney has a continuing ethical obligation to provide competent representation.[12] In providing representation, the attorney may present witnesses on behalf of his or her client and vigorously cross-examine witnesses presented by the county department of social services.

Client Communication and Attendance at Hearings

An attorney may not decline to advocate on behalf of the client simply because the client does not attend court hearings or provide direction to the attorney.[13] An attorney must still exercise professional judgment as to how to advocate for the client's best interests. To avoid making such decisions without input from the client, an attorney may, at the outset of the representation, advise the client that he or she will exercise his or her independent professional judgment in determining an appropriate trial strategy if the client does not maintain communication with the attorney or attend court hearings.[14]

Stipulation to Offers of Proof

The attorney may agree to, or not object to, the presentation of evidence by offers of proof[15] if the client is not present at court, even if the attorney has no recent or unambiguous directions from the client. The Comment to Colo. RPC 1.2 clarifies that in questions of means, the lawyer should assume responsibility for technical and legal tactical issues. Agreement to offers of proof is similar to other trial tactics that are within the ambit of attorney choices,[16] and does not rise to the level of attorney interference with the objectives of the case.[17]

Lawyer's Obligation to Pursue Appeal

When a respondent parent in a dependency and neglect proceeding requests his or her court-appointed lawyer to appeal a judgment terminating the client's parental rights, the lawyer must file a timely notice of appeal. Colo. RPC 1.2(a) provides that a lawyer shall abide by a client's decisions concerning the scope and objectives of representation subject to specified exceptions. While Colo. RPC 3.1 says "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for

doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law," the Colorado Supreme Court has determined that in a dependency and neglect respondent's appeal, "[s]o long as the [court-appointed] attorney does not misstate the facts or controlling law, she is free to present her client's arguments to the court as well as her client's desire to prevail."[18] Accordingly, the Supreme Court has concluded that in appealing a judgment terminating the client's parental rights, the appointed lawyer does not have an ethical dilemma as to whether the appeal might be frivolous.

In dependency and neglect proceedings, as in other areas of practice, a lawyer must provide competent representation to a client.[19] When an appointed lawyer represents an indigent parent in a dependency and neglect proceeding, the lawyer may be subject to claims of ineffective assistance of counsel based on *Strickland v. Washington*.[20] Under *Strickland*, a respondent parent must show that the lawyer's representation fell below an objective standard of reasonableness and that the lawyer's deficient performance prejudiced the parent.

In *Roe v. Flores-Ortega*, the U.S. Supreme Court held that *Strickland* applies to claims of ineffective assistance of appellate counsel, and that the defendant need not show a likelihood of success on appeal.[21] The Court characterized filing a notice of appeal as a purely ministerial task, and held that the failure to file a notice of appeal reflects inattention to the defendant's wishes and gives rise to a claim of ineffective assistance of counsel.[22]

Thus, the Committee concludes that when a lawyer is requested to file an appeal of a judgment terminating parental rights, he or she must do so, without regard to the likelihood of success on appeal. This is consistent with a lawyer's duty to abide by a client's decisions concerning the scope and objectives of representation under Colo. RPC 1.2.

Nevertheless, nothing in Colo. RPC 1.2 prevents the lawyer from discussing with the client the merits and likely success of pursuing an appeal. Colo. RPC 1.2(c) provides that a lawyer may limit the scope or objectives of representation if the client consents after consultation. Thus, if a client explicitly tells the lawyer he or she does not wish to appeal, the client could not later complain that the lawyer provided ineffective assistance by not filing a notice of appeal. Additionally, if, after consultation with the lawyer, a client consents to a determination not to appeal, the lawyer would not be required to file a notice of appeal.

However, assuming that after consultation with the lawyer the client determines that an appeal should be filed, the lawyer has an ethical obligation to do so. This is particularly so because of the short timelines under C.A.R. 3.4(b)(1), which provide that a notice of appeal must be filed within twenty-one days after the entry of an order terminating parental rights.[23]

NOTES

1. This opinion applies equally to the ethical obligations of attorneys for dependency and neglect respondents other than natural parents, *e.g.*, grandparents who are legal guardians. The opinion may provide guidance for attorneys representing special respondents in dependency and neglect proceedings.

2. Colo. RPC 1.2. (A lawyer shall abide by client's decisions concerning the scope and objectives of representation, subject to paragraphs (c), (d), and (e).)

3. *Id*. at Comment (in questions of means, the lawyer should assume responsibility for technical and legal tactical issues); *People v. Schultheis*, 638 P.2d 8, 12 (Colo. 1981) (the decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client).

4. *Id*.

5. Attorney/respondent representing juvenile under prepaid legal plan failed to send Rule 1.5(b) fee writing (in part), Matters Resulting in Diversion and Private Admonition, 35 *The Colorado Lawyer* 155 (Jan. 2006).

6. Colo. RPC 1.8(f) (if an attorney is paid by a third party, the client must consent, there must be no interference with the lawyer's independence of professional judgment or with the client–lawyer relationship, and the attorney may not reveal confidences to the third party).

7. If, upon appointment, the attorney is aware that the court provided to the client a document that adequately communicates the basis or rate of the fee, the attorney's obligation under Colo. RPC 1.5(b) is satisfied.

8. *See* Colo. RPC 1.5(b) and Colo. RPC 1.4; Comment, Paragraph 4 as to fees. (It is strongly recommended that all these communications be in writing.)

9. Many indigent clients do not have a high level of education and may have trouble reading or understanding the writing. Appointed attorneys should offer to read the writing if there is any question.

10. *But see* Colo. RPC 6.2(c) (accepting court appointments). It is implicit in Colo. RPC 1.7(b) that the attorney has the option of refusing the entire appointment or moving to withdraw. Colo. RPC 1.16 allows the attorney to withdraw for other reasons.

11. An attorney's violation of Colo. RPC 1.2 by refusing to seek the client's objectives is different from an attorney refusing to present perjured witness testimony at trial. *See Schultheis, supra* note 3.

12. *See* Colo. RPC 1.1.

13. *See* Colo. RPC 1.2 (a lawyer shall abide by client's decisions concerning the scope and objectives of representation, subject to paragraphs (c), (d), and (e)); Colo. RPC 1.1 (a lawyer shall provide competent representation to a client).

14. Colo. RPC 1.2 Comment (in questions of means, the lawyer should assume responsibility for technical and legal tactical issues); *Schultheis, supra* note 3 (the decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client).

15. The Children's Code at § 19-1-106(2) says, in part: "Hearings may be conducted in an informal manner." Many Colorado jurisdictions use informal offers of proof to expedite proceedings. These offers of proof are not the offers of proof described in Colorado Rule of Evidence 103(a)(2). The attorney should make clear he or she is not stipulating to the truth of the other parties' offers of proof, and should reserve, if possible, the right to cross-examine the person on whose behalf the offer is made.

16. *See Schleiger v. Schleiger*, 137 Colo. 279, 324 P.2d 370, 373 (1958) (holding that it was within the scope of trial counsel's employment to try the case as his best judgment dictated, and his client is bound by the course of procedure adopted in the trial of the case); *Wilson v. Calder*, 518 P.2d 952, 954 (Colo.App. 1973) (holding that the choice of litigation procedures lies within the scope of an attorney's implied authority, and with regard to such matters the client is bound by the attorney's actions); *Davis v. People*, 871 P.2d 769, 773 (Colo. 1994) (trial counsel must exercise reasonable professional judgment in determining, among other things, trial strategy, including whether to interview witnesses or to rely on other sources of information, or whether to call a particular witness); *People v. Smith*, 77 P.3d 751, 758 (Colo.App. 2003) (the court further advised defendant that he controlled whether to have a trial, whether to plead guilty, and whether to testify; defendant also was advised by the trial court that defense counsel controlled trial strategy and that a disagreement over applicable law was not grounds to dismiss counsel); *People v. Outlaw*, 998 P.2d 20, 25 (Colo.App. 1999) (court observed that substitution of counsel would not solve defendant's dissatisfaction with the rule that an attorney, and not a defendant, determines motion and trial strategy); *People v. Apodaca*, 998 P.2d 25, 29 (Colo.App. 1999) (whether to call a particular witness is a tactical decision within the discretion of trial counsel; further, an attorney's decision not to interview certain witnesses, if made in the exercise of reasonable professional judgment, does not amount to ineffective assistance); *People v. Sparks*, 914 P.2d 544, 548 (Colo.App. 1996) (when and whether trial counsel objects during the trial are matters of trial strategy and technique); ABA Standards for Criminal Justice, The Defense Function, provide that defense counsel determines trial strategy and tactical matters. Standard 4-5.2(b) states:

> The decision on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client.

17. *Cf. People v. Silvola*, 915 P.2d 1281 (Colo. 1996) (attorney filed counter-claim without knowledge of or meeting with client); *Jones v. Feiger, Collison & Kilmer*, 903 P.2d 27 (Colo.App. 1994), reversed on other grounds, 926 P.2d 1244 (Colo. 1996) (client has the right to reject settlement).

18. *People in the Interest of C.Z.*, 226 P.3d 1054, 1060 (Colo. 2010). Subsequent to the original adoption date of this Ethics Opinion 114, in October 2006, the Colorado Supreme Court, in *C.Z.,* disapproved of this Committee's conclusion that after filing a notice of appeal, a respondent's appointed lawyer could move to withdraw if the lawyer determined that a parent's claims on appeal lacked merit. The Court noted that in *Anders v. California*, 386 U.S. 738 (1967), the U.S. Supreme Court approved a procedure for lawyers who found no merit in their client's appeal: to file an "*Anders* brief" detailing why there was no appeal issue. But in *C.Z.*, the Colorado Supreme Court determined that the *Anders* brief procedure is neither binding nor appropriate for Colorado dependency and neglect appeals:

> If an attorney cannot discern a meritorious legal argument in support of her client's appeal, she must present those issues her client wishes to be addressed. Where neither law nor facts can be framed in support of an indigent client, a court-appointed attorney's obligation as a zealous advocate is fulfilled by accurately describing the facts of the case, locating and applying controlling law, and presenting the issues her client wishes to be considered.

19. *See* Colo. RPC 1.1.

20. *Strickland v. Washington*, 466 U.S. 668 (1984). *See C.Z.*, 226 P.3d at 1063 ("Thus, the obligation of court-appointed attorneys to advocate for indigent parents in termination proceedings is no different from the obligation imposed on counsel appointed to represent criminal defendants on appeal."); *People in Interest of V.M.R.*, 768 P.2d 1268, 1270 (Colo.App. 1989). ("[I]n such cases, a contention of ineffective assistance of counsel requires a determination whether counsel's conduct so undermined the proper functions of the adversarial process that the proceeding cannot be relied on as having produced a just result.")

21. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). *See People v. Long*, 126 P.3d 284 (Colo.App. 2005).

22. *Roe*, 528 U.S. at 477.

23. After *C.Z.*, it is not clear whether a retained—as opposed to court-appointed—lawyer in a dependency and neglect case has an equivalent duty to file a notice of appeal at his or her client's request without regard to the merits of the appeal.

115 ETHICAL CONSIDERATIONS IN THE COLLABORATIVE AND COOPERATIVE LAW CONTEXTS

Adopted February 24, 2007.

Introduction and Scope

For many years, parties have turned to Alternative Dispute Resolution (ADR) methods to resolve disputes. ADR methods allow the parties to customize the process of resolving a particular dispute. One ADR method which has emerged in recent years is commonly referred to as the Collaborative Law process. The touchtone of Collaborative Law is an advance agreement, often referred to as a "Four-Way Agreement" or "Participation Agreement," entered into by the parties and the lawyers in their individual capacities, which requires the lawyers to terminate their representations in the event the process is unsuccessful and the matter must proceed to litigation. Cooperative Law, on the other hand, is a process which incorporates many of the hallmarks of Collaborative Law discussed below but does not require the lawyer to enter into a contract with the opposing party providing for the lawyer's disqualification. While Collaborative and Cooperative Law are most frequently employed in the family law context, their application is not restricted to family law.[1]

It is the opinion of this Committee that the practice of Collaborative Law violates Rule 1.7(b) of Colorado Rules of Professional Conduct insofar as a lawyer participating in the process enters into a contractual agreement with the opposing party requiring the lawyer to withdraw in the event that the process is unsuccessful.[2] The Committee further concludes that pursuant to Colo.RPC 1.7(c) the client's consent to waive this conflict cannot be validly obtained. Because Cooperative Law lacks the disqualification agreement found in Collaborative Law, the practice of Cooperative Law is not *per se* unethical. However, those participating in Cooperative Law face unique ethical issues and must be mindful of myriad potential ethical pitfalls discussed below.

What Are Collaborative and Cooperative Law?

The Collaborative Law model of practice is generally regarded as constituting a fundamental shift in the lawyer's role from an advocate in an adversarial system to an advocate in a collaborative environment where the commitment is to the settlement of a dispute outside the traditional litigation model.[3] Collaborative Law involves the advance agreement entered into by the clients and the lawyers. Importantly, the lawyers execute this Four-Way Agreement as independent parties. The Four-Way Agreement limits the lawyers' participation to the negotiation and facilitation of a settlement without the threat of litigation. If the parties decide to use the court system, they must hire lawyers other than the lawyers who participated in the Collaborative Law process. The lawyers agree to discontinue representing their client if the parties choose to litigate the dispute, which creates a practical incentive to resolve the dispute without the need for litigation.[4] While Collaborative Law has not been universally defined, "[v]irtually all collaborative law leaders and practitioners believe that the disqualification agreement is the irreducible minimum condition for calling a practice collaborative law."[5]

The Collaborative Law process is based upon a problem-solving model rather than an adversarial model. In order to resolve the dispute, the Four-Way Agreement requires that parties freely and timely exchange information and commit to joint problem solving. The typical Four-Way Agreement contractually obligates the parties to timely and fully disclose all relevant materials.[6] Some Four-Way Agreements even require counsel to withdraw if he or she determines that the client is participating in bad faith. As a product of this agreement, the lawyer's continued participation serves as an implicit certification of the client's good faith.[7]

The process itself usually involves a series of meetings with all of the parties and their lawyers in attendance. These meetings, or "four ways," as they are frequently called, are designed to foster a team

approach to creative problem solving that encompasses elements such as open and honest communication, cooperation, good faith, and willingness to listen.[8] In this respect, the Collaborative Law process focuses on the future relationship of the parties. By taking the adversarial piece out of resolving a dispute, it is thought the Collaborative Law process allows the parties to settle the dispute in a manner that leaves them with a new productive relationship.

Cooperative Law, which is a much smaller movement than the Collaborative Law movement, uses the same principles as Collaborative Law, except that Cooperative Law does not involve a disqualification agreement.[9] Cooperative Law therefore includes a written agreement to make full, voluntary disclosure of all financial information, avoid formal discovery procedures, utilize joint rather than unilateral appraisals, and use interest-based negotiation. Thus, Cooperative Law, as defined in this Opinion, is identical to Collaborative Law, with the exception of the disqualification agreement.

Nonconsentable Conflict Under Rule 1.7(b)

Rule 1.7(b) of the Colorado Rules of Professional Conduct, *Conflict of Interest: General Rule,* provides in relevant part:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to . . . a third person . . . unless:
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
> (2) the client consents after consultation.

The comment to Rule 1.7 explains: "Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client."

Collaborative Law, by definition, involves an agreement between the lawyer and a "third person" (i.e., the opposing party) whereby the lawyer agrees to impair his or her ability to represent the client. In particular, the lawyer agrees to discontinue the representation in the event that the Collaborative Law process is unsuccessful and the client wishes to litigate the matter. The entry of the Collaborative Law Four-Way Agreement therefore implicates Rule 1.7(b) of the Colorado Rules of Professional Conduct. Under Rule 1.7(c), the client's consent to a conflict "cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of the particular situation."[10]

However, this does not end the inquiry. A client has the autonomy to authorize the representation notwithstanding the conflict but this autonomy is not without limitation. A client's consent to the representation is only effective where the lawyer "reasonably believes the representation will not be adversely affected" by the responsibilities to the third party. *See* Colo.RPC 1.7(b)(1) & (2). The comment to Rule 1.7 further clarifies:

> A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict 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 the client.

The Committee concludes that a client may not consent to this conflict for several reasons. First, in the Collaborative Law context, the possibility that a conflict will materialize is significant. In fact, the conflict materializes whenever the process is unsuccessful because, in that instance, the lawyer's contractual responsibilities to the opposing party (the obligation to discontinue representing the client) are in conflict with the obligations the lawyer has to the client (the obligation to recommend or carry out an appropriate course of action for the client). Second, the potential conflict inevitably interferes with the lawyer's independent professional judgment in considering the alternative of litigation in a material way. Indeed, this course of action that "reasonably should be pursued on behalf of the client," or at least considered, is foreclosed to the lawyer.

Moreover, a potential conflict under Rule 1.7 is not ethically reconciled simply because another lawyer can represent the client if the conflict materializes. Rule 1.7 prohibits the lawyer originally retained from representing a client if the representation of that client may be materially limited by the lawyer's responsibilities to a third person. Thus, the ability of another lawyer to alleviate the materialized conflict is irrelevant. Rather, it is the ethical obligation of the collaborative law practitioner to ascertain whether the disqualification agreement materially interferes with that lawyer's "independent professional judgment in considering alternatives" or "foreclose courses of action that reasonably should be pursued on behalf of the client" by the collaborative law practitioner. *See* Colo.RPC 1.7 cmt. Because the disqualification agreement invariably interferes with such independent professional judgment in considering alternatives and forecloses courses of action for the client and the collaborative law practitioner, it violates Rule 1.7.[11]

It is also noteworthy that disqualification from future litigation is not contingent upon any good faith erosion of the collaborative process. If the process does not result in an agreement between the parties, regardless of the good or bad faith participation of any party to the process, the Four Way Agreement requires the Collaborative Law practitioner to withdraw. The process is particularly susceptible to abuse in this respect.

Ethical Considerations Relative to Cooperative Law

Cooperative law, which is identical to Collaborative Law in all material respects with the exception of the disqualification agreement, is not *per se* unethical. However, even without such a contractual requirement, a lawyer practicing Cooperative Law must be mindful of a number of potential ethical pitfalls. While the balance of this Opinion discusses some of those potential ethical pitfalls, it is not intended to be an encyclopedic compendium of all issues which could possibly arise during the Cooperative Law process. Lawyers who elect to practice Cooperative Law are subject to all ethical rules whether or not such rules are discussed in this Opinion.

The Cooperative Law Agreement

It is unclear whether lawyers participating in Cooperative Law are required to execute a Cooperative Law agreement in their individual capacity and there may well be variation in the practice. As discussed above, to the extent a lawyer enters into an agreement with the opposing party and/or opposing counsel that requires that lawyer to withdraw in the event the process fails, the agreement violates Rule 1.7(b). However, a Cooperative Law Agreement that merely obligates the lawyer to ensure full, voluntary disclosure of all financial information, avoid formal discovery procedures, utilize joint rather than unilateral appraisals, and use interest-based negotiation, is not necessarily antithetical to Rule 1.7(b) because those obligations do not materially limit or interfere with the lawyer's ability to represent the client. *See* Colo.RPC 1.7(b) & cmt.[12]

Such a Cooperative Law Agreement is not without ethical trappings, however. For example, instances may arise where relevant information subject to disclosure under the Cooperative Law Agreement is acquired by the lawyer from his or her client in connection with attorney-client communications. Rule 1.6(d) states in pertinent part: "A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using such (confidential) information. . . ." When information that would otherwise be subject to disclosure pursuant to the Participation Agreement is provided to the lawyer in confidence, Rule 1.6(a) may nonetheless authorize the disclosure if such disclosure is "impliedly authorized in order to carry out the representation." However, in some circumstances, the client expressly directs the lawyer not to disclose information obtained by the lawyer in confidence. This problem, not uncommon in the litigation context, may be compounded where the lawyer participating in the Cooperative Law process executed a Cooperative Law Agreement requiring disclosure of relevant information irrespective of whether it was acquired in confidence.

If the lawyer's representation of the client within the Cooperative Law process will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). If the client prohibits the disclosure simply on grounds that it is harmful or

perceived as harmful to the client's case, the lawyer should nonetheless consider withdrawing, provided such withdrawal can be accomplished without material adverse effect on the client's interests. *See* Colo. RPC 1.16 cmt.

Terminating the Relationship

Even without a Four-Way Agreement containing a disqualification provision, the termination of the representation in the Cooperative Law environment raises a number of unique ethical considerations, particularly where the lawyer and client agree to the termination in advance. Rule 1.2 allows a lawyer practicing in Colorado and client to limit the scope of the lawyer's representation. In accordance with Colorado Bar Association Formal Opinion 101, a lawyer may also provide a client with some, but not all, of the work normally involved in litigation. This is typically referred to as "unbundled" legal services. *See* CBA Formal Opinion 101 (1998). Thus, an advance agreement with the client to terminate or limit the representation is ethical.

Rule 1.16 governs termination and withdrawal. Subsection (b)(3) provides: "A lawyer may not request permission to withdraw in matters pending before a tribunal and may not withdraw in other matters unless such request or such withdrawal is because… (3) the lawyer's client knowingly and freely assents to termination of the lawyer's employment." The subject has not been addressed directly in Colorado, but at least one case seems to indicate that an advance assent to withdrawal may violate public policy in some circumstances. *See Jones v Feiger, Collison and Killmer*, 903 P.2d 27, 34-35 (Colo. App. 1994) (holding fee agreement authorizing lawyer's right to withdraw if the client unreasonably refused settlement in violation of public policy and Colo.RPC 1.2), *rev'd on other grounds*, 926 P.2d 1244 (Colo. 1996). However, an advance agreement authorizing withdrawal is not *per se* unethical.

Even if the client's advance agreement is made "knowingly and freely," the comment to Rule 1.16 permits withdrawal only where it can be accomplished without "material adverse effect" on the client's interests. Where the client is of relatively meager means, the lawyer's withdrawal may be materially adverse to the client. Under such circumstances, the lawyer's withdrawal may be unethical.

If counsel has filed pleadings in the case prior to commencement of the Cooperative Law process, withdrawal will be governed by the Court.[13] Rule 1.16(c) provides: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Assuming that the client consents and there is no material adverse effect on the client from the withdrawal, a court would likely authorize the withdrawal. However, such judicial authorization can not be presumed. An advance agreement with the client to withdraw should therefore recognize and make exception for the Court's ability to require the lawyer to continue the representation.

Communications with Clients

The potential for participation in the Cooperative Law process implicates some unique issues with respect to a lawyer's communication obligations pursuant to Rule 1.4 of the Colorado Rules of Professional Conduct. Rule 1.4 requires that a lawyer "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Colo.RPC 1.4(b).[14] The comment to Rule 1.4 clarifies that this obligation applies to the means in which a dispute may be resolved. The Rule does not, however, require that a lawyer provide information as to every method by which the dispute can be resolved. Rule 2.1 makes it clear that the lawyer need not provide the client information regarding all forms of Alternative Dispute Resolution, but should discuss those that would be reasonable based upon the specific circumstances of the client's case. In analyzing the appropriateness of the Cooperative Law process, the lawyer should consider not only the facts of the case, but the personalities of the parties to participate in the cooperative process and the relative financial means given that failure of the process may prove more costly.

If the lawyer believes that the Cooperative Law process may be suitable for the client after due consideration and reasonable investigation into the client's case, the lawyer must advise the client of the "possible legal effect of each alternative course of action." Colo. RPC 1.4 cmt. This necessarily includes an

explanation of the risks and benefits of the different means that can be used to resolve her dispute.[15] Additional care may need to be taken when describing the risks and benefits of Cooperative Law because it is dramatically different from litigation and other ADR methods.[16]

In the event that the Cooperative Law process is successful, it may in some circumstances be more cost effective than litigation. However, if the process is not successful, the client may be required to litigate the dispute, which will prove more costly than immediately litigating a dispute. Depending on the scope of the representation as agreed to by the lawyer and client, the client may also be required to incur the additional cost associated with hiring trial counsel. A client's and lawyer's tactical decisions will also be limited. For instance, a party participating in the Cooperative Law process may not use the courts to compel discovery. This limitation should also be fully discussed.

One of the hallmarks to the Cooperative Law model is the requirement that the parties voluntarily disclose all relevant information. The lawyer should discuss this requirement with the client before entering into the process and ensure that the client understands the implications of this requirement.

The potential benefits of Cooperative Law should also be disclosed. For example, Cooperative Law allows the parties to privately resolve their dispute. The process may also enable the participants to maintain a relationship after the dispute is resolved because it is designed to be less adversarial than litigation and many of the traditional methods of ADR. This may be particularly important in the family law context where allocation of parental responsibilities is at issue.

Finally, parties to Cooperative Law often retain a single, joint expert on issues ranging from financial affairs to sociological family dynamics. Lawyers should discuss with the client the ramifications of hiring a single expert. The attorney expert may also face ethical considerations in the Cooperative Law context, similarly implicated in domestic relations litigation as a result of Rule 16.2(g) of the Colorado Rules of Civil Procedure. The ethical implications of a lawyer serving as a joint expert are outside the scope of this Opinion.

Client Under Disability

In evaluating the Cooperative Law process, the lawyer should also consider whether the client may be under a disability which prevents the client from "adequately considering decisions in connection with the representation." Colo. RPC 1.14(b). As a preliminary matter, the lawyer must determine if the client can understand, deliberate and make conclusions about his or her well-being. *Id*. If the client suffers from a disability and has no guardian, the lawyer must often act as the de facto guardian. *Id*. Thus, under such circumstances, the lawyer may need to independently determine whether the Cooperative Law process is appropriate. Given the unique nature of Cooperative Law, which promotes active client participation, lawyers should be reluctant to engage in the process when the client's ability to make adequately considered decisions in connection with the representation is impaired and/or where the client lacks the legal capacity to enter into an advance agreement with the opposing party on the client's own accord.

The lawyer considering participation in the Cooperative Law process should be particularly cognizant of a history of domestic abuse. Though not universally the case, Cooperative Law may not be suitable in such circumstances given the abused client's increased susceptibility to intimidation during the "four-way meetings."[17]

Cooperative Law Organizations

With the increase in popularity of this form of alternative dispute resolution, lawyers must be aware of issues ancillary to the process. Of particular note, Cooperative Law organizations are becoming more prevalent in Colorado and across the country. Typically, these organizations refer clients who are interested in participating in the Cooperative Law process to members of the organization. In addition to ethical considerations relating to the structure of the organization itself and potential member representation of both parties to the Cooperative Law process, the referral function of such Cooperative Law organizations raises significant ethical issues.

The referral processes employed by such organizations must be considered under the construct of Rules 1.5 and 7.2. Rule 1.5(e) prohibits a lawyer from accepting or paying a referral fee. Rule 7.2(c) prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services, except the reasonable costs of advertisements and the usual charges of a not-for-profit lawyer referral service or legal service organization.[18] As this Committee stated in Formal Opinion 106, *Referral Fees and Networking Organizations*, "lawyers may pay the 'usual charges' of a not-for-profit lawyer referral service or legal service organization" and lawyers and law firms "may engage in cooperative marketing with other firms and may refer clients to each other informally" so long as the referral and/or cooperative marketing does not violate Rule 7.2.

A lawyer is therefore prohibited from participating in a for-profit cooperative law organization that functions as a referral service if payment of a fee is a condition of membership. However, a lawyer may participate in a for-profit referral service that does not require any payment from the lawyer, so long as the lawyer's participation in the for-profit referral service does not otherwise violate any of the Colorado Rules. CBA Formal Opinion 106 (1999); *see also* Colo.RPC 5.4 (prohibiting a lawyer from forming a "partnership" with the for-profit organization).

If the cooperative law organization functioning as a referral service is "not-for-profit," participation is permissible provided the lawyer (1) pays nothing more than the "usual charges" for membership to the not-for-profit organization and (2) provides neither the organization nor its members something of value for the referrals other than the "usual charges," provided of course that membership does not otherwise violate the Rules.[19] The initial, threshold question is therefore whether the organization qualifies as not-for-profit. An organization generally satisfies the not-for-profit requirement if it is organized as such pursuant to Colorado Statute. However, such designation is not determinative. "[A] lawyer who intends to use a purportedly not-for-profit referral service not sponsored by a bar association should verify for himself or herself that the referral service in fact is a legitimate not-for-profit organization and that it is not a profit-making enterprise masquerading as a non-profit entity." CBA Formal Opinion 106 (1999) (citing *People v. Zimmermann*, 938 P.2d 131, 132 (Colo. 1997)).

Once the lawyer is satisfied that the cooperative law organization is truly not-for-profit, the lawyer must consider whether payment to the organization for membership exceeds the "usual charges" of a not-for-profit lawyer referral service. The Rules do not define the phrase "usual charges." Thus, a clearly defined rule or litmus test does not exist. It is generally accepted that a nominal membership fee, commensurate with membership fees charged by other legal service organizations, such as a local bar association, is permissible. *See* CBA Formal Opinion 106 (1999); ABA Informal Opinion 85-1512 (1985); *see also* CBA Ethics Comm. Abstract 98/99-10 (finding $2,500/month to violate Rule 7.2). On the other hand, payment of exorbitant membership fees or payment of a percentage of fees collected by participating lawyers from plan referrals, are likely impermissible. *See* CBA Formal Opinion 106 (1999) (prohibiting exorbitant fees and referring to payment of a percentage fee as "problematic"); *but see* ABA Comm. On Prof. Ethics and Grievances, Formal Opinion 291 (1956) (permitting percentage fee payment to a lawyer referral service).

Finally, a lawyer may participate in a not-for-profit cooperative law organization functioning as a referral service if, and only if, the lawyer provides the organization nothing of value other than the "usual charges" for the referrals. In other words, the lawyer may not provide the organization anything of value other than monetary consideration for membership. There are other types of consideration for referrals that could potentially violate Rule 7.2(c). The most likely (and perhaps most undetectable) violation exists where members to the Cooperative Law organization contract to refer business to one another. While lawyers may agree to "consider each other for appropriate referrals," the exchange of a binding promise to do so constitutes giving something of value for referrals in violation of Rule 7.2(c). *See* CBA Formal Opinion 106 (1999).

Conclusion

The Colorado Rules of Professional Conduct prohibit a lawyer from participating in Collaborative Law so long as a contractual obligation exists between the lawyer and the opposing party whereby the lawyer agrees to terminate the representation of the client. Absent such a contractual obligation, a lawyer may participate in the process referred to as Cooperative Law provided that the lawyer complies with all of the Rules of Professional Conduct.

NOTES

1. *See* Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 Baylor L. Rev. 141, 141-42 (2004).

2. The Colorado Ethics Committee is aware that several similar committees and bar associations have concluded that a lawyer is ethically permitted to enter into the disqualification agreement unique to Collaborative Law. *See*, *e.g.*, New Jersey Advisory Committee on Professional Ethics, *Collaborative Law*, Op. 699, 12/12/05; Kentucky Bar Ass'n Ethics Comm., Op. E-425, 6/05; Judith Hodor & Rosemarie S. Roth, The Florida Bar Handbook Supplement (2006), Ch. 24, *Collaborative Law*. However, none of those commentaries have focused on Model Rule of Professional Conduct 1.7(b) or any similar state rule. It is also worthy of note that several commentators have called into question whether Collaborative Law fits within the current ethic construct. As one commentator aptly put it: "It may be that the existing rules of professional conduct for lawyers must be redefined to allow for alternative conceptions of practice while ensuring that clients continue to be served by ethical practitioners who meet uniform professional standards of conduct." Spain, *supra* note 1, at 172-73; *accord* Elizabeth K. Strickland, *Putting "Counselor" Back In The Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. Rev. 979, 1001 (2006) ("Current ethical codes may have to be reworked to adapt to the new methods of dispute resolution.").

3. *Id*. at 141-42

4. *See* New Jersey Advisory Committee on Professional Ethics, *Collaborative Law,* Op. 699, 12/12/05 ("It is deemed critical to the success of the collaborative law process that the lawyers contractually limit the scope of their representation to achieving resolution through non-adversarial processes. . . .").

5. John Lande & Greg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 Fam. Ct. Rev. 280, 283 (2004) (internal quotations omitted); *see also* Spain, *supra* note 1 at 143 ("Despite the variety of definitions of collaborative law, it has been suggested that there is a universal and necessary element for the model of practice referred to as collaborative law: A written commitment from each party's counsel disqualifying them from representing their client against the other in court.").

6. This requirement is analogous to the requirements under Colorado's relatively new Rule 16.2(e) of Civil Procedure, which provides that parties to domestic relations cases "owe each other and the court a duty of full and honest disclosure of all facts that materially affect their rights and interests and those of the children involved in the case."

7. John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 Ohio St. L. J. 1315, 1332 (2003) (citing Pauline H. Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation 1*, ABA Manual Section of Family Law (2001)).

8. Tom Arnold, *Collaborative Dispute Resolution: An Idea Whose Time Has Come*, 16 A.L.I.-A.B.A. 379, 381, 382-85 (2000).

9. *See* Lande and Herman, *supra* note 5 at 284; Joshua Isaacs, *A New Way to Avoid the Courtroom: Ethical Implications Surrounding Collaborative Law*, 18 Geo. J. Legal Ethics 833, 835 (2005).

10. Similar language also appears in the Comment to ABA Model Rule 1.7.

11. While it is not within this Committee's province to comment on legal issues, it is axiomatic that private parties in Colorado may contract for any legal purpose. Thus, parties wishing to participate in a collaborative environment may agree between each other to terminate their respective lawyers in the event that the process fails, provided the lawyer is not a party to that contract. Such agreements may promote the valid purposes of Collaborative Law, including creating incentives for settlement, generating a positive environment for negotiation, and fostering a continued relationship between the parties without violating the Colorado Rules of Professional Conduct.

12. The lawyer's duty to the Cooperative Law process, however, cannot prevail over the lawyer's duty to the client.

13. *See* Colo. R. Civ. P. 121 § 1-1(2) and Rule 1.16

14. Rule 1.4 Communication

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

15. *See* Kentucky Bar Ass'n Ethics Comm., Op. E-425, 6/05.

16. *Id.*

17. Lande, *supra* note 7, *at 1382.*

18. The comment to Rule 7.2(c) further explains that ". . . a lawyer is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs."

19. For instance, the lawyer must ensure that the lawyer's professional judgment remains independent, that confidentiality requirements are not compromised, and that conflicts of interest are avoided.

CITED RULES, CASES AND OTHER MATERIALS

Rules

C.R.C.P. 16
C.R.C.P. 121 § 1-1(2)
Colo.RPC 1.2
Colo.RPC 1.4
Colo.RPC 1.5
Colo.RPC 1.6
Colo.RPC 1.7
Colo.RPC 1.16
Colo.RPC 2.1
Colo.RPC 7.2

Cases

Jones v Feiger, Collison and Killmer, 903 P.2d 27 (Colo. App. 1994)
People v. Zimmermann, 938 P.2d 131 (Colo. 1997)

Formal Ethics Opinions

ABA Comm. On Prof. Ethics and Grievances, Formal Opinion 291
Colorado Bar Association, *Unbundled Legal Services*, Formal Opinion 101 (1998)
Colorado Bar Association, *Referral Fees and Networking Organizations,* Formal Opinion 106 (1999)
New Jersey Advisory Committee on Professional Ethics, *Collaborative Law,* Op. 699, 12/12/05
Kentucky Bar Ass'n Ethics Comm., Op. E-425, 6/05.

Informal Ethics Opinions and Abstracts

ABA Informal Opinion 85-1512 (1985)
CBA Ethics Comm. Abstract 98/99-10

Other Materials

Tom Arnold, *Collaborative Dispute Resolution: An Idea Whose Time Has Come*, 16 A.L.I.-A.B.A. 379, 381 (2000)

Joshua Isaacs, *A New Way to Avoid the Courtroom: Ethical Implications Surrounding Collaborative Law*, 18 Geo. J. Legal Ethics 833, 835 (2005)

John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 Ohio St. L. J. 1315 (2003)

John Lande & Greg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 Fam. Ct. Rev. 280, 283 (2004)

Larry R. Spain, *Collaborative Law: A Critical Reflection on Whether a Collaborative Orientation Can Be Ethically Incorporated into the Practice of Law*, 56 Baylor L. Rev. 141, 141-42 (2004)

Elizabeth K. Strickland, *Putting "Counselor" Back In The Lawyer's Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. Rev. 979, 1001 (2006)

Pauline H. Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce Without Litigation 1*, ABA Manual Section of Family Law (2001)

On January 1, 2008, substantial amendments to the Colorado Rules of Professional Conduct became effective. The text of Colo. RPC 1.7, *Conflict of Interest: Current Clients*, was significantly modified. However, the ABA Ethics 2000 Commission reported that it intended no substantive changes in the rule, and that the changes were intended for clarification purposes only. The Committee agrees that the changes to Rule 1.7 are not substantive and do not alter the conflict analysis. Rather, the changes to Rule 1.7 merely alter the procedure through which informed consent must be obtained. Accordingly, the changes to Rule 1.7 do not alter the analysis or conclusions contained in this Formal Opinion.

The Subcommittee recommends appending this legend to the following Formal Opinions: 45 (Representation of client by part-time judge), 46 (Municipal attorney, representation of defendants), 58 (Water rights, representation of multiple clients), 97 (Ethics considerations where an attorney or the attorney's partner serves on the board of a public entity), 98 (Ethical Responsibilities of Lawyers who Engage in other Business), 109 (Acquiring an ownership interest in a client), 115 (Collaborative Law).

With the changes effective January 1, 2008, the term "consent after consultation" was changed to "informed consent." "Consultation" only required "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question." Despite the fact that the American Bar Association Ethics 2000 committee indicated that no substantive change was intended by the change to "informed consent," its definition now "denotes the agreement by a person to a proposed course if conduct after the lawyer has communication adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." *See* Rule 1.0 Comment [6] to Rule 1.0 indicates that the crux of this requirement is that "the lawyer must make reasonable efforts to ensure that the client or the other person possesses information reasonably adequate to make an informed decision." Thus, the lawyer's duty is not just to explain the significance of the decision, but also to make sure the client is sufficiently informed to consider available options and risks prior to making that decision. The Subcommittee recommends appending this legend to the following Formal Opinions: 29 (representation of seller, buyer or borrower by lender's counsel); 58 (water rights representation, multiple clients), 97 (service on board of public entity), 107 (Third-Party Auditors), 115 (collaborative law).

116 ETHICAL CONSIDERATIONS IN THE DISSOLUTION OF A LAW FIRM OR A LAWYER'S DEPARTURE FROM A LAW FIRM

Adopted March 17, 2007.

Intoduction and Scope

Many ethical issues arise in connection with the dissolution of a law firm or a lawyer's departure or withdrawal from a firm. Such issues often arise in the context of determining who will represent particular clients following the break-up. The departing lawyer and the responsible members of the firm with which the lawyer has been associated have ethical obligations to clients on whose legal matters they worked.[1] These ethical obligations sometimes can be at odds with the business interests of the law firm or the departing lawyer. In such circumstances, all involved lawyers must hold the obligations to the client as paramount. The ethical considerations discussed in this opinion include the duty to keep the client reasonably informed about the status of the legal matter and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, pursuant to Colo. RPC 1.4(a) and (b); the duty to provide competent representation to the client, pursuant to Colo. RPC 1.1; avoiding neglect of client matters because of a break-up, in violation of Colo. RPC 1.3; taking appropriate steps upon withdrawal from representation, in accordance with Colo. RPC 1.16(d); ensuring that any funds in which a client or a third party may claim an interest are maintained separate from the lawyers' own property, in accordance with Colo. RPC 1.15(a); refraining from any solicitation or efforts to retain clients that would violate the provisions of Colo. RPC 7.1 or Colo. RPC 7.3; restrictions on a lawyer's right to practice after leaving a firm that might violate Colo. RPC 5.6(a); and generally refraining from any conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Colo. RPC 8.4(c).

The primary focus of this opinion is on the ethical obligations of lawyers to the *clients* they represent at the time of the dissolution or the lawyer's departure. The opinion also touches upon the actions of lawyers toward each other in these circumstances. The ethical obligations of the lawyers involved are the same whether the departing lawyer is a partner/shareholder, an associate, or some other category of lawyer such as one designated as of counsel. However, the opinion does not address the *legal* obligations owed to clients, or the legal duties arising from the relationship between and among the lawyers. It also does not address circumstances in which lawyers who are not in the same firm represent, as co-counsel, a common client.

This opinion substantially adopts and endorses Formal Opinion 99-414 (1999) issued by the Standing Committee on Ethics and Professional Responsibility of the American Bar Association (ABA). [editor's note: ABA Formal Opinion 99-414 was attached to this opinion as Appendix A as printed in the May 2007 issue of *The Colorado Lawyer*, by permission of the ABA] The remainder of this opinion focuses on application of the Colorado Rules of Professional Conduct to these circumstances and on issues that warrant comment beyond that in ABA Formal Opinion 99-414.

Analysis

The Client's Right to Choose Counsel

It is now uniformly recognized that the client-lawyer contract is terminable at will by the client.[2] Colo. RPC 1.16(a)(3) codifies this principle.[3] When a lawyer who has had primary responsibility for a client matter withdraws from a law firm, the client's power to choose or replace the lawyer borders on the absolute.[4] Neither the firm nor any of its members may claim a possessory interest in clients.[5] In other words, clients do not *belong* to lawyers.[6]

A lawyer or law firm may not, therefore, take action that impermissibly impairs a client's right to choose counsel. For example, a dispute between attorneys in a law firm over a fee that is due or may come due should not impact the client's right to freely choose counsel.

Nevertheless, the client's right to choose is subject to certain limitations. Generally, a lawyer shall not represent a client, or where representation has commenced, shall withdraw from the representation of a client, if the representation will result in violation of the Rules of Professional Conduct or other law[7] or if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.[8] For example, the departing lawyer may be the only lawyer in the firm with experience in a specialized area of law applicable to a particular client matter. In such circumstances, the law firm from which the lawyer is departing may be unable to continue the representation, except on a limited basis.[9] On the other hand, the departing lawyer may lack the support and resources necessary to handle a complex matter properly after leaving the firm. The departing lawyer may also be prohibited from representing the client if he or she is associating with a firm that would be precluded from representation due to a conflict of interest. In some situations, the right of a client to select the lawyer may be limited under the provisions of an insurance contract.[10]

In any event, a client represented by a particular lawyer or law firm will have to choose counsel again if the firm breaks up or the responsible lawyer departs from the firm during the course of the representation. In order to make appropriate choices, the client must have sufficient information.

Notice to Clients

In Colorado, a lawyer has a duty to keep a client reasonably informed about the status of a matter[11] and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.[12] When a lawyer plans to cease practice at a law firm, or when a law firm plans to terminate the lawyer's association with the firm, both the lawyer and the firm have responsibility for providing timely notification to clients affected by the lawyer's departure and providing such clients with information sufficient to allow informed choice.

Not only are the remaining and departing lawyers *permitted* to contact clients about an impending change in personnel, they are *required* to provide the client with at least enough information to determine the future course of the representation.[13] It is highly preferable that any affected client be notified by a joint communication from the departing lawyer and the firm and that the joint notice be transmitted sufficiently in advance of the lawyer's anticipated departure to allow the client to make decisions about who will represent it and communicate that decision before the lawyer departs. An "affected client" is one for whose active matters the departing lawyer currently is responsible or plays a principal role in the current delivery of legal services.[14] The joint and advance notice helps ensure an orderly transition that will best protect the interests of the affected client. Attached to this Opinion as Appendix B is a form of letter that, if given in a timely manner, should satisfy the ethical requirements of notice to affected clients.

In some limited circumstances joint, advance notice is not practicable.[15] If either the departing lawyer or the firm fails or refuses to participate in providing timely and appropriate joint notice, unilateral notice is necessary. If unilateral notice is given, it should impartially and fairly provide the same type of information as would have been included in the joint notice.[16]

Consistent with Colo. RPC 7.1, 7.3 and 7.4, as applicable, both the departing lawyer and the firm may solicit professional employment from clients or former clients of the firm. In doing so, however, the departing lawyer should be mindful that such solicitation may give rise to a civil claim for damages or other relief under the substantive law, especially while the departing lawyer is still employed by or associated with the law firm.[17] Pursuant to Colo. RPC 7.3, departing lawyers may solicit professional employment through written or electronic communications. Departing lawyers having a "family or prior professional relationship with the prospective client" are not subject to the 30-day waiting period for soliciting clients in personal injury or wrongful death matters as provided in Colo. RPC 7.3(c), and also may solicit clients in person or by telephone without running afoul of Colo. RPC 7.3.[18]

If a client or potential client inquires of the firm seeking to contact a lawyer who has departed the firm, the firm must provide the lawyer's new business address and telephone number, if known. Failure to do so may be a violation of Colo. RPC 1.4 or may reflect a lack of candor.[19] However, after providing

information as described above, the firm may inquire whether the call is regarding a legal matter and, if so, may ask whether someone at the firm may help instead.[20]

Proper and Continuous Handling of Client Matters

Amid the turmoil of a firm break-up, attorneys should never forget that they have clients and that they continue to owe those clients ethical and legal duties.[21] While an affected client is choosing between the departing lawyer and the law firm, both have a duty to ensure that the client's matter is handled properly. A lawyer shall act with reasonable diligence and promptness in representing a client, and shall not neglect a legal matter entrusted to that lawyer.[22] Unless the relationship between a lawyer and client is terminated as provided in Colo. RPC 1.16, a lawyer should carry through to conclusion all matters undertaken for a client.[23]

Absent a special agreement, the client employs the firm and not a particular lawyer, and the firm has responsibility, along with the departing attorney, for the cases being handled by the departing attorney.[24] Therefore, subject to the contrary wishes of an affected client, a law firm is obligated to continue to handle matters that were handled by a departing lawyer.[25] The affected client, however, may continue to view the departing lawyer as the client's representative despite the lawyer's withdrawal from the firm. The attorney-client relationship is an ongoing relationship that gives rise to a continuing duty to the affected client unless and until the client clearly understands, or reasonably should understand, that the relationship is one on which he, she or it can no longer depend.[26]

Withdrawal by the Law Firm or Attorney

A lawyer's departure from a law firm generally leads to withdrawal of either the firm or the departing lawyer as counsel for one or more affected clients. In matters in which a lawyer or firm has entered an appearance in a court proceeding, a formal motion to withdraw may be required.[27] Colo. RPC 1.16(d) provides that 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 that has not been earned.

When the law firm and the departing lawyer provide proper notice as discussed above, the affected client's matter is handled with diligence and competence during the withdrawal and selection of counsel, and the client chooses to be represented by one or the other (or chooses another lawyer or firm), the interests of the client will have been protected to a large extent. However, client papers and property still can be an issue. In any client matter, files generally are created while the departing lawyer is associated with the firm. The proper handling of these client files is discussed below.

The affected client may have paid an advance retainer for representation in a particular matter. Typically, such retainers are paid to the firm rather than an individual lawyer. These funds must be held separate from the lawyers' own property.[28] If the lawyer or law firm holding the client funds is withdrawing from representation, and neither the lawyer nor any third person claims any interest in the funds, the lawyer or firm holding the funds must promptly pay the remaining trust balance to the client or otherwise apply the funds as directed by agreement with the client.[29] If the departing lawyer will be representing the affected client, the client funds held by the firm may, with the client's consent, be transferred to an appropriate trust account established by the departing lawyer.

In some circumstances neither the departing lawyer nor the law firm wants to continue representing the affected client. In this situation, the obligations of the lawyers are no different than in any other situation in which a lawyer wishes to withdraw from representation. The departing lawyer and the firm must bear in mind the responsibilities imposed under Colo. RPC 1.3 (diligent representation), Colo. RPC 1.4 (communication), and Colo. RPC 1.16 (termination of representation).

Client Files

With limited exceptions, the client is entitled to the client file.[30] The departing lawyer may remove client files only with the consent of the affected client. If the affected client so requests, the firm must provide the files to the departing lawyer, subject to the limitations discussed in CBA Formal Opinion 104. Pending receipt of instructions from the client, both the departing lawyer and the law firm should have reasonable access to the file in order to protect the interests of the client, which remains the paramount obligation of both.[31] Even if the client has requested that the file be transferred to the departing lawyer, the file should not be removed without giving the firm notice and opportunity to copy the file. Likewise, if the affected client requests that the firm continue the representation, the departing lawyer should be given the opportunity to copy the file.[32] The contents of such client files remain confidential pursuant to the provisions of Colo. RPC 1.6.

In some circumstances, a client wishing to have a file transferred to the departing lawyer may owe the firm for past services or for costs advanced on the client's behalf. It is this Committee's view that such situations should be treated the same as any other in which a client discharges a lawyer without fully satisfying his or her financial obligations to the lawyer. The firm may, under certain limited circumstances, assert a retaining lien against client property in its possession.[33]

The law firm may possess client files in legal matters that are inactive or have been closed. Both the departing lawyer and the firm should consider any ethical obligations they may have with respect to such files insofar as they pertain to client matters for which the departing lawyer was responsible or played a principal role.[34]

Conflicts of Interest Arising Out of the Departing Lawyer's New Affiliation

The departing lawyer must also be aware of and avoid conflicts of interest that may arise out of his or her affiliation with another law firm. While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Colo. RPC 1.7, 1.8(c), 1.9 or 2.2.[35] The rule of imputed disqualification flows from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client.[36] Thus, when the departing lawyer brings clients to his or her new firm, they become the new firm's clients. Likewise, the new firm's clients become the departing lawyer's clients.

Because of the rules concerning imputed disqualification, the departing lawyer and the new firm must perform a thorough conflicts check. This conflicts check should be designed to determine whether the departing lawyer's association with the new firm may involve conflicts of interest based on consideration of the departing lawyer's current *and* former clients.[37] The process of checking for conflicts of interest may, in some circumstances, be undertaken prior to the departing lawyer's affiliation with the new firm.[38]

Restrictions on the Right to Practice

Colo. RPC 5.6(a) provides that a lawyer shall not participate in offering or making a "partnership or employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement or as permitted by Rule 1.17 [regarding the sale of a law practice]." The comment to Rule 5.6 provides that such an agreement "not only limits the lawyer's professional autonomy but also limits the freedom of clients to choose a lawyer."

In Colorado, an agreement prohibiting a departing lawyer from soliciting clients after departure from a firm impermissibly impairs the client's right to discharge and choose counsel, and may lead to discipline for the offending attorney.[39] Courts in many other jurisdictions have refused to enforce agreements between lawyers and law firms that they viewed as anti-competitive.[40] While a departing lawyer must be mindful of the lawyer's fiduciary obligations to the firm and of the existing contractual relations between the firm and affected clients, the lawyer may not agree to, and the firm must not impose, conditions that might inhibit a client's right to choose counsel.

Duty of Candor

Regardless of the nature of the departure, a departing lawyer and firm each have a duty to act with candor toward the other.[41] Colo. RPC 8.4(c) states that, "it is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The duty of candor, as well as Rule 8.4(c), may be breached by a lawyer who misrepresents the lawyer's status or intentions to others at the firm, and vice versa.

While a discussion of the legal, as opposed to ethical, duties of lawyers is beyond the scope of this opinion, lawyers and firms contemplating a dissolution or departure should give careful consideration to their respective legal duties, including potential obligations based on their contractual, agency, or fiduciary relationships. A departing lawyer should consider the consequences that may arise from contacting clients and attempting to obtain consent to transfer matters to the departing lawyer in advance of notifying the firm, or in denying to the firm the lawyer's intention to depart. Firms likewise should consider the consequences of similar actions prior to the contemplated departure of a lawyer who is not yet aware of impending change.[42] Such actions by a departing lawyer or a firm may reflect a lack of candor.

NOTES

1. The Colorado Rules of Professional Conduct apply to lawyers as individuals and not to law firms as separate entities. Any references to the duties and obligations of a law firm within this opinion are to the responsible members of the firm.

2. Charles W. Wolfram, *Modern Legal Ethics,* § 9.5.2, at 545 (1986). The Colorado Supreme Court recognized the client's right to terminate the attorney-client relationship as a matter of public policy in *Olsen & Brown v. City of Englewood,* 889 P.2d 673, 676 (Colo. 1995).

3. Colo. RPC 1.16(a)(3) provides that except when a lawyer is ordered to do so by a tribunal, a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the lawyer is discharged, subject to the approval of the tribunal where applicable.

4. Robert W. Hillman, *Hillman on Lawyer Mobility,* ("Hillman"), Chapter 2, § 2.3.1 (2000 Supplement).

5. *Id.*

6. In expressing this view, the committee is aware that the Restatement of the Law Governing Lawyers suggests that clients belong to the firm and not an individual lawyer. Rest. (3d) Law Governing Lawyers, § 9(3), cmt. i. The Committee disagrees with any characterization of clients as property.

7. Colo. RPC 1.16(a)(1).

8. Colo. RPC 1.16(a)(2).

9. The comment to Colo. RPC 1.1 provides in pertinent part:

> While the licensing of a lawyer is evidence that the lawyer has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which the lawyer is not qualified. However, a lawyer may accept such employment if in good faith the lawyer expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to clients. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which the lawyer is not and does not expect to become so qualified should either decline the employment or, with the consent of the client, accept the employment and associate with a lawyer who is competent in the matter.

The comment further provides:

> In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill considered action under emergency conditions can jeopardize the client's interest.

10. *See* CBA Formal Op. 91, "Ethical Duties of Attorney Selected by Insurer to Represent Insured" (Jan. 16, 1993). 11. Colo. RPC 1.4(a)

12. Colo. RPC 1.4(b).

13. Alexander R. Rothrock, *Essays on Legal Ethics and Professional Conduct* ("Rothrock") § A4.2.1, CLE in Colorado, Inc. (2005).

14. *See* ABA Formal Op. 99-414, Appendix A hereto, which provides a similar definition for the term "current clients." In determining whether or not the departure of a lawyer from a firm triggers the requirement to notify a client on whose matter the lawyer has been working (that is, whether the client is an "affected client"), the lawyer and the firm also should consider whether the client reasonably would believe itself to be affected by the lawyer's departure, for example, where a lawyer is specifically named in an engagement letter as being expected to provide services to the client. Even if a client is not an affected client, the departing lawyer may choose to notify the client of his or her departure if such notification complies with Colo. RPC 7.1 and 7.3. Restrictions purporting to prohibit such contact likely would violate the prohibition of Colo. RPC 5.6 on restrictions of the right of a lawyer to practice after termination of his or her relationship with a firm.

15. There will be situations in which a departing lawyer will be unable to represent the client, and the notice to the client would not present representation by the departing lawyer as an option. For example, the departing lawyer would be unable to represent the client if the lawyer were suspended from the practice of law or placed on disability inactive status. However, a difference of opinion between the firm and the departing lawyer regarding the competence or ability of one or the other to represent the client does not, standing alone, justify failure or refusal to extend to the client a choice in
representation.

16. Kentucky Bar Assn. Ethics Op., KBA E-424 ("KBA E-424"), n. 4 (2005).

17. *See e.g.*, *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486 (Colo. 1989) (addressing an employee's duty of loyalty, generally). *See also* additional cases cited in ABA Formal Op. 99-44, Appendix A hereto, at n.16, 17.

18. The Committee concurs with the ABA view that a lawyer does not have a prior professional relationship with a client sufficient to permit in-person or live telephone solicitation solely by having worked on a matter along with other lawyers in a way that afforded little or no direct contact with the client. "Prior professional relationship" also may apply to the constituents of an organizational client with whom the lawyer has had substantial contact, who in their individual capacity never were clients of the firm or lawyer. *See* 2 G. Hazard & W. Hodes, *The Law of Lawyering*, § 57.7, n. 4, p. 57-25 (3d ed. 2001).

19. Colo. RPC 8.4(c) provides that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. To the extent such inquiries are handled by non-lawyers employed or associated with the firm, partners or principals in the firm, or those lawyers having direct supervisory authority over the non-lawyer, shall make reasonable efforts to insure that the firm has in effect measures giving reasonable assurance that the non-lawyer's conduct will be compatible with the professional obligations of the lawyer, or shall make reasonable efforts to insure that the person's conduct is compatible with those professional obligations. Colo. RPC 5.3(a) and (b).

20. Phila. Bar Assn./Pa. Bar Assn. Joint Ethics Op. 99-100 (April 1999).

21. Rothrock § A4.2.1.

22. Colo. RPC 1.3.

23. Comment, Colo. RPC 1.3. Even after the attorney-client relationship has terminated, the firm and the departing lawyer have an obligation to avoid harming the client's interests. For example, where a client has terminated the client's relationship with a firm, the firm nonetheless has the obligation to make sure that communications coming to the client through the firm are promptly communicated to the client. *See* Restatement (Third) The Law Governing Lawyers, § 33(2)(c).

24. ABA Comm. On Ethics and Professional Responsibility, Informal Op. 1428 (Feb. 16, 1979).

25. Wisconsin Ethics Op. E-97-2, State Bar of Wisconsin CLE Books (July 1998).

26. *People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991) (quoting *In re Weiner*, 120 Ariz. 349, 352, 586 P.2d 194, 197 (1978)). In *People v. Bennett*, the Colorado Supreme Court held that whether an attorney-client relationship exists turns on the reasonable, subjective view of the client, and an important factor is whether the client believes that the relationship existed. "The attorney-client relationship is an ongoing relationship giving rise to a continuing duty to the client until the client understands, or reasonably should understand, that the relationship is no longer to be depended on." Id.

27. C.R.C.P. 121, §1-1(4), applicable to attorneys practicing in the district courts in Colorado, seems to indicate that when an attorney enters an appearance as a member of a firm, it is the firm as a whole that becomes counsel of record. Thus, if the departing lawyer will not be continuing the representation after leaving the firm, a formal motion to withdraw may not be necessary if the firm will continue representing the client. In contrast, the local rules of the United States District Court for the District of Colorado state that the law firm is not counsel of record. D.C. Colo. L. R. 83-5(B). Thus, in a matter pending in certain federal courts, it may be necessary for the departing lawyer to withdraw from representation and for a different lawyer with the firm, who will take over responsibility for the case, to enter an appearance.

28. Colo. RPC 1.15(a).

29. *See* Colo. RPC 1.15(b). For proper handling of funds in a lawyer's possession in which the lawyer or another person claims an interest, *see* Colo. RPC 1.15(c).

30. *See* CBA Formal Op. 104, "Surrender of Papers to the Client Upon Termination of the Representation," (April 17, 1999).

31. ISBA Op. 95-02, n. 4; Utah Ethics Op. 132 (1993).

32. *See* KBA E-424 (recognizing that both the firm and the departing lawyer may have legitimate interest in the content of a client file because, among other reasons, it would be essential in defending a later malpractice action). *See also,* D.C. Bar Legal Ethics Comm. Op. 168 (1986) (concluding that a firm may copy transferred files at its own expense).

33. *See* CBA Formal Op. 82, "Assertion of Attorney's Retaining Lien on Client's Papers," (April 15, 1989; Addendum Issued 1995).

34. For general discussion regarding client files in closed legal matters, *see* Raymond P. Micklewright, "Understanding File Retention: Developing an Ethical Policy and Plan-Part I," 30 *The Colorado Lawyer* No. 10, p. 147 (October 2001); Raymond P. Micklewright, "Understanding File Retention: Developing an Ethical Policy and Plan-Part II," 30 *The Colorado Lawyer* No. 11, p. 77 (November 2001).

35. Colo. RPC 1.10(a).

36. Colo. RPC 1.10, Comment.

37. Even if the departing lawyer did not personally represent a particular client at the prior firm, a conflict of interest can exist if the lawyer's new firm represents a client in the same or a substantially related matter, the interests of the prior firms's client are materially adverse to those of the new firm's client, and the departing lawyer acquired information protected by Rule 1.6 that is material to the matter. Colo. RPC 1.9(b).

38. The Committee recognizes that there is an inherent tension between the new firm's need to obtain information concerning the departing lawyer's former and current clients in order to comply with the conflict rules, and the departing lawyer's obligations under Colo. RPC 1.6(a) not to reveal information relating to representation of clients. The Colorado Supreme Court is currently considering a proposed new comment to Colo. RPC 1.6, which would generally recognize a departing lawyer's implied authorization to disclose certain limited non-privileged information protected by Colo. RPC 1.6 in order to conduct a conflicts check. *See* Proposed Amendments to Colorado Rules of Professional Conduct (Dec. 30, 2005), Colo. RPC 1.6, Comment [5A], available at http://www.courts.state.co.us/supct/committees/profconductdocs/sc-appendixa-1205.pdf. In addition, the departing lawyer may seek the consent of former or current clients to disclose information to permit a conflict check and under some circumstances it may be possible to check for conflicts of interest without disclosing information relating to the representation of former clients. For a more thorough discussion of such situations, *see* Marcy Glenn, "Conflict Issues When Attorneys Switch Jobs," 27 *The Colorado Lawyer* No. 5, p. 49 (May 1998).

39. In *People v. Wilson*, 953 P.2d 1292 (Colo.1998), the Colorado Supreme Court disciplined a lawyer for attempting to enforce an employment agreement prohibiting departing lawyers from soliciting clients and providing for forfeiture of all fees earned by departing lawyers through such solicitation. The court held that such conduct violated Colo. RPC 8.4(g), which prohibits conduct in violation of accepted standards of legal ethics.

40. For a thorough discussion of agreements discouraging competition among lawyers, *see* Hillman, § 2.3.4 (2004 Supplement).

41. This committee agrees with the Oregon Bar Association and the Oregon Supreme Court that a lawyer has a duty of candor to her or his firm. Or. Bar Assn. Formal Op. No. 2005-70. ("Regardless of contractual, fiduciary, or agency relationship between Lawyer and Firm A, however, it is clear under Oregon RPC 8.4(3) that Lawyer may not misrepresent Lawyer's status or intentions to others at Firm A. *See In re Smith*, 315 Or. 260, 843 P.2d 449 (1992); *In re Murdock*, 328 Or. 18, 968 P.2d 1270 (1998) (although not expressly written, implicit in disciplinary rules and in duty of loyalty arising from lawyer's contractual or agency relationship with his or her law firm is a duty of candor toward that law firm)").

42. *See, e.g., Meehan, et al. v. Shaughnessy*, 535 N.E.2d 1255 (Mass. 1998); *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 393 A.2d 1175 (Pa. 1978); *In re Smith, supra; In re Murdock*, *supra*, at n. 7.

Appendix A

September 8, 1999

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 99-414
Ethical Obligations When a Lawyer Changes Firms

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September 8, 1999

A lawyer's ethical obligations upon withdrawal from one firm to join another derive from the concepts that clients' interests must be protected and that each client has the right to choose the departing lawyer or the firm, or another lawyer to represent him. The departing lawyer and the responsible members of her firm who remain must take reasonable measures to assure that the withdrawal is accomplished without material adverse effect on the interests of clients with active matters upon which the lawyer currently is working. The departing lawyer and responsible members of the law firm who remain have an ethical obligation to assure that prompt notice is given to clients on whose active matters she currently is working. The departing lawyer and responsible members of the law firm who remain also have ethical obligations to protect client information, files, and other client property. The departing lawyer is prohibited by ethical rules, and may be prohibited by other law, from making in-person contact prior to her departure with clients with whom she has no family or client-lawyer relationship. After she has left the firm, she may contact any firm client by letter.

When a lawyer ceases to practice at a law firm, both the departing lawyer and the responsible members of the firm who remain have ethical responsibilities to clients on whose active matters the lawyer currently is working to assure, to the extent reasonably practicable, that their representation is not adversely affected by the lawyer's departure. In this Opinion, the Committee addresses obligations under the Model Rules of Professional Conduct that a lawyer has when she leaves one law firm for another, including the following: (1) disclosing her pending departure in a timely fashion to clients for whose active matters she currently is responsible or plays a principal role in the current delivery of legal services (sometimes referred to in this Opinion as "current clients"); (2) assuring that client matters to be transferred with the lawyer to her new law firm do not create conflicts of interest in the new firm and can be competently managed there; (3) protecting client files and property and assuring that, to the extent reasonably practicable, no client matters are adversely affected as a result of her withdrawal; (4) avoiding conduct involving dishonesty, fraud, deceit, or misrepresentation in connection with her planned withdrawal; and (5) maintaining confidentiality and avoiding conflicts of interest in her new affiliation respecting client matters remaining in the lawyer's former firm.[1]

1. This Opinion addresses mainly the obligations of the departing lawyer. Nevertheless, the firm members remaining, and especially those with supervisory responsibility, have an obligation under the Rules of Professional Conduct, and may have obligations as well under other law, to assure to the extent reasonable practicable that the withdrawal from the firm is accomplished without material adverse effect on any clients' interests, especially clients on whose active matters the departing lawyer currently is working. *Cf.* ABA Informal Opinion 1428 (1979), decided under the former Model Code of Professional Responsibility, and California Bar Ethics Op. No. 1985-86, 1985 WL 57193 *2 (Cal.St.Bar.Comm.Prof.Resp. 1985), both of which place the responsibility of notifying clients upon the departing lawyer and her firm. Among remaining firm members' ethical obligations are to make reasonable efforts to ensure that

The departing lawyer also must consider legal obligations other than ethics rules that apply to her conduct when changing firms, as well as her fiduciary duties owed the former firm. The law of agency, partnership, property, contracts, and unfair competition impose obligations that are not addressed directly by the Model Rules. These obligations may affect the permissible timing, recipients, and content of communications with clients, and which files, documents, and other property the departing lawyer lawfully may copy or take with her from the firm. Although the Committee does not advise upon issues of law beyond the Model Rules, we must take account of other law in construing the Rules; so must the departing lawyer before determining an appropriate course of action.

Notification to Current Clients Is Required

The impending departure of a lawyer who is responsible for the client's representation or who plays a principal role in the law firm's delivery of legal services currently in a matter (i.e., the lawyer's current clients), is information that may affect the status of a client's matter as contemplated by Rule 1.4.[2] A lawyer who is departing one law firm for another has an ethical obligation, along with responsible members of the law firm who remain, to assure that those clients are informed that she is leaving the firm. This can be accomplished by the lawyer herself, the responsible members of the firm, or the lawyer and those members jointly. Because a client has the ultimate right to select counsel of his choice,[3] information that the lawyer is leaving and where she will be practicing will assist the client in determining whether his legal work should remain with the law firm, be transferred with the lawyer to her new firm, or be transferred elsewhere. Accordingly, informing the client of the lawyer's departure in a timely manner is critical to allowing the client to decide who will represent him.[4]

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there are in effect measures: (1) to keep clients informed pursuant to Rule 1.4(b) of the impending departure of a lawyer having substantial responsibility for the clients' active matters; (2) to make clear to those clients and others for whom the departing lawyer has worked and who inquire that the clients may choose to be represented by the departing lawyer, the firm or neither (*see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 cmt. h (Proposed Official Draft 1998); (3) to assure that active matters on which the departing lawyer has been working continue to be managed by remaining lawyers with competence and diligence pursuant to Rules 1.1 and 1.3; and (4) to assure that, upon the firm's withdrawal from representation of any client, the firm takes reasonable steps to protect the client's interests pursuant to Rule 1.16(d). *See infra*, n.4 and accompanying text. This Opinion does not address the issue of a division of fees between the departing lawyer and her law firm.

2. Rule 1.4 (Communication) states:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment [1] to Rule 1.4 provides that "the client should have sufficient information to participate intelligently in decisions concerning . . . the means by which they [the objectives of the representation] are to be pursued . . . ."

3. Rule 1.16 (Declining Or Terminating Representation) in paragraph (a)(3) states in pertinent part that a lawyer "shall withdraw from the representation of a client if . . . the lawyer is discharged." *See also* Comment [4]; Restatement § 26 cmt h, *supra* n.1.

4. State ethics opinions also have determined that, under the Model Rules, a departing lawyer has an ethical duty to inform current clients that she is leaving the firm. *See, e.g.*, District of Columbia Bar Legal Ethics Committee Op. No. 273 (1997); State Bar of Michigan Std. Com. on Prof. and Jud. Ethics Op. No. RI-224, 1995 WL 68957 (Mich.Prof.Jud.Eth. 1995). *See also* Rule 1.16(d), *infra* n.8. The ABA Committee gave approval under the former Model Code of Professional Responsibility for a partner or associate who is leaving one firm for another to send an announcement soon after departure to those clients for whose active, open, and pending matters the lawyer had been directly responsible immediately before resignation. Informal Opinions 1457 (1980) and 1466 (1981). These opinions did not, however, address the question whether the departing lawyer might send notices to any clients *before* resigning.

Notification of Current Clients is Not Impermissible Solicitation

Because she has a present professional relationship with her current clients, a departing lawyer does not violate Model Rule 7.3(a)[5] by notifying those clients that she is leaving for a new affiliation. Under Rule 7.3(a), the departing lawyer is, however, prohibited from making in-person contact with firm clients with whom she does *not* have a prior professional or family relationship. A lawyer does not have a prior professional relationship with a client sufficient to permit in-person or live telephone solicitation solely by having worked on a matter for the client along with other lawyers in a way that afforded little or no direct contact with the client.[6] The departing lawyer nevertheless may contact the client through written or oral recorded communication pursuant to Rule 7.2(a), subject to the limitations in Rules 7.1, 7.3(b), and 7.3(c), at least after the lawyer has departed the firm and joined the new firm.[7]

The Committee also is of the opinion that a departing lawyer must, under Rule 1.16(d),[8] take steps to the extent practicable to protect her current clients' interests. Moreover, the responsible members of the former firm must themselves comply with Rule 1.16(d) respecting all clients who select the departing lawyer to represent them, whether or not they are current clients of the departing lawyer.[9]

A lawyer's duty to inform her current clients of her impending departure is similar to a lawyer's obligation to inform clients if the lawyer will be unavailable to provide legal services to them for an

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5. Model Rule 7.3(a) states:

> A lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

6. The rationale for the prohibition is that "there is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to be in need of legal services." Rule 7.3, Comment [1]. The rationale for the exception is that "there is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal (*sic*) or professional relationship . . . ." Rule 7.3, Comment [4]. The Committee views the exception under Rule 7.3(a) to permit in-person solicitation *only* of those current clients of the firm with whom the lawyer personally has had sufficient professional conduct to afford the client an opportunity to judge the professional qualifications of the lawyer and as not extending beyond the text of the Rule to apply to firm clients with whom her relationship is solely personal and not professional. *See, e.g.*, N.C. Bar Opinion 200, 1994 WL 899607 (N.C.St.Bar 1994) (lawyer after departure may contact clients of firm for whom he has been responsible); Arizona Comm. on Rules of Professional Conduct Op. No. 91-17 (June 10, 1991) (permissible before departure to notify clients with whom he had a personal, professional relationship); Kentucky Bar Opinion E-317 (1987) (permissible before departure to notify clients whom he personally represented of his impending departure).

7. Lawyers are permitted, subject to certain limitations, "to make known their services not only through reputation but also through organized information campaigns. Rule 7.2, Comment [1]. Rule 7.2 permits not only general advertising, but also targeted "written or recorded communication."

8. Model Rule 1.16(d) states:

> 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 that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

9. If a current client chooses to remain with the firm or to move with the departing lawyer to her new firm, the lawyer(s) selected must continue the representation unless withdrawal is necessary under Rule 1.16(a) or permissible under Rule 1.16(b). In the Committee's opinion, "other good cause for withdrawal" does not exist under Rule 1.16(b)(6) solely because the client's matter is difficult or time consuming or has little chance of success, so long as no other enumerated predicate for withdrawal exists.

extended period because of major surgery or an extended vacation.[10] In all of these situations, the clients have a right to know of the impending absence so that they can make informed decisions about future representation, even though the lawyer who temporarily will be unavailable is likely to believe that other lawyers in the firm are fully capable of handling the clients' matters during her absence.

The Initial Notice Must Fairly Describe the Client's Alternatives

Any *initial* in-person or written notice informing clients of the departing lawyer's new affiliation that is sent before the lawyer's resigning from the firm generally should conform to the following:

1) the notice should be limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice (*i.e.*, the current clients);
2) the departing lawyer should not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working;
3) the departing lawyer must make clear that the client has the ultimate right to decide who will complete or continue the matters; and
4) the departing lawyer must not disparage the lawyer's former firm.[11]

The Departing Lawyer Should Provide Additional Information

In order to provide each current client with the information needed to make a choice of counsel, the departing lawyer also may inform the client whether she will be able to continue the representation at her new law firm.[12] If the client requests further information about the departing lawyer's new firm, the lawyer should provide whatever is reasonably necessary to assist the client in making an informed decision about future representation, including, for example, billing rates and a description of the resources available at the

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10. *Cf.* Passanante v. Yormack, 138 N.J.Super. 233, 238, 350 A. 2d 497, 500 (N.J. 1975), *cert. denied*, 704 N.J. 144, 358 A.2d 199 (N.J. 1976) (lawyer has implicit obligation to inform clients of failure to act for whatever cause to permit clients to engage another lawyer).

11. ABA Informal Opinion 1457 (1980) found consistent with the Model Code of Professional Responsibility the timing, content, and choice of recipients of a form letter announcement by a lawyer that he had resigned from a law firm to become a member of another firm sent "soon after making the change to clients (and only those clients) for whose active, open, and pending matters he was directly responsible as a member of the ABC law firm immediately before his resignation." The form letter stated that the client had a right to decide how and by whom the pending matters would be handled and did not urge the client to choose the departing lawyer over the firm. In ABA Informal Opinion 1466 (1981), Opinion 1457 was extended to include associates, assuming the same fact pattern. The Committee there noted it "does not determine or advise upon issues of law," but then distinguished the facts presented to the Committee from the facts shown in Adler v. Epstein, 393 A.2d 1175 (Pa. 1978), *cert. denied*, 442 U.S. 907 (1979) (departing group of associates enjoined from actively soliciting clients of old firm as part of pre-departure efforts to borrow money on the basis of the clients). Today we reject any implication of Informal Opinions 1457 or 1466 that the notices to current clients and discussions as a matter of ethics must await departure from the firm.

12. The departing lawyer must ensure that her new firm would have no disqualifying conflict of interest in representing the client in a matter under Rule 1.7, or other Rules, and has the competence to undertake the representation. In order to do so, she may need to disclose to the new firm certain limited information relating to this representation. When discussing an association with another firm, the departing lawyer also must be mindful of potentially disqualifying conflicts of interest in her old firm if the new firm currently represents any client with interests adverse to a client of the old firm. Should such a client be identified, the departing lawyer may need to be screened within the old firm no later than the commencement of serious discussions with the new firm. *See* ABA Formal Opinion 96-400. Lastly, the departing lawyer also might find that her work in her former firm would, upon her arrival at the new firm, create a conflict of interest under Rule 1.9 with one of her new firm's clients requiring the creation of a screen that, subject to the affected clients' consents in most jurisdictions, would avoid imputation of her individual conflict of interest to her new firm under Model Rule 1.10(a).

new firm to handle the client matter.[13] The departing lawyer nevertheless must continue to make clear in these discussions that the client has the right to choose whether the firm, the departing lawyer and her new firm, or some other lawyer will continue the representation.

Joint Notification By the Lawyer and the Firm is Preferred

Far the better course to protect clients' interests is for the departing lawyer and her law firm to give joint notice of the lawyer's impending departure to all clients for whom the lawyer has performed significant professional services while at the firm, or at least notice to the current clients.[14] Unfortunately, this is not always feasible when the departure is not amicable. In some instances, the lawyer's mere notice to the firm might prompt her immediate termination. When the departing lawyer reasonably anticipates that the firm will not cooperate on providing such a joint notice, she herself must provide notice to those clients for whose active matters she currently is responsible or plays a principal role in the delivery of legal services, in the manner described above, and preferably should confirm the conversations in writing so as to memorialize the details of the communication and her compliance with Model Rules 7.3 and 7.1.[15]

Law Other Than the Model Rules Applies to the Departure

In addition to satisfying her ethical obligations, the departing lawyer also must recognize the requirements of other principles of law as she prepares to leave, especially if she notifies her current clients before telling her firm she is leaving. For example, the departing lawyer may avoid charges of engaging in unfair competition and appropriation of trade secrets if she does not use any client lists or other proprietary information in advising clients of her new association, but uses instead only publicly available information and what she personally knows about the clients' matters.[16]

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13. In this respect, we agree with D.C. Bar Legal Ethics Opinion 273 (1997), "Ethical Considerations of Lawyers Moving From One Private Firm to Another."

14. Cal. Bar Ethics Op. No. 1985-86, 1985 WL 57193 at * 2, *supra*, n.1, interprets the California Rule to require both the departing lawyer and the law firm to provide fair and adequate notice of the withdrawal to the client sufficient to allow a client an opportunity to make an informed choice of counsel, and states that, where practical, the notice should be made jointly. ABA Informal Opinion 1428 (1979) suggested that, under the Model Code, both the departing lawyer and the law firm had an obligation to give the client "the choice as to whether or not the client wishes the firm to continue handling the matter or whether the client wishes to choose another lawyer or legal services firm." *See also* Cleveland Bar Opinion 89-5 (under the Model Code, either the departing lawyer or the law firm must give due notice to those clients of the former firm for whose active, open, and pending matters the lawyer is directly responsible).

15. The responsible members of the law firm must not take actions that frustrate the departing lawyer's current clients' right to choose their counsel under Rule 1.16(a) and Comment [4] by denying access to the clients' files or otherwise. To do so may violate the responsible members' ethical obligations under Rules 1.16(d) and 5.1.

16. *See, e.g.*, Siegel v. Arter & Hadden, 85 Ohio St. 3d 171, 707 N.E.2d 853 (Oho. Sup. Ct. 1999) (unresolved fact issues precluded summary judgment on unfair competition and trade secret counts because of departing lawyer's use of client list with names, addresses, telephone numbers and matters and fee information, despite notice to firm before notice to clients). *See also* Shein v. Myers, 394 Pa. Super. 549, 552, 576 A.2d 985, 986 (Pa. 1990), *appeal denied*, 533 Pa. 600, 617 A.2d 1274 (Pa. 1991) ("break-away" lawyers tortiously interfered with contract between their former firm and its clients by taking 400 client files, making scurrilous statements about the firm, and sending misleading letters to firm clients). In a joint opinion, the Pennsylvania and Philadelphia Bars warned that notice to clients before advising the firm of her intended departure "may be construed as an attempt to lure clients away in violation of the lawyer's fiduciary duties to the firm, or as tortious interference with the firm's relationships with its clients." Pa. Bar Ass'n Comm. on Legal Ethics and Prof. Resp. Joint Op. No. 99-100, 1999 WL 239079 * 2. (Pa.Bar.Assn.Comm.Leg.Eth.Prof.Resp.1999). The Committee also noted that the "prudent approach" is for the departing lawyer not to notify her clients before advising the firm of her intention to leave to join another firm. *Id.*

Charges of breach of fiduciary and other duties owed the former firm also might be avoided if the departing lawyer and her new firm go no further than the permissible conduct noted in *Graubard Mollen v. Moskovitz*[17] and avoid the conduct the court found actionable, such as secretly attempting to lure firm clients to the new firm (even when the departing lawyer originated and had principal responsibility for the clients' matters) and lying to clients about their right to remain with the old firm and to partners about the lawyer's plans to leave. Although that case involved civil litigation, other courts have imposed discipline on lawyers for similar conduct because it involved dishonesty, fraud, deceit, or misrepresentation in violation of Rule 8.4(c).[18]

Entitlement to Files, Documents, and Other Property Depends on The Model Rules and Other Law

A lawyer moving to a new firm also may wish to take with her files and other documents such as research memoranda, pleadings, and forms. To the extent that these documents were prepared by the lawyer and are considered the lawyer's property or are in the public domain, she may take copies with her. Otherwise, the lawyer may have to obtain the firm's consent to do so.

The Committee is of the opinion that, absent special circumstances, the lawyer does not violate any Model Rule by taking with her copies of documents that she herself has created for general use in her practice. However, as with the use of client lists, the question of whether a lawyer may take with her continuing legal education materials, practice forms, or computer files she has created turns on principles of property law and trade secret law. For example, the outcome might depend on who prepared the material and the measures employed by the law firm to retain title or otherwise to protect it from external use or from taking by departing lawyers.

Client files and client property must be retained or transferred in accordance with the client's direction.[19] A departing lawyer who is not continuing the representation may, nevertheless, retain copies of client documents relating to her representation of former clients, but must reasonably ensure that the confidential client information they contain is protected in accordance with Model Rules 1.6 and 1.9.

Conclusion

Both the lawyer who is terminating her association with a law firm to join another and the responsible members of the firm who remain have ethical obligations to clients for whom the departing lawyer is providing legal services. These ethical obligations include promptly giving notice of the lawyer's impending departure to those current clients on whose matters she actively is working.

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17. 86 N.Y.2d 112, 653 N.E.2d 1179 (1995). The Court stated that a departing lawyer's efforts to locate alternative space and affiliations would not violate his fiduciary duties to his firm because those actions obviously require confidentiality. Also, informing firm clients with whom the departing lawyer has a prior professional relationship about his impending withdrawal and reminding them of their right to retain counsel of their choice is permissible. *Id.* at 1183. A departing lawyer should, of course, consult all case law applicable in the practice jurisdiction.

18. *See, e.g.*, In the Matter of Cupples, 979 S.W.2d 932, 935 (Mo. 1998); *In re* Cupples, 952 S.W.2d 226, 236-37 (Mo. 1997) (in separate disciplinary proceedings involving a lawyer in connection with his departure from two different law firms, the court held that the lawyer's conduct, which included secreting client files as he prepared to withdraw from a firm, removing files without client consent, failing to inform client of change in nature of the representation, and other actions constituted conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Missouri's counterpart to Model Rule 8.4(c)). *See also In re* Smith, 853 P.2d 449, 453 (Or. 1992) (Before leaving law firm, lawyer met with new clients in his office, had them sign retainer agreements with him, and took files from the office. In imposing a four (4) month suspension from practice of law, the Court stated that "although there is no explicit rule requiring lawyers to be candid and fair with their partners or employers, such an obligation is implicit in the prohibition of DR 1-102(A)(3) against dishonesty, fraud, deceit, or misrepresentation.").

19. *See* Model Rule 1.16(d), *supra*, n.8. Pending client instructions, client property must be held in accordance with Model Rule 1.15.

The lawyer does not violate any Model Rule in notifying the current clients of her impending departure by in-person or live telephone contact before advising the firm of her intentions to resign, so long as the lawyer also advises the client of the client's right to choose counsel and does not disparage her law firm or engage in conduct that involves dishonesty, fraud, deceit, or misrepresentation. After her departure, she also may send written notice of her new affiliation to any firm clients regardless of whether she has a family or prior professional relationship with them.

Before preparing to leave one firm for another, the departing lawyer should inform herself of applicable law other than the Model Rules, including the law of fiduciaries, property and unfair competition. She also should take care to act lawfully in taking or utilizing the firm's information or other property.

This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, 541 North Fairbanks Court, 14th Floor, Chicago, Illinois 60611-3314 Telephone (312)988-5300 CHAIR: Donald B. Hilliker, Chicago, IL; Loretta C. Argrett, Washington, DC; Jackson M. Bruce, Jr., Milwaukee, WI; William B. Dunn, Detroit, MI; James W. Durham; Mark I. Harrison, AZ; Daniel W. Hildebrand, Madison, WI; William H. Jeffress, Jr., Washington, DC; Bruce Alan Mann, San Francisco, CA; M. Peter Moser, Baltimore, MD. CENTER FOR PROFESSIONAL RESPONSIBILITY: George A. Kuhlman, Ethics Counsel; Eileen B. Libby, Associate Ethics Counsel.

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Appendix B

Form Letter Announcing Departure of a Lawyer from a Firm Joint Announcement

[Date]

[Client Name]
[Client Address 1]
[Client Address 2]

Re: [Matter Reference]

Dear [Client Salutation],

Effective [Date], Susan Q. Lawyer will no longer be a member of Frip & Frap, LLP. Effective that date, she will be a member of Lawyer & Doe, PC. While a member of [or employed at] Frip & Frap, Ms. Lawyer provided legal representation to you. In light of her departure, you may choose whether you want to have Ms. Lawyer continue to represent you as a member of Lawyer and Doe, P.C.; have another lawyer from Frip & Frap continue to represent you; or engage another lawyer of your choosing.

In order to facilitate a smooth transition, please advise Ms. Lawyer and Melville Frip of Frip & Frap in writing at your earliest convenience of your choice of attorney. You may respond by noting your choice below, and signing and faxing this letter to Ms. Lawyer and Mr. Frip at 303-XXX-XXXX.

If you have any questions, please call either of us at 303-XXX-XXXX. Thank you for your prompt attention to this request.

Sincerely,

_____ _____

Susan Q. Lawyer

Melville Frip
Frip & Frap, LLC

☐ I wish to be represented by Susan Q. Lawyer and authorize the transfer of all paper and electronic files to Ms. Lawyer at her new firm, Lawyer & Doe, PC.

☐ I wish to be represented by Frip & Frap, LLC and would like to be contacted by Frip & Frap to discuss its continuing representation of me.

☐ I wish to be represented by _____ and authorize the transfer of all paper and electronic files to her/him at the firm of _____.

_____

[Client Name]

117 ETHICAL RESPONSIBILITIES OF ATTORNEYS IN LEGAL SERVICES AND PRO BONO PROGRAMS CONCERNING PROSPECTIVE CLIENTS

Adopted June 16, 2007.

Introduction

Colorado Legal Services ("CLS") is a legal services program that provides free legal representation in civil cases to indigent clients through multiple offices across the state.[1] In addition, approximately twenty pro bono programs sponsored by local bar associations process requests for legal representation and refer indigent or limited means clients to pro bono attorneys participating in those programs. Because the need for legal services by the indigent or persons of limited means is far greater than the resources available to meet those needs, programs are required out of necessity to limit their representation to certain substantive areas of law. When the programs are regulated by federal law or otherwise, they also must limit representation to individuals meeting specified financial guidelines.

To determine an applicant's eligibility for program services, some pro bono programs conduct joint intakes through CLS, while others maintain separate offices to process applications for services. Generally, a program's intake process is a "free standing" operation whose primary responsibilities are to determine an applicant's eligibility for legal services and refer qualifying clients to staff or volunteer counsel. They also serve as a "hub," working cooperatively with other providers to assist indigent and low income individuals obtain whatever services they may need even when they are not legal services. Because legal services programs are generally just one part of a multi-faceted network delivering services to the poor, which includes other legal services and social services providers, the private bar, and clients representing themselves pro se, working in the intake process has evolved into a functional specialty within legal services organizations.

Most legal services and pro bono programs utilize intake specialists that include both attorneys and non-attorneys. These intake specialists determine whether there are conflicts with existing clients, whether the legal issue presented is within the scope of the program's services (substantive eligibility) and whether an individual financially qualifies for representation (financial eligibility). The mix of attorneys and paralegals serving as intake specialists varies among programs.

During the intake process, an individual must provide information about the matter for which he or she seeks representation and disclose his or her financial circumstances. This information typically includes the applicant's name, address, a brief description of the individual's legal problem, source and amount of income, and any adversary's name. The intake specialist reviews this information, checks for conflicts of interest, and initially determines substantive and financial eligibility. If the intake specialist determines that there are no conflicts with the program's existing or past clients, the program offers the services sought by the applicant, and the individual is deemed financially eligible for the program's services, the applicant is referred to one of the program's staff attorneys or a private, pro bono counsel who is willing to accept the referral.

Particularly in the domestic relations area, parties who may be adverse to one another sometimes apply for legal assistance from CLS or the same pro bono program. When the information obtained by an intake specialist reveals an actual or potential conflict of interest, CLS and pro bono programs are sometimes unclear how to proceed. For instance, CLS and pro bono legal services programs have questioned whether its intake specialists may continue to obtain limited qualifying information from the applicant once the intake specialist believes there is a potential or actual conflict of interest and whether they may continue to represent an existing client who is adverse to an applicant from whom an intake specialist subsequently has received application information. Other questions concern whether referrals are permitted generally and when, and to what extent, a legal services program can provide financial assistance to volunteer counsel. This opinion provides ethical guidance to resolve these dilemmas.

Syllabus

If the CLS or a pro bono program's intake attorney or non-attorney intake specialist discovers that an individual applying for the program's services is otherwise eligible for the program's services, but has interests adverse to those of an existing client, intake staff may continue to obtain limited qualifying information from the applicant without violating the Colorado Rules of Professional Conduct. Furthermore, if the intake specialist determines that the applicant qualifies for the program's services, but the program cannot undertake representation because of a conflict of interest with an existing client, the intake attorney or non-attorney intake specialist may refer the applicant to other counsel or another program if:

(1) the applicant provided to the intake specialist no more information than necessary to make an initial determination whether the person was qualified for the program's services;

(2) the legal services program and the private lawyer to whom the matter will be referred are not considered to be in one firm under Colo. RPC 1.10;

(3) safeguards are in place to ensure that the program's lawyers who represent a party adverse to the applicant referred to private counsel or other program do not have access to the information about the adverse party gathered during intake; and

(4) the lawyer to whom the adverse party is referred does not have access to the information in the program's possession regarding the adverse party which triggered the conflict.

If the intake attorney or specialist believes that the conditions above cannot be met or have been breached, both the existing client and the adverse applicant should be referred to other counsel. *See* CBA Formal Ethics Opinion 57, Conflicts of Interest (March 21, 1981, addendum 1995)(providing guidance in situations raising possible conflicts of interest) and CBA Formal Ethics Opinion 68, Conflicts of Interest: Propriety of Multiple Representation (April 20, 1985)(addressing multiple representation in common conflict situations).

When CLS or a pro bono program refers an indigent person or person of limited means to volunteer counsel, it may provide financial assistance to the volunteer lawyer consistent with the requirements of Colo. RPC 1.6 (Confidentiality of Information) and Colo. RPC 1.7 (Conflicts of Interest) applicable to the program's attorneys.

Analysis

No Attorney-Client Relationship at Intake

An intake interview conducted by an intake attorney or non-lawyer intake specialist to screen for possible conflicts, to determine a person's eligibility for services, and to identify his or her legal needs or objectives generally does not establish an attorney-client relationship.

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." This test is subjective, and an important factor is whether the client believes such a relationship existed. *People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991).[2] Therefore, an intake attorney or specialist may obtain limited information from an applicant to screen for possible conflicts, determine eligibility, and determine a prospective client's legal needs or objectives. Accordingly, the intake attorney or the attorney supervising the intake specialist must ensure that only information necessary for determining eligibility and screening for conflicts is obtained.

The intake attorney or specialist should also stress that no attorney-client relationship can be established until the legal services or pro bono program determines the prospective client is financially and substantively eligible for the program's services. Nevertheless, even if the initial inquiries suggest there is a conflict of interest, the intake specialist may still obtain limited information to determine financial and substantive eligibility for purposes of referral or possible representation, because obtaining such information does not establish an attorney-client relationship. Furthermore, the act of referral does not create an attorney-client relationship between the legal services program and the applicant. *See* ABA Formal Op. 90-358 (Protection of Information Imparted by Prospective Client). The mere act of referral, alone, does not

involve the furnishing of advice or service under circumstances which require the possession or use of legal knowledge or skill. *See* C.R.C.P. 201.3(2)(b)(i) & (ii)(describing acts related to the practice of law).

Conflicts of Interest

The Colorado Rules of Professional Conduct prohibit a lawyer from undertaking representation of one client that is directly adverse to another client, unless the clients consent and the lawyer believes that he or she is able to represent each client without adversely affecting the other. Colo. RPC 1.7 (Conflict of Interest). This means that a lawyer generally may not act as an advocate against a person the lawyer or a member of the lawyer's firm represents in some other matter, even if the matter is wholly unrelated. Colo. RPC 1.7 (Conflict of Interest) and Colo. RPC 1.10 (Imputed Disqualification). The principle underlying these ethical proscriptions is the duty of loyalty that each lawyer owes to a client. *Id*. Additionally, Colo. RPC 1.9 (Conflict of Interest: former client) limits representation by a lawyer who has formerly represented a client in the same or a substantially related matter in which the new prospective client's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

CLS and pro bono programs often face questions regarding conflicts of interest when parties who have interests adverse to one another each seek representation by program staff attorneys or volunteers. Most often, conflict of interest questions arise in connection with dissolution of marriage proceedings. Often, one spouse has come to CLS or a pro bono program to seek representation in a dissolution of marriage and, shortly thereafter, the other spouse comes to the same office also seeking representation. Occasionally, other conflicts of interest questions arise when CLS or a pro bono program formerly represented a party in one matter, such as a husband or a husband and wife in an eviction action, and subsequently, one spouse requests representation in connection with a dissolution of marriage proceeding.

Historically in Colorado, CLS and pro bono programs sometimes have refused services to otherwise eligible applicants because of concerns about the application of conflict of interest and confidentiality rules. Consequently, only the first of two or more equally deserving eligible people may receive free legal services through CLS or a pro bono program. This first come-first served policy unfairly benefits the first party with conflicting interests because the adverse party subsequently may be unable to obtain free or affordable counsel elsewhere.

Ethics opinions in several jurisdictions have addressed questions regarding conflicts of interest when each of two parties who have interests adverse to one another seeks pro bono representation by program volunteers. In some jurisdictions, ethical opinions have been rendered on this issue. *See* Philadelphia Bar Association, Professional Guidance Committee, Opinion 80-41; Maine Commission on Professional Ethics, Opinion #59 (9/4/85); Virginia State Bar Association, Standing Committee on Legal Ethics, Opinion 808 (6/25/86); and The Florida Bar, Professional Ethics Committee, Advisory Opinion 92-1. These opinions have generally concluded that, with appropriate safeguards, a legal services or pro bono program may ethically refer prospective clients with a conflict of interest.

Based on these opinions, the committee believes that CLS and pro bono programs, through its attorneys, may ethically refer to private counsel an eligible applicant it cannot represent because of a conflict of interest without also having to refer the existing client to other counsel if:

(1) the applicant provided to the intake specialist no more information than necessary to make an initial determination whether the person was qualified for the program's services;

(2) the legal services program and the private lawyer to whom the matter will be referred are not considered to be in one firm under Colo. RPC 1.10;

(3) safeguards are in place to ensure that the program's lawyers who represent a party adverse to the applicant referred to other counsel or another program or other employees do not have access to the information about the adverse party gathered during the intake; and

(4) the lawyer to whom the adverse party is referred does not have access to the information in the program's possession regarding the adverse party which triggered the conflict.

Consequently, the committee concludes that where a conflict is detected during the intake process, that because no staff attorney within CLS or a pro bono program has undertaken to represent the individual

referred, there is no ethical rule that prohibits the intake specialist from referring the applicant to other counsel or another program. Upon referral to and acceptance of the matter by other counsel, the individual becomes the client of the attorney who agrees to undertake the representation, not a client of the organization making the referral.

Other state bar association opinions have considered the specific issue of whether legal services organizations can establish intake procedures to screen a potential client with interests adverse to those of a current legal services client and then refer the client to other counsel or another program. These opinions reach a similar conclusion to the one reached in this opinion. *See*, *e.g*., South Carolina Opinion 96-15 (1996), Tennessee Opinion 93-F-130 (1993), West Virginia Bar Opinion 93-1 (1993), Arizona State Bar Opinion 91-24 (1991), and Alabama Opinion 91-36 (1991). Those opinions held it ethically permissible for legal services intake staff to refer clients with interests adverse to those of legal services clients to an affiliated pro bono panel if there was no client-lawyer relationship established at the intake stage, the legal services organization and affiliated pro bono panels are not considered to be one firm under Rule 1.10 and safeguards are in place to ensure that the legal services staff lawyers do not have access to information gathered at the intake stage.

Furthermore, even if a conflict is discovered after an applicant has been qualified for a program's services and referred to counsel in that program, CLS and pro bono programs, through their attorneys, may subsequently refer the applicant to other counsel or another program subject to the same conditions noted above, if the attorney to whom the client has been assigned has not obtained confidential information or otherwise established an attorney-client relationship with the applicant. *See* ABA Informal Opinion 1334, Fee Arrangements by Legal Aid Organizations, issued May 27, 1975 (holding referral proper even after legal aid society had accepted the client prior to discovery of a conflict).

If the intake attorney or specialist believes that the conditions above cannot be met or have been breached, both the existing client and the adverse applicant should be referred to other counsel. *See* CBA Formal Ethics Opinion 57, Conflicts of Interest (March 21, 1981, addendum 1995) and CBA Formal Ethics Opinion 68, Conflicts of Interest: Propriety of Multiple Representation (April 20, 1985).

The analysis of conflicts of interest in these circumstances has been clarified by the Colorado Supreme Court's adoption of Colo. RPC 1.18 (Duties to Prospective Clients)(effective January 1, 2008). This new rule recognizes that "a lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, the prospective client should receive some but not all of the protection afforded clients." Colo. RPC 1.18, comment [1]; *see also* Oregon Formal Opinion No. 2005-138 (applying Oregon RPC 1.18(b) and (d) to communications between prospective client and legal services intake unit).

Colo. RPC 1.18(a) provides that a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client. Thus, individuals who seek representation from CLS or a pro bono program would be considered prospective clients under Colo. RPC 1.18.

Colo. RPC 1.18(b) provides that even when there is no client-lawyer relationship, a lawyer who has discussions with a prospective client shall not use or reveal information learned in the consultation, except as Colo. RPC 1.9 (Conflict of Interest: Former Client) would permit. Further, Colo. RPC 1.18(c) states that a lawyer subject to Colo. RPC 1.18(b) "shall not represent the 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 Colo. RPC 1.18(d)." Finally, Colo. RPC 1.18(d) provides that even if the lawyer has received disqualifying information under Colo. RPC 1.18(c), representation is permissible when both the affected client and prospective client give informed consent in writing or the lawyer who received the information takes reasonable screening measures to limit exposure to disqualifying information.

Thus, Colo. RPC 1.18 (Duties to Prospective Clients) establishes a three-tiered procedure to determine whether a conversation with a prospective client establishes a disqualifying conflict of interest. First, Colo. RPC 1.18(b) provides that lawyers should not reveal or use information learned in a

consultation, except as permitted by Colo. RPC 1.9. That rule applies to circumstances involving representation of a second person where the lawyer has formerly represented the first person in "the same or a substantially related matter in which that person's interests are materially adverse to the interests of a former client unless the former client consents after consultation." Therefore, if a prospective client speaks with a CLS or pro bono attorney about representation in a dissolution of marriage, and that program previously represented that individual and/or his spouse in an eviction several years earlier, Colo. RPC 1.9 and 1.18(b) generally would not preclude the new representation.

Second, even if CLS or the pro bono program that represents one spouse in a dissolution of marriage proceeding is not disqualified from continuing such representation if an intake attorney or specialist of CLS or the pro bono program meets with the other spouse as a prospective client and obtains certain information from that spouse, there is no disqualifying conflict of interest unless such information could be significantly harmful to the prospective client. Accordingly, if a prospective client divulges basic information in an intake interview concerning the request for representation in a dissolution of marriage proceeding and basic financial information necessary to determine eligibility, it is unlikely that such information would be considered "significantly harmful" to the prospective client.

Third, Colo. RPC 1.18(d) provides that even if the lawyer obtains information that could be significantly harmful to the prospective client, representation is still permissible if (1) both the affected client and the prospective client have given informed consent in writing, or (2) the lawyer who received the information takes reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client and further, if (a) the disqualified lawyer is timely screened from any participation in the matter and (b) written notice is promptly given to the prospective client. In other words, even in this situation, if disqualifying information is obtained by an intake attorney or intake unit, CLS or a pro bono program may continue to represent its existing client as long as the above procedural protections are utilized.

The safe harbor against imputed disqualification under Colo. RPC 1.18(d) applies if the intake attorney or the attorney supervising the intake specialist ensures that the prospective client initially provides information related only to determining eligibility and conflicts of interest. *See* Colo. RPC 1.18(d)(2). Further, if both the prospective and affected clients give informed written consent, imputed disqualification will not be required. Colo. RPC 1.18(d)(1).

The comments to Colo. RPC 1.18 are consistent with the conclusions reached above that the applicant should provide the intake attorney or specialist with no more information than is necessary to make an initial eligibility determination and that information obtained from the prospective client is not shared with the attorney who provides representation to a client with possibly or actually conflicting interests. Thus, the comments note that in order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. *See* Colo. RPC 1.18, comment [4]. Additionally, the comments note that "a lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter." *See* Colo. RPC 1.18, comment [5]. In short, Colo. RPC 1.18 makes it clear that ordinarily, no disqualifying conflict of interest will be presented when CLS or a pro bono program interviews a prospective client to determine whether the applicant is eligible for the program's services.

To ensure compliance with the applicable ethics rules, as well as the guidance provided in this opinion, CLS and pro bono programs should develop a conflict of interest policy based on the provisions of Colo. RPC 1.7 and 1.18 discussed above. In particular, the Committee believes that such policy should provide that the intake specialist obtain initially only information necessary to determine eligibility and possible or actual conflicts of interest. Further, the prospective client should be specifically informed, in language reasonably understandable to the prospective client, that the prospective client should only disclose information requested concerning eligibility and conflicts of interest. Nevertheless, not all legal services and pro bono programs are the same, and conflict of interest policies will naturally differ. No policy

can anticipate every situation that may arise. Whatever the specific conflict of interest policy that is adopted, the committee believes it should take into account the manner in which the program operates and the availability of free legal assistance from other sources in balancing the need to avoid conflicts of interest against the desire to maximize access to legal representation.

Confidentiality of Information

The committee recognizes that a lawyer has an ethical duty to maintain client confidences and that this obligation may be compromised, either purposefully or inadvertently, if a lawyer represents adverse parties. We do not believe, however, that an applicant is "represented" by CLS or a pro bono program during the intake process or that the information requested from the applicant during the intake process is information "relating to representation of a client," as that term is used in Colo. RPC 1.6(a). There is a fundamental distinction between an intake interview to determine whether an individual is eligible for representation by CLS or a pro bono program's lawyer and a consultation with a lawyer to determine rights and responsibilities that may apply to a given set of circumstances.

The limited inquiry necessary for an intake specialist to determine whether an applicant qualifies for assistance from one of the program's staff or volunteer attorneys does not solicit confidential information protected under Colo. RPC 1.6 because the information is neither given in confidence nor during the course of representation.

The fact that an intake attorney or specialist may obtain information about an applicant who is adverse to an existing client of CLS or a pro bono program does not preclude the intake attorney or specialist from continuing to obtain qualifying information from the applicant or from referring the applicant to a CLS or volunteer lawyer. Furthermore, if an intake attorney or specialist discovers a conflict between an existing client and an applicant during the intake process, the possession of the limited intake information does not trigger a conflict of interest that would preclude CLS or a pro bono program from continuing to represent the existing client.

CLS and pro bono programs must make clear to the applicant that limited preliminary information must be provided by the applicant to determine the applicant's *eligibility* for representation and that the information provided will not be considered confidential. Likewise, CLS and pro bono programs must make clear to the applicant that the intake information is a necessary *predicate* to determining whether the applicant is eligible for representation, and that the intake process itself is not "representation." Given those disclosures prior to the intake interview, Colo. RPC 1.6 has no application to the information obtained during the intake process.

Whenever feasible, the committee believes that each prospective client should execute a written informed consent form acknowledging that the limited information given will not be treated as confidential and will only be used to enable the intake specialist to screen for conflicts or to make referrals. Only after a conflicts check reveals no conflict and eligibility is verified should the applicant be asked additional information about himself or herself and the details of the legal matter for which he or she seeks representation to assist in placing the applicant with CLS or pro bono counsel.

Supervision over a program's intake process by an attorney may be helpful to provide a basis for preserving the confidentiality of intake information received by intake staff when evaluating an applicant for services. As previously noted, obtaining intake information is not obtaining information protected under Colo. RPC 1.6 (Confidentiality of Information). Many applicants, however, generally expect that the information they convey to intake staff will not be disclosed to others. Consequently, CLS and pro bono programs should make clear the extent to which intake information will be protected, if at all, before obtaining intake information and get the informed consent from the applicant to undergo intake questioning. Adopting a privacy policy may be helpful in ensuring uniform advisements.

Imputation of Conflicts

Pursuant to Colo. RPC 1.10 (Imputation of Conflicts) CLS attorneys are considered to be members of the same firm for purposes of imputed disqualification. Pro bono attorneys who agree to accept referrals

from CLS generally are not members of the same law firm and are not considered members of CLS. Colo. RPC 1.10 (Imputation of Conflicts). Therefore, CLS may refer applicants eligible for its services but who are adverse to existing clients or clients it may subsequently determine cannot be further represented because of a conflict to pro bono attorneys who agree to accept referrals from CLS. Similarly, a pro bono program may refer otherwise eligible clients with adverse interests to different attorneys associated with the pro bono program. When the program is required to refer an applicant and the existing adverse client to volunteer counsel, those referrals are permissible as long as they are not attorneys in the same firm. *See* Oregon Op. 2005-138; Pennsylvania Bar Op. 94-148 (November 14, 1994).

Financial Assistance to Pro Bono Counsel

When a pro bono or other legal services program refers an individual to a private lawyer based on a conflict of interest, the program may sometimes provide financial assistance to the pro bono lawyer accepting the representation. Such assistance may include secondary malpractice insurance, reimbursement of litigation costs, or a modest negotiated fee. That assistance does not violate existing ethics rules governing the program's lawyers. A lawyer may be compensated from a source other than the client, if the client is informed of that fact, consents, and the arrangement does not compromise the lawyer's duty of loyalty to the client. Colo. RPC 1.8(f) (Conflict of Interest: Prohibited Transactions).

This issue was addressed by the American Bar Association in Informal Opinion No. 1334 (1975). Interpreting the then-effective Code of Professional Responsibility, the ABA opined that "no Disciplinary Rule forbids a lawyer with a legal aid society from making such a reference or forbids a lawyer from receiving such a reference on any fee basis that is mutually satisfactory and that is not clearly excessive or illegal." ABA Informal Opinion 1334. Such arrangements must also conform to the requirements of Colo. RPC 1.6 (Confidentiality of Information) and Colo. RPC 1.7 (Conflict of Interest).

NOTES

1. This opinion discusses ethical issues concerning Colorado Legal Services and bar association-sponsored pro bono programs throughout the state. However, the principles discussed herein may also apply to other legal services organizations, nonprofit organizations providing pro bono services, or other pro bono programs.

2. Federal courts have considered whether a meeting between a prospective client and a lawyer creates an attorney-client relationship that would require the attorney's disqualification if the attorney declined to represent the prospective client and later represented the client's adversary in subsequent litigation. *See Cole v. Ruidoso Municipal Schools*, 43 F.3d 1373 (10th Cir. 1994)(under Model American Bar Association Rule 1.9 and New Mexico's equivalent of Colo. RPC 1.9, there must be an attorney-client relationship between prospective client and attorney, based on prospective client submitting confidential information to a lawyer with the reasonable belief that the lawyer was acting as the prospective client's attorney); *see also Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1411 (7th Cir. 1978). Further, while the test to determine the existence of an attorney-client relationship is subjective, the client's belief must be reasonable. *See Monus v. Colorado Baseball 1993, Inc.*, 103 F.3d 145 (Table)(10th Cir. 1996).

118 HANDLING OF FUNDS DISPUTED AFTER PROPER WITHDRAWAL FROM TRUST ACCOUNT

Adopted February 12, 2008.

Syllabus

If a lawyer properly withdraws client funds from the lawyer's trust account to apply to the lawyer's fees, in accordance with Colo. RPC 1.5 and the lawyer's agreement with the client, and the client subsequently disputes the lawyer's fee, the lawyer is not required or permitted to return the disputed amount to the lawyer's trust account that holds funds of any clients. Although the lawyer is not required to, the lawyer may place the disputed amount in a separate trust account that holds only the disputed amount.

Facts

Lawyers are required to safeguard client property and hold retainers and advance payments in the lawyer's trust account until earned. Client property and funds must be held separately from the lawyer's own property. Typically, a lawyer withdraws funds from the lawyer's trust account for the lawyer's fees on or after sending a statement to the client respecting those fees. The question has arisen whether a lawyer may or must return funds to the lawyer's trust account if the client disputes a fee after the lawyer sends a statement and withdraws funds from the lawyer's trust account to satisfy the statement.

Analysis

Colo. RPC 1.15(a) states:

> In connection with a representation, an attorney shall hold property of clients or third persons that is in an attorney's possession separate from the attorney's own property.

Colo. RPC 1.5(f) states:

> 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 lawyers' trust account pursuant to Rule 1.15(f)(1) until earned.

If a lawyer withdraws funds from the lawyer's trust account in good faith, in payment of a statement in accordance with the lawyer's agreement with the client, the withdrawal is proper under Colo. RPC 1.5(f). If the client then disputes the lawyer's fee, the question is whether the withdrawn funds can be characterized as property of the client simply because the client subsequently disputes the lawyer's fee.

Applying language substantively identical to the quoted language of Colo. RPC 1.15(a), Oregon State Bar Formal Ethics Opinion No. 2005-149 concluded that a lawyer was not required to replenish the lawyer's trust account if a client disputed a fee after the lawyer had withdrawn the fee from the trust account, but also concluded that if the lawyer did replenish the trust account, the lawyer would not be considered to have commingled the lawyer's property with that of the client. For support, the Oregon Opinion cites a California decision, *Guzzetta v. State Bar of California*.[1] However, *Guzzetta* involved the restoration of an amount wrongfully withdrawn from a trust account.

More recently, the State Bar of California Standing Committee on Professional Responsibility and Conduct issued Formal Opinion No. 2006-171,[2] concluding:

> [F]unds properly withdrawn from a [client trust account] . . . and later disputed by the client neither retain nor regain their trust account status, and therefore do not need to be re-deposited into the attorney's [client trust account]. Based on a plain reading of [the California equivalent to Colo. RPC 1.15], such funds bear none of the indicia of trust account status at the moment of withdrawal, i.e. the withdrawn funds do not belong to the client, are not subject to a joint interest of attorney and client, are not subject to a joint interest of the client and any third party, and are not being held by the attorney as part of the subject representation. The fact that the client later expresses remorse, regret, or other dissatisfaction with the amount of

> [the] attorney's fee is a matter of contract to be resolved by an analysis of the engagement agreement and the respective performance of the parties.

The California Opinion does not address whether the attorney could return the disputed amount to the attorney's client trust account. The California Opinion also distinguished situations in which a lawyer misappropriates funds in a client trust account.

The Oregon and California opinions are consistent with the view expressed in the comments to Restatement (Third) of The Law Governing Lawyers:

> A lawyer holding client funds as an advance fee payment may withdraw them for fees as earned, so long as there is no existing dispute about the lawyer's right to do so. In such instances, the lawyer acts rightly in retaining the money even though, for example, the client might later claim that the fee was unreasonable.[3]

Applying different language, the Vermont Bar Association (VBA) reached a different conclusion. VBA Advisory Ethics Opinion 1998-05 quotes Vermont DR 9-102(a)(2):

> [T]he portion [of the trust account] belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.[4]

VBA Ethics Opinion 1998-05 concludes that if the lawyer knows of no dispute, the lawyer may withdraw an earned fee immediately, without any waiting period after the lawyer renders a statement to the client; however, in the event a dispute arises after the lawyer withdraws a fee from the trust account, "the immediate re-deposit of the funds into the trust account places the lawyer or law firm in compliance with the Rule."[5]

Property of Client

Once a lawyer properly withdraws funds from the lawyer's trust account, it seems difficult to characterize the withdrawn funds as property of the client notwithstanding that the client subsequently disputes the fee. If such funds are characterized as property of the lawyer, as the Colorado Bar Association Ethics Committee believes is proper, to return the funds to a trust account that held property of clients would be commingling, in violation of Colo. RPC 1.15(a).

Accordingly, the Committee does not believe that a lawyer should be required or permitted to return a disputed amount to a trust account of the lawyer that holds funds of any client, if the client does not dispute the lawyer's fee before the lawyer withdrew the funds for payment of the fee from the lawyer's trust account in accordance with Colo. RPC 1.5(f) and the lawyer's agreement with the client.[6] However, the Committee also believes that, if a client disputes a lawyer's fee, a lawyer may deposit the disputed amount in a separate trust account that will hold no funds other than the disputed amount but is not required to do so.

Separate Trust Account

The Committee believes that the lawyer is permitted, but not required, to place a disputed fee amount in a separate trust account, notwithstanding the requirement of Colo. RPC 1.15(c) that:

> [W]hen in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

The Committee believes, based on the commentary to Colo. RPC 1.15(c), that the requirement of Colo. RPC 1.15(c) is limited to property in which both the lawyer and a nonclient third-party claim an interest.

Disputed Amount

The situation may arise in which a client disputes a fee that a lawyer has paid by a withdrawal from the lawyer's trust account and the lawyer, after reviewing the matter, determines that the client is correct.

For example, the client may have been charged for the same services twice, or may not have received credit for a previous withdrawal from the trust account due to a bookkeeping error. In this situation, the Committee believes that the lawyer clearly would have an obligation to return the mistakenly transferred funds to the trust account, unless the problem otherwise will be promptly resolved, for example, by direct payment to the client or, with the client's consent, a reduction in the next bill if the client is being billed monthly.

NOTES

1. 43 Cal.3d 963, 741 P.2d 172 (1987).

2. State Bar of California Formal Opinion No. 2006-171, available at www.calbar.ca.gov/calbar/pdfs/ethics CAL%96202006-171.pdf.

3. Restatement (Third), The Law Governing Lawyers (2000) § 44, comment f.

4. Available at 69.39.146.6/Upload%20Files/WebPages/Attorney%20Resources/aeopinions/Advisory%20 Ethics%20Opinions/Client%20Property/98-05.pdf.

5. *Id.* at 2.

6. *Accord* State Bar of California Formal Opinion No. 2006-171, *supra* note 2.

119 DISCLOSURE, REVIEW, AND USE OF METADATA

Adopted May 17, 2008.

Introduction

Lawyers routinely send and receive documents or computer files in electronic form, whether in email correspondence, in the course of civil discovery, or otherwise. An electronic document typically includes data that may or may not be visible when viewing the document on the computer screen or as printed out. These hidden data are called "metadata." Metadata embedded in a document 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. This list of types of metadata is not complete. Moreover, common types of metadata are likely to change and multiply over time as computer software and technology change.

Much metadata is of little or no practical significance. For example, it may be of no importance when a document was created and edited or by whom. Other metadata, such as formulas in a spreadsheet, may be important but not confidential. Some metadata, however, particularly metadata such as hidden comments or redlines, can be Confidential Information. "Confidential Information" is used in this Opinion to include information that is subject to a legally recognized exemption from discovery and use in a civil, criminal, or administrative action or proceeding, even if it is not "privileged." *See* Op. 108.

This opinion addresses the ethical obligations of a lawyer (the "Sending Lawyer") who transmits electronic documents containing metadata to a third party, including the lawyer for an adverse party. This opinion also addresses the ethical obligations of a lawyer (the "Receiving Lawyer") who receives electronic documents containing metadata from a third party, including the lawyer for an adverse party or a non-lawyer third party.

Syllabus

A Sending Lawyer who transmits electronic documents or files has a duty to use reasonable care to guard against the disclosure of metadata containing Confidential Information. What constitutes reasonable care will depend on the facts and circumstances. The duty to provide competent representation requires a Sending Lawyer 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 nonlawyer assistants are able to control the transmission of metadata.

A Receiving Lawyer who receives electronic documents or files generally may search for and review metadata. If a Receiving Lawyer knows or reasonably should know that the metadata contain or constitute Confidential Information, the Receiving Lawyer should assume that the Confidential Information was transmitted inadvertently, unless the Receiving Lawyer knows that confidentiality has been waived. The Receiving Lawyer must promptly notify the Sending Lawyer. 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.

If, before examining metadata in an electronic document or file, the Receiving Lawyer receives notice from the sender that Confidential Information was inadvertently included in metadata in that

electronic document or file, the Receiving Lawyer must not examine the metadata and must abide by the sender's instructions regarding the disposition of the metadata.

Opinion

Metadata are not really different from any other sort of information. In Formal Opinion 108, the Committee addressed a lawyer's obligations with respect to receipt of inadvertently transmitted documents. In Formal Opinion 90, the Committee addressed a lawyer's obligations to be aware of disclosure of Confidential Information using new technology. In most respects, this opinion is an application of those two previous opinions and the underlying Rules. The Committee believes that this separate opinion regarding metadata is appropriate because there is a split among other jurisdictions over the application of familiar rules to a type of data that is new and mysterious to some.

1. The Sending Lawyer's Obligations to Guard Against Disclosure of Metadata Containing Confidential Information.

Under the Colorado Rules of Professional Conduct, a Sending Lawyer has an ethical duty to take steps to reduce the likelihood that metadata containing Confidential Information would be included in an electronic document transmitted to a third party. This duty arises out of several interrelated rules.

First, Rule 1.6(a) provides that "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 [otherwise] permitted. . . ." Second, Rule 1.1 provides that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Third, Rules 5.1 and 5.3 generally require a lawyer to make reasonable efforts to ensure that the lawyer's firm, including lawyers and non-lawyers, conform to the Rules.

Under these Rules, a Sending Lawyer must act competently to avoid revealing a client's Confidential Information, and to ensure that others at the Sending Lawyer's firm similarly avoid revealing a client's Confidential Information. This requires a Sending Lawyer to use reasonable care to ensure that metadata that contain Confidential Information are not disclosed to a third party. *See* DC Ethics Op. 341 (2007); Maryland State Bar Ass'n Formal Ethics Op. 2007-09, "Ethics of Viewing and/or Using Metadata," ("the sending attorney has an ethical obligation to take reasonable measures to avoid the disclosure of confidential or work product materials imbedded in the electronic discovery"); Arizona Ethics Op. 07-03, "Confidentiality; Electronic Communications; Inadvertent Disclosure" (same); Alabama Ethics Op. RO-2007-02, "Disclosure and Mining of Metadata" (same); Florida Ethics Op. 06-2 (same); New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 782 (2004) (same); *see also* CBA Formal Ethics Op. 90, "Preservation of Client Confidences in View of Modern Communications Technology" (1992) ("A lawyer must exercise reasonable care when selecting and using communications devices in order to protect the client's confidences or secrets from unintended disclosure.").

What constitutes reasonable care will depend on the facts and circumstances. For example, a Sending Lawyer could avoid creating certain types of metadata by choosing not to use redlining or hidden comments in a document that may be transmitted to third parties. In addition, software is available to "scrub" files of some types of metadata. In a circumstance where it is vital that no metadata be transmitted, a Sending Lawyer could print out an electronic document to ensure absolutely that no unseen metadata of any kind are included. Other methods of controlling or preventing disclosure of metadata exist.[1]

In many instances, it would be appropriate for a lawyer to retain persons with expertise in computer software and hardware, either through an in-house computer systems department in a larger firm, or through outside contract vendors for a smaller firm or solo practice. These computer experts can set up systems to control or prevent the transmission of metadata.

A supervising lawyer has a duty to make reasonable efforts to make sure that the lawyer's firm has appropriate technology and systems in place so that subordinate lawyers and nonlawyer assistants can control transmission of metadata. RPC 5.1; RPC 5.3.

The ultimate responsibility for control of metadata rests with the Sending Lawyer. A Sending Lawyer may not limit the duty to exercise reasonable care in preventing the transmission of metadata that contain Confidential Information by remaining ignorant of technology relating to metadata or failing to obtain competent computer support. The duty to provide competent representation requires a lawyer 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. *See* DC Ethics Op. 341 (2007) ("lawyers must either acquire sufficient understanding of the software that they use or ensure that their office employs safeguards to minimize the risk of inadvertent disclosures"); New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 782 (2004) (same).

2. The Receiving Lawyer's Obligations Upon Receiving Metadata

There are two distinct issues relating to a Receiving Lawyer's obligations regarding metadata. The first issue is whether the Receiving Lawyer ethically may review metadata. The second issue is what a Receiving Lawyer must do when he or she receives metadata that appear to contain Confidential Information.

a. May a Receiving Lawyer Ethically Review Metadata?

The authorities are split on whether a Receiving Lawyer ethically may review metadata in electronic documents received from adversaries or other third parties. The American Bar Association Ethics Committee concluded that the Model Rules of Professional Conduct generally do not prohibit a lawyer from searching for or reviewing embedded metadata in electronic documents or files received from opposing counsel, an adverse party, or other third party. ABA Formal Op. 06-442, "Review and Use of Metadata." The Maryland State Bar Association Ethics Committee followed the ABA on this point. Maryland State Bar Ass'n Formal Ethics Op. 2007-09, "Ethics of Viewing and/or Using Metadata." The District of Columbia Bar Association concluded that a Receiving Lawyer generally may review metadata included in an electronic document unless the Receiving Lawyer has actual knowledge that metadata containing Confidential Information were transmitted inadvertently. DC Ethics Op. 341 (2007).

The New York State Bar Association Committee on Professional Ethics concluded that a lawyer may not search for or review metadata in electronic documents received from third parties. The New York Committee stated that "A lawyer may not make use of computer software to surreptitiously 'get behind' visible documents." New York State Bar Ass'n Comm. on Prof'l Ethics, Op. 749 (2001). The New York opinion relied on a lawyer's ethical obligation under the New York Code of Professional Responsibility to refrain from dishonest, fraudulent, or deceitful conduct. New York's lead was followed by the bar association ethics committees of Arizona, Alabama, and Florida.[2] Arizona Ethics Op. 07-03, "Confidentiality; Electronic Communications; Inadvertent Disclosure"; Alabama Ethics Op. RO-2007-02, "Disclosure and Mining of Metadata"; Florida Ethics Op. 06-2; *see also* D. Hricik, *Mining for Embedded Data: Is It Ethical to Take Intentional Advantage of Other People's Failures?*, *N.Car. J. of Law & Tech.* 231 (Spring 2007) (reaching the same conclusion). The Alabama decision relied on Alabama's version of Colorado Rule of Professional Conduct 8.4 which prohibits "conduct involving dishonesty, fraud, deceit, or misrepresentation." These opinions—as evidenced by their use of such language as "mining"—appear to be based on an implied premise that searching for metadata is surreptitious or otherwise involves procedures that are difficult or complicated. They also seem to assume that metadata generally contain Confidential Information and that any metadata transmitted to a third party must, therefore, have been transmitted inadvertently.

The Committee concludes that the ABA, Maryland, and District of Columbia opinions are better reasoned, and that the New York, Arizona, Alabama, and Florida opinions are based on incorrect factual premises regarding the nature of metadata. Thus, the Committee concludes that a Receiving Lawyer generally may ethically search for and review metadata embedded in an electronic document that the Receiving Lawyer receives from opposing counsel or other third party. This conclusion is supported by the following.

First, there is nothing inherently deceitful or surreptitious about searching for metadata. Some metadata can be revealed by simply passing a computer cursor over a document on the screen or right-clicking on a computer mouse to open a drop-down menu that includes the option to review certain metadata. Typical word processing software can be configured so that files are routinely opened to show redlines or embedded comments.[3] Referring to searching for metadata as "mining" or "surreptitiously 'get[ting] behind'" a document is, therefore, misleading.

Second, an absolute ethical bar on even reviewing metadata ignores the fact that, in many circumstances, metadata do not contain Confidential Information. To the contrary, in some circumstances metadata are intended to be searched for, reviewed, and used. For example, in discovery in a civil case, a party is entitled to discover pre-existing files in electronic form to enable review of metadata to trace the history of a document, its authors, edits, and comments. *See, e.g.,* Fed. R. Civ. P. 34 (explicitly requiring production of electronically stored information). As another example, when opposing parties are negotiating a document, a Sending Lawyer may specifically intend a Receiving Lawyer to review some metadata, such as redlines or comments in a draft of the document. Similarly, when a Sending Lawyer transmits a spreadsheet, the Sending Lawyer may intend that the Receiving Lawyer be able to see the formulas used in the spreadsheet so that the Reviewing Lawyer may understand and rely upon the numbers in the rows and columns of the spreadsheet.

Third, metadata are often of no import. In many circumstances it is of no significance who created a document, when the document was created, or the like.

Once one discards the notions that it is dishonest or deceitful to search for or look at metadata or that metadata typically contain significant Confidential Information, there is no Rule in the Colorado Rules of Professional Conduct that contains any prohibition on a lawyer generally reviewing or using information received from opposing counsel or other third party. Therefore, a Receiving Lawyer generally may search for and review any metadata included in an electronic document or file.

b. The Receiving Lawyer's Obligations On Discovering that He or She Has Received Metadata that Appear to Contain Confidential Information.

If a Receiving Lawyer knows or reasonably should know that a Sending Lawyer (or non-lawyer) has transmitted metadata that contain Confidential Information, the Receiving Lawyer should assume that the Confidential Information was transmitted inadvertently, unless the Receiving Lawyer knows that confidentiality has been waived. The Receiving Lawyer must promptly notify the Sending Lawyer (or non-lawyer sender). 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.

If, before examining metadata in an electronic document or file, the Receiving Lawyer receives notice from the sender that Confidential Information was inadvertently included in metadata in that electronic document or file, then the analysis changes. In this scenario, the Receiving Lawyer must not examine the metadata and must abide by the Sending Lawyer's instructions regarding the disposition of the metadata.

We reach these conclusions as follows.

It is reasonable to expect that a Sending Lawyer will seek to act competently (under Rule 1.1) to protect the Confidential Information of the Sending Lawyer's client (under Rule 1.6). Accordingly, it is reasonable to assume that the Sending Lawyer would not intentionally transmit to opposing counsel or another third party any Confidential Information included in metadata in an electronic document or file. Thus, a Receiving Lawyer reasonably should believe that any Confidential Information contained in metadata received from the Sending Lawyer was transmitted inadvertently.

Because the Receiving Lawyer reasonably should believe that Confidential Information in metadata was transmitted inadvertently, Rule 4.4(b) is directly applicable. Rule 4.4 provides:

Rule 4.4. Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

(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.

Under Rule 4.4(b), once a Receiving Lawyer knows or reasonably should know that an electronic document or file contains metadata that appear to contain Confidential Information, the Receiving Lawyer should assume that the Confidential Information was transmitted inadvertently and must promptly notify the Sending Lawyer.[4] *See also* CBA Formal Ethics Op. 108, "Inadvertent Disclosure of Privileged or Confidential Documents" (2000).

Rule 4.4(b) does not state what the Receiving Lawyer should do after giving notice to the Sending Lawyer. May the Receiving Lawyer continue to review the electronic document or file that appears to include metadata containing Confidential Information?

The District of Columbia bar ethics committee concluded that a Receiving Lawyer must stop reviewing an electronic document or file when the Receiving Lawyer has actual knowledge that the Sending Lawyer did not intend to disclose Confidential Information in the metadata contained in an electronic document or file. DC Ethics Op. 341 (2007). The District of Columbia committee relied on its version of Rule 8.4(c), which provides that "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." The California Supreme Court likewise concluded that a Receiving Lawyer must stop reviewing materials when it is "reasonably apparent" that there was no intent to disclose Confidential Information.[5] *Rico v. Mitsubishi Motors Corp.,* 42 Cal. 4th 807 (Cal. 2007).

The Committee disagrees with these decisions. The Committee believes that Rule 4.4(b) and (c) are the more specific rules, and that these rules trump the more general requirements of Rule 8.4(c). Therefore, where the Receiving Lawyer has no prior notice from the sender, the Receiving Lawyer's only duty upon viewing confidential metadata is to notify the Sending Lawyer. *See* RPC 4.4(b). There is no rule that prohibits the Receiving Lawyer from continuing to review the electronic document or file and its associated metadata in that circumstance. However, where the Receiving Lawyer has prior notice from the sender of the inadvertent transmission of confidential metadata, Rule 4.4(c) does prohibit the Receiving Lawyer from reviewing the electronic document or file.

As the Committee noted in Opinion 108, other considerations than the Receiving Lawyer's obligations under the Rules may come into play, including professionalism and applicable substantive and procedural law. Once the Receiving Lawyer has notified the Sending Lawyer, the lawyers may, as a matter of professionalism, discuss whether waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. *See* RPC 4.4, comment [3]. 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 document or file, based on the substantive law of waiver.[6] *See* CBA Formal Ethics Op. 108, "Inadvertent Disclosure of Privileged or Confidential Documents" (2000).

NOTES

1. This Opinion is not intended to be a technical primer on metadata or methods to control metadata. Such a task would be beyond the expertise of the Committee, and any primer would inevitably become obsolete almost immediately.

2. The Pennsylvania Bar Association Committee on Legal Ethics declined to take a position. Instead, it summarized the rationales reached by others. It then concluded that there is no rule that would be applicable in all circumstances, and that the determination of how to address inadvertently disclosed metadata should be left to the individual Receiving Lawyer based on his or her analysis of the facts. Pennsylvania Bar Ass'n Comm. on Legal Ethics and Prof. Resp. Formal Op. 2007-500.

3. The Committee rejects the notion that a lawyer is unethical if the lawyer configures word processing software in this manner. Indeed, it may be that a lawyer should configure word processing software in this manner so that the lawyer routinely sees redlining or embedded comments in the lawyer's own documents, thus reducing the chance that the lawyer would inadvertently send such data to opposing counsel or a third party.

4. If the Receiving Lawyer receives notice before reviewing an electronic document that the electronic document contains Confidential Information in metadata, then Rule 4.4(c) applies. The Receiving Lawyer shall not review that electronic document and shall abide by the sender's instructions as to its disposition.

5. The California Supreme Court upheld the disqualification of a lawyer who continued to review materials after the lawyer had concluded that the materials contained Confidential Information that appeared to have been inadvertently produced.

6. This opinion does not address the legal issue of waiver. In some circumstances, a court may determine that the transmission of some Confidential Information waives any protections against disclosure of that Confidential Information or related Confidential Information. A Receiving Lawyer who believes that such a waiver may have occurred may ask a court to determine the issue. That is beyond the scope of this opinion.

120 REPRESENTING AN ORGANIZATION AS A PARTY IN A DISPUTE

Adopted May 17, 2008.

Introduction and Scope

This Opinion addresses certain ethical obligations of a lawyer who represents an organization as a party in a dispute. For purposes of this Opinion, "dispute" includes both matters in litigation and pre-litigation matters, such as investigations. This Opinion does not address the ethical obligations of a lawyer who concurrently represents an organization in a dispute and one or more constituents of the organization or others who are not constituents.

This Opinion complements Rule 4.2 and cmt. [7] of the Colorado Rules of Professional Conduct (Rules) and CBA Formal Ethics Opinion 69, "Propriety of Communicating with Employee or Former Employee of an Adverse Party Organization" (rev. 1987; add. 1995). Formal Opinion 69 was issued under the Colorado Code of Professional Responsibility, and it continues to provide guidance to the Bar with the adoption of the Rules in 1993. Rule 4.2 and Formal Opinion 69 address the propriety of communicating with current or former employees of an adverse party organization. However, Rule 4.2 and Formal Opinion 69 do not address the ethical obligations of the lawyer representing the organization. As with Formal Opinion 69, this Opinion does not address issues relating to the attorney-client privilege.

Syllabus

A lawyer employed or retained by an organization represents the organization and owes duties to the organization itself. Although the organization acts through its authorized constituents such as stockholders, directors, officers, agents, and employees, the lawyer representing the organization does not automatically represent these individual constituents merely by virtue of representing the organization.

In general, it is improper for a lawyer who represents an organization to assert that he or she represents some or all of the constituents of the organization unless the lawyer reasonably believes he or she has in fact been engaged by the constituent or constituents. Knowingly making such an assertion without having a reasonable belief that he or she has in fact been engaged by the constituent or constituents would violate Rule 4.1 on truthfulness in statements to others. Further, such an assertion may violate Rule 3.4(a), which prohibits unlawfully obstructing another party's access to evidence.

When the lawyer represents an organization and when the lawyer knows or reasonably should know that the interests of the organization are adverse to those of the non-client constituents with whom the lawyer is dealing, the lawyer must clarify his or her role. In this circumstance, the lawyer should advise the constituent that the organization is the lawyer's client, that a conflict of interest may exist between the organization and the constituent, that the lawyer does not and cannot represent the constituent, and that the constituent may wish to obtain independent representation. Further, in such circumstances, the lawyer must inform the constituent that he or she cannot assert the attorney-client privilege with regard to communications between the constituent and the lawyer.

Under Rule 3.4(f), a lawyer is prohibited from requesting a person other than a client to refrain from voluntarily giving relevant, non-privileged information to another party unless (1) the person is a relative or employee or other agent of a client and the lawyer is not prohibited by other law from making such request *and* (2) the lawyer reasonably believes the person's interest will not be adversely affected by refraining from giving such information.

Opinion

Representing the Organization as Client

The ethical issues encountered by lawyers representing organizations flow from the unique legal status of organizations. *See Restatement (Third) of the Law Governing Lawyers*, § 96, cmt. b (Rationale: an Organization as Client). Organizations are legal fictions. Legally, organizations have separate existence, but they act only through natural persons as their constituents such as shareholders, directors, officers, and employees. At the threshold, it is critical to identify the client and to maintain that clarity throughout the representation.

A lawyer who is employed or engaged by an organization represents the organization as the client, *not* the organization's individual constituents. Rule 1.13 provides:

> A lawyer employed or retained by an organization represents the organization which acts through its duly authorized constituents.
>
> This fundamental principle is echoed in Comments [1] and [2] to Rule 1.13:
>
> [1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.
>
> [2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.
>
> Similarly, comment b to Section 96 of the *Restatement of the Law Governing Lawyers* explains:
>
> The lawyer who has been employed or retained to represent an organization as a client owes professional duties of loyalty and competence to the organization. By representing the organization, a lawyer does not thereby also form a client-lawyer relationship with all or any individuals employed by it or who directs its operations or who have an ownership or other beneficial interest in it, such as its shareholders. However, additional circumstances may result in a client-relationship with constituents while the lawyer concurrently represents the organization (see Comment h hereto).

The Lawyer for an Organization Client Does Not Automatically Represent its Constituents

Rule 4.2 prohibits a lawyer, in representing a client, from communicating about the subject of the representation with a person a lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or court order. More specifically, Comment [7] to Rule 4.2 addresses the case of a represented organization.

Sometimes, lawyers representing an organization assert that they "automatically" represent some or all of the current or former constituents of the organization, either because of confusion about the identity of the clients under the Rules or otherwise. In turn, this raises an issue for the adverse party's lawyer under Rule 4.2.

Courts have rejected the assertion that a lawyer representing an organization automatically represents its employees, because an attorney-client relationship cannot be formed unilaterally, at the direction of the lawyer or the organization. *Harry A. v. Duncan*, 330 F.Supp.2d 1133, 1141 (D.Mont. 2004);

Banks v. Office of the Senate Sergeant-at-Arms, 222 F.R.D. 1, 12-13 (D.D.C. 2004); *Michaels v. Woodland*, 988 F.Supp. 468, 472 (D.N.J. 1997); *Terra Int'l. v. Mississippi Chemical Corp.*, 913 F.Supp. 1306, 1316-17 (D.Ia. 1996); *Carter-Herman v. City of Philadelphia*, 897 F.Supp. 899, 903 (E.D.Penn. 1995); *Brown v. Joseph County*, 148 F.R.D. 246, 251 (N.D. Ind. 1993). The Utah State Bar Ethics Advisory Opinion Committee has reached a similar conclusion. Utah State Bar Ethics Advisory Opinion Committee, Opinion 04-06 (December 2, 2004).

> Colorado law is in accord. Though in a different context, the Colorado Supreme Court concluded: 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.' *People v. Morley*, 725 P.2d 510, 517 (Colo. 1986). The relationship may be inferred from the conduct of the parties. *Id.* The proper test is a subjective one, and an important factor is whether the client believes that the relationship existed. *In re Petrie*, 154 Ariz. 295, ___, 742 P.2d 796, 800-01 (1987).

People v. Bennett, 810 P.2d 661, 665 (Colo. 1991) (applying R.P.C. 1.8(a), involving business transactions with a client).

A lawyer who knowingly asserts that he or she represents current or former constituents of an organization automatically or unilaterally, without having a reasonable belief that he or she has in fact been engaged by the constituents, may violate at least two separate Rules. First, a lawyer knowingly making such an assertion without having such a belief would violate Rule 4.1 on truthfulness in statements to others.

Second, a lawyer who unilaterally asserts that he or she represents current or former constituents of an organization may violate Rule 3.4. Among other things, Rule 3.4(a) prohibits a lawyer from "unlawfully obstruct[ing] another party's actions as to evidence. . . ." If a lawyer asserts that an attorney-client relationship exists with current or former constituents of an organization client without actually have an attorney-client relationship with the constituents, the effect is to prevent the adverse party's lawyer from communicating *ex parte* with those constituents without the consent of the lawyer, pursuant to Rule 4.2. In this situation, the lawyer making the assertion may be unlawfully obstructing the adverse party's access to evidence in violation of Rule 3.4(a). *See* Utah State Bar Ethics Advisory Opinion Committee, Opinion 04-06.

Clarifying the Lawyer's Role in Dealing with Non-Client Constituents

When the lawyer represents only the organization and when the lawyer knows or reasonably should know that the interests of the organization client are adverse to those of non-client constituents with whom the lawyer is dealing, the lawyer must clarify his or her role.[1] Rule 1.13(f) provides:

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

Comments [10] and [11] to Rule 1.13 amplify the lawyer's duty in this situation:

> There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for the constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged. Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Requesting a Person Other Than a Client to Refrain From Providing Information to Another Party

Under Rule 3.4, it is unethical for a lawyer to request a person other than a client to refrain[2] from voluntarily giving non-privileged information to another party, except in certain, limited circumstances. In particular, Rule 3.4(f) prohibits such efforts to limit an adverse party's access to persons other than the lawyer's clients *unless* two conditions are met: (1) that the person is a relative or an employee or agent of a client and the lawyer is not prohibited by other law from making the request, *and* (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information. The purpose of this Rule is addressed in Comment [4]: "Paragraph (f) permits a lawyer to advise relatives and employees of a client to refrain from giving information to another party because the relatives or employees may identify their interests with those of the client. See also Rule 4.2. However, other law may preclude such a request. *See* Rule 16, Colorado Rules of Criminal Procedure."

Thus, a lawyer who represents an organization client may request a non-client constituent to refrain from voluntarily giving information to another party only if, among other things, the lawyer considers the effect that not providing such information would have on the constituent and only if the lawyer reasonably believes that the person's interests will not be adversely affected thereby.

These considerations depend on the facts in a particular case, but two examples illustrate common situations. In a truck driving accident, such a request of the constituent truck driver ordinarily would be appropriate. In contrast, in a class action alleging race or gender discrimination in employment, such a request of constituents who might have suffered from the discrimination would not be appropriate, because the constituent's interests might be adversely affected thereby.

NOTES

1. This is analogous to the lawyer's duties in dealing with unrepresented persons generally. *See* Colo. R.P.C. 4.3 and comments.

2. As noted above, this Opinion does not address issues relating to the attorney-client privilege. The substantive evidentiary issues of privilege are addressed in numerous treatises. *E.g.,* American Bar Association, Section of Litigation, 1 The Attorney-Client Privilege and the Work Product Doctrine at 141-179 (Edna Selan Epstein, ed., 5th ed. 2007).

121 USE OF TEMPORARY LAWYERS AND OTHER PROFESSIONALS NOT ADMITTED TO PRACTICE LAW IN COLORADO ("OUTSOURCING")

Adopted June 16, 2009.

Introduction and Scope

In Colorado Bar Association (CBA) Formal Ethics Opinion 105 (May 22, 1999), the CBA Ethics Committee (Committee) addressed the use of "temporary" lawyers by other lawyers, law firms, or corporate or other institutional legal departments to work or assist on specific projects or matters. Opinion 105 recognized "the myriad of possible arrangements by which temporary legal services can be provided or utilized" and, therefore, did "not attempt to comment on the ethical considerations implicated in every possible arrangement." Instead, the opinion addressed "certain general ethical principles involved in the provision of legal services or assistance by temporary lawyers who are not otherwise regularly employed by the employing lawyer or law firm." Opinion 105 focused on potential conflicts, fee-related issues, recommended disclosures to the client, ethical issues arising from the involvement of placement agencies for temporary lawyers, and supervision issues. The Opinion generally addressed these issues from the perspective of the temporary lawyer as well as that of the hiring lawyer. Opinion 105 appeared to assume that both the temporary and hiring lawyers were admitted to practice in Colorado (Colorado Lawyers) and, therefore, were subject to the Colorado Rules of Professional Conduct (Colorado Rules or Colo. RPC).

This opinion supplements Opinion 105. It addresses the use of temporary lawyers who are *not* admitted to practice in Colorado but are admitted to practice only in another U.S. jurisdiction (Domestic Lawyers) or lawyers not admitted in any U.S. jurisdiction, but licensed to practice in a foreign country (Foreign Lawyers).[1] Like Opinion 105, this opinion discusses certain general ethical principles but not every possible implication of the use of Domestic and Foreign Lawyers on a temporary basis. In the judgment of the Committee, the analysis of most issues in Opinion 105 applies equally to all lawyers—Colorado, Domestic, and Foreign—providing temporary legal services.[2]

Where the analysis and conclusions of Opinion 105 are equally germane to Domestic and Foreign Lawyers as temporary lawyers, this opinion incorporates relevant portions of Opinion 105. Other issues call for further or different analysis when the temporary lawyer is not a Colorado Lawyer. This opinion provides that guidance.[3]

Syllabus

In addition to the duties described in Opinion 105, a Colorado Lawyer who hires a Domestic or Foreign Lawyer has an obligation under Colo. RPC 5.3(b) to make reasonable efforts to ensure that the Domestic or Foreign Lawyer's conduct conforms to the Colorado Lawyer's duties under the Colorado Rules, especially the obligation to provide competent representation under Colo. RPC 1.1. Reasonable efforts include: (a) confirming that the Domestic or Foreign Lawyer is licensed and in good standing in his or her home jurisdiction; (b) confirming that the Domestic or Foreign Lawyer is competent to undertake the work to be assigned; and (c) supervising the work of any nonlawyer hired by the Colorado Lawyer to assist in assigned tasks.

In addition, to avoid assisting in the unauthorized practice of law (UPL) in violation of Colo. RPC 5.5(a)(3), the Colorado Lawyer should satisfy himself or herself that Colorado law permits the Domestic or Foreign Lawyer to assist in the delegated task without engaging in UPL. Although analysis of UPL is beyond the scope of this opinion, in general, the Colorado Lawyer must determine whether the activities of the Domestic or Foreign Lawyer constitute the practice of law in Colorado, and, if so, whether and to what extent those activities are authorized by virtue of the Colorado Lawyer's supervision of and responsibility for the Domestic or Foreign Lawyer's work.

To avoid disqualifying conflicts of interest, the Colorado Lawyer must determine: (a) whether the temporary lawyer has a conflict in performing work to be delegated; and (b) whether the temporary and hiring lawyers are "associated in a firm" under Colo. RPC 1.10(a) such that all of the clients of the hiring lawyer or firm are deemed to be the temporary lawyer's clients, and vice versa, for conflict imputation purposes. The Committee continues to endorse the "functional analysis" of conflict imputation discussed in Opinion 105.

Colo. RPC 1.5(d) regulates the division of fees among lawyers not in the same firm. If the Colorado Lawyer and the Domestic or Foreign Lawyer are not in the same firm, the Colorado Lawyer must determine whether the financial arrangement with the client constitutes a "division of a fee" under Colo. RPC 1.5(d). The Committee adheres to its conclusion in Opinion 105 that an arrangement does not constitute a division of fees if the firm is responsible for paying the Domestic or Foreign Lawyer regardless of whether the client pays the firm, and if the Domestic or Foreign Lawyer's compensation is not a percentage or otherwise directly tied to the amount paid by the client. If the payment to a Domestic or Foreign Lawyer under this analysis constitutes the division of a fee, then the hiring Colorado Lawyer must comply with Colo. RPC 1.5(d).

Colo. RPC 1.5(a) requires a lawyer's fees and expenses to be reasonable. That rule sets forth criteria under which reasonableness is to be judged. The Committee concluded in Opinion 105 that it is not improper for a Colorado Lawyer to mark up the cost of a Domestic or Foreign Lawyer's fees when billing the Colorado Lawyer's client. If the mark-up is substantial, as when the fees charged by the Foreign Lawyer to the Colorado Lawyer are low by domestic standards, the marked-up fee charged by the Colorado Lawyer might not be considered reasonable under Colo. RPC 1.5(a).

Under Colo. RPC 1.2(a), a lawyer is responsible for determining, in consultation with the client, the means to carry out a representation. Colo. RPC 1.4(a)(3) and (b) require a lawyer to "keep the client reasonably informed about the status of the matter" and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Whether the delegation of tasks to a Domestic or Foreign Lawyer constitutes a significant development that the Colorado Lawyer must disclose to the client depends on the circumstances. If the lawyer reasonably believes that a client expects its legal work to be performed exclusively by Colorado Lawyers, the Colorado Lawyer may be required to disclose the fact of delegation, as well as its nature and extent. The Committee continues to conclude that a Colorado Lawyer is not required to affirmatively disclose the amount of fees paid to, and profits made from, the services of Domestic and Foreign Lawyers, even where the mark-up is substantial.

The considerations discussed in Opinion 105 concerning the use of placement agencies in arranging temporary legal services apply equally when a placement agency is involved in arranging for a Colorado Lawyer's use of a Domestic or Foreign Lawyer.

Analysis

I. Communication, Competence, and Supervision Issues

Whenever a Colorado Lawyer employs or otherwise contracts with another person to assist in the representation of clients, the Colorado Lawyer has a duty to ensure that the person is capable of performing the assigned tasks. This responsibility arises out of the lawyer's duties "to provide competent representation to a client" and "to make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct," including the duty to provide competent representation. Colo. RPC 1.1, 5.1(b).

The hiring Colorado Lawyer's duties related to competence and supervision include, at a minimum, the following: (a) the duty to confirm the Domestic or Foreign Lawyer's status as a lawyer; (b) the duty to confirm the Domestic or Foreign Lawyer's competence to undertake the assigned work; (c) the duty to supervise the Domestic or Foreign Lawyer; and (d) the duty to supervise the work of any nonlawyer hired by the Colorado Lawyer to assist in assigned tasks.

A. Communication Issues

The first issue that may arise in considering outsourcing is what communications can be made when interviewing a prospective temporary lawyer. As when using any vendor, the Colorado Lawyer cannot

disclose any information inconsistent with Colo. RPC 1.6. Other state Bars considering this issue have not been consistent. For example, the Maine Bar in Opinion 194 (2007) opined that it is ethically permissible to outsource transcription and computer back-up services, even though otherwise protected information will be disclosed. (The Committee recognizes that this is not outsourcing of "legal services" but rather "administrative services," but the ethical consideration is the same). *See also* Los Angeles Cty. Bar Ass'n Prof. Resp. and Ethics Comm. Op. No. 518 ("Confidential information can be disclosed to outside contractors so long as the outside contractors agree to keep the client confidences and secrets inviolate.").

On the other hand, American Bar Association (ABA) Formal Opinion 08-451 states that "where the relationship between the firm and the individuals performing the services is attenuated, as in the typical outsourcing relationship, no information protected by Rule 1.6 may be revealed without the client's informed consent."

There is no express exception in Colo. RPC 1.6 simply for convenience; thus, the ABA approach is more consistent with the Colorado Rules. The Colorado Lawyer considering outsourcing should be especially careful when considering outsourcing to foreign jurisdictions that might not treat the attorney-client relationship and requirement of confidentiality in a manner comparable to such treatment in the United States. The more attenuated the relationship between the Colorado Lawyer and the outsourcing services, the more careful the lawyer must be in communications.

B. Confirming the Domestic or Foreign Lawyer's Status as a Lawyer

When the person providing legal services purports to be a lawyer, the hiring lawyer should confirm that the person is licensed and in good standing, particularly in the case of a person holding himself or herself out to be a lawyer in a foreign country. This duty applies to both temporary and permanent legal services, and to Colorado, Domestic, and Foreign Lawyers providing such services.

Once a Colorado Lawyer has confirmed that another Colorado Lawyer or a Domestic Lawyer providing temporary legal services is admitted to practice law and in good standing in Colorado or another United States jurisdiction, the hiring Colorado Lawyer may reasonably assume that the temporary lawyer possesses certain minimal qualifications to practice law, based on the lawyer admission standards in place in every U.S. jurisdiction; has obtained a reasonably standardized legal education before being admitted to practice law in one or more U.S. jurisdictions; and is subject to similar, if not identical, ethical rules.

These same assumptions *cannot* reasonably be made with respect to every Foreign Lawyer. Rather, various foreign nations, and various states or provinces within foreign nations, impose legal educational, licensing, and ethical requirements that differ significantly from those in place in the United States. The potential for vastly different educational requirements, admission standards, and ethical expectations for Foreign Lawyers require the hiring Colorado Lawyer to carry out additional tasks to comply with the Rules when outsourcing a task to a Foreign Lawyer.

A Colorado Lawyer considering outsourcing work to a Foreign Lawyer must initially determine that the Foreign Lawyer is a member of a recognized legal profession, such that it is reasonable to treat the Foreign Lawyer as a "lawyer." The ABA Standing Committee on Ethics and Professional Responsibility considered this issue in its Formal Opinion 01-423 (2001), in the context of forming partnerships with foreign lawyers. ABA Opinion 01-423 concluded that to qualify as a lawyer for purposes of ABA Model Rule 5.4 (prohibiting the sharing of fees and formation of a partnership with nonlawyers), a foreign professional "must be a member of a recognized legal profession in a foreign jurisdiction." According to the ABA:

> The term "profession" itself generally connotes the attributes of education and formal training, licensure to practice, standards, and a system of sanctions for violations of the standards. There nevertheless is no arbitrary definition of "lawyer" or "legal profession" that must be applied to determine whether a person in a foreign jurisdiction is a lawyer. The determination essentially is factual, requiring consideration of the jurisdiction's legal structure as well as the nature of the services customarily performed by the person in question.

ABA Opinion 01-423 concluded that generally, "a person who is specially trained to provide advice on the laws of the foreign jurisdiction and to represent clients in its legal system, and is licensed by the jurisdiction to do so, will qualify as a foreign lawyer." On the other hand, foreign professionals who "are not members of a recognized legal profession in the jurisdiction" and persons in countries that have "no recognized legal profession" should be considered nonlawyers. The ABA provides examples of professions within some foreign jurisdictions falling into these various categories, at least as of 2001:

> For example, foreign lawyers admitted to practice in Sweden, Japan, Great Britain and other European Countries would satisfy these requirements and have been found by bar association ethics committees to qualify for partnerships in U.S. law firms.
>
> If, however, professionals in a foreign jurisdiction are not members of a recognized legal profession in that jurisdiction, the professionals should, in our opinion, be considered nonlawyers rather than lawyers for purposes of Model Rule 5.4. . . . For example, qualification as foreign lawyer for purposes of Rule 5.4 ordinarily should be accorded members of the profession of *avocat* (courtroom lawyer) or *conseil juridique* (transactional or business lawyer), but might not be accorded members of the profession of *notario*, or notary, a substantially different function in most civil law countries.

ABA Op. 01-423 (footnotes omitted).

This Committee finds the ABA's analysis instructive in assessing a Colorado Lawyer's duties when hiring a foreign professional as a temporary lawyer, although the ABA's use of precise terms ironically underscores the difficulty of the issue. In some jurisdictions *notarios* are the more qualified professionals. *See* www.sos.state.tx.us/statdoc/notariopublicoarticle.shtml (indicating that in Mexico a "notario publico" must be a lawyer, gain additional training, and pass additional testing). This confusion underscores the difficulty in this analysis, and serves to emphasize the challenges facing the Colorado Lawyer considering outsourcing services.

Like a lawyer considering whether to form a partnership with a foreign professional, a Colorado Lawyer "must take reasonable steps to ensure that the foreign lawyer is a member of a recognized legal profession authorized to engage in the practice of law in the foreign jurisdiction"—that is, that the person is in fact a "Foreign Lawyer"—before hiring that person to perform legal services that only a lawyer may perform. If the foreign professional does not qualify as a lawyer, it would be misleading for the Colorado Lawyer to hold out the foreign professional as such. *See* Colo. RPC 4.1(a), 7.1(a)(1), 8.4(c). In addition, the Colorado Lawyer would have increased supervisory responsibilities over a nonlawyer. (The Colorado Lawyer's disclosure and supervision responsibilities are discussed below.)

C. Confirming the Domestic or Foreign Lawyer's Competence, and Supervising His or Her Work

The discussion in Opinion 105 of the hiring Colorado Lawyer's responsibility to determine competence and to supervise applies equally when a Colorado Lawyer hires Domestic or Foreign Lawyers to provide temporary legal services. A Colorado Lawyer should be especially sensitive to these obligations when the temporary attorney is not licensed in Colorado. Both Domestic and Foreign Lawyers generally can be expected to be less conversant with Colorado law and practice than are Colorado Lawyers, and Foreign Lawyers generally can be expected to be less familiar with U.S. federal law than Colorado Lawyers. Moreover, as discussed above, Foreign Lawyers in particular might lack the training of lawyers educated in and licensed by U.S. jurisdictions, and might be unfamiliar with important principles of legal ethics that apply to Colorado Lawyers. In addition, Domestic and Foreign Lawyers often work in physically distant locations and cultural and language differences might complicate communications between Colorado and Foreign Lawyers. As a result, the hiring Colorado Lawyer must exercise particular care to supervise the work of Domestic and Foreign Lawyers.

The Committee endorses the observations, quoted below, of the Bar of the City of New York, concerning a lawyer's supervision of overseas providers of legal services. Although the New York City opinion addressed temporary legal services provided by foreign *nonlawyers*, the Committee believes the analysis also applies to legal services provided by Domestic and Foreign *Lawyers*.

> [G]iven the hurdles imposed by the physical separation between the New York lawyer and the overseas non-lawyer, the New York lawyer must be both vigilant and creative in discharging the duty to supervise. Although each situation is different, among the salutary steps in discharging the duty to supervise that the New York lawyer should consider are to (a) obtain background information about any intermediary employing or engaging the non-lawyer, and obtain the professional resume of the non-lawyer; (b) conduct reference checks; (c) interview the non-lawyer in advance, for example, by telephone or voice-over-internet protocol or by web cast, to ascertain the particular non-lawyer's suitability for the particular assignment; and (d) communicate with the non-lawyer during the assignment to ensure that the non-lawyer understands the assignment and that the non-lawyer is discharging the assignment according to the lawyer's expectations.

Ass'n of the Bar of the City of N.Y. Comm. on Prof. and Jud. Ethics, Formal Op. 2006-3 (2006). *See also* ABA Formal Op. 08-451 (noting that in many countries professionals labeled "lawyers" do not receive the same special training and education as lawyers do in the United States, and that hiring lawyers should consider conducting background checks of and interviews with Foreign Lawyers being considered for hire).

D. Supervision of Nonlawyers

If a Colorado Lawyer concludes that a foreign professional does not qualify as a Foreign Lawyer, the Colorado Lawyer may hire that professional, as long as the Colorado Lawyer exercises supervisory duties as set out in Colo. RPC 5.3. Those include making reasonable efforts to ensure that the temporary lawyer's conduct is compatible with the professional obligations of the lawyer. Colo. RPC 5.3(b). For further discussion regarding the supervision of nonlawyers generally, *see, e.g.,* CBA Formal Ops. 63 (1983, addendum issued 1995) and 78 (1988, revised 1994 and 1997); N.Y.C. Bar Ass'n Formal Op. 2006-3; Diane M. Kueck, "Avoiding Unauthorized Practice of Law by a Non-Lawyer," 32 *The Colorado Lawyer* 27 (March 2003).

A Colorado Lawyer in a firm that regularly hires Domestic or Foreign Lawyers should consider the potential application of Colo. RPC 5.3(a), which requires partners (or those with comparable managerial authority) to "ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the obligations of the lawyer."

II. Unauthorized Practice Issues

Because Opinion 105 assumed that the temporary lawyer is a Colorado Lawyer, it did not address issues related to UPL. Colorado Rule 5.5(a)(3) prohibits a Colorado Lawyer from assisting another person "in the performance of any activity that constitutes the unauthorized practice of law." Therefore, in addition to the duties outlined above, the hiring Colorado Lawyer should satisfy himself or herself that the Domestic or Foreign Lawyer does not engage in UPL.

A complete analysis of Colorado law on UPL is beyond the scope of this opinion. In general, Colo. RPC 5.5(a)(3) requires a Colorado Lawyer initially to determine whether the activities of the Domestic or Foreign Lawyer constitute the practice of law in Colorado. *See Denver Bar Ass'n v. Public Utilities Comm'n,* 391 P.2d 467, 471 (Colo. 1964) ("There is no wholly satisfactory definition as to what constitutes the practice of law; it is not easy to give an all-inclusive definition. We believe that generally one who acts in a representative capacity in protecting, enforcing, or defending the legal rights and duties of another and in counseling, advising and assisting him in connection with these rights and duties is engaged in the practice of law."). The Committee notes that Rules 220, 221, and 221.1 of the Colorado Rules of Civil Procedure liberally permit Domestic Lawyers to practice law in Colorado on a temporary basis.

Although the protections of those rules do not extend to Foreign Lawyers, ethics opinions from other jurisdictions hold that, as long as the lawyer supervises and remains responsible for the activities of the nonlawyer, those activities do not constitute the unauthorized practice of law. Los Angeles Cty. Bar Ass'n Op. 518 ("attorneys who contract for services which assist the attorneys in representation of their clients do not assist in [the unlawful practice of law] so long as the attorney remains ultimately responsible

for the final work product provided to or on behalf of the client"); *In re Op. 24 of Comm. on Unauthorized Practice of Law*, 607 A.2d 962, 966-67 (N.J. 1992) (under New Jersey statutes, work performed by paralegal under supervision of attorney is by definition not UPL); San Diego Cty. Bar Ass'n Formal Op. 2007-1 (2007) (attorneys do not aid in UPL where they retain supervisory control over and responsibility for tasks constituting practice of law).

III. Conflicts

The conflict of interest analysis in Opinion 105 applies equally when a Domestic or Foreign Lawyer provides temporary legal services. Specifically, the hiring Colorado Lawyer must determine (a) whether the temporary lawyer has a conflict in performing work to be delegated, and (b) whether the temporary and hiring lawyers are "associated in a firm" under Colo. RPC 1.10(a) such that all the clients of the hiring lawyer or firm are deemed to be the temporary lawyer's clients, and vice versa, for conflict imputation purposes. The Committee continues to endorse the "functional analysis" of conflict imputation discussed in Opinion 105. It often will be more feasible to successfully screen Domestic and Foreign Lawyers, who frequently will be physically remote from the hiring lawyer's office, because they likely will have reduced access to information relating to other clients than would a temporary Colorado Lawyer.

IV. Fee-Related Issues

A. Division or Sharing of Fees

Assuming that the temporary Foreign Lawyer is qualified as a lawyer, the analysis of division of fees in Opinion 105 also applies when a Domestic or Foreign Lawyer provides temporary legal services. In particular, the hiring lawyer should undertake the analysis prescribed in Opinion 105 concerning whether the Domestic or Foreign Lawyer is "in the same firm" as the Colorado Lawyer, as that phrase is used in Colo. RPC 1.5(d); and, if the lawyers are not in the same firm, whether the financial arrangement with the client constitutes a "division of a fee" as used in that rule. The Committee adheres to its conclusion in Opinion 105 that an arrangement does not constitute a division of fees if the firm is responsible for paying the Domestic or Foreign Lawyer regardless of whether the client pays the firm, and if the Domestic or Foreign Lawyer's compensation is not a percentage of or otherwise directly tied to the amount paid by the client.

If the payment of a Domestic or Foreign Lawyer under this analysis constitutes a division of fees, then the hiring Colorado Lawyer must comply with Colo. RPC 1.5(d), which the Colorado Supreme Court has amended since the issuance of Opinion 105. Under the prior rule, a fee could be divided between lawyers in different firms only based on the proportion of the services performed by each lawyer. Under the new rule, lawyers in different firms may now divide fees disproportionately to the services performed by each, but only if "each lawyer assumes joint responsibility for the representation." Comment [7] to the new rule explains that "[j]oint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership." In most cases, Colo. RPC 1.5(d) will prohibit a division of fees disproportionately to the work performed by a Domestic or Foreign Lawyer because a temporary lawyer generally will not "assume[ ] joint responsibility for the representation."

If a Colorado Lawyer determines that a foreign professional is not a Foreign Lawyer, then under Colo. RPC 5.4(a), the Colorado Lawyer may not share legal fees with him or her under any circumstances. Rather, the foreign professional must be paid on a per task, per hour, or other basis not related to the amount collected from the client. *See*, *e.g.*, *People v. Easley*, 956 P.2d 1257, 1258 (Colo. 1998).

B. Reasonableness of Fees

Colo. RPC 1.5(a) requires a lawyer's fee to be reasonable. The discussion in Opinion 105 of the reasonableness of fees paid to a temporary lawyer applies equally to the reasonableness of fees paid to a Domestic or Foreign Lawyer for temporary legal services. The hiring attorney or firm may bill its client for the time of the Domestic or Foreign Lawyer at a rate higher than that paid to the lawyer, just as a Colorado

Lawyer or firm may charge a client a mark-up over the actual compensation paid to its employees (including associates who are Colorado Lawyers, and paralegals). The factors for assessing reasonableness that were identified in Opinion 105 ("such as the nature of the services provided, the experience and skill of the person providing the services, and the range of rates charged in the community for similar services") are equally relevant to the temporary services of Domestic and Foreign Lawyers.

In the judgment of the Committee, the compensation actually paid to the Foreign Lawyer is an additional factor in assessing the reasonableness of fees. Press and scholarly reports indicate that some Foreign Lawyers, particularly from non-Western countries such as India, often charge a fraction of the fees charged by Colorado and Domestic Lawyers. *See*, *e.g.*, Jennifer Fried, "Outsourcing Reaches Corporate Counsel," *The Recorder* (Aug. 25, 2004) ("There are lots of opportunities to use foreign lawyers in place of outside counsel or other lawyers at a lower cost structure."); Alison M. Kadzik, "The Current Trent to Outsource Legal Work Abroad and the Ethical Issue Related to Such Practices," 19 *Georgetown J. of Legal Ethics* 731, 731 (2006) ("The recent downturn in the U.S. economy has driven numerous American corporations to begin outsourcing and offshoring their legal work to professionals in countries such as India, New Zealand, South Korea, and other countries where the cost of labor is significantly lower. One recent study reports that employees in India charge only $40 an hour as compared to the $120 an hour charged by U.S. firms for comparable work.") (footnotes omitted); Joel L. Merkin, "Litigating Outsourced Patents: How Offshoring May Affect the Attorney-Client Privilege," 2006 *U. Ill. J.L. Tech. & Pol'y* 215, 215 (Spring 2006).

If the differential between the compensation actually paid to a Domestic or Foreign Lawyer and the amount charged to a client is excessive, the fee might not be reasonable. *But see* L.A. Cty. Bar Ass'n Op. 518 ("The Committee believes that the amount paid by the attorney for [work performed by an out-of-state brief-writing service] is not determinative on the question of whether a fee is unconscionable."). *See also* CBA Formal Op. 105 (differential between fees paid to temporary lawyer and fees billed to client for temporary lawyer's services is not listed as one of the factors relevant to the determination of reasonableness of fees billed to client).

V. Disclosures to Clients

Colo. RPC Rule 1.2 requires a lawyer to "consult with the client as to the means by which [the objectives of the representation] are to be pursued." Similarly, Colo. RPC Rule 1.4(a)(2) requires the lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Comment [3] states that this "requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments . . . ." In an extreme case, a failure to correct a client's misapprehension could rise to the level of a misrepresentation prohibited by Colo. RPC Rule 8.4(c).

Under these Rules, if the use of outsourcing is a "significant development" in the representation, it must be disclosed to the client. Opinion 105, in addressing disclosures to clients related to fees and staffing when a Colorado Lawyer wishes to use another Colorado Lawyer to provide temporary legal services, recognizes that the lawyer's duty to disclose will depend on the facts of a given engagement. Similarly, whether the Colorado Lawyer must inform a client of the use of Foreign or Domestic Lawyers will depend on the facts of the matter, particularly the client's expectations. At least as of this writing, the Committee is of the opinion that most clients of Colorado Lawyers do not expect their legal work to be outsourced, particularly to a foreign county. Thus, in the vast majority of cases, a Colorado Lawyer outsourcing work to a Foreign Lawyer who is not affiliated with the Colorado law firm would constitute a "significant development" in the case and disclosure to the client would be required.

The Los Angeles County Bar Association has adopted a similar circumstance-specific test for required disclosures, opining that a lawyer must disclose to the client a brief-writing arrangement with an out-of-state lawyer only "when the use of the outside lawyer constitutes a significant development," and that whether a "significant development" exists "is based upon the circumstances of each case[.]" L.A. Bar Op. 518. Similarly, the San Diego County Bar Association has opined that if the client "has a reasonable

expectation under the circumstances" that the work will be performed by a California lawyer, the California lawyer must inform the client if the work is being outsourced. San Diego County Bar Ass'n Formal Op. 2007-1.

The New York City Bar Association has concluded that "the law firm has an ethical obligation *in all cases*," including those involving in-state, out-of-state, and foreign lawyers, to disclose the use of temporary lawyers and to obtain the client's consent. Ass'n of the Bar of the City of N.Y. Comm. on Prof. and Jud. Ethics, Formal Op. 1989-2 (1989) (emphasis added). This Committee does not agree with the approach of the New York City Bar Association that disclosure is required in all cases (although that is obviously the most conservative approach), but emphasizes that the Colorado Lawyer's duty to disclose the use of Domestic or Foreign Lawyers will apply in *most* cases.

If disclosure is required under Colo. RPC 1.2 and 1.4(a)(2), the Colorado Lawyer should advise the client that a Domestic or Foreign Lawyer will assist in performing particular aspects of the client's work. *See* L.A. Bar Op. 518 (requiring "disclosure of the nature and extent of the [attorney's relationship with an out-of-state provider of legal services] . . . in the written retainer agreement"). Opinion 105 concluded that a Colorado Lawyer "does not have a duty to disclose the amount paid to the temporary lawyer or the profits made from using the temporary lawyer as long as the financial arrangement does not constitute fee-splitting[.]" The Committee reaches the same conclusion regarding fees paid to and profits made from the use of Domestic and Foreign Lawyers, even where the mark-up is substantial.

VI. Placement Agencies

The considerations discussed in Opinion 105 apply equally when a placement agency is involved in arranging for a Colorado Lawyer's use of a Domestic or Foreign Lawyer to provide temporary legal services.

Conclusion

Using Domestic or Foreign Lawyers and other professionals is ethically acceptable, but should be done with caution. The hiring lawyer must remember that he or she is ultimately responsible to the client, and, where applicable, the court, for the legal product produced. In some circumstances, the decision to hire a Domestic or Foreign Lawyer can be made only after consultation with the client.

A Colorado Lawyer who hires a Domestic or Foreign Lawyer has an obligation to make reasonable efforts to ensure that the Domestic or Foreign Lawyer's conduct conforms to the Colorado lawyer's duties under the Colorado Rules of Professional Conduct, including competence, confidentiality, and avoidance of conflicts of interest. Further, Colo. RPC 1.5 issues could arise as to fee sharing or the amount of the fee charged.

NOTES

1. This opinion does not consider the use of persons outside Colorado to perform legal *administrative* services, such as accounting support, file management, and data entry. Services that relate to the administration of a law firm rather that the provision of legal services to particular clients often will be appropriate for outsourcing in the general commercial sense of that term. However, lawyers outsourcing such services must be sensitive to confidentiality issues.

2. The use of such lawyers is often referred to as "outsourcing" and that term is used in this Opinion.

3. The Colorado Bar Association Ethics Committee (Committee) notes that the Colorado Supreme Court amended the Colorado Rules of Professional Conduct effective January 1, 2008. The Committee will issue an Addendum to Opinion 105 to identify specific rules applied in that opinion that have been amended, and any impact on the Committee's conclusions as a result of those rule amendments.

122 THE APPLICABLITY OF COLO. RPC 7.2 TO INTERNET-BASED LAWYER MARKETING PROGRAMS

Adopted March 20, 2010, Amended October 16, 2010.

Introduction and Scope

With the acceleration of technology, Colorado lawyers are exposed to a proliferation of private companies offering internet-based services designed to market legal services. Rule 7.2 of the Colorado Rules of Professional Conduct (Colorado Rules or Colo. RPC) governs lawyer advertising and addresses the propriety and contours of both advertising in internet directories and the use of referral services. This opinion addresses the application of Colo. RPC 7.2 to certain internet-based lawyer marketing programs and attempts to provide guidelines for Colorado attorneys to determine whether a given program is permissible under Colo. RPC 7.2. The potential applicability of other Colorado Rules is also discussed.

Syllabus

Colo. RPC 7.2(a) permits lawyer advertising, stating that "[s]ubject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media." Further, Colo. RPC 7.2(b) states that "[a] lawyer shall not give anything of value to a person for recommending the lawyer's services." Colo. RPC 7.2(b) contains two exceptions to this general rule that are pertinent here. First, Colo. RPC 7.2(b)(1) provides that a lawyer does not violate Colo. RPC 7.2(b) by "pay[ing] the reasonable costs of communications permitted by [Rule 7.2]." Comment [5] specifically states that Rule 7.2(b)(1) includes "on-line directory listings." Second, Colo. RPC 7.2(b)(2) provides that a lawyer may "pay the usual charges of a not-for-profit lawyer referral service or legal service organization." By definition, Colo. RPC 7.2(b)(1) thus makes for-profit referral services impermissible.

The pivotal point is the distinction between "on-line directory listings" and a for-profit "referral service." The lawyer must evaluate the program under consideration to ascertain that it is in the nature of a listing-type directory rather than a for-profit program that provides referrals to specific lawyers, regardless of the purported criteria for such referrals.

Analysis

A lawyer in Colorado is generally permitted to advertise as long as the lawyer complies with the Colorado Rules. Colo. RPC 7.2(a). A lawyer in Colorado is generally not permitted to pay another person (or entity) in exchange for a recommendation of that lawyer's services. Colo. RPC 7.2(b).[1] Two exceptions to Colo. RPC 7.2(b) are pertinent here: (1) under Colo. RPC 7.2(b)(1), a lawyer may pay the reasonable costs of communications permitted by Colo. RPC 7.2; and (2) under Colo. RPC 7.2(b)(2), a lawyer may pay the usual charges of a not-for-profit lawyer referral service or a qualified lawyer referral service.

Comment [5] elaborates on the exception contained in Colo. RPC 7.2(b)(1) by clarifying that the exception includes "the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, banner ads, and group advertising." Comment [5] goes on to state that "[a] lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers."

With respect to a referral service, Comment [6] states:

> A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by laypersons to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only

permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for prospective clients.

Comment [6] also cites the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (ABA Model Lawyer Referral Rules) as guidance with regard to the definition of a referral service. The ABA Model Lawyer Referral Rules do not specifically define a referral service, but instead articulate the functions of such services. On this point, the ABA Model Lawyer Referral Rules provide the following guidance:

- Lawyer referral services have been in operation in this country for more than 50 years, and were first established in response to requests by middle-income people for assistance in obtaining appropriate legal counsel.
- Lawyer referral and information services are designed to assist persons who are able to pay normal attorney fees but whose ability to locate appropriate legal representation is frustrated by a lack of experience with the legal system, a lack of information about the type of service needed, or a fear of the potential costs of seeing a lawyer.
- Lawyer referral programs offer two important services to the public. First, they help the client determine if the problem is truly of a legal nature by screening inquiries and referring the client to other service agencies when appropriate. The second, and perhaps more important function of a lawyer referral service is to provide the client with an unbiased referral to an attorney who has experience in the area of law appropriate to the client's needs.
- The public has come to equate the function of lawyer referral programs with consumer-oriented assistance, and expects that the loyalty of the program will lie with the consumer, and only secondarily with the participating attorney. Thus, the analysis of whether an online marketing program is permissible under Colo. RPC 7.2 seems to be based on the dichotomy between, on one hand, permissible legal service plans or not-for-profit or qualified lawyer referral services, and, on the other hand, a for-profit referral service that is not an approved lawyer referral service. *See* Colo. RPC 7.2, cmt. [6]. Aside from the language set out above, the Colorado Rules and the materials cited in them do not appear to provide additional guidance.

I. Types of Programs

The Committee has observed that many of the existing on-line marketing programs being offered to Colorado lawyers fall on a spectrum between a clearly permissible directory and a clearly impermissible for-profit referral service. This opinion examines two hypothetical programs, one from each of these modes.

A. Online Lawyer Directories

FictitiousLegalDirectory.com (a fictional name) re-creates traditional forms of advertising, such as telephone directories and printed lawyer directories, but is adjusted for use on websites. In general, this service provides a directory listing much like that of the Colorado Bar Association's Find-A-Lawyer online directory. The information is free to the user and the user contacts the lawyer directly. The engagement occurs between the user and the lawyer. A lawyer participating in FictitiousLegalDirectory.com must pay for the advertising, typically a monthly fee.

FictitiousLegalDirectory.com groups lawyers, and is searchable, on the bases of practice area and geographical area. This program also provides an opportunity for lawyers to increase their visibility in the directory by paying a larger fee for a more prominent listing. The program prominently explains that it is an advertisement and that it is not recommending a specific lawyer to a client.

B. Online Legal Referral Services

A prospective client submits a description of his or her legal problem to FictitiousLegalReferral.com. Any member lawyer in the client's geographic area who is interested in working with that client

submits a return message through FictitiousLegalReferral.com that is then forwarded to the client. The lawyer pays a fee for each client contact.

In addition to a per contact fee, to participate in FictitiousLegalReferral.com, an attorney must pay a fee based on the size of the geographic area in which the attorney's listing will appear. A lawyer may pay an additional fee to be the "recommended" lawyer in a limited geographic area. The "recommended" lawyer in a geographic area is listed first in the list given to a prospective client. The site refers to the "recommended" lawyers as being of the "highest quality." However, the site bases its recommendation solely on the payment of an additional fee and does not screen or investigate the qualifications of lawyers designated as "recommended." The site does not disclose that "recommended" status is based solely on the payment of a fee.

FictitiousLegalReferral.com nonetheless describes the "pairing" process as one that will pair the prospective client with the "right" lawyer, one who is "specifically qualified" to handle the client's case and is located in the desired geographic area. FictitiousLegalReferral.com also makes representations about the quality of the lawyers with whom prospective clients will be paired, claiming that they are "knowledgeable," and "competent."

FictitiousLegalReferral.com requires only that the attorney be licensed and in good standing in the jurisdictions in which he or she practices. FictitiousLegalReferral.com limits membership in each geographic and practice area. FictitiousLegalReferral.com guarantees members that it will limit participation by geographic area and practice area such that members will recoup at least the amount of their membership fee via clients obtained through the site.

FictitiousLegalReferral.com is a for-profit entity. It has not been approved by any regulatory authority in Colorado.[2]

II. Directory vs. For-Profit Referral Service

FictitiousLegalDirectory.com fits within the delineation of permissible advertising set out in Comment [5] to Colo. RPC 7.2 in that it clearly identifies itself as an advertisement. Further, fees charged to participating lawyers are fixed rather than based on "leads" generated. Finally, FictitiousLegalDirectory.com provides information about lawyers only in a ministerial fashion based on non-substantive criteria such as geographic location and practice area.

By contrast, FictitiousLegalReferral.com does not comply with the standards established by Colo. RPC 7.2. First, it charges lawyers based on the actual number of people who hire the lawyer. Further, and crucially, FictitiousLegalReferral.com purports to recommend a lawyer who will meet the inquiring client's needs. It does this without making clear to the client that (a) the recommended lawyer's information is being provided because the lawyer advertised on FictitiousLegalReferral.com and paid a fee for "recommended" status, and (b) FictitiousLegalReferral.com is not substantively recommending the services of that lawyer.[3]

FictitiousLegalDirectory.com and FictitiousLegalReferral.com represent extreme examples of permissible and impermissible services. In light of the variety of internet advertising programs, the Committee has determined that it is appropriate to identify criteria for evaluating whether a program is an advertising service or a referral service under Colo. RPC 7.2.

III. Criteria for Evaluating Internet Marketing Programs

It is likely that the proliferation of online attorney marketing programs will continue and that new programs will arise with various permutations of the characteristics identified in this opinion. For future guidance to Colorado lawyers, the Committee sets out the following characteristics that must be present in such a program for it to be an advertising program in which a lawyer is permitted to participate:

A. The selection of lawyers for a potential client identified in response to the potential client's information is a non-subjective process performed by a software program or, in any event, performed without exercise of any discretion, based on the information provided by the potential client and the information provided by participating lawyers.[4]

B. The program takes sufficient steps to ensure that a reasonable potential client understands that (1) only lawyers who have paid a fee to be included in the service will be given the opportunity to respond to the potential client and (2) the service makes no assertion about the quality of the lawyers included in the service without an objective basis for such assertion. The service must not state that it is making referrals of lawyers and must not describe itself in a way that would cause a reasonable potential client to believe the program is selecting, referring, and recommending the participating lawyers. The service should disclose whether the program is open to all licensed lawyers or, if there are limits on the number or qualifications of lawyers who may participate in the program, it should disclose the nature of those limits.

C. The fee charged by the program is a reasonable fee for the advertising and public relations services provided.

D. The program does not limit or restrict, whether directly or by means of a high fee structure, finely drawn geographic and legal practice areas, or otherwise, the number of lawyers it allows to participate for a given geographic area or legal practice area to such an extent that the program in effect recommends particular types of potential clients to a particular lawyer.

E. Every initial communication sent by the lawyer to a potential client that is identified through the program complies with Colo. RPC 7.3(d).

Conclusion

The existing lawyer marketing programs in Colorado vary widely with respect to the characteristics that bear on the distinction between "online directory listings" and a for-profit "referral service." The lawyer must evaluate the program under consideration to ascertain that it is in the nature of a listing-type directory rather than a program that purports to provide unbiased referrals to specific lawyers based on criteria such as expertise and experience.

NOTES

1. Colo. RPC 1.5(e) prohibits referral fees.

2. Despite the reference to approval of for-profit entities in Colo. RPC 7.2, the Colorado Supreme Court has not designated a regulatory authority to approve for-profit services. The Committee is not aware of any process for obtaining designation as an "approved for-profit entity" in Colorado.

3. Ethics opinions from other states have reached conflicting conclusions on whether certain services constitute permissible advertising or improper recommendations. Arizona and Washington opinions concluded that referral services that were similar to FictitiousLegalReferral.com violated the Arizona version of Colo. RPC 7.2. State Bar of Ariz. Ethics Op. 06-06 (2006); Wash. State Bar Ass'n Informal Op. 2106 (2006). Conversely, ethics opinions from South Carolina, North Carolina, Maine, and Rhode Island approved somewhat similar programs under the versions of Colo. RPC 7.2 adopted in those states. S.C. Bar Ethics Advisory Comm. Advisory Op. 01-03 (2003); N.C. State Bar 2004 Formal Ethics Op. 1 (2004); Maine Bd. of Bar Overseers Op. 174 (2000); Op. 2005-1, R.I. Supreme Ct. Ethics Advisory Panel Request No. 885 (2004). A for-profit referral program was rejected in Texas in 2005. Tex. Ctr. for Legal Ethics Op. 561 (2005). In 2006, the Texas Center for Legal Ethics considered a second for-profit referral program and, instead of approving or rejecting the program, promulgated criteria for determining whether a program is a permissible advertising service or a prohibited for-profit referral service. Tex. Ctr. for Legal Ethics Op. 573 (2006). The Ohio Supreme Court's disciplinary advisory committee also declined to approve or reject a for-profit program with certain features of FictitiousLegalReferral.com and, instead, issued an opinion that provided guidance for distinguishing between permissible advertising and impermissible paid referrals. Bd. of Comm'rs on Grievances and Discipline of the Supreme Ct. of Ohio Advisory Op. 2001-2 (2001). The Utah State Bar adopted a for-profit referral program as its approved referral service. Utah's Rule 7.2(b)(2) specifically authorizes payment of the usual charges of a legal service plan or a lawyer referral service.

4. Permissible factors include information about the practice areas, the jurisdictions and courts where the attorney is admitted or regularly practices, years of experience, and hourly rates. Impermissible factors include payment of a fee for preference in referrals or payment of a fee for all referrals in a geographic area.

123 CANDOR TO THE TRIBUNAL AND REMEDIAL MEASURES IN CIVIL PROCEEDINGS

Adopted June 18, 2011.

Introduction and Scope

The Colorado Rules of Professional Conduct (Colo. RPC or Rules) establish a lawyer's duties of candor to tribunals. This opinion addresses the lawyer's duties of candor only in civil matters. In criminal litigation, the accused has constitutional rights to testify and to the assistance of counsel, which may require a different analysis.

Following an analysis of the lawyer's duties in civil matters, the Colorado Bar Association Ethics Committee (Committee) provides four illustrations designed to provide practical guidance to lawyers facing these situations.

Syllabus

Colo. RPC 3.3(a)(3) prohibits a lawyer from offering evidence that the lawyer knows to be false. If a lawyer knows that a client or a witness called by the lawyer has offered material evidence that is false, the lawyer has a duty to take reasonable remedial measures. This duty may override a lawyer's duty under Colo. RPC 1.6(a) not to disclose information relating to the representation of the client.

If the false evidence was presented by a client (for example by testimony at a trial or hearing), the lawyer must remonstrate confidentially with the client. If the client refuses to rectify or permit the lawyer to rectify the situation, then the lawyer must take further remedial action. In most cases, withdrawal of the false evidence, with the consent of the tribunal, will constitute an adequate remedial measure. In some cases, the conflicts created will require the lawyer to withdraw from the representation. Depending on the circumstances, withdrawal from the representation alone may or may not be an adequate remedial measure, and in some cases, the tribunal may not permit the lawyer's withdrawal. When the tribunal does not permit withdrawal from the representation or when withdrawal from the representation alone is insufficient to undo the effect of the false evidence, the lawyer must make such disclosure to the tribunal as is necessary to undo the effect of the false evidence.

The content of the disclosure that may be required by Colo. RPC 3.3 necessarily depends on the facts and circumstances. Nevertheless, certain general principles offer guidance. In most situations, Colo. RPC 3.3 will not require the disclosure of information protected by the attorney–client privilege; and in all situations, the lawyer should make every reasonable effort to avoid the disclosure of privileged information. However, in some circumstances, only the disclosure of information that may be protected by the attorney–client privilege will be sufficient to meet the lawyer's obligations under Colo. RPC 3.3. In those limited circumstances, the plain language of Colo. RPC 3.3 does not create an exception for information that may be protected by the attorney–client privilege. Such disclosures must be limited to those that are reasonably necessary to undo the effects of the false evidence and must be made in a manner that is the least harmful to the client while satisfying the commands of Colo. RPC 3.3. The lawyer has a continuing duty to object, in all testimonial or evidentiary contexts, to the introduction into evidence of privileged information, including the information previously disclosed by the lawyer under Colo. RPC 3.3. It is then the responsibility of the tribunal to address the evidentiary use of communications that are protected by the attorney–client privilege.

Finally, under Colo. RPC 3.3(a)(1), a lawyer has a duty to remedy a false statement of material fact or law made by the lawyer, and in this regard, reasonable remedial measures may require the lawyer to disclose the false statement to the tribunal. In this case, too, the disclosure to remedy such a false statement must be limited to the extent reasonably necessary to achieve such ends and must be made in the manner that is the least harmful to the client while satisfying the commands of Colo. RPC 3.3.

Analysis

I. Candor to the Tribunal: Colo. RPC 3.3

Colo. RPC 3.3 provides:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Colo. RPC 1.0(m) defines a "tribunal" as

> a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

Thus, under Colo. RPC 3.3, the lawyer has several separate duties of candor to a tribunal. Each of these duties presents the lawyer with separate but related problems. *See* 2 Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering*, § 29.8, at 29-9 to 29-10 (Supp. 2007) (Hazard & Hodes). This opinion addresses only the prohibitions against offering false evidence, the duty to take remedial measures regarding false evidence, and the duty to correct false statements by the lawyer.[1]

A. Materiality

Certain of the duties imposed by Colo. RPC 3.3 turn on whether statements made to the tribunal or evidence offered in the proceeding are "material." The Colorado Rules do not define "material," and different jurisdictions have derived different definitions of materiality in the context of their counterparts to Colo. RPC 3.3. The Colorado Supreme Court interpreted "materiality" under Colo. RPC 3.3(a)(1) in *In re Fisher*.[2] There, the Supreme Court held that

> the concept of materiality encompassed in Colo. RPC 3.3(a)(1) is not directed by the outcome of a particular matter, but rather whether there is potential that the information could influence a determination as to that matter.[3]

B. Confidential Remonstration with the Client

The concept of confidential remonstration with the client is a fundamental part of the reasonable remedial measures mandated by Colo. RPC 3.3. Comment [6] to Colo. RPC 3.3 describes the process as follows:

> If a lawyer learns that the client or a witness that the lawyer plans to call intends to offer false evidence, the first challenge for the lawyer is to remonstrate with the client to attempt to persuade the client or witness that the false evidence should not be offered. It is at this initial stage that the problem of false evidence is best and most frequently resolved.

The *Restatement (Third) of the Law Governing Lawyers* (*Restatement*) further explains this process as follows:

> *Remonstrating with a client or witness*. Before taking other steps, a lawyer ordinarily must confidentially remonstrate with the client or witness not to present false evidence or to correct false evidence already presented. Doing so protects against possibly harsher consequences. The form and content of such a remonstration is [*sic*] a matter of judgment. The lawyer must attempt to be persuasive while maintaining the client's trust in the lawyer's loyalty and diligence. If the client insists on offering false evidence, the lawyer must inform the client of the lawyer's duty not to offer false evidence and, if it is offered, to take appropriate remedial action (see Comment *h*).

Restatement, § 120, cmt. [g] (2000) (emphasis added).

In his treatise on modern legal ethics, Professor Charles W. Wolfram details the process of remonstrating with a client or witness:

> *Remonstration* is clearly required: a lawyer must attempt to persuade a client not to present or, if it is presented, to correct, false testimony. Remonstration in most cases should cover the fact that perjury is a criminal offense, the risks of its deception, and the importance of truthful testimony, the attorney's duty to withdraw, and the extent of the lawyer's duty to disclose perjury.

Charles W. Wolfram, *Modern Legal Ethics*, § 12.5.3, at 656 (1986) (footnotes omitted). *See also* Colo. RPC 3.3, cmts. [6], [10].

Thus, when material evidence has been presented to the tribunal and the lawyer subsequently discovers that the evidence is false, the lawyer must first remonstrate with the client confidentially. In this discussion, it is appropriate for the lawyer to inform the client that the client's failure to correct the false evidence may require the lawyer to seek withdrawal from the representation[4] and that the lawyer may have to disclose the false evidence to the tribunal with or without the client's consent, with the potential for dramatic adverse effect on the client, both as to the outcome of the pending matter and in terms of potential perjury charges. If the lawyer lacks competence in criminal law practice, the lawyer also may wish to advise the client to seek independent criminal defense counsel.

II. A Lawyer May Not Knowingly Offer False Evidence

Colo. RPC 3.3(a)(3) prohibits a lawyer from offering evidence that the lawyer knows to be false. Colo. RPC 1.0(f) provides that "knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. If the lawyer knows before the evidence is presented that it is false, then the lawyer may not offer it. Colo. RPC 3.3(a)(3).[5] A lawyer also may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, if the lawyer reasonably believes it is false. Colo. RPC 3.3(a)(3).

> If a lawyer reasonably believes that evidence is false, but does not "know," Rule 3.3(a)(3) provides that the attorney *may* refuse to offer the evidence. This provision leaves up to the discretion of the lawyer whether to seek admission of questionable evidence. Some lawyers may err on the side of inclusion and risk the need to correct the submission at a later time. Other lawyers may prefer to be cautious and demand additional proof of its authenticity. This Rule permits a lawyer's decision to override client choice on whether to admit the evidence.

Ronald Rotunda and John Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, 741 (2009–10).

In any event, a lawyer is prohibited from assisting a client in conduct the lawyer knows is criminal or fraudulent. Colo. RPC 1.2(d). Knowingly assisting a person to testify falsely is criminal conduct.[6]

If the lawyer's efforts at persuasion are not effective, the lawyer's duties may vary, depending on whether the witness is the client. If a witness (including a client) whom the lawyer intends to call in a civil case insists on giving false evidence despite the lawyer's efforts at persuasion, then the lawyer must not call the witness. If only a portion of the witness's testimony would be false, the lawyer may call the witness but "may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false."[7] Colo. RPC 3.3, cmt. [6]. If the witness nevertheless gives evidence the lawyer knows to be false, then, as explained below, the lawyer must take remedial measures.

III. A Lawyer Must Correct False Evidence Already Presented—Remedial Measures

If a lawyer has offered material evidence and later learns that the evidence is false, the lawyer shall take "reasonable remedial measures." Colo. RPC 3.3(a)(3). The "reasonable remedial measures" that are required are not specifically listed in the Rules. Colo. RPC 3.3(c) explains that "[t]he duties . . . continue to the conclusion of the proceeding,[8] and apply even if the compliance requires disclosure of information otherwise protected by Rule 1.6." The measures taken should be the least damaging to the client consistent with the lawyer's duties to the tribunal as established in Colo. RPC 3.3 and consistent with the purpose of remedial measures to undo the taint of the false evidence. *See, e.g., Restatement*, § 120, cmt. [h] (2000); State Bar of Ariz. Ethics Op. 05-05 (2005).[9]

Comment 10 of Colo. RPC 3.3 provides guidance in this regard. It states:

> Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the attorney to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

One remedial measure available to the lawyer, under some circumstances, is withdrawal of the false evidence. If the tribunal permits the withdrawal of the evidence, in most cases the lawyer will have fully satisfied his or her responsibility under Colo. RPC 3.3. Although rare, circumstances may arise where withdrawal of the evidence, even if permitted by the tribunal, will not undo the effect of the false evidence and thus will not constitute an adequate remedial measure. Because the duty of candor under Colo. RPC 3.3 continues until the conclusion of the proceeding and because the lawyer might come to know at various times in the process that false evidence was presented, the form, nature, and effectiveness of the attorney's disclosure necessarily varies. For example, if the lawyer learns during a hearing or trial that false evidence was presented, then withdrawal of the false evidence would constitute an adequate remedial measure. *Restatement*, § 120, cmt. [h]. Specifically, if the lawyer learns that a witness testified falsely after the witness has left the stand but still during trial, the lawyer could recall the witness and thus withdraw the false evidence. Again, such a withdrawal of the evidence would constitute an adequate remedial measure. *Id*.[10] In contrast, if the lawyer learns during an appeal that false evidence was presented, then withdrawal of

the false evidence (even if feasible and permitted by the tribunal) likely would not be sufficient to undo the effect of the false evidence and thus would not, by itself, constitute an adequate remedial measure. Just as in the situation before false evidence is offered, obtaining the client's consent to correct false evidence already presented is critical not only to fulfilling the lawyer's duty of candor to the tribunal but also to maintaining the client's trust in the lawyer's loyalty and diligence.

Withdrawal from the representation also may constitute, under appropriate circumstances, an adequate remedial measure either by itself, or in combination with other remedial measures, and, in any event, may be required when conflicts of interest under Colo. RPC 1.7(a) arise and cannot be resolved. When the client permits the lawyer to withdraw the false evidence and the tribunal permits the withdrawal of the evidence, the lawyer's withdrawal from the representation ordinarily will not be required. However, when the lawyer makes disclosure to the tribunal regarding the false evidence without the client's consent, and particularly when the client specifically directs the lawyer not to make the disclosure, withdrawal from the representation may be required or permitted under Colo. RPC 1.16. *See* Colo. RPC 1.7, 1.16(a)(1), (b)(1)(B)–(D), 3.3, cmt. [10]. *See also Restatement*, 120, cmt. [h]. Moreover, the client's actions may be grounds for permissive withdrawal under Colo. RPC 1.16.

Depending on the circumstances, however, withdrawal from the representation alone may not constitute an adequate remedial measure. And, in some cases, the tribunal may not permit withdrawal from the representation. If withdrawal from the representation alone is not sufficient to undo the effects of the false evidence, or if the tribunal does not permit withdrawal from the representation, the lawyer must make such disclosure to the tribunal as is reasonably necessary to undo the effect of the false evidence. Colo. RPC 3.3, cmt. [10]. The Committee believes that in most, if not all, cases where the false evidence has already been presented to the tribunal, withdrawal from the representation alone will not constitute an adequate remedial measure. *See* ABA Comm. on Ethics and Prof. Resp., Formal Op. 98-412 (1998) (lawyer must correct his or her own false representations to the tribunal).[11]

IV. Distinctions Between Confidentiality and the Attorney–Client Privilege

The ethical duty of confidentiality is set forth in Colo. RPC 1.6. The scope of the duty of confidentiality is extremely broad, encompassing "information relating to the representation of a client. . . ." Colo. RPC 1.6(a). Included within this broad scope of confidentiality under Colo. RPC 1.6 is information that is subject to the attorney–client privilege. *See* Colo. RPC 1.6, cmt. [3]. The attorney–client privilege is a matter of the substantive law of evidence, not legal ethics. In Colorado, the attorney–client privilege is codified by statute.[12] Under federal law, the attorney–client privilege is governed by federal common law when the underlying dispute involves federal law and is governed by state law if jurisdiction is based on diversity of citizenship.[13]

Comment [3] to Colo. RPC 1.6 explains this distinction as follows:

> The principle of client–lawyer confidentiality is given effect by related bodies of law: the attorney–client privilege, the work-product doctrine and the rule of confidentiality established in professional ethics. The attorney–client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client–lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. *See also* Scope.

Colo. RPC 1.6, cmt. [3].

The duty of disclosure under Colo. RPC 3.3 is, on its face, unqualified. In particular, Colo. RPC 3.3 does not by its own terms exclude from the lawyer's duty of disclosure information that is or may be protected by the attorney–client privilege. Rather a lawyer's disclosure to the tribunal under Colo. RPC 3.3 is a matter separate and apart from any determination about whether and how that information might be

used as evidence in a proceeding. Comment [10] to Colo. RPC 3.3 states, in relevant part, that where the lawyer knows that evidence already offered or admitted is false and remonstration with the client to correct the false evidence has failed,

> the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosures to the tribunal as is [*sic*] reasonably necessary to remedy this situation even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. *It is for the tribunal to then determine what should be done*—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

Colo. RPC 3.3, cmt. [10] (emphasis added). Because information protected by Colo. RPC 1.6 includes privileged information, a lawyer's duty to disclose under Colo. RPC 3.3 includes the duty, in some cases, to disclose privileged information.

The Colorado Supreme Court has not expressly addressed whether the duty of disclosure under Colo. RPC 3.3(a)(3) includes information that may be subject to the attorney–client privilege or whether that information is somehow exempt from disclosure. However, in *In re Petition for Disciplinary Action Against John E. Mack*,[14] the respondent lawyer was disciplined for violating Minnesota version of Colo. RPC 3.3 by failing to take reasonable remedial measures after the introduction of evidence he knew to be false. Mack defended the disciplinary charge on the ground that he could not make the disclosure contemplated under Minnesota Rule 3.3 because the information was privileged. The Minnesota Supreme Court rejected this defense without distinguishing between privileged and other information relating to the representation that is protected under Minnesota Rule 1.6.[15]

The Colorado Supreme Court's decision in *People v. Casey*[16] supports the conclusion that the disclosure duty under Colo. RPC 3.3 extends to privileged information, even though *Casey* did not address this precise issue. In *Casey*, a disciplinary case, the Supreme Court addressed the interplay between a lawyer's duty to be truthful to the court and the lawyer's duty to competently represent the client. Casey represented a defendant in a criminal case who was an imposter; the actual defendant was another individual. Nevertheless, Casey appeared before the court and expressly and implicitly represented to the court that his client was the defendant when Casey knew that was not the case. According to the Court, Casey "portray[ed] his situation as involving a close question between the loyalty he owed his client and his duty to the court."[17] The Court emphatically rejected Casey's argument:

> Colo. RPC 3.3 (b) clearly resolves the respondent's claimed dilemma in that it provides that the duty to be truthful to the court applies even if to do so requires disclosure of [otherwise confidential information]. It is not "arguable" that the respondent's duty to his client prevented him from fulfilling his duty to be truthful to the court.[18]

While the Supreme Court did not specifically refer to the attorney–client privilege in *Casey*, the case is noteworthy in that, like *Mack*, it placed no limit on the type of confidential information that must be disclosed to discharge the attorney's obligations under Colo. RPC 3.3. Similarly, in *In re Hill*,[19] a federal bankruptcy court stated:

> Firm attorneys who had knowledge, in light of privileged e-mails of which they were aware, of misleading nature of testimony of member of firm in proceedings in bankruptcy court had duty to take some remedial action, even though it could potentially require divulging attorney–client privileged material.[20]

Outside of Colorado, several authorities have attempted to reconcile the duty of disclosure under other states' version of Colo. RPC 3.3(a)(3) with the attorney–client privilege, by distinguishing between non-evidentiary disclosures on the one hand and evidentiary submissions on the other hand.

This reconciliation finds support in a recent Ethics Opinion of the New York State Bar Association.[21] The New York Committee determined that while New York's statutory attorney–client privilege limited the available remedial measures under New York's version of Colo. RPC 3.3, that limitation applied only to the *introduction* of protected information *into evidence* and did not prohibit non-

evidentiary disclosures in compliance with New York Rule 3.3. Moreover, at least one commentator supports this approach:

> When an exception to confidentiality stated in the ethics rules does not align with an exception to the attorney–client privilege, the lawyer's duty of disclosure is limited to extra-evidentiary form, namely sharing the information with the appropriate person or authority. In sum, the exception to confidentiality in Rule 3.3 does not permit introduction of attorney-client communications into evidence through lawyer testimony or permit inquiry about those communications as part of the presentation of evidence before any tribunal, absent a recognized exception to the privilege itself.[22]

Two state appellate court decisions also support this approach they address permissive disclosures under those states' versions of Colo. RPC 1.6(b), rather than mandatory disclosures under their versions of Colo. RPC 3.3. In *Purcell v. District Attorney*,[23] Purcell's client had received a court order requiring his eviction from his apartment, which was located in the same building where the client had recently been discharged as a maintenance man. The client made statements to Purcell that Purcell believed constituted threats of criminal activity by the client. Purcell deemed the threats to be serious and, acting in reliance on Massachusetts's version of Colo. RPC 1.6(b), exercised his professional discretion to make disclosure to law enforcement authorities. Acting on that disclosure, constables (accompanied by the police) went to the apartment to evict the client, found incendiary devices, and arrested the client for attempted arson. At the client's trial, the district attorney subpoenaed Purcell to testify against his former client regarding the statements made by the client to Purcell. The trial court rejected the client's assertion of the attorney–client privilege and ordered Purcell to testify against his former client. The Massachusetts Supreme Judicial Court reversed, holding that "the fact that the disciplinary code permitted Purcell to make the disclosure tells us nothing about the admissibility of the information that Purcell disclosed. . . ."[24]

A similar result was reached in *Kleinfeld v. State*[25] where the defendant in a murder case made inculpatory statements to his lawyer in connection with a separate civil case. At the murder trial, the statements were admitted over objection, and the client was convicted of murder. The Florida appellate court held that because the requirements of the attorney–client privilege had been met, it was error to admit the lawyer's testimony. The court went on to note that the existence of an ethical rule that permits a lawyer to reveal a confidence under certain circumstances does not modify the evidence code, which governs the admissibility of evidence at trial.[26]

For all of these reasons, the Committee concludes that, if reasonable remedial measures necessitate disclosure, Colo. RPC 3.3 requires a lawyer to make disclosure to the tribunal, even if such disclosure includes information that is or may be protected by the attorney-client privilege and even if the client does not consent to the disclosure. However, the Committee again emphasizes that disclosure of privileged information always must be limited to that information which is reasonably necessary to apprise the tribunal of the problem.[27] There are few, if any, circumstances in which the lawyer properly would be required or permitted to expressly disclose the source of the privileged information or any other details of the privileged communication. Once the required disclosure is made to the tribunal, the lawyer should take appropriate efforts to resist further efforts by the tribunal to compel additional disclosures. In addition, the lawyer has a continuing duty to object, in all testimonial or evidentiary contexts, to the introduction or disclosure of privileged information, including information previously disclosed pursuant to Colo. RPC 3.3. It is then the responsibility of the tribunal to address the evidentiary use of privileged communications.[28]

V. Correction of Misstatements Made by the Lawyer to the Tribunal

A lawyer must not knowingly make false statements of material fact or law to a tribunal. Colo. RPC 3.3(a)(1). If the lawyer makes a material factual statement believing it to be true, and later discovers that the representation was false, reasonable remedial measures may include correction of the lawyer's own misstatement. The same issues and potential conflicts of interest under Colo. RPC 1.7 that can arise when the client or other witness called by the lawyer testifies falsely, discussed in detail above, can arise when the lawyer made the false statement.

Illustrations[29]

Illustration 1. In a proceeding regarding title to property, Client delivers to Lawyer a deed that is material to the dispute. A variety of circumstances cause Lawyer to question the authenticity of the deed. Lawyer requests and Client gives permission to have the deed examined by a document examiner. The document examiner concludes that the document is a forgery because the ink and paper used did not exist on the date borne by the deed. Lawyer approaches Client with this information and Client confesses that the deed is false but insists that Lawyer nevertheless use the evidence. Under these facts, Lawyer "knows" that the evidence is false—not only did the document examiner unequivocally determine it was not genuine, but Client admitted the document was false. Lawyer may not offer the evidence and if Lawyer discovers its falsity after it is offered, Lawyer must take reasonable remedial measures.

Suppose instead that the document examiner determines that the deed probably is not genuine but cannot rule out the possibility that the deed is, in fact, genuine. When Lawyer confronts Client with this information, Client absolutely maintains that the deed is genuine. Under these circumstances, Lawyer does not "know" that the deed is false and reasonable remedial measures are neither required nor permitted. However, under Colo. RPC 3.3(a)(3), if Lawyer reasonably believes (but does not know) that the deed is false, Lawyer may refuse to offer the evidence.[30]

Illustration 2. Lawyer represents Client in a dissolution of marriage proceeding. Under the applicable procedural rules, each party must make comprehensive disclosure, under oath, of their financial assets. Lawyer files with the court the client's financial affidavit without knowledge that any of the information contained in the affidavit is false. After submission of Client's affidavit, Client advises Lawyer that the values ascribed to certain assets are incorrect. Assume that the value of the asset as originally disclosed was $10,000 and Client now tells the lawyer that the real value is $15,000. Assume further that the marital estate is $5 million. The $5,000 differential in the value of the piece of property probably is not material in relation to the controversy. Suppose, however, that the total marital estate is $20,000. In that context, a $5,000 differential probably is material and would require Lawyer to take reasonable remedial measures under Colo. RPC 3.3.

Illustration 3. Lawyer represents Client in a civil litigation or arbitration proceeding. During the course of preparing Client's anticipated testimony, Lawyer learns from Client that material testimony that Client intends to give is false. Given that source, Lawyer "knows" that the testimony will be false, within the meaning of Colo. RPC 1.0(f). Lawyer must confidentially remonstrate with Client and attempt to convince Client not to testify falsely. If Client insists on presenting the false evidence, Lawyer must, before the false testimony is given, move to withdraw from the representation pursuant to Colo. RPC 1.16(a)(1), and in compliance with the rules of the tribunal. If the tribunal permits Lawyer's withdrawal prior to the presentation of the false testimony, Lawyer has fully satisfied his or her ethical responsibilities under Colo. RPC 3.3. In the event that the tribunal either denies the motion to withdraw or does not rule on the motion prior to the admission of the false testimony, Lawyer is prohibited from participating, in any manner, in the admission of the evidence. (Lawyer is not prohibited from participating in the admission of other evidence or testimony that the lawyer does not know is false.) If the evidence is, in fact, admitted before the tribunal, despite all of the efforts by Lawyer to prevent its admission, Lawyer has the duties described in Illustration 4, below.

Illustration 4. Lawyer represents Client in a civil litigation or arbitration proceeding. Lawyer calls Client to testify. After the completion of Client's testimony, but before the conclusion of the proceeding (*see* Colo. RPC 3.3(c) and cmt. [13]), Client tells Lawyer that he testified falsely on matters that were material to the proceeding. What are Lawyer's responsibilities in these circumstances? First, Lawyer must remonstrate with Client, attempting to persuade Client that the best course of action is for Client to authorize Lawyer to withdraw the evidence or otherwise disclose sufficient information to the tribunal to undo the effect of the false prior testimony. Lawyer must make clear to Client that Lawyer has an ethical duty to make disclosure to the tribunal even if Client refuses consent. If Client refuses to give such consent and even if Client purports to prohibit Lawyer from making disclosure to the tribunal, Lawyer must move to withdraw from the representation pursuant to Colo. RPC 1.16(a)(1), because of the conflicts created between Lawyer and Client.

But in the circumstances where material testimony that Lawyer knows is false has already been presented to the tribunal, withdrawal from the representation is not sufficient because it does not undo the effect of the false evidence. Accordingly, Lawyer must either withdraw the evidence with the consent of the tribunal or make sufficient disclosure to the tribunal to undo the effect of the false evidence. A statement made by Lawyer to the tribunal to the effect that specific evidence is false or unreliable should be sufficient to meet Lawyer's ethical obligations in this regard. Indeed, Lawyer should not disclose any information beyond that which is necessary to apprise the tribunal of the false evidence. The tribunal will likely want more information from Lawyer, specifically, the basis for Lawyer's disclosure to the tribunal. The tribunal also may demand that Lawyer disclose the true facts. In response to such inquiries and to the extent that the information necessary to respond to the tribunal's questions is subject to the attorney-client privilege (or any other privilege recognized by the applicable law), Lawyer should respectfully decline to provide additional information to the tribunal, on authority of the attorney–client (or other) privilege. In this situation, of course, the tribunal may directly examine Client, subject to Client's rights against self-incrimination.

If the tribunal persists and orders Lawyer to disclose additional information, Lawyer must consider whether seeking a stay of such order to permit a judicial challenge to the tribunal's order would be appropriate. If the tribunal refuses to grant a stay and orders immediate disclosure, and the tribunal has contempt power, Lawyer may comply with the tribunal's order even if Lawyer believes the order is erroneous.[31] If Lawyer believes in good faith that the tribunal's order is erroneous or improper, Lawyer may ethically, respectfully and openly decline to obey the order solely for the purpose of seeking prompt review by a higher tribunal. However, Lawyer must be prepared to suffer the consequences of a finding of contempt.[32]

NOTES

1. This opinion does not address other duties of candor that apply in civil proceedings, including the duty to disclose legal authority in the controlling jurisdiction that is directly adverse to the client's position, the duty to take reasonable remedial measures to address criminal or fraudulent conduct by persons related to the proceeding, and the duty in an *ex parte* proceeding to disclose all material facts to the court. *See* Colo. RPC 3.3(a)(2), (b), and (d).

2. *In re Fisher*, 202 P.3d 1186, 1202 (Colo. 2009).

3. *Id*. (emphasis in original).

4. Colo. RPC 1.16 provides that grounds for withdrawal include circumstances where "the representation will result in violation of the Rules of Professional Conduct."

5. The Committee understands the term "false" as used in Colo. RPC 3.3 to mean objective falsity. For example, if the lawyer knows, within the meaning of Colo. RPC 1.0(f), that the traffic light was red at the time of the collision, and if the fact at issue is whether the light was red or green (not the subjective state of mind of the witness), the fact that the client's testimony that it was green was given honestly and in good faith is irrelevant to the lawyer's duty of candor under Colo. RPC 3.3. Of course, if the client honestly believes and testifies that the traffic light was green, that information may well prevent the lawyer from having "knowledge" that it was red, but if the Colo. RPC 1.0(f) threshold is passed and the lawyer, through other evidence, "knows" that the light was red, the lawyer's duty of candor is not suspended because of the client's good faith beliefs. *See Liggett v. People*, 135 P.3d 725 (Colo. 2006) (discussing numerous alternative explanations for evidentiary discrepancies and conflicts in testimony that do not involve "lying": differences in opinion, lapses or inaccuracies in memory, differences in perception, a misunderstanding, or any other number of wholly innocent explanations for discrepancies between two witnesses' testimony).

6. *See* CRS § 18-8-502 (Colorado's criminal perjury statute).

7. It is readily apparent what is meant when the lawyer may not elicit the testimony, but the phrase "or otherwise permit the witness to present the testimony" is less clear. The phrase appears in Comment [6] to Colo. RPC 3.3, but no further guidance is provided in either the Colorado Rule or in American Bar Association (ABA) Model Rule 3.3. Under a reasonable interpretation of this phrase, if the lawyer is examining the witness in a way to avoid eliciting any testimony that the lawyer knows to be false, but the witness blurts out known false testimony, the lawyer should attempt to stop the witness from giving the false testimony. On the other hand, if the adverse lawyer is examining the witness and the witness offers testimony that the lawyer knows to be false, it might not be possible for the lawyer to

prevent the witness from presenting the false testimony. In this latter situation, if the lawyer cannot "prevent" the witness from presenting false evidence in response to cross-examination by the adverse lawyer, the lawyer must take remedial measures to correct the false evidence then presented. Colo. RPC 3.3, cmt. [10]. *See* "Correcting False Evidence Already Presented—Remedial Measures," below.

8. Generally, the conclusion of the proceeding has occurred when a final judgment has been affirmed on appeal or the time for appeal has expired. *See* Colo. RPC 3.3, cmt. [13].

9. The Arizona opinion states: "The Committee stresses, however, that disclosures made pursuant to ER 3.3 should be narrowly tailored and not broader than necessary to undo the effect of the tainted evidence." State Bar of Ariz. Ethics Op. 05-505. *See also* Colo. RPC 3.3, cmt. [10] (the purpose of remedial measures is to "undo the effect of the false evidence").

10. Perjury in the first degree by a witness can be cured if the false testimony is retracted in the course of the same proceeding in which it was made. CRS § 18-8-508.

11. Whether a "noisy" withdrawal, in which the motion to withdraw from the representation contains information to apprise the tribunal of the problem, may be sufficient to discharge a lawyer's obligations to take reasonable remedial measures is beyond the scope of this Opinion. For a comprehensive discussion of the noisy withdrawal concept, *see* Hazard and Hodes, *The Law of Lawyering*, § 9.31, 9-132 to 9-136 (Aspen Publishers).

12. CRS § 13-90-107(1)(b) (2010).

13. Fed. R. Evid. 501.

14. *In re Petition for Disciplinary Action Against John E. Mack*, 519 N.W.2d 900 (Minn. 1994).

15. *Id.* at 902.

16. *People v. Casey*, 948 P.2d 1014 (Colo. 1997).

17. *Id*. at 1016.

18. *Id*.

19. *In re Hill*, 437 B.R. 503 (Bankr.W.D.Pa. 2010).

20. *Id*. at 545.

21. N.Y. State Bar Ass'n Committee on Professional Ethics Op. 837 (March 16, 2010).

22. Sisk, "Rule 3.3 Candor Toward the Tribunal," 16 *Iowa Prac., Lawyer and Judicial Ethics* § 5.6(d)(4)(c) (2009 ed.).

23. *Purcell v. District Attorney*, 676 N.E.2d 436 (Mass. 1997).

24. *Id*. Although *Purcell* involved the permissive disclosure of information under Massachusetts Rule 1.6, as opposed to the mandatory disclosure under Massachusetts Rule 3.3, the court's discussion of the differences between the Rules of Professional Conduct and the attorney–client privilege is instructive.

25. *Kleinfeld v. State*, 568 So.2d 937, 939-40 (Fla.App. 1990).

26. *Id.* at 939-40.

27. *See* Arizona Ethics Op. 05-05, *supra* note 9.

28. *See* Colo. RPC 3.3, cmt. [10].

29. These illustrations address the mandatory disclosures required by Colo. RPC 3.3, not the permissive disclosures authorized (but not required) by Colo. RPC 1.6(b).

30. If lawyer takes this position, contrary to client's demand, a concurrent conflict of interest under Colo. RPC 1.7(a) will result. Unless the conflict can be and is resolved satisfactorily in accordance with Colo. RPC 1.7(b), the lawyer must move to withdraw. *See* Colo. RPC 1.16(a)(1).

31. The *Restatement* takes the position that in circumstances where the only available avenue of appeal or review of an order to disclose requires a finding of contempt against the lawyer, the lawyer "may be warranted in incurring risk of contempt." § 105, cmt. [e]. *See also Maness v. Meyers*, 419 U.S. 449 (1975); *United States v. Ryan*, 402 U.S. 530, 532-33 (1971); *State v. Schmidt*, 474 So.2d 899 (Fla.App. 1985). A lawyer is not required to run the risk of a contempt order. If a tribunal possessing contempt powers orders disclosure, a lawyer will not violate the confidentiality rules (or the rules requiring competent representation) by complying with such an order no matter how ill-advised or wrong such an order may be. *Restatement* §§ 63, cmt. b, 105, cmt. [e]; D.C. Bar Op. 288 (1999). Where the disclosure order entered is by a tribunal that does not have contempt power, the law is less settled. The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility has opined that a lawyer is not ethically obligated to disobey an arbitration panel's order to disclose ostensibly confidential information, but that a lawyer who is the subject of such an order must promptly advise any clients whose confidences may be required to be disclosed, so that the potentially affected clients may, if they choose to do so, independently pursue any remedies, judicial or otherwise, which may be available to them. Pa. Eth. Op. 2002 106, 2003 WL 23358338 (Pa. Bar Assoc. Ethics Comm.).

32. *See* Colo. RPC 1.2(d), cmt. [12].

124 A LAWYER'S USE OF MARIJUANA

Adopted April 23, 2012.
Addendum issued December 10, 2012.
Adopted October 19, 2015.

Introduction

The Colorado Bar Association Ethics Committee (Committee) has been asked to opine whether a lawyer who, in compliance with Colorado law, cultivates, possesses, and uses marijuana to treat a debilitating medical condition, or who purchases, possesses, and uses marijuana recreationally, may do so without violating the Colorado Rules of Professional Conduct (Colo. RPC or the Rules). The Committee first summarizes the relevant federal law criminalizing possession and use of marijuana. Next, the Committee summarizes Colorado law applicable to the use of marijuana. The Committee then identifies ethics rules and case law that frame its analysis of when a lawyer's use of marijuana may violate the Rules. Finally, the Committee summarizes the Rules and considerations which apply when one lawyer suspects that another lawyer is practicing law while impaired, regardless of the cause of the impairment.

Our conclusion is limited to the narrow issue of whether personal use of marijuana by a lawyer violates Colo. RPC 8.4(b). This opinion does not address whether a lawyer violates Rule 8.4(b) by counseling or assisting clients in legal matters related to the cultivation, possession, or use by third parties of marijuana under Colorado law. *See* Colo. RPC 1.2, cmt. [14] ("A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. ln these circumstances, the lawyer shall also advise the client regarding related federal law and policy.").

Syllabus

Federal law treats the cultivation, possession, and use of marijuana for any purpose, even a medical one, as a crime. Although Colorado law also treats the cultivation, possession, and use of marijuana as a crime, it nevertheless permits individuals to cultivate, possess, and use small amounts of marijuana for the treatment of certain debilitating medical conditions. Colorado law also permits, under certain restrictions, the possession and use of marijuana for recreational purposes. Cultivation, possession, and use of marijuana which complies with Colorado law, however, does not guarantee an individual's protection from prosecution under federal law. Consequently, an individual permitted to possess and use marijuana under Colorado law may be subject to arrest and prosecution for violating federal law.

To violate Colo. RPC 8.4(b), there must be evidence that the lawyer's conduct adversely affects the lawyer's honesty, trustworthiness, or fitness as a lawyer.[1] This opinion concludes that a lawyer's use of marijuana in compliance with Colorado law does not, in and of itself, violate Colo. RPC 8.4(b).

A lawyer's use of marijuana in compliance with Colorado law may implicate additional Rules, including Colo. RPC 1.1, 1.16(a)(2), and 8.3(a). Colo. RPC 1.1 is violated where a lawyer's use of marijuana impairs the lawyer's ability to provide competent representation. If a lawyer's use of marijuana materially impairs the lawyer's representation of the client, Colo. RPC 1.16(a)(2) requires the lawyer to withdraw from the representation. If a lawyer knows that another lawyer's use of marijuana has resulted in a Colo. RPC violation that raises a substantial question as to the using lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, then the other lawyer may have a duty under Colo. RPC 8.3(a) to report those violations to the appropriate disciplinary authority.

Analysis

I. Federal Law

The federal government regulates marijuana possession and use through the Controlled Substances Act, 21 U.S.C. § 811 (CSA). The CSA classifies "marihuana" as a Schedule I controlled substance. 21 U.S.C. § 812(b). Federal law prohibits physicians from dispensing a Schedule I controlled substance, including marijuana, by prescription. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 (2001) (no medical necessity exception to CSA prohibition of marijuana). The CSA makes it a crime, among other things, to possess and use marijuana even for medical reasons. *Id.*; 21 U.S.C. §§ 841-864. In *Gonzales v. Raich,* 545 U.S. 1 (2005), the United States Supreme Court recognized the authority of the federal government to prohibit marijuana for all purposes, even medical ones, despite valid state laws authorizing the medical use of marijuana.[2]

II. Colorado Law

The Colorado Uniform Controlled Substances Act of 1992 (the UCSA) substantially mirrors the federal CSA. *See* C.R.S. §§ 18-18-101 to 18-18-605. Colorado's UCSA, like the federal CSA, treats marijuana as a "controlled substance." *See* C.R.S. § 18-18-102(5). Like federal law, Colorado law criminalizes the possession and use of marijuana. *See* C.R.S. § 18-18-406. Colorado law, however, differs from federal law because, under certain circumstances, it exempts the medical and recreational use of marijuana from criminal prosecution under Colorado law.

A. Medical Use of Marijuana Under Colorado Law

The Colorado Constitution provides that a "patient may engage in the medical use of marijuana, with no more marijuana than is medically necessary to address a debilitating medical condition." Colo. Const. art. XVIII, § 14(4)(a). An individual must obtain "written documentation" from a physician stating that he or she has been diagnosed with a "debilitating medical condition" that might benefit from the medical use of marijuana. *Id.*, § 14(3)(b)(I). A "debilitating medical condition" is defined as:

> (I) Cancer, glaucoma, positive status for human immunodeficiency virus, or acquired immune deficiency syndrome, or treatment for such conditions;
>
> (II) A chronic or debilitating disease or medical condition, or treatment for such conditions, which produces, for a specific patient, one or more of the following, and for which, in the professional opinion of the patient's physician, such condition or conditions reasonably may be alleviated by the medical use of marijuana: cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis; or
>
> (III) Any other medical condition, or treatment for such condition, approved by the state health agency, pursuant to its rule making authority or its approval of any petition submitted by a patient or physician as provided in this section.

Id., § 14(1)(a). "Medical use" is defined as:

> [T]he acquisition, possession, production, use, or transportation of marijuana or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a patient's debilitating medical condition, which may be authorized only after a diagnosis of the patient's debilitating medical condition by a physician or physicians . . . .

Id., § 14(1)(b).

Colorado statutes codify the constitutional medical use exemption for marijuana. *See* C.R.S. § 12-43.3-102(b). A Colorado patient is exempted from application of Colorado law criminalizing cultivation, possession, and use of marijuana if the individual can establish that the cultivation, possession, or use was solely for medical purposes as permitted by Colorado law. *Id.*

B. Recreational Use of Marijuana under Colorado Law

Although, as noted in the introduction to this section, the possession, use, cultivation, and sale of marijuana is generally illegal under Colorado law, the Colorado Constitution provides an additional exception for certain recreational use of marijuana: "[T]he use of marijuana should be legal for persons twenty-one years of age or older and taxed in a manner similar to alcohol." Colo. Const. art XVIII § 16 (1)(a). The Colorado Constitution further declares certain acts to be lawful and that such acts "shall not be an offense under Colorado law or the law of any locality within Colorado or be the basis for seizure or forfeiture of assets under Colorado law for persons twenty-one years of age or older." *Id.*, § 16(3). The acts that shall be lawful if conducted by persons 21 years of age or older are:

(a) Possessing, using displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana.
(b) Possessing, growing, processing, or transporting no more than six marijuana plants, with three or fewer being mature, flowering plants, and possession of the marijuana produced by the plants on the premises where the plants were grown, provided that the growing takes place in an enclosed, locked space, is not conducted openly or publicly, and is not made available for sale.
(c) Transfer of one ounce or less of marijuana without remuneration to a person who is 21 years of age or older.
(d) Consumption of marijuana provided that nothing in this section shall permit consumption that is conducted openly and publicly or in a manner that endangers others.
(e) Assisting another person who is 21 years of age or older in any of the acts described in paragraphs (a) through (d) of this subsection.

Id., § 16(3)(a)-(e).

Colorado statutes codify the constitutional exemption for recreational use of marijuana. A person in Colorado over the age of 21 is exempted from prosecution for the illicit cultivation, manufacture, distribution, and sale of retail marijuana and retail marijuana products if those actions are in compliance with the terms, conditions, limitations, and restrictions in section 16 of article XVIII of the state Constitution and article 43.4 of title 12 of the Colorado Revised Statutes. *See* C.R.S. § 12-43.4 102(2).

III. Colo. RPC

Colo. RPC 1.1 requires lawyers to represent their clients using "the legal knowledge, skill, thoroughness, and preparation reasonably necessary" for the task.

Colo. RPC 1.16 prohibits a lawyer from representing a client where the lawyer's "physical or mental condition materially impairs the lawyer's ability" to do so.

Colo. RPC 8.4(b) provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects[.]" Colo. RPC 8.4(b) sets out a two-part test. First, there must be evidence of a criminal act. Second, the evidence must establish that the criminal act reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. *See*, *e.g.*, *People v. Andersen,* 58 P.3d 537, 541 (Colo. O.P.D.J. 2000) (stating in *dictum* that not all convictions of the criminal laws necessarily justify the conclusion that Colo. RPC 8.4(b) has also been violated).

IV. Misconduct

All lawyers admitted to practice law in Colorado take an oath that they will support the United States and Colorado Constitutions. They also swear to faithfully and diligently adhere to the Colo. RPC at all times. Unfortunately, the Colo. RPC do not provide lawyers with clear guidance on proper ethical conduct when federal and Colorado laws conflict as in the unique circumstance regarding an individual's use of marijuana in compliance with Colorado law.

The Supremacy Clause of the United States Constitution unambiguously provides that if there is any conflict between federal and state law, federal law prevails. *Gonzales v. Raich,* 545 U.S. at 29. Consequently, even if a lawyer is permitted to cultivate, possess, and use marijuana under Colorado law, such use nevertheless may constitute a violation of federal criminal law.

The Committee concludes, however, that a Colorado lawyer's violation of federal criminal law prohibiting the cultivation, possession, and use of marijuana where the lawyer's cultivation, possession, or use is permitted under Colorado law does not necessarily violate Colo. RPC 8.4(b). The Committee reads Colo. RPC 8.4(b) as requiring a nexus between the violation of law and the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. *See People v. Hook,* 91 P.3d 1070, 1073-74 (Colo. O.P.D.J. 2004) (the fact that a lawyer may have committed the felony of illegal discharge of a firearm does not by itself determine the professional discipline he should receive); *People v. Senn,* 824 P.2d 822, 825 (Colo. 1992) (linking a lawyer's discharge of a firearm directly over his wife's head during an argument to a "critical failure of judgment" and "a contempt for the law which was at odds with [his] duty to uphold the law").

Colorado has come to its own conclusion about the difficult and sensitive question of whether marijuana should be available for recreational use or to relieve severe pain and suffering. No controlling judicial authority has yet held that Colorado law permitting the medical or recreational use of marijuana is unconstitutional, preempted, void, or otherwise invalid. Consequently, even if a lawyer's cultivation, possession, or use of marijuana under Colorado law may constitute a federal crime, the Committee does not see a nexus between the lawyer's conduct and the lawyer's "honesty" or "trustworthiness" within the meaning of Colo. RPC 8.4(b), provided that the lawyer complies with the requirements of Colorado law permitting and regulating the use and possession of marijuana. The Committee also does not see a nexus between the lawyer's conduct and his or her "fitness as a lawyer in other respects," provided that (a) the lawyer complies with the requirements of Colorado marijuana law, and (b) the lawyer satisfies his or her obligation under Colo. RPC 1.1 to provide competent representation. *E.g., Iowa Sup. Ct. v. Marcucci,* 543 N.W.2d 879, 882 (Iowa 1996) ("The term 'fitness' as used in [Rule 8.4(b)] . . . embraces more than legal competence.").

While not directly on point, cases addressing parenting time where medical use of marijuana is an issue similarly prohibit restrictions on parenting time *simply* because a parent is permitted to use and uses medical marijuana pursuant to state law. *In re Marriage of Parr*, 240 P.3d 509, 512 (Colo.App. 2010) (before parenting time could be restricted, evidence was required to show the use of medical marijuana represented a threat to the physical and emotional health and safety of the child, or otherwise suggested a risk of harm).

V. Impairment

Colo. RPC 1.16(a)(2)'s prohibition against representing a client when "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client" reflects the position that allowing lawyers who do not possess the requisite capacity to make professional judgments and/or follow the standards of ethical conduct harms clients, undermines the integrity of the legal system, and denigrates the legal profession.

Under the Rules, not every debilitating medical condition, treatment regimen, use of medicine, use of psychotropic substances, or combination of these factors will result in mental impairment adversely affecting a lawyer's professional behavior. To trigger mandatory withdrawal from representation under Rule 1.16, the condition and/or treatment must "materially impair[ ]" the lawyer's ability to represent a client. *See* Colo. RPC 1.16(a)(2); *see also* American Bar Ass'n (ABA) Comm. on Ethics and Prof. Resp., Formal Op. 03-429, "Obligations With Respect to Mentally Impaired Lawyer in the Firm" (2003). In that circumstance, a lawyer must not undertake or continue representation of a client.

Every lawyer has a personal responsibility to ensure that the lawyer's physical condition or the substances the lawyer consumes do not adversely affect the lawyer's ability to follow the ethics rules. Impaired and unimpaired lawyers alike are required, among other things, to act competently. Colo. RPC 1.1. If a lawyer cannot do that because of ongoing substantial impairment, Colo. RPC 1.16(a)(2) requires the lawyer to withdraw from the representation and take "reasonably practical" steps to protect the client's interests. Colo. RPC 1.6(d). As for the lawyer, there are sources of assistance to help deal with the impairment.[3]

Unfortunately, some lawyers will be unaware of, or will deny, the fact that their ability to represent clients is materially impaired. They may be unwilling or unable to take appropriate action to decline representation or withdraw. *See* ABA Formal Op. 03-429, at 3. When the materially impaired lawyer is unable or unwilling to deal with the consequences of that impairment, the firm's partners and the impaired lawyer's supervisors have obligations under Colo. RPC 5.1(a) and (b) to take reasonable steps to ensure that the impaired lawyer complies with the ethics rules.[4]

If the firm's lawyers believe they have prevented the impaired lawyer from violating any ethical rules while the impaired lawyer was practicing in the firm, the firm's lawyers have no duty to report the lawyer's condition to the authorities. *See* ABA Formal Op. 03-429, at 4-5. However, if the firm's lawyers believe that the impaired lawyer has violated the ethical rules in a way that raises a substantial question about the lawyer's fitness to practice law, they are required to report the lawyer's condition to the appropriate disciplinary authority. *See* Colo. RPC 8.3(a); ABA Formal Op. 03-429, at 5.

Colo. RPC 8.3(a) addresses the more general obligation of any lawyer with knowledge that another lawyer's conduct has violated the ethics rules. The rule requires a lawyer to report another lawyer to "the appropriate professional authority" when the lawyer "knows" that the other lawyer's violation of the ethics rules raises a "substantial question as to that [other] lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." A lawyer outside the firm who is aware of another lawyer's impairment and who *knows* that another lawyer has violated the ethical rules in a manner that raises a "substantial question" regarding the lawyer's "honesty, trustworthiness, or fitness as a lawyer" has a duty to report the violation to the appropriate authority. In Colorado, the appropriate authority is the Office of Attorney Regulation Counsel (OARC). *See* CBA Formal Op. 64, "Duty of Attorney to Report an Ethical Violation" (1983, amended 1996) (referring to Office of Disciplinary Counsel, predecessor to OARC). Only those violations that raise a "substantial question" as to the lawyer's ability to represent clients must be reported.

"Substantial" refers to the seriousness of the offense, not to the amount of evidence of which the lawyer is aware. Colo. RPC 8.3, cmt. [3]. An impaired lawyer's failure to refuse or terminate representation of clients ordinarily raises a "substantial question" about the lawyer's fitness as a lawyer. *See* ABA Comm. on Ethics and Prof. Resp., Formal Op. 03-431, at n.6, "Lawyer's Duty to Report Another Lawyer Who May Suffer From Disability or Impairment" (2003).

"Knows" refers to actual knowledge, which may be inferred from circumstances. Colo. RPC 1.0(f). The reporting lawyer may know of the impaired lawyer's misconduct through first-hand observation or through a third party. *See* ABA Formal Op. 03-431, at n.12. The "actual knowledge" standard can be difficult to apply. On one hand, knowledge that a lawyer uses marijuana or drinks heavily, for instance, does not necessarily reflect knowledge that the lawyer is impaired in his ability to represent clients. *See* ABA Formal Op. 03-431, at 3. On the other hand, behavior such as frequently missing court deadlines, failing to make requisite filings, failing to perform tasks agreed to be performed, or failing to address issues that would be raised by competent counsel may supply the requisite knowledge that another lawyer is impaired. *Id*. at 2. In determining whether a lawyer "knows" of another lawyer's impairment that has caused a violation of the ethics rules, the lawyer with the potential reporting obligation is not expected to be able to identify impairment with the precision of a medical professional. *Id.* at n.10.

Before deciding whether to report the other lawyer to the appropriate disciplinary authority under Colo. RPC 8.3, a lawyer may consider raising the issue with the impaired lawyer or the impaired lawyer's firm. A lawyer also may consider reporting the affected lawyer's impairment to an approved lawyer's assistance program. If the lawyer speaks with the seemingly impaired lawyer, that lawyer may be able to explain the circumstances giving rise to the other lawyer's conclusion regarding impairment. However, the impaired lawyer's denial or explanation may not remove the need to report if the first lawyer concludes that the impaired lawyer continues to violate the Rules in a manner that raises a substantial question regarding the impaired lawyer's fitness to represent clients. ABA Formal Op. 03-431, text following n.13.

If, after analysis of the appropriate Colo. RPC, a lawyer feels compelled to report a substantially impaired lawyer to the appropriate disciplinary authority, he or she should consider the ethics issues surrounding client confidentiality. *Id.* at n.16. If information relating to the representation will be disclosed,

the reporting lawyer should consider whether there is a need to get the client's permission to disclose this information. *See* Colo. RPC 1.6; *see also* ABA Formal Ops. 03-429 and 03-431.

The Committee cannot speak to how the Colorado Supreme Court Office of Attorney Regulation Counsel or other disciplinary authorities may regard the lawful use of marijuana by attorneys. *See* C.R.C.P. 251.5(b) (grounds for discipline).

NOTES

1. Under Colo. RPC 8.4(b), it is "professional misconduct" for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."

2. Although numerous states permit and regulate the use of marijuana for medical purposes, as of September 22, 2015, only four states (Alaska, Colorado, Oregon, and Washington) and the District of Columbia permit and regulate marijuana for recreational use. *See generally* "Legalization," http://norml.org/legal/legalization (last visited Sept. 22, 2015).

3. The Colorado Lawyer Assistance Program (COLAP) provides "[i]mmediate and continuing assistance to members of the legal profession who suffer from physical or mental disabilities that result from disease, disorder, trauma, or age and that impair their ability to practice." C.R.C.P. 254(2)(a).

4. Colo. RPC 5.1(a) and (b) describe the obligation of managerial and supervisory attorneys to ensure ethical conduct within the firms they manage and by the lawyers they supervise. Lawyers with managerial authority have an affirmative obligation to make reasonable efforts to establish internal policies and procedures designed to give reasonable assurance that all lawyers in the firm, not just impaired lawyers, fulfill the requirements of the Rules. Supervisory lawyers are obliged to make reasonable efforts to ensure that the conduct of the lawyers they supervise conforms with the Rules.

125 THE EXTENT TO WHICH LAWYERS MAY REPRESENT CLIENTS REGARDING MARIJUANA-RELATED ACTIVIES

Adopted October 21, 2013.
Addendum issued October 21, 2013.
Withdrawn May 17, 2014.

WITHDRAWN

Introduction and Scope

In Formal Opinion 124, "A Lawyer's Medical Use of Marijuana" (2012), the Colorado Bar Association Ethics Committee (Committee) addressed the narrow question of whether a lawyer's personal use of marijuana under C.R.S. § 12-43.3-101 - 1001 (the Medical Marijuana Code), standing alone, violated the Colorado Rules of Professional Conduct (Colo. RPC or the Rules). In concluding that the use of marijuana in compliance with the Medical Marijuana Code, by itself, did not violate the Rules, the Committee expressly noted, but declined to address, the related issue of whether a lawyer violates the Rules by counseling or assisting clients in legal matters related to the cultivation, possession, use, or sale of medical marijuana under Colorado law.

That issue has now come to the forefront. Effective December 10, 2012, Colorado passed Amendment 64, which generally permits and regulates the personal use of marijuana in the same way that the personal use of alcohol is permitted and regulated, and which establishes a regulated industry to supply and sell marijuana much like the industry that supplies and sells alcohol. At the same time, however, marijuana continues to be illegal under federal law for all purposes.

Under Colo.RPC 1.2(d), "a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal. . . ." The Committee has been asked to opine whether, and to what extent, a Colorado lawyer may counsel clients regarding the use of, and commerce in, marijuana consistent with Colo.RPC 1.2(d).

At present, the issue is more theoretical than practical. The Committee knows of no instance in which a Colorado lawyer has been disciplined for counseling or representing clients with regard to marijuana use or commerce that is lawful under Colorado law but unlawful under federal law. This fact, however, does not moot the issue. The Rules have a two-fold purpose: "to provide guidance to lawyers and to provide a structure for regulation conduct through disciplinary agencies." Colo.RPC, Scope [20]. The plain language of Colo.RPC 1.2(d) prohibits Colorado lawyers from counseling a client to engage, or assist a client, in conduct that the lawyer knows to be criminal. Certain client conduct may now be legal under Amendment 64 and the Medical Marijuana Code but may remain a violation of federal criminal statutes. Therefore, the Committee offers this opinion in an effort to prevent the Rules from becoming a source of confusion rather than a source of guidance.

Syllabus

Under Colo.RPC 1.2(d), "a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal. . . ." Federal law treats the cultivation, possession, sale, and use of marijuana for any purpose, even a medical one, as a crime. By contrast, Colorado law has decriminalized these activities provided that they are conducted in compliance with Colorado's laws and regulations.

The novelty and complexity of the conflict between Colorado and federal law prevent the Committee from devising a bright line distinction between lawyer conduct that complies with Colo.RPC 1.2(d) and lawyer conduct that violates it. Instead, the Committee has determined that there is a spectrum of conduct ranging from that which Colo.RPC 1.2(d) clearly permits to that which it clearly prohibits.

The Committee concludes that a lawyer does not violate Colo.RPC 1.2(d) by representing a client in proceedings relating to the client's past activities; by advising governmental clients regarding the creation of rules and regulations implementing Amendment 64 and the Medical Marijuana Code; by arguing or

lobbying for certain regulations, rules, or standards; or by advising clients regarding the consequences of marijuana use or commerce under Colorado or federal law. The Committee further concludes that, for good or ill, under the plain language of Colo.RPC 1.2(d), it is unethical for a lawyer to counsel a client to engage, or assist a client, in conduct that violates federal law. Between these two points lies a range of conduct in which the application of Colo.RPC 1.2(d) is unclear.[1]

Analysis

Federal law criminalizes the cultivation, sale, distribution, and use of marijuana for virtually any purpose. *See* Controlled Substances Act, 21 U.S.C. §§ 801 – 904 (the "CSA"). The CSA categorizes marijuana as a Schedule I controlled substance and prohibits its cultivation, sale, distribution, and use based on Congress's conclusion that marijuana has no accepted utility. 21 U.S.C. § 812(b)(1), (c).

By contrast, Colorado and a number of other states and the District of Columbia have decriminalized the limited use of marijuana for medical purposes. *See* CRS § 12-43.3-102(2), 103. Colorado has also established a regulatory scheme by which qualified individuals may lawfully obtain marijuana. *See* C.R.S. § 12-43.3-101 - 1001. Colorado voters approved a constitutional amendment decriminalizing the possession and use of small amounts of marijuana for recreational use on November 6, 2012. *See* Colorado Ballot Initiative Amendment 64. Marijuana cultivated, manufactured, sold, distributed, and used as permitted by Amendment 64 will be regulated and taxed like alcohol and tobacco. It is anticipated that Colorado will enact a use code for recreational marijuana similar to the Medical Marijuana Code. Notwithstanding state decisions to exempt the cultivation, sale, distribution, and use of marijuana for medical and recreational purposes, such conduct remains criminal under federal law and may be prosecuted by federal authorities.

Colo.RPC 1.2(d) states that a lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal. If the conduct is illegal, Comment [9] to Colo.RPC 1.2 advises the lawyer not to undertake the representation or to limit the lawyer's advice to an honest opinion about the actual consequences that appear likely to result from a client's conduct.

This conflict between federal and state law creates a dilemma for Colorado lawyers. On the one hand, members of the public need legal advice on how to apply or reconcile conflicting federal and state laws regarding the cultivation, sale, manufacture, distribution, or use of marijuana. On the other hand, a potential client's cultivation, sale, manufacture, distribution, or use of marijuana, although legal under Colorado law, violates federal law.[2]

Public policy considerations favor lawyers providing the full range of legal advice authorized under Colo. RPC 2.1 so that their clients may comply with Colorado's marijuana use laws. "[I]t too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs." *Hickman v. Taylor*, 329 U.S. 495, 514 (U.S. 1947) (Jackson, J., concurring). Nevertheless, unless and until there is a change in applicable federal law or in the Colorado Rules of Professional Conduct, a lawyer cannot advise a client regarding the full panoply of conduct permitted by the marijuana amendments to the Colorado Constitution and implementing statutes and regulations. To the extent that advice were to cross from advising or representing a client regarding the consequences of a client's past or contemplated conduct under federal and state law to counseling the client to engage, or assisting the client, in conduct the lawyer knows is criminal under federal law, the lawyer would violate Rule 1.2(d).

This is not to say that a lawyer may never ethically counsel or represent a client in areas in which Colorado has decriminalized marijuana. The question is, at what point do a lawyer's legal services in this area violate Colo.RPC 1.2(d)? Circumstances in which the question arises are too various to permit a single, bright-line answer. It must suffice to describe a spectrum of conduct starting with conduct which the Committee believes is unquestionably permissible, ending with conduct which the Committee believes is undoubtedly unethical, and circling back to the range of conduct in between as to which reasonable minds may differ.

WITHDRAWN

It is, for example, unquestionably permissible for lawyers to represent clients regarding the consequences of their past conduct. Just as a lawyer may ethically defend a client accused of committing a crime, so too may a lawyer ethically represent a client accused of violating Colorado's rules and regulations regarding marijuana, in any area in which that conduct may become an issue—including family law, employment law, workers' compensation law, and criminal law.

Under the Rules, it is equally permissible for government lawyers to counsel their clients regarding the creation and application of zoning and other ordinances and legislation relating to marijuana. The CSA provides that "no civil or criminal liability shall be imposed by virtue of this subchapter upon . . . any duly authorized officer of any State . . . who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances." 21 U.S.C. § 885(d). Some courts have interpreted this section to provide civil and criminal immunity for state law enforcement officers enforcing valid state marijuana laws. *See City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355, 369 (2007); *State v. Kama*, 39 P.3d 866, 868 (Or. App. 2002). Under this line of cases, state officials carrying out their responsibilities under Colorado's marijuana laws are not engaging in criminal activity. Relying on these cases, the Committee believes that government lawyers advising these officials do not violate Colo.RPC 1.2(d) when they work to help their clients enforce, interpret, or apply marijuana laws. It is similarly permissible for lawyers to advocate for changes in the law and to help their clients advocate for a change in the law. *See* Colo.RPC 3.9 ("Advocate in Nonadjudicative Proceedings"); Colo.RPC 6.4 ("Law Reform Activities Affecting Client Interests").

Finally, in the family law context, a lawyer may advise a client about the consequences of using marijuana before, during, or after exercising parental rights or parenting time without violating the Rules. Colo.RPC 1.2(d) "does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct." Colo.RPC 1.2(d), cmt. [9].

By contrast, the Committee concludes that the plain language of Colo.RPC 1.2(d) prohibits lawyers from assisting clients in structuring or implementing transactions which by themselves violate federal law. A lawyer cannot comply with Colo.RPC 1.2(d) and, for example, draft or negotiate (1) contracts to facilitate the purchase and sale of marijuana or (2) leases for properties or facilities, or contracts for resources or supplies, that clients intend to use to cultivate, manufacture, distribute, or sell marijuana, even though such transactions comply with Colorado law, and even though the law or the transaction may be so complex that a lawyer's assistance would be useful, because the lawyer would be assisting the client in conduct that the lawyer knows is criminal under federal law. Similarly, a lawyer cannot under Colo.RPC 1.2(d) represent the lessor or supplier in such a transaction if the lawyer knows the client's intended use of the property, facilities, or supplies, as such actions are likely to constitute aiding and abetting the violation of or conspiracy to violate federal law.

Between these two extremes is a range of conduct the permissibility of which is subject to question. A case in point is tax law. Advising or assisting clients with tax issues related to the cultivation, sale, distribution, and use of marijuana pursuant to Colorado law may comply with Colo.RPC 1.2(d) insofar as it involves simply counseling a client about the legal consequences of past conduct. However, "[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity." Colo.RPC 1.2(d), cmt. [9]. Under Colo.RPC 1.2(d) as written, a lawyer violates that Rule at the point where tax preparation becomes tax planning, the intent of which is to assist a client in planning the violation of federal law. Similarly, in a family law context, it is unclear to what extent, if any, a lawyer may negotiate a parenting plan or separation agreement in which one component is the permissible use of marijuana, either recreational or medicinal.

Colorado is one of a handful of states conducting an experiment in democracy: the gradual decriminalizing of marijuana. The Committee notes that, as a consequence of Colo.RPC 1.2(d) as written, Colorado risks conducting this experiment either without the help of its lawyers or by putting its lawyers in jeopardy of violating its rules of professional conduct.

WITHDRAWN

Addendum

The Colorado Supreme Court's Standing Committee on the Colorado Rules of Professional Conduct has recommended that the Colorado Supreme Court adopt marijuana related amendments to the Colorado Rules of Professional Conduct. The proposed amendments would insulate a lawyer from discipline by the Colorado Supreme Court for the lawyer's personal or medical use of marijuana and for the lawyer's provision of legal services and advice on marijuana-related conduct. The Colorado Bar Association Ethics Committee supports this recommendation.

NOTES

1. *See*, *e.g.*, T.S. Eliot, "The Hollow Men," § V ("Between the conception/And the creation/Between the emotion/ And the response/Falls the Shadow").

2. The bar association ethics committees of three other states—Arizona, Connecticut, and Maine—have considered the uncertainty surrounding a lawyer's duties in light of the conflicting provisions of federal and state marijuana laws. Arizona's Ethics Committee refused to "apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in 'clear and unambiguous compliance' with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits." State Bar of Ariz. Ethics Op. 11-01 (2011). Maine's Professional Ethics Commission opined that so long as both the federal law and the language of Rule 1.2(d) remain the same, a lawyer must perform the analysis required by Rule 1.2(d) and determine whether the particular legal service being requested rises to the level of assistance in violating federal law. Maine Prof. Ethics Comm'n, Opinion 199 (2010). Connecticut's Ethics Committee also identified the problem and, quoting the Maine opinion, noted that "the Rule which governs attorney conduct does not make a distinction between crimes which are enforced and those which are not," but left it to individual lawyers to draw the line between permissible advice to clients on the requirements of the Connecticut Palliative Use of Marijuana Act and impermissible assistance to clients in conduct that violates federal law. Connecticut Bar Ass'n Prof. Ethics Committee, Informal Opin. 2013-02 (2013).

WITHDRAWN

126 REPRESENTING THE ADULT CLIENT WITH DIMINISHED CAPACITY

Adopted May 6, 2015.

Scope

This opinion addresses ethical issues that arise when a lawyer believes that an adult client's ability to make adequately considered decisions is diminished. Although Rule 1.14 of the Colorado Rules of Professional Conduct (Colo. RPC or Rules) also addresses a client's diminished capacity due to minority, this opinion is limited to the consideration of ethical issues that arise by reason of the diminished capacity of a client due to reasons other than the client's minority. This opinion does not address representation in adult protective proceedings.[1]

Syllabus

At times, a lawyer may need to consider whether an adult client's capacity to make adequately considered decisions relating to the representation is diminished. If the lawyer reasonably concludes that the client's capacity is diminished in such a manner as to impair the client's ability to make adequately considered decisions regarding the representation, including whether to give informed consent to a course of conduct by the lawyer when required, the lawyer must nevertheless maintain a normal client–lawyer relationship with the client so far as is reasonably possible. If the lawyer reasonably believes that the client's diminished capacity places the client at risk of substantial physical, financial, or other harm unless action is taken and that the client cannot adequately act in the client's own interests, the lawyer should consider whether to take reasonable protective action necessary to protect the client's interests. In taking such protective action, the lawyer should be guided by the wishes and values of the client and the client's best interests, and any protective action taken should intrude into the client's decision-making authority to the least extent feasible. When taking such protective action, the lawyer is impliedly authorized to disclose information relating to the representation that Colo. RPC 1.6 would otherwise prohibit, but the implied authorization is only to the extent reasonably necessary to protect the client's interests. The lawyer should take care to ensure that information thus disclosed will not be used against the client's interests. Differences may arise between the lawyer and client regarding whether or to what extent the client's capacity is diminished, whether the lawyer should disclose information regarding the client's condition despite the client's lack of consent to such disclosure, or whether the lawyer should take any action to protect the client. These differences may present conflicts between the client's and the lawyer's respective interests, and the lawyer must assess whether those conflicts will materially limit the representation of the client.

Summary of Opinion

Introduction

A lawyer's effective and efficient representation of a client's interests depends substantially upon the client's ability to receive, analyze, and process information and advice received from the lawyer and to accurately inform the lawyer regarding information relevant to the representation. Generally, the client has the right to determine the objectives of the lawyer's representation and to be consulted by the lawyer as to the means by which such objectives are to be pursued. Colo. RPC 1.2(a).

Moreover, many actions that the lawyer takes in the course of representing the client require the client's informed consent, which the Rules define as the client's agreement to a proposed course of conduct after the client has been provided by the lawyer with adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. Colo. RPC 1.0(e). Thus, the client–lawyer relationship substantially depends upon the capacity of the client to make the adequately considered decisions that are required in connection with the representation.

Diminished capacity issues can arise in virtually any setting, involving any area of law, where a client–lawyer relationship exists. To illustrate different ethical issues, this opinion uses one transactional and one litigation hypothetical.

1. Transactional scenario—elderly client. A longtime, elderly client meets with you to prepare her estate plan. The client is accompanied by her son. The client directs that the bulk of her estate be left to her son and only a nominal portion be left to her daughter. You draft a will in accordance with those instructions and give it to the client to review. Days later, the client returns, this time accompanied by her daughter. The client explains that, having spoken with her daughter, she now wishes to leave the bulk of the estate to the daughter. You suspect that your longtime client is evidencing signs of dementia and that her two children are taking advantage of her mental state and attempting to unduly influence her testamentary decisions.

2. Litigation scenario—divorce. You represent a wife in a proceeding for dissolution of marriage. After the wife separated from her husband, she was diagnosed with a psychological disorder that interferes with her ability to understand and make decisions based upon your advice. She has instructed you to tell no one about this diagnosis. Your client has no separate assets, and there is a substantial marital estate. Your client tells you that she wants to settle the proceeding in a manner where she receives no assets or maintenance. You believe that a court would never enter such an order after trial or approve such a settlement upon conscionability review, but if the court did so the result would be the impoverishment of your client.

Maintaining a Normal Client Relationship

Colo. RPC 1.14 contains only one mandatory obligation: "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client–lawyer relationship with the client." Colo. RPC 1.14(a); *accord Restatement (Third) of the Law Governing Lawyers* § 24(1) (2000) (*Restatement*).

Unlike the discretionary actions permitted under Rule 1.14(b), once the lawyer forms a reasonable belief that the client has diminished capacity, Rule 1.14(a) requires that the lawyer maintain a normal relationship with the client insofar as reasonably possible notwithstanding the client's diminished capacity. The fact that the client suffers from a lack of capacity does not lessen the lawyer's obligation to treat the client with attention and respect. Colo. RPC 1.14, cmt. [2]. This is so even if a guardian or other representative has been appointed for the client and the guardian or other representative is the legal decision-maker with regard to the representation. The lawyer representing a client with diminished capacity should continue to accord the client attention and respect; attempt to communicate and discuss relevant matters with the client; and continue, as far as reasonably possible, to take action consistent with the client's directions and decisions. *See, e.g.*, American Bar Ass'n (ABA) Comm. on Ethics and Prof. Resp. Formal Op. 96-404, "Client Under a Disability" (1996) (ABA Op. 96-404); Or. State Bar Formal Ethics Op. 2005-159, "Competence and Diligence: Requesting a Guardian Ad Litem in a Juvenile Dependency Case" (2005) (Or. Op. 2005-159) (although a client who has become incompetent to handle his own affairs can be difficult to represent, a lawyer must maintain as regular a lawyer–client relationship as possible and must adjust the representation to accommodate the client's limited capacity); *In re Flack*, 272 Kan. 465, 33 P.3d 1281, (2001) (lawyer who knew that client was impaired had a duty to maintain a normal client–lawyer relationship with client, including a duty to abide by her estate planning objectives as far as reasonably possible).

Rule 1.14 recognizes that (a) "the normal client–lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters," (b) when the client suffers from a diminished mental capacity, maintaining the normal client–lawyer relationship may not be possible "in all respects," and (c) that a client suffering from diminished capacity "often has the ability to understand and deliberate upon, and reach conclusions about matters affecting the client's own well-being." Colo. RPC 1.14, cmt. [1]. Although Rule 1.14(b) creates a narrow exception to the normal responsibilities of a lawyer to his or her client—permitting the lawyer to take action that by its very

nature could be regarded as "adverse" to the client—it does not otherwise diminish the lawyer's responsibilities to the client and certainly does not abrogate the client–lawyer relationship. *See, e.g.*, *In re Laprath*, 2003 S.D. 114, 670 N.W.2d 41 (2003) (Rule 1.14 did not authorize lawyer to represent third party in seeking to have court appoint guardian for his client). The duty to maintain a normal client–lawyer relationship precludes a lawyer from acting solely as an arm of the court, using the lawyer's assessment of the "best interests" of the client to justify waiving the client's rights without consultation, divulging the client's confidences, disregarding the client's wishes, or presenting evidence against the client. *E.g.*, *In re Lee*, 132 Md.App. 696, 754 A.2d 426 (2000)*; In re Guardianship of Henderson*, 150 N.H. 349, 838 A.2d 1277 (2003*)* (the duty to maintain a normal client–lawyer relationship with the client requires lawyer to represent and advocate the client's interests and avoid assuming the role of guardian *ad litem*).

Assessing the Client's Capacity

Colo. RPC 1.14 does not define "capacity," but, in the context of stating a lawyer's ethical duties in representing a client with diminished capacity, Rule 1.14(a) refers to the pertinent capacity as the client's "capacity to make adequately considered decisions in connection with a representation." Thus, the lawyer should not confuse what may appear to be a client's imprudent or ill-considered decisions with decisions made by the client *because* of a diminished capacity. A client's poor judgment does not warrant protective action under Rule 1.14(b). ABA Op. 96-404 ("Rule 1.14(b) does not authorize the lawyer to take protective action because the client is not acting in what the lawyer believes to be the client's best interest"); Rest. § 24 cmt. [c] (lawyer should not construe as proof of disability a client's insistence upon view of client's welfare that lawyer considers unwise or at variance with lawyer's views). In the transactional scenario described above, where the lawyer is concerned about the client's mental state—about her capacity to make adequately considered decisions about her estate—the lawyer can discuss those concerns with the client alone and away from the client's children. The lawyer also can recommend that the client obtain a doctor's written opinion about her mental abilities, which the lawyer can retain in the client's file as evidence of the client's capacity at or near the time of her execution of estate planning documents.

A client may have the capacity to make adequately considered decisions about some aspects of the representation yet have a diminished capacity to do so with respect to other aspects. The degree of capacity required of the client to make adequately considered decisions concerning the scope and objectives of the representation, including giving informed consent to proposed actions, necessarily will depend upon the complexity of the factual and legal issues involved in those decisions. Consequently, the lawyer should assess the capacity of the client, and determine if the client suffers from diminished capacity, in the context of those complexities. In the litigation scenario described above, the lawyer already is aware that the client has a diagnosis of a psychiatric disorder but should still apply his or her best judgment about the extent to which the client can continue to participate in the decisions that must be made in the course of her representation. If the lawyer reasonably believes that the client is unable to act in her own interests, the lawyer should consider seeking the appointment of a guardian *ad litem*. *See In re Marriage of Sorensen*, 166 P. 3d 254 (Colo.App. 2007) (Rule 1.14 permits attorney to seek appointment of guardian *ad litem* when attorney reasonably believes the client is unable to act in his or her own interests).

The lawyer's assessment of a client's capacity also is important when the lawyer initiates representation of the client. A client–lawyer relationship is a matter of contract, and the client's capacity to contract is a legal issue. If the lawyer becomes aware during the first meeting with a prospective client that the prospective client may not have the capacity to enter into an agreement to form the client–lawyer relationship, the lawyer may consider other alternatives, including speaking to other appropriate persons. In that circumstance, the lawyer should consider the duties to a prospective client described in Colo. RPC 1.18. If the lawyer concludes that the prospective client lacks the capacity to enter into the client–lawyer relationship, the lawyer may wish to consider and discuss with the prospective client the establishment of a conservatorship or guardianship by a close relative or person whose interests are aligned with the prospective client in order to protect the prospective client's interests and facilitate representation of the prospective client.

In every situation where the client's capacity to participate in the decision-making process may be diminished, the lawyer must nonetheless endeavor, as far as reasonably possible, to maintain a normal client–lawyer relationship, including communicating and consulting with the client with regard to matters and issues involved in the representation. This may entail special efforts on the part of the lawyer to communicate in a manner that will allow the client to make those decisions concerning the representation that the client's capacity permits. A lawyer is not excused from the duty to communicate with the client simply because the client may suffer from diminished capacity. *See e.g.*, *State ex. rel. Nebraska State Bar Ass'n v. Walsh*, 206 Neb. 737, 294 N.W.2d 873 (1980) (lawyer disciplined for failure to sufficiently explain to deaf mute client the nature of workman's compensation claim and proceedings and necessity of appeal); *In re Brantley*, 260 Kan. 605, 920 P.2d 433 (1996) (lawyer disciplined for failure to adequately communicate with client believed to have diminished capacity); Or. Op. 2005-159 (lawyer should "examine whether the client can give direction on decisions that the lawyer must ethically defer to the client").

Rule 1.14 does not attempt to identify or enumerate the causes or conditions that may result in a client's diminished capacity, other than to explain that the diminishment may be because of "minority [or] mental impairment" or may be "for some other reason." Thus, the lawyer should consider and evaluate any condition that limits or interferes with the client's decision-making capacity, in order to determine whether the condition is such that the client lacks the capacity to make adequately considered decisions regarding the representation within the meaning of the rule.

Comment [6] to Rule 1.14 enumerates several factors the lawyer should consider in assessing the diminishment of a client's capacity:

> the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client.

Comment [6] adds that "[i]n appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician."[2] ABA Opinion 96-404 observes:

> If a lawyer is unable to assess his client's ability to act or if the lawyer has doubts about the client's ability, Comment [5] [now Comment [6]] to Rule 1.14 suggests it is appropriate for the lawyer to seek guidance from an appropriate diagnostician, particularly when a disclosure of the client's condition to the court or opposing parties could have adverse consequences for the client. Such discussion of a client's condition with a diagnostician does not violate Rule 1.6 (Confidentiality of Information), insofar as it is necessary to carry out the representation. See ABA Informal Opinion 89-1530. For instance, if the client is in the midst of litigation, the lawyer should be able to disclose such information as is necessary to obtain an assessment of the client's capacity in order to determine whether the representation can continue in its present fashion.

The ABA opinion cautions, however, that the lawyer must be careful to limit the disclosure to information that is pertinent to the assessment of the client's capacity and determination of the appropriate protective action, noting that "this narrow exception in Rule 1.6 does not permit the lawyer to disclose generally information relating to the representation."

Thus, if necessary, the lawyer may seek information and assistance from others, such as the client's family members or appropriate diagnosticians, in assessing the client's capacity to make decisions relating to the representation. *See also* N.Y. City Bar Ass'n Formal Op. 1997-2 (1997) (in forming conclusions about the client's capacity, lawyer must take into account not only information and impressions derived from lawyer's communications with client, but also other relevant information that may reasonably be obtained from other sources, and lawyer also may seek guidance from other professionals and concerned parties); State Bar of N.D. Ethics Comm. Op. 00-06 (2000) (lawyer who believes that divorce client will accept offer contrary to her best interests to avoid disclosing her substance abuse problem must determine if client is able to consider her decision adequately; lawyer may consult with professional to determine nature and extent of client's disability); Pa. Bar Ass'n Legal Ethics and Prof. Resp. Comm., Formal Op. 87-214 (1988)

(lawyer who reasonably believes that client cannot handle her financial affairs and health care needs may seek court appointment of physician to report to court on threshold issue of client's competence). *See generally*, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (ABA Comm'n on Law and Aging and the Am. Psycholog. Ass'n 2005).

The lawyer must ensure that any information that the lawyer discloses in the process of assessing the client's capacity will not be used in a manner that is adverse to the client's best interests. Thus, the lawyer should not disclose client information to persons whose interests are adverse or potentially adverse to those of the client.

Taking Protective Action

As indicated above, Rule 1.14(b) leaves to the lawyer's discretion whether or not to take protective action to protect the client's interests. However, the Rule establishes three predicates for such protective action. The lawyer must "reasonably believe" that the client (1) has diminished capacity, (2) is at risk of substantial physical, financial or other harm unless protective action is taken, and (3) cannot adequately act in the client's own interest.

Under Rule 1.0(i), a "reasonable belief" means that the lawyer "believes the matter in question" and that "the circumstances are such that the belief is reasonable." Thus, while leaving to the lawyer's discretion whether or not to take protective action, Rule 1.14(b) establishes the three conditions precedent enumerated above, to taking protective action, and each of those preconditions must satisfy the objective standard of "reasonable belief" by the lawyer.

In addition to the lawyer's obligation under Rule 1.14(a) to endeavor to maintain a normal client–lawyer relationship with the client suffering from diminished capacity, and the requirements of Rule 1.14(b) for undertaking any protective action, the lawyer should consult with and inform the client with regard to the nature and extent of any protective action the lawyer intends to undertake, providing the client with the lawyer's considerations and reasoning in deciding to take that action. In doing so, the lawyer should consider and respect the client's desires and values and should attempt to obtain the client's understanding of the need for the contemplated protective action to protect the client's interests. In the litigation scenario, for instance, the lawyer may have to advise the client that the lawyer believes the symptoms relating to her diagnosis may affect her decision-making and that the lawyer is considering alternatives relating to that situation. Those alternatives might include the appointment of a guardian *ad litem* to protect the client's interests in the marital estate and to participate in other decisions arising in the course of the proceedings. In such event, before taking such action, the lawyer should explain and discuss with the client the lawyer's reasons and considerations in proposing such action and describe and explain what steps would be taken in effecting such action. If the client opposes or objects to the proposed protective action and such opposition and objections cannot be resolved, the lawyer should consider whether withdrawal from representation is required.

Reasonably Necessary Action

Under Rule 1.14(b), protective action taken by the lawyer must be "reasonably" necessary to protect the client's interests. The nature and extent of the protective action depends upon the nature and extent of the client's diminished capacity to make adequately considered decisions and the complexity of the decisions needed to be made. The lawyer should be guided by "the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections." Colo. RPC 1.14, cmt. [5]. *See also* ABA Op. 96-404; Vt. Bar Ass'n Advisory Ethics Op. 2006-1 (2006); Conn. Bar Ass'n Prof. Ethics Comm. Informal Op. 04-10 (2004).

If the client's diminished capacity appears to be mild and the client is merely tentative or hesitant in making decisions, the lawyer should provide advice in the simplest terms possible, and, if necessary, in repetitive fashion, providing the client the time to review and digest the advice and the suggested alternatives. In the transactional scenario, for instance, the lawyer may want to advise the client that

changing her estate planning documents so quickly depending on which child brought her to the lawyer's office lays a foundation for costly litigation between her children down the road. The lawyer may want to discuss with the client the alternative of resolving family issues about the family's estate through mediation. Providing the client with written advice and alternatives may assist the client in reaching appropriate decisions.

The principle of informed consent that underlies client autonomy normally requires the lawyer to refrain from overly suggestive advice which, due to the lawyer's perceived superior status, may encroach on client autonomy and could lead to a paternalistic relationship. *See* Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 *Utah L.Rev.* 515, 527 (1987). But the client may simply not possess the mental dexterity to make quick decisions, particularly while under a degree of pressure. In such cases the lawyer should provide the client with an opportunity and time to reconsider decisions that were initially made on short notice, preserving the client's autonomy in reaching the final decisions.

When the client needs assistance in making adequately considered decisions regarding the representation, the lawyer may find it useful and appropriate to involve persons whose natural interests are congruent with those of the client, such as trusted family members who may be in a position to help the client make decisions. In the litigation scenario, the lawyer may confer with the client, who is concerned about disclosure of her diagnosis of a psychological disorder, to determine whether there may be trusted friends or family members, perhaps those who are already helping her in other ways, who could also help her make decisions in the divorce litigation.

If another person becomes involved to assist the client in making the necessary decisions, then, to protect the attorney–client privilege, the lawyer's consultation with that person should preferably take place out of the client's presence, with the lawyer keeping the client separately informed about the consultation. However, the client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons might not vitiate the attorney–client privilege but the lawyer should take care to avoid an unintended waiver of the privilege.

The application and impairment of the attorney–client privilege is beyond the scope of this opinion. However, Comment [3] to Rule 1.14 states: "The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney–client evidentiary privilege." *See also Restatement* § 70 (the evidentiary privilege is retained when a "person's participation is reasonably necessary to facilitate the client's communication with a lawyer, and if the client reasonably believes that the person will hold the communication in confidence").

The lawyer may consider a client's previously executed power of attorney or other grant of agency, which appointed an individual as an agent for the client with authority to make decisions for the client in areas relating to the representation. Before the lawyer relies on decisions of the agent under the client's previous grant of agency, the lawyer must be satisfied that the client had the ability to understand the import of that grant at the time the client made it.

The lawyer for the client with diminished capacity should become familiar with social agencies or support groups that may be able to provide assistance to the client in making decisions with respect to matters within their areas of service, and should be prepared to advise the client regarding their services.

In more severe cases of diminishment, the lawyer should consider and advise the client regarding the appointment of a guardian *ad litem* who may have special knowledge and experience in the subject matter involved in the representation to act on behalf of the client in certain areas of the decision-making process, such as determining or changing the objectives of representation or settlement. The appointment of a conservator or special conservator with authority to deal with the client's property to the extent needed in the representation may be proper and may be required by other parties to the transaction or litigation under the circumstances. Under Rule 1.14(b), the lawyer for a client with diminished capacity may seek the appointment of a guardian to protect the client's interests if there is no less drastic alternative. ABA Op. 96-104 (appointment of guardian is a "serious deprivation of the client's rights and ought not to be undertaken

if other, less drastic, solutions are available"); Or. Op. 2005-159 (lawyers should seek appointment of guardians only when client "consistently demonstrates lack of capacity to act in his or her own interests and is unlikely to assist in the proceedings").

A lawyer should not seek to be appointed as the client's guardian, "except in the most exigent of circumstances, that is, where immediate and irreparable harm will result from the slightest delay, and even then, only on a temporary basis." ABA Op. 96-404; *accord, In re Laprath*, 670 N.W. 2d at 51. Moreover, the lawyer should not represent a third party petitioning for the appointment of a guardian for the lawyer's client. ABA Op. 96-404; *accord*, *In re Wyatt*, 982 A.2d 396 (N.H. 2009); Mass Bar Ass'n Ethics Op. 05-5 (2005) (lawyer may not represent client's son seeking appointment as client's guardian); Va. Legal Ethics Op. 1769 (2003) (legal aid lawyer may not represent daughter seeking appointment of guardian for elderly mother represented by same office in unrelated matter but may seek appointment of guardian if warranted under Rule 1.14). *See also* S.C. Bar Ethics Advisory Op. 06-06 (2006) (law firm may petition court for appointment of conservator and/or guardian for impaired client, but may not represent client's daughter in proceeding to have daughter named as such unless she is already acting as client's representative). *But see* R.I. Supreme Court Ethics Advisory Panel Op. 2004-1 (2004) (lawyer may represent party seeking appointment as guardian over elderly client if lawyer "reasonably believes that a guardianship is in the elderly client's best interest").

Disclosure of Client Information

Rule 1.14(c) is discretionary. It permits the lawyer, when taking protective action pursuant to Rule 1.14(b), to disclose information relating to the representation that Rule 1.6 would require be maintained in confidence absent the client's informed consent to disclosure: "When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests." Correspondingly, Rule 1.6(a) provides: "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 [Rule 1.6(b)]." (Emphasis supplied.)

Thus, while Rule 1.14(b) provides that reasonably necessary protective action may include "consulting with individuals or entities that have the ability to take action to protect the client . . . ," Rule 1.14(c) limits such a disclosure to what is reasonably necessary to protect the client's interests.

Comment [8] to Rule 1.14 observes that disclosure of the client's diminished capacity could itself adversely affect the client's interests, including, at its extreme, by resulting in proceedings for involuntary commitment of the client. The lawyer must take care to ensure that information disclosed for the purpose of protecting the client's interests is not used against the client's interests. This is particularly tricky in the litigation scenario, where the client's diagnosed psychiatric disorder interferes with her ability to understand the lawyer's advice and disclosure of information concerning the diagnosis could be used to the client's detriment in other issues in the divorce proceedings.

The lawyer must consider whether persons to whom disclosure is proposed have potential conflicting interests with the client's interests that might lead to further disclosure or to use of the information to the client's detriment. The lawyer may wish to consider whether to require confidentiality agreements or similar commitments, or the lawyer's written consent to further disclosure, before making the lawyer's disclosure.

In disclosing information relating to a client with diminished capacity, the lawyer needs to be keenly aware of the limitations. The disclosure must be required in taking reasonably necessary protective action and reasonably necessary to protect the client's interests. Rule 1.0(h) defines the terms "reasonable" and "reasonably," "when used in relation to conduct by a lawyer" in the Rules, as "denot[ing] the conduct of a reasonably prudent and competent lawyer."

Accordingly, a lawyer taking protective action must exercise the care that a reasonably prudent and competent lawyer would exercise with regard to what information is disclosed, to whom it is disclosed, and the possible uses of the information by persons to whom it is disclosed or by others who may learn of it.

The lawyer for the client with diminished capacity should first seek the client's informed consent to disclosure of information in the course of protective action and should explain to the client the information to be disclosed and the lawyer's reasons for seeking permission to disclose such information. If the client refuses to consent to disclosure or objects to disclosure, the lawyer should give respect and consideration to the client's objections and should make reasonable efforts to assuage the client's concerns in order to obtain the client's informed consent.

This opinion has suggested that the lawyer, acting reasonably prudently and competently, might consider seeking the appointment of a guardian *ad litem* or other fiduciary to protect the interests of the client with a diminished capacity, although the lawyer should avoid seeking such an appointment if less drastic action will suffice. Comment [8] to Rule 1.14 states, in part: "When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, *even when the client directs the lawyer to the contrary*." (Emphasis supplied.) As previously noted, both Rule 1.6(a) and Rule 1.14(c) refer to the lawyer's implied authority to disclose information relating to the representation.

Normally, the law of agency dictates that an agent's implied authority terminates when it is expressly withdrawn or terminated by the principal. Restatement (Third) of Agency, § 3.06. Consequently, when the lawyer takes protective action pursuant to Rule 1.14(b) over the client's objections, the lawyer should exercise his or her authority to disclose information relating to the representation of the client with an especially high degree of care and caution. *See, e.g., Sturdza v. United Arab Emirates,* 644 F.Supp.2d 50 (D.D.C. 2009) (lawyer sought the appointment of a guardian *ad litem* over the objections of client). If the court finds the client competent to register an objection to the lawyer's conduct, the client's objections might be found to constitute an effective termination of the lawyer's representation.

Termination of Representation

When a client with a diminished capacity to make adequately considered decisions about the representation objects to the lawyer's disclosure of information that the lawyer believes to be necessary in order to protect the client's interests, the lawyer must assess whether an irreconcilable difference impairs the client–lawyer relationship, preventing the lawyer from effectively and competently representing the client. In such an instance, the lawyer must assess whether continued representation of the client would present a conflict requiring the lawyer's withdrawal pursuant to Rule 1.7(a)(2), precluding a representation if there is a significant risk that the representation will be materially limited by the lawyer's personal interest, in combination with Rule 1.16(a), requiring termination of a representation if continuation would result in violation of the Rules of Professional Conduct, *i.e.*, in this case, Rule 1.7(a)(2).

If the lawyer seeks protective action contrary to the directions of the client, then the lawyer's interests are probably adverse to those of the client, and the lawyer cannot represent the client in the protective proceedings—and possibly not thereafter in the underlying representation. The lawyer may be required to withdraw from representation. Rule 1.14 may thus place the lawyer in the dual positions of having to encroach on client autonomy while also having to withdraw, leaving the client unrepresented at a critical time. If the client is incapacitated (as opposed to suffering diminished capacity), the client may even be unable to form a client–lawyer relationship with a new lawyer to take over the underlying representation. The lawyer should consider such impacts and consequences prior to seeking the protective action that may engender them. The lawyer should be acutely aware of the potential consequences of taking protective action over the client's objections.

In the litigation scenario, for instance, if the lawyer believes protective action is necessary to protect the client's best interests and that the client cannot adequately act in her own best interests or otherwise participate in the litigation, the lawyer may have a conflict of interest with the client, if the client has stated that she does not want her psychiatric disorder disclosed. In that circumstance, the lawyer may have no choice other than to withdraw due to the lawyer's inability to adequately represent the client's interests. Such a dilemma, combined with the other issues of limits on disclosure and whether withdrawal

would leave the client in jeopardy of substantial financial harm, render difficult the determination as to a proper course of action under Rule 1.14, when the lawyer reasonably perceives a diminished capacity in the client.

The lawyer should be aware that withdrawal from representation due to taking actions adverse to the client's perceived interest or in contradiction of the client's direction can be a two-edged sword. While the rules may dictate withdrawal, the lawyer also may be leaving a client with diminished capacity without effective representation from the lawyer most likely to have knowledge of the client's positions, intentions, and interests, while leaving the client unable to retain new legal counsel due to the client's diminished capacity. The lawyer may consider petitioning the court for appointment of a guardian *ad litem* under such circumstances.

Disagreements between the lawyer and a client with diminished capacity about disclosure of information relating to the client's mental or physical condition that contributes to or causes the client's diminished capacity or about the nature or extent of protective action to be taken by the lawyer may lead to the client's discharge of the lawyer from the representation. Rule 1.16(a)(3) provides that a lawyer shall not represent a client after the client has discharged the lawyer. Comment [6] to Rule 1.16 notes that a client with severely diminished capacity "may lack the legal capacity" to discharge the lawyer and points out that the lawyer's discharge may be "seriously adverse" to the client's interests. Comment [6] suggests that in such case the lawyer should "make special effort to help the client consider the consequences" and that the lawyer may take reasonably necessary protective action as provided in Rule 1.14. Moreover, Comment [4] to Colo. RPC 1.2, dealing with the allocation of authority between client and lawyer, states, "In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14." Thus, the considerations discussed above relating to the client's capacity to make adequately considered decisions relating to the representation, and whether the lawyer should take reasonable action necessary to protect the client from substantial physical, financial or other harm, apply equally to the client's decision to discharge the lawyer.

NOTES

1. "Protective proceedings" refers generally to guardianship and conservatorship actions. The term stems from the title of the Uniform Guardianship and Protective Proceedings Act, CRS §§ 15-14-101 *et seq.* The term also appears in the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, CRS §§ 15-14.5-101 *et seq.* The latter Act defines "protective proceedings" as "a judicial proceeding in which a protective order is sought or has been issued." CRS § 15-14.5-102 (11).

2. *See In re Brantley*, 920 P.2d 433 (lawyer violated Rule 1.14 when he failed to personally meet with client to assess her state of mind or understanding of financial affairs prior to filing a petition to establish a voluntary conservatorship for client). *See also* Ind. Ethics Op. 2-2001 (2001) (failure to ascertain client's physical and mental condition and evaluate client's capacity violates Rule 1.14); Or. Op. 2005-159 lawyer should "examine whether the client can give directions that the lawyer must ethically defer to the client").

127 USE OF SOCIAL MEDIA FOR INVESTIGATIVE PURPOSES

Adopted September 2015.

Introduction

As various forms of social media have become commonplace, lawyers increasingly utilize social media and social networks as investigative tools. Various social media such as Facebook, Twitter, LinkedIn, and YouTube are potential treasure troves of information concerning opposing parties, witnesses, jurors, opposing counsel, and judges. Use of social media to obtain information in the course of representing clients implicates a number of ethical issues. In many respects, the ethical issues involved in conducting investigations through social media are neither novel nor unique. The Colorado Bar Association Ethics Committee (Committee) recognizes, however, that various jurisdictions and bar associations have expressed differing views about the application of established ethical principles to some aspects of the rapidly-evolving world of investigation through social media. As social media continue to change, and new forms of social media are developed, lawyers should seek guidance from the principles discussed in this opinion and the provisions of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) referenced herein.

This opinion addresses ethical issues that arise when lawyers, either directly or indirectly, use social media to obtain information regarding witnesses, jurors, opposing parties, opposing counsel, and judges. The opinion also addresses circumstances in which lawyers seek to access restricted portions of a person's social media profile or website that ordinarily may be viewed only by permission.

This opinion does not address a lawyer's use of social media for marketing or for disseminating information. This opinion also does not address the extent to which lawyers may have to become familiar with or utilize social media to comply with the applicable standard of care or the ethical obligation to provide competent representation to clients.

Syllabus

A lawyer may always view the public portion of a person's social media profile and any public posts made by a person through social media. A lawyer acting on behalf of a client may request permission to view a restricted portion of a social media profile or website of an unrepresented party or unrepresented witness only after the lawyer identifies himself or herself as a lawyer, and discloses the general nature of the matter in which the lawyer represents the client. A lawyer acting on behalf of a client may not request permission to view a restricted portion of a social media profile or website of a person the lawyer knows to be represented by counsel in that same matter, without obtaining consent from that counsel. When requesting or obtaining information from a third person who has access to restricted portions of a social media profile or website of a party or witness, a lawyer is subject to the same standards as when requesting any other information in the hands of a third person. A lawyer may not request permission to view a restricted portion of a social media profile or website of a judge while the judge is presiding over a case in which the lawyer is involved as counsel or as a party, nor may a lawyer seek to communicate *ex parte* with a judge through social media concerning a matter or issue pending before the judge. A lawyer may not request permission to view a restricted portion of a social media profile or website of a prospective or sitting juror. A lawyer must never use any form of deception to gain access to a restricted portion of a social media profile or website. Finally, a lawyer may not avoid prohibitions relating to the use of social media for investigative purposes by delegating investigative tasks to others.

Analysis

The Internet has become indispensable for lawyers in the twenty-first century for, among other things, marketing, conducting investigations and legal research, and obtaining general information in connection with the practice of law. Social media are among the many tools available to lawyers for these purposes. Social networks have been defined as follows:

> [I]nternet-based communities that individuals use to communicate with each other and view and exchange information, including photographs, digital recordings, and files. Users create a profile page with personal information that other users may access online. Users may establish the level of privacy they wish to employ and may limit those who view their profile page to "friends"—those who have specifically sent a computerized request to view their profile page which the user has accepted.[1]

The capabilities, features and security measures available to users of social media are in a constant state of flux. As social media and social networks evolve, ethical issues undoubtedly will arise that will have to be analyzed on a case-by-case basis. Lawyers utilizing social media in the practice of law should stay reasonably informed of these changes and how they may impact their ethical obligations.[2]

I. Accessing the Public Portion of a Person's Social Media Profile and Public Posts Made by a Person in Social Media

Individuals cannot control all of the information, observations, or opinions posted about them on the Internet, including through social media. To the extent they decide to establish their own social media presence, however, individuals generally have some degree of control over the information included. Depending upon the type of social media utilized and the privacy settings available, individuals may exercise some control over the people, or class of people, to whom certain information is available. Some information posted by a person through social media is available to anyone, or almost anyone, who has Internet access. Other information is accessible only to those granted specific permission by the individual who created the profile.

For purposes of this opinion, the *public portion* of a person's social media profile or webpage refers to the information posted by an individual through some form of social media that is available to and viewable by anyone with access to the Internet or at least by anyone who subscribes to, or is a member of, the larger social network through which the information is posted. For purposes of this opinion, the *restricted portion* of a person's social media profile or website refers to information or portions of the profile accessible to and viewable by only those receiving specific permission from the person who established the profile or posted the information.

Bar association ethics committees that have addressed this issue generally agree that lawyers may view any information publicly posted by a witness, or included on the public portion of that person's social media profile.[3] Such information is treated no differently from any other publicly available information or public record. The Committee believes that the same rule applies to the public portion of a social media profile or posting established by any other individual, including an opposing party, opposing counsel, a judge before whom the lawyer is appearing, or a juror. The Committee concludes that simply viewing the public portion of a person's social media profile or any public posting made by an individual does not constitute a "communication" with that person. Therefore, the lawyer's conduct in viewing such material does not implicate any of the restrictions upon communications between a lawyer and certain others involved in the legal system. Similarly, a lawyer may iew or utilize information to which the lawyer already has access through the lawyer's social media connections.

Several provisions of the Rules prohibit or limit communications between a lawyer and various types of individuals involved in the legal system. Colo. RPC 3.5(b) prohibits *ex parte* communications between a lawyer and a judge, juror, prospective juror, or other official by means prohibited by law. Colo. RPC 4.2 prohibits a lawyer who represents a client from communicating about the subject matter of the representation with a person the lawyer knows to be represented by another lawyer in the same matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. Colo. RPC 4.3 restricts communications between a lawyer who represents a client and a person who is *not* represented by counsel. The Committee believes that these rules are not implicated when a lawyer reviews or attempts to review the public portion of social media profiles of any of the classes of persons identified in Rules 3.5, 4.2, and 4.3, because the lawyer's actions in such circumstances do not constitute a form of communication with the individual.

In expressing this opinion, the Committee realizes that some social media networks automatically notify a person when someone views his or her profile. In these circumstances, the person whose profile is viewed may also receive information concerning the individual who viewed the profile. Some bar association committees have opined that it is proper for a lawyer to view a juror's social media profile *only* so long as the juror remains unaware that such investigation is occurring.[4] The American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility expressed its disagreement with this view, reasoning that in such circumstances, the lawyer is not communicating with the juror. Rather, the social media service is communicating with the juror based on a technical feature of the particular social media, consistent with agreements between the provider and the subscriber.[5] The Committee agrees with the ABA's view in this regard. Moreover, the Committee believes that the same logic applies when a lawyer views the public portion of a social media profile or posting of a judge or a person the lawyer knows to be represented by counsel. Judges who maintain a presence on social media should expect that attorneys and parties appearing before them will view the public portion of the judge's profile. Similarly, lawyers should advise their clients to expect opposing counsel or their agents to view the public portions of their social media profiles.

There may be circumstances in which a lawyer might take improper advantage of the fact that a particular individual will receive automatic notification that the lawyer or someone on the lawyer's behalf viewed the individual's social media profile. Colo. RPC 4.4(a) provides that in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person. A lawyer who engages in repetitive viewing of an individual's social media profile could potentially violate Colo. RPC 4.4(a) if if the lawyer knew the other person would receive notice each time the lawyer viewed the profile, the lawyer had no other legitimate purpose for the repetitive viewing, and the repetitive viewing rose to the level of harassment or intimidation. To constitute a violation of the Rules, this would have to be an extreme situation, and it would be an exception to the general opinion expressed herein.

II. The Use of Deception to Gain Access to a Restricted Portion of a Social Media Profile or Website

In most respects, conducting investigations or discovery through social media is no different than performing these tasks by any other means. In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person or 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 Colo. RPC 1.6. *See* Colo. RPC 4.1. It also is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Colo. RPC 8.4(c). Given these clear provisions of the Rules, a lawyer must never use deception to gain access to a restricted portion of a social media profile or website. This prohibition includes "pretexting" and other forms of trickery through which the person seeking access to a restricted portion of a social media profile pretends to be someone other than himself or herself. As stated in an article in the Colorado Supreme Court Attorney Regulation Counsel Newsletter, "donning an alias and 'friending' someone on Facebook to gain access to restricted information is prohibited."[6]

Engaging in any form of deception to gain access to the restricted portion of a person's social media profile violates Colo. RPC 8.4(c), and also violates Colo. RPC 4.1 if the lawyer's actions occur during the representation of a client. This type of conduct also may violate Colo. RPC 4.3, which provides that in dealing on behalf of a client with a person who is not represented by counsel, the lawyer shall not state or imply that the lawyer is disinterested. A lawyer assuming a false identity in seeking access to information from a restricted portion of a social media website in a client matter may imply to the person from whom information is sought that the lawyer is a disinterested person. This would create a false impression if the lawyer is actually seeking information from the third party in connection with a client matter.

No exception in the Rules permits a lawyer to employ deception or subterfuge to gain access to restricted information through social media. In *In Re Pautler*, 47 P.3d 1175 (Colo. 2002), the Colorado Supreme Court clarified that deceitful conduct by a lawyer is never justified, even in exigent circumstances. In *Pautler*, a deputy district attorney posed as a public defender in order to convince a murder suspect to turn himself in to law enforcement authorities. The attorney believed he was protecting the public through

his actions because the suspect already had confessed to multiple killings and was still at large. In the course of affirming the discipline imposed on Mr. Pautler, the Court clarified that lawyers "must adhere to the highest moral and ethical standards, even in circumstances in which they believe that lying serves the public interest."[7]

Lawyers also may not circumvent the prohibition against seeking information through social media by means of deception by delegating investigative tasks to another person. Pursuant to Colo. RPC 8.4(a), it is professional misconduct for a lawyer to "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." A lawyer having direct supervisory authority over another lawyer must make reasonable efforts to ensure that the other lawyer's conduct conforms to the Rules. Colo. RPC 5.1(b). Rule 5.1(c) also makes a lawyer responsible for another lawyer's violation of the Rules if the lawyer orders or, with knowledge of specific conduct, ratifies the conduct involved; or the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action. Colo. RPC 5.3 sets forth similar obligations and establishes similar responsibility with respect to non-lawyers employed, retained by, or associated with a lawyer.

Whenever a lawyer employs the services of a subordinate lawyer or a nonlawyer in seeking information through social media, the lawyer must make reasonable efforts to ensure that the person understands the ethical obligations of the lawyer in seeking such information, and complies with those obligations. Subordinate lawyers and nonlawyers performing services for the lawyer must be instructed that they are prohibited from using deception to gain access to a restricted portion of a social media profile or website.

III. Requesting Permission to View a Restricted Portion of a Social Media Profile or Website of an Unrepresented Party or Witness

Viewing a restricted portion of a social media profile generally requires some form of communication with the person who established the profile. Through this communication, the person seeking access communicates a request that may be accepted, rejected, or simply ignored. There is no difference under the Rules between interviewing a person and communicating with that person through social media. Bar association ethics committees and commentators differ regarding the information lawyers must include when requesting access to a restricted portion of a social media profile or website of an unrepresented party or witness. Both the New York City Bar Association Committee on Professional Ethics and the Commercial and Federal Litigation Section of the New York State Bar Association have opined that an attorney or the attorney's agent may use his or her real name and profile to send a "friend request" to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request.[8] The Oregon State Bar expressed a similar opinion, with the caveat that if the account holder from whom access is requested asks for additional information from the requesting lawyer, or if the lawyer has some other reason to believe that the person misunderstands the lawyer's role, the lawyer must either must provide additional information and not state or imply that the lawyer is disinterested, or the lawyer must withdraw the request.[9]

On the other hand, the New Hampshire Bar Association Ethics Committee opined that a lawyer's request for access to a restricted portion of a social media profile that discloses the lawyer's name, but not the lawyer's identity and role in pending litigation, is generally improper because it omits material information.[10] Although the New Hampshire opinion cited as authority for this conclusion a 2009 Philadelphia Bar Association Professional Guidance Committee opinion, the Philadelphia opinion does not deal directly with the issue of a lawyer seeking access to a restricted portion of a social media profile in the lawyer's own name. Instead, it addresses the propriety of having another person seek access, whose name would not be recognized or associated with the lawyer. The Philadelphia opinion concluded that such conduct would violate Pennsylvania ethics rules that are substantially identical to Colo. RPC 4.1, 8.4(a), and 8.4(c), and would possibly violate the Pennsylvania equivalent of Colo. RPC 4.3 (pertaining to dealing with an unrepresented person).[11]

This Committee generally agrees with the New Hampshire opinion. A lawyer who represents a client and requests access to the restricted portion of a social media profile established by an unrepresented party or witness implies that he or she is disinterested if disclosure includes the fact that he or she is a lawyer, but does not include additional information. In regard to communications with unrepresented persons in general, Comment [1] to Colo. RPC 4.3 provides in part:

> An unrepresented person, particularly when not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, the lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person.

A person who is a witness or an unrepresented party may not recognize the lawyer by name. A witness may not even be aware of the existence of an ongoing legal dispute or of pending litigation. A person receiving a "friend request" from a lawyer or an agent of a lawyer under these circumstances may be inclined to allow access based upon false assumptions. Other individuals may be more suspicious or protective by nature. In any event, lawyers and their agents must provide sufficient disclosure to allow the unrepresented person to make an informed decision concerning whether to grant access to restricted portions of a social media profile. This means (1) providing the name of the lawyer requesting access or for whom the requesting person is acting as an agent, (2) disclosing that the lawyer is acting on behalf of a client, and (3) disclosing the general nature of the matter in connection with which the lawyer is seeking information. The lawyer also must identify the client if disclosure is necessary to avoid a misunderstanding regarding the lawyer's role. For example, a lawyer representing a party in a personal injury matter seeking access to a restricted portion of the profile of someone identified as a bystander witness would need to provide his or her real name, disclose that he or she is a lawyer, and state that the lawyer seeks access in connection with representation of a client in a personal injury matter in which this person has been identified as a witness. If the lawyer is seeking access to a restricted portion of the social media profile of an unrepresented party, the above-quoted comment to Colo. RPC 4.3 also suggests that the lawyer may have to explain that his or her client has interests opposed to those of the unrepresented party.

The Committee also agrees that an attorney violates the ethical duty not to deceive by requesting access to the restricted portion of an unrepresented person's social media profile without disclosing the reason for the request.[12] Some individuals may be willing to allow anyone access to the restricted portion of their social media profile. Other people, however, are more discerning in allowing access to the restricted portions of their profiles. In such cases, the true identity of the person seeking access to the profile and the other information discussed above would be material to the person's decision to grant or deny access. Accordingly, a lawyer's failure to include information concerning the lawyer's identity and the reasons for his or her request could be a misrepresentation by omission. In this regard, Comment [1] to Colo. RPC 4.1, which applies when a lawyer is representing a client, provides in pertinent part that "omissions or partially true but misleading statements can be the equivalent of affirmative false statements."

A lawyer's ethical obligations are different when seeking access to the restricted portion of a person's social media profile for reasons unrelated to either the representation of a client or a legal matter in which the lawyer is personally involved. When, for example, a lawyer seeks to "friend" another person on Facebook for purely social reasons or in connection with professional networking, the lawyer need not disclose the additional information required when doing so with respect to a client matter or a legal matter in which the lawyer is a party.

IV. Requesting Permission to View a Restricted Portion of a Social Media Profile of a Person the Lawyer Knows to be Represented by Counsel

In the course of representing a client, a lawyer may not request permission to view a restricted portion of a social media profile or website of a person the lawyer knows to be represented by another lawyer in that matter, without obtaining consent from that counsel. Colo. RPC 4.2 prohibits a lawyer, in representing a client, from communicating about the subject of the representation with a person the lawyer

knows to be represented by another in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. If a request for access to the represented person's social media profile is for the purpose of gaining information for use in the matter in which the lawyer represents a client, then the communication would be prohibited. On this issue, various bar association ethics committees and commentators appear to be substantially unanimous.[13]

As with other forms of prohibited conduct discussed in this opinion, a lawyer may not circumvent the prohibition against contacting a person the lawyer knows to be represented by counsel under the circumstances discussed above by utilizing the services of a third party, including a non-lawyer. Moreover, the prohibitions relating to communications with a person represented by counsel apply even if the represented person initiates or consents to the communication. *See* Colo. RPC 4.2, cmt. [3]. Accordingly, a lawyer representing a client in a matter must not accept a request to participate in a social media website from a person the lawyer knows to be represented by counsel in that matter. If the lawyer and the person represented by another lawyer are already part of the same limited social network, the lawyer should avoid posting communications relating to the representation might be viewed by the represented party.

V. Requesting Permission to View a Restricted Portion of a Social Media Profile or Website of a Prospective or Sitting Juror

Pursuant to Colo. RPC 3.5(a), a lawyer shall not seek to influence a juror or prospective juror by means prohibited by law. Pursuant to Colo. RPC 3.5(b), a lawyer shall not communicate *ex parte* with a juror or prospective juror during the proceeding unless authorized to do so by law or court order. As with witnesses and parties, requesting permission to view a restricted portion of a social media profile of a prospective or sitting juror involves a communication with that person. Without express authorization from the court, any form of communication with a prospective or sitting juror during the course of a legal proceeding would be an improper *ex parte* communication, whether a lawyer or someone else acting on the lawyer's behalf initiates the communication. The same prohibition would apply to communications through social media initiated by a juror. Essentially, communications between a lawyer and a juror through social media are no different than face-to-face communications or telephonic communications between a lawyer and a juror.

After a jury is discharged, the provisions of Colo. RPC 3.5(c) also would apply to communications through social media, just as with any other form of communication between a lawyer and a former juror. Rule 3.5(c) provides that a lawyer shall not communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;
(2) the juror has made known to the lawyer a desire not to communicate;
(3) the communication involves misrepresentation, coercion, duress or harassment; or
(4) the communication is intended to or is reasonably likely to demean, embarrass, or criticize the jurors or their verdicts.

Even if communication with a discharged juror is not otherwise prohibited, lawyers and those acting on their behalf must respect the desire of the juror not to talk with the lawyer and may not engage in improper conduct during any communications through social media. *See* Colo. RPC 3.5, cmt. [3].

VI. Requesting or Obtaining Information from a Person With Access to Restricted Portions of a Social Media Profile or Website of a Party or Witness

In some circumstances, lawyers or their agents do not have direct access to restricted portions of the social media profile of a party or witness, but may know a third person who does. The lawyer's ethical obligations when dealing with the third person on behalf of a client will partially depend on the status of the third person. Under no circumstances may the lawyer request that the third person make requests for new or additional information from a party or witness if the lawyer would be legally or ethically prohibited from requesting or obtaining it directly. Moreover, the lawyer may not request the third person to engage in

deceptive conduct to obtain access to new or additional information from a party or witness through social media. The analysis of such conduct would be the same as under Section II of this opinion.

The Committee believes that the use of social media in this scenario does not significantly alter the lawyer's ethical obligations. Even if the Committee assumes the lawyer is not otherwise prohibited from communicating with the third person, the lawyer must adhere to the same ethical standards that apply whenever the lawyer requests information from a third person who is not a client. A lawyer may advise a client concerning the client's legal rights to access a restricted portion of a social media profile or website. Also, consistent with Colo. RPC 4.2, a lawyer mayadvise a client concerning direct communications through social media that the client is legally entitled to engage in with another party the lawyer knows to be represented by counsel. *See* Colo. RPC 4.2, cmt. [4]. However, a lawyer may not simply use the client as a means of communicating directly with a represented party in circumvention of Rule 4.2. *See also* Colo. RPC 8.4(a).

VII. Requesting Permission to View a Restricted Portion of a Social Media Profile of a Judge Presiding Over a Case in Which the Lawyer Is Involved as Counsel or as a Party

Lawyers are not the only members of the legal profession utilizing social media. A 2013 national survey of state judicial employees reported that 37% of responding judges used Facebook, specifically, to read and consume content, while 23.1% said they posted and commented on personal Facebook pages; and 9.83% of judges who responded said they read and consumed content on Facebook in their professional roles, while 5.33% said they posted or shared content in a professional capacity.[14]

Some ethics opinions have concluded that a judge may be a "friend" on a social networking site with a lawyer who appears as counsel in a case before the judge.[15] The Colorado Judicial Ethics Advisory Board has not yet addressed the issue. While it is beyond the scope of this opinion, and beyond the authority of the Committee, to opine on the obligations of judges under the Colorado Code of Judicial Conduct, Colo. RPC 3.5 requires lawyers to consider the interplay between a lawyer's actions and a judge's obligations and authority under the Code of Judicial Conduct.

Colo. RPC 3.5 also covers communications between a lawyer and a judge during a proceeding before the judge. Lawyers may not seek to influence a judge by means prohibited by law, nor may they communicate *ex parte* with a judge during the proceeding concerning the matter before that judge, unless authorized to do so by law or court order. *See* Colo. RPC 3.5(a) and (b). Rule 2.9 of the Colorado Code of Judicial Conduct, for example, provides that except in limited circumstances, a judge "shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter." Rule 2.4(B) of the Code provides that a judge "shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment." Lawyers are prohibited from seeking to influence a judge through improper *ex parte* communications or any other means that would cause the judge to violate the provisions of the Code of Judicial Conduct.

The Committee believes that Colo. RPC 3.5 does not prohibit lawyers from participating on social networking sites with judges, seeking permission to view restricted portions of a judge's social media profile, or becoming "friends" with judges through social media during any period in which the lawyer is not appearing in a legal matter over which the judge presides. However, Colo. RPC 3.5 prohibits a lawyer from actively communicating *ex parte* with a judge during the period the lawyer is appearing as counsel or as a party before a judge, concerning or relating to the matter before that judge. This prohibition would clearly apply to any *ex parte* communications through social media concerning the legal matter itself, or issues therein, from the time the legal matter is assigned to the judge through the date that the judge's participation or potential participation in the matter has concluded. A lawyer generally should not send a "friend request" to a judge while the judge is presiding over a case in which the lawyer is appearing as counsel or a party. At least one commentator has recommended that to eliminate any risks and to comply with Rule 3.5, a lawyer and judge who know they are part of the same restricted social network, and who learn that the lawyer is to appear in a matter before the judge, should "un-friend" one another.[16] While the

Committee does not believe such steps are mandated, lawyers must be cautious about what they post on any social media network of which they know a judge is a member while they have legal matters pending before that judge.

Conclusion

Social media provide a valuable and powerful investigative tool. Undoubtedly, the various forms of social media existing at the time this opinion is issued will undergo significant changes, and additional forms of social media will be developed. Therefore, it is impossible to address all of the specific features of social media and the ethical obligations of lawyers utilizing them for investigative purposes. In general, lawyers utilizing social media for investigative purposes should be guided by the Rules and should consider how they would apply to other more traditional means of obtaining information and forms of communication.

NOTES

1. N.Y. City Bar Ass'n Comm. on Prof. Ethics, Formal Op. 2010-2, "Obtaining Evidence from Social Networking Websites" (2010) (N.Y. City Bar Op. 2010-2).

2. The ABA recently amended the comments to Rule 1.1 of the Model Rules of Professional Conduct to require lawyers to "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." Model Rule 1.1, cmt. [8]. The Colorado Supreme Court has not adopted this comment as of the date of this opinion; but Colorado attorneys should consider it as instructive.

3. *See*, *e.g.*, N. H. Bar Ass'n Ethics Advisory Comm., Advisory Op. 2012-13/05, "Social Media Contact with Witnesses in the Course of Litigation" (2013) (N.H. Op. 2012-13/05); San Diego Cnty. Bar Legal Ethics Comm., Legal Ethics Op. 2011-2; N.Y. Bar Ethics Op. 843 (2010) (San Diego Cnty. Op. 2011-2).

4. *See*, *e.g.*, N.Y. City Bar Ass'n Op. 2012-2; N.Y. Cnty. Lawyers Ass'n Comm. on Prof. Ethics, Formal Op. 743 (2011).

5. ABA Standing Comm. on Ethics and Prof. Resp., Formal Op. 466, "Lawyer Reviewing Jurors' Internet Presence" (2014).

6. James Carlson and Amy DeVan, "New Tools, Same Rules," 1 *OARC Update* (Summer 2013), coloradosupremecourt.com/newsletters/summer_2013 (Carlson & DeVan).

7. *Pautler*, 47 P.3d at 1175.

8. N.Y. City Bar Ass'n Op. 2010-2; Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association (2014) (N.Y. State Bar Ass'n Guidelines).

9. Or. State Bar Formal Op No. 2013-189, "Accessing Information About Third Parties Through a Social Networking Website" (2013) (Or. Op. 2013-189).

10. N.H. Op. 2012-13/05. *See also* Carlson & DeVan (advising lawyers who make a "friend" request seeking nonpublic information of an unrepresented party to "truthfully identify yourself and your purpose") (bolded text in original).

11. Phil. Bar Ass'n Prof. Guidance Comm. Op. 2009-02 (2009).

12. The San Diego County Bar Legal Ethics Committee opined that regardless of whether the person sought to be "friended" is represented and whether the person is a party to the matter, an attorney violates the ethical duty not to deceive by making a "friend request" to a person's social media page without disclosing why the request is being made. *See* San Diego Cnty. Bar Ass'n Legal Ethics Op. 2011-2 (2011) (San Diego Cnty. Op. 2011-2).

13. *See, e.g.*, San Diego Cnty. Op. 2011-2 (stating that "as a matter of logic and language, the subject of the representation need not be directly referenced in the query for the query to be "about," or concerning, the subject of the representation"); Carlson & DeVan ("Don't . . . attempt to 'friend' a represented party, even if you are truthful about the identity and purpose."); N.H. Bar Ass'n Op. 2012-13/05 (opining that a lawyer may not send a request to access restricted information to a person using the lawyer's name and disclosing the lawyer's role if the lawyer knows the person is represented by counsel); Or. Op. 2013-189 ("If Lawyer has actual knowledge that the holder of the account is represented by counsel on the subject of the matter, Oregon RPC 4.2 prohibits Lawyer from making the request except through the person's counsel or with the counsel's prior consent."); N.Y. State Bar Ass'n Guidelines ("A lawyer shall

not contact a represented person to seek to review the restricted portion of the person's social media profile unless an express authorization has been furnished by such person.").

14. Christopher Davey and Carol Taylor, 2013 CCPIO New Media Survey, A Report of the Conference of Court Public Information Officers (2013), *available at* www.ccpio.org. In previous surveys, judge respondents who said they used social media profile sites without reference to the specific type of site grew from 40% in 2010 to 46% in 2012. *Id.*

15. Hope A. Comisky and William M. Taylor, "Don't Be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas—Discovery, Communications with Judges and Jurors, and Marketing," 20 *Temple Pol. & Civ. Rts. L. Rev.* 297, 308 (Spring 2011) (citing Supreme Court of Ohio Bd. of Comm'rs on Grievances and Discipline, Op. 7 (2010)) (Comisky & Taylor); *see* Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119 ("The Committee believes that a Kentucky judge or justice's participation in social networking sites is permissible, but the judge or justice should be extremely cautious that such participation does not otherwise result in violations of the Code of Judicial Conduct."); *see also* N.Y. Judicial Ethics Comm. Op. 08-176 (permitting judge to join social network that includes lawyers and litigants). *But see* Fla. Supreme Ct. Judicial Ethics Advisory Comm. Op. 20 (2009) (concluding that a judge may not "add lawyers who appear before the judge as 'friends' on a social networking site, and [may not] permit such lawyers to add the judge as their 'friend'"). *See also* ABA Comm. on Ethics and Prof. Resp., Formal Op. 462, "Judges' Use of Electronic Social Networking Media" (2013).

16. Comisky & Taylor, 20 *Temple Pol. & Civ. Rts. L. Rev.* at 310.

128 ETHICAL DUTIES OF LAWYER WHO CANNOT CONTACT CLIENT

Adopted October 17, 2015.

Introduction and Scope

The problem of the "missing client" arises when the lawyer does not know where the client is or when the client is not responding to the lawyer's communications. Many situations exist in which a lawyer retained to represent a client in a civil matter cannot initiate or maintain contact with that client. Perhaps the client retained the lawyer to pursue a lawsuit but then vanished during discovery or settlement discussions. A client may go missing between a lawyer's initial meeting with the client and the expiration of the statute of limitations for the client's claim, requiring the lawyer to consider whether to timely file a complaint to protect the client's interests.

Alternatively, the lawyer might have been retained by the client's insurance company to defend the client/insured in a lawsuit, but the lawyer cannot locate and communicate with the client in formulating a defense.[1] This typically occurs pursuant to insurance policies in which the insured gives the insurer the right and duty to defend the insured against liability claims that the policy may cover. However, the lawyer may have difficulty locating the insured after receiving the referral. This scenario has become more common in Colorado since the enactment of C.R.S. § 42-7-414, which requires a purchaser of a motor vehicle liability policy to designate an insurance carrier as the agent for service of process in the event that the insured cannot be located. Since this statute permits substitute service on the insurer for service on the insured, the fact that the defendant has gone missing does not prevent the lawsuit from moving forward. The "missing client" problem raise the following ethical questions: What happens if the lawyer is unable to make contact with a client in time to satisfy the deadline to file a pleading or otherwise act? May the lawyer undertake the representation on behalf of a missing client, and if so, what actions may the lawyer take on the client's behalf? This opinion outlines the lawyer's ethical duties and limitations in these situations.

In considering these questions, the Colorado Bar Association Ethics Committee (Committee) recognizes that other jurisdictions have reached divergent conclusions on issues involving missing clients. *Compare* N.C. State Bar Formal Ethics Op. 1, "Representation of Insurance Carrier after Insured Disappears" (2010) (concluding that a lawyer retained by an automobile insurance carrier to defend its missing insured in a negligence action may not file pleadings or appear in court on the insured's behalf) *and* Utah State Bar Ethics Advisory Op. 04-01a (2004) (Utah Op. 04-01a) (opining that a lawyer representing an employer may not also represent a missing former employee because "the lawyer cannot receive any direction regarding the objectives of the representation" from the missing former employee and "the lawyer runs the risk of acting in contravention of the desires of the former employee."), *with* State Bar of Cal. Standing Comm. on Prof. Resp. and Conduct Formal Op. 1989-111, "What are the ethical responsibilities of an attorney representing the defendant in a civil action wherein a complaint has been filed and served on the defendant, an answer is now due and the client cannot be located?" (1989) (Cal. Op. 1989-111) (opining that "the attorney may file an answer to the complaint to avoid reasonably foreseeable prejudice" to a client who goes missing after a complaint is filed) *and* Ky. Bar Ass'n Ethics Op. E-433, "Ethical obligations of a lawyer who is unable to locate a client in a civil matter" (2012) (Ky. Op. E-433) (concluding that the lawyer may answer or file an "appropriate pleading to protect the client's interests" in certain "rare situations in which, prior to disappearing, the client expressly or impliedly authorized the filing of a claim or an answer, and provided the lawyer with sufficient information to do so"). The Committee believes that opinions allowing a lawyer to minimize prejudice to the client by taking actions to protect the client's interests represent the better approach. The Committee notes, however, that there may be circumstances when the lawyer cannot take such actions without implicating other ethical considerations or when acting without conferring with the client would prejudice the client. In all circumstances, a lawyer must balance various

ethical factors, including the duties of diligence, communication, and confidentiality to the client; the duty of candor toward a tribunal; and the duty not to make a false statement of material fact to third parties.

This opinion does not address the limitations that may arise in the insurance defense context with regard to the lawyer's ability to inform the insurer of difficulties in locating the client. An insured client who fails to stay in contact with the retained lawyer may violate the cooperation clause typically found in liability insurance policies. *See* CBA Formal Op. 91, (discussing the lawyer's ability to inform the insurer of information that may affect the client's insurance coverage). This opinion does not address representation in criminal matters.

Syllabus

When the lawyer's client is missing from the outset of the engagement or has gone missing since the representation began, the lawyer must take reasonable steps to locate the client and, whenever possible, seek continuances of court deadlines while continuing efforts to contact the client. If the lawyer concludes that a lawyer-client relationship exists, the lawyer may ethically undertake the representation and take such action as may be necessary in order to prevent immediate prejudice to the client's interest. If, however, the litigation continues and the client cannot be located despite a diligent search, the lawyer ultimately may be required to withdraw from the representation.

Analysis

I. Creation of the lawyer-client relationship

Before undertaking the representation of a missing client, the lawyer must make a threshold determination of whether, in the lawyer's professional judgment, a lawyer-client relationship exists. "[F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists . . . . Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." Colorado Rules of Professional Conduct (Colo. RPC) Preamble, cmt. [17].

Although the existence of a lawyer-client relationship is a substantive legal issue, there are ethical considerations as well. First, the client must consent to the representation. "An attorney-client relationship is one of agency and arises only when the parties have given their consent, either express or implied, to its formation." *Comm. on Prof'l Ethics and Grievances of Virgin Islands Bar Ass'n v. Johnson*, 447 F.2d 169, 174 (3d Cir. 1971). "The lawyer may not ethically represent a vanished former employee unless the lawyer has an existing attorney-client relationship or the former employee agreed to the representation at the company's expense prior to vanishing . . . ." Utah Op. 04-01a. Second, if the insurance company will be paying the lawyer's fees, the client must consent to this arrangement. "A lawyer shall not accept compensation for representing a client from one other than the client unless . . . the client gives informed consent . . . ." Colo. RPC 1.8(f).

In the insurance defense context, the matter of consent must be evaluated in light of the language of the insurance contract. "The formation of a relationship between an attorney and his or her client is based upon contract, which may be either express or implied by the conduct of the parties." *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1311 (Colo. App. 1998). The terms of the contract may delegate to the insurer permission to form the relationship. "[T]he insurance company can, on behalf of the insured, formulate the requisite attorney-client relationship between the defense counsel and the insured until such time as the insured manifests such action by word or deed as to disavow the attorney-client relationship. The consent of the insured to the establishment of the attorney/client relationship in this manner is implied by the insurance policy which has language to the effect that 'We will defend at our expense, with attorneys of our choice, any suit against the insured.'" Penn. Bar Ass'n Ethics Op. 97-123 (1997). Alternatively, the insured's consent may be inferred from the decision to purchase the policy in the first instance. *See Hornberger v. Wendel*, 764 N.W. 2d 371, 376 (Minn. App. 2009) (holding that insurer's retention of defense counsel pursuant to a liability insurance policy created a lawyer-client relationship as a matter of law); *Burke v. Lewis*, 122 P.3d 533, 542-43 (Utah 2005) (holding that "appointment of counsel" for a missing defendant

"was the best means of effectuating a just process and a fair result and that [the missing client's] consent to such representation could be fairly implied" from the circumstances and his purchase of a malpractice insurance policy). *See also* Colo. RPC 1.0, cmt. [7] ("In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter.").

A lawyer retained by an insurer should consider Colo. RPC 1.8(f), which permits a lawyer to accept payment of a legal fee from a source other than the client only if three requirements are met: (1) the client gives informed consent; (2) there is no interference with the lawyer's independent judgment or the client-lawyer relationship; and (3) lawyer-client confidentiality is preserved. These requirements are individually defined in Colo. RPC 1.0(e) (informed consent), Colo. RPC 5.4(c) (independent judgment), and Colo. RPC 1.6 (confidentiality). As with the creation of the lawyer-client relationship, in the insurance defense context the absent client's informed consent to third-party payment may be inferred from the terms of the insurance contract.

II. The lawyer's ethical duties upon commencement of the representation

A. Cases in which the lawyer actually communicates with the client at the outset of the representation

Diligence at the outset of a representation can avoid many "missing client" problems. "An attorney should be encouraged to treat most clients as though they are likely to disappear because doing so will significantly reduce the chances of it happening." Allison Elizabeth Williams, *Missing Clients: What to Do When Your Client Has Vanished*, 28 J. LEGAL PROF. 247, 254 (2003-2004). When possible at the outset of a lawyer-client relationship, a lawyer should obtain information from the client that would enable the lawyer to make reasonable efforts to locate the client throughout the course of the representation. This could include obtaining multiple telephone numbers, physical addresses, and e-mail addresses for the client and obtaining contact information for other persons who may know the client's whereabouts. A lawyer should direct a client to inform the lawyer if the client's contact information changes.

When appropriate, a lawyer should advise the client at the outset of the representation that it is important for the lawyer always to be able to locate the client during the course of representation. Subject to Colo. RPC 1.2(c), the lawyer and client may agree to a course of action if the lawyer cannot locate the client, for instance, setting out the methods the lawyer will use to attempt to contact the client or actions the lawyer will take if the lawyer cannot locate the client. *See* CBA Formal Op. 95, "Funds of Missing Clients" (1993) (CBA Op. 95) (authorizing use of client funds to locate missing client). The client and lawyer may agree that if the client does not respond to the lawyer's efforts to locate the client, the lawyer may terminate the representation. Colo. RPC 1.16(b)(5). The client also may authorize the lawyer to take some action on the client's behalf, such as filing a complaint before a statute of limitations expires. As stated in comment [3] to Rule 1.2:

> At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

Similarly, the lawyer may ask the client for advance authority to settle a claim within a certain range. *See* Ky. Op. E-433 ("There may be rare cases where, prior to the client's disappearance, the client set specific settlement parameters and authorized the lawyer to settle on his behalf. If the lawyer has clear authority, he or she may be able to act for the client, assuming there is no foreseeable prejudice to the client. . . ."); Williams, 28 J. LEGAL PROF. at 250 (stating that "when a client is missing, the best situation is for the attorney to have authority to consent to a settlement favorable to the missing client's interests"); *but see* State Bar of Ariz. Ethics Op. 06-07, "Communication; Settlement Authority; Fee Agreements; Conflict of Interest" (2006) (opining that a lawyer may not use a fee agreement giving the lawyer unfettered discretion to unilaterally settle cases).

B. Cases in which the representation is initiated by contract without the client's actual involvement

When a lawyer-client relationship exists, but the lawyer has not previously received direct instruction from the client and has not received direction from the client on how to act, for instance, in the insurance defense context, then immediately upon receiving the assignment the lawyer should exercise reasonable efforts to locate the client. This may include, as appropriate, hiring a professional investigator, searching public records, and/or contacting family or friends of the client. Alaska Bar Ass'n Ethics Op. 2011-4, "Duties of an attorney in a criminal appeal when the client cannot be contacted" (2011) (Alaska Op. 2011-4) ("A 'reasonable inquiry' may consist of, but is not limited to, attempts to contact the client by telephone, letter to client's last known address, personal visit to the client's last known address, electronic mail inquiry, internet search, post office search, registry of motor vehicle search, or newspaper publication."). "In all cases the attorney must expend a reasonabl[e] amount of time and funds so as to insure that the attorney makes a diligent effort to locate the client. Since each case is unique, the attorney should evaluate what methods of search would be reasonable to locate the client." Cal. Op. 1989-111. "Even without such a provision in a retainer agreement, a lawyer may expend a reasonable amount of the client's unexpended funds in order to locate the client." CBA Op. 95.

Even if the client cannot be located, the lawyer still owes the client duties of diligence, loyalty, and communication. "A lawyer shall act with reasonable diligence and promptness in representing a client." Colo. RPC 1.3. "Loyalty [is an] essential element[] in the lawyer's relationship to a client." Colo. RPC 1.7, cmt [1]. When someone other than the client retained the lawyer, the lawyer represents the client, not the third party. CBA Op. 91 ("This Committee has concluded that in the context of this tri-partite relationship, the better rule is that the lawyer's client is the insured and not the carrier."). The lawyer must protect the interests of the client, even though the insurer may be exercising control over, and paying for, the defense. "The attorney's ethical duty is to assure that the interests of the insured are protected, while at the same time fulfilling the insured's contractual obligations to the carrier against a backdrop where the insurance company, by virtue of financing the defense, may effectively control the result and may have its own interests at stake." CBA Op. 91.

A lawyer also has a duty to communicate with the client. "Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation." Colo. RPC 1.4, cmt [1]. However, "a standard of reasonableness under the circumstances determines the appropriate measure of consultation." Restatement (3d) Law Governing Lawyers (Rest.) § 20, cmt. c (2000); *see also Burke*, 533 P.3d at 540 (permitting representation of a missing client and finding that "just because representation of [the missing client] will not neatly accord with the general assumptions underlying the communication requirements contained in the rules of professional conduct, it does not necessarily follow that the rules prohibit the representation entirely"). The Committee recognizes that in situations where the lawyer cannot locate the client, the lawyer's duties of diligence and communication may be in tension. On the one hand, if the lawyer takes action without first communicating with the client, the client may be deprived of the opportunity to direct the objectives of the representation. On the other hand, if the lawyer refrains from taking action until the client can be located, the client may suffer prejudice from, for example, missing a statute of limitations or having a default judgment entered.

The Committee concludes that this tension should be resolved in favor of protecting the absent client's interests. This conclusion is supported by the Committee's previous statement regarding a lawyer's duties representing clients in dependency and neglect proceedings: "An attorney may not decline to advocate on behalf of the client simply because the client does not attend court hearings or provide direction to the attorney. An attorney must still exercise professional judgment as to how to advocate for the client's best interests." CBA Formal Ethics Op. 114, "Responsibilities of Respondent Parents' Attorneys in Dependency and Neglect Proceedings" (2006, modified 2010). Although that opinion addressed a different area of practice, its conclusion offers guidance with respect to a lawyer's duty to take action to protect the client who is not available to consult about decisions.

III. What action may the lawyer take?

In determining the extent of actions a lawyer may take on behalf of an absent client, the primary consideration should be avoiding prejudice to the client to the extent feasible. Cal. Op. 1989-111. This may include filing pleadings or briefs to preserve a client's rights or delaying proceedings to allow the lawyer more time to locate the client. Alaska Op. 2004-3, "Responsibilities of an Attorney When a Client Cannot Be Contacted" (2004) (Alaska Op. 2004-3) (a lawyer may file a complaint before a statute of limitations expires "if she believes that failing to file would materially and adversely affect the client's interests"); Rest. § 134, cmt. b ("In an emergency situation in which the lawyer must take action to protect the interests of the client, as in filing an answer to avoid default, the lawyer may take such action even if a conflict appears to exist, but must also promptly take action to address the conflict."). Whether a pleading can be prepared will depend on the facts and circumstances of each case. The lawyer must consider whether the client has authorized the action and whether the lawyer has enough information to act. *See* Ky. Op. E-433 (lawyer may provide "temporary protection" for the client by answering or filing other pleadings if the lawyer has the express or implied authorization and sufficient information).

A lawyer may take action on behalf of a client as is impliedly authorized to carry out the representation. Colo. RPC 1.2(a). If a lawyer reasonably believes the client has authorized the lawyer to take some action and is relying on the lawyer to do so, the lawyer may act on behalf of the client. Alaska Op. 2004-3. The client's prior communications with the lawyer may provide authorization to take actions like filing pleadings or briefs. Alaska Op. 2011-4 (lawyer must file notice of appeal and may file briefs when client previously directed filing of notice of appeal). In some circumstances, when a client has previously directed a lawyer to take action and the lawyer cannot communicate with the client following this direction, the lawyer must take the directed action. Colo. RPC 1.2, cmt [3].

Consent may be determined from circumstances other than the client's communications. For instance, when an insurance policy expressly calls for the insurer to provide a defense, the client has impliedly consented to the insurance company's payment of the lawyer's fees and the lawyer's preparation of a defense simply by purchasing the policy. Colo. RPC 1.0, cmt. [7]; Colo. RPC 1.4, cmt. [2]. Rest. § 134, cmt. d ("Informed client consent may be effective with respect to many forms of direction, [including] informed consent to general direction of the lawyer by another, such as an insurer or indemnitor on whom the client has contractually conferred the power of direction.").

The lawyer may have enough information to prepare a pleading from prior consultation with the client or may obtain information from a third party, for instance, the client's insurance company, concerning the facts of the case. However, if there is not enough information available, the lawyer must consider whether there is an adequate basis for preparing the pleading. In some circumstances, the lawyer will not have enough information to act on the client's behalf. Colo. RPC 3.1 ("What is required of lawyers . . . is that they inform themselves about the facts of their clients' cases . . . and determine that they can make good faith arguments in support of their clients' positions."); *see also* C.R.C.P. 11(a). The lawyer also must be careful to avoid misleading the court with false statements of fact regarding the scope of the lawyer's investigation or the client's participation in preparing the pleading. Colo. RPC 3.3. The lawyer representing an absent defendant must consider whether the client has compulsory counterclaims and, if so, must take appropriate action not to waive such counterclaims. This is pursuant to the principle that even if the lawyer's retention is limited to defending claims against the client and not to prosecute counterclaims, "[t]o avoid loss of a counterclaim, insurance defense counsel should inform the insured about potential counterclaims to the extent necessary so the insured can decide whether to seek independent counsel." CBA Op. 91.

In other circumstances, the lawyer may seek to postpone proceedings to allow additional time for the lawyer to locate the client. For example, Colo. RPC 1.2(a) mandates that "[a] lawyer shall abide by a client's decision whether to settle a matter." If mediation is scheduled but the lawyer cannot locate a client prior to mediation and the client has not authorized the lawyer to settle the case, the lawyer should postpone the mediation until the lawyer can locate the client. *See also* Williams, 28 J. LEGAL PROF. at 254 (noting that a lawyer may settle a case on behalf of a client only if the client has previously authorized the lawyer to settle).

Just as an insurance policy may provide the client's implied consent to the creation of a lawyer-client relationship, the policy may give the insurer the right to exercise the client's control of settlement of claims covered by the insurance. The lawyer should consider carefully the extent to which the insurance contract gives the insurance company authority to settle. If (1) the insurance contract clearly gives the insurer the right to settle claims without the consent of the insured, (2) the lawyer has made reasonable efforts to contact the client regarding the settlement proposal, (3) the proposal does not impose obligations on the client to the claimant beyond what the insurer is paying under the settlement, (4) the lawyer determines in the exercise of independent professional judgment that the settlement is appropriate for the client, and (5) the lawyer has not received express instructions to the contrary from the insured client, then the lawyer may settle a claim if such action is warranted. *Mitchum v. Hudgens*, 533 So.2d 194, 202 (Ala. 1988) (where an insurance policy gives the insurer the exclusive right to settle, a lawyer may follow the insurer's settlement instructions without prior approval from the client). In evaluating a settlement proposal covered by insurance, the lawyer also should consider whether the settlement would cause negative consequences for the client, such as the reporting of the settlement to a professional licensing authority. Authority to settle claims against an insured client would not, by itself, authorize the lawyer to agree to a release or dismissal with prejudice of counterclaims that the client might have against the claiming party. Outside the context of settling a claim covered by insurance, the Committee is unaware of circumstances in which a lawyer could enter into a settlement agreement without the client's express authorization. Ky. Op. E-433 (stating it is very unlikely that a lawyer could ever negotiate a settlement on behalf of a missing client); Colo. RPC 1.2(a); *see also* Or. State Bar Ass'n, Formal Ethics Op. 2005-33, "Declining or Terminating Representation: Withdrawal When Client Not Found" (2005) (stating that a lawyer may not accept even a favorable settlement proposal for her client absent the client's consent).[2]

If the lawyer cannot locate a client prior to the deadline to respond to interrogatories served under C.R.C.P. 34(a), the lawyer should request an extension of time to permit the lawyer more time to locate the client. As with filing a complaint or answer without conferring with the client, the lawyer should be mindful of Colo. RPC 3.3 and Colo. RPC 4.1 and not make any false statements of material fact to a tribunal or third party regarding the client's availability or participation in the preparation of the pleading.

In preparing an answer for a missing client in the insurance defense context, the lawyer should be attentive to issues in the case relating to insurance coverage. As the Committee stated in Opinion 91, "Defense counsel must be alert to ethical duties which prohibit actions by the attorney which favor the non-coverage interests of the carrier over the interests of the insured to establish coverage . . . . The existence of a coverage question should not be allowed to interfere with the lawyer's duty to exercise independent professional judgment on behalf of the insured."

The lawyer must determine whether the lawyer's decision to undertake representation of the absent client might otherwise be detrimental to the client's interests. The lawyer should not enter an appearance for a missing client (even if the client or the insurance carrier previously authorized such entry) if to do so would be prejudicial to the client or would compromise the defense of the case:

> Because the lawyer cannot receive any direction regarding the objectives of the representation, the lawyer runs the risk of acting in contravention to the desires of the [absent client] . . . . [I]f the lawyer took action that subjected the [absent client] to the jurisdiction of the court, then the [absent client] could be substantively prejudiced by lawyer's actions.

Utah Op. 04-01a.

III. Limitations on the lawyer's representation

Because consent is predicate for many aspects of the lawyer-client relationship, the lawyer must avoid taking action that fails to fully take into account the missing client's right to give–or to deny–necessary consents. For example, an absent client is unable to provide consent to waive a concurrent conflict of interest. Colo. RPC 1.7. Therefore, in the insurance defense context, the lawyer should carefully review any reservation of rights letter before accepting the referral. Similarly, the lawyer should decline the joint defense of an employer and an absent former employee because the former employee cannot consent

to the potential conflict of interest between the two clients. *See* Colo. RPC 1.7(b)(4) (requiring "informed consent, confirmed in writing" of a concurrent conflict of interest); Colo. RPC 1.7, cmt. [18] ("When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved,"); *see also* Utah Op. 04-01a (advising against joint representation of employer and absent former employee because "the attorney cannot make the explanation required by the rule, cannot obtain the [absent] client's consent to representation and would therefore violate Rule 1.7").

After acting on behalf of the client, the lawyer should consider whether continued representation of the absent client is possible. Withdrawal or terminating the lawyer-client relationship may be required if the client cannot be located within a relatively short period of time. *People v. Silvola*, 915 P.2d 1281, 1284-85 (Colo. 1996) (sanctioning lawyer for purporting to represent absent client for 19 months). Other jurisdictions are in agreement:

> [W]hat are the ethical obligations of a lawyer who, for reasons beyond his control, is unable to communicate with or secure instructions from his client in a pending action? His duty would appear to be to protect the interests of his client to the extent that he can reasonably do so and, when the lawyer cannot reasonably carry out his employment effectively, he should relieve himself from those duties by seeking withdrawal . . . taking care to obtain permission of the court where needed . . . and to avoid foreseeable prejudice to the rights of the client.

State Bar of Ariz. Ethics Op. 80-11 (1980). *Accord* Cal. Op. 1989-111 ("Under the facts presented, the attorney is severely limited in the ability to act on behalf of the client without the client's express authority. The attorney has a sufficient basis to withdraw . . . ."); Ky. Op. E-433 ("In most civil matters, the lawyer will have to withdraw, because the lawyer will likely be unable to meet the ethical obligations imposed by the Rules of Professional Conduct without the client's participation.").

As with the decision to act on behalf of an absent client, if the lawyer continues to be unable to contact the client and therefore has grounds to withdraw, the lawyer's primary consideration in deciding when to withdraw should be minimizing the potential prejudice to the client. Generally speaking, the lawyer should stay in the case as long as it is feasible to do so. The need to obtain information from the client should be balanced against preventing prejudice to the client if possible. When withdrawing from representation due to a client's unavailability or unresponsiveness, a lawyer "shall take steps to the extent reasonably practicable to protect a client's interests." Colo. RPC 1.16(d). When a lawyer has reason to believe that the client is receiving communications from the lawyer but not responding to them, the lawyer must inform the client of the lawyer's intent to withdraw from the representation prior to withdrawing. The lawyer should pursue means similar to those previously used to locate the client to notify the client of the withdrawal and should "take care to document all steps taken to give notice to the client." Cal. Op. 1989-111. The lawyer should be mindful of the fact that the court is under no obligation to grant a request for withdrawal.

IV. Disclosure that the client is unavailable

Ordinarily the lawyer's pleading should not suggest that the absent client played a role in its preparation. This suggestion could violate Colo. RPC 3.3.

In discussing the propriety of the lawyer's disclosure of the unavailability of the client to opposing counsel and the court, a California opinion states the factors to be considered:

> The attorney has a duty to maintain inviolate the confidence of his client and at every peril to himself to preserve the secrets of his client. The attorney also has a duty not to mislead the judge or a judicial officer by an artifice or false statement of fact or law. The concealment of material information is as misleading as an overtly false statement. Disclosure of the inability to locate the client could be detrimental to the client's interests.
>
> Clearly, the attorney is under no obligation to inform opposing counsel that the client cannot

> be located. However, the attorney may reveal such information as may be necessary to formulate the basis for a motion to withdraw.

Cal. Op. 1989-111 (citations omitted).

There may be circumstances where disclosing the client's absence will be detrimental to the client's interests. *Id.* However, if the desire to preserve the confidence of "information relating to the representation" conflicts with the lawyer's duty of candor to the court, then the lawyer must truthfully inform the court of the client's absence. Colo. RPC 1.6; *see also* CBA Op. 123. However, the lawyer should take care to reveal such information only to the extent reasonably necessary to comply with Colo. RPC 3.3 or as otherwise permitted by Colo. RPC 1.6. Colo. RPC 3.3, cmt. [15].

Conclusion

Many missing client problems can be avoided through careful client intake procedures, including obtaining multiple means of contacting the client and obtaining the client's informed consent to methods the lawyer will employ to handle the case should the client become unavailable. Obtaining permission to file pleadings or settle the case within a predetermined range can resolve future problems. A lawyer who has formed a lawyer-client relationship with an absent client may file pleadings on the client's behalf to avoid the expiration of a statute of limitations or to prevent entry of a default judgment against the client. However, any such pleadings must not imply that the client actively participated in their preparation. If the lawyer conducts a diligent and well-documented search but remains unable to locate an absent client, and has reached the point that further representation is impossible without input from the client, the lawyer should withdraw. In preparing the withdrawal, the lawyer must again be diligent in attempting to contact the client to notify the client of the withdrawal, and may reveal to the court and opposing counsel the minimum information necessary to support withdrawal. Even in the course of withdrawing, the lawyer must endeavor not to prejudice the interests of the absent client.

NOTES

1. This opinion uses "client" to refer to the insured person whom the insurer retains the lawyer to defend. "[T]he insured is unquestionably a client to whom the attorney owes the ethical duties owed to any client. . . . [T]he carrier is not a client simply by retaining the attorney to defend its insured. . . ." CBA Op. 91, "Ethical Duties of Attorney Selected by Insurer to Represent Its Insured" (1993, Addendum 2013) (CBA Op. 91).

2. The Colorado Supreme Court has not addressed the issue of the client's contractual delegation of settlement decision-making authority to the insurer. However, in older cases, the Court addressed the client's express settlement authority. *Cross v. Dist. Ct.*, 643 P.2d 39 (Colo. 1982) (holding "an attorney does not have the authority to compromise and settle the claim of his client without the knowledge or consent of his client"); *Radosevich v. Pegues*, 292 P.2d 741 (Colo. 1956) (same); *Lewis v. Vache*, 20 P.2d 554 (Colo. 1933) (same); *Hallack v. Loft*, 34 P. 568 (Colo. 1893) (same).

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

Adopted March 18, 2017.

Introduction and Scope

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

Syllabus

The Colorado Rules of Professional Conduct (Colo. RPC or the Rules) allow a lawyer to provide legal services to a client and to accept payment for those services from a third party, as long as the requirements of Colo. RPC 1.8(f) are satisfied: The client must give informed consent, there must be no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and the confidentiality of information related to the representation must be maintained. The lawyer must understand the primacy of the lawyer's duties to the client and may need to manage the expectations of the third-party payer with respect to involvement in the representation. Discussing and defining the relationships among the client, the lawyer, and the payer in a written agreement among them at the outset of the representation can avoid or mitigate issues throughout the course of the representation.

Analysis

There are many situations, apart from insurance coverage, in which a third party undertakes to pay the client's cost of legal representation. A family member or friend may pay the defense costs of someone charged with a crime. In the domestic relations field, a parent or prospective new partner of the client may pay the costs to dissolve the client's marriage. A corporation may pay the legal fees of an officer or employee concerning a matter arising in the course of the office or employment. Family members, including potential beneficiaries of a will, often pay a lawyer's fees to draft testamentary documents for the lawyer's client, their relative. A contractual indemnitor may pay the legal fees incurred by an indemnitee. A principal may pay the legal fees of an entity filing bankruptcy. The parents of a newlywed couple might assist with the purchase of a new home and include payment of the couple's legal fees in the financial assistance provided. Legal services programs or other similar non-profit providers of legal services may receive funding to provide legal representation to employees or indigent individuals.[1] Even pro bono or reduced-rate legal services programs may invite some application of the rules relating to third-party payers, as when, for instance, a legal assistance organization pays the client's litigation expenses. The principles of Rules 1.7, 1.8(f) and 5.4(c) apply to each circumstance in which a lawyer accepts compensation for representing a client from a source other than the client.

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

"Loyalty and independent judgment are essential elements in the lawyer's relationship to a client." Colo. RPC 1.7, cmt. [1]. Rule 1.7 provides the general rules for addressing conflicts of interest involving current clients; Rule 1.8 provides additional rules regarding certain specific concurrent conflicts of interest

that can arise from, among other things, the lawyer's responsibilities to another client or a third person. Colo. RPC 1.7, cmt. [1].

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

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

A. Informed Consent

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

The communication necessary to obtain informed consent will vary according to the circumstances. Colo. RPC 1.0, cmt. [6]. It may be presumed that the client has received adequate communication to give an informed consent under Rule 1.8(f)(1) when the court has appointed counsel in response to the client's application for appointment of counsel and in other situations in which a statute or court order authorizes the representation. *See, e.g.*, C.R.S. § 21-1-103 (representation by public defender); C.R.S. § 19-2-706 (appointment of counsel in juvenile delinquency proceedings); C.R.S. § 19-2-508(2.5) (public defender representation of juveniles in detention hearings); C.R.S. 19-1-111 (appointment of guardian *ad litem*); C.R.S. 14-10-116 (appointment of Child's Legal Representative); Colorado Supreme Court Chief Justice Directive 04-06(2004) ("Court Appointments Through the Office of the Child's Representative") (Chief Justice Directive 04-06); Colorado Supreme Court Chief Justice Directive 04-04 ("Appointment of State-Funded Counsel in Criminal Cases and for Contempt of Court") (2004).

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

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

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

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

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

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

If the conflict is consentable under Rule 1.7(b), if the clients have received adequate information about the material risks of the dual representation, and if the informed consent of both clients is confirmed in writing, then the lawyer may represent both clients and accept payment for the representation from one of them. Colo. RPC 1.7(b); Colo. RPC 1.8(f), cmt. [12]. Even with such informed consent, however, the lawyer should consider carefully whether the dual representation is advisable given the potential for later and non-waivable conflicts of interest.

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

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

arrangement, the lawyer must decline or withdraw from the representation. Colo. RPC 5.4(c), cmt. [1]; *see also* Colo. RPC 1.8, cmt. [11].

1. Client's Right to Make Decisions About Representation

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

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

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

The third-party payer may designate the matter or type of matter for which its funds will or will not be used.[4] The third-party payer also may limit the amount of funds given to the lawyer for a particular representation, but it may not control the legal decisions made in that representation. Similarly, a third-party payer may designate its payment or a portion thereof for a particular aspect of the representation, such as payment for a deposition or an expert's fees, but it may not direct that aspect of the representation in any way.

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

2. Client Communication

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

C. Protecting Confidential Information

The third requirement imposed by Colo. RPC 1.8(f) is that information relating to representation must be protected as required by Rule 1.6 (Confidentiality of Information). Under Rule 1.6, a lawyer generally may not reveal information related to the representation – regardless of whether the information is confidential – unless the client gives informed consent as defined by Rule 1.0(e). This prohibition includes revealing information to third-party payers. The requirement of the client's informed consent to the release of information to the third-party payer is separate from the client's informed consent to the third-party arrangement itself. Rest. § 134, cmt. e.

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

The obligation to preserve confidentiality means that timesheets, billing statements, and other such documentation containing information about the representation – other than the bare totals of accrued fees and incurred expenses that are to be paid under the payment arrangement – may not be shared with the third-party payer unless the client has given informed consent to the sharing of such information or as otherwise permitted by Rule 1.6.[6] Certain payers, such as parents paying for the representation of an adult son or daughter charged in a criminal matter, may naturally be curious about what the payment is buying and what progress is being made, but the lawyer may not provide information to the parents as the case progresses absent compliance with Rule 1.6 . *See* Colo. RPC 1.6(a); Colo. RPC 1.8(f)(3).

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

II. Practical Considerations — Discussions with the Third-Party Payer

In third-party payer situations, the lawyer should take precautions at the outset to prevent misunderstanding as to the rights and obligations of the client, the lawyer, and the third-party payer. As noted above, the disclosures to the client about the risks and benefits of the third-party payment arrangement must be sufficient to obtain the client's informed consent. In addition to a candid discussion with the client about the conditions of – and risks inherent in – a third-party payment arrangement, the lawyer should consider having a candid discussion with the third-party payer so that the payer understands the limitations on the kind and scope of information that the lawyer will be able to provide to the payer as the representation progresses.[7]

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

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

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

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

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

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

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

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

Conclusion

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

NOTES

1. Legal services programs and other non-profit providers of legal services typically receive funding from Federal, state, local and private entities, not for the purpose of representing specifically identified individuals,but to represent particular types of clients who are eligible for representation under grants from or contracts with those providers.

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

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

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

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

6. For instance, Colo. RPC 1.6(b)(7) permits disclosure that the lawyer reasonably believes necessary to comply with law. Laws that provide public funding of legal service programs may require that governmental auditors be given access to lawyer timesheets and other records of legal representation. State agencies statutorily required to oversee the payment of lawyer services may require submission of detailed billing records to carry out their statutory responsibilities. Similarly, guardians *ad litem* may need to reveal information relating to the representation if necessary to ensure the child's best interests. Chief Justice Directive 04-06, § V(B). Disclosure of records reasonably necessary to comply with such legal requirements would be consistent with Rule 1.6(b)(7).

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

8. Notwithstanding Colo. RPC 1.8(f) and 5.4(c), the client may, by agreement and with informed consent, provide the payer with rights not otherwise permissible in the absence of such agreement. An example would be a contractual indemnification arrangement in which the indemnitee gives the indemnitor the right to fully control the representation in exchange for the indemnitor's assumption of the indemnitee's liability.

130 ONLINE POSTING AND SHARING OF MATERIALS RELATED TO THE REPRESENTATION OF A CLIENT

Adopted April 3, 2017.

I. INTRODUCTION AND SCOPE

The Internet has made sharing many forms of information easier. It is easy, for example, for lawyers to post video clips from depositions, share responses to common motions or deposition transcripts of often-used experts, or publish recent court orders. The practice of sharing litigation materials, including deposition transcripts, briefs, and discovery responses, allows lawyers to assist one another in representing their respective clients. A comment to Rule 3.6 of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) reminds lawyers that "there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves." Colo. RPC 3.6, cmt. [3].

Despite the strong interest in allowing the free flow of information, including through various electronic media, lawyers must be mindful of and adhere to various provisions of the Rules when sharing or posting information online. Lawyers must be particularly vigilant about client confidentiality when revealing information relating to the representation of a client. In addition, lawyers must be mindful of their duty of candor and other obligations flowing from court orders and rules. Although some of the Rules do not apply when a lawyer is not representing a client, most of the Rules relevant to posting or sharing materials obtained or generated during representation apply generally to a lawyer regardless of whether the lawyer posts or shares the materials as part of the representation of a client. These rules also generally apply even after the representation has concluded.

This opinion focuses on posting or sharing materials electronically, through various forms of online media, but the conclusions in this opinion apply to dissemination in any form. For instance, the principles underlying this opinion would apply to a lawyer showing a video deposition to a live audience or distributing written materials at a CLE presentation.

II. LAWYER'S DUTY TO MAINTAIN CLIENT CONFIDENCES

A. Confidential Client Information

A deposition transcript in which an expert admits to lacking certain qualifications might be helpful for other lawyers to review before preparing a response to a summary judgment motion or preparing to examine the same expert in a deposition or at trial. A video of a deposition in which a government official admits to public corruption might be valuable for the public to watch. When a lawyer obtains these materials in connection with representing a client, however, Colo. RPC 1.6 is implicated.

Colo. RPC 1.6(a) prohibits a lawyer from revealing "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" meets one of a few specific and narrowly drafted exceptions in Colo. RPC 1.6(b). There is no exception for revealing information for educational purposes, to assist another lawyer, or because the information is "newsworthy."

Similarly, Colo. RPC 1.8(b) provides "[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." Comment 5 to Rule 1.8 explains this prohibition applies even when "information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer." The Comment clarifies, however, that Rule 1.8(b) "does not prohibit uses that do not disadvantage the client."

The scope of what is confidential under Rule 1.6 is much broader than the evidentiary attorney-client privilege. "The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Colo. RPC 1.6, cmt. [3]. The Colorado Supreme Court broadly interprets "client information." *People v. Hohertz*, 102 P. 3d 1019, 1022 (Colo. 2004).

Information relating to the representation of a client often exists in public records. Because a client may not understand that many records, like court filings, are available to the public, a lawyer should advise the client that certain tasks necessary to the representation of the client will result in information about the client, even sensitive information, becoming public.

Information in public records that relates to the representation of a current client is "information related to the representation of a client" that is covered by the Rules. There is no exception for disclosing information in public records. *In re Anonymous*, 654 N.E.2d 1128, 1129 (Ind. 1995) (disclosure of client information that "was readily available from public sources and not confidential in nature" violated Rule 1.6); *Lawyer Disciplinary Bd. v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850, 860 (W.Va. 1995) ("The ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it."). Nor is there an exception for information that is otherwise publicly available. For example, without informed consent, a lawyer may not disclose information relating to the representation of a client even if the information has been in the news.

When materials contain information relating to the representation of a client, regardless of the source of the information, a lawyer must obtain the client's informed consent to post or share them. "'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." Colo. RPC 1.0(e). The information a lawyer seeking informed consent should provide to the client will vary depending on the circumstances. At a minimum, the lawyer should ensure the client understands exactly what information the lawyer proposes to publish, the manner of publication, to whom the information will be available, and the foreseeable ramifications to the client and the client's case. A lawyer must consider and advise the client that once the lawyer discloses the information, those receiving the information may distribute it further. The lawyer should also clarify that the client may withhold consent. If the lawyer's purpose in posting information obtained in the course of representing a client is unrelated to the client's legal matter, the lawyer should disclose that unrelated purpose to the client.

B. The "Generally Known" Exception for Former Clients

Colo. RPC 1.9(c)(2), relating to duties to former clients, prohibits a "lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter" from revealing information relating to the representation subject to the same exceptions that apply to representation of a current client. Colo. RPC 1.9(c)(1), however, permits a lawyer to "use information relating to the representation to the disadvantage of the former client . . . when the information has become generally known." Comment 8 to Rule 1.9 further provides that "the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client."

As of the issuance of this opinion, no Colorado appellate decision has interpreted the phrase "generally known" as used in Rule 1.9(c)(1). Courts in other jurisdictions have varied in their interpretations. In *In re Anonymous*, 932 N.E.2d 671, 674 n.2 (Ind. 2010), the Indiana Supreme Court suggested that the fact that a divorce had been filed—information a lawyer had learned during the course of representing a client—was not necessarily generally known. In *Pallon v. Roggio*, 2006 WL 2466854 (D.N.J., Aug. 23, 2006), the court, applying New Jersey law and professional rules, held that generally known "does not only mean that the information is of public record." *Id.* at 7. Rather, the information "must be within the basic understanding and knowledge of the public." *Id.* In *Wood's Case*, 634 A.2d 1340 (N.H. 1993), the court concluded that a lawyer violated New Hampshire's equivalent to Rule 1.9 by revealing to a

reporter a former client's intention to construct a mall in connection with the lawyer's public opposition to attempts by the former client to obtain re-zoning of certain property because that information was more specific than was generally known to the public.

Other jurisdictions have construed the term "generally known" more broadly. In *Statewide Grievance Committee v. Heghmann*, 2004 WL 3130568 (Conn. Super. Ct. Dec. 20, 2004) (unpublished), the court held that there was not clear and convincing evidence that a lawyer violated Connecticut's version of Rule 1.9 by advising others involved in disputes with the lawyer's former clients that the former clients had certain tendencies in litigation, *e.g.*, personally attacking their opponents' character, litigating cases in the media, and engaging in "vendetta-type tactics." *Id.* at 2-3. Although the court found that the lawyer's communications revealed information relating to the representation of a former client, the court was unpersuaded to the requisite degree of proof that the information was not "generally known." *Id.* at 3. In *State v. McKinley*, 860 N.W.2d 874, 883 (Iowa 2015), the court concluded that matters of public record, such as felony convictions, are generally known within the meaning of a substantially similar Iowa disciplinary rule. Other courts have reached similar conclusions. *E.g., State v. Mark*, 238, 231 P.3d 478, 511 (Haw. 2010) (information regarding the prior conviction of a lawyer's former client was generally known); *State ex rel. Youngblood v. Sanders*, 575 S.E.2d 864, 871 (W.Va. 2002) (information contained in police reports was generally known); *Janas v. Janas*, 2004 WL 3167959, at *1 (Conn. Super. Ct. Dec. 14, 2004) (unpublished) (in dissolution action, denying husband's motion to disqualify wife's lawyer on the basis that the lawyer had learned husband's psychological and medical history while previously representing husband in a personal injury case: finding that the history was known to husband's treating physicians and, therefore, generally known).

Because of the varying interpretations of this key phrase, and the lack of direction from courts in Colorado, a Colorado lawyer should exercise caution when posting or sharing information learned during the representation of a former client, even when the lawyer believes the information is "generally known."

C. Redaction as a Potential Protective Measure

When a client has not provided informed consent to share or post litigation materials, a lawyer may be able to redact the materials sufficiently to share or post the materials in compliance with Colo. RPC 1.6(a) and 1.9(c). The redactions must be sufficient to ensure that the disclosure no longer provides "information relating to the representation of a client." Colo. RPC 1.6(a).

The Committee agrees with the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, which concluded that the confidentiality rule "is intended to strongly caution the lawyer to give consideration to the rule of client confidentiality - and whether the informed consent of the client should be obtained - whenever the lawyer makes any verbal, written[,] or electronic communication relating to the client." Nevada Formal Op. No. 41 (2009). Similarly, the Committee agrees with the Alaska Bar Association's Ethics Committee, which opined that Rule 1.6 "does not prohibit informal communication or the exchange of public documents between counsel," but that "a cautious lawyer should delete from documents and discussions all information that might identify the client and that is not relevant for purposes of the disclosure." Alaska Ethics Op. No. 95-1, "Propriety of Shop Talk and Courtesy Copies Under ARPC 1.6" (1994).

Merely redacting the client's name is usually insufficient to comply with Colo. RPC 1.6(a) and 1.9(c). When the client has not given informed consent to the dissemination of the client's information, the lawyer must, at a minimum, redact all information that identifies the client or connects the non-redacted information to the client. This includes redacting all information that could lead to the identification of the client, such as addresses and other personal details about the client. This also includes redacting all information that could connect the non-redacted information to the client or show that the information is related to the client, including dates, locations, and specific descriptions of events. A comment to Rule 1.6 explains:

> Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Colo. RPC 1.6, cmt. [4].

A lawyer should take care to redact all information that would enable a person viewing the materials to conduct outside research to learn the client's identity or connect the non-redacted information to the client. A lawyer also should redact information that would enable a person who knows the client's identity from a different source to connect the non-redacted information to the client. In some circumstances, such as when the facts are highly unusual and involve a public figure, it may be extremely difficult to protect confidentiality with any level of redacting.

When sharing or posting a summary judgment brief, for example, a lawyer may need to remove paragraphs from the statement of facts, the names of exhibits, and other information specific to the representation of the client. When posting a deposition transcript, a lawyer may need to redact all but a few questions and answers that do not reveal information related to the client or the specific matter litigated, depending on the circumstances.

Although a lawyer should broadly interpret the information covered by Colo. RPC 1.6(a) and 1.9(c), the Committee believes that some information never needs to be redacted to comply with these rules. For instance, legal citations, non-legal research from treatises, and curriculum vitae for disclosed experts may generally be shared without obtaining the client's informed consent, as long as the materials do not contain any other information that, if shared without informed consent, would violate these rules.

III. OTHER RESTRICTIONS ON SHARING OR POSTING LITIGATION MATERIALS.

In some circumstances, even when sharing or posting the information does not violate Rule 1.6 or 1.9, other Rules may preclude a lawyer from revealing information relating to the representation of the client.

For example, even if a lawyer has obtained the client's consent to share information, court orders may prevent disclosure of the information. Colo. RPC 3.4(c) prohibits a lawyer from "knowingly disobey[ing] an obligation under the rules of a tribunal." A lawyer may violate this rule by, for instance, sharing discovery responses or specific documents that are subject to a protective order. In some cases, courts may have entered orders concerning trial publicity, or may have directed that all filings in a case be suppressed. Before posting any information obtained in the course of litigation, a lawyer must consider the scope of any orders entered in the case. A lawyer who is concerned about the potential that an opposing party or lawyer might widely disseminate sensitive information concerning the lawyer's client should consider seeking an appropriate protective order.

Additionally, Colo. RPC 3.6 prohibits a "lawyer who is participating or has participated in the investigation or litigation of a matter" from making "an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." Colo. RPC 3.6(b) permits a lawyer to make statements or post materials about certain specific subjects and Colo. RPC 3.6(c) permits a lawyer to post materials "that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client." Even when the public statements or posting of materials is allowed under Colo. RPC 3.6(b) or (c), a lawyer must comply with Colo. RPC 1.6 and 1.9 when the statements or posting would reveal information related to the representation of a client or former client.

The Committee, like the drafters, recognizes that a lawyer may have an interest in free expression related to these matters. *See* Colo. RPC 3.6, cmt. [1] ("It is difficult to strike a balance between protecting

the right to a fair trial and safeguarding the right of free expression."). Analyzing this balance fully involves consideration of legal issues, including those arising under the First Amendment to the United States Constitution, that are beyond the scope of this opinion.

Even with informed client consent, sharing edited or misleading litigation materials may violate the Rules. Under Colo. RPC 8.4(c), a lawyer may not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." A lawyer would likely violate this rule, for example, by posting only an edited portion of a video deposition that presents information in a false or misleading light. Similarly, other discovery materials or recorded information could be misleading if presented out of context or in a manipulated fashion. This is particularly true when an answer to a particular question posed during a deposition or through some other form of discovery is placed immediately after a question to which the answer was not intended to respond.

When "representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person." Colo. RPC 4.4(a). Materials obtained concerning an opposing party in litigation may be of a highly personal and sensitive nature. Sharing such information could be extremely embarrassing to parties involved in the litigation process. Similarly, sensitive information learned during the course of representation can be embarrassing to a lawyer's former client if revealed in connection with a subsequent dispute with the former client. Lawyers who contemplate publishing materials, even when not precluded from doing so by any direct court order, must carefully consider whether there is a legitimate purpose for making the material generally available.

In some circumstances, a lawyer may wish to post information and materials obtained or generated in the course of representing a client in connection with the lawyer's marketing efforts. Use of such materials in marketing is beyond the scope of this opinion. However, a lawyer contemplating use of information or materials obtained in the course of representing a client for marketing purposes must carefully consider the Rules discussed in this opinion and any other applicable Rules.

Colo. RPC 8.4(a) prohibits a lawyer from violating the Rules through another and knowingly assisting or inducing another to violate the Rules. Therefore, a lawyer may not encourage a client to post litigation materials when the lawyer's posting of the same materials would violate the Rules—for instance, by encouraging a client with a large social media following from distributing edited video deposition clips that the lawyer knows will substantially prejudice an upcoming trial. But this rule does not prohibit a lawyer from advising a client regarding action the client is legally entitled to take. Thus, a lawyer may advise a client about posting litigation materials online as long as the lawyer does not assist or induce the client to post the materials if the lawyer would be precluded from doing so directly.

IV. CONCLUSION.

In many situations, making information obtained in the course of representing a client public is helpful, either to other lawyers or to educate the public. But client confidences must be respected. When a client gives informed consent to a lawyer's posting or sharing of materials, or the lawyer redacts client identifying information, a lawyer does not violate Rules 1.6 or 1.9. However, even where the Rules on client confidentiality permit a lawyer to post or otherwise share client information, the lawyer must nevertheless be careful to adhere to other Rules, including those requiring adherence to court orders, prohibiting communications that are dishonest, deceitful, or substantially likely to materially prejudice the administration of justice, and governing advertising.

131 REPRESENTING CLIENTS WITH DIMINISHED CAPACITY WHERE THE SUBJECT OF THE REPRESENTATION IS THE CLIENT'S DIMINISHED CAPACITY

Adopted September 13, 2017.

Scope

This opinion addresses the representation of clients where the subject of the representation is an adult protective proceeding (guardianship and conservatorship). It also encompasses ethical issues when the lawyer is acting as a *guardian ad litem* in an adult protective proceeding or when the lawyer represents an allegedly incapacitated person. While lawyers are appointed as *guardians ad litem* in the majority of adult protective proceedings, non-lawyers may also be appointed.

The Colorado Bar Association (CBA) has issued a separate formal ethics opinion that addresses representing clients with diminished capacity where the presence of diminished capacity is incidental to the lawyer's representation. *See* CBA Formal Op. 126, "Representing the Adult Client With Diminished Capacity" (2015). This opinion does not cover representation of individuals who are minors or who may have a mental incapacity in addition to their incapacity due to their minority.

Syllabus

A lawyer may become involved in adult protective proceedings in a variety of ways. The lawyer may have a long-term lawyer-client relationship with a client who, over the course of the representation, develops diminished capacity and becomes the subject of an adult protective proceeding. Perhaps more commonly, the lawyer may become involved in the adult protective proceeding because the individual alleged to have diminished capacity, or an adult child of the allegedly incapacitated person, retains the lawyer for the purpose of representing the allegedly incapacitated person in the adult protective proceeding. In another common scenario, the lawyer may be appointed by the court as counsel for the allegedly incapacitated person. Still other lawyers may be appointed by the court as *guardians ad litem* in the adult protective proceeding.

Whether the lawyer acting as counsel in an adult protective proceeding had a preexisting lawyer-client relationship with the allegedly incapacitated person, is retained to represent that person for the first time as a result of a protective proceeding, or is court-appointed counsel, the controlling ethical rule is Rule 1.14 of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules).

However, Rule 1.14's application to the lawyer in an adult protective proceeding differs from the application of Rule 1.14 when the discovery of diminished capacity is incidental to the legal representation. The lawyer representing the allegedly incapacitated person in an adult protective proceeding is subject to the same considerations relative to lawyer-client privilege and confidentiality under Rule 1.6 that apply to any other lawyer.

If the allegedly incapacitated person's alleged incapacity is so severe that the lawyer cannot form or continue a lawyer-client relationship, the lawyer should decline or withdraw from representation, and if the lawyer has entered an appearance in the protective proceeding, he or she should seek to withdraw from the representation. If there is no *guardian ad litem* in the protective proceeding when the lawyer seeks to withdraw, the withdrawing lawyer should inform the court of the lawyer's inability to form or continue the lawyer-client relationship and should request the appointment of a *guardian ad litem*. Colo. RPC 1.14, cmt. [7]; see also C.R.S. § 15-14-305 (preliminaries to hearing), C.R.S. § 15-14-309 (right to a lawyer post-adjudication).

Guardians Ad Litem

A lawyer serving as a *guardian ad litem* in an adult protective proceeding has certain different responsibilities and ethical issues. In *People v. Gabriesheski*, 262 P.3d 653 (Colo. 2011), the Colorado Supreme Court ruled that a *guardian ad litem* is an independent officer of the court and the minor is not the *guardian ad litem's* client.[1] *Gabriesheski* involved a minor, not an adult protective proceeding. But, to the extent the role of the *guardian ad litem* for a minor may be similar to the role of the *guardian ad litem* in an adult protective proceeding, *Gabriesheski* may provide some insight. In a dependency and neglect case, the *guardian ad litem* is tasked with investigating, reporting, and representing the child's best interest. As there is no lawyer-client relationship in the traditional sense, the child has no expectation of privacy for communications with the *guardian ad litem*. This part of *Gabriesheski* is the traditional interpretation of the role of a *guardian ad litem* in adult protective proceedings, and is the generally accepted interpretation of how *Gabriesheski* applies in adult protective proceedings.

As an independent actor in protective proceedings, the *guardian ad litem* has no client, and therefore, except to the extent that the Rules apply to all Colorado lawyers, Rule 1.14 and Rule 1.6 are not directly implicated. Rather, because the allegedly incapacitated person is not the *guardian ad litem's* client, the *guardian ad litem* also has no lawyer-client privilege with regard to any information he or she obtains, concerning the allegedly incapacitated person, including information from that person.

Maintaining a Normal Lawyer-client Relationship

The lawyer's effective and efficient representation of any client depends on the client's ability to receive, analyze, and process information and advice received from the lawyer, and to accurately inform the lawyer regarding information relevant to the representation. CBA Formal Op. 126. When the lawyer represents an allegedly incapacitated person, this ability is compromised. The question becomes to what extent the ability to form and maintain a lawyer-client relationship is compromised. Colo. RPC 1.14(a) is implicated in representation of an allegedly incapacitated person. Rule 1.14(a) mandates that the lawyer, "as far as reasonably possible, maintain a normal lawyer–client relationship with the client." Despite the client's diminished capacity, the client retains the right to determine the goals and objectives of the representation and to consult with the lawyer concerning the means by which the objectives are obtained. Colo. RPC 1.2(a). Thus, the lawyer must consult with the client and respect and be guided by the client's assessment and direction. Colo. RPC 1.14, cmt. [1]. Still, the lawyer should remain cognizant of the client's limited capacity and how that impacts the client's ability to effectively communicate his or her true intentions.

However, because the lawyer representing the allegedly incapacitated person begins the representation knowing of the alleged incapacity, Rule 1.14(b) applies only in a limited way to permit the lawyer to seek professional assistance in determining how to communicate with the allegedly incapacitated person. In this circumstance, Rule 1.14 would not appear to extend to steps the lawyer would normally take, including "consulting with individuals or entities that have the ability to take actions to protect the client," since the very situation that led to the representation is the incapacity, which the lawyer was aware of at the outset. The first sentence of Rule 1.14(c) applies in that situation, and the lawyer is subject to Rule 1.6. However, the implied exception of the second sentence of Rule 1.14(c) does not apply to the lawyer for the allegedly incapacitated person in an adult protective proceeding, as the lawyer representing the allegedly incapacitated person in such a proceeding represents the client's interests as expressed to the lawyer by the client. The protective proceeding permitted under Rule 1.14(b) is already in progress, and therefore the lawyer may not reveal confidential information, as the reason for this sentence (the right to reveal information so as to pursue appropriate protective proceedings) has already occurred.

Absent a lawyer-client relationship, the *guardian ad litem* should be guided by the Rules but need not follow the goals and objectives of the allegedly incapacitated person. Rather, the *guardian ad litem* should be guided by what he or she believes, in his or her professional opinion, is in the best interests of the allegedly incapacitated person. The *guardian ad litem* is appointed by the court and is directed by the court to advise the court and act in the best interests of the allegedly incapacitated person, regardless of whether

the advice and actions of the *guardian ad litem* are consistent with the goals and objectives of the allegedly incapacitated person.[2]

The primary difference between representing a fully competent client and an allegedly incapacitated client concerns communication. A lawyer representing an allegedly incapacitated person, should adjust his or her interview and communication style so that the allegedly incapacitated client can understand the information provided by the lawyer to the fullest extent possible. This may require the lawyer to modify and simplify language so that the client can understand and internalize it in order to make an informed decision. See Roberta K. Flowers & Rebecca C. Morgan, "Ethics in the Practice of Elder Law," Am. Bar Ass'n, 2013. Such a modification in communication style is similar to the adjustment in language a lawyer might use with a less educated client, compared to the language the lawyer might use with a highly educated client or one who has expertise in the subject matter of the litigation.

The lawyer also may adjust his or her communication technique by accepting the assistance of a third party who enjoys the special confidence of the allegedly incapacitated person. Such person is typically an adult child or other relative of the allegedly incapacitated person, but may be any person in whom the allegedly incapacitated person places special confidence.

While normally the presence of a third party destroys the lawyer-client privilege, this is generally not so if the presence of the third party is necessary to assist in the representation. Colo. RPC 1.14 cmt. [3]. However, the lawyer should be cognizant that in all circumstances, the lawyer's duty is to follow the client's objectives and goals, not to defer to the goals or objectives of the third party assisting the client in communicating with the lawyer. Colo. RPC 1.14, cmt [3].

The lawyer also may communicate with an allegedly incapacitated person using written memoranda to summarize conversations or requesting the client to explain what the lawyer has just stated. This type of interaction between lawyer and client may enable the lawyer to gain a better sense of the client's capacity to grasp, interpret, and retain information.

Another step the lawyer should consider in his or her attempt to maintain a normal lawyer-client relationship includes scheduling meetings with the client at a time of day when the client has the greatest level of capacity, such as early in the day, immediately after the client has eaten, or after the client has rested.

Requests for Representation by Others Seeking Protective Proceedings

Where the lawyer has had a prior lawyer-client relationship with the allegedly incapacitated person, and an adult relative (typically an adult child or other trusted relative) or others approach the lawyer to commence a protective proceeding against the former client, the lawyer must decline the representation. Colo. RPC 1.9. In the typical situation, the lawyer will have created an estate plan for the allegedly incapacitated person, including creating powers of attorney naming the relative who has approached the lawyer as an agent under the power of attorney, and that agent now wishes the lawyer to commence a protective proceeding against the client. In this situation, the lawyer most likely has obtained confidential information concerning the allegedly incapacitated person that may directly or indirectly impact any protective proceeding. The lawyer may recommend to the agent or relative other lawyers qualified in protective proceedings who might represent the agent or relative, but the lawyer cannot provide information to the referred lawyer concerning the reason for the referral. Colo. RPC 1.6. Note also that the lawyer must not provide referrals to other lawyers in his or her law firm, since all members of the firm are disqualified from accepting representation if one member is disqualified. *Liebnow v. Boston Enterprises, Inc*., 2013 CO 8, 296 P. 3d 108, 118; *see also* Colo. RPC 1.10(a).

Most available guidance for *guardians ad litem* is written in terms of, and applies to appointments in dependency and neglect cases, in which the *guardian ad litem* must act in the minor's best interests. The only existing guidance for *guardians ad litem* in adult protective proceedings is Chief Justice Directive 04-05, Section VII, "Duties of *Guardians Ad Litem* and Court Visitors Appointed on Behalf of Wards or Impaired Persons." Under that directive, the court appointing the *guardian ad litem* determines the scope of the *guardian ad litem's* duties. The *guardian ad litem* should request clarification of the court's appointing directive as necessary for the *guardian ad litem* to accomplish his or her role in the protective proceeding.

Confusion Among Roles Between Counsel for Allegedly Incapacitated Persons and Guardians Ad Litem

Ethical issues frequently arise when a lawyer for an allegedly incapacitated person or a *guardian ad litem* loses sight of his or her role in the legal process. This often occurs when the lawyer continues to represent a client whose capacity has decreased to the point where it is impossible to maintain a meaningful lawyer-client relationship. If the lawyer reasonably believes the client is unable to act in his or her own interests, the lawyer should consider seeking appointment of a *guardian ad litem*. *See In re Sorensen*, 166 P.3d 254 (Colo. App. 2007); Colo. RPC 1.14; CBA Formal Op. 126. If the lawyer determines that the client or potential client cannot form a lawyer-client relationship, the lawyer may take steps to withdraw from the representation or the lawyer may petition the court to convert the lawyer's court appointment to appointment as a *guardian ad litem*. *See* Restatement (Third) of Agency § 1.01 (Agency Defined); § 3.04 (Capacity to Act as Principal); § 3.06(3) (Termination of Actual Authority - in General); § 3.08(1) (Loss of Capacity); *see also* Restatement (Third) of the Law Governing Lawyers § 20 (A Lawyer's Duty to Inform and Consult with a Client); § 31 (Termination of a Lawyer's Authority). If the lawyer seeks appointment as a *guardian ad litem*, the lawyer should remain diligent in protecting confidential or privileged information obtained from the client while the lawyer served in the capacity of lawyer for the allegedly incapacitated person. *See* Colo. RPC 1.6. Before requesting the court to change the lawyer's role from lawyer to *guardian ad litem*, the lawyer should consider whether such a shift in roles might create a conflict of interest, which might not be waivable by the now-incapacitated client.

However, the lawyer may not continue to act on behalf of a client with whom the lawyer can no longer maintain a lawyer-client relationship. Colo. RPC 1.2 requires the lawyer to act in consultation with the client and to abide by the decision of the client. If the client can no longer provide such guidance or consult with the lawyer, the lawyer may not act on behalf of the client. The obverse problem exists for the *guardian ad litem*, whose role is to act and make recommendations in the best interests of the client. The *guardian ad litem* has the duty to consider, but to act independently of, the desires of the allegedly incapacitated person. When the *guardian ad litem* loses sight of this mandate and falls back into the more familiar role of advocate for the allegedly incapacitated person, the lawyer abdicates his or her role as independent advisor to the court, and becomes a self-appointed counsel for the allegedly incapacitated person, contrary to the appointment order.

Conclusion

Adult protective proceedings are an important and growing area of legal representation. However, there is little ethics guidance on representing a client with diminished capacity in such proceedings, and even less with regard to the role of the *guardian ad litem*.

NOTES

1. In *L.A.N. v. L.M.B*, 292 P.3d, 942 (Colo. 2013) the Colorado Supreme Court ruled that the "GAL's 'client' is the 'best interest of the child,'" *id.* at 949 (citing C.R.S. § 19-3-203(3) (a section of the Colorado Children's Code), & Chief Justice Directive 04-06, "Court Appointments Through the Office of the Child's Representative"). The cited authorities apply only to *guardians ad litem* representing minors. To date, no Colorado appellate court has opined on the question of who is the *guardian ad litem's* client in an adult protective proceeding.

2. For guardians (as distinguished from *guardians ad litem*), the standard under Colorado law is known as "substituted judgment," C.R.S. § 15-14-314(1); "best interests" is the standard only if the desires and personal values of the allegedly incapacitated person cannot be established. *Id.* By contrast, the "best interests" standard always applies to *guardians ad litem*. *See* C.R.S. § 15-14-314.

132 DUTIES OF CONFIDENTIALITY OF WILL DRAFTER UPON DEATH OF TESTATOR

Adopted September 26, 2017.

A lawyer's duty of confidentiality continues after the death of a client. *Cf.* Colo. RPC 1.6(b) (listing exceptions to requirement of confidentiality, and "death of client" not listed); Colo. RPC 1.6, cmt. [20] (duty of confidentiality continues after the client-lawyer relationship has terminated); Colo. RPC 1.9(c)(2) (lawyer may not reveal information related to representation of former client); *see also Wesp v. Everson*, 33 P.3d 191, 200 (Colo. 2001) (attorney-client privilege continues after death of client).

Accordingly, a lawyer ordinarily should not disclose client information following a client's death. For example, if a family member is disappointed with the gift provided under a will and asks the drafting lawyer questions about the testator's intentions, the lawyer usually may not respond without violating Rule 1.6. *See also* American College of Trust and Estate Counsel, *ACTEC Commentaries on the Model Rules of Professional Conduct*, R. 1.6, at p. 80 (5th ed. 2016) ("ACTEC Commentaries") (lawyer's duty of confidentiality continues after death of client).

If the decedent had authorized the drafting lawyer to make such disclosures or if the deceased client's Personal Representative (who holds the rights to the client information) gives consent, then the lawyer may provide an interested party, including a potential litigant, with client information regarding a deceased client's dispositive instruments and intent. *See id.*. This could include prior instruments and communications relevant to those instruments. *Id*. The disclosure should be no broader than necessary to carry out the decedent's wishes. *Id.*

If neither the client nor the Personal Representative has authorized the disclosure, however, there is a split of authority as to whether the lawyer may disclose client information as a matter of ethics. Some authorities contend that such a disclosure would have been "impliedly authorized" by the testator's mere retention of counsel, under the rationale that the testator presumably wanted his or her wishes followed. *Id.* at 88-91 (collecting conflicting ethics opinions from around the country, including Iowa Op. 98-11 (1998), which concludes that questions related to the decedent's potential implied authorization turn on individual facts, and thus a lawyer should not make such disclosures without a court order). Other authorities reject this analysis. *See ACTEC Commentaries* at 88-91 (citing North Carolina 2002 Op. 7 (2003), which concludes that the lawyer may make such disclosures if consistent with the attorney-client privilege).

There is no case authority in Colorado on this ethical point, as *Wesp* addresses only the privilege question, not the ethical issue. While some other states have held that the act of communicating with a drafting lawyer itself may constitute implied consent under Rule 1.6 to disclosure of client information (to enhance the chances of the testator's wishes being carried out), no Colorado decision so holds. The Colorado Bar Association Ethics Committee is of the opinion that simply retaining a lawyer to draft estate documents, without more, is not sufficient to constitute implied consent for the lawyer to voluntarily provide information protected by Rule 1.6.

Therefore the safer course of action is for the drafter not to provide such information voluntarily without the consent of either the testator or the Personal Representative. If a court orders the drafting lawyer to disclose information, however, then the lawyer may reveal the information without violating Rule 1.6. *See* Colo. RPC 1.6(b)(8) (lawyer excused from requirement of confidentiality to comply with court order).

In conclusion, a drafting lawyer may ethically provide client information relating to a deceased client's testamentary wishes as necessary to carry out those wishes where: (a) the decedent authorized such disclosure; (b) the Personal Representative authorizes such disclosure; or (c) a court orders such disclosure. If none of those circumstances are present (and no other exception in Rule 1.6 applies), no Colorado authority would allow the drafting attorney to provide client information to third parties, including beneficiaries under the will and other documents.

133 ETHICAL DUTIES OF A LAWYER WHO IS A PARTY TO A MATTER SPEAKING WITH A REPRESENTED PARTY

Adopted October 27, 2017.

Facts

A lawyer who is a party in a legal matter desires to discuss settlement with the opposing party without seeking the consent of the opposing party's lawyer. The lawyer/party does not represent any other party in the lawsuit.

Question Presented

May a lawyer who is a party in a legal matter communicate directly with a represented adverse party concerning the matter without the consent of the adverse party's lawyer?

Discussion

Rule 4.2 of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) provides that: "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."[1]

There are two scenarios to consider when applying Colo. RPC 4.2 to a lawyer who is a party to a case: (1) when the lawyer/party is representing himself or herself in the matter; and (2) when the lawyer/party is represented by counsel.[2] In the first instance, the Colorado Supreme Court Office of the Presiding Disciplinary Judge (OPDJ) recently held that a lawyer appearing *pro se* was acting as his own lawyer in the matter and, therefore, violated Rule 4.2 when he communicated directly with a represented adverse party.[3] The OPDJ specifically rejected the lawyer/party's argument that he was communicating with the opposing party as a *pro se* party, not as a lawyer "representing a client" under the plain language of the Rule.[4] The OPDJ concluded that Rule 4.2 applies to a lawyer's communication while acting *pro se*, based on relevant Colorado precedent, the weight of authority from other jurisdictions, and the OPDJ's assessment that such a conclusion supports the purposes of the rule.[5] Based on an ABA formal opinion, the OPDJ identified three purposes of Rule 4.2: (1) to provide protection of the represented person against overreaching by adverse counsel; (2) to safeguard the client-lawyer relationship from interference by adverse counsel; and (3) to reduce the likelihood that clients will disclose privileged or other information that might harm their interests.[6] The recent OPDJ decision is consistent with decisions in other jurisdictions, which have unanimously held that when a lawyer represents his own interest in a case, Rule 4.2 prohibits the lawyer/party from discussing the matter with another party who is represented by counsel.[7]

Only two jurisdictions have addressed the facts in the second scenario—when the lawyer/party is represented by counsel—and this case law is split. The Connecticut Supreme Court held that a lawyer/party who had hired an attorney did not violate Rule 4.2 when he sent correspondence regarding the case directly to the opposing party who was also represented by counsel.[8] This opinion has been criticized in some states and an intermediated appellate court in Texas rejected its conclusion on the basis that it allowed a lawyer/party to "do that which he would otherwise be unable to do if he represented himself, by simply employing a counsel of record."[9]

No Colorado decision has directly addressed the second scenario. The Colorado Bar Association Ethics Committee (Committee) concludes that Rule 4.2 does not prohibit a lawyer/party from discussing the matter with a represented adverse party when the lawyer/party is also represented by counsel. The Committee relies on the basic canon of statutory construction: if the plain language permits, , then a rule "should be construed as written, giving full effect to the words chosen, as it is presumed that the General Assembly meant what it clearly said."[10] This rule of statutory construction applies equally to court rules.[11]

Rule 4.2's prohibition against communication with a represented adverse party is qualified by the phrase, "when representing a client." When a lawyer/party is himself or herself represented by counsel, then the lawyer/party is not acting as his or her own counsel and is not communicating with a represented adverse party while "representing a client."[12]

Conclusion

Absent a court order to the contrary, a lawyer who is representing himself or herself in a legal matter may not communicate about the matter directly with a represented adverse party without the consent of the adverse party's lawyer. However, the same lawyer/party may communicate about the matter directly with a represented adverse party when the lawyer/party himself or herself is represented by counsel.

NOTES

1. Colo. RPC 4.2 is identical to ABA Model Rule 4.2. Other states mentioned in this opinion likewise have adopted either the Model Rule *verbatim* or a materially similar version of the Model Rule.

2. For purposes of this Opinion, it is assumed that the lawyer/party does not have the consent from the opposing party's lawyer to communicate about the subject matter of the case with opposing party nor is authorized or prohibited from such communication by law or a court order.

3. *People v. Wollrab,* 16PDJ062 (Colo. O.P.D.J. 2017); *see also People v. Crews*, 901 P.2d 472 (Colo. 1995); *People v. Marquardt,* 03PDJ053 (Colo. O.P.D.J. 2003); *People v. Waitkus,* 02PDJ022 (Colo. O.P.D.J. 2002).

4. *Wollrab*.

5. *Id.*

6. ABA Standing Comm. on Ethics and Prof. Resp., Formal Op. 95-396, "Communications with Represented Persons" (1995).

7. *See Runsvold v. Idaho State Bar*, 925 P.2d 1118 (Idaho 1996); *In re Segall*, 509 N.E.2d 988 (Ill. 1987); *In re Discipline of Schaefer*, 25 P.3d 191 (Nev. 2001), *In re Disciplinary Proceeding against Haley*, 126 P.3d 1262 (Wash. 2006); *Comm. on Legal Ethics v. Simmons*, 399 S.E.2d 894 (W. Va. 1990); *Sandstrom v. Sandstrom*, 880 P.2d 103 (Wyo. 1994).

8. *Pinsky v. Statewide Grievance Comm.*, 578 A.2d 1075, 1079 (Conn. 1990).

9. *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 259 (Tex.App. Houston [14 Dist.] 1999); s*ee also Schaefer*, 25 P.3d at 199 (finding "[t]he lawyer still has an advantage over the average layperson, and the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se."); *Haley*, 126 P.3d at 1269 (noting the apparent discrepancy in holding that Rule 4.2 applies to a *pro se* lawyer/parties but not to a lawyer/party represented by counsel); *see generally Nieto,* 993 P.2d at 501 (stating "in construing a statute, we must seek to avoid an interpretation that leads to an absurd result"); § 2-4-201(1)(c) C.R.S. (2017) ("A just and reasonable result is intended.").

10. *See State Dep't of Corrections v. Nieto,* 993 P.2d 493, 500 (2000); *see also* § 2-4-101 C.R.S. (2017) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage.").

11. *See In re Marriage of Wiggins,* 279 P.3d 1, 7 ¶ 24 (Colo. 2012).

12. *See generally Fasing v. LaFond,* 944 P.2d 608, 612 (Colo. App. 1997) ("an attorney seeks legal counsel as a client, not as an attorney")

134 ETHICS OF PREPARING AGREEMENTS FOR JOINTLY-REPRESENTED CLIENTS IN LITIGATION TO MAKE COLLECTIVE SETTLEMENT DECISIONS

Adopted January 4, 2018.

Question

Under the Colorado Rules of Professional Conduct (Colo. RPC or Rules), may a lawyer prepare an agreement for multiple jointly-represented clients providing that majority rule, or other non-unanimous procedures, will govern collective settlement decisions?[1]

Syllabus

A lawyer ethically may prepare an advance agreement for multiple jointly-represented clients, which provides that majority rule will govern future settlement decisions. Rule 1.8(g) is not implicated at the stage of drafting such an agreement, but the lawyer must ensure compliance with Rule 1.7. Specifically, before undertaking this representation, the lawyer must adequately disclose to the potential clients the risks and potential conflicts that may arise from such an agreement and from joint representation in the drafting of that agreement, and must obtain the informed consent of each potential client.

When a proposed settlement is being considered, Rule 1.8(g) does apply and a lawyer may not participate in a joint settlement without consent from all clients. At that time, and notwithstanding the existence of a prior agreement that majority rule will govern future settlement decisions, if one or more of the joint clients does not abide by a majority decision regarding a specific settlement proposal, the lawyer may neither compel the dissenting clients to settle nor otherwise take steps to enforce the agreement. In that event, the clients who form a majority on the specific settlement proposal may have a claim against the dissenting minority clients for breach of the agreement. The lawyer, however, may not represent any of the clients in this dispute among the clients, and might need to withdraw from any further representation of any of the clients.

Introduction

A, B, and C ask Lawyer to represent them jointly in a single action against a single defendant. Recognizing the potential benefit of a unified position regarding settlement, the potential clients ask Lawyer to prepare an agreement among the clients providing that (1) the clients will make all settlement decisions by majority vote,[2] and (2) settlement proceeds will be divided pro rata based on the amount of each client's initial claim.[3]

Lawyer undertakes the joint representation and prepares an agreement that includes the requested provisions regarding settlement decisions. Lawyer files the lawsuit and proceeds to jointly represent all three clients in the litigation. The defendant makes a settlement proposal. A and B wish to accept the settlement, but C does not. Even though a majority of the clients wish to accept the settlement, the minority client, C, refuses to follow the majority decision and refuses to enter into the settlement.

These facts raise the following questions:

1. May Lawyer ethically prepare the agreement among the jointly represented clients that they will make settlement decisions by majority rule?

2. Once C dissents from the majority decision of A and B regarding the proposed settlement, may Lawyer take action to compel the dissenting client, C, to settle? In other words, may Lawyer enforce the majority-rule agreement against C on behalf of A and B?

3. May Lawyer continue to represent all three clients, A, B, and C, once C refuses to comply with the majority-rule agreement?

We answer the first question in the affirmative, and the second and third questions in the negative.

Analysis

Rules 1.7 and 1.8 apply when a lawyer considers entering into an engagement to represent multiple clients jointly. Generally, joint representation is permissible, notwithstanding the existence of possible conflicts of interest among the jointly-represented clients, if

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
(2) the representation is not prohibited by law;
(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing.

Colo. RPC 1.7(b).

Rule 1.8(g) applies specifically to possible conflicts of interest among jointly-represented clients presented by aggregate settlements of litigation:[4] "A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client."

Rule 1.2(a) also provides guidance regarding a lawyer's responsibility to abide by client decisions regarding settlement: "[A] lawyer shall abide by a client's decision 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 shall abide by a client's decision whether to settle a matter."

Several courts and ethics committees have concluded that a lawyer may not enforce against any of the lawyer's clients an advance agreement to settle. That is, if some of a lawyer's clients do not wish to accept a settlement proposal, the lawyer may not compel the lawyer's dissenting clients to settle, even if all clients have previously agreed to abide by majority decision regarding settlement and a majority of the clients wish to accept that proposal. Nor may clients delegate in advance *to their lawyer* the decision to settle so that the lawyer may bind all clients in responding to a settlement proposal.[5] The Colorado Bar Association Ethics Committee (Committee) concurs. These conclusions proceed directly from Rules 1.2(a), 1.7, and 1.8(g), which give clients, and not their lawyer, full authority regarding settlement decisions.

These court decisions and ethics opinions often use broad language that suggests that, not only is a lawyer forbidden from compelling any joint client to settle notwithstanding the client's prior agreement that the majority of jointly-represented clients will control settlement decisions, but also that a lawyer cannot draft such an agreement in the first place. The Committee concludes otherwise. A lawyer may prepare an agreement for jointly-represented clients providing that future decisions regarding settlement will be made by majority rule. An agreement to govern litigation decisions, including possible decisions regarding settlement, is in many respects similar to any other agreement among jointly-represented clients that provides how their future relationship will be governed, such as an operating agreement for a business entity formed for jointly-represented clients.

Under Rule 1.8(g), a lawyer "shall not participate in making an aggregate settlement" of claims belonging to more than one of the lawyer's clients without written, informed consent from each client. The quoted language from Rule 1.8(g) is somewhat ambiguous. Arguments could be made that any activity that relates in any way to a potential settlement would fall within the scope of "participat[ion] in making." The Committee concludes, however, that such an interpretation of the language would be too broad. Preparing an agreement in advance of an offer to settle is not "making" a settlement based on that offer, much less "participat[ion]" in making such a settlement. Therefore, Rule 1.8(g) does not apply to the drafting. Rule 1.8(g) does not apply until the jointly-represented clients are considering a proposed settlement.

The Committee further concludes that Rule 1.7 applies to a lawyer drafting the requested agreement among multiple clients. In Ethics Opinion 68, the Committee set forth a framework to analyze the propriety of potential joint representation under Rules 1.7 and 1.8, and addressed some common circumstances in which multiple clients may ask a lawyer to represent them jointly. A lawyer considering a potential joint representation should determine (1) whether a concurrent conflict of interest exists, (2)

whether the clients may consent to waive that conflict, and, if so, (3) what information must be communicated to the clients to obtain their informed consent. The Committee applies that framework here.

I. Whether a Conflict of Interest Exists.

A potential conflict of interest is inherent in any joint representation. Settlement decisions by multiple clients present additional potential conflicts of interest among joint clients.

> Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent.

Colo. RPC 1.8, cmt. [13].

One client may wish to accept a proposed settlement, and another client may wish to reject the same proposed settlement. Or clients may disagree about how an aggregate settlement amount will be apportioned among them. These potential conflicts are inherent and unavoidable.

II. Whether the Clients Can Consent to Waive Potential Conflicts Associated With an Agreement to Make Future Settlement Decisions by Majority Rule.

When a joint representation creates an existing or potential concurrent conflict of interest among the multiple clients, Rule 1.7 requires "informed consent" in writing from each client. Colo. RPC 1.7(b)(4). "Informed consent," in turn, requires the lawyer to communicate "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Colo. RPC 1.0(e). Comment 22 to Rule 1.7 explains that, with respect to advance waivers, "[t]he effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails."

Thus, the question is whether it is possible for a lawyer to provide, in advance, adequate information and explanation of the material issues and risks likely to arise in connection with a joint decision by multiple clients to respond to a settlement proposal so that the clients can (1) agree at the outset of the representation to intelligently waive their individual rights to respond to a specific future settlement proposal in favor of submitting their decisions to a majority-rule decision, and (2) intelligently waive their rights to be represented by separate counsel in negotiating and preparing the agreement to submit future settlement decisions to majority rule.

In this regard, it is critical to define exactly what "consent" is being provided in advance. One possible "consent" is consent to having the lawyer prepare a current agreement among the jointly-represented clients that provides that the group will respond to future settlement proposals by majority rule. Another possible "consent" is current consent to having the lawyer enforce that agreement in the future by accepting a proposed aggregate settlement on behalf of all of the lawyer's clients, intending to bind all clients, over the objections of a client who does not wish to comply with a majority decision in the context of a specific settlement proposal.

The Committee concludes that, with adequate disclosures, a lawyer may seek multiple clients' consent to the lawyer's preparation for all of them of an agreement providing a majority-rule mechanism for the jointly-represented clients to respond to an aggregate settlement proposal. However, under no circumstances may a lawyer seek those clients' advance consent to the lawyer's participation in enforcing that agreement if one of the clients subsequently does not wish to comply with the majority-decision rule in the context of a specific settlement proposal. In that circumstance, the lawyer may need to withdraw from the joint representation.

A. Preparing an Agreement for a Majority-Rule Response to an Aggregate Settlement Proposal

Rule 1.2(a) provides that "A lawyer shall abide by a client's decision whether to settle a matter." This Rule prohibits a lawyer from compelling a client, whether a sole client or one of multiple clients, to

accept (or reject) a specific settlement proposal. If a lawyer represents multiple clients, and one of those clients does not want to accept a proposed settlement, then there is a conflict among the lawyer's joint clients and the lawyer may not compel an aggregate settlement that includes the dissenting client.

Rule 1.8(g) is a straightforward statement of this principle. Neither Rule 1.2(a) nor Rule 1.8(g), however, says anything about the timing of a client's decision regarding settlement.[6] In particular, those Rules say nothing about whether the decision may be made only in the context of a specific settlement proposal. They also do not address whether multiple claimants may agree among themselves, in advance of considering any specific settlement proposal, to make settlement decisions by majority decision. That is, the Rules are silent regarding whether the "client's decision whether to settle a matter" may take the form of an advance agreement to make that decision as part of a group. The Rules clearly do not prohibit such an agreement.

There is no good reason why litigants, properly advised, cannot agree in advance to give up, or waive, their rights to make their own settlement decisions and, instead, submit those decisions to majority decision. Waivers of important rights are valid in a variety of areas, including the most cherished of constitutional rights. *See* American Law Institute, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17(b) (2010), comment b. "[W]e commonly permit litigants to waive their due process rights to notice, to a hearing, and to a trial. One may even waive one's right to appeal a death sentence. Against this backdrop, the proposition that litigants should be free to use less-than-unanimity rules to govern their collective behavior seems unremarkable, even pedestrian." Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 Wake Forest L. Rev. 733, 769 (1997).

Just as the Rules are silent regarding whether multiple claimants may agree to a majority-decision rule governing future settlement decisions, the Rules do not provide that such an agreement among multiple claimants would be unenforceable. Therefore, if multiple claimants are each advised by separate counsel, the Rules would not in any way prohibit those claimants, through their respective counsel, from drafting and entering into such an advance agreement governing future settlement decisions.[7]

The question, thus, is whether those same multiple claimants could jointly engage a single lawyer and have that lawyer draft the agreement. The Committee concludes that, if multiple claimants wish to be jointly represented and have their joint lawyer prepare that agreement, the lawyer may do so if the lawyer is able to make adequate disclosures and the clients can provide informed consent to the joint representation.

There are many similarities between (1) preparing an agreement for jointly-represented clients who are co-parties in a litigation governing how the clients will make decisions for the litigation, including responding to settlement proposals, and (2) preparing an agreement for jointly-represented clients who are forming an entity and wish to include in the formation agreement a mechanism for governing the entity by majority rule, or a mechanism for valuing each client's ownership interest in the entity, or for dividing the assets and liabilities of the entity among the clients if they subsequently disagree about how the entity should be run.

In both circumstances, the jointly-represented clients wish to set up a joint enterprise. In one the enterprise is the lawsuit. In the other the enterprise is the to-be-formed entity. Both circumstances involve inherent uncertainty about exactly what might arise in the future. In both circumstances, the lawyer can anticipate and explain many potential risks and uncertainties to the joint clients.

In Formal Opinion 68, the Committee concluded that, with appropriate disclosures to the potential clients, a lawyer ethically may represent multiple clients in preparing an entity agreement to form a joint enterprise for the clients:

> The comments to Colo. RPC 1.7 specifically contemplate a lawyer acting on behalf of multiple clients when their interests are generally aligned, such as helping entrepreneurs to organize and establish a business entity. … In such circumstances, "the lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests."

CBA Formal Op. 68, "Conflicts of Interest: Propriety of Multiple Representation" (1985, revised 2011) (citing and quoting Colo. RPC 1.7, cmt. [28]).

Similar circumstances exist when multiple claimants ask a lawyer to prepare an agreement specifying how they will manage their common litigation, including making settlement decisions, by majority rule. Potential claimants with common interests in litigation often have generally aligned interests. There are potential benefits to all claimants in having an advance agreement governing how they will make joint settlement decisions. The lawyer may secure those benefits for the claimants by working to resolve their potentially adverse interests and to develop their mutual interests in such an advance agreement.

The main difference between preparing an entity agreement and preparing a settlement-decision-making agreement for jointly-represented clients is in the types of risks and uncertainties that must be anticipated and explained. The jurisprudence and case law relating to disputes that are likely to arise among joint owners of a business enterprise are well-developed and generally can be readily explained in advance.

In contrast, there is little jurisprudence or experience regarding the complications that may arise from an agreement regarding future majority-rule settlement decisions by multiple claimants. The absence of substantial jurisprudence and experience regarding such agreements does not raise an insurmountable bar to obtaining multiple clients' consent to having their joint lawyer draft the settlement-decision-making agreement for them—but it does heighten the burden on the lawyer to communicate sufficient information to obtain informed consents. Ultimately, the Committee concludes that, just as a lawyer ethically may prepare an agreement among joint clients to set up a common business enterprise, if a lawyer makes appropriate disclosures the lawyer ethically may prepare an advance agreement for jointly-represented clients governing how the client group will make litigation decisions, including how to respond to an aggregate settlement offer, so long as the clients have provided informed consents.[8]

B. Enforcing an Advance Agreement on How to Respond to an Aggregate Settlement Proposal

Even though a lawyer may prepare an advance agreement providing for majority rule on settlement decisions, a lawyer may not enforce that agreement against the lawyer's clients who are in the minority with respect to whether to accept a specific, aggregate settlement proposal. This conclusion flows directly from Rule 1.2(a), which requires a lawyer to abide by a client's decision on whether to settle a matter, and from Rule 1.7(b)(3), which precludes a lawyer from representing one client in the assertion of a claim against another client. The latter rule expressly prohibits a lawyer from seeking consent to represent one client directly against another client. The Committee agrees with the cases that have held that a lawyer also may not seek advance consent for the lawyer to override a client's absolute control over settlement decisions. *See Hayes*, 513 F.2d at 894–95; *Abbott,* 42 F. Supp. 2d at 1050-51; *Tax Auth., Inc.*, 898 A.2d at 521-22; *In re Hoffman*, 883 So. 2d at 432-33; *see also Nichols v. Orr,* 63 Colo. 333, 166 P. 561, 561 (1917) ("[A]ny agreement which deprives the litigant of the right to control his case, before it is finally determined, is void as against public policy.").

If multiple clients agree in advance on a majority-decision rule for how they will respond to an aggregate settlement proposal, but one client in the future refuses to follow the majority's decision, the dissenting client might be in breach of that agreement. The other clients might have claims against the dissenting client. This circumstance creates an unwaivable conflict for their joint lawyer due to the dispute between the dissenting client and the other clients.[9] The lawyer may not take sides in this dispute, and may not seek to enforce the agreement against the dissenting client, on behalf of the majority clients, by compelling the dissenting client to settle. The lawyer might need to withdraw from the joint representation entirely.

Returning to the analogy to a lawyer's permissible preparation of an agreement for multiple clients forming a business entity, if a dispute arises among the clients in which a subset of clients seeks to enforce the entity agreement against another client or clients, the lawyer may not take sides in that dispute and might need to withdraw from further joint representation. If the lawyer does withdraw, then the lawyer's clients could engage new, separate counsel to represent their no-longer-aligned interests.[10]

III. Necessary Disclosures by Lawyer Drafting the Agreement for Joint Clients

As the Committee noted in Opinion 68, under the Rules, the propriety of any joint representation is always contingent on the lawyer making adequate disclosures to the joint clients of the risks inherent in joint representation.

> The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision.

Colo. RPC 1.0, cmt. [6].

If joint clients request their common lawyer to prepare an agreement providing that they will make settlement decisions by majority rule, the lawyer must make all disclosures necessary for joint representations in general. Lawyers frequently make these disclosures in undertaking joint representation of clients in litigation. The Committee will not discuss these disclosures here, other than to note that "[d]ifferences in willingness to make or accept an offer of settlement are among the risks of common representation … that should be discussed" before undertaking joint representation of multiple claimants, even if the issue of an advance agreement among the claimants is not on the table. Colo. RPC 1.8, cmt. [13].

In addition to the disclosures that are required before a lawyer may undertake joint representation of co-litigants, the lawyer must make additional disclosures sufficient for the clients to make an informed decision about waiving the conflicts inherent in drafting the agreement and regarding how the agreement might affect the clients in the ensuing litigation. These disclosures, at a minimum, would need to include an explanation of ways in which the clients' individual interests or opinions might diverge in the context of any specific settlement proposal and the consequences of that divergence. For example, the merits of the individual clients' claims might differ or might develop differently over the course of the litigation. Or the allocation of a potential settlement might appear more favorable to some clients than others. These are examples only. Clients' respective opinions on the merits of accepting or rejecting a particular settlement proposal could diverge for other reasons.

Regardless of the reason that the clients' respective opinions regarding a proposed settlement may diverge, any divergence could lead to a potential conflict of interest between the majority and dissenting clients. The lawyer would need to explain what might happen in that event, *i.e.*, that (1) the minority clients might choose to abide by the majority decision, even if they disagree with it, or they might choose not to abide by the majority decision; (2) if the minority chooses not to abide by the majority decision, Rule 1.8(g) would preclude the lawyer from closing a settlement over the objection of any client; (3) in that circumstance, the lawyer, or any other lawyer representing all of the claimants jointly, might need to withdraw from further representation of all clients, which might adversely affect the joint litigation and possible settlement[11]; (4) the majority clients could seek to enforce the majority-decision agreement against the dissenting minority clients, or seek damages from the dissenting clients for breach of the agreement; and (5) some of the case law cited in this opinion might persuade a court to hold the majority-rule agreement not to be specifically enforceable, or enforceable at all.[12]

It might be difficult to foresee and explain all potential future events that could arise relating to an agreement among common claimants to make settlement decisions by majority rule. Indeed, in some circumstances it might be impossible to provide disclosures sufficient for the clients to consent to joint representation. However, the Committee concludes that, in at least some circumstances and for some potential joint clients, lawyers can make sufficient disclosures for clients to make a reasonably informed decision allowing the lawyer to prepare an agreement providing that the joint clients will submit settlement decisions to a majority-decision rule.

NOTES

1. This opinion does not address the application of Rule 1.7 to joint representation generally. *See generally* Colo. RPC 1.7 and cmts. [29]-[33]. Nor does this opinion address the enforceability of an agreement among jointly-represented clients that they will manage all aspects of their joint litigation by majority rule, although much of the discussion in this opinion may be relevant to that issue. Finally, for simplicity of language, this opinion refers to a "majority-rule" decision on settlement matters, but the analysis would be the same for any settlement-decision rule that does not require unanimity among jointly-represented clients.

2. This is a majority of the clients, only, and does not include a vote for the lawyer. As noted below, under Rule 1.2(a), because the lawyer must abide by client decisions regarding settlement, the lawyer may not have control of settlement decisions.

3. The following discussion focuses on the agreement's provision that settlement decisions will be governed by majority rule. The same analysis applies to the agreement's advance provision regarding division of any eventual settlement proceeds.

4. Rule 1.8(g) does not define "aggregate settlement." The American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility suggested an appropriate definition: "An aggregate settlement or aggregated agreement occurs when two or more clients who are represented by the same lawyer together resolve their claims or defenses …." ABA Comm. on Ethics and Prof'l Resp., Formal Op. 06-438, "Lawyer Proposing to Make or Accept an Aggregate Settlement or Aggregated Agreement," 2 (2006).

5. *See* ABA Formal Op. 06-438; N.Y. City Bar Ass'n Formal Op. 2009-06, "Aggregate Settlements" (2009); *Hayes v. Eagle-Picher Indus., Inc.*, 513 F.2d 892, 894–95 (10th Cir. 1975); *Abbott v. Kidder Peabody & Co.,* 42 F. Supp. 2d 1046 1050-51 (D. Colo. 1999); *Tax Auth., Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512, 521-22 (2006); *In re Hoffman*, 883 So. 2d 425, 432-33 (La. 2004).

6. Rule 1.8(g) requires "informed consent, in a writing signed by the client." It does not specify when that informed consent must be provided, or whether it must in all circumstances be provided only in the context of a specific settlement proposal.

7. The Committee notes that, in other contexts, claimants routinely agree, by contract, to allow another person or entity to control their claims, and that such contracts are enforceable. For example, an insurance agreement or other indemnification contract often gives the insurer or indemnitor the authority to control a claim, including the authority to settle or compromise the claim. Furthermore, a claimant can assign an entire claim to a third party by contract.

8. The types of disclosures that must be made are discussed below.

9. Note that there is no conflict (and no possible breach of agreement) if the clients who are in the minority regarding how to respond to a settlement decision follow the advance agreement and submit to the majority decision. In the fact pattern above, when A and B vote to accept the proposed settlement, and C votes against the settlement, there is no conflict if C agrees to abide by the majority decision and enter into the proposed settlement in a writing signed by C (and A and B). Rather, a conflict arises only if C refuses to abide by the majority-decision rule to which A, B, and C agreed in advance.

10. No Colo. RPC would prevent the new counsel from pursuing a claim against the original lawyer's former clients who do not wish to comply with the majority-rule agreement. Because the new lawyer would not be proceeding against any of the new lawyer's current or former clients, there would be no conflict of interest, and Rules 1.7 and 1.8 would not be implicated.

11. Withdrawal in the event of a conflict among the claimants regarding a specific settlement proposal is required under Rule 1.7 because that conflict would represent an unwaived present conflict of interest among jointly-represented clients. This conflict would affect any lawyer who represented the claimants jointly, whether or not that lawyer drafted the majority-decision-rule agreement among the claimants.

12. *See Hayes,* 513 F.2d at 894 (suggesting in dictum that majority-decision-rule agreement might not be binding on dissenting minority in the face of a specific settlement proposal); *Nichols,* 166 P. at 561; *Tax Authority,* 898 A.2d at 522 ("We conclude that RPC 1.8(g) forbids an attorney from obtaining consent in advance from multiple clients that each will abide by a majority decision in respect of an aggregate settlement."); *see also Jones v. Feiger, Collison & Killmer,* 903 P.2d 27, 34 (Colo. App. 1994) ("Any provision in an agreement to provide legal services that would deprive a client of the right to control settlement is unenforceable as against public policy."), *rev'd on other grounds,* 926 P.2d 1244 (Colo. 1996).

135 ETHICAL CONSIDERATIONS IN THE JOINT REPRESENTATION OF CLIENTS IN THE SAME MATTER OR PROCEEDING

Adopted February 20, 2018.

I. Introduction and Scope

This opinion discusses a lawyer's responsibility, when requested to represent more than one client in the same matter, to identify and address conflicts of interest between the potential clients and to obtain informed client consent to the joint representation with respect to the identified conflicts. The lawyer also should consider how the lawyer will address the following: conflicts that may arise between the jointly represented clients during the representation; the sharing of confidential information; and revocation of consent to joint representation. This opinion builds on earlier opinions of the Colorado Bar Association Ethics Committee (Committee). Together with CBA Formal Opinion 68, "Conflicts of Interest: Propriety of Multiple Representation" (1985, rev. 2011), this opinion supersedes the portion of withdrawn CBA Formal Opinion 57, "Conflicts of Interest," that addressed simultaneous representation of multiple clients under the former Colorado Code of Professional Responsibility. In addition to a general discussion of current conflicts, conflict waiver, and informed consent, Formal Opinion 68 provides specific illustrations of common conflicts in the context of family law and transactional law. This opinion's guidance on joint representation generally applies within the context of litigation, including both civil and criminal representation.

II. Syllabus

When undertaking a new representation, a lawyer must first determine whether the engagement calls for the lawyer to represent more than one person or entity. If so, the lawyer then must consider whether there are conflicts of interest between those clients with respect to the representation and must decide whether a joint representation is permissible notwithstanding the conflicts. If the conflicts are consentable, the lawyer may undertake the joint representation only after obtaining the informed consent of each client and confirming each consent in writing. The lawyer's discussion with the clients should alert them to issues relating to confidentiality and the attorney client privilege. The lawyer should not only discuss these items with the clients at the time of retention, but also may wish to address each item, providing appropriate written advisement, in a waiver, retention agreement, or other appropriate collateral documentation (referred to in this opinion as a "retention agreement").

III. Discussion and Analysis

A. Joint Representation

Rule 1.7(a) of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) governs whether a lawyer may undertake the representation of multiple clients in the same matter. Under Rule 1.7(a), a lawyer may not represent a client if the representation involves a concurrent conflict of interest: *i.e.*, the representation will be *directly adverse* to another client or there is a significant risk that the representation will be *materially limited* by the lawyer's responsibilities to another client. The representation may be undertaken despite the existence of a concurrent conflict, however, if "(1) the lawyer *reasonably believes* that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client in the same litigation or proceeding; and (4) each affected client provides *informed consent*, confirmed in writing. Colo. RPC 1.7(b) (emphasis added).

B. Informed Consent to the Conflict Identification Process

Both at the outset of representation and during its pendency, the lawyer should evaluate whether the representation involves the representation of two or more clients. If so, the lawyer must analyze the conflict and consent issues involved in a joint representation.

When the lawyer has been asked to represent multiple clients in the same matter or proceeding, the lawyer should consider the impact of Rule 1.6 on the lawyer's ability to discuss and resolve potential conflicts between the potential joint clients. In the course of identifying any conflicts, the lawyer will gain information about either existing clients, which the lawyer may not disclose under Rule 1.6(a), or information about prospective clients, which may not be used or revealed pursuant to Rule 1.18(b). Under Rule 1.6(a), confidential information may be revealed if the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation.

If the communications inherent to the conflict identification process do not result in joint representation, then one or more of the clients will be a prospective client, defined under Rule 1.18 as "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." Rule 1.18 prohibits representation of a client with interests materially adverse to those of a prospective client. Under Rule 1.18(c), if the lawyer received information from the prospective client that could significantly harm the prospective client, the lawyer may not represent a client whose interests are materially adverse in the same matter or a substantially related matter, subject to the enumerated exceptions, one of which is obtaining informed consent, confirmed in writing, from both the affected client and the prospective client.

Comment [5] to Rule 1.18 provides guidance on disclosure of confidential information during the conflict identification process: "A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client." (Internal citation omitted.)

Therefore, the lawyer should consider the extent and nature of the written agreements or advisements that may be necessary to permit the lawyer to ethically collect information relating to the representation of a client or prospective client in order to identify conflicts, disclose that information to existing or prospective clients, and preserve the lawyer's ability to represent only one of these clients if the proposed joint representation is either prohibited or not undertaken for other reasons.

C. Identifying Actual and Potential Conflicts

Before agreeing to any joint representation of two or more clients, the lawyer must determine whether conflicts of interest presently exist between the clients or are reasonably likely to arise in the future and, if so, whether the representation nevertheless may move forward.[1] The interests of any two persons or entities are seldom, if ever, perfectly aligned. A direct conflict exists if the multiple clients' interests are directly adverse. *See* Rule 1.7(a)(1). The interests may be adverse even if the relationship is not hostile.[2] In the litigation context, adversity may exist regarding the facts of the case, as they are understood by each of the potential clients, or due to "substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question." Colo. RPC 1.7, cmt. [23]. For example, co-defendants may be reasonably likely to be or become adverse with respect to at least some aspect of the defense or defense strategy, such as a desire to deflect blame to the other defendant if, together, they cannot wholly defeat the plaintiff's claims. Even interests of spouses may diverge on some issues in matters on which they are jointly represented. A lawyer contemplating a joint representation should give careful thought not only to whether the clients' interests are currently in conflict but also to how they might diverge as the representation goes forward, and the relative likelihood of such divergence. Conflicts arising only from conjecture related to potential future scenarios, however, are not concurrent conflicts under Rule 1.7 and are not a basis for

disqualification from the joint representation. *See Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 855 F. Supp. 330, 336 (D. Colo. 1994).

Material limitation conflicts occur when there is a significant risk that the representation of a jointly represented client will be materially limited by the lawyer's responsibility to another client or by the lawyer's own interests. *See* Rule 1.7(a)(2). Generally, the lawyer must consider whether the ability to recommend or advocate all positions that each client reasonably might take will be limited because of the duty of loyalty owed to another jointly represented client. *See* Rule 1.7, cmt. [8]. This consideration is pertinent to the individual defense strategies that co-defendants may pursue . A lawyer's long-standing relationship with only one of two jointly represented clients also may present a material limitation conflict.

Material limitation conflicts also may occur, for example, when one of the clients is paying all or a disproportionate share of the fees and expenses. In that circumstance, the lawyer must consider whether his or her representation of the non-paying client will be limited by responsibilities to the paying client or the lawyer's personal interest in maintaining the relationship with the paying client. *See* Rule 1.7, cmt. [13]. This circumstance commonly occurs when a lawyer defends both a business and its employee in litigation.

The lawyer also should consider whether there is a *significant* risk of a material limitation conflict. California courts have noted that joint representation is not precluded in situations in which the potential conflict – although material if it were to eventuate – is merely theoretical and not realistic. *See Carroll v. Superior Court*, 101 Cal. App. 4th 1423, 1429, 124 Cal. Rptr. 2d 891, 896 (2002). As discussed at greater length below, the lawyer must discuss any actual or reasonably possible potential conflicts that the lawyer has identified with the prospective clients in order to obtain informed consent to the joint representation.

D. Determining Whether Joint Representation Is Permitted Despite a Conflict

Once the existence of a conflict is determined, the lawyer must evaluate whether the proposed joint representation is nevertheless permissible. Joint representation is prohibited, regardless of consent, when the representation is prohibited by law or when the representation involves the assertion of a claim by one client against the other client in the same litigation or proceeding. Colo. RPC 1.7(b). Joint representation likewise is prohibited, regardless of consent, if the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation to each client. Colo. RPC, cmt. [15]. Further, joint representation is impermissible if the lawyer determines that one or more of the clients cannot reasonably give informed consent.

Certain conflicts are rarely consentable. For example, "the potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant." Colo. RPC 1.7, cmt. [23]. Colorado case law and the Rules of Criminal Procedure impose heightened considerations of consent relating to joint representation of co-defendants in a criminal prosecution. A criminal defendant's constitutional rights to effective assistance of counsel may be violated when a defendant is represented by a lawyer who simultaneously represents conflicting interests. *See Armstrong v. People*, 701 P.2d 17, 19 (Colo. 1985). "Although joint representation does not per se violate the right to effective assistance of counsel, and although a defendant may waive the right to conflict-free representation if such waiver is made voluntarily and with full knowledge of the actual conflict, it is recognized that representation by one lawyer of two or more defendants in prosecutions arising from a single criminal episode invariably creates the possibility that a conflict of interest will arise." *Id.* (citations omitted); *see also People v. Chew*, 830 P.2d 488, 489 (Colo. 1992) (under former Code of Professional Responsibility and despite written conflict waivers, concluding that defense attorney could not adequately represent the individual interests of jointly represented criminal co-defendants due to their different degrees of culpability). Where the same lawyer represents criminal co-defendants, the court must independently inquire with respect to the joint representation and must personally advise each defendant of the right to effective assistance, including separate representation. Colo. R.Crim.P. 44. Rule 44 of the Rules of Criminal Procedure further requires the court to take such measures as may be appropriate to protect each defendant's right to counsel, "unless it appears that there is good cause to believe no conflict of interest is

likely to arise." *Id.* However, the court may accept the defendant's waiver of the right to conflict-free representation upon a showing that the defendant was fully advised of the existing or potential conflict and the likely effect of the conflict on the lawyer's ability to provide effective representation, and the defendant voluntarily, knowingly, and intelligently waived his or her right to conflict-free representation. *See People v. Martinez*, 869 P.2d 519, 525 (Colo. 1994).

The lawyer also should consider the relationship between the prospective joint clients in determining whether the clients should, or can, provide consent to joint representation. *See* Colo. RPC 1.7, cmt. [29]. If the prospective clients are already in an antagonistic relationship, or if there is a likelihood of imminent litigation or contentious negotiation among them, the lawyer likely may not undertake a joint representation. Similarly, when there is a material inequality in the lawyer's relationship with each of the prospective joint clients, the lawyer should consider with particular care whether informed consent is possible. If the lawyer is unlikely to be able to maintain impartiality between the jointly represented clients, the joint representation is improper. *Id.* For example, whether and how informed consent may be obtained requires careful evaluation in employer/employee representations or other circumstances in which the clients would not equally share the costs of the representation. The lawyer also should consider the relative sophistication of the prospective joint clients, and whether a less sophisticated client may sufficiently understand both the actual and potential conflicts of interest. The lawyer also may recommend or even, if appropriate, may require that one or more of the clients consult independent counsel concerning the giving of the requisite consent.

E. Obtaining Informed Consent

Upon determining that joint representation is permissible, the lawyer must secure the clients' informed consent before undertaking the representation. 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." Colo. RPC 1.0(e); *see also id.,* cmt. [6] (discussing informed consent and considerations related to whether the lawyer has made reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision). To be effective with respect to concurrent conflicts of interest, informed consent must be confirmed in writing. Colo. RPC 1.7(b)(4). "The writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing." Colo. RPC 1.7, cmt. [20]. The writing may take the form of a letter or email from the lawyer that outlines the substance of verbal discussions and advisement regarding the identified actual or potential conflicts, and confirms the client's oral informed consent. *Id.* Obtaining the client's signature and confirming informed consent in a retention agreement is advisable, but not required.

Information that should be conveyed to potential joint clients to obtain informed consent includes the implications of the joint representation, such as possible effects on loyalty, confidentiality and the attorney-client privilege. Colo. RPC 1.7, cmts. [18], [30], [31] & [32].[3] These matters are considered below.

1. Duty of Loyalty

Lawyers have duties of both undivided loyalty and confidentiality to all of their clients. *See Smith v. Mehaffy*, 30 P.3d 727, 733 (Colo. App. 2000). A lawyer jointly representing co-clients owes an equal degree of loyalty to each, and may not favor the interests of one client over another client. *See Nelson Bros. Prof'l Real Estate, LLC v. Freeborn & Peters, LLP*, 773 F.3d 853, 855, 857-58 (7th Cir. 2014).

The lawyer must advise the clients of those circumstances in which the lawyer reasonably believes that the joint representation may constrain the lawyer's duty of loyalty, and the likelihood that those circumstances may occur, in order for the clients to provide informed consent to the joint representation. The lawyer may wish to memorialize this explanation in the retention agreement. For example, the agreement might acknowledge that clients who are co-defendants in civil litigation have been advised and understand that each of them may have an interest in pursuing defenses that would shift blame to the other,

but that each client foregoes its ability to assert those defenses in order to be jointly represented. The agreement also may identify any limitations on representation that arise from the joint representation – *i.e.*, areas in which the individual clients must assume greater responsibility for decisions than if they had been separately represented. *See* Colo. RPC 1.7, cmt. [32]. The retention agreement may also specify that the defendants have chosen to pursue a unified defense, utilizing a jointly engaged lawyer, and that each client understands that this lawyer will be prohibited from recommending a course of action to one client that would be injurious to a jointly represented co-defendant.

2. Confidentiality and Information Sharing

Rule 1.6(a) generally prohibits a lawyer from revealing any information relating to the representation of a client, unless the client gives informed consent or the disclosure is impliedly authorized to carry out the representation. The confidentiality rule applies "not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Colo. RPC 1.6, cmt. [3]. The duty of confidentiality extends to all joint clients in the representation and must be reconciled with the lawyer's obligation under Rule 1.4 to keep each client reasonably informed about the status of the matter, and to promptly inform each client of any decision or circumstances with respect to which the client's informed consent is required.

Compliance with both the obligation to maintain confidentiality and to reasonably and timely communicate appropriate information to each client requires the lawyer to explain to each jointly represented client, at the outset of the representation, the lawyer's obligations under Rule 1.6 and how they might affect each jointly represented client. The lawyer should advise each client that information related to the joint representation will be shared between the joint clients and that the lawyer will have to withdraw if one joint client decides that some information material to the representation should be withheld from the other client. The lawyer also should memorialize, in the retention agreement or elsewhere, the clients' consent to sharing information and their understanding of the possible impacts of withdrawal of consent to share information.[4] *See* Colo. RPC 1.7, cmts. [18] & [31].

Another significant consideration for the lawyer is what will happen if the lawyer becomes aware of confidential information, the disclosure of which to one client will be harmful to the other jointly represented client's interests. *See* Am. Bar Ass'n (ABA) Comm. on Ethics and Prof. Resp., Formal Op. 08-450, "Confidentiality When Lawyer Represents Multiple Clients in the Same or Related Matters" (2008). The ABA opinion reflects skepticism that a client's prospective agreement consenting to the disclosure of harmful confidential information, given at the outset of representation, would meet the requirements for informed consent to disclosure:

> Absent an express agreement among the lawyer and the clients that satisfies the "informed consent" standard of Rule 1.6(a), the Committee believes that whenever information related to the representation of a client may be harmful to the client in the hands of another client or a third person, the lawyer is prohibited by Rule 1.6 from revealing that information to any person, including the other client and the third person, unless disclosure is permitted under an exception to Rule 1.6. Whether any agreement made before the lawyer understands the facts giving rise to the conflict may satisfy "informed consent" (which presumes appreciation of "adequate information" about those facts) *is highly doubtful*. In the event the lawyer is prohibited from revealing the information, and withholding the information from the other client would cause the lawyer to violate Rule 1.4(b), the lawyer must withdraw from representing the other client under Rule 1.16(a).

Id., pp. 4-5 (emphasis added).

Contrary to ABA Opinion 08-450, some state courts and ethics committees have concluded that a lawyer engaged in joint representation either may or must reveal the confidential information to the other joint client when the jointly represented clients have agreed prospectively to the disclosure. *See A v. B.*, 726 A.2d 924, 929 (N.J. 1999) (commenting that explicit agreement on sharing of confidential information between jointly represented clients should be upheld, and separately finding that, under application of New

Jersey RPC 1.6, law firm that prepared married couple's wills may disclose existence of husband's illegitimate child to wife); Mass. Bar Ass'n Ethics Op. 09-03 (2009) (lawyer must disclose to employer client the fact of co-client employee's revocation of employment authorization, in part, because "the normal rule in joint client representation is that there is no confidentiality between joint clients, unless they agree otherwise, and that the lawyer should explain this at the outset of the representation"); D.C. Bar Ass'n Ethics Op. 327, "Joint Representation: Confidentiality of Information Revisited" (2005) (commenting that when jointly represented clients consent to the disclosure of confidential information by the lawyer to each co-client, thereby waiving confidentiality, the lawyer *must* reveal the confidential information if it is relevant or material to the representation of the other client)

Colorado courts have not examined or commented upon whether an explicit prospective waiver of confidentiality between jointly represented clients constitutes informed consent such that confidentiality may or must – or may or must *not* – be maintained if the lawyer receives information that one client requests the lawyer to not disclose to the other joint client.

Given the considerations discussed above, this Committee emphasizes the recommendation, found in comment [31] to Rule 1.7, that the lawyer advise each co-client that "information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other." This follows the comment's observation that "continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation." *Id.* The lawyer also should consider whether the client's instruction not to share information is in fact a revocation of consent to the joint representation. Comment [21] to Rule 1.7 notes that a client that has given consent to a conflict may revoke the consent and terminate the lawyer's representation at any time, and that revocation may preclude the lawyer from continuing to represent other clients.

Comments [21] and [31], standing alone, do not dictate whether, if the lawyer withdraws from representation of one or both clients, the lawyer must comply with one jointly represented client's decision that harmful information be kept from another co-client. The Restatement (Third) of the Law Governing Lawyers provides helpful guidance on this issue:

> . . . [T]he lawyer is required to withdraw unless the communicating client can be persuaded to permit sharing of the communication. Following withdrawal, the lawyer may not, without consent of both, represent either co-client adversely to the other with respect to the same or a substantially related matter.
>
> In the course of withdrawal, the lawyer has discretion to warn the affected co-client that a matter seriously and adversely affecting that person's interests has come to light, which the other co-client refuses to permit the lawyer to disclose. Beyond such a limited warning, the lawyer, after consideration of all relevant circumstances, has the further discretion to inform the affected co-client of the specific communication if, in the lawyer's reasonable judgment, the immediacy and magnitude of the risk to the affected co-client outweigh the interest of the communicating client in continued secrecy. In making such determinations, the lawyer may take into account superior legal interests of the lawyer or of affected third persons, such as an interest implicated by a threat of physical harm to the lawyer or another person.

Rest. (3d) of the Law Governing Lawyers § 60, cmt. *l* (2000) (internal citations omitted).

In summary, at the outset of the representation a lawyer jointly representing clients should provide a sufficient disclosure that all material information relating to the representation will be shared between the clients, and obtain each affected client's informed consent. The lawyer also should advise each affected client that the lawyer will have to withdraw from the representation if one client instructs the lawyer not to disclose material information to the other joint client. If these circumstances do arise and the lawyer determines that withdrawal is necessary, the lawyer will then consider the extent of any existing agreement to disclose information between the parties and whether that agreement extends to the type of information identified, such that the client (who now wishes not to disclose information) provided prospective informed

consent to the disclosure of the information. If the objecting client did not provide effective informed consent to the disclosure, the lawyer has discretion to warn the affected client that a matter seriously and adversely affecting that client's interests has come to light, but that the other jointly represented client refuses to permit the lawyer to disclose the information. There may be further circumstances in which the immediacy and magnitude of the risk to the affected jointly represented client outweighs the interest of the communicating client in the continued secrecy of the information. In the limited circumstances implicated by the Restatement commentary, the lawyer should consider disclosing the substance of the harmful confidential information to the affected jointly represented client during the course of the lawyer's withdrawal. The lawyer should separately consider whether the information at issue is subject to permissive disclosure pursuant to Rule 1.6(b).

3. Attorney-Client Privilege

The lawyer should advise joint clients that, as between them, there is no attorney-client privilege for communications with the lawyer that are related to the joint representation, during the period of the representation. *Gottlieb v. Wiles*, 143 F.R.D. 241, 247 (D. Colo. 1992). Equally important, the lawyer should advise that the privilege will not bar the use of any such communications in any later dispute between the jointly represented clients with respect to the subject matter of the joint representation. *See* Colo. RPC 1.7, cmt. [30].

F. Responsibility for Payment of Fees

The lawyer should confirm, preferably in writing, the jointly represented clients' agreement on responsibility for payment of the lawyer fees and costs, including whether payment of fees and costs is a shared obligation. If the lawyer has identified any material limitations on representation arising from the payment agreement between the jointly represented clients, these limitations should also be explained. The Committee has addressed a lawyer's ethical obligations under Rule 1.8 when the lawyer accepts compensation for representation from a source other than the client, including the necessity of obtaining the client's informed consent to the third party payer arrangement, as well as protection of confidential information, and practical considerations for the representation. *See* CBA Formal Op. 129, "Ethical Duties of Lawyer Paid by One Other than the Client" (2017),

G. When Conflicts Later Arise

Even if informed consent can be, and is, obtained at the outset of the joint representation, a conflict between the jointly represented clients may arise from developments later in the representation.[5] In that event, absent further informed consent[6] or a reliable prospective consent, the lawyer likely will have to withdraw from the representation of both clients. *See* Colo. RPC 1.7, cmt. [4]. Similarly, if one jointly represented client withdraws its earlier consent to a conflict identified and accepted at the outset, the lawyer must consider whether to withdraw from representation of both clients. *See* Colo. RPC 1.7, cmt. [21]. The withdrawing or terminating client then becomes a former client for purposes of Rule 1.9's prohibition against representation of another person in the same or a substantially related matter, if the continuing client's interests in the matter are materially adverse to the interests of the former client.

Conflict may arise among the jointly represented clients when an opposing party's settlement offer or other negotiating strategy, intentionally or otherwise, creates a wedge between the lawyer's joint clients. This may occur in class action litigation, as well as in litigation involving a relatively small number of jointly represented clients. Parties negotiating jointly for concessions from an opponent may become adverse if the opponent concedes the matter bargained for, but to only one of the clients. Similarly, conflict may arise among jointly represented clients if an opponent offers settlement terms that vary between the clients (*e.g.*, one plaintiff client is required to release certain rights not jointly held with the other plaintiff client). In this instance, the lawyer may be required to withdraw if the clients cannot provide informed consent, confirmed in writing, to proceeding with the joint representation despite the conflict. *See* Colo. RPC 1.8(g) & cmt. [13].

It is prudent to consider expressly addressing in the retention agreement how the lawyer will proceed in the event an unresolved conflict arises from either developments in the matter or withdrawal of an earlier consent. In at least some circumstances, clients may, by advance or prospective waiver, provide informed consent to the lawyer's continued representation of one of the previously jointly represented clients while the other client obtains separate counsel. *See In re Rite Aid Corp. Sec. Litig.*, 139 F. Supp. 2d 649, 660 (E.D. Pa. 2001) (the terms of an engagement letter that specified that, in the event of conflict between a corporate client and its employee, the law firm would cease to represent the employee and would continue to represent the corporate client, was held valid and served as effective consent to the lawyer's ongoing corporate representation under Rule 1.9); *Zador Corp. v. Kwan*, 31 Cal. App. 4th 1285, 1294-95, 37 Cal. Rptr. 2d 754, 759, 763 (1995) (an employee client's prospective waiver of his right to assert a conflict and seek disqualification of counsel for previously jointly represented corporation was held valid, "notwithstanding any adversity that may develop"); *see also* NY State Bar Assn. Eth. Op. 903, "Revocation of Consent to Conflict" (2012) (implying the validity of an advance agreement that specifies (1) whether a lawyer may continue to represent either client after the other client revokes its consent, and (2) whether the lawyer may use or reveal confidential information obtained from the client that has revoked consent).

In determining whether to remain in the matter in the event of either a later-developed but unresolved conflict or a revocation of an earlier consent, the lawyer should carefully evaluate whether the conflict that has arisen was of the type fairly within the advisement to, and contemplation of, the clients at the time they gave their advance consent to future conflicts. The client's reasonable understanding of the material risk that the waiver entails generally determines the effectiveness of the waiver. *See Galderma Labs., LP v. Actavis Mid Atl. LLC*, 927 F. Supp. 2d 390, 396 (N.D. Tex. 2013). Informed consent by clients that are experienced users of the legal services involved and are reasonably informed regarding the risk that a conflict may arise is more likely to be effective. *Id.* at 397. Informed consent is also more likely to be effective when it is accompanied by advice of independent counsel and describes the material risk of waiving future conflicts. *See, e.g., Zador Corp., supra*, 31 Cal. App. 4th at 1294-95, 37 Cal. Rptr. 2d at 759, 763; *see also* Colo. RPC 1.7, cmt. [22] ("On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.").

NOTES

1. Rule 6.5(a)(1) governs the obligation of lawyers acting under the auspices of a nonprofit or court-sponsored short-term limited legal services program, and provides in relevant part that the lawyer "is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest."

2. *See*, *e.g.*, CBA Op. 68 (discussing the considerations involved in parties' mutual transactional interests).

3. A lawyer may be required to communicate with the client concerning these subjects even if the lawyer has determined that no conflict of interest exists. See Colo. RPC 1.4(b); N.Y.C. Bar Ass'n Comm. on Prof. Ethics, Formal Op. 2017-7, "Disclosures to Joint Clients When the Representation Does Not Involve a Conflict of Interest" (2017).

4. Sophisticated parties may agree, as part of the retention agreement, that not all information will be shared: "In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients." Colo. RPC 1.7, cmt. [31].

5. The lawyer should note that "[w]hen a lawyer or law firm suddenly finds itself in a situation of simultaneously representing clients who either are presently adverse or are on the verge of becoming adverse, it

may not simply drop one client like a 'hot potato' in order to treat it as though it were a former client for the purpose of resolving a conflict of interest." *Pamlab, LLC v. Hi-Tech Pharmacal Co.*, 2009 WL 77527, at *3 (D. Colo. Jan. 9, 2009)

6. When developments during the course of representation create a new conflict, the lawyer must again make full disclosure to the clients and advise them on the nature of the conflict, in order to seek and obtain informed consent for the joint representation to continue. The commentary in this section primarily addresses advance planning for these circumstances in order to minimize, to the extent possible, disruption to the representation.

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NO CHANGES

Chapter 4

COLORADO BAR ASSOCIATION ETHICS COMMITTEE INFORMAL OPINIONS

NOTICE: The practitioner should not rely on withdrawn opinions for ethical guidance, although the fact that an opinion has been withdrawn does not necessarily indicate that the Ethics Committee believes the opinion is incorrect in its entirety. The practitioner should be aware that the conclusions of some Informal Opinions, whether or not they have been withdrawn, may be affected by the Colorado Rules of Professional Conduct that become effective January 1, 2008.

SYNOPSIS

INFORMAL OPINIONS

A Group legal services; solicitation of contributions — 9/13/70, 11/10/70; 1 *Colo. Law.* 41 (March 1972)

B District attorneys; representation of criminal defendant; partners of district attorney — 6/16/71; 1 *Colo. Law.* 47 (April 1972)

D Legal service activities of non-profit organization — 11/15/71; 1 *Colo. Law.* 47 (June 1972)

F Recordings, attorney-attorney communications — 12/4/71; 1 *Colo. Law.* 47 (March 1972)

G Representation of suspended attorney's clients; fees — 12/8/71; 2 *Colo. Law.* 14 (November 1972)

I Office sharing with county attorney — 10/10/72; 2 *Colo. Law.* 20 (February 1973)

K District Attorneys; partnerships; letterhead — 10/10/72; 2 *Colo. Law.* 27 (January 1973); revised 7/24/93

L City Attorneys — 10/11/72; 2 *Colo. Law.* 27 (January 1973)

O Class actions; solicitation of professional employment — 3/17/73; 2 *Colo. Law.* 25 (August 1973); revised 7/24/93

P Prosecutors; plea bargaining — 5/19/73; 2 *Colo. Law.* 25 (August 1973)

R Patent attorney; letterhead — 10/8/73; 3 *Colo. Law.* 53 (December 1973)

S Attorney-client relationship; disqualification of attorney — 10/29/73; 3 *Colo. Law.* 54 (December 1974)

T Collection of attorney fees; withdrawal; attorneys' lien — 11/17/73; 3 *Colo. Law.* 45 (February 1974)

U Receipt of attorney fees from lending institutions — Undated; 3 *Colo. Law.* 17 (March 1974)

V Attorney's negligence; duty to report to client — 4/27/74; 3 *Colo. Law.* 14 (June 1974)

W Part-time deputy district attorneys and county attorneys; location of private practice — 5/18/74; 3 *Colo. Law.* 354 (August 1974)

WITHDRAWN INFORMAL OPINIONS

C Withdrawn 1/75 (Payment of legal fees by credit card — 7/26/71)

E Withdrawn 1/75 (Interest charges on legal fees — 12/3/71)

H Withdrawn 12/96 (Fees of lawyer-real estate broker — 4/10/72)

J Withdrawn 7/93 (Announcements: government association — 10/10/72; 2 *Colo. Law.* 20 (February 1973))

M Withdrawn 8/89 (Attorney author of articles in non-legal magazines — 1/23/73)

N Withdrawn 7/93 (Announcements, newspaper publicity, advertising — 2/24/73; 2 *Colo. Law.* 33 (April 1973))

Q Withdrawn 7/93 (Assistant attorney general; names on letterheads and announcements used in private practice — 10/5/73; 3 *Colo. Law.* 49 (January 1974))

X Withdrawn 4/89 (Legal assistants; letterhead and business cards — 8/21/74)

Y Withdrawn 10/91 (Credit card payment for legal fees, appropriate credit card plan, interest on fees; overruled Informal Opinions C and E — 1/25/75; 4 *Colo. Law.* 519 (March 1975))

A

Adopted September 13, 1970.
Revised November 10, 1970.

Topic

Group legal services; solicitation of contributions.

Digest

Certain "outreach activities" of a non-profit organization offering group legal services are ethically permissible as a means of creating public awareness as to the availability of the services. Solicitation of contributions for such a non-profit organization is permissible.

Question

The Ethics Committee received an inquiry from Colorado Rural Legal Services ("CRLS") requesting the opinion of the Committee as to the ethical propriety of the following "outreach activities" of CRLS. The following is the "Proposed Statement by the CRLS Board of Directors concerning Permissible Limits of Outreach Activities."

> The function of Colorado Rural Legal Services, Inc. is to provide legal services to indigents in rural Colorado in an attempt to break the cycle of poverty. To provide such services efficiently, two problems must be surmounted. First, more people must be made aware that the program is available to them. Second, efforts must be made to educate the client community with respect to basic legal rights, so that individuals can identify potential legal difficulties and know the circumstances under which legal remedies may be employed to seek redress of their grievances. Far too frequently poor people do not know there is a legal services program in the vicinity, or when they do know that free legal services are available they do not have sufficient sophistication to recognize their own problems as legal.
>
> It is therefore imperative that the attorneys and lay staff employed by CRLS take an active and aggressive role in disseminating information concerning the services offered by CRLS and in educating the client community as to their legal rights so that they may utilize the legal system as a means of resolving conflict; and, more importantly, they may be able to avoid legal difficulties altogether because they will be able to recognize the legal consequences of their actions.
>
> It is equally imperative that the outreach and community action efforts on the part of CRLS staff members be within the limits of ethical conduct prescribed by the American Bar Association's Canons of Professional Ethics and the newly promulgated Code of Professional Responsibility which may be adopted soon in Colorado. Particular care must be taken to avoid violating Canon 27 which prohibits individual advertising by an attorney and Canon 28 which prohibits stirring up litigation where an attorney is attempting to reap individual gain.
>
> Giving due consideration to the factors mentioned above, the CRLS staff is authorized to engage in the activities outlined below with the understanding that this is a general outline only and each individual member of the staff is responsible for his or her conduct in any given situation.
>
> 1. Efforts may be made through the use of pamphlets, posters, bumper stickers, radio and T.V. spot advertisements, lectures and other techniques to provide the public with information concerning the location of CRLS offices and the nature of the services CRLS attorneys and other staff members provide.

2. Lay staff may advise individuals and groups of the availability of legal services and may refer them to specific CRLS offices or CRLS attorneys when in their opinion legal counsel is advisable. However, under no circumstances may staff members undertake to provide legal advice.

3. Pamphlets and other materials may be prepared and disseminated informing individuals of their legal rights.

4. Lectures or talks may be given by CRLS attorneys to potentially eligible community groups informing them of their legal rights. During the course of such talks it shall be permissible to encourage individuals to form groups to seek solutions to mutual problems. At no time, however, [is it] permissible to advocate or promote the use of illegal means to achieve the group's objectives.

5. CRLS attorneys may encourage eligible individuals and groups to engage in specific litigation to resolve their problems and to establish their legal rights. CRLS attorneys may offer their services for such litigation to individuals and groups eligible for free legal assistance under the guidelines established by the CRLS Board of Directors.

6. Lay staff members who conclude that an individual's legal rights have been infringed may refer such person to CRLS attorneys for assistance. Further, lay staff members may refer individuals to a CRLS office for the express purpose of having such individuals engage in litigation which will establish specific legal rights for such individuals and others similarly situated.

7. With the permission of the court, in county court litigation, in cases in which there is either an institutional plaintiff or when the plaintiff is represented by an attorney, CRLS attorneys may apprise defendants of the need for representation and the availability of CRLS services in appropriate cases, by means of a letter substantially as follows:

Dear _____

A lawsuit has been filed against you in County Court. In order to insure that you receive the protection of the law, we suggest that you see your attorney. He will be able to raise every legal defense to which you are entitled.

If you do not have an attorney and qualify as a person who cannot afford to employ one, you may consult Colorado Rural Legal Services. We are empowered by law to represent, free of charge, people who cannot afford an attorney in civil matters.

In a court action, an attorney is trained and has a duty to know the law, to advise you of your legal rights, and to represent you to the best of his ability. By seeing an attorney you will be assured that you will receive equal justice under the law.

Yours truly,

(end of statement)

CRLS subsequently inquired as to whether it could ethically solicit funds to finance its activities.

Opinion

With the exceptions and subject to the admonitions contained herein, we approve as being within the scope of permissible conduct the activities outlined in paragraphs 1 through 5 of the "Proposed Statement by the Colorado Rural Legal Services Board of Directors Concerning Permissible Limits of Outreach Activities" which accompanied your letter of May 5, 1970, addressed to the Chairman of the Colorado Bar Association Ethics Committee. It is our opinion, however, that the pamphlets, posters, newspapers and other materials disseminated by CRLS should not identify individual lawyers. It is the opinion of the Committee that the goals and purposes of CRLS can be attained, provided care is exercised

in the methods utilized in the dissemination of information, without reference to individual members of your legal staff.

We approve the activities outlined in paragraph 6 of said Proposed Statement, provided the admonition contained in the last sentence of paragraph 2 is adhered to; to-wit ". . . under no circumstance may staff members undertake to provide legal advice."

The Committee approves the activities outlined in paragraph 7 of said Proposed Statement provided the word "attorneys" immediately following "CRLS" is deleted and provided the proposed letter is not signed by and does not identify any individual lawyer.

Lawyers on your staff are subject to standards of ethical conduct imposed by the Code of Professional Responsibility as adopted by the American Bar Association and by the Colorado Supreme Court. Group legal services, in many respects, transcend traditional concepts of legal ethics; nevertheless, because of the recognized need for public awareness of and the desirable social benefits to be gained from utilization of legal services as recognized in the Code of Professional Responsibility such services and promotion thereof have been accepted as being within the boundaries of ethical conduct. It is therefore important that the limitation on the extension of this acceptance set forth in the Code of Professional Responsibility be recognized and adhered to by the members of your legal staff in the conduct of their activities.

The Committee has concluded that there is nothing improper in CRLS engaging in a fund-raising campaign, provided that there is adherence to the aforementioned admonitions.

NOTE: Informal opinions of the Ethics Committee published in *The Colorado Lawyer* shall not contain names of individuals or organizations involved. Exception was made in the CRLS opinion with the express consent of CRLS.

B

Adopted June 16, 1971.

Topic

District attorneys; representation of criminal defendant; partners of district attorney.

Digest

A partner of a district attorney may not ethically represent persons charged with misdemeanors in the district in which the district attorney serves.

Question

Is it unethical for partners of the Assistant District Attorney to represent persons charged with misdemeanors in the Municipal Court in the same district?

Opinion

The facts presented are closely analogous to those considered by this Committee in its Formal Opinion No. 46. The Canons, Ethical Considerations, and Disciplinary Rule discussed therein are directly applicable to the instant inquiry. Thus the Assistant District Attorney cannot ethically represent persons charged with misdemeanors in the Municipal Court since such representation would create an appearance of professional impropriety.

The Ethical Considerations to Canon 8 of the new Code state: "A lawyer who is a public officer, whether full- or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties." EC 8-8.

In addition, DR 8-101(A)(2) of the Code of Professional Responsibility requires that: "A lawyer who holds public office shall not: . . . use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or a client."

A District Attorney must give his undivided loyalty to the district which he serves and its agents or employees. The American Bar Association Committee on Professional Ethics and Grievances has consistently condemned the defense of criminal cases by city attorneys. *See* Opinion No. 34, dated March 3, 1931 as amended by Opinion No. 186, dated July 24, 1938.

Canon 9 of the new Code of Professional Responsibility clearly requires a lawyer to "avoid even the appearance of impropriety." A District Attorney must scrupulously avoid any conduct which could lead the public to conclude that he is using his position to promote either the interests of his private clients or his own financial success.

Having come to the foregoing conclusion, the Committee is of the further opinion that a partner, associate, employee or co-shareholder of a lawyer employed as a District Attorney may not accept or continue employment which such a District Attorney must decline or from which he must withdraw. *See* DR 5-105(D). Ethical guidelines heretofore set forth by this Committee and the ABA Committee on Professional Ethics preclude such representation.

Quoting from the opinions of the ABA Committee on Professional Ethics, the Colorado Bar Association Ethics Committee, in its Opinion No. 27 (1963), has stated that:

> The relations of partners in a law firm are such that neither the firm nor any member or associate thereof may accept any professional employment which any member of the firm may not properly accept.

Further, the ABA Committee has stated that the "relations of partners in a law firm are so close that the firm, and all members thereof, are barred from accepting any employment that any one member of the firm is prohibited from taking." Formal Opinion No. 33 (1931). "Likewise, anything which requires a lawyer to

withdraw from a case requires that his partners withdraw." Formal Opinion No. 185 (1938). The relations of associates, employees and co-shareholders in the practice of law are sufficiently close to require that these ethical guidelines be applied to those relations also. Accordingly, anything that requires a lawyer to withdraw from or refuse employment requires that his associates, employees and co-shareholders in the practice of law withdraw from or refuse employment.

D

Adopted November 15, 1971.

Topic

Legal service activities of non-profit organization.

Digest

Lawyers may ethically be listed in a certain publication of the church to which they belong, and participate in the church's efforts to procure legal assistance to members desirous of preparing wills.

Question

A church proposes to provide a list of names of lawyers to its members and to those who attend services on Sunday who need the help of a lawyer in preparing a will. A brief announcement will be included periodically in a weekly church publication concerning gifts to the church with a paragraph to read substantially as follows:

> If you do not have a will, see your attorney. If you do not have an attorney, the Church offices can furnish you with a list of lawyers who are members of the church.

Upon inquiry to the church by one seeking legal assistance in connection with a will, the church will send a form letter to the inquirer substantially as follows:

> This letter is sent to you in answer to your request for a list of attorneys who are members of the church. It is hoped that if you do not have a will, or if your existing one needs updating, you will proceed with this all-important business immediately.
>
> There are a number of ways you can include your church in your will. Ask your attorney about them. By including the church, you are perpetuating your love of the church and your stewardship far into the future.
>
> We have a number of lawyer-members. A list of such members, in alphabetical order, is enclosed.

(Attorneys and their telephone numbers would be listed here, and all would be members of the church.)

Opinion

It is the opinion of the Colorado Bar Association Ethics Committee that this plan is not improper and that it does not violate the standards for ethical practices by lawyers. We recommend a change in the final paragraph of the letter of inquiry so as to eliminate any reference to "specialists" and avoid the implied directive to "consult one of these." All member-lawyers should be listed unless a specific request for omission is made by a particular lawyer.

The legal profession has a duty to make legal counsel available to those in need of legal services. Canon 2, Code of Professional Responsibility ("CPR"). Toward this end, lawyers are reminded that:

> The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their legal problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available. (EC 2-1, CPR).

In fulfilling this duty, a lawyer may not use or participate in the use of any form of public communication that contains professionally self-laudatory statements calculated to attract clients (DR 2-101(A), CPR). Nor may a lawyer knowingly assist an organization that recommends legal services to promote the use of his services (DR 2-103(D), CPR).

However, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person, a lawyer may cooperate in a dignified manner with the legal service activities of a non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries if: (a) the primary purposes of such organizations do not include the rendition of legal services; (b) the recommending, furnishing or paying for legal services is incidental and reasonably related to the primary purposes of the organization; (c) the organization does not derive a financial benefit from the rendition of legal services by the lawyer; and (d) the member or beneficiary for whom the legal services are rendered, and not the organization, is recognized as the client of the lawyer in that matter (DR 2-103(D)(5), CPR).

It would appear that the plan of the church meets these criteria. Presumably, it is a non-profit organization. Its primary purposes do not include the rendition of legal services. The recommending of legal services in this instance is reasonably related to its primary purposes. It will not participate in any fees which may be charged by lawyers whose services it recommends, although it may be named as a beneficiary or legatee in wills which are prepared by the lawyers it recommends, and the church will not be the client of the lawyers. As thus proposed and understood, the plan will not violate the guidelines of ethical conduct for lawyers.

Plans similar to that covered by the inquiry have been considered by the United States Supreme Court. *See, e.g., United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967); *Brotherhood of Trainmen v. Virginia State Bar,* 377 U.S. 1 (1964); and *NAACP v. Button,* 371 U.S. 415 (1963). More recently the United States Supreme Court considered a plan by a group to facilitate the rendition of legal services in *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576 (1971). The United Transportation Union (successor to the Brotherhood of Railroad Trainmen) recommended selected lawyers to its members and their families in connection with FELA claims. Apparently the lawyers were so recommended with the understanding that they would not charge in excess of 25 percent of any recovery for their services. In addition, the Union's representatives were reimbursed for transporting injured employees, or their members, to legal counsel offices. In approving this plan, the Court reaffirmed the principle that groups can unite to assert their rights as effectively and economically as possible. In its opinion, the Court stated,

> At issue is the basic right to group legal action, a right first asserted in this Court by an association of Negroes seeking the protection of freedoms guaranteed by the Constitution. The common thread running through our decision in *NAACP v. Button, Trainmen* and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.

These principles further support the plan of the church to provide legal services for its members and communicants in connection with the drafting of wills.

The lawyer-members and the church administrative staff should be reminded that each lawyer consulted must, of course, exercise his independent professional judgment in advising his client, without influence from the church.



Adopted December 4, 1971.

Topic

Recordings, attorney-attorney communications.

Question

(1) Is it unethical for a lawyer to make a verbatim record by mechanical or electronic means of a telephone conversation with another lawyer without the latter's knowledge or consent?

(2) Is it unethical for a lawyer to make a mechanical or electronic recording of a conference between himself and another lawyer without the latter's knowledge or consent?

Opinion

We do not deem the admissibility or inadmissibility of such records in evidence, a factor mentioned in connection with the second question, to be a relevant consideration in deciding the applicable ethical standard, nor do we think the ethical standard applicable in the situation described in the first question to be different from the one applicable in the second situation. Likewise, whether the device used to record a telephone conversation – or a conference – is mechanical, electronic, or secretarial, is not controlling. The controlling question is whether the lawyer knows that his words are being recorded and has consented to the making of a verbatim record.

> The syllabus of Opinion No.22, adopted by the Ethics Committee on January 26, 1962, states:
>
> It is improper for an attorney to record by means of a mechanical or electronic device conversations or statements without disclosing that the conversations or statements are being recorded.

Opinion No. 22 applies to conversations between a lawyer and "other persons"; since "there is inherent in the undisclosed use of a recording device . . . an element of deception, artifice or trickery which falls below the standard of candor and fairness which all attorneys are bound to uphold" (Opinion No. 22), the fact that a secretly recorded conversation is one between a lawyer and another lawyer should make no difference in construing that Opinion. *See* ABA Informal Opinion No. 1009 (October 25, 1967); *cf.* H. Drinker, *Legal Ethics* 197 at n. 39 (1953); R. Wise, *Legal Ethics* 299 at n. 71 (2d ed. 1970).

The Canons of Ethics effective at the time Opinion No. 22 was adopted were replaced in Colorado on August 20, 1970, by the new Code of Professional Responsibility. Canon 22, relied upon in Opinion No. 22, required a lawyer to conduct himself with candor and fairness toward other lawyers. Under the new Code, a lawyer is obligated "to treat with consideration all persons involved in the legal process," even in representing "a client zealously within the bounds of the law." Canon 7; EC 7-10.

"The adversary system depends upon cooperation between lawyers" (EC 7-39), and a lawyer should therefore "be courteous to opposing counsel and . . . follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so" (EC 7-38).

Clandestine recordation of another lawyer's conversation, in a meeting, over the telephone, or otherwise, is neither courteous nor ethical. When discovered, such trickery by a lawyer will ultimately jeopardize his ability, when dealing with other lawyers, to advance his clients' causes zealously, as required by Canon 7, since one who has the option either to say nothing or risk having his words recorded without his knowledge and consent should say nothing. *Compare* Opinion No. 22.

Opinion No. 22 is equally as applicable under the new Code of Professional Responsibility as it was under the old Canons of Ethics when adopted. It is as applicable to conversations between lawyers as it is to conversations between a lawyer and non-lawyers.

G

Adopted December 8, 1971.

Topic

Representation of suspended attorney's clients; fees.

Digest

A suspended attorney still owes certain obligations to his former clients; an attorney suspended from the practice of law may be compensated only for work performed and advances made prior to suspension.

Question

What are some of the ethical considerations involved in entering an appearance as counsel of record on matters previously handled by an attorney who has been suspended from the practice of law?

Opinion

First, an attorney must satisfy himself that the change of attorneys is with the express consent and agreement of the clients involved. This may well require a meeting with the clients prior to the change of attorneys.

Secondly, we believe that the suspended attorney has an obligation to his former clients to assist a new attorney in becoming familiar with the particular files, and he should disclose whatever information he may have concerning those matters. Any time spent by the suspended attorney in this connection would not be subject to compensation as set forth below.

Thirdly, on the assumption that the suspension of the attorney had nothing to do with the pending matters which the new attorney would be assuming, we see no reason why the new attorney should be under any ethical limitation of such a nature so as to prevent him from seeing that the suspended attorney is compensated for the work performed prior to the date of suspension on the matters and that he is reimbursed for advances, if any, which he made while he was acting as an attorney. In no sense, however, should fees be divided as to work performed, if any, after suspension.

We believe it to be appropriate to determine on a case-by-case basis that which has been done by the suspended attorney prior to assuming responsibility for the matters. In regard to any matters which the suspended attorney had undertaken on a contingent fee basis, a determination should be made between the new attorney and the suspended attorney as to the percentage of work on the matter completed by the suspended attorney prior to his suspension, and he would then be entitled to that percentage of the attorney's fee ultimately paid. In that connection, we make reference to Informal Decision 628, December 31, 1962, of the Standing Committee on Professional Ethics of the American Bar Association.

Adopted October 10, 1972.

Topic

Office sharing with county attorney.

Digest

It would be inappropriate for an attorney to appear before the Board of County Commissioners if he shares an office with a County Attorney.

Facts

A law firm rents office space to the County Attorney, but does not share fees with that attorney. The County Attorney has his own stationery and writes a check to the firm monthly in payment of jointly shared items such as rent, telephone and secretaries.

Opinion

The facts raise two problems. First, the situation gives rise to the appearance of impropriety, which should be avoided by all attorneys and especially by those serving the public (*see* Opinion No. 48 and Canon 9 of the Code of Professional Responsibility). Second, the problems involved in sharing secretaries and file room space create a situation where confidential matters could be inadvertently disclosed to an opposing party. Moreover, the financial arrangement between the firm's office and the County Attorney creates a potential for leverage over the County Attorney in cases where, for example, he falls behind on his monthly payments. Hypothetically, the office arrangement could also result in favorable allocation of office expenses in return for favors granted.

The above problems are not susceptible of being solved by having the County Attorney "disqualify himself" from those cases where the firm appears before the Board. In addition to the difficulties in arranging for such disqualification, the Committee believes that general advice and recommendations given by the County Attorney to the Board of County Commissioners would render such disqualification ineffective. For example, the County Attorney might have opined as to the legality of a zoning ordinance which the interests of the firm's client might require the firm to challenge. In that case, the County Attorney should be available to defend his opinion or modify it as the case may be.

A great deal of consideration was given by the Committee to the effect that the above opinion might have on day-to-day practice in smaller communities. The Committee believes that the dangers discussed above and the need for a public official to avoid any appearance of impropriety outweigh the inconvenience to attorneys practicing in smaller communities.

K

Adopted October 10, 1972.
Revised July 24, 1993.

Topic

District Attorneys; partnerships; letterhead.

Digest

A law firm may not ethically retain on its letterhead the name of a lawyer elected District Attorney.

Opinion

The question presented is whether a law firm may retain on its letterhead the name of a partner who has been elected to the office of District Attorney. The Committee unanimously agreed that it would be improper for the firm to continue the partner's name on the letterhead.

Under present law in Colorado, district attorneys cannot engage in the private practice of law, nor receive any income from any private law firm. C.R.S. § 45-2-1, as amended by HB 1002 (1972). Thus the partner in question cannot be actively engaged in the affairs of the firm during the time he is serving as District Attorney.

DR 2-102(B) of the new Code of Professional Responsibility provides:

> A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in the professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.

See also, Colorado Rules of Professional Conduct, Rule 7.5(e).

In addition, DR 2-102(C) provides: "A lawyer shall not hold himself out as having a partnership with one or more other lawyers unless they are in fact partners."

Formal Opinion No. 318 of the American Bar Association also deals extensively with this problem and, in substance, prohibits the use of the name of a person on a firm letterhead when that person cannot, in fact, actively practice law within the state as a member of that firm. The rationale of the Opinion is that to do otherwise would be misleading.

Adopted October 11, 1972.

Topic

City Attorneys.

Digest

A city attorney may ethically represent criminal defendants in county and district courts, provided that no representation of the type proscribed by Opinion No. 46 is involved, and no appearance of professional impropriety exists.

Opinion

The question presented is whether it is ethical for a lawyer in a firm whose members include city attorneys to handle criminal defense matters in county and district courts. It is universally recognized that if one lawyer is precluded from ethically doing a certain act, such act may not be ethically accomplished by any other member of the lawyer's firm. Consequently, the Committee has considered the broader issue of whether a city attorney is ethically precluded from handling criminal defense matters in county and district courts.

In Opinion No. 46, adopted by this Committee February 20, 1971, we held that a lawyer employed as the municipal attorney could not ethically represent a defendant charged with a crime occurring within the municipality, or in a criminal case where an employee of the municipality will appear as a witness, or represent a party in any litigation wherein such attorney may be required to take a position which could adversely affect the validity of any law or ordinance governing the municipality. The Committee has consistently adhered to the principle that an attorney holding a governmental or quasi-governmental office should "scrupulously avoid any conduct which could lead the public to conclude that he is using his position to promote either the interest of his private clients or his own financial success." Informal Opinion B, June 16, 1971.

We decline, however, to extend the prohibitions of Opinion No. 46 to preclude all representation of criminal defendants by city attorneys in county and district courts. Thus, it is our opinion that a city attorney may ethically represent criminal defendants in county and district courts, provided that no representation of the type proscribed by Opinion No. 46 is involved, and no appearance of professional impropriety exists.

O

Adopted March 17, 1973.
Revised July 24, 1993.

Topic

Class actions; solicitation of professional employment.

Digest

A lawyer should not contact a non-client directly or indirectly for the purpose of being retained to represent him for compensation. A lawyer may accept but shall not seek employment from persons contacted by his client for joinder in class actions, or those having similar interests in litigation, provided that such persons have been approached by the client and have been made to understand that they may be represented by a lawyer of their own choosing. If the nature of the litigation is such that the client may likely contact others as parties, the lawyer must insist to the client that the client tell each prospective party that he is free to engage his own attorney. A lawyer, upon being contacted by any prospective party solicited by his client, shall advise such party that he may employ his own attorney.

Facts

An attorney is retained by an organization to represent the organization and its members in opposing certain water claims. The attorney would be asked to file statements of opposition for all persons similarly situated or affected by the filing. The attorney prepares and mails on his letterhead a letter advising each person of the existence of the claim and urging that action be taken to oppose the application. With each letter is sent a verified statement of opposition to be signed by each interested party, there appearing on the statement of opposition the name of the attorney, presumably representing all opponents to the filing.

Opinion

It is the opinion of the Committee that the activity of the attorney is a clear violation of DR 2-104(A)(5):

> If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

Rule 7.3 of the Colorado Rules of Professional Conduct governs direct contact with prospective clients. EC 2-3 provides that a lawyer should not contact a non-client, directly or indirectly, for the purpose of being retained to represent him for compensation.

It is not improper for a lawyer to advise his regular clients of new statutes, court decisions and administrative rulings which may affect the client's interest, provided the communication is strictly limited to such information. When such communications go to organizations or individuals other than regular clients of the lawyer, they are thinly disguised advertisements for professional employment, and are obviously improper. ABA Opinion 213.

It is the opinion of the Committee that when an attorney is contacted by an organization to represent its members or contacted by a client who may wish to obtain the economic assistance of others having a similar interest in the litigation, any contact made with any other person should be made by the client and not by the attorney.

The client should be told that, in soliciting others situated in a similar position, each person contacted should be advised that he is free to engage his own attorney.

It is clearly improper for the attorney to solicit the representation of a client directly.

> Difficult questions arise as to the propriety of notifying persons having interests similar to those of a client, of a controversy in which they should be represented and whose participation in the litigation may be of benefit to the lawyer's client, not only in dividing the expenses, but also in guarding against an inconsistent or inefficient presentation of the client's contention. *In such cases, while it would seem clearly proper for the lawyer to see to it that these similar interests are properly represented, they should be approached by the client and not by the lawyer, and be made to understand that they may be represented by a lawyer of their own choosing. He may not advise them in order to get their business*. Cheatham, *Cases and Materials on the Legal Profession*, at 535. [Emphasis added].

In the factual situation given, if the attorney were retained to represent the organization, then it is his duty to represent the organization and not the individual members of the organization in a matter that would require the solicitation of the members on his part.

Whether the organization is of the type permitted under DR 2-103 is not clear from the inquiry made to the Committee. However, any charitable organization or organization formed for the specific purpose of representation would be more fully governed by the line of Supreme Court cases commencing with *NAACP v. Button*, 371 U.S. 415 (1963).

P

Adopted May 19, 1973.

Topic

Prosecutors; plea bargaining.

Digest

A prosecuting attorney should, in the course of plea bargaining with counsel for a defendant or with a defendant if he has no counsel, disclose to the defense not only the existence of evidence known to him which supports the innocence of the defendant but also the fact that evidence has been lost, become unavailable or destroyed.

Facts

In executing a search warrant, the police seized 16,000 tablets which a field test conducted by a policeman indicated were LSD. Two men were arrested and both were charged with possession with intent to dispense LSD and with conspiracy to possess LSD. The possession charge is punishable by a sentence of one to fourteen years in the state penitentiary; the charge of conspiracy is punishable by a sentence of one to ten years in the state penitentiary.

One of the defendants, after plea bargaining, pleaded guilty to the conspiracy charge, and the charge of possession with intent to dispense against him was dismissed. The other defendant fled from the state but was re-arrested and returned to the state. The public defender, who had represented the first defendant and also represented the second defendant, then asked the district attorney whether the same bargain with respect to a plea could be made for the second defendant as had been made for the first defendant.

Thereupon, the district attorney re-evaluated the evidence in the case and learned that the 16,000 tablets which had been seized in the search had apparently been destroyed by the police. The district attorney further learned that the pills had never been analyzed by a chemist and that no other evidence identifying the supposed drugs was available.

Upon learning these facts and in view of difficulties with respect to placing the results of the field test into evidence, the district attorney informed the public defender and the judge of the lack of sufficient evidence to convict the second defendant, and then dismissed the charges against him without prejudice and with leave to file a complaint within six months if sufficient evidence of the crime could be obtained. The district attorney inquires with respect to the propriety of his action.

Opinion

The inquiry of the district attorney raises the question of whether a prosecuting attorney, who learns during the course of plea bargaining that there is not sufficient evidence to convict a defendant of the charges which have been made against the defendant, has any duty to disclose that fact to the defendant or his counsel. In those situations where a prosecuting attorney learns of the existence of evidence which tends to negate the guilt of the defendant, mitigate the degree of the offense, or reduce the punishment which might be imposed against the defendant, there is a duty upon such an attorney to make timely disclosure of such evidence. Thus, for example, as set forth in DR 7-103(B) of the Code of Professional Responsibility ("the Code"):

> A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

This norm of conduct for prosecuting attorneys as set forth in the Code is general in nature and does not attempt to differentiate that duty with respect to various phases of the prosecuting function. The duty applies across the whole prosecuting function and is a minimal standard below which a prosecuting attorney should not fall without being subjected to disciplinary action.

The American Bar Association Special Committee on Standards for the Administration of Criminal Justice in the amendments to the Standards for Criminal Justice Relating to the Prosecution Function, approved draft, 1971 ("the Standards"), endeavored to conform the general rule as set forth in the Standards to DR 7-103(B) of the Code. However, in so doing the Special Committee limited this general duty of the prosecuting attorney by differentiating between evidence which supports the innocence of the defendant and other types of exculpatory evidence. The general rule with respect to the duty of a prosecuting attorney to make disclosures to the defense is set forth in Section 3.11(a) of the Standards as follows:

> It is unprofessional conduct for a prosecutor to fail to make timely disclosure to the defense of the existence of evidence, known to him, supporting the innocence of the defendant. He should disclose evidence which would tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment at the earliest feasible opportunity.

The Special Committee points out that this section is intended to conform to DR 7-103(B) of the Code of Professional Responsibility. The commentary to Section 3.11 is more specific:

> The first sentence sets a more limited scope to the evidence which must be disclosed and the timing of disclosure and emphasizes culpability, because of the disciplinary sanction imposed. The second sentence retains the higher standard of the original (draft of this section) on both timing and scope, but not at the level where failure to comply would be unprofessional conduct.

Regardless of the differences which may exist between the norms for conduct of prosecuting attorneys as set forth in DR 7-107(B) of the Code and Section 3.11(a) of the Standards, it is important to note that both of these norms purport to set forth only minimal levels of conduct and do not exhaust the professional responsibilities of the lawyer who is a prosecuting attorney. In this connection, the norm as set forth in Section 3.11(a) of the Standards actually differentiates between conduct which subjects the prosecuting attorney to disciplinary action and a higher standard of conduct for such lawyers. More specifically, these sections do not explicitly deal with the responsibilities of lawyers when engaged in bargaining a plea for a defendant.

Thus, it would appear that DR 7-107(B) and Section 3.11(a) do not resolve the questions raised in this matter. Further consideration is necessary with respect to the requirements for professional conduct of the lawyer who when acting as a prosecuting attorney learns of facts during the course of plea bargaining which tend to negate the convictability of a defendant rather than evidence which pertains to the innocence of the defendant or which is otherwise exculpatory in nature.

Although there is a paucity of guidance in the Code for lawyers who are engaged in the process of bargaining a plea for a defendant who is charged with the commission of a crime, some norms are set forth in EC 7-13 of the Code, which reads:

> The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice: the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused,

> mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused.

Of particular significance is the recognition that the responsibility of the prosecuting attorney is not that of the "usual advocate" – that the duty of the lawyer acting as a prosecuting attorney "is to seek justice, not merely to convict."

The duties of the prosecuting attorney in the plea bargaining process are spelled out in more detail in the Standards. Section 4.1(c) of the Standards provides that: "It is unprofessional conduct for a prosecutor knowingly to make false statements or representations in the course of plea discussions with defense counsel or the accused."

In explanation of this section, it is stated:

> "Intentionally deceiving opposing counsel is ground for disciplinary action." *Monroe v. State Bar,* 55 Cal.2d 145, 358 P.2d 529, 533, 10 Cal.Rptr. 257 (1961). Although the prosecutor is under no obligation to reveal any evidence to defense counsel in the course of plea discussion, truth is required in the presentation of facts relating to the case or any mitigating facts to the defense counsel. The prosecutor's basic duty to seek a just result as well as his obligation to eschew the use of deception in dealing with the evidence also forbids his misrepresenting the law or sentencing practices of the court in his plea discussions. Not only does misrepresentation reflect upon the integrity of the prosecutor but it severely handicaps his ability to effect just disposition by pleas of guilty since lawyers will understandably be reluctant to negotiate with a prosecutor who cannot be trusted. (Commentary to Section 4.1(c), Standards).

Accordingly, it is the opinion of the Committee that because there are peculiar responsibilities which devolve upon a lawyer who acts as a prosecuting attorney by reason of his representation of the sovereign, the nature of the decisions which he must make, and the benefits accorded the accused under our system of justice, a prosecuting attorney should exercise candor in his dealings with the defense during the process of plea bargaining and should be free from not only active deception but also conduct which gives the appearance of deception during that process.

The loss of the pills in the instant case might materially affect the defendant's consideration in tendering any plea to the charges. Under these circumstances, the withholding of information about the lack of such evidence from the defendant or his counsel would have been active deception by the prosecuting attorney particularly when the existence of evidence of such a substantial nature was apparent at the time the charges were made against the defendant and may reasonably be assumed by the defendant or his counsel to still be in existence. Therefore, when the prosecuting attorney elects to plea bargain concerning the charges made against a defendant and the prosecuting attorney learns that evidence which was at hand at the time when the charges were made is not now available, then it is the duty of the prosecuting attorney to inform the counsel for the defendant, or the defendant if he has no counsel, of that fact. Justice requires that the prosecuting attorney act with candor in the plea bargaining process so that the defendant or his counsel is not actively misled in assessing the merits of any plea being negotiated.

R

Adopted October 8, 1973.

Topic

Patent attorney; letterhead.

Digest

It is improper for a patent attorney to include on his letterhead the name of a registered patent agent.

Facts

An attorney desires to include on his letterhead the name of a registered patent agent. A registered patent agent is permitted to represent inventors before the U.S. Patent Office in preparing and prosecuting patent applications.

Opinion

It is ethically improper for an attorney to include on his letterhead the name of a registered patent agent. We concur with Opinion 545 (May 1, 1940) of the Ethics Committee of the Bar Association of New York City which deals with this question. It is our opinion also that the inclusion of the patent agent's name on the letterhead of the attorney would constitute unethical advertising on the part of the attorney whenever the letterhead was used by the patent agent in correspondence with his clientele.

Since the attorney in question is admitted to the general practice, the inclusion of the registered patent agent's name on the letterhead of the attorney, and the use of such stationery by the patent agent in his correspondence, could constitute his advertising of the attorney as a general practitioner.

Formal Opinion 257 (June 9, 1944) of the ABA Committee on Professional Ethics lends support to our conclusion. It states that a law list or directory publishing the names of lay patent agents and of firms containing lay patent agents must list such patent agents and firms apart from attorneys and firms composed of attorneys only. In addition, the opinion points out that an attorney may enter into a partnership with a layman who is an agent licensed by the United States Patent Office only if the partnership's activities are limited to those which laymen are permitted to perform under the Patent Office Rules.

Our Opinion 41 (February 3, 1968) should also be noted. That Opinion, dealing with the problem of a practicing attorney who was also a licensed certified public accountant and who holds himself out as qualified to practice law and accounting, concludes that the use of stationery incident to the practice of accounting would, of necessity, advertise the lawyer and his specialty.

We commend the attorney concerned in this case for being sensitive to the ethical considerations involved and for inquiring of us as to the propriety of such a letterhead prior to putting it to use.

S

Adopted October 29, 1973.

Topic

Attorney-client relationship; disqualification of attorney.

Digest

The representation of an attorney of a husband in an action by his wife for dissolution of the marriage is not made ethically improper by the fact that the attorney, in his capacity as counsel for a Board of County Commissioners, has frequent contact with the wife.

Facts

A wife, who had filed an action to dissolve her marriage, was appointed chairman of a commission created by a Board of County Commissioners. The Board also appointed her to serve on another commission. The husband's attorney in the dissolution of marriage action serves as the attorney for the Board of County Commissioners and has frequent contact with the wife in connection with her service on the commissions to which she was appointed. It is conceivable that as attorney for the Board, the attorney could be asked to give legal advice to at least one of the commissions upon which the wife serves.

Opinion

The attorney's representation of the husband in the action for dissolution of the marriage is ethically proper. An attorney for a board or commission is not, solely by virtue of that relationship, the personal attorney of the members of the body. Thus here there is no direct attorney-client relationship between the attorney in question and the wife. The fact that the wife has frequent occasion to see the attorney is no impediment to his representation of the husband in the domestic relations case. To disqualify the attorney in such a case would, in effect, allow the wife to disqualify, as her husband's attorney, any person with whom she had frequent or close contact. Such a rule is neither required nor contemplated by the Code of Professional Responsibility.

Adopted November 17, 1973.

Topic

Collection of attorney fees; withdrawal; attorneys' lien.

Digest

An attorney cannot ethically refuse to withdraw as counsel of record in order to collect an unpaid fee, but an attorney may pursue collection of the fee even after withdrawal in various ways including the assertion of a statutory lien.

Facts

An attorney agreed to accept a legal aid low cost referral on a dissolution of marriage action and was later discharged by his client prior to the conclusion of the dissolution. There was a written employment agreement and the attorney was not paid pursuant to that agreement.

The client employed a new attorney, and the first attorney inquires as to whether or not it is proper to refuse to withdraw as counsel until the former client pays the balance of the fee due pursuant to the agreement, and if it is not ethically proper to refuse to withdraw, what alternatives remain to allow recovery of the balance of the fee?

Opinion

The answer to the first question is provided by DR 2-10(B), Mandatory Withdrawal:

> "A lawyer representing a client before a tribunal, with its permission if required by its rules, *shall* withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if: . . .
>
> (4) He is discharged by his client."

To the Committee's knowledge, the local rules of each judicial district in the state of Colorado do require permission of the court to withdraw as counsel of record.

From the above Disciplinary Rule, it is clear that withdrawal after discharge is mandatory, and must be done with the permission of the court pursuant to local rules. The attorney thus may not demand that the client pay the balance of the fee prior to the filing of a motion to withdraw.

As a practical matter, in order to collect the fee, the attorney may wish to utilize the provisions of C.R.S. § 46-1-19 (1963, as amended) which provides as follows:

> The court from time to time, after considering the financial resources of both parties, may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this article and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

In addition, DR 5-103(A)(l) of the Code of Professional Responsibility provides as follows:

> A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:
>
> (1) Acquire a lien granted by law to secure his fee or expenses.

EC 5-7 of the Code also recognized the validity of attorney's lien rights:

> The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in

> the outcome of the litigation. However, it is not improper for a lawyer to protect his right to collect a fee for his services by assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation.

With regard to a suit to collect attorney fees, the Ethics Committee has previously dealt with this problem in Formal Opinion No. 20 which was adopted June 23, 1961. Although this Opinion dealt with Canon 14 of the old Canons of Professional Ethics, it would be equally applicable today. In addition, EC 2-23 of the Code of Professional Responsibility deals with the subject.

Since the attorney obtained the client as a legal aid low cost referral, Canon 2 of the Code of Professional Responsibility should be considered prior to bringing suit to collect fees. That Canon relates to an attorney's obligation to make legal counsel available to those who are not in a position to employ counsel by the payment of reasonable fees.

U

Undated.

Topic

Receipt of attorney fees from lending institutions.

Digest

An attorney may properly receive a fee from a lending institution for examining a mortgage title commitment, even if he knows that the institution may pass the legal expense on to the borrower. However, to avoid any appearance of improper conduct by the lender's attorney, he should satisfy himself, in advance, that there has been disclosure to the loan applicant that he will be assessed for the lender's legal expenses incurred in connection with the proposed loan.

Facts

An attorney receives a fee from a lending institution for reviewing and advising on the adequacy of a mortgage title commitment obtained by the institution. The attorney knows that it is customary for the lender at the closing of a loan to assess the amount of its attorney fee as an item of costs against the borrower. Is the attorney's conduct unethical in this situation?

Opinion

The attorney's conduct is not unethical. His client is the lending institution, and he may properly receive a fee from it for his services. The fact that the lender may later obtain reimbursement of its legal expense from the borrower is a contractual matter between the lender and the borrower.

This question regarding ethics has arisen because many borrowers, being assessed for legal expense at the loan closing, have assumed that they were being compelled to pay for legal services which they had not engaged, and, in effect, that this constituted solicitation on behalf of an attorney by the lending institution. Some have also assumed that the attorney represented both the lender and the borrower, with an apparent conflict of interests. Of course, an attorney could not ethically participate in a course of conduct involving either solicitation or unauthorized conflict of interests. It is believed that the principal problem could be avoided if it were clearly explained to the borrower by the lender at the outset that any legal expenses incurred by the lender in processing the loan application will become an item of costs assessed against the borrower. The Committee recommends that a lender's attorney heed the admonition of Canon 9 and take special precautions to avoid even the appearance of impropriety. He may do so by assuring himself, before performing legal services of this type for a lender, that if the lender intends to pass its legal expense on to the borrower this fact has been clearly disclosed to the loan applicant at the outset.

For the purpose of this Opinion, it is assumed that the attorney's fee involved is in an amount which would not be considered excessive under DR 2-106.

Ethics Opinion No. 12 of the Colorado Bar Association deals with related subject matter. In that Opinion, it is pointed out that an attorney must not condone any course of conduct by a lender which would imply to the loan applicant that the lender's legal services were rendered for the borrower, or that the borrower could or should retain the same attorney to protect his interests in addition to those of the lender. (*See also* DR 2-103(c) and (3e)). If the borrower, without solicitation, were to request that the lender's attorney represent him as to the same transaction, the attorney could justifiably do so if he first complied with DR 5-105(c) by making full disclosure to both the lender and the borrower, and if both consented thereto.

Also, as pointed out in Opinion No. 12, the attorney could not properly authorize any practice by the lending institution of assessing legal fees to the borrower, except to the extent that such fees are, in fact,

paid by the institution to the attorney (Canon 3). Such a situation might arise in the case of an attorney acting as a salaried employee of the lender. However, if the salaried employee were to receive a separate specific fee for his services in connection with a particular loan, apart from his salary, then the lender's assessment of the specific legal expense to the borrower would be subject to the same considerations as the fee of an independent attorney.

V

Adopted April 27, 1974.

Topic

Attorney's negligence; duty to report to client.

Digest

A lawyer who learns of his own negligence or of the negligence of his partner or associate should take steps to assure that the same is fully reported to the injured client.

Facts

A and B are law partners (or B is an associate employee of A). A discovers that B, in handling a matter for client C, neglected to take certain steps in C's behalf which will cause C to incur substantial expense. Is A obligated to report B's negligent omission to C?

Opinion

It is axiomatic that a lawyer should take steps to report his negligent omissions to a client. It necessarily follows that A has the same obligation to client C as does his partner or associate B.

Recognizing the fact that most lawyers carry liability insurance, it is permissible and ethical for the lawyer to notify his insurance company, if he elects to do so, of an error committed by him, or someone in his office for whom he is responsible, in order not to jeopardize his coverage under his policy, prior to notifying the injured client.

W

Adopted May 18, 1974.

Topic

Part-time deputy district attorneys and county attorneys; location of private practice.

Digest

It is not proper for a part-time deputy district attorney or county attorney to conduct the private practice of law, or hold himself out as conducting the private practice of law, in office space in any building identified as a county building.

Facts

In many counties, particularly rural mountain counties, positions of deputy district attorney and of county attorney are part-time positions, filled by attorneys who have separate private practices. In some cases, because of budgetary limitations, the counties have provided, in lieu of compensation, office space in county buildings to the attorneys filling these positions. From the standpoint of the attorneys accepting such positions, the lower overhead achieved by the provision of such office space is often the only way that acceptance of such position can be financially justified.

Opinion

Under these facts, the problem is whether the attorney who is employed part-time and who is provided office space in a county building in lieu of other compensation can properly conduct his private practice from that office or use the address of that office on letterheads for his private practice.

In the opinion of the Committee, it would not be proper for the deputy district attorney or county attorney who is provided office space in a county building in lieu of compensation to use such office space for his private practice, or to hold himself out as conducting a private practice from that office.

Attorneys who fill the positions of public officials, whether on a part-time or full-time basis, have a high degree of visibility to the public at large, and the dangers of an appearance of impropriety are correspondingly increased. “On occasion, ethical conduct of a lawyer may appear to laymen to be unethical.” EC 9-2. The part-time county employee must, therefore, carefully avoid any conduct which would suggest that he was using his official position as a means of attracting business. The use of county facilities for the conduct of a private practice is likely to appear improper in the eyes of the general public, and would not serve to promote public confidence in the legal profession.

In addition, the use of an office in a county facility for a private practice could result, as a matter of practical fact, in a feeder operation of the sort which the Committee has previously proscribed in Opinions 29 (January 18, 1964) and 39 (July 15, 1967). Either the proximity of the premises to county judicial agencies or the identification of the office space as housing both the private practice and a public function could result in an unfair competitive advantage for the attorney. It was for this very reason that the Committee previously disapproved, in Opinion 35 (June 19, 1965), any signs or shingles which “identify in both capacities at either office a person who is a public employee (such as a district attorney) and who also engages in private law practice in a separate office.”

There may be occasions where, in exigent circumstances, such an attorney may take an occasional phone call or hold a brief discussion with an outside client in that public office. In general, however, the attorney should either maintain and use separate office space for such conferences or arrange to meet his private clients on their own premises. In addition, and as mentioned in Informal Opinion Q, October 5, 1973, relating to assistant attorneys general, it is improper for a part-time district attorney or county attorney

to reveal on the stationery which he uses in private practice that he is, in fact, also serving in some public capacity. The stationery used in the private practice should not identify the attorney's office with a county building.

The Committee is not unmindful of the hardship which this Opinion may cause in many of the rural counties which cannot afford full-time county attorneys and deputy district attorneys. However, as we stated in Opinion No. 45 (February 20, 1971), "the exigency of these practical problems is no warrant for ignoring the consequences of fostering practices which may expose the bench and bar to conflicts of interest, the appearance of impropriety, and the denigration of the process of justice."

Thus, to avoid even the appearance of impropriety, the attorney should not use, nor hold himself out as using, public office space for purposes of private practice.

NO CHANGES

Chapter 5

ABSTRACTS OF RESPONSES TO LETTER INQUIRIES

SYNOPSIS

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An attorney may charge clients a flat percentage of the attorney's total hourly billings to compensate for the client's expenses provided the attorney and each client agree in advance to such a billing arrangement 00/01-3

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A law firm does not have to change its name when an attorney, whose maiden name is part of the firm's name, changes because that attorney begins using a married name 01/02-1

Prior to shredding the contents of inactive client files, a lawyer must make reasonable efforts to contact former clients regarding the potential destruction of their files, and give the clients opportunity to obtain their respective file or files 01/02-2

It is unethical for a lawyer to join a for-profit organization to obtain legal work. It is, however, ethical for a lawyer to pay the usual charges of a not-for-profit lawyer referral service or a legal service organization 01/02-3

A lawyer must maintain client confidences but also shall not counsel or assist a client in criminal or fraudulent conduct, here in the context of representation in a workers' compensation case and in connection with a child support matter. 02/03-1

A lawyer is prohibited from advancing or guaranteeing financial assistance to a client (here, in a personal injury matter); however, a lawyer may advance or guarantee expenses of litigation. 02/03-2

It may be ethically permissible for an attorney hired by an insurance company to prepare the petition to appoint a conservator and the petition to approve the settlement with a minor. 2005-1

It is ethical for an attorney representing a respondent in a protective proceeding to circulate an itemized billing statement for services rendered to all of the parties to the proceedings as an attachment to a motion for payment of attorney fees from the estate. [Submission of itemized bills with motion for payment of fees] 2007-1

An attorney must provide client papers in accessible electronic format if so requested and so maintained. [Request by client for electronic files] 2007-2

It is ethical for a full-time in-house municipal attorney to enter into an employment agreement containing a severance pay provision. [Employment agreement for in-house municipal attorney] 2007-3

It is not ethical for an attorney to pay an Internet-based business consulting company for the exclusive right to referrals of the company's customers located in a defined geographic area. [Payment to Internet-based service for exclusive right to referrals] 2007-4

It is ethical, subject to the assumptions discussed, for an attorney admitted in Colorado to become a partner with an out-of-state professional corporation in a limited liability partnership for the practice of law in Colorado. [Partnership with an out-of-state professional corporation] 2007-5

It is unethical for the attorney who is owed fees by a partner individually to assert an attorney's lien on partnership funds in a trust account. [Attorney's assertion of lien on partnership funds where a partner owes fees to the attorney] 2007-6

It is ethically permissible for attorney members of the board of directors and executive director of a non-profit legal services organization to represent their respective clients against one another in adversary proceedings or otherwise, provided that certain conditions are satisfied. It is ethically permissible for attorney members of the board of directors of a non-profit legal services organization and organization's staff attorneys to represent their respective clients against one another in adversary proceedings or otherwise, provided that certain conditions are satisfied. t is ethically permissible for a non-profit legal services organization to refer otherwise qualified individuals whom it cannot represent to community attorneys for *pro bono* representation, and assist those attorneys by providing secondary malpractice insurance, costs of litigation, and legal advice. [Conflicts questions regarding attorneys who are members of a board of directors or executive directors of non-profit legal services organizations] 2007-7

It is ethical for a municipal attorney to negotiate with a local developer for employment after leaving employment with the municipality. It is not ethical for a former municipal attorney to represent a client before or against the municipality on any matter in which he or she "participated personally and substantially as a public officer or employee" unless the municipality consents after consultation. It is not ethical for a former municipal attorney to represent a client on any matter in which the client's interests are adverse to any person or entity about whom the attorney obtained confidential information while in the municipality's employ. A former municipal attorney must be screened from participation and the municipality must be notified if other counsel employed by a client appear before or against the municipality on matters the attorney participated personally and substantially as a municipal attorney or adverse to any person about whom the attorney obtained confidential information which in the municipality's employ. [Conflicts questions regarding former municipal attorney who is employed by a local developer] 2007-8

It is not unethical, without more, for an attorney who is also a county commissioner with budget authority over the prosecuting attorney's budget to represent a criminal defendant in the judicial district. It is unethical for an attorney who is also a county commissioner to represent a criminal defendant if that representation would be materially limited by the attorney's status as a public official and such a circumstance may arise when an employee of the sheriff's department is scheduled to be a witness. [Conflicts questions regarding an attorney who is a county commissioner and also represents criminal defendants] 2007-9

It is not unethical for a law firm engage a Professional Employee Organization (PEO) to employ attorneys and manage the human relations functions relating to that employment. [Law firm engaging a professional employee organization to employ attorneys and manage human resources functions] 2007-10

It is not unethical for an attorney to author, publish, and promote materials on the law or procedure and partner with a non-lawyer to publish and promote such materials. [Attorney writing and publishing a book with a non-lawyer] 2007-11

It is unethical for an attorney in private practice to contract with a "full-service tax negotiation" company that bills its customers for the attorney's services and compensates the attorney in accordance with the contract. [Attorney working for a "full-service tax negotiation" company] 2007-12

The Colorado Rules of Professional Conduct permit the corporate name of a legal professional corporation to include the name of an attorney engaged in the corporation's practice but who is not a shareholder as long as the corporation carries malpractice insurance. 2011-1

A former city attorney who is now in private practice is permitted to represent a client with respect to an ordinance that was passed by the city when the attorney was the city attorney. The attorney may also represent clients as a lobbyist with respect to the ordinance. 2011-2

Under the applicable rules of professional conduct, an attorney may not pay a for-profit referral service to obtain clients because such services are considered referral services and not advertising. 2011-3

Colo. RPC 1.11(d)(2)(ii) may limit the ability of a lawyer employed in a managerial capacity by a governmental agency to negotiate for private employment with a person or entity that is a party or attorney in any matter in which the agency is involved. The rule applies only to the duration of the matter. 2011-4

An attorney's use of a paperless office raises potential ethical concerns about the confidentiality and security of the client information and whether it is adequately protected. If an attorney decides to use a third-party service provider for electronic storage, he or she must use reasonable care and competently safeguard the confidential information from unauthorized access or disclosure. 2011-5

Contingency fee based on receiving equity interest in entity which is subject of contingency litigation 2014-1

No duty for appellate counsel appointed by office of alternate defense counsel to review or deliver copies of transcripts or other documents to clients 2014-2

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TABLE OF AUTHORITIES

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ABTRACTS OF RESPONSES TO LETTER INQUIRIES

The following abstracts of informal CBA Ethics Committee letter opinions are offered as potential sources of guidance to the Bar on matters of ethical concern. Because they abridge the letter opinions and omit facts and circumstances tending to identify the inquiring attorney, the abstracts are not exhaustive, and should therefore serve only as a starting point for, or supplement to, thorough research and analysis. Inquirers are advised, in advance, if the opinion provided to them will be abstracted and published. For a number of reasons, the full letter opinions themselves are not provided to persons other than the original inquirer. The letter opinions and these abstracts are issued for advisory purposes only and are not binding in any way upon the Supreme Court or the Appellate Discipline Commission. Citations in the abstracts to the "Colorado Rules" refer to the Colorado Rules of Professional Conduct.

94/95-1

Summary of Facts Provided

X, a Colorado lawyer, is a director and an officer of A, a quasi-governmental entity. A's legal counsel is Y. X is not legal counsel for A. In X's capacity as an officer and director of A, X sometimes communicates directly with officers and directors of other corporations regarding matters in which both A and the other corporations are represented by legal counsel.

Issues and Conclusions

Does Rule 4.2 of the Colorado Rules prohibit X from communicating with officers and directors of other corporations directly and not through counsel for those other corporations?

The Committee advised that Rule 4.2 is limited to instances where a lawyer is the attorney for the client. If X is acting as a director/officer, but not as corporate counsel, then such direct communication is permissible.

The Committee did caution, however, that Rule 8.4(a) prohibits a violation of the Rules "through the act of another." It would be unethical for A's legal counsel to instruct or direct X in such communications. As long as X's communications are directed by the corporate entity and not its counsel, such communication would be permissible.

94/95-2

Summary of Facts Provided

Lawyer A, licensed to practice in Colorado, is asked by Acquaintance for assistance in contacting a plaintiff's personal injury attorney in State X. Lawyer A recommends an attorney practicing in State X and telephones that attorney to advise that attorney can expect a call from Acquaintance. During that conversation, the attorney in State X informs Lawyer A that the attorney's firm's policy is to pay a referring attorney a referral fee equal to one-third of the contingent fee earned by the firm in representing the plaintiff. This fee will be paid even though Lawyer A is not expected to assume any responsibility for the representation.

Acquaintance subsequently engages the attorney in State X. A suit is brought and successfully concluded. Lawyer A assumes no responsibility for the prosecution of the suit, and renders no services in connection with the suit. Following the conclusion of the suit, attorney in State X contacts Lawyer A and

offers to send the referral fee. Lawyer A's acceptance of the fee will have no effect on the amount received by Acquaintance. It is assumed that acceptance of the referral fee would be appropriate for an attorney licensed to practice in State X.

Issues and Conclusions

The issue is whether Lawyer A can ethically accept the referral fee. Whether viewed under the current Colorado Rules or the prior Code of Professional Responsibility, acceptance of the referral fee would not be appropriate for an attorney licensed to practice in Colorado.

Rule 1.5(e) of the Colorado Rules explicitly prohibits referral fees. Although DR 2-107 of the Code of Professional Responsibility did not explicitly prohibit referral fees, it provided that unassociated lawyers (those who were not partners in or associates of the same firm) could not divide fees for legal services unless "the division [was] made in proportion to the services performed and responsibility assumed by each." DR 2-107(A)(2). A similar limitation is contained in Rule 1.5(d)(1) of the Colorado Rules. Since the fee was described and intended as a "referral fee" by the attorney in State X, and since Lawyer A performed no services and assumed no responsibility in connection with Acquaintance's case, lawyer A's acceptance of the fee would violate Rules 1.5(d)(1) and (e) and DR 2-107.

94/95-3

Summary of Facts Provided

The inquiring lawyer A, a part-time municipal attorney, prosecutes ordinance violations in municipal court. Lawyer A wishes to know if it is ethical for Lawyer A to defend clients charged with crimes in courts other than the municipal court in which the inquiring lawyer is a prosecutor.

Issues and Conclusions

Is it ethical for a part-time municipal attorney to represent defendants charged with crimes in courts (such as the county court in which the municipality is located) other than that in which the municipal attorney prosecutes ordinance violations for the municipality?

The Colorado Rules do not bar a part-time municipal attorney, who prosecutes ordinance violations in that capacity, from representing clients charged with violations of the law in forums other than the municipal court in which the attorney appears as prosecutor, as long as the violation did not take place in the municipality in question and as long as personnel of the municipality, such as police, are not involved in the case in question. This advice includes defending clients charged with crimes in the county court in which the municipality is located.

In reaching this conclusion, the Committee relied heavily on CBA Formal Ethics Opinion 46, which was adopted on February 20, 1971. The Committee concluded that Opinion 46 still provides valid guidelines under the Colorado Rules, and it directed the inquiring lawyer to read that opinion (especially its cautionary language about the difficulties that a part-time prosecutor may face in doing defense work in other cases) before undertaking to defend a client.

94/95-4

Summary of Facts Provided

Lawyers seek to encourage members of various nonprofit organizations (the "Nonprofits") to use their firm by including in their fee agreements one of the following arrangements: (1) donation by the firm to the Nonprofits of 10 percent of the fees paid; (2) an "appropriate donation" by the firm to the Nonprofits,

without specific agreement as to the amount; or (3) reduced-rate services so that the member-clients can make direct contributions to the Nonprofits.

Issues and Conclusions

Does a fee arrangement that requires the lawyer or client to pay a portion of the fees earned to a nonprofit organization of which the client is a member violate the Colorado Rules?

Any of the proposed fee arrangements would violate the Colorado Rules. Each would result in an impermissible splitting of legal fees with a non-lawyer, in violation of Rule 5.4(a). The proposed fee arrangements also could result in an improper payment of referral fees, contrary to Rules 7.2(c) and 1.5(e). *See also* Rule 1.8(f). The advertisement of the discount fee proposed as Option (3) could be deceptive and misleading, in violation of Rule 7.1. In reaching this conclusion, the Committee relied upon the plain language of the cited rules, and upon a number of ethics opinions from other jurisdictions applying the same or similar rules.

95/96-1

Summary of Facts Provided

A lawyer is retained to defend three parties in business litigation involving a specialized area of commercial law. The lawyer advises the clients that although he is competent in trial work, the lawyer does not have expertise in the specialized area of law. The lawyer informs the clients he will need to associate with counsel competent in the specialized area of law. The lawyer is advised by the clients that they are presently short of funds but intend to raise funds for a possible settlement. The clients instruct the lawyer to perform the absolute minimum necessary to defend the case.

The lawyer complies with the clients' instructions, and undertakes essentially no work in defending the case for over two years. The clients were unable to raise the necessary funds for settlement. Trial is now three months away and it is clear the case will not settle. The lawyer informs the client that it is necessary actively to prepare the case for trial and to associate with co-counsel regarding the specialized area of law. The clients still do not have the funds to hire co-counsel, and instruct the lawyer to forebear from putting in the work required to prepare the case for trial.

Issues and Conclusions

Does the clients' instruction to avoid incurring the expense of hiring co-counsel and preparing the case properly for trial constitute an impermissible limitation on the scope of the lawyer's representation because the lawyer is unable to provide competent representation at trial?

Two Colorado Rules were analyzed to determine whether the lawyer must follow the client's instructions. Rule 1.1 requires lawyers to provide competent representation to their clients, but does not specifically provide what a lawyer must do to be or become competent in the representation. Under the facts of this case, Rule 1.1 precludes the lawyer from acting as trial counsel because the lawyer does not have experience or expertise in the specialized area of law, and cannot gain the necessary expertise before trial. Furthermore, a lawyer may not act as counsel in a matter where the lawyer has not been able to prepare adequately.

Rule 1.2 of the Colorado Rules provides that a lawyer shall abide by the client's decision regarding the objectives of the representation and any limitations placed thereon. The limitations on the scope of services provided by the lawyer, however, must be consistent with the lawyer's other ethical duties under the Rules. A lawyer cannot agree to representation of a client which is so limited in scope that it would violate the lawyer's duties under Rule 1.1, of the Colorado Rules. *See* comments to Rule 1.2.

The Committee concluded, based upon the facts and circumstances presented in this case, that the lawyer's obligations to follow his client's instructions not to retain co-counsel or prepare for trial must yield

to the lawyer's obligation to provide competent representation. Colorado Rules 1.1 and 1.2 do not permit the lawyer to continue to defend the lawsuit on the limited basis requested by the clients.

The Committee further determined that under Rule 1.16(a) the lawyer's withdrawal from the representation is mandatory because the lawyer's continued representation will result in violation of the Rules since the clients will not authorize the lawyer to prepare for trial or to retain co-counsel. Because the lawyer is counsel of record in a case pending before a court, withdrawal requires court permission. If the court denies the motion to withdraw, Rule 1.16(c) requires the lawyer to continue the representation, notwithstanding good cause for termination. If not permitted to withdraw, the attorney should again address the issue of whether it is necessary to retain co-counsel.

95/96-2

Summary of Facts Provided

A private attorney practices criminal law, which matters usually involve municipal patrol personnel. The attorney's spouse is the supervisor of the patrol personnel. The local court asked the attorney to take appointments during the local Public Defender's temporary absence. Recognizing a potential conflict, the attorney and the spouse (presumably with the concurrence of the city attorney) agree that: (1) the supervisor/spouse would relinquish any supervisory responsibilities in a case where the attorney was retained; (2) the attorney would inform the client of the spouse's position to insure that the client would appreciate there could be no special advantage and could seek other counsel if uncomfortable; and (3) in any event, the attorney would not take a case if the spouse would be a witness.

Issues and Conclusions

In light of the proposed arrangement, is it proper for the attorney to take Public Defender court appointments and to continue representing private defendants when the spouse's police department is involved?

Citing Colorado Rule 1.7 and Iowa Bar Association Ethics Committee Opinion 89-31, the Committee concluded that the attorney may not represent parties in cases in which the spouse or members of the Police Department are parties to the case or witnesses unless no actual conflict exists, full disclosure of the relationship is made, and all parties give their written consent. Constitutional issues involving effective assistance of counsel require more stringent application of conflict of interest rules. Although it is theoretically possible in certain situations for the proposed arrangement to pass ethical muster, the situation is rife with potential conflicts. Potential areas of conflict include inadvertent marital communications, failure to cross-examine vigorously or otherwise to provide a zealous defense, a disappointed client's accusations of collusion between attorney and spouse, ever-present possibility that the spouse would have to testify, and public perceptions regarding fair trial. As a practical matter, it would be very difficult for the attorney to represent defendants when the spouse's Police Department is involved.

95/96-3

Summary of Facts Provided

A Colorado lawyer plans to form a partnership with lawyers practicing in other countries who are not United States citizens, are not licensed in any of the United States and will practice law in foreign countries. The foreign lawyers will practice in countries that do not have legal systems based on common law and in which the functions of lawyers may differ from those in common law systems.

Issues and Conclusions

Under Rule 7.5(c) of the Colorado Rules, a law firm may have offices in more than one jurisdiction, including foreign jurisdictions. This rule permits a Colorado lawyer to form a partnership with lawyers not licensed in the United States. Pursuant to Colorado Rule 5.1(a), the Colorado lawyer has an obligation to make reasonable efforts to ensure that all lawyers in the partnership, foreign and domestic, comply with the Colorado Rules. The applicable Colorado Rules include Colorado Rule 5.4(b), which prohibits a Colorado lawyer from forming a partnership with a non-lawyer. In order to comply with this Rule, the Colorado lawyer must determine that the foreign partners are lawyers. Other applicable Colorado Rules that will impact the relationship with the foreign attorneys include rules requiring the preservation of client confidences (Rule 1.6); avoidance of conflicts of interest (*e.g.*, Rule 1.7); prohibiting referral fees (Rule 7.2(c)); and identification on the lawyer's letterhead, business cards, etc. of jurisdictional limitations on any named attorney's ability to practice law in the jurisdiction where the office is located (Rule 7.5(c)).

95/96-4

Summary of Facts Provided

The American Bar Association accredits certain programs that certify attorneys as specialists. These programs include the American Academy of Matrimonial Lawyers, the National Board of Trial Advocacy, the National Board of Professional Liability Lawyers, the National College of Real Estate Lawyers and the Association of Estate Planners. The ABA distributes a brochure on these accredited specialist programs, which apparently is written for the information of clients or prospective clients.

Issues and Conclusions

(1) May a firm with attorneys certified as specialists by an ABA-accredited program list that certification by the relevant attorney's name on the firm's letterhead? Yes. Colorado Rules of Professional Conduct (Colo. RPC) Rule 7.4, Communication of Field of Practice, paragraph (a), provides that a lawyer may communicate the fact that he or she does or does not practice in particular fields of law and may state or imply that she or he is a specialist in accordance with Rule 7.1. The listing may not violate Colo. RPC Rule 7.1, Communications Concerning a Lawyer's Services.

Rule 7.1 states that a lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it: (a) contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not misleading; (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; or (c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated.

All lawyers on the letterhead and in the firm are responsible for ensuring that listing of such certifications on the letterhead does not violate Rule 7.1. *See* Colo. RPC Rule 7.5, Firm Names and Letterheads; Rule 5.1, Responsibilities of a Partner or Supervisory Lawyer; and Rule 5.2, Responsibilities of a Subordinate Lawyer.

(2) May the firm mail to its clients the ABA brochure on certification? Yes, provided the brochure and any accompanying communication do not violate Rule 7.1 and the firm complies with the requirements of Colo. RPC Rule 7.2, Advertising, and, if applicable, Rule 7.3, Direct Contact with Prospective Clients. *See also* CBA Ethics Committee Formal Opinion Nos. 76 and 83 [No. 76, "Lawyer Advertising Guidelines," 16 *The Colorado Lawyer* (Dec. 1987) at 2205; No. 83, "Lawyer Advertising, Solicitation and Publicity," 19 *The Colorado Lawyer* (Jan. 1990) at 25]. Although issued under the former Code of Professional Responsibility, these opinions continue to provide guidance in the areas of advertising, solicitation and publicity.

95/96-5

Summary of Facts Provided

R, a recently admitted member of the Colorado bar, limits her practice to providing legal research to other attorneys who compensate her on an hourly basis. The hiring attorney meets with R and outlines the pertinent facts and issues. R performs the research and provides a written memo. R currently does not meet with the hiring attorney's client. However, R keeps a list of those clients and checks it for conflicts.

Issues and Conclusions

Based on Rule 1.5(d) of the Colorado Rules of Professional Conduct and the comment thereto, ABA Formal Opinion 88-356 (1988), *In re Marriage of Ziemann*, 674 N.E. 2d 767, 7 Law. Man. Prof. Conduct 197 (Ill. App. 1991); and ABA/BNA Lawyers Manual on Professional Conduct, § 41:714, the Committee advised that:

1. Legal research performed for another lawyer, the fees for which are billed directly to that lawyer at a set hourly rate, does not violate Rule 1.5 as an improper division of fees.

2. Meeting with the hiring lawyer's client to obtain additional facts or clarification, or doing so over the phone, with the hiring lawyer's consent, in conjunction with the legal research and drafting services described, does not cause a violation of Rule 1.5(d).

3. Drafting a motion for another attorney's signature under these circumstances does not violate Rule 1.5.

The Committee distinguished the situation in which a contract or temporary lawyer is compensated by a direct division of the actual fee paid by the client, such as a percentage division of a contingent fee. That situation requires consent of the client and satisfaction of the other requirements of the rule regardless of the extent of supervision. *See* ABA Formal Opinion 88-356 (1988).

95/96-6

Summary of Stated Facts

A lawyer regularly represents workers' compensation clients, and if the on-the-job injury is caused by a non-employer, represents the client in a civil lawsuit against the person causing the injury. Pursuant to the workers' compensation statute, the lawyer has a 20 percent contingent fee agreement. The lawyer charges a higher contingent fee for damages recovered in the civil lawsuit.

Issue

Is the lawyer prohibited from charging different contingent fees due to a conflict of interest?

Conclusion and Reasoning

A conflict of interest is inherent in every fee-based professional relationship. Hazard and Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, 70-71 (1985); Brickman, "Contingent Fees Without Contingencies," 37 *U.C.L.A. Law Rev.* 29, 48-49 (1989). Because they are inherent, such conflicts are not *prohibited* conflicts of interest. *See* Colorado Rules of Professional Conduct (Colo. RPC) Rule 1.8(j)(2).

The Committee viewed the situation presented as being similar to that which arises when a client agrees to a "graduated" contingent fee. A typical graduated fee provides for a contingent fee percentage that is increased if (1) settlement negotiations are unsuccessful and a complaint is filed, (2) the case goes to trial, and (3) the trial verdict is appealed. Many states by statute explicitly approve the use of graduated fee agreements. *See e.g.*, Calif. Bus. & Prof. Code, § 6146; New Jersey Supreme Court Rule 1:21-7; New York

22 N.Y.C.R.R. 691.20(e)(2). In these situations, the lawyer's self-interest in increasing the contingent fee percentage may conflict with the client's economic interest in having the case resolved before the percentage increases.

Philadelphia Bar Association Ethics Opinion 93-11 (7/93) observed that conflicts related to graduated contingent fees exist in hourly fee arrangements as well: ". . . while it would be wrong to defer settlement to recover a higher percentage, it would be equally wrong for an attorney to defer settlement so that the file can continue to be billed on an hourly basis."

The Committee concluded that a graduated contingent fee does not violate the Colo. RPC as an impermissible conflict of interest, regardless of whether the contingency percentage varies due to the stage of the proceeding when recovery is received or the forum in which the recovery is received. However, the Committee noted that this is a separate issue from the lawyer's obligation to charge only a reasonable fee, Colo. RPC Rule 1.5(a); to represent the client with reasonable diligence, Colo. RPC Rule 1.3; and to abide by the fiduciary duties inherent in the representation.

96/97-1

Summary of Facts Provided

Law firm A represented several co-parties in complex litigation which concluded several years ago and generated voluminous files. Certain of the formerly jointly represented clients ("Former Clients") continued to be represented by Firm A in other litigation related to the concluded litigation. Former Clients then secured new counsel in the other litigation, and the current litigation files were turned over to the new counsel. Former Clients now are threatening litigation against Firm A relating to one of the active matters and to a portion of the concluded litigation. Former Clients have requested that Firm A turn over the inactive files from the concluded litigation. Firm A regards the inactive files as work product and necessary to its representation of potential new clients in other litigation also related to the subject matter of the concluded litigation. Photocopying the files would be expensive.

Issues and Conclusions

A. Is Firm A required to release the inactive files to Former Clients? The authorities agree that, in the absence of a valid attorney's lien, upon request an attorney must deliver to a client original documents provided to the attorney by the client, documents obtained by the attorney for the client, and the finished work product of the representation. *E.g. People v. Shunneson,* 814 P.2d 800 (Colo. 1991).

The authorities are not in agreement as to whether an attorney must deliver all documents generated in the course of the representation, such as the attorney's own notes and research. Effectively, this is the issue of whether an attorney may assert a work product privilege *vis à vis* a client or whether fiduciary duty to the client precludes such assertion. *Compare, e.g.,* ABA Informal Ethics Op. 1376 (Feb. 18, 1977) (decided under DR 9-102(B)(4)); *Neeb v. Superior Court*, 214 Cal. App. 3d 693, 262 Cal. Rptr. 887 (4th Dist. 1989) (relying on Calif. Code); and *Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus*, 824 S.W.2d 92 (Mo. App. 1992), *with In re Grand Jury Proceedings,* 727 F.2d 941 (10th Cir. 1984); *Matter of Kaleidoscope, Inc.,* 15 B.R. 232 (Bkrtcy. D. Ga. 1981), *modified on other grounds,* 25 B.R. 729 (D. Ga. 1982); *Gottlieb v. Wiles*, 143 F.R.D. 241 (D. Colo. 1992); and *Martin v. Valley Nat. Bank of Arizona*, 140 F.R.D. 291 (S.D.N.Y. 1991).

Colorado Rules 1.15(a) ("property of clients" must be held separately from the attorney's own property) and 1.16(d) (upon termination of the representation the attorney must "surrender[ ] papers and property to which the client is entitled") do not define "papers" or "property." However, the implication from both rules is that the only exception to the requirement that client papers and property must be returned is when an attorney's lien is permitted by substantive law.

B. If release of files is required, is it sufficient if Firm A merely makes them available for inspection and copying by Former Clients at their expense? The issue of originals versus copies is mooted here, for practical purposes, by the fact of joint representation. Each jointly represented client has an undivided interest in files created in the course of the joint representation. *E.g., Kaleidoscope, Inc., supra; Gottlieb, supra.* Former Clients are entitled to full access to the inactive files, but not sole possession of them, because of the other clients' interests. Firm A has a fiduciary obligation to preserve the original files for the benefit of all of the jointly represented clients. Under these circumstances, Firm A's obligation would be met by providing Former Clients a full opportunity to inspect the files and make copies at their own expense.

96/97-2

Summary of Facts Provided

A marketing service publishes periodic newsletters and arranges meetings attended by members of business groups. An attorney may join the service by paying a flat annual fee and may thereafter include articles in the newsletter under his or her by-line (including his or her address and phone number) and attend the meetings to speak on areas of topical interest. In addition, the service places paid ads in various bar and business related publications and refers those who respond to the ads to its member attorneys.

Issues and Conclusions

Does Colorado Rule 7.2 prohibit an attorney from paying the fee charged by the marketing service?

Because the marketing service is a for-profit organization, payment of the fee by an attorney violates Colorado Rule 7.2(c). That Rule prohibits attorneys from:

> . . . giving anything of value to a person for recommending [their] services, except that [they] may pay the reasonable cost of advertisements or communications permitted by [Rule 7.2] and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

The comment to the Rule affirms the general prohibition against paying another for "channeling professional work," and recognizes exceptions only when the "other" is a "legal aid agency or prepaid legal services plan" or a "not-for-profit lawyer referral program." The marketing service is not such a plan or program. As discussed in the Ethics Committee's Formal Opinion 83 (19 *The Colorado Lawyer* 25 (Jan. 1990)); (addendum 22 *The Colorado Lawyer* 2235 (Oct. 1993)), it is a "group advertising" mechanism which functions as a for-profit referral service. Payment of costs or charges to such a service is prohibited by Colorado Rule 7.2(c). Payment also is prohibited by Colorado Rule 1.5(e), which prohibits attorneys from paying referral fees.

96/97-3

Summary of Facts Provided

An attorney acting as guardian *ad litem* ("GAL") for a child in a dependency and neglect action receives a written report from the child's therapist concerning issues raised in a motion previously filed by GAL. GAL submits the therapist's report to the court to supplement the motion, certifying service to all parties/counsel of record. An attorney representing another party informs GAL that he considers GAL's filing of the report to be *ex parte* communication with the court, and expresses the intent to file a grievance if GAL takes similar action in the future.

Issues and Conclusions

A. Is filing an expert therapist's report in a dependency and neglect action, where all parties/counsel of record are served, a prohibited *ex parte* communication?

No. Colorado Rule 3.5(b) prohibits communicating *ex parte* with a judge "except as permitted by law." Filing a therapist's report with the court, with copies to all parties/counsel, is not a violation. The Colorado Children's Code at C.R.S. § 19-1-107(2) permits the filing of reports regarding a child's mental, physical, and social history with the court so long as the author is available as a witness subject to cross-examination. It does not violate the constitutional right to confront witnesses or due process, where the report is made available to all interested parties in sufficient time before a hearing to permit the parties to compel attendance of the author and to subject the author to examination under oath. *People in the Interest of A.M.D.*, 648 P.2d 625 (Colo. 1982).

B. Is GAL required to report the lawyer's threat to file a grievance to the appropriate professional authority?

Yes, if GAL has actual knowledge that the lawyer's threat was made to obtain an advantage in the dependency and neglect proceedings. Colorado Rule 4.5 prohibits a lawyer from threatening disciplinary charges to obtain an advantage in a civil action. Such conduct raises a substantial question as to a lawyer's honesty, trustworthiness or fitness as a lawyer. Thus, Colorado Rule 8.3 requires GAL to report the lawyer's threat, if GAL has actual knowledge that the threat was made to obtain an advantage in the dependency and neglect proceedings. GAL is not required to report unless GAL has such actual knowledge. Committee Comment to Colorado Rule 8.3. Actual knowledge may be inferred from the circumstances. Colorado Rules, Terminology, definition of "knows."

96/97-4

Summary of Facts Provided

Attorney represents a juvenile in a personal injury case which resulted in an out-of-court settlement. The settlement was approved by the probate court, which ordered the proceeds to be placed in a trust account. The juvenile's parent, however, deposited half of the proceeds in the parent's personal account. When the attorney discovered this action, the parent promised the attorney that the parent would place the remaining proceeds in a trust account established for the juvenile within two weeks.

Issues and Conclusions

Is the attorney obligated to notify the probate court of the parent's action?

As an officer of the court, the attorney is obligated to inform the probate court of the parent's actions regarding the proceeds. *See* Colorado Rule 3.3. Furthermore, the lawyer, as a fiduciary, has an obligation to protect the child's interests. Colorado Rule 1.14 provides that a lawyer has the responsibility to determine the needs and wishes of a client when the client is under a disability. A lawyer representing a juvenile has "additional" responsibilities and may need to take "protective action" on behalf of the juvenile. These fiduciary obligations also require the lawyer to report the parent's misappropriation of the juvenile's funds to the probate court even if the parent may have hired the attorney and paid the attorney's fees. *See* Colorado Rules 1.2(d) and 3.3(a)(2).

96/97-5

Summary of Facts Provided

Lawyer A is employed by a corporation which also employs accountants and other non-lawyers to provide tax advice to clients. A often learns, in the course of giving tax advice, that a client may need legal representation in related administrative or judicial proceedings.

Issues and Conclusions

A. May A, in the course of her employment, ethically represent clients of the corporation in such proceedings, as long as the clients are billed separately for such representation and the legal fees are not shared with the corporation? No. Colorado Rule 5.4(b) states that a lawyer may not practice law in partnership with a non-lawyer. It makes no difference that the legal fees would be segregated and go only to A; the clients are those of the corporation, and A would be practicing law in partnership with non-lawyers. A's employment by the corporation might compromise her independent professional judgment in her relationship with the clients.

B. May A maintain her employment with the corporation, practice law part time "on the side," and represent clients referred to her by the corporation, as long as she bills the clients on her own letterhead, makes it clear to clients that she will be acting independently of the corporation and that they are free to hire another attorney, and makes no payment to the corporation for such referrals? Yes. Under these circumstances, referrals from the corporation are not *per se* unethical under Colorado Rules 7.2(c) (a lawyer is prohibited from giving "anything of value" in exchange for the referral of a potential client) and 5.4(a) (a lawyer is prohibited from sharing legal fees with a non-lawyer).

However, A should analyze the situation under Colorado Rules 5.4(c) and 1.7(b) to determine whether, even though she is not undertaking the representation as an agent of the corporation, her professional judgment still may be affected by the employment. As part of this analysis, A must evaluate each referral for potential conflicts of interest which could arise, for example, if A discovers that the corporation had offered the client erroneous or inadequate tax advice. A also would be well advised to consider the point at which giving advice regarding clients' rights and obligations under the tax law may become the practice of law in association with a non-lawyer, thereby aiding the unauthorized practice of law in violation of Colorado Rule 5.5. *See* Colorado Bar Ethics Opinion 87 (Jul. 14, 1990; rev. Dec. 14, 1991) (21 *The Colorado Lawyer* 219 (Feb. 1992)).

96/97-6

Summary of Facts Provided

Attorney is in-house counsel for an insurance company and, from time to time, defends the company in arbitrations. Attorney also assigns defense of arbitrations to other in-house counsel or external counsel with input from the company's claims department. The claims department also must approve designations of arbitrators made by Attorney and requested that Attorney appoint as arbitrators external counsel who in the past have received defense assignments from Attorney and who, it is implied, will be considered for future defense assignments.

Each arbitrator must sign an oath of complete impartiality and swear that, except as disclosed in writing, he or she has no financial or personal interest in the outcome of the case and no existing or past financial or business relationships with any of the parties or their attorneys "that will affect my impartiality or create an appearance of partiality or bias."

Issues and Conclusions

A. May Attorney designate as an arbitrator external counsel who will not disclose the past relationship with the insurance company and the possibility of future defense assignments, or proceed with arbitration knowing that the designated arbitrator has not disclosed such relationship?

No. Failure of the designated arbitrator to disclose the past and possible future relationship with the insurance company is misconduct "involving dishonesty, fraud, deceit or misrepresentation" in violation of Colorado Rule 8.4(c) and may be conduct prejudicial to the administration of justice under Colorado Rule 8.4(d). Colorado Rule 8.4(a) prohibits an attorney from knowingly assisting or inducing another to violate the Colorado Rules or violating the Rules through the act of another. If Attorney designates an arbitrator or proceeds with an arbitration under these circumstances, Attorney's conduct would itself violate Colorado Rule 8.4(c) and possibly 8.4(d), as well as 8.4(a).

B. If the designated arbitrator fails to make proper disclosure, is Attorney obligated to report that failure to the Grievance Committee of the Colorado Supreme Court?

If the circumstances are such that Attorney has knowledge that the designated arbitrator has committed a violation of the Colorado Rules "that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects," Attorney is obligated to make such a report pursuant to Colorado Rule 8.3(a).

96/97-7

Summary of Facts Provided

An elderly couple had established a living trust with a trustee. The trustee became concerned that a third person was exercising improper influence on the couple and obtaining large cash gifts from them. The trustee filed a petition for guardianship and conservatorship of the couple. The attorney was asked to represent the couple in the proceedings. The attorney argued that the couple was competent and that the large cash gifts were free of undue influence. The couple were found to be competent and the petition was denied. However, the court admonished the third person to have no further financial involvement with the couple.

Over two years later, the attorney received a typewritten letter apparently bearing the husband's signature. The letter requested that the couple's estate plan be amended to leave their entire residuary to the third person. When the attorney met with the couple, the attorney noted that the clients' physical and mental capacities had declined dramatically. The husband had no recollection of sending the letter and said he would never have suggested such a thing.

Although the attorney believed the couple still to be competent, the attorney concluded that both had become "incredibly vulnerable" to the exercise of undue influence. Moreover, the attorney was provided information which suggested that the third person had continued to have regular contact with the couple after the original court hearing.

The attorney contacted the judge who had admonished the third person regarding further financial involvement with the couple. The judge declined to take any formal action, but suggested that the attorney consider alerting the county department of social services, so it could determine whether court protection was warranted. The attorney believes that the clients would resist a conservatorship or other protective proceeding and would view any such effort by the attorney as contrary to their basic wishes. The attorney is concerned that he may not be adequately protecting the clients if he does nothing.

Issues and Conclusions

Colorado Rule 1.14(b) provides that "a lawyer may seek the appointment of a guardian or take other protective actions with respect to a client only when the lawyer reasonably believes the client cannot act in the client's own interest." To make this determination, an attorney may "seek guidance from an

appropriate diagnostician." Although ethics opinions in some states are to the contrary, the preferable view is that Colorado Rule 1.6 impliedly authorizes the attorney to disclose information relating to the representation to the extent necessary to serve the best interests of the client who the attorney reasonably believes to be disabled. *See* ABA Informal Opinion 69-1530. Thus, an attorney may consult a physician or other appropriate diagnostician. Further, such consultation may be helpful in identifying other voluntary protective arrangements, such as a durable power of attorney, irrevocable trust, or a voluntary court protective proceeding such as limited guardianship, special conservatorship, or an appropriate court trust.

Ordinarily, lawyers who are concerned about the need for a guardianship or conservatorship for an incapacitated client feel they are impliedly authorized to contact interested family members who can then decide on a course of action after consulting with another attorney concerning the available options.

Commentators have warned that an attorney who represents an older person with diminishing capacities is confronted with a host of difficult ethical issues. They suggest that competent representation may require the lawyer to develop knowledge of other fields, such as medicine, gerontology, psychiatry, psychology, or social services. For a compendium of resources, *see* Hemp and Nyberg, "Elder Law: A Guide to Key Resources," 2 *The Elder Law Journal* 1-87 (Spring 1995). Assistance for any attorney who is not a specialist in elder law is also available through the CBA Elder Law Committee, Disability Law Committee, and the Real Property, Probate, and Trust Law Section. *See also* Callahan and Strauss, *Estate and Financial Planning for the Aging or Incapacitated Client* (Practicing Law Institute, 1986, 1988 *et seq.*); Schneider, "Planning Options for the Elderly and Disabled," *Probate and Property* at 8-12 (May-June 1996); Adams and Morgan, "Representing the Client Who is Older in the Law Office and in the Courtroom," 2 *The Elder Law Journal* 1-38 (Spring, 1994).

96/97-8

Summary of Stated Facts

An attorney (the "Counseling Attorney") has been engaged by a lawyer assistance program for the purpose of providing legal counseling to other attorneys regarding the conduct of the latter. An attorney receiving counseling (the "Lawyer/ Client") may disclose to the Counseling Attorney conduct which violates the Colorado Rules.

Issues and Conclusions

Is the Counseling Attorney obligated to advise the Grievance Committee or Disciplinary Counsel of information learned through that counseling that the Lawyer/Client may have violated one of the Colorado Rules?

If an attorney-client relationship exists between the Counseling Attorney and a Lawyer/Client, or if the Counseling Attorney is providing counseling through an approved lawyer assistance program, Colorado Rules 1.6(a) and 8.3(c) relieve the Counseling Attorney of the obligation to report violations of the Colorado Rules by the Lawyer/Client and disclosed by that Lawyer/Client, subject to the exception of Colorado Rule 1.6(b) (information related to the intent to commit a crime and to prevent the crime). *People v. Morely*, 725 P.2d 510 (Colo. 1986); *Committee on Professional Ethics of the Illinois State Bar Association Opinion 90-8* (Jan. 29, 1991) (a lawyer who gains knowledge of another lawyer's misconduct which would, in other circumstances, trigger the reporting requirement is not required to report when the information was gained through confidential communications in the course of representing the Lawyer/Client); *New Jersey Bar Association Opinion 638* (1990) (a lawyer who represents another lawyer and who learns, during the course of representation, that the Lawyer/Client engaged in conduct that raises a substantial question as to the Lawyer/Client's honesty, trustworthiness, or fitness to practice has no duty to reveal the information to disciplinary authorities when the attorney-client privilege applies, unless the acts are continuing or unless the Lawyer/Client is using the representation to carry out the misconduct).

96/97-9

Issues and Conclusions

Is it unethical for a lawyer to explain to a client how to proceed *pro se* with a matter in either traffic court or small claims court? [This informal opinion specifically stated that it did not address the issue of the ethical propriety of an attorney ghostwriting documents for the client to use *pro se*.]

A lawyer may advise a client how to proceed with a matter in traffic or small claims court and what arguments might best be made to advance the client's cause, except that the lawyer may not advise the client to engage in any conduct that would be improper for the lawyer.

Under Colorado Rule 1.2(c), a lawyer may limit the objectives of representation provided that the client is informed of and consents to such limits. Thus, there is nothing unethical in a lawyer who has the requisite expertise limiting the scope of representation to advising a client about traffic or small claims matters and how to proceed with those cases *pro se*. Colorado Rule 5.5 and Comments. Such advice may even be beneficial to the tribunal by allowing the hearing to proceed more efficiently because the client understands the procedures in advance. Of course, just as a lawyer under the Colorado Rules is prohibited from engaging in certain conduct, a lawyer is prohibited from encouraging or advising a client with respect to conduct that would be improper conduct if engaged in by the attorney.

96/97-10

Summary of Facts Provided

A broker who handles the sale of dental practices proposes to recommend an attorney and then guaranty payment of the attorney's fees and costs if the attorney is chosen by a selling dentist to represent that dentist in connection with the sale of the dental practice.

Issues and Conclusions

May the attorney accept the dentist clients under applicable Colorado Rules? The mere fact that payment of the attorney's fees is guaranteed by a person other than the client does not violate Colorado Rule 1.8(f), as long as each of the three prerequisites of that Rule are met—the client must consent to the guaranty after full disclosure and consultation with the attorney; the attorney must remain fully independent, notwithstanding the guaranty; and the attorney must fully maintain the client's rights of confidentiality as required by Colorado Rule 1.6. Moreover, the attorney is cautioned to be alert to meeting the further requirements of Colorado Rules 1.7(b), 5.4(a) and (c), 7.1, 7.2(c) and 7.3, which are briefly summarized below.

Colorado Rule 1.7(b) states that an attorney shall not proceed with any representation which is "materially limited" by the interests of the attorney or of some third person. The attorney must carefully consult with the client and should analyze whether the proposed guaranty of fees and costs might adversely impact on the relationship with the client, or on the attorney's independence and professional judgment. After such full consultation and analysis, the attorney must obtain the client's informed consent to the guaranty arrangement.

Similarly, Colorado Rule 5.4(c) prohibits a lawyer from undertaking the representation of any client where another "person who recommends, employs or pays the lawyer" directs or regulates the lawyer's services or judgment. Colorado Rule 5.4(a) generally prohibits an attorney from sharing legal fees with a non-lawyer, except under certain circumstances not present here.

Finally, Colorado Rules 7.1, 7.2(c) and 7.3 prohibit any false communications about a lawyer's services, prohibit the solicitation of clients, and prohibit a lawyer from paying anything of value to a third person in exchange for recommending the lawyer's services to another. The attorney here must take

reasonable steps to assure that the broker does not indirectly do anything on behalf of the attorney which the attorney acting alone could not do under the Colorado Rules. *See also* Colorado Bar Ethics Opinion 91 (Jan. 16, 1993) (22 *The Colorado Lawyer* 497 (March 1993)).

96/97-11

Summary of Facts Presented

An attorney represents both a corporate employer and an employee accused of sexual harassment. During the course of interviews of corporate employees, the attorney assured the employees that candid statements would not be met with adverse consequences, but did not promise confidentiality. The attorney kept notes of the interviews, but did not share the interview notes with the employee client. The attorney discussed portions of the interviews with the employee client. The employee client now has requested copies of the interview notes.

Issues and Conclusions

1. Is it proper for the attorney to withhold the interview notes from the employee client? No. Colorado Rule 1.4 requires a lawyer to comply promptly with a client's reasonable requests for information. *See People v. James,* 502 P.2d 1105 (Colo. 1974). The lawyer generally is not permitted to withhold information that affects the legal matter for which the lawyer was retained, if the information is important to the client, even if that information is covered by the attorney work-product privilege.

2. Would the result be the same if the attorney performed under the direction of corporate in-house counsel and the corporate counsel held the interview notes? Not necessarily. Assuming the same joint representation, the result would be the same. The result would differ if the attorney represented only the corporate client; then the work-product privilege would apply on behalf of the corporate client, and the accused employee would not be entitled to discover the information.

96/97-12

Summary of Facts Provided

An attorney represents a collection agency. Accounts are assigned to the agency by its customers. The attorney has no interest in the accounts acquired by the agency. The non-attorney staff of the agency handles negotiations with debtors and other aspects of the collection of claims. Non-attorney staff also prepare pleadings for cases against debtors. The attorney's involvement is limited to signing pleadings, conducting trials, and enforcing judgments.

Issues and Conclusions

Is the attorney aiding the collection agency in the unauthorized practice of law? The attorney may sign pleadings drafted by non-attorneys if the attorney reviews the pleadings before signing them. Colorado Rule 1.1 (requiring competent representation); Colorado Rule 1.3 (requiring reasonable diligence). Under Colorado Rule 5.3, the attorney may not delegate work for which the attorney is responsible to persons who are not under the attorney's control and supervision.

The attorney may be aiding the collection agency in the unauthorized practice of law if the work of the agency's non-attorney staff constitutes the practice of law. Colorado Rule 5.4 requires the attorney to maintain professional independence. *See also*, CBA Formal Ethics Opinion 25, dated August 25, 1962.

96/97-13

Summary of Facts Presented

A company is a broker-dealer and registered investment advisor ("Company") licensed under the securities law of the United States and authorized to do business in Colorado. Company is qualified to act as an investment advisor and broker-dealer on a nationwide basis through its network of associated investment advisor representatives ("Advisors"). Through its Advisors, Company proposes to offer a fee-based asset management program to customers, who would include legal clients referred by "participating" attorneys. In return for the referral, the attorney would receive an ongoing fee if an account is opened by the client. The attorney could monitor the client's account, as deemed appropriate, but would have no authority to manage or assist the Advisor in the management of the client's account. The proposed fee would be a split of the investment management fee in an amount agreed upon by the attorney and the Advisor. This arrangement would be subject to the knowledge and written consent of the client.

Issues and Conclusions

May an attorney ethically be paid a fee for referring a client to an investment advisor? No, because Colorado Rule 1.5(e) prohibits *all* referral fees. Such an arrangement would create impermissible conflicts of interest (Colorado Rules 1.7 and 1.8), interfere with the professional independent judgment of the attorney (Colorado Rule 2.1), and might constitute splitting fees with a nonlawyer (Colorado Rule 5.4(a)). While counseling and advising clients can include referring them to nonlawyers in appropriate situations, such referrals should be based wholly on the skill, competence, and other attributes of the nonlawyer, and not at all on the lawyer's expectation of a fee.

96/97-14

Summary of Facts Provided

Lawyer A is a private hearing officer who presides over a private organization's arbitrations. Although not required by law, the organization's internal policy provides that Lawyer A will keep confidential the identity of the participants in the hearing. Internal policy also provides that the hearing officer's factual findings and conclusions, but not the identity of the participants, will be discussed with other lawyers who review the factual findings and conclusions before they are formally issued.

Lawyer A presided over a hearing in which Lawyer B disclosed that he had signed his client's name on a medical records release form, had his secretary falsely notarize the signature as if it were the client's signature, and obtained medical records utilizing the release form.

Issues and Conclusions

Lawyer A inquires whether: (1) there is a duty to report Lawyer B's conduct to the Supreme Court Grievance Committee; (2) the organization's internal confidentiality policy changes any reporting responsibility; and (3) the other lawyers who learn of Lawyer B's conduct during their review of Lawyer A's factual findings and conclusions have their own duty to report the conduct.

Colorado Rule 8.3(a) requires that a lawyer having knowledge that another lawyer has committed a rules violation which "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority." Lawyer B's conduct as described raises the substantial question noted in Colorado Rule 8.3(a). Thus, Lawyer A has a duty to report the conduct.

Colorado Rule 8.3(c) provides that the reporting rule does not require disclosure of information protected by Rule 1.6 ("information relating to representation of a client"). However, the information here

was not related to representation of any client of Lawyer A. The organization's internal confidentiality policy does not override Lawyer A's reporting duty under Colorado Rule 8.3(a).

Lawyer A has direct, first-hand information about the conduct and thus has "knowledge" of the conduct (*see* the definition of "knows" in the Colorado Rules terminology section), and therefore has a reporting duty. In contrast, the other lawyers who learned the information only from Lawyer A do not have a duty to report. *See* CBA Formal Ethics Opinion 64 (revised 11/95). While the other lawyers may report the conduct, they have no formal duty to report.

96/97-15

Summary of Facts Provided

An attorney performs contract work for various law firms and, at the same time, maintains a solo practice. The attorney is compensated for the contract work on an hourly basis by the various law firms. The attorney's participation is reflected in the law firms' billing statements to their clients, and the attorney is supervised by attorneys in the firms contracting out the work.

Issues and Conclusions

Does Colorado Rule 1.5(d) require written disclosure to the law firms' clients and consent by those clients to the arrangement between the law firms and the contract attorney?

No. Neither written disclosure nor client consent is required where payment of the hourly rate to the contract attorney is not contingent upon the clients' payment of the law firms' fees, particularly given that the clients are generally aware of the contract attorney's participation and the attorney's work is supervised by attorneys in the firms contracting out the work. *See, In re Marriage of Ziemann,* 574 N.E.2d 767, 770 (Ill. App. 1991); ABA Formal Opinion No. 88-356 (1988).

If the arrangement is akin to a contingent fee arrangement, and the compensation of the attorney performing the contract work is dependent upon the clients' payment of the fee, then the arrangement falls within Colorado Rule 1.5(d), which requires written disclosure and consent. However, where the compensation of the attorney performing contract work is not contingent upon the collection of the fee, then Colorado Rule 1.5(d) is not applicable. *See, e.g.*, Formal Opinion No. 1994-138, California State Bar Standing Committee on Professional Responsibility and Conduct, 1994 WL 721969.

This analysis does not express an opinion on the related issues which an attorney performing contract work must consider, such as conflicts of interest, confidentiality of information, and arrangements with placement agencies. This analysis also does not address the ethical considerations which are involved if the attorney is office sharing with one of the law firms for which he or she is performing contract work. *See*, CBA Ethics Committee Formal Opinion 89 (20 *The Colorado Lawyer* 2493, Dec. 1991).

96/97-16

Summary of Facts Provided

A law firm (the "Firm") represents discharged employees in employment discrimination cases. In some of those cases, reinstatement is available as a remedy. The Firm desires to enter into a fee agreement with those clients under which the client agrees to pay "the greater of fifty percent of any cash lump sum award or the attorneys' fees expended by the lawyers [calculated on an hourly basis] if the client accepts a settlement offer which includes reinstatement of employment." The fee arrangement includes both administrative and judicial proceedings.

Issues and Conclusions

Is the proposed fee agreement permitted under applicable provisions of the Colorado Rules?

A mixed hourly and contingency fee agreement is permitted if the agreement as a whole is reasonable within the meaning of Rule 1.5(a) of the Colorado Rules, and if the agreement otherwise complies with Chapter 23.3, C.R.Civ.P. For example, an agreement which obligates the client to pay a fee equal to the greater of (1) a set percentage of his/her recovery, or (2) the fee actually awarded by the court, would be permitted, provided the agreement as a whole satisfied Rule 1.5(a)'s test of reasonableness. In such a case, the client's obligation to pay is funded by the results of the representation, and is consistent with most clients' expectations of the way in which a contingency fee arrangement will work.

Although the form of the Firm's proposal is permitted under Rule 1.5(a), it may be inconsistent with its clients' expectations, since many of the clients may not have the financial wherewithal to pay fees on an hourly basis at the time they seek representation, and since relief in the form of reinstatement (as opposed to damages or other monetary relief) probably will not appreciably enhance their ability to pay hourly fees. Such circumstances could easily lead to misunderstandings and disputes. Although the client's ability to pay is not a factor expressly identified by Rule 1.5(a), the Committee believes that an attorney is obligated to fully inform the client of the foreseeable consequences of the operation of a fee agreement. *See,* Colorado Rule 1.4(b).

The Colorado Supreme and Appeals Courts have not addressed the question of whether a contingency fee of 50 percent is excessive *per se,* or, if not, the circumstances under which it might be permitted. There appears to be general agreement among primary and secondary authorities outside Colorado that a contingency as high as 50 percent might be permitted when justified by the particular circumstances of the representation, including its complexity and risk, and the need for highly skilled counsel. However, those authorities make clear that a 50 percent contingency is the exception, not the rule, and that an agreement providing for a 50 percent contingency will be deemed excessive and invalid when not supported by relevant circumstances.

The Committee believes that a 50 percent contingency fee does not constitute a *per se* violation of Rule 1.5(a), and may, under appropriate circumstances, constitute a reasonable fee. However, as a matter of policy, and because it is ill equipped to address such questions, the Committee declines to express an opinion concerning whether the Firm's proposed 50 percent contingency would be reasonable.

The Committee did not comment on whether it would it be permissible for an attorney defending a claim brought by a client of the Firm to offer settlement in the form of reinstatement, conditioned upon a requirement that the employee either waive or compromise his/her statutory right to attorneys' fees. However, the subject of fee waivers in the settlement context has engendered substantial discussion. *See, e.g.,* ABA/BNA *Lawyer's Manual on Professional Conduct*, at 41:1601-1613.

96/97-17

Summary of Facts Provided

An attorney represents a personal injury client who wishes to sell a portion of the proceeds of the client's personal injury claim to a third party in order to obtain living expenses from the third party pending resolution of the claim. The attorney has been requested to acknowledge and agree to the arrangement, and to pay over to the third party the amount of advances and a percentage of the gross recovery upon final disposition of the claim, after deducting attorneys' fees, expenses of litigation, and hospital and medical liens.

Issues and Conclusions

Does the attorney violate the Colorado Rules by consenting to an agreement between the client and third party for advances of living expenses?

If the attorney has no financial interest in the arrangement with the third party, the attorney is not prohibited from acknowledging and honoring the agreement. Although the Colorado Rules do not prohibit the concept of the proposed arrangement, any such agreement must be closely examined in order to confirm that its terms and implementation will not violate individual provisions of the Colorado Rules.

A number of possible effects of the Colorado Rules were considered and determined not to prevent the agreement. Colorado Rule 1.8(e), while prohibiting the attorney from advancing or guaranteeing financial assistance to a client, does not apply to the proposed agreement if the attorney has no financial interest in the agreement. Because Colorado Rule 5.4 requires protection of the attorney's professional independence against interference from third parties, any proposed agreement must be reviewed in order to confirm that this prohibition is not violated. Any limitation upon the attorney's professional independence or judgment under Colorado Rule 1.2, any provision which could result in a breach of confidentiality prohibited under Colorado Rule 1.6, or a conflict of interest prohibited under Colorado Rule 1.7 should be expunged or the problem should be specifically discussed with the client and the client's consent should be obtained, if compliance with the Colorado Rules can be attained through such consent.

Examples of provisions which would require particular scrutiny under the Colorado Rules include a requirement to disclose information to the third party; restrictions on the attorney's ability to proceed independently on behalf of the client in the event of a dispute with the third party or a negotiated settlement of the litigation; restrictions on the client's right freely to change attorneys; and definitions of expenses which may be deducted prior to computing the percentage due to the third party.

Because of the involvement of the attorney in the transaction, it may be advisable to have the client consult with other counsel to satisfy the spirit of Colorado Rule 1.8(a)(2).

96/97-18

Summary of Facts Provided

Attorney A represents defendant, who is involved in a land dispute with plaintiff. Prior to a lawsuit being filed, plaintiff invited defendant to a meeting with plaintiff and plaintiff's attorney. Attorney A believes that plaintiff's attorney knew that attorney A represented defendant in the matter. No agreement was reached at the meeting, and plaintiff then filed the lawsuit. At a deposition, some on-the-record negotiations occurred between plaintiff, plaintiff's attorney and defendant. Attorney A stopped the discussions and advised that any negotiations should take place in a different setting.

After the deposition had concluded, attorney A discovered plaintiff's attorney negotiating with defendant in the lobby without attorney A's participation. When attorney A asked the attorney to discontinue such discussions, plaintiff's attorney responded that he was "merely continuing the negotiations that had begun during the deposition." Attorney A believes that plaintiff's attorney is unaware of the provisions of Colorado Rule 4.2, which precludes an attorney from communicating with a party about a matter in which the party is represented by an attorney unless the party's attorney has given permission for such communication or such communication is otherwise authorized by law.

Issues and Conclusions

May attorney A notify plaintiff's attorney of the restrictions of Colorado Rule 4.2 and advise that the attorney's communications with attorney A's client are improper?

Attorney A may notify opposing counsel of the restrictions in Colorado Rule 4.2 and of the fact that opposing counsel may be violating the rule, but the inquiring attorney should avoid stating that opposing counsel's actions are in fact a violation of the rule because this is a determination to be made by other authorities. While Colorado Rule 4.5 prohibits threats of disciplinary charges to obtain an advantage in a civil matter, there is a distinction between threatening someone with a grievance and notifying someone that his or her conduct may violate a rule or statute. Many violations can be eliminated, rectified, or minimized

if a lawyer is notified of a rule the lawyer may be violating and there is a frank dialogue among the participants to the dispute. Because a disciplinary counsel has the charging authority as to whether conduct has violated a disciplinary rule, the opposing attorney should be told only that the attorney's actions may be in violation of the rule.

97/98-1

Summary of Facts Presented

The inquiring attorney has agreements with credit card providers (such as VISA and MasterCard) pursuant to which he will accept payment of his legal fees and costs by credit card. The attorney proposes to add provisions to his standard written retainer agreement under which (a) if a statement remains unpaid for over thirty days, the attorney may submit it to the credit card provider for payment without further authorization or concurrent approval from the client, and (b) the client agrees to raise any billing dispute in writing within thirty days of the billing date. If the client disputes a bill in this manner, the attorney agrees not to submit the bill to the credit card provider for payment until the billing dispute is resolved. While not specifically expressed in the written retainer agreement, the attorney also states that even after thirty days have passed and a bill has been paid by the credit card provider, if the client later disputes that bill the attorney would, "as a practical matter," credit back to the credit card provider the earlier payment to avoid involvement of the credit card company in the dispute, and would then resolve the billing dispute directly with the client.

Issues and Conclusions

Does the proposed arrangement violate the Colorado Rules? No. While not on their face in violation of the Colorado Rules, these facts do raise several potential concerns and possible pitfalls which the attorney should carefully consider.

CBA Ethics Committee Formal Opinion 99 (adopted May 10, 1997), 26 *The Colorado Lawyer* 29 (August 1997), confirms that an attorney may accept credit card payments for professional services under certain circumstances, so long as the arrangement is fair and reasonable within the guidelines of Colo. RPC 1.8, appropriate confidentiality protection is assured under Rule 1.6, and the attorney's independence under Rule 1.7 is not compromised.

The fairness and reasonableness of retainer agreements are to be considered at the time the retainer agreement is entered into. However, Rule 1.8 does not definitively eliminate the possibility of a later fairness review. For this reason, caution is advised if later exercise of the attorney's rights under the retainer agreement would cause substantial hardship for the client. And, at the time the agreement is entered into, the attorney should evaluate both whether it is reasonable and fair at the time, and also when taking into account reasonably foreseeable future circumstances.

The retainer agreement's requirement that notification of fee disputes must be in writing would appear to allow the attorney to disregard a client's oral notification of a dispute. Submission of a bill for credit card payment in the face of a dispute, whether noticed to the attorney in writing or orally, and whether thirty days have passed or not, would violate Colo. RPC 1.15(c). The intent of that rule is to protect the client by maintaining the status quo between the attorney and client pending resolution of a fee dispute, whenever the dispute may arise and however it may be brought to the attorney's attention.

In addition, if it is the attorney's practice to reverse a prior credit charge in the event a dispute arises later than thirty days after the billing date and after payment has already been received under the credit card agreement, then the attorney has a duty to so advise the client at the time the retainer agreement is entered into. *See* Colo. RPC 1.4(b) and 1.5(c). The attorney should also describe circumstances or conditions which would cause the attorney to vary from such practices.

97/98-2

Summary of Facts Presented

An attorney wants to compensate a paralegal on a flat monthly salary plus a percentage of the value of hours billed, although compensation does not relate to actual fees received or whether the time billed by the paralegal is collectible. For example, assume the paralegal's base salary is $1,500 per month and the paralegal is also to be paid an amount equal to 10 percent of the value of the hours billed by the paralegal. If the paralegal billed 100 hours at $60 per hour, the paralegal would receive an additional $600 compensation, for a total compensation of $2,100 ($1,500 + $600).

Issues and Conclusions

Is the compensation plan in conflict with Colo. RPC 5.4 which prohibits a lawyer or law firm from sharing legal fees with a non-lawyer? No. In the situation described, there is no sharing of actual fees collected with a non-lawyer, but rather compensation is based upon the hours worked by the paralegal without regard to collections. In this sense, the compensation is no different than for other non-lawyer employees of a law firm who are paid on an hourly basis.

97/98-3

Summary of Facts Presented

A law firm ("Firm") owns its office building and rents a number of suites to attorneys beginning their private practices (collectively, the "Attorney-Tenants"). Pursuant to the lease agreement, the Attorney-Tenants may utilize the Firm's office, copiers, and telephones and are provided with overflow work by the Firm, all at no additional charge, and the Firm's attorneys regularly consult with and even assist the Attorney-Tenants with their cases. In exchange, the Attorney-Tenants pay the Firm rent based on a fixed percentage of their respective gross client receipts, although the Attorney-Tenants are not required to disclose any information about their clients to the Firm. However, the clients of the Attorney-Tenants are not told that the Firm's attorneys share in the fees paid by the clients or that they assist in providing advice.

Issues and Conclusions

Is the Firm's arrangement with the Attorney-Tenants an unethical fee split in violation of the Colo. RPC? Yes, an arrangement by which a lawyer provides office space and other support to a second lawyer in exchange for a share of fees paid to the second lawyer violates Colo. RPC 1.5.

The arrangement between the Firm and the Attorney-Tenants violates Rule 1.5 and is unethical for two reasons. First, the arrangement does not comply with Rule 1.5(d). This Rule provides that a division of a fee between lawyers who are not in the same firm may be made only if, among other things, the division is in proportion to the services performed and responsibility assumed by each lawyer; the client consents to the employment of an additional lawyer after a full disclosure of the division of fees to be made; and the division is set forth in writing, signed by the lawyers and the client with informed consent. Colo. RPC 1.5(d)(1), (2), (4). On the facts presented, the firm's attorneys regularly consult with and even assist the Attorney-Tenants with their cases, but the division of fees is based on a fixed percentage set forth in the lease. Therefore, the division of fees is not proportionate to the services performed or the responsibility assumed by the respective lawyers as required by subdivision (d)(1). Moreover, on the facts presented, it does not appear that the clients have been provided with full disclosure, that the clients' consent has been obtained as required by subdivision (d)(2), or that the agreement for the division of fees is set forth in writing and signed by the clients with informed consent as required by subdivision (d)(4).

Second, the arrangement between the Firm and the Attorney-Tenants may result in an unethical

referral fee to the Firm, in violation of Rule 1.5(e). Under the lease, the Firm may provide the Attorney-Tenants with overflow work, and in return, the Firm is entitled to receive a percentage of the fees generated from this overflow work. This is the type of referral fee which Rule 1.5(e) is intended to prevent. *See* CBA Ethics Committee Formal Opinion 89 (Office Sharing—Conflicts, Confidentiality, Letterheads and Names), 20 *The Colorado Lawyer* 2493 (Dec. 1991).

97/98-4

Summary of Facts Presented

In-house counsel for an association is paid through membership dues. In the past, in-house counsel provided general legal information and advice about issues common to members of the association at no extra charge to the member. As a result of recent regulatory initiatives, in-house counsel has been requested to represent individual members in adversarial proceedings against the individual members by third parties. The association would continue to pay in-house counsel's salary, but would bill out-of-pocket costs and possibly some portion of legal fees (in-house counsel's salary) to individual members.

Issues and Conclusions

What are the ethical considerations in representing individual members of the association in adversarial proceedings?

Colo. RPC 1.13(a) provides that as counsel to an organization, an attorney's primary duty of loyalty is owed to the entity, and not to its constituents. Subsection (e) recognizes that an attorney may also represent the organization's constituents, but emphasizes that such representation can be undertaken only if it will not affect the attorney's allegiance to the entity client. If the undertaking on behalf of the individual member would be against the interests or otherwise interfere with representation of the association, the primary duty of loyalty to the association must prevail.

Under Colo. RPC 5.4(c), the association cannot dictate or interfere with the representation of member clients simply because it pays, in part, for those services. Similarly, under Colo. RPC 1.7(b) and 1.8(f)(2), the attorney cannot be influenced in the representation of the individual member by the association's position.

In the course of representing the association and individual members, the attorney must not disclose confidential information relating to the representation of either under Colo. RPC 1.6. Colo. RPC 1.8(b) further provides that information garnered in the course of a representation may not be used to a client's disadvantage without a client's consent. Communication with the association concerning details of the representation of individual members or the association, including information contained in billing statements, should be limited to non-confidential information.

Colo. RPC 1.13 specifically requires that representation of an organization's constituents must not give rise to a conflict of interest under Colo. RPC 1.7. Colo. RPC 1.7(a) provides that a lawyer shall not represent a client if the representation would be directly adverse to another client, except with disclosure, waiver, and a reasonable belief that the relationship with the client will not be adversely affected. Colo. RPC 1.7(b) provides further that a lawyer shall not represent a client if the representation may be materially limited by the lawyer's responsibilities to another client, a third party, or the lawyer's own interests. The attorney must consider, on a case-by-case basis, whether representation of the individual member gives rise to any conflict with the general duty of loyalty to the association. The attorney must also consider the potential conflicts arising out of representation of multiple individual members. *See also* CBA Ethics Committee Formal Opinion 57 (March 21, 1981).

The attorney has a duty under Colo. RPC 1.4 and 1.7 to provide clients with consultation sufficient to allow them to make informed decisions concerning the representation, including the waiver of potential conflicts. Some conflicts of interest under Colo. RPC 1.7 and 1.8 may be waived. However, any such

waiver would require thorough disclosure and discussion with both the association and individual member. Further, Colo. RPC 1.7(c) provides that conflicts of interest are not waivable when a disinterested lawyer would conclude that the client should not agree to the representation.

97/98-5

Summary of Facts Presented

C.R.S. § 42-7-401 provides for suspension of a judgment debtor's driver's license by the Colorado Department of Motor Vehicles ("DMV") when the DMV receives the judgment creditor's affidavit that the judgment, rendered in an action specified in that article, has not been satisfied within thirty days after entry. C.R.S. § 42-7-407 requires the clerk of a court to forward to the director of the DMV a certified record of any judgment, nonpayment of which requires the director to suspend the judgment debtor's license and which remains unpaid thirty days after entry. An attorney for a subrogated insurance carrier is reporting by such affidavit, or is assisting the court clerk in reporting, unsatisfied judgments to the DMV for the primary purpose of encouraging judgment debtors to pay outstanding judgments.

Issues and Conclusions

Does the attorney violate Colo. RPC 4.5 by reporting or assisting in reporting an unsatisfied judgment to the DMV? No. Reporting an unsatisfied judgment pursuant to C.R.S. § 42-7-401 or assisting a court clerk in the reporting of an unsatisfied judgment pursuant to C.R.S. § 42-7-407 does not attempt to subvert the civil adjudicative process. Therefore, it does not violate Colo. RPC 4.5(a).

98/99-1

Summary of Facts Provided

A lawyer anticipates receiving client funds in the form of a check or draft, which the lawyer will deposit to the lawyer's trust account. The client is in financial distress and is in need of immediate access to the funds. However, if the client attempts to deposit or cash a check drawn on the trust account, the check may be refused or returned because the underlying deposit has not cleared. To insure the immediate availability of the client's funds, the lawyer proposes to deposit her own funds to the trust account or, alternatively, to guarantee payment of any overdraft to the trust account resulting from payment of the client's check.

Issue and Conclusion

May the lawyer deposit her own funds to the trust account or guarantee payment of the client's check? The Committee believes that she may not.

Rule 1.15(a) of the Colorado Rules of Professional Conduct unconditionally requires lawyers to keep client funds separate from their own funds. Commingling lawyer and client funds is dangerous to the client because it subjects the client's funds to the claims of the lawyer's creditors. *People v. Shidler*, 901 P.2d 477 (Colo. 1995). Consequently, commingling is regarded as a serious ethical offense and will result in substantial discipline even in cases where the client has suffered no actual harm. *Id.* An annotation of disciplinary cases arising from commingling lawyer and client funds may be found at 94 A.L.R.3d 837.

Given the plain and unconditional requirement of Rule 1.15(a), it is the Committee's view that a lawyer may not deposit personal funds to her trust account, even where the sole purpose of the deposit is to assist the client's access to client funds. Since a guaranty or other form of overdraft protection would result in commingling when drawn upon, it too would be prohibited by Rule 1.15(a). In addition, in the context of

contemplated or pending litigation, the deposit or guaranty would violate Rule 1.8(e) (prohibiting the lawyer from guarantying or advancing financial assistance to the client), unless the funds in question were related solely to litigation expenses.

98/99-2

Summary of Facts Provided

An attorney notices depositions for the production of documents from non-party witnesses, and when doing so, sends the non-party witnesses a form letter together with the subpoena *duces tecum*. In the form letter, the attorney states the following: (1) that the non-party witness may produce the requested documents by delivering them to the attorney's office or by arranging for the documents to be picked up before the deposition, provided there are not claims of privilege with respect to the requested documents; (2) that the deposition will be canceled if the non-party witness does so; and (3) that copies of all documents produced will be provided to opposing counsel.

Issue and Conclusion

In light of Revised Formal Opinion 86 [available at 27 *The Colorado Lawyer* 93 (June 1998) and www.cobar.org/comms/ ethics/], is it ethical to send the letter described in the facts above to a non-party witness if the deposition is properly noticed and if copies of documents produced by the non-party witness are provided to opposing counsel? Yes. However, the letter should provide more information to the non-party witness, especially if that person is a lay witness. In particular, Revised Formal Opinion 86 advises the attorney to identify himself or herself clearly, state the reason for the communication, and advise the witness that the subpoena does not require the witness to disclose information to that attorney other than at the deposition, hearing, or trial to which the non-party witness has been commanded to appear. The attorney's letter also should inform the non-party witness that he or she has the right to withhold privileged documents, and advise that witness to consult his or her attorney if the witness has any questions regarding what constitutes "privileged" documents or information.

Further, whether an attorney can unilaterally cancel the deposition for production of documents, if the non-party witness produces the documents in advance, depends on the court in which the underlying case is pending. In a civil action in federal court, the revised Federal Rules of Civil Procedure permits a party to obtain the production of documents from a non-party witness by subpoena *duces tecum* without requiring a deposition. In a civil action in Colorado state court, Rule 45 of the Colorado Rules of Civil Procedure requires that a deposition be scheduled in conjunction with the issuance of a discovery subpoena. Accordingly, it would be unethical to cancel the deposition unilaterally, without the agreement of the opposing party or that party's counsel, after obtaining the documents from the non-party witness when the attorney knows that such unilateral cancellation violates Rule 45.

98/99-3

Summary of Facts Provided

An attorney representing a client in a fee dispute (the "Inquiring Attorney") with prior counsel (the "Prior Attorney") questioned whether the Inquiring Attorney had a duty to report the Prior Attorney to the disciplinary authority regarding one of the provisions in the contingency-fee agreement between the client and the Prior Attorney. The provision of the agreement required an additional fee based on a percentage of all marital property, regardless of the amount actually received by the client. The Prior Attorney did not assert fees based on this provision in the dispute handled by the Inquiring Attorney.

Issue and Conclusion

Does Colo. R.P.C. 8.3 require the Inquiring Attorney to report the Prior Attorney's use of that provision in the contingency-fee agreement? Rule 8.3 requires an attorney having knowledge that another lawyer has committed a violation of the Colorado Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer to inform disciplinary counsel. Rule 8.3(c) does not require disclosure if the information is protected by Rule 1.6. As noted in the Comment to Rule 8.3, complying with this rule requires a measure of judgment on the part of the Inquiring Attorney to determine whether the Prior Attorney's actions are sufficiently serious to require reporting. If the agreement is not confidential information protected by Rule 1.6 or the client has consented to its disclosure, and the Inquiring Attorney determines that the provision in the agreement is a violation of the Rules of Professional Conduct that raises a substantial question as to the Prior Attorney's honesty, trustworthiness, or fitness as a lawyer in other respects, the Inquiring Attorney must inform disciplinary counsel.

98/99-4

Summary of Facts Presented

A client of advanced age has undergone major surgeries and is in considerable pain. The medical prognosis appears to call for more surgery, and the prospect of having to deal with significant pain for the rest of the client's life. The client has informed the attorney that the client is contemplating suicide. The client tells the attorney that the client wishes to notify the attorney immediately before committing suicide so that the body can be found at once.

Issues and Conclusions

1. Does the attorney have a duty to notify anyone about the client's present state of mind?

2. If the client tells the attorney that the client intends to commit suicide, does the attorney have a duty to notify the authorities or the client's family in order to try to prevent the suicide?

The Committee concluded that there is no exception to the duty of confidentiality in Colo. RPC 1.6 that would require disclosure of the client's present state of mind. But if the attorney were to decide that the client might be operating under a disability or making a plea for help, the attorney may choose to consult with a health care provider for assistance in evaluating the client's situation and the best course of action, including even the appointment of a guardian under Colo. RPC 1.14(c). *See* CBA Ethics Committee Abstract 96/97-7 and the citations to elder law therein [available at 26 *The Colorado Lawyer* 77 (Oct. 1997) and www.cobar.org/comms/ ethics/]. The lawyer is, of course, always free under Colo. RPC 1.6 and 2.1 to counsel the client to disclose the suicidal thoughts and intentions to family members or an appropriate health care provider.

The Committee further concluded that, if the client tells the attorney that the client intends to commit suicide, the lawyer is not under a duty to inform any governmental agency, health care provider, or family member of the client's intention to take his or her life. But the lawyer may do so under Colo. RPC 1.14 if the lawyer reasonably believes that the client is under a disability or is crying out for help, so long as the disclosure is narrowly tailored to reveal no more than is necessary under the circumstances.

98/99-5

Summary of Facts Presented

The private investigator retained by an attorney reports to the attorney that, without the lawyer's prior knowledge or authorization, the investigator secretly tape-recorded a witness interview in Colorado.

Issue and Conclusion

What use, if any, may the attorney make of the tape-recorded interview?

Under CBA Formal Opinion 22 and Colo. RPC 5.3, such undisclosed taping by either an attorney or an agent acting on behalf of the attorney is improper. Accordingly, the attorney should take possession of the tape, for safekeeping, but may not listen to or use the tape for any purpose without first obtaining the witness' permission. If the investigator made contemporaneous notes of the interview without using or relying on the tape, those notes may be used by the attorney, but any notes based upon the tape itself may not be used. It is further prudent, if not mandatory, that attorneys advise non-lawyers whom they retain or employ that the conduct of such non-lawyer agents must be compatible with the attorney's ethical obligations under the Rules of Professional Conduct. Colo. RPC 5.3(a), (b).

98/99-6

Summary of Facts Presented

An attorney charges a reduced hourly fee to certain clients, such as survivors of child abuse. The attorney also represents other clients *pro bono*, that is, without charging any attorney fee. In some cases, the attorney has been entitled to an award of fees against the opposing party.

Issue and Conclusion

The attorney asked whether it is ethically permissible to request an award of fees at an hourly rate, which is greater than that being charged to the *pro bono* and reduced fee clients.

Colorado Rule of Professional Conduct 1.5(a) provides that a lawyer's fee shall be reasonable. The United States Supreme Court held in *Blum v. Stenson*, 465 U.S. 886 (1984) that a "reasonable" fee could be collected from an opposing party even though the client was receiving free representation from a non-profit organization. The Colorado Court of Appeals has similarly held that an attorney was entitled to recover fees from an opposing party, even though the attorney was providing *pro bono* representation. *In re Marriage of Swink*, 807 P.2d 1245 (Colo. App. 1991). These decisions are consistent with the principle underlying Colo. RPC 6.1. Allowing an attorney to collect reasonable fees for representing a *pro bono* client encourages attorneys to provide *pro bono* public service. Under the circumstances described, so long as the fee requested is reasonable, the request does not violate the Colorado Rules of Professional Conduct. It should be made clear to the client that the attorney is entitled to retain all attorneys' fees obtained in this manner, less any fees the client may have already paid.

98/99-7

Summary of Facts Presented

The attorney entered into a written contingency fee agreement with the client to represent the client in a personal injury action. The contingency fee agreement between the attorney and the client did not provide that the attorney could recover attorney fees if the client discharged the attorney prior to the conclusion of the matter. After performing some services, the client discharged the attorney without cause.

Issues and Conclusions

Can the attorney ethically assert a charging lien, pursuant to CRS § 12-5-119 (1998), for attorney fees and costs incurred in representing the client who unilaterally terminated the attorney's services without cause?

If the contingency fee agreement does not expressly provide that the attorney may recover attorney fees where the client has discharged the attorney without cause, the agreement does not substantially comply with C.R.C.P., Ch. 23.3 regarding the recovery of attorneys' fees. As such, Colo. RPC 1.5 and 8.4(d) ethically prohibit the attorney from asserting a lien to recover such fees. Colo. RPC 1.5(c) provides that a lawyer's fee may be contingent provided, *inter alia*, that a contingent fee shall meet all of the requirements of C.R.C.P., Ch. 23.3. Under Ch. 23.3, Rule 5(d), the contingency fee agreement must set forth "a statement of the contingency upon which the client is to be liable to pay compensation otherwise than from the amounts collected for him by the attorney." Further, Rule 6 prohibits an attorney from recovering any fees if he fails to comply substantially with all of the requirements of C.R.C.P., Ch. 23.3. In *Elliott v. Joyce*, 889 P.2d 43 (Colo. 1994), under similar circumstances the Supreme Court applied these rules to prohibit a recovery of attorney fees under a *quantum meruit* theory, as a sanction for failure to comply with C.R.C.P., Ch. 23.3.

Assuming the attorney has complied with the requirements in Colo. RPC 1.8(e) and C.R.C.P. 23.3, Rule 5(f), regarding costs incurred on the client's behalf, the attorney may ethically assert a charging lien pursuant to CRS § 12-5-119 (1998), for the reasonable, authorized costs incurred on behalf of the client. However, if the attorney does not comply with C.R.C.P., Ch. 23.3, Rule 5(f), the attorney may not ethically assert a lien to recover costs. *Elliott v. Joyce*, 889 P.2d at 45. Rule 5(f) requires all contingency fee agreements to include a stipulation from the client that the client, except as permitted by Colo. RPC 1.8(e), is to be liable for expenses. The stipulation must include an estimate of such expenses, authority of the attorney to incur the expenses and make disbursements, and a maximum limitation not to be exceeded without the client's written authority. Colo. RPC 1.8(e) prohibits the attorney from advancing expenses on behalf of the client unless the client remains ultimately liable for such expenses. The attorney may only forgive such expenses "if it is or becomes apparent that the client is unable to pay such expenses without suffering substantial financial hardship."

98/99-8

Summary of Facts Presented

Lawyer A is an associate in a law firm. Lawyer B is a partner in the same law firm and also serves as a part-time municipal judge for the city in which the firm is located. Lawyer B is appointed on an annual basis by the city and is paid directly by the city; the firm does not receive any sort of fee or salary in connection with Lawyer B's service as a part-time municipal judge.

Issue and Conclusion

Is it ethical for Lawyer A to represent criminal defendants in county court where city law enforcement personnel are expected to testify, even though Lawyer B is employed as a part-time municipal judge for the city? Yes.

One potential problem involves conflicts of interest, Colo. R.P.C. 1.10(a) prohibits a lawyer in a firm from knowingly representing a client when any one lawyer in the firm practicing alone would be prohibited from doing so by Colo. R.P.C. 1.7, 1.8(c), 1.9 or 2.2. Given the facts presented, however, it does not appear that Lawyer B would have a conflict of interest, so there is not imputed conflict under Rule 1.10(a).

Another potential problem involves Colo. R.P.C. 1.12, which prohibits a lawyer in a firm from representing anyone in a matter in which another lawyer in that firm participated personally and substantially as a judge, unless (1) all parties to the proceeding consent after disclosure or (2) the disqualified lawyer is "screened" from the case, and written notice is given to the appropriate tribunal. In this regard, a lawyer is "screened" from a case when he or she is barred from participating in it and is not apportioned any fee from it. Given the facts presented, however, Rule 1.12 does not prohibit Lawyer A from representing clients in county court because Lawyer B serves as a part-time municipal judge.

This issue was addressed in Formal Opinion 45 (1984 & 1996 Addendum) [26 *The Colorado Lawyer* 58 (May 1997)]. Formal Opinion 45 concludes that a lawyer may not accept employment with respect to matters which have or may come before the lawyer who is a part-time judge or which derive from or are incidental thereto or matters involving persons who are parties to any matter which has or appears likely to come before the lawyer in his capacity as judge. In addition, the Opinion states that anyone practicing with a lawyer who is a part-time judge shall not accept any employment which the part-time judge could not. As noted in Formal Opinion 45, these prohibitions are necessary to maintain the public's confidence in the judicial system.

98/99-9

Summary of Facts Provided

Two trust and estate planning attorneys, who work for different law firms, have formed a Colorado corporation to serve as a fiduciary (trustee, successor trustee, or personal representative) of estates left by clients of each of the attorneys or by residents in the geographic area. The two attorneys are shareholders and directors of the corporation. They are the only officers of the corporation, and the work efforts and products of other employees or agents of the corporation will be subject to their direct supervision and control. Although the two attorneys presently are the only shareholders of the corporation, they anticipate admitting non-attorney shareholders in the future, most likely investment advisors who will be compensated through a year-end profit-sharing arrangement.

The operations of the corporation have not commenced yet, but when they do they will be conducted from the law office of one of the attorneys. The attorneys plan to serve as trust officers for each client of the corporation. The attorneys also plan to review, through their respective law firms, trust and estate documents the corporation administers, thus, in effect, providing legal advice to the corporation.

The attorneys plan to disclose fully their respective interests in the corporation when mentioning the corporation to their respective clients as a fiduciary option for the clients' estate planning purposes. They also plan to disclose fully the corporation's fee schedules, and other possible fiduciaries for their respective clients to consider appointing in the estate planning documents they each prepare through their respective law firm practices. The attorneys formed the corporation to provide trust and estate administration services in their geographic area, where no other business entity currently provides such services.

Issues and Conclusions

May the attorneys ethically conduct the operations of the corporation as planned? Do the services provided by the corporation constitute legal services? How may the attorneys ethically inform their clients of the availability of the corporation to provide fiduciary services?

The CBA Ethics Committee ("Committee") believes it would be very difficult, if not impossible, for the attorneys to conform their respective practices through their law firms and through the corporation with the ethics rules which pertain to dual practices. There is no per se prohibition in the Colorado Rules of Professional Conduct against lawyers engaging in a second occupation or business, provided that the second occupation does not constitute a vehicle for improper solicitation, otherwise known as a "feeder operation," in violation of Rules 7.2(c) and 7.3(a). However, the ethical danger of dual occupations increases if the separate business involves any of the following elements: (a) the second occupation is conducted from the law office premises, (b) the second occupation is related to the practice of law, or (c) the lawyer provides both legal and non-legal services in the same transaction. CBA Formal Op. 98 (adopted December 14, 1996) [26 *The Colorado Lawyer* 21 (April 1997)]. All three elements exist in the present case. In addition, persons associated with the same law firm may not ethically charge separate fees as an estate fiduciary and attorney for their respective services to the estate. CBA Formal Op. 21 (as amended July 20, 1962,

addendum issued 1995). Here, the attorneys would be acting as trust officers of the corporation, and providing legal advice through their respective law firms. Accordingly, the attorneys should make certain their clients consent to such dual representation, coordinate which entity will bill for the services rendered, and explain to the client that the client will be billed only once for the services provided by the corporation and the law firm, together.

The following additional ethics rules also may pertain to the proposed arrangement: Rule 1.5(a) (reasonableness of fees), Rule 1.6 (confidentiality of information), Rule 1.7 (conflicts of interest), Rule 1.8 (prohibited transactions), Rule 1.9 (conflicts of interest relative to former clients), Rule 1.10(a) (imputed disqualification), Rule 1.16(a)(1) (declining or terminating representation), and Rule 2.2 (duties of a lawyer acting as an intermediary).

Whether the services rendered through the corporation constitute the practice of law is a legal question outside the purview of the Ethics Committee. However CBA Formal Op. 87 (revised December 14, 1991, addendum issued 1995) [21 *The Colorado Lawyer* 219 (Feb. 1992)] provides examples of trust funding tasks, such as assignment of business interests and preparation of deeds for real estate, that are "legal" in nature; whereas, tasks such as changing beneficiary designations, bank account titles and stock account titles are "non-legal." Thus, the attorneys should clearly delineate the non-legal services provided through the corporation from the legal services rendered through their respective law firms. If the corporation's services are legal in nature, its operation would violate Rule 7.5(b), which prohibits lawyers from practicing under a trade name or a name that is misleading as to the identity of the attorneys. In addition, attorneys ethically may not use professional notices containing a trade name or a name that is misleading. CBA Formal Op. 83 (adopted November 18, 1989, addendum issued 1993) [19 *The Colorado Lawyer* 25 (Jan. 1990)]. Furthermore, if the corporation's services are legal in nature, the plan to allow non-lawyer shareholders would violate Rule 5.4(a) and (b), which prohibit sharing legal fees with a non-lawyer and prohibit forming a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law. Also, Rule 5.5(b) prohibits a lawyer from assisting another in the unauthorized practice of law.

With regard to informing their clients that the corporation is available to provide fiduciary services, any communication in that regard must comply with Rules 7.1 through 7.4 (as amended January 1, 1998) and Rule 7.5. These rules govern both the context and content of any communication intended to solicit business for the corporation. Likewise, if any clients of the corporation need legal advice or estate planning work, referral to either of the attorneys or their respective law firms must comply with Rules 7.1 through 7.4. *See* CBA Formal Op. 83 and CBA Formal Op. 98.

98/99-10

Summary of Facts Provided

A for-profit corporation (the "Corporation") has invited a lawyer to participate in an attorney referral network. In exchange for a monthly participation fee of $2,500, the Corporation would refer "leads" (names and addresses of patients seen at chiropractic and physical therapy clinics, and names and addresses of people involved in automobile accidents) to a limited number of attorneys; referrals would be exclusive and would be divided among lawyers participating in the network based on the leads' zip codes. The Corporation would mail a form letter to each of those leads on Corporation letterhead, and the letter would include the following statements: (1) "We make sure that you receive all the benefits you deserve." (2) "We handle cases like yours—on a contingency (percentage) basis, which means that the referral attorney does not get paid unless you get paid." (3) "If you want to receive the most complete medical care and money for which you are entitled from your injury, call your team at [Corporation] . . . and we will schedule a 'Free Consultation' with the right attorney for you." (4) "[Corporation] and our referral service is FREE to you. *We charge NO FEE* to you for our service whatsoever."

Issues and Conclusions

May the lawyer participate in the Corporation's referral network? No. The Committee believes that the lawyer's participation in the program would violate the Colorado Rules of Professional Conduct.

Colorado Rule of Professional Conduct 1.5(a) unequivocally prohibits referral fees. Rule 7.2(c) prohibits a lawyer from providing anything of value to a for-profit organization in exchange for referrals. Under these rules and the comment to Rule 7.2, the $2,500 per month payment for leads is unethical. *See People v. Zimmerman*, 938 P.2d 131 (Colo. 1997); CBA Formal Op. 83 (adopted Nov. 18, 1989, addendum issued July 24, 1993) [23 *The Colorado Lawyer* 329 (Feb. 1994)].

Although the letter would be from the Corporation, not the lawyer, it would be mailed on the lawyer's behalf, and the lawyer therefore may be responsible for its content. The form letter to prospective clients contains statements which violate several rules governing attorney communications concerning legal services. Colo. RPC 7.1(e), 8.4(a), (c).

Rule 7.1(a) prohibits misleading communications about the lawyer or the lawyer's services, including statements that are "likely to create an unjustified expectation about results the lawyer can achieve." The form letter is or may be misleading in its statements or suggestion that (a) the Corporation itself will perform the work for the client, (b) the participating attorney is a part of the Corporation, and (c) the participating attorney is competent to handle the matter. Also, statements such as "[w]e make sure that you receive all the benefits you deserve" and "WE CAN HELP YOU" are likely to create an unjustified expectation about the results the lawyer can achieve. The form letter also violates Rule 7.1(d) which requires "[a]ny communication that states or implies the client does not have to pay a fee if there is no recovery" to "also disclose that the client may be liable for costs."

Rule 7.2(d) requires "[a]ny advertisement made pursuant to this Rule" to "include the name of at least one lawyer responsible for its content." Rule 7.3(d) requires any communication governed by Rule 7.3 to include the words "this is an advertisement" in a clear and conspicuous form on the outside of the envelope and at the beginning and end of any written communication. The form letter is from the Corporation and not the lawyer, but it is on the lawyer's behalf; however, it does not identify the lawyer or include the "advertisement" legend. Therefore, it also does not comply with Rules 7.2(d) and 7.3(d).

Rule 7.3(c) prohibits solicitation of legal work from a client whom the lawyer knows or reasonably should know is represented by another lawyer in the matter. According to the Corporation's proposal to the lawyer, some of the leads are already represented by counsel. If the form letter were sent to those leads, the mailing would violate Rule 7.3(c).

Finally, if the Corporation would be involved in providing services to clients, and if the lawyer does not adequately supervise the Corporation and its lay employees, the lawyer might be in violation of Rule 5.5(b) which prohibits a lawyer from assisting a person who is not a member of the Colorado bar in the unauthorized practice of law. In that regard, the lawyer must be sensitive to his duty of confidentiality under Rule 1.6. Because the Corporation would screen and process incoming calls from prospective clients, the lawyer is responsible for assuring that the Corporation's non-attorney personnel are properly trained to perform their screening work and to comply with the requirements of Rule 1.6. *See* CBA Formal Op. 83.

98/99-11

Summary of Facts Provided

Upon his retirement from the practice of law, Lawyer A wishes to sell his law practice to Lawyer B. The attorneys are considering a transaction whereby Lawyer B would pay Lawyer A a percentage of future fees received by Lawyer B for work performed by Lawyer B for Lawyer A's clients.

Issues and Conclusions

May a retiring lawyer structure the sale of his law practice to require the purchasing lawyer to pay the retiring lawyer a percentage of future fees collected by the purchasing lawyer for work performed by the purchasing lawyer for the selling lawyer's clients? The Committee believes that this arrangement is permissible under the Colorado Rules of Professional Conduct.

Colorado Rule of Professional Conduct 1.17, which became effective on July 1, 1997, permits a lawyer to sell his or her law practice, including the value of its goodwill, subject to compliance with the terms of the Rule. The Rule does not regulate the method of establishing a price for a practice or how the price is to be paid; the comment assumes that the price will be based on the reasonable value of the practice. Rule 1.17(b) prohibits the buyer from increasing the fees charged to clients because of the sale, or from otherwise passing on to clients the cost of goodwill. Rule 7.2(c) provides that the sale of a law practice in accordance with Rule 1.17 does not constitute a prohibited payment for the recommendation of the purchasing lawyer's services.

The Committee believes that the rationale for the adoption of Rule 1.17 was to enable sole practitioners to sell their practices at a reasonable price, which would include the value of its goodwill. Because a sale price based on a percentage of future collected fees is consistent with that underlying goal of Rule 1.17, the Committee concludes that such a transaction is permissible. The Committee does not believe that payment of a percentage of future fees to a retiring lawyer constitutes a prohibited division of fees under Rule 1.5(d), particularly in light of the later adoption of Rule 1.17. However, the Committee notes that there is authority for a contrary conclusion, including Schoenwald, *Model Rule 1.17 and the Ethical Sale of Law Practices: A Critical Analysis*, 7 Geo.J.Legal Ethics 395 (1993).

99/00-1

Statement of Facts

An attorney wishes to start a non-profit corporation, (the Center), which will provide low- or no-cost services to non-custodial parents regarding child support and parenting time. In addition, a state agency for whom the attorney provides clinics on the subject of parental responsibilities has requested that the attorney form a non-profit corporation to accept and manage grant funding.

Initially, the Center, through the attorney, will provide "unbundled" legal services, in accordance with newly revised C.R.C.P. 11(B), C.R.C.P. 311(B), C.R.C.P. 121, Section 1-1 (Comment) and Colo. RPC 1.2(c). The Center will also contract with the state for the clinics now being done by the attorney. It is anticipated that the Center will be recognized as a legal aid provider by the Colorado Supreme Court. The Center will also provide parenting classes, mental health consultation, group sessions, legal clinics, parenting time activities, library services and, at some future time, housing location assistance.

The attorney will be the attorney/director of the Center, will office at the Center, and may conduct a separate private practice out of the Center.

Issues and Conclusions

At the outset, what constitutes the practice of law, whether a non-profit corporation can engage in the practice of law, and what qualifies as a legal services organization, are questions of law, fact, or mixed questions of law and fact concerning which the Committee expresses no opinion. Nor does the Committee give any opinion or advice as to whether, from an ethical point of view, there may be another, or more preferable, entity for the activities in which the attorney and the Center wish to engage.

1. Is it unethical for the attorney who is the only director of, and is hired by, the Center to provide legal services on behalf of the Center which also provides non-legal services? No, provided the Center qualifies as a "legal services organization" (LSO). An LSO is permitted to provide both legal and non-legal services. *See* Formal Opinion 106 (June 19, 1999).

2. May non-lawyers serve as directors of the Center? Yes, non-lawyers may serve as directors (but not owners) of either an LSO or a private law firm subject to C.R.C.P. 265, which prohibits non-lawyer directors from exercising any authority over the entity's activities relating to the practice of law.

3. Can the attorney conduct a private practice out of the Center? Yes, but there are several concerns which arise from this arrangement.

If the Center qualifies as an LSO the operation of a private practice of law in, but apart from, the Center would probably jeopardize the Center's status. In addition, the operation a separate private law practice out of the Center implicates ethical issues addressed in Formal Opinion 98 (December 14, 1996) on Dual Practices; most particularly, the use of the Center as a "feeder operation" for the separate private practice would be a violation of Colo. RPC 7.2(c) and 7.3(a).

If, however, the Center does not qualify as an LSO, but constitutes instead, a law firm, it may not provide non-legal services. C.R.C.P. 265 1.A.2; *See* Colo. RPC 5.4(d). And, while the Committee expresses no opinion as to what constitutes the practice of law, it seems highly likely that parenting classes, mental health consultation, group sessions, legal clinics, parenting time activities, library services and, at some future time, housing location assistance, would be found to be outside the scope of the practice of law.

00/01-1

Summary of Facts Presented

When arraigning in-custody defendants, a municipal court tells the defendants that if they plead not guilty they will meet with a city public defender within a few hours. In such cases, the city attorney writes a plea offer and gives it to the city public defender. The city public defender then meets with the defendant for five to ten minutes. The city public defender explains to the defendant his or her right to trial, right to bond, and the nature of the plea offer. If the defendant is an immigrant, the city public defender inquires of his or her status, and advises the defendant of the possible consequences of a conviction upon his or her immigration status. Regarding that status, the city public defender also tells the defendant that without additional information, it is uncertain which of the possible consequences will occur. Generally, there is little or no time to discuss the defendant's entire side of the case during this initial meeting.

If the defendant subsequently pleads guilty, no further services are provided to the defendant. If the defendant pleads not guilty, a file is opened by the city public defender and the city public defender represents the defendant at the bond hearing.

If the defendant remains in custody, the city public defender is appointed to represent him or her. If the defendant is released from custody, the defendant returns to court the following day and may apply for a city public defender.

Issues and Conclusions

Is an attorney/client relationship established by these short meetings with a defendant? If so, what parameters, if any, may the city public defender establish regarding the extent of the advice given? Is it ethical to act primarily as an option-provider and not as legal advisor during these five- to ten-minute meetings? Is the immigration advice ethically sufficient?

An attorney/client relationship is established by these short meetings between the city public defender and a defendant. The city public defender may limit the scope of future representation by time and custody status of the defendant. During the initial meeting, the city public defender is ethically required to provide competent representation, to act with reasonable diligence, to protect the confidentiality of information, and to exercise independent professional judgment. The advice provided concerning the defendant's immigration status may not be legally adequate and therefore may not be ethically adequate. The defendant should be informed that he or she should not enter a plea until the likely immigration consequences are known.

00/01-2

Summary of Facts Presented

To increase productivity, a law firm wishes to pay bonuses to non-attorney staff members based on the law firm's net income. The bonus program would involve the payment of a bonus to each employee based on the amount by which the firm's income or net profits exceed predetermined levels. The proposed bonus program would not be a deferred compensation profit-sharing arrangement, such as a pension and profit sharing plan or 401(k) plan, but would involve current compensation to the firm's employees.

Issues and Conclusions

Does the payment of compensation to non-attorney staff members based on the income, or net profits, of a law firm constitute an impermissible fee splitting or fee sharing arrangement?

Rule 5.4(a)(4) of the Colorado Rules of Professional Conduct provides that a lawyer or law firm shall not share legal fees with a non-lawyer, except that a lawyer or law firm may include non-lawyer employees in a *compensation or retirement plan*, even though the plan is based in whole or in part on a profit-sharing arrangement. Rule 5.4(a)(4) suggests that it is permissible to base current compensation for non-lawyer employees, as well as deferred retirement plan compensation, in whole or in part on a profit-sharing arrangement, but does not indicate whether there are any limitations on such compensation plans.

C.R.C.P. 265 II, E, concerning legal professional service companies, establishes those limitations. It provides that a professional company may adopt retirement, pension, profit-sharing (whether cash or deferred), health and accident insurance, or welfare plans for all or some of its employees, including lay employees, provided that such plans do not require or result in the sharing of specific or identifiable fees with any lay employees, and provided that any payments made to lay employees or into any such plan on behalf of lay employees are based upon their compensation or length of service or both rather than upon the amount of fees or income
received.

Accordingly, the Committee believes that a lawyer or law firm may ethically pay bonuses, or similar cash profit-sharing payments, to layperson staff members as current compensation based upon the lawyer or firm's exceeding predetermined income or net profit levels, *provided* the bonus or other profit sharing compensation is based upon the staff members' regular compensation or length of service, or both, and is not based on a percentage of the fees, income or revenues of the lawyer or law firm, or any specific or identifiable fees. For example, in the Committee's opinion, it is permissible for a law firm to allocate a certain percentage of the firm's profits as a fund from which bonuses will be paid to layperson staff members, and then to distribute bonuses from the allocated percentage to individual staff members based upon each staff person's regular compensation, position, length of service or similar factors. It is also permissible to pay a layperson staff member a bonus equal to a certain percentage of his or her regular compensation, or a specific amount. It is not permissible, however, to pay an individual layperson staff member a bonus or other current compensation based upon fee revenue from a specific case or cases.

00/01-3

Summary of Facts Presented

An attorney's fee agreement states that clients will be billed expenses equal to a flat percentage of the attorney's total hourly billings. The attorney does not separately itemize expenses for computerized legal research, long distance, photocopying, or similar out-of-pocket expenses.

Issue and Conclusion

The issue presented is whether it is ethical for an attorney to include in a fee agreement a charge equal to a flat percentage of the attorney's total hourly billings to compensate for the client's expenses.

If the attorney and the client both agree in advance to this billing arrangement and it is reasonable, an attorney may charge clients a flat percentage of the attorney's total hourly billings to compensate for the client's expenses. Rule 1.5(a) of the Colorado Rules of Professional Conduct states that an attorney's fee must be reasonable. In establishing an attorney-client relationship, the attorney should promptly establish an understanding of how fees will be computed, including an identification of any hourly charges or fixed amounts that will be part of the attorney's fee.

ABA Formal Ethics Opinion 93-379 (1993) addressed the ethical considerations of charging clients for overhead expenses and other out-of-pocket expenses. In that opinion, the American Bar Association was troubled where an attorney submitted a bill to a client that included charges for general office overhead, but stated that such a practice may be reasonable if the client was informed of the attorney's practice of charging for general overhead expenses before receiving a bill. The opinion also concluded that an attorney may pass onto the client reasonable charges for expenses incurred on the client's behalf, such as photocopying and computer research, provided both parties agree in advance to the amount charged. In the absence of an agreement between the parties, a lawyer may charge only the direct cost associated with the service (*i.e.*, the actual cost of making a copy on the photocopier) plus a reasonable allocation of overhead expenses associated with the provision of the service (*e.g.*, the salary of the person operating the photocopier).

Viewing Rule 1.5(a) in conjunction with *ABA Formal Ethics Opinion* 93-379, an attorney would ultimately be required to demonstrate that the flat percentage basis for computing expenses was reasonable. If the attorney can justify the reasonableness of the charges and the client agrees to this billing arrangement before the attorney begins employment, expenses may be billed as a flat percentage of the attorney's total hourly billings, but the Committee believes the attorney should disclose to the client the types of expenses incurred in the operation of a law practice that will be subsumed within the flat percentage so that the reasonableness of the fee can be justified.

00/01-4

Summary of Facts Presented

Lawyer serves as inside counsel for Company A and its wholly-owned subsidiary, Company S, which provides technology services to its customers. One of S's most important customers —Company C— also buys technology services from other, unrelated vendors pursuant to written contracts. C's technology purchases from these vendors relate to the services performed for it by S. Although C has its own legal counsel, due to the press of time it sometimes asks Lawyer to provide legal advice with respect to its contracts with those vendors.

Issue and Conclusion

Can Lawyer ethically provide legal services to Company C concerning these third-party vendor transactions?

By advising C about its vendor contracts, an attorney-client relationship is created. *People v. Bennett*, 810 P.2d 661 (Colo. 1991). Because Lawyer does not regularly represent C, Colo. RPC 1.5(c) requires a written communication to C of the basis or rate of Lawyer's fee. Because Lawyer is an employee of Company A, there is potential concern and confusion about whether Company A and/or Company S are engaging in the unauthorized practice of law contrary to Colo. RPC 5.5(b) and C.R.C.P. 265. *See* CBA Formal Op. No. 17. This presents a legal question beyond the purview of the Ethics Committee, but which Lawyer should analyze carefully.

Because Lawyer's salary is paid by Company A, Lawyer's duty of loyalty to C may be compromised. It is not improper for Lawyer's fee to be paid by someone other than the client, but Lawyer should carefully review Colo. RPC 1.7 and 1.8(f) and the Comments thereto. And if after that review Lawyer determines to continue to provide such legal services to C, Colo. RPC 1.5(c) requires that the basis of the fee be communicated to C in writing. It may be prudent also to clarify in writing that Lawyer, and not Company A or Company S, is individually providing the legal services, to specify the fees, if any, to be charged, and the party responsible to pay such fees. In addition, Lawyer should carefully review Colo. RPC 1.6 and 1.7, in that providing legal services at the same time to A, S and C constitutes the representation of multiple clients in a related series of transactions, requiring extreme caution and special care to preserve the clients' confidential information. The potential for future conflicts of interest in the event of a later dispute among A, S and/or C also is present, and requires full prior disclosure and discussion with all three companies. *See* CBA Formal Op. Nos. 57 and 68.

01/02-1

Summary of Facts Presented

A firm was established naming only one attorney. That attorney is getting married and after her marriage will be using her married name, not the name used by the firm. She will be listed on the firm letterhead using both her maiden and married names. The members of the firm, and the named attorney, want to continue using the original firm name.

Issues and Conclusions

Does the firm have to change its name given the named attorney's marriage and discontinued use of her maiden name? No. The Committee concluded that the firm can continue to use its name, without change, without violating Rule 7.5 of the Colorado Rules of Professional Conduct.

Rule 7.5 prohibits a lawyer from practicing in a firm whose name contains "names other than those of one or more of the lawyers in the firm . . . ." However, the Rule makes an exception and allows firms to use "the name . . . of (a) deceased or retired member of the firm or of a predecessor firm in a continuing line of succession." The Comment to Rule 7.5 indicates that the purpose of the Rule is to ensure the public is aware of the nature of the business and makeup of the firm. While trade names are also prohibited by the Rules, a firm may use the name of a deceased partner because it has "proven to be a useful means of identification." Rule 7.5(b).

In this instance, the attorney's discontinued use of the name which has historically identified the firm does not present a likelihood that the public will be confused as to the firm's makeup or nature of its business, particularly given the fact that the named attorney will use a combination of her maiden and married names on the firm's letterhead. The original firm name has become this firm's "persona" and continued use of it despite the named attorney's name change does not violate Rule 7.5.

01/02-2

Summary of Facts Presented

A law firm has been in existence for over 60 years and many of its client files have been inactive for a long period of time. The firm wishes to hire a professional company to shred certain inactive files pre-dating 1988.

Issues and Conclusions

Can a law firm ethically hire a professional company to have the company shred files that have been inactive for many years?

Even with respect to files that have been inactive for over twenty years, a lawyer has a responsibility to make reasonable efforts to contact former clients in order to advise them that their files may be destroyed. The lawyer should attempt to obtain authorization for such destruction from the client or give the client a reasonable opportunity to have returned to them materials provided to lawyer by the client, documents prepared on behalf of the client, and any other documents the client may wish to have returned.

The issue of a client's right to the surrender of papers at the end of representation was covered in depth by CBA Ethics Committee Formal Opinion 104, Surrender of Papers to the Client Upon Termination of the Representation (April 17, 1999). Unfortunately, there is no numeric cutoff period which brings to an end the lawyer's over-arching professional responsibility to retain important documents—particularly critical original documents—which the client would expect the lawyer not to destroy, and to protect the interests of the client in future matters relating to the representation.

Given how old some of the files are, there may be instances in which no authorization to destroy the documents can be obtained from the former client. But even in those cases, the lawyer has an obligation to review each file before destroying it to reach a professional judgment as to whether the file contains documents which should be retained for the client, such as title documents, original wills, and the like.

An article in two parts on the ethical issues surrounding file retention appears in the October and November 2001 issues of *The Colorado Lawyer*.

01/02-3

Summary of Facts Presented

A lawyer wishes to join a for-profit advertising organization that represents itself as "a partnership of professionals who provide fully integrated financial planning, legal services, and accounting for individuals and businesses." The lawyer would become an "associate member" for a monthly fee of $25.00. This same lawyer wishes to obtain a license to sell insurance and related products and to sell those products from the lawyer's law office.

Issues

1. Whether membership in a for-profit organization for the purpose of obtaining legal work is prohibited under the Colorado Rules of Professional Conduct ("CRPC").

2. Whether the ethical ramifications of obtaining a license to sell insurance and related products, and selling those products through the attorney's law office complies with ethical guidelines for an attorney engaging in dual practices.

Conclusions

1. Membership in a for-profit organization for the purpose of obtaining legal work is prohibited under the CRPC. CRPC 1.5(e) prohibits a lawyer from accepting or paying a referral fee. CRPC 7.2(c) states that a lawyer "shall not give anything of value to a person for recommending the lawyer's services," except as provided in CRPC 7.2(c)(1) through (3). Those exceptions, in pertinent part, provide as follows:

(a) a lawyer may pay the reasonable cost of advertisements permitted by CRPC 7.2; and

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

This prohibition against a lawyer using a "feeder operation" to channel legal work to the lawyer is discussed in detail in CBA Formal Opinion 106.

CRPC 5.4(a) prohibits a lawyer from sharing fees with a non-lawyer, and CRPC 5.4(b) prohibits the formation of a partnership with a non-lawyer that includes the practice of law. Whether a lawyer has formed a partnership with a non-lawyer is determined under the principles of law pertaining to the formation of partnerships. *See* CBA Formal Opinion 98 (1996), and CBA Formal Opinion 87 (1991 and addendum 1995). The advertisement of the for-profit organization at issue states that the lawyer-member joins a "partnership of professionals who provide fully integrated financial planning, legal services, and accounting for individuals and businesses." Clearly, CRPC 5.4(a) and 5.4(b) prohibit a lawyer from forming a "partnership" with the for-profit advertising organization. Further, the lawyer having legal work referred by the for-profit advertising organization contravenes the prohibition of CRPC 7.2(c) against a lawyer using a "feeder operation" to channel legal work to the lawyer. A lawyer contemplating any form of advertising should review CRPC 7.1 through 7.5.

Finally, a lawyer who joins a for-profit advertising organization such as the one at issue risks violating CRPC 1.6. CRPC 1.6(e) says that a lawyer cannot "reveal information relating to the representation of a client," without first obtaining that client's consent. Joining such an organization could cause inadvertent waivers of the attorney-client privilege and unauthorized disclosures of client information. Such inadvertent waivers or unauthorized disclosures could result by a client having a conversation with the lawyer in the presence of a non-lawyer member of the same organization.

2. A lawyer who obtains a license to sell insurance should not provide legal work for the same client that in any manner pertains to the insurance the lawyer sells the client. Further, any insurance the lawyer sells should not be sold through or on the premises of the lawyer's law firm. For a complete discussion of the issues posed by such dual practice, *see* CBA Formal Opinion 98 (1996). That Formal Opinion says that a lawyer may engage in a second occupation, however, any such second occupation must not provide a vehicle for improper solicitation, known as a "feeder" operation. Further, CBA Formal Opinion 98 warns that the ethical danger to the dual practice lawyer increases if the second occupation is law-related. A lawyer interested in selling insurance should note that CBA Formal Opinion 98 lists "insurance agent" and "financial planning" among examples of occupations that have been deemed to be related to the practice of law.

02/03-1

A lawyer must maintain client confidences but also shall not counsel or assist a client in criminal or fraudulent conduct, here in the context of representation in a worker's compensation case and in connection with a child support matter.

Statement of Facts

A lawyer represents a client in a workers' compensation case. The client has been receiving temporary total disability benefits under the premise that the client was unemployed. The client told the lawyer that the client was not working. The lawyer also agreed to represent the client in seeking a modification of the client's child support obligation. In the child support action, the client filed a Financial Affidavit stating the client was unemployed. At a hearing regarding modification of the child support, the District Attorney provided the lawyer with a document showing that the client has been employed part-time during every quarter since the client was injured.

Issue and Conclusions

Is the lawyer obligated to notify the insurance carrier on the workers' compensation claim or otherwise report the fact of the client's employment during the time the client had received temporary total disability benefits?

1. Colorado Rule of Professional Conduct ("CRPC") 1.6 requires a lawyer to maintain client confidences unless the client intends to commit a fraud crime. When the client's conduct with respect to fraudulently obtaining temporary total disability benefits is continuing, it involves future fraud. The Rules require the lawyer to counsel the client to correct the client's past actions and future conduct, including the filing of the false Financial Affidavit.

2. CRPC 1.2(d) prohibits a lawyer from counseling or assisting a client in conduct the lawyer knows is criminal or fraudulent. Under CRPC 1.6(b) a lawyer should counsel the client on the lawyer's professional discretion to disclose the client's intent to commit continuing fraud, regardless of whether the client corrects the client's past fraudulent conduct. CRPC 3.3(a)(4) requires a lawyer to take reasonable remedial measures to correct material evidence offered to a tribunal, which the lawyer later learns to be false, if the client is unwilling to disclose the false character of the evidence immediately. Under CRPC 3.3(b) the duties imposed by CRPC 3.3(a) continue to the conclusion of the proceedings and apply even if compliance requires disclosures otherwise protected by CRPC 1.6.

3. If the client will not correct the false affidavit, CRPC 1.16 requires the lawyer to withdraw from representing the client and disavow the filed Financial Affidavit. (*See* Comment to Rule 1.16 regarding withdrawal.) In addition, as to future conduct of the client, in the lawyer's professional discretion the lawyer may disclose information necessary to prevent future fraud.

02/03-2

A lawyer is prohibited from advancing or guaranteeing financial assistance to a client (here, in a personal injury matter) however a lawyer may advance or guarantee expenses of litigation.

Statement of Facts

A lawyer represents a plaintiff in a personal injury matter. The client suffered significant disabling injuries, has not worked since being injured, and was denied disability benefits. The client has no ready means of income and is in desperate need of money.

Issue and Conclusions

May a lawyer loan money to this client pending the resolution of his lawsuit?

1. The proposed loan is prohibited by Colorado Rule of Professional Conduct ("CRPC") 1.8(e), which prohibits a lawyer from advancing or guaranteeing financial assistance to a client. The only exception contained within CRCP 1.8(e) is that a lawyer may advance or guarantee the expenses of litigation.

2. The Colorado Supreme Court has disciplined lawyers who have violated CRCP 1.8(e) by providing clients advances on potential settlement of their claims. *See People v. Kocel*, 61 P.3d 56, 57-59 (Colo. 2003); *In re Gibson*, 991 P.2d 277, 278-79 (Colo. 1999).

2005-1

Issue and Conclusion

Is it ever ethically permissible for an attorney hired by an insurance company to prepare the petition to appoint a conservator and the petition to approve the settlement with a minor?

Yes. The Committee believes it is ethically permissable under the following conditions: (1) the attorney represents only the insurance company and does not purport to represent, or in any way take on the representation of, the minor or the minor's adult representative; (2) the attorney clearly discloses to the adult representative of the minor, and the minor if he or she is old enough to understand, that the attorney is

representing only the insurance company and not representing either the minor or the adult representative; (3) the attorney clearly notifies the adult representative, and the minor if he or she is old enough to understand, that they have the right to obtain counsel of their own choosing to represent them; (4) the attorney does not counsel or advise the minor or the adult representative, or make representations to them regarding the reasonableness or fairness of the settlement, or representations regarding whether the settlement would serve the best interests of the minor; (5) the attorney clearly notifies the court that he or she represents only the insurance company and does not represent the minor or the adult representative.

2007-1

Statement of Facts

An attorney appointed to represent a respondent in protective proceedings is required to file a motion with an attached itemized billing statement with the court when requesting payment of attorney fees from the estate.

Issue

Is it ethical for an attorney to circulate to all of the parties to the proceedings an itemized billing statement for services rendered to the respondent?

Conclusion and Analysis

Yes. Colorado Rules of Professional Conduct (C.R.P.C.) 1.6 governs confidentiality of client information. The application of the rule is problematic here because, although it forbids an attorney from revealing information relating to the representation without the consent of the client, it permits such disclosure when it is impliedly authorized to carry out the representation. CRS § 15-24-417 authorizes an attorney to petition the court for compensation in probate matters. In many instances, particularly protective proceedings, a respondent may be unable to give informed consent to such a disclosure. It is the opinion of the Colorado Bar Association (CBA) Ethics Committee (Committee) that the court order appointing an attorney to represent the respondent in a protective proceeding impliedly authorizes that attorney to disclose client information contained in itemized billing statements to the extent necessary for the court to authorize payment.

The Committee does not express any opinion on legal matters and, therefore, expresses no opinion as to who is an interested party entitled to notice in the probate estate, what disclosure may be permitted when the fees are to be paid by the state, or privilege issues that may be intertwined with the disclosure of itemized billing statements.

2007-2

Statement of Facts

You have an estate planning practice that includes the preparation of wills and codicils. You previously have prepared such documents for this client and, in the course of preparing replacement documents, you and your client mutually agreed that other counsel should handle the matter. The client has paid your fees in full. You have provided the client with printed or paper copies (hard copies) of all wills, codicils, and other estate planning documents in your possession. Your client now has requested that you also provide copies of all such documents on accessible disk or transmitted by e-mail (electronic format). The apparent reason for accessibility is to save the client money during the revision process.

Issue

Does C.R.P.C. 1.16(d) require an attorney to provide the client, on request, property and papers in accessible electronic format, if so maintained?

Conclusion

Under the limited facts presented, the Committee concludes that providing wills, codicils, and related estate planning documents in accessible electronic format is a reasonably practical step that you should take to enable the continued protection of your former client's interests within the meaning of C.R.P.C 1.16(d).

Analysis

C.R.P.C. 1.16(d) requires that an attorney take steps to surrender to the client his or her papers and property reasonably practicable to protect the client's interest. CBA Ethics Opinion 104: Surrender of Papers to the client Upon Termination of the Representation (April 17, 1999) contains an exhaustive discussion of an attorney's obligation to surrender client papers to a client on termination of the representation and what constitutes client papers. It emphasizes the primary ethical obligation of the attorney with respect to surrendering client papers to the client. It does not, however, address client papers maintained in electronic format.

The Committee is of the opinion that the client's request that the client papers be provided in accessible electronic format is a step "reasonably practicable" to enable the continued protection of the client's interests. The rule requires the attorney to define the client's needs liberally and generally favors surrender. The downloading or transmission of accessible electronic format materials is both easy and efficient.

The Committee notes that other ethics committees have reached essentially the same result. *See* Illinois State Bar Association Advisory Opinion No. 01-01, 2001WL809802 (downloading for attorney leaving a firm with client); State Bar Association of North Dakota Ethics Opinion 01-03 (May 24, 2001) (downloading for attorney leaving a firm with client); Wisconsin Ethics Opinion E-00-03 (although an attorney is not required to surrender papers in both formats, the attorney should provide them in the requested electronic format, if reasonably practical).

As stated in Formal Opinion 104, the Committee believes that the rule does not require the surrender, in any format, of personal attorney work product or documents protected from disclosure based on third party interests.on third party interests.

2007-3

Statement of Facts

An attorney is employed as an in-house counsel to a municipal corporation under a written employment agreement that requires the municipality to give a notice of termination a stated time prior to the effective date of the termination, and further provides for a severance payment in an amount equal to that which the attorney would have received had he or she been given the requisite notice.

Issue

Is it ethical for an attorney to provide full-time in-house legal services to a municipality under a written employment agreement that provides that: (1) the attorney will be paid an annual salary payable in monthly or semi-monthly installments; (2) the agreement may be terminated on notice a specified time prior to the effective date of the termination; and (3) the attorney will be paid severance pay measured by the compensation that he or she would have received during the notice period had the notice been timely.

Conclusion

It is the opinion of the Committee that it is not unethical for an attorney to enter into an employment agreement with a municipality containing a severance pay provision such as that described, so long as it does not limit the municipality's ability to terminate the attorney's representation of the municipality contrary to C.R.P.C. 1.16.

Discussion

C.R.P.C. 1.5 (Fees) requires that an attorney's fees must be reasonable. This rule does not appear to apply to the salary, or compensation package, payable to an in-house municipal attorney. The general purpose of a severance pay provision is to assist the employee with the inevitable economic adjustments occasioned by the termination of employment. *See generally Moore v. Digital Equipment Corporation*, 868 P.2d 1170, 1172 (Colo.App. 1994). Under these facts, the municipality becomes liable for severance pay only on its breach of the employment agreement.

C.R.P.C. 1.16 provides that a client has the right to discharge an attorney at any time, with or without cause, subject to the obligation to pay for services rendered. This right to terminate is a matter of public policy and is implied in any employment contract between an attorney and his or her client. *See Olson v. Englewood*, 889 P.2d 673, 676 (Colo. 1995). It follows that, although the ability of the municipality to terminate the employment of an in-house attorney may be limited by the inclusion of a severance pay provision in the employment agreement, its ability to limit or terminate any representation of the municipality by that attorney cannot be so limited.

The Committee:

1) expresses no opinion on the capacity of municipalities to enter into such an agreement as that presents a legal question beyond the purview of the Committee;
2) limits the scope of this opinion to the specific provisions described in the inquiry; and
3) expresses no opinion as to the appropriateness of such provisions in employment contracts involving other governmental attorneys or private in-house or private general counsel.

2007-4

Statement of Facts

A consulting company operating online provides business plans and other services to business owners and, in conjunction with that activity, refers clients to attorneys and other professionals. In exchange for an annual fee, an attorney obtains the exclusive right to referrals by the consulting company to its clients in the attorney's zip code area and, for an additional fee, other zip codes. When a client of the consulting company types in a zip code, he or she is directed to a website containing the attorney's picture, biography, and contact information, with links to the attorney's separate website, if any.

Issue

Does the described relationship between the consulting company and the attorney comply with C.R.P.C. 1.5(e) and C.R.P.C. 7.2(c)?

Conclusion and Analysis

No. C.R.P.C. 1.5(e) succinctly states that: "[r]eferral fees are prohibited." This means that an attorney cannot pay or accept such a fee. As described, this is a for-profit referral service wherein an attorney gets the exclusive right to referrals from a defined geographic area in exchange for a fixed annual fee. This Committee previously has concluded that an annual membership fee paid to a for-profit referral service violates C.R.P.C. 1.5(e) and 7.2(c). *See* CBA Ethics Comm. Abstract, 2nd Inquiry, 26 *The Colorado* Lawyer 69 (July 1997); *see also* CBA Formal Opinion 106 (an advertising arrangement may, in fact, be a referral service).

C.R.P.C. 7.2(c) provides that, with exceptions not here pertinent, "a lawyer shall not give anything of value to a person for recommending the lawyer's services." The Comment to the rule states, again with exceptions not here pertinent, that "[a lawyer] is not permitted to pay another person for channeling professional work."

It is the opinion of the Committee that the annual fee paid by the attorney to the consulting business is a referral fee prohibited by C.R.P.C. 1.5(e), and is the giving of something of value in exchange for a recommendation, in violation of C.R.P.C. 7.2(c).

2007-5

Statement of Facts

An attorney admitted to practice in Colorado wants to enter into a Colorado limited liability partnership (LLP) with an out-of-state professional corporation (PC) and practice through the LLP.

Issue

Is it ethical for an attorney who is admitted in Colorado to become a partner in a LLP with an out-of-state PC?

Conclusion and Analysis

Yes, with the assumptions hereinafter set forth. The Committee assumes the following things, all of which are necessary to its conclusion:

1. The attorney is licensed to practice law in Colorado.

2. Both the LLP and the PC will be organized exclusively for the practice of law. Neither C.R.C.P 265 nor C.R.P.C. 5.4(c) requires that the PC be incorporated under Colorado law. The Committee does not read the requirement in C.R.C.P. 265 II.B. that shareholders, partners, or members of professional companies be "established" in accordance with C.R.C.P. 265 to mean that they must be formed or organized under the rule, as such matters are authorized and regulated by statute.

3. Names of both the LLP and PC comply with C.R.C.P. 265 I.A.1.

4. All practice through the LLP in the state of Colorado will be conducted by persons qualified and licensed to practice law in the state of Colorado.

5. The LLP and PC must be operated in accordance with C.R.C.P. 265.

6. Each attorney practicing law in Colorado as a shareholder, director, officer, or employee of the PC, or as a partner or employee of the LLP shall comply with the standards of conduct as set forth by C.R.C.P. 265 I.B.

7. Each partner in the LLP and each shareholder, director, and officer of the PC shall be individuals duly licensed to practice law in Colorado or in some other state or jurisdiction provided, however, that the PC may have directors or officers who are not licensed to practice law, so long as such persons do not exercise any authority whatsoever over any of the PC's activities relating to the practice of law.

8. Both the LLP and PC will comply with the C.R.P.C.

2007-6

Statement of Facts

An attorney has performed legal services for a client who is a partner in a partnership and has not been paid. The attorney holds partnership funds in his or her trust account that were not obtained in connection with the legal services performed for the client.

Issue

Is it ethical for the attorney to assert an attorney's lien on partnership funds in a trust account for the attorney fees owed by a partner individually?

Conclusion

No. An attorney may not claim an attorney's fee lien on trust funds unless those funds are owned by the defaulting client *and* were generated by the efforts of the attorney in the matter for which the fees are claimed.

Analysis

Attorneys can assert a lien for unpaid fees only in certain circumstances provided by statute, and the attorney's right to claim fees applies only to fees owed by his or her client. *See People v. Gray*, 35 P.3d 611 (Colo. PDJ 2001); *People v. Brown*, 840 P.2d 1085 (Colo. 1992); *see also* C.R.P.C. 1.15 cmt.

Two types of liens are provided for in Colorado statutes: a charging lien, CRS § 12-5-119; and a retaining lien, CRS § 12-5-120. These liens can be asserted only against the client's property and, if improperly asserted, can lead to disciplinary action. *See People v. Brown*, 840 P.2d 1085 (Colo. 1992); *People v. Smith*, 830 P.2d 1003 (Colo. 1992).

A charging lien can be used only for professional services rendered in pursuing, obtaining, and collecting a judgment, but not for unrelated matters. *See People v. Mills*, 861 P.2d 708 (Colo. 1993); *Estate of Benney*, 790 P.2d 319 (Colo. 1990); *see generally* CBA Ethics Opinions 94 and 110.

A retaining lien can extend to secure payment for all services rendered; however, it can be placed only on the papers of the client in the hands of the attorney and on money due to the client that is the possession of the adverse party. *See Jenkins v. District Court*, 676 P.2d 1201 (Colo. 1984). However, this lien does not extend to funds *in the possession of the attorney* generated from matters outside scope of the representation for which fees were earned. *See People v. Rozatos*, 636 P.2d 666 (Colo. 1981); *Collins v. Thuringer*, 21 P.2d 709 (Colo. 1933).

2007-7

Statement of Facts

A nonprofit legal services organization provides *pro bono* representation in civil legal matters to eligible indigent and near-indigent persons. Examples of the representation are: tenant rights, evictions, debts, small claims actions, custody, divorce, civil rights, employment, elder law, and public benefits. The representation is provided to the individuals by the organization's executive director and staff attorneys. The organization's board of directors includes several attorneys from the surrounding legal community. When the organization cannot represent an individual because of workload limitations or a conflict of interest, the organization obtains *pro bono* representation for the individual from an attorney in the legal community. To entice community lawyers to accept matters the organization cannot handle, the organization wants to provide the *pro bono* lawyers with secondary malpractice insurance, costs of litigation, and legal advice.

Issues

1. Is it ethically permissible for attorney members of the organization's board of directors or their firms, and the organization's executive director, to represent their respective clients against one another in adversary proceedings or otherwise?

2. Is it ethically permissible for attorney members of the organization's board of directors or their firms, and the organization's staff attorneys, to represent their respective clients against one another in adversary proceedings or otherwise?

3. Is it ethically permissible for the organization to refer otherwise qualified individuals whom it cannot represent because of workload limitations or conflicts of interest, to community attorneys for *pro bono* representation, and assist those attorneys by providing secondary malpractice insurance, costs of litigation, and legal advice?

Conclusions

1. Attorney members of the organization's board of directors or their firms, and the organization's executive director, may represent their respective clients against one another in adversary proceedings or otherwise without violating the C.R.P.C., even though the board has authority over the hiring, firing, and salary of the executive director, only if the situation is fully disclosed to each client and the client consents to the representation.

2. Attorney members of the organization's board of directors or their firms, and the organization's staff attorneys, may represent their respective clients against one another in adversary proceedings or otherwise without violating the C.R.P.C.., only if:

a) the organization's bylaws vest authority over individual personnel matters principally in the executive director;

b) the attorney board members uniformly and consistently do not discuss or vote on such matters as individual staff attorney salaries, promotions, or evaluations; and

c) the adverse representation is fully disclosed to the respective client and the client consents to continue the representation.

3. It is ethically permissible for the organization to refer individuals it cannot represent based on workload limitations or conflicts of interest to other lawyers in the community. When the referral occurs as the result of workload limitations on the organization's staff attorneys, the organization may provide counsel with secondary malpractice insurance, costs of litigation, and legal advice. When the referral occurs as the result of an applicant's conflict of interest with the organization's staff attorneys, the organization may provide counsel with secondary malpractice insurance and costs of litigation, but may not provide counsel with legal advice on the matter in such a way as to violate the prohibitions articulated in C.R.P.C. 1.6 regarding confidentiality.

Analysis

Imputed Disqualification

Generally, C.R.P.C. 1.10 prohibits lawyers "associated in a firm" from knowingly representing a client when one of them practicing alone would be prohibited from doing so by C.R.P.C. 1.7, 1.8(c), 1.9, or 2.2. This general rule of imputed disqualification presumes that lawyers in a law firm, or other association, have access to each others' confidential client information and share that information to facilitate the representation of clients. Comment [1] to C.R.P.C. 1.10 states that the term "firm" includes lawyers in a legal services organization.

Unfortunately, C.R.P.C. 1.10 does not specifically address the questions: (1) whether board members should be automatically disqualified from representing parties adverse to clients of a legal services organization on whose boards they sit; (2) whether the legal services organization's staff attorney should be automatically disqualified when the client is seeking the organization's assistance in an adversary proceeding; or (3) when the attorney on the other side is a board member of the organization. Consequently, there has been conflicting authority on this subject. Some authorities have concluded that such representation may be improper. *See, e.g.*, S.D. Ethics Opinion 88-6 (1998); New Jersey Bar Opinion 126, 91 N.J. 257 (1968); *Estep v. Johnson*, 383 F.Supp. 1323 (D.Conn. 1974). Other authorities suggest that where the board of a legal services organization restricts its activities to the formulation of broad policies and guidelines and refrains from involvement with individual cases, board members may represent such parties, provided requisite consideration is given to the conflict of interest provisions of the applicable ethics rules. *See, e.g.*, N.Y. State Ethics Opinion 688 (1997); Oregon Ethics Opinion 1991-66 (1991); S.C.

Ethics Opinion 90-08 (1990); Philadelphia Ethics Opinion 89-29 (1989); American Bar Association (ABA) Informal Opinion 1309 (1975).

The Committee finds that three formal ABA opinions—ABA Formal Ethics Opinion 324 (1970), ABA Formal Ethics Opinion 334 (1974), and ABA Formal Ethics Opinion 345 (1979)—persuasively delineate the role and scope of authority a legal services organization's governing board may assume in prescribing organizational rules and regulations or operational methods for the organization without its board members and staff attorneys being deemed a "firm" for purposes of the imputed disqualification rule.

To avoid attorney board members and staff attorneys of a legal services organization from being considered a "firm," ABA Opinions 324, 334, and 345 require that:

1) the scope and authority of the board of directors of a legal aid organization be limited to broad goals and policies, such as the establishment of guidelines delineating categories or kinds of clients and cases the staff attorneys may represent;
2) no board members participate in the particular cases handled by staff attorneys;
3) the board members not infringe on the professional independence of the staff attorneys; and
4) there be no disclosure of confidences either by or to the board members with respect to a particular case by staff counsel.

These requirements ensure that the relationship between staff attorneys and the legal services board members is significantly different from the relationship between two lawyers in the same firm; the "critical difference" being "the absence of a general opportunity for shared knowledge by the board member of the affairs of the staff attorney's client." *See* ABA Opinion 345. Where the board of directors is effectively screened off from the professional relationship between staff and client, there is no shared knowledge between board members and staff attorneys regarding the affairs of the organization's clients. Consequently, "clients" of the board member ought not to be imputed to the organization and clients of the organization ought not to be imputed to the board member. If the board's authority is consistent with the restrictions articulated in the ABA Opinions, C.R.P.C. 1.10 simply does not apply because there is no representation of multiple clients.

The conclusions in the ABA Opinions mirror and support the conclusions contained in C.R.P.C. 6.3, which states:

> A lawyer may serve as a director . . . of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that lawyers provided by the organization serve persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:
>
> (a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or
>
> (b) where the decision or action could have a material adverse effect on the representation of a client of a lawyer provided by the organization whose interests are adverse to a client of the lawyer.

The Comment to C.R.P.C. 6.3 states:

> It may be necessary in appropriate cases to reassure a client of a lawyer provided by the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

When a new client comes to a legal services organization, one of whose board members represents a client in an adverse proceeding or otherwise, it cannot reasonably be concluded under C.R.P.C. 1.10 that the board member's client also is the organization's "client." Likewise, when a client comes to the board member, it cannot reasonably be concluded that the organization's client is a "client" of the board member. Strictly speaking, this type of conflict is simply a special instance of a C.R.P.C. 1.7(b) conflict. Therefore, if the organization's board is structured in such a way that members do not discuss pending cases with the executive director or the staff attorneys, and have no access to the organization's case files, then ABA Opinions 324, 334, and 345 and C.R.P.C. 6.3 permit an organization's board member, executive director,

and staff attorneys to represent their respective clients against one another where full disclosure of the potential conflict is made to the client and the client consents to the representation.

Disclosure and Client Consent

C.R.P.C. 1.7(b) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.

What kind of disclosure is required to obtain the informed consent of the client to the representation? Depending on the nature of the case and the circumstances of the clients, the board member or the staff attorney may feel constrained in representing the client in the fullest sense. *See* ABA Formal Opinion 345. It is one thing to assure a client that no disclosures of confidences will occur. It is quite another to assure a client that the future course of his or her representation by a staff attorney or a board member might not in some subtle way be influenced by the relationship between the lawyers as a result of their association through the organization. *See Estep v. Johnson*, 383 F.Supp. 1323, 1326 (D.Conn. 1974). These concerns, when appropriate, should be disclosed and discussed with the client. Also, some clients may be submissive and acquiesce in the representation, feeling that they have no choice, but at the same time feeling concerned that they may not be getting independent representation. ABA Formal Ethics Opinion 345. Lawyers must be sensitive to these possibilities. Accordingly, it is important that the organization's clients be made aware of the board member's role in the organization, as well as the fact that the board member or a lawyer in his or her firm is representing a client opposing the organization's client.

The same applies to the client represented by the board member or a lawyer in his or her firm when the adversary counsel is the organization's executive director or a staff attorney. The board member's client should be made aware of the board member's role in the organization and the board member's relationship with the organization's executive director or a staff attorney representing the opposing party. Clients and counsel on both sides must feel comfortable that neither client will be deprived of independent and uninhibited representation.

Not all clients may be capable of directly providing informed consent, such as when the client is a minor or is mentally impaired. For instance, in *B.A. v. L.A.*, 761 N.Y.S.2d 805 (N.Y.Fam.Ct. 2003), the court concluded that a disinterested attorney would reasonably believe the professional judgment of a law guardian representing children in a custody matter might be influenced to the detriment of the clients because one parent's attorney was on the board of directors of the legal aid society that employed the law guardian; however, the clients could not legally consent to the representation because they were minors. Thus, there may be situations where it is appropriate for either the board member or staff attorney to seek consent for the minor or impaired person from a parent, legal guardian, or court. This opinion does not address the situation where one party does not consent.

Preserving the Independent Professional Judgment of the Executive Director and Staff Attorneys

Once the organization has agreed to accept a matter where the opposing client already is represented by a board member or a member of his or her firm and has assigned the matter to the executive director or a staff attorney for representation, the board must take special precautions not to interfere with the attorney's independent professional judgment. C.R.P.C. 5.4 requires that staff lawyers represent the legal service organization's clients in accordance with their own professional judgment, without interference from the organization's board. C.R.P.C. 5.4, Comment [2] states:

> Various types of legal aid offices are administered by boards of directors composed of lawyers and non-lawyers. A lawyer should not accept employment from such an organization unless the board sets only broad polices and there is no interference in the relationship of the lawyer and the individual client the lawyer serves. Where a lawyer is employed by an organization,

> a written agreement that defines the relationship between the lawyer and the organization and provides for the lawyer's independence is desirable since it may serve to prevent misunderstanding as to their respective roles. . . . [T]he responsibility of the lawyer to maintain the lawyer's professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer. . . . A lawyer . . . should make certain that a relationship with a . . . legal assistance organization in no way interferes with the lawyer's independent, professional representation of . . . the . . . client.

Consequently, if the organization's board operates as described in ABA Opinions 324, 334, and 345 and C.R.P.C. 6.3, it would be ethically permissible for a board member, the executive director, and staff attorneys to represent their respective clients against one another without concern that there will be interference with each lawyer's independent professional representation of the client's interests. To avoid the appearance of impropriety, if at all possible, the board member should not be the lawyer selected by his or her firm to be adverse to the organization's client and in such situations the board member should be screened off by his or her law firm from all contact with the matter. *See* CBA Ethics Committee Formal Opinion 88 (1991). Finally, if during the course of the representation it becomes apparent that independent representation is not being afforded or a client perceives that it is not afforded, no matter what the reality, then the lawyers should assist in change of counsel for one or both clients.

Referrals to Pro Bono *Counsel*

C.R.P.C. 5.4(c) provides that a lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment. C.R.P.C. 1.8(f) prohibits a lawyer from accepting compensation for representing a client from one other than the client unless the client consents after consultation, there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship, and information relating to representation of a client is protected as required by C.R.P.C. 1.6.

Therefore, it is ethically permissible for the organization to refer individuals it cannot represent based on workload limitations or conflicts of interest to lawyers in the community for *pro bono* representation, and to provide *pro bono* counsel with secondary malpractice insurance and costs of litigation, as long as the client provides informed consent to the arrangement, the organization does not interfere with *pro bono* counsel's exercise of independent professional judgment on behalf of the client, and *pro bono* counsel conforms to C.R.P.C. 1.6 concerning confidentiality of information related to the representation. *See* ABA Informal Ethics Opinion 1334. When the referral is made on the basis of workload limitations, the organization also may provide *pro bono* counsel with legal advice. When the referral is made on the basis of a conflict of interest, however, the organization may not provide *pro bono* counsel with legal advice on the matter in such a way as to violate the prohibitions articulated in C.R.P.C. 1.6.

2007-8

Statement of Facts

Attorney is employed as a full-time in-house municipal attorney with responsibilities that include land use review, annexation, zoning, and subdivision approvals. Attorney is considering an employment opportunity with a local real estate developer.

Issues

1. May municipal attorney negotiate a position of employment with the local developer after leaving employment with the municipality?

2. What is the propriety of attorney representing the developer with respect to developments within the municipality?

Conclusions

1. Attorney may negotiate for a position of employment with the developer after he or she leaves the city's employment.

2. The scope of attorney's work for the developer is limited by C.R.P.C. 1.11 and any conflict of interest rules adopted by the municipality.

Analysis

> Pursuant to C.R.P.C. 1.11(c)(2), an attorney serving as a public officer or employee shall not negotiate for private employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially.

By its express terms, this prohibition against negotiating for employment applies only to attorneys serving as a public officer or employee. After leaving employment with the municipality, an attorney will no longer be a public officer or employee and, thus, will be free to negotiate and accept a position of employment with a private client, subject to other ethical obligations discussed below.

An attorney may not represent the developer on any matter in which he or she "participated personally and substantially as a public officer or employee" unless the municipality consents after consultation. C.R.P.C. 1.11(a). An attorney may not represent the developer on any matter in which its interests are adverse to any person or entity about whom the attorney obtained confidential information while in the municipality's employ. C.R.P.C. 1.11(b). Other attorneys working for the developer may represent it on such matters only if the attorney is screened from participation and the municipality is notified. C.R.P.C. 1.11(a). In addition, the municipality may have its own binding rules governing these matters to which the attorney may be bound. However, absent a municipal rule to the contrary, an attorney may represent the developer in matters adverse to the city as long as he or she was not "personally or substantially" involved in the matter *and* gained no confidential information concerning the subject matter during his or her tenure with the city. *and* gained no confidential information concerning the subject matter during his or her tenure with the city.

2007-9

Statement of Facts

An attorney whose practice includes criminal defense work also is a county commissioner. The county is part of a multi-county judicial district so, as a county commissioner, the attorney participates in the budgeting for a portion of the district attorney's budget and in the entirety of the county sheriff's department budget.

The following questions are presented:

1. If a conflict or appearance of a conflict exists, is it removed by the attorney not participating in setting the district attorney's budget?

2. If a conflict or appearance of a conflict does exist and cannot be removed by the attorney abstaining in the budget matters, what effect does that have on his or her and law firm members in the representation of clients in criminal defense matters?

Issues

1. Whether the appearance of impropriety standard precludes the attorney's representation of criminal defendants in the judicial district.

2. Whether the attorney's representation of criminal defendants in the judicial district violates C.R.P.C. 8.4(e), which states that it is professional misconduct for an attorney to "[s]tate or imply an ability to influence improperly a judge, judicial officer, government agency or official."

3. Whether the attorney's representation of criminal defendants in the judicial district creates a conflict of interest; and, if so, whether a reasonable attorney would conclude that his or her client could consent to the representation after consultation; and, if not, whether that reasonable attorney would reach a different conclusion if he or she agreed to abstain from consideration of the district attorney's budget. Further, if the attorney's responsibilities as a county commissioner preclude such a representation, whether that prohibition extends to any other attorneys in his or her law firm.

Conclusions

1. The appearance of impropriety standard does not apply to Colorado lawyers in private practice.

2. The representation of criminal defendants in the judicial district and the attorney's status as a county commissioner create a potential for a violation of C.R.P.C. 8.4(e); however, by itself, representation of a criminal defendant in these circumstances does not violate C.R.P.C. 8.4(e).

3. The representation of criminal defendants in cases filed in the judicial district and the attorney's status as a county commissioner creates a conflict of interest under C.R.P.C. 1.7(b) only to the extent that the attorney's responsibilities as a county commissioner may materially limit the representation of the client. Such a circumstance may arise when an employee of the sheriff's department is scheduled to be a witness, and this conflict applies to all attorneys in the firm.

Analysis

1. The C.R.P.C. do not contain a provision requiring the disqualification of private lawyers to avoid an appearance of impropriety.

2. The C.R.P.C. provide that it is professional misconduct for an attorney to "[s]tate or imply an ability to influence improperly a judge, judicial officer, government agency or official." C.R.P.C. 8.4(e). In CBA Formal Ethics Opinion 46, "Municipal Attorney; Representation of Defendants," adopted February 20, 1971 and revised May 18, 1996, the Committee commented that when a municipal attorney represents criminal defendants there is a "great risk that the lawyer's conduct implies that the lawyer is able to improperly influence a governmental agency or official." *See also* CBA Formal Ethics Opinion 97, "Ethical Considerations Where an Attorney or the Attorney's Partner Serves on the Board of a Public Entity," adopted June 17, 1995 ("[l]awyers who serve on Boards must be mindful of the public's perception of their ability to influence government," and a "lawyer who serves on a Board has obligations and responsibilities to that board, to his or her Board colleagues, and to the public").

The Committee believes that, without more, an attorney-public official's representation of criminal defendants does not violate C.R.P.C. 8.4(e). However, the attorney-public official must go out of his or her way to avoid remarks or conduct that may be construed or misconstrued as implying an ability to influence governmental officials for the benefit of private clients.

3. C.R.P.C. 1.7(a) is not implicated in the attorney's situation because, among other things, he or she is not in an attorney-client relationship with the county. Further, C.R.P.C. 1.7(b) is not implicated as it does not prohibit an attorney from compromising his or her obligations to third parties who are not clients.

The Committee also concludes that an attorney's responsibilities as county commissioner, particularly his or her budgetary authority over the district attorney's office, will not materially limit the representation of a criminal defendant prosecuted by that office. *Medberry v. People,* 107 Colo. 15, 108 P.2d 243 (1940), is distinguishable as it involved a county attorney without budgetary powers.

However, in the Committee's view, the attorney also must consider whether his or her status as a county commissioner might compromise the representation of a criminal defendant. *See* CBA Formal Ethics Opinion 46: Municipal Attorney; Representation of Defendants; Michigan Ethics Opinion R-15, July 24, 1992. The concern expressed in these opinions is that the relationship between government officials and law enforcement personnel may materially compromise a government official's representation of a criminal

defendant. Such a conflict of interest may arise when an employee of the sheriff's department is expected to testify as a witness. This conflict applies to all attorneys in the attorney's law firm. The representation may continue only if the attorney (1) reasonably believes the representation will not be adversely affected, and (2) the criminal defendant consents after consultation.

2007-10

Statement of Facts

A law firm is considering contracting with a professional employer organization (PEO) to assume and manage human resource and personnel responsibilities. Attorneys would be hired through the PEO and the contract between the attorney and the PEO would be at-will and in writing. Further, the PEO has an employee handbook that governs, among other things, problem resolution, discipline, dismissal, resignation, and paychecks.

The PEO would hire and place the attorney with a law firm where he or she would practice law. The attorney would sign an employment agreement that would provide that he or she is "co-employed" by the PEO and the law firm. The attorney would be paid by, or through, the PEO, which is responsible for making all appropriate deductions. The attorney agrees that his or her employment by the PEO is at-will and that the attorney, the law firm, or the PEO may terminate the agreement at any time.

Issue

May a law firm engage a PEO for the purpose of employing attorneys and handling the human resource functions relating to that employment?

Conclusion

Generally, it is ethical for law firms or sole practitioners to use a PEO for hiring attorneys, so long as the attorney and the law firm adhere to the C.R.P.C. Neither the attorney nor the law firm is insulated from complying with the C.R.P.C. by virtue of using this arrangement. Specifically, the contract between the law firm and the PEO, the employment agreement between the PEO and the attorney, and the policies of the PEO should be reviewed to assure compliance with the C.R.P.C., particularly those discussed below.

Discussion

1. ***Competence and Diligence.*** The employee attorney has an attorney-client relationship with the clients who are represented by the law firm and for whom the employee attorney provides services, and the duties arising out of that relationship must not be affected by the PEO employment arrangement. Thus, the employee attorney owes duties of competence and diligence to those clients. C.R.P.C. 1.1; C.R.P.C. 1.3. The employee attorney must observe all these ethical duties, and the employing law firm must take reasonable measures to ensure that the employee attorney satisfies these duties.

2. ***Professional Independence.*** Attorneys are required to exercise independent professional judgment in representing clients, and may not permit a nonattorney who represents, employs, or pays them to render legal services or to direct or regulate their professional judgment. C.R.P.C. 2.1; C.R.P.C. 5.4(c). Therefore, even though the PEO is a "co-employer," it is not permitted to interfere with or regulate in any fashion the independent professional judgment of the attorney. Moreover, the PEO must not be permitted to engage in any activity that would constitute the practice of law. C.R.P.C. 5.5(b).

3. ***PEO Compensation.*** The law firm is prohibited from sharing legal fees with nonlawyers. C.R.P.C. 5.4(a). In general, an arrangement would comply if: (1) payment of the fees charged by the PEO is not contingent on payment for the services by clients served by the attorney, and (2) the PEO's compensation is not a percentage of, or otherwise directly tied with, the amounts paid to the firm by such clients. *See* CBA Ethics Opinion 105 (1999).

4. ***Employee Attorney's Compensation.*** The employment agreement should provide for the possibility that the law firm can compensate the attorney directly with bonuses, deferred compensation, commissions, or stock options. If the law firm directly compensates the attorney, it must take care to ensure that the requirements of C.R.P.C. 1.5(d), relating to the division of fees between lawyers, are satisfied. Regarding the definition of a "firm," *see* C.R.P.C. "Terminology" and C.R.P.C. 1.10, cmt. *See also* CBA Opinion 105 (Division of Fees and Disclosure). If the attorney is not considered to be "in the same firm," the requirements of C.R.P.C. 1.5(d) must be satisfied.

5. ***Duty of Confidentiality.*** Both the law firm and the attorney have a duty of confidentiality to clients under C.R.P.C. 1.6. Thus, care must be taken to protect confidential client information. This is especially true where the attorney is engaged on a temporary basis. Further, care must be taken to ensure that no information relating to the representation of clients is communicated or revealed to the PEO, unless permitted by C.R.P.C. 1.6.

6. ***Conflicts.*** C.R.P.C. 1.7-1.10, relating to conflicts of interest and imputed disqualification, may be implicated because the PEO is being used to hire the attorney. Given the imputed disqualification provisions of C.R.P.C. 1.10, the determination of whether the attorney is "in the same firm" is critical. *See* CBA Opinion 105. To avoid the C.R.P.C. 1.10 imputation and disqualification as a result of the attorney being considered as "associated in" the law firm, the attorney should be screened with respect to information relating to other firms in which he or she may have been associated, and the clients he or she may have represented, in relation to the law firm's clients. Even absent any imputation under C.R.P.C. 1.10, the law firm and the attorney must comply with C.R.P.C. 1.7; C.R.P.C. 1.8; and C.R.P.C. 1.9.

7. ***Employee Attorney's Right to Withdraw.*** An attorney's right to withdraw from the representation of a client is limited by C.R.P.C. 1.16, and the employment agreement must ensure compliance with the rule.

8. ***Supervision of Employee Attorney.*** Partners and supervisory attorneys in the law firm have a duty to make reasonable efforts to ensure that the other attorneys in the firm conform to the Rules. C.R.P.C. 5.1. This duty to supervise includes the duty to select and hire competent attorneys. *See* CBA Opinion 105. Thus, the law firm cannot delegate to the PEO its nondelegable duties to hire and supervise competent attorneys.

2007-11

Statement of Facts

An attorney practicing immigration law is considering authoring "nutshells" or pamphlets in Spanish on immigration law and procedures; advertising these publications for sale; and entering into a partnership with a nonlawyer to publish and market these materials.

Issues

The inquiry asked whether an attorney practicing immigration law may author, publish, and promote materials on immigration law and procedures and, in conjunction therewith, enter into a partnership with a nonlawyer for the purposes of publishing, advertising, and promoting such materials and thereby share the proceeds or profits.

Conclusions

1. An attorney may ethically author and publish materials on legal issues because this does not constitute the practice of law.

2. An attorney may ethically promote such materials, as long as the promotion does not bring discredit on the profession.

3. An attorney may enter into a partnership for the publication and promotion of legal materials he or she has authored with a nonlawyer, as long as the activities of the partnership do not consist of the practice of law.

Discussion

1. At the outset, the Committee does not express opinions on what constitutes the "practice of law" because that is a legal, not ethical, question. That said, in *Denver Bar Association v. Public Utilities Commission*, 154 Colo. 273, 391 P.2d 467 (1964), the definition of the term is limited to representing, counseling, advising, or assisting a person in connection with legal rights and duties. *See also Ross v. Indus. Comm'n*, 39 Colo. App. 204, 566 P.2d 267 (1977). When authoring a pamphlet, article, or book on legal issues, there is no identifiable client whom an attorney is assisting, nor is an attorney making an appearance in a legal proceeding or assisting an individual in the completion of legal documents. There is no rule governing the publication of articles, books, or pamphlets authored by attorneys. Further, attorneys frequently publish materials on legal issues through private publishing houses and association publications. The C.R.P.C.. encourage such activities. *See* C.R.P.C. Preamble.

2. When promoting materials, an attorney is required to act in such a way as not to bring discredit on the profession. *See* C.R.P.C. Preamble; C.R.P.C. 7. This includes not advocating actions by others that violate laws or lead the reader to believe it is permissible to take actions that are unlawful or unethical, *see* C.R.P.C. 7.1(a)(2), and having any advertising of his or her legal services in the publication comply with C.R.P.C. 7.2. Further, the attorney should pay attention to C.R.P.C. 7.4, relating to communication with respect to specialties in particular fields of practice.

3. An attorney may enter into a venture for the publication of writings and may partner and share revenues with a nonlawyer, as long as the venture: (1) does not involve the practice of law, which the publication of materials does not; (2) does not bring discredit on the profession, *see* C.R.P.C. Preamble; and (3) complies with the requirements of C.R.P.C. 7 concerning advertising. In addition, because publishing legal materials does not involve the practice of law, an attorney also may pay royalties or enter into other such profit sharing arrangements with nonattorneys without violating C.R.C.P. 5.4(a), which prohibits the sharing of legal fees.

2007-12

Statement of Facts

In the original inquiry, an attorney is considering employment, or affiliation, with a company that describes itself as a full-service tax negotiation firm. The company is owned by two nonattorneys; operates and uses a website and cold calling to find clients; sends its clients to the attorney who represents the clients before the Internal Revenue Service; and bills its clients for services rendered, including those provided by the attorney. The company compensates the attorney in one of three ways: (1) a flat monthly rate; (2) a flat monthly rate plus significant bonuses based on the number of hours billed to the clients; or (3) a flat hourly rate based on the number of hours billed to the clients.

Issue

Whether it is ethical for an attorney in private practice of law to be employed by, or affiliated with, the company and provide representation to its clients in the manner described.

Conclusion and Analysis

No. C.R.P.C. 5.4 prohibits an attorney or law firm from sharing legal fees with the nonattorney. The Committee previously explained that "[t]he lawyer-client relationship should be direct and personal without intermediaries, and any compensation paid by the client to the lawyer should be agreed on with, and paid directly to, the lawyer." *See* CBA Ethics Opinion 87. It also has been determined that it is impermissible for

the company to collect a fee from a client, keep a portion, and pay a portion to the lawyer for services rendered. *See* CBA Ethics Opinion 63. Here, the company receives a fee from the client and pays a portion to the attorney. This arrangement is an impermissible division of fees violating C.R.P.C. 5.4.

C.R.P.C. 5.4 also provides that an attorney shall not permit a person who recommends, employs, or pays the attorney to render legal services for another to direct or regulate the attorney's professional judgment in rendering such services. Here, the attorney's independent judgment might well be influenced by economic or other pressures from the company, which is compounded by the fee structure.

C.R.P.C. 7.3 prohibits an attorney from soliciting employment for pecuniary gain by in-person or live telephone contact with a prospective client with whom he or she has no family or prior professional relationship. Attorneys cannot permit nonattorneys such as the company to engage in the same conduct on his or her behalf. *See* C.R.P.C. 5.3. The employment or affiliation violates the rule because the attorney is permitting, or contracting with, the company to engage in the prohibited conduct.

In addition, C.R.P.C. 1.6 requires client information be kept confidential, which the attorney might, depending on the circumstances, violate by sharing information with the company or by failing to follow the appropriate measures to protect the information. Also, clients may incorrectly assume that any information shared with the company will be treated as privileged and confidential.

Further, C.R.P.C. 1.16 governs withdrawal of an attorney from a matter pending before a tribunal. Not having control over the initial fee could put the attorney in an ethically difficult situation if he or she terminates his or her relationship with the company and is not ethically permitted to withdraw from pending matters.

In a follow-up inquiry, the Committee was asked to consider the import, if any, of ABA Informal Opinion 1241 (1973) on its analysis. It was stated in the ABA opinion that attorneys may join tax negotiation firms or form partnerships with enrolled agents so long as: (1) they limit representation to matters before the IRS, and (2) do not hold themselves out as attorneys. The ABA opinion reasoned that attorneys may engage in occupations open to nonattorneys, as long as they do not hold themselves out as attorneys. However, the ABA opinion cautioned that, as a practical matter, it may be impossible for an attorney to walk this fine line.

Therefore, if the attorney is employed by the tax negotiation firm, instead of engaging or continuing to engage in the practice of law as the initial inquiry suggested, neither the attorney nor the firm can hold the attorney out as an attorney. In addition, ethical pitfalls remain if any of the attorney's activities or those of the firm could be deemed to constitute the practice of law or the sharing of fees by an attorney with a nonattorney, and the firm continues to solicit customers or clients in the manner described. The same infirmities would pertain to a partnership between an attorney and nonattorney. Therefore, the ABA opinion does not substantially impact the analysis or the conclusion reached in response to the initial inquiry.

2011-1

Statement of Facts

A legal professional corporation has a single shareholder who also acts as the sole director. The corporation has for a number of years employed an associate. The associate was offered an opportunity to purchase an equity interest in the corporation but, for a variety of reasons, declined. Despite the associate's lack of equity, the shareholder wishes to change the name of the corporation to include the name of the shareholder and the associate.

Issue

Do the Colorado Rules of Professional Conduct permit the corporate name of a legal professional corporation to include the name of an attorney engaged in the corporation's practice but who is not a shareholder?

Conclusion

Assuming the corporation carries malpractice insurance meeting the coverage requirements of C.R.C.P. 265(I)(A)(4), the Committee concludes that the use of the proposed firm name is permissible.

Analysis

Colo. RPC 7.5 no longer prohibits law firms from practicing under a trade name, as long as it does not imply a connection with a government agency or with a public or charitable legal services organization. In addition, the trade name cannot violate Colo. RPC 7.1, which prohibits false or misleading communications about the attorney or the attorney's services. The proposed name clearly does not imply a connection with a government agency or with a public or charitable legal services organization, so the corporation is not prohibited from including the associate's name in the name of the firm unless it is false or misleading under Colo. RPC 7.1(a).

Ethics opinions in other states have prohibited inclusion of the name of an associate attorney in the firm name because such a name implied a general partnership, which today is a rarity. Because of the evolution in law firm structures (for example, limited liability entities and non-equity partners are permitted under C.R.C.P. 265), as well as the changes in ethical rules regarding firm names, the Committee believes that the line of reasoning in the ethics opinions of other states prohibiting the practice of including the names of associates in a corporation's or firm's name is no longer persuasive.

The Committee believes that consumers of legal services understand the concept of limited liability. Because the associate attorney practices in the law firm or for the corporation, the Committee does not believe the inclusion of the associate's name would be misleading to clients or potential clients. On the contrary, the Committee believes that permitting the use of the associate's name provides a benefit to consumers by informing them that the associate practices for the corporation.

The Committee does not address questions of law and expresses no opinion as to whether, if the associate remains an employee and the firm name is changed, the associate would be exposed to malpractice liability as if he or she were a shareholder. The Committee also does not express an opinion on the effect of its conclusion on firms that fail to maintain malpractice coverage as specified in C.R.C.P. 265.

2011-2

Statement of Facts

A former city attorney (attorney) is now associated with a private law firm. The attorney's practice focuses on local government issues, representing local governments and persons who have business before local governments. The attorney has been engaged to represent the interests of a client with respect to an ordinance that was adopted when the attorney was the city attorney. The attorney submitted a critique of the ordinance to the city, suggesting that it might violate state and/or federal constitutional limitations.

Issues

1. Does Colo. RPC 1.11 or Colo. RPC 1.9 apply in this situation?

2. Is it permissible for the attorney to represent clients as a lobbyist with respect to an ordinance that was adopted while the attorney was city attorney?

Conclusion and Analysis

1. Colo. RPC 1.11 is intended to govern the issue of when an attorney may represent a client in a matter before the former employing government entity. In some circumstances, however, a former government attorney may be subject to Colo. RPC 1.9 and the conflict of interest provisions of that section.

Colo. RPC 1.11 applies. The Comment to that rule indicates that application of the rules should not be so restrictive as to inhibit transfer of employment to and from the government. Were the rules overly

restrictive, the government's ability to attract qualified candidates would be inhibited. Thus, a broader interpretation is used in this context than that used in Colo. RPC 1.9, which construes the conflict definition more narrowly. A former government attorney could, in theory, comply fully with the requirements of both rules; however, the result would render Colo. RPC 1.11(a) superfluous in adverse representations, and enlarge the scope of the attorney's resulting disability beyond that contemplated by either rule standing alone. Because it is clear that Colo. RPC 1.11 is intended to define conflict of interest issues as they relate to obligations of former government attorneys, the Committee believes that Colo. RPC 1.11 occupies the field to the exclusion of sections (a) and (b) of Rule 1.9.

2. Yes. The attorney's representation of the city as city attorney at the time the ordinance was considered and adopted is not sufficient to rise to the level of matter that would be necessary to trigger the conflict of interest provisions of Colo. RPC 1.11.

Colo. RPC 1.11 indicates that an attorney shall not represent a private client in connection with a matter in which the attorney participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. An initial examination of this question appears to indicate that the attorney's situation may trigger the conflict of interest provisions of Colo. RPC 1.11; however, it first must be determined whether the representation at issue constitutes a matter. If no matter is involved, then the level of involvement is immaterial, and no waiver is required.

> Colo. RPC 1.11(d) states that the term "matter" includes
>
> any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other *particular matter* involving a *specific party or parties* and any other matter covered by the conflict of interest rules of the appropriate government agency. (Emphasis added.)

It is apparent to the Committee that because there are no identifiable parties, other than the city itself, and it is not possible to define a discrete set of isolatable transactions in this instance, the attorney is not prevented by conflict of interest rules from representing clients in the scenario described.

2011-3

Issue

Do certain types of group lawyer advertising constitute impermissible for-profit referral services? Formal Ethics Opinion 106 describes a referral service to include an entity that indirectly or directly operates for the purpose of referring potential clients to lawyers. The Committee uses this description as a basis for the following discussion.

Conclusion

Under the applicable rules of professional conduct, an attorney may not pay a for-profit referral service to obtain clients because such services are considered referral services and not advertising.

Analysis

Colo. RPC 7.2(a) provides that "a lawyer may advertise services through written, recorded or electronic communication, including public media." Colo. RPC 7.2(b) provides that a lawyer "shall not give anything of value to a person for recommending the lawyer's services." Comment 5 to Colo. RPC 7.2 states that a lawyer may advertise and communicate as permitted by the rule, but he or she "is not permitted to pay another person for channeling professional work." *People v. Zimmerman*, 938 P.2d 131, 132-33 (Colo. 1997) (determining that an attorney who paid a for-profit referral agency for referrals violated Colo. RPC 7.2(c), now Colo. RPC 7.2(b)). See also Colo. RPC 1.5(e) (prohibiting an attorney from receiving and paying referral fees).

Colo. RPC 7.2(b) carves out three exceptions to this prohibition and allows an attorney to:

> (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; and (3) pay for a law practice in accordance with Rule 1.17. (Emphasis added.)
>
> [I]f company offers to provide a lawyer with all personal injury referrals within a particular geographic area in return for a monthly fee, the fee well may be an impermissible referral fee rather than a permissible publication cost.

Formal Ethics Opinion 106 at 4-330 (2007). An attorney likely violates Colo. RPC 1.5(e) and 7.2(b) if he or she purchases leads or referrals from a for-profit company. The key fact is that the attorney pays to have calls or leads directed to him or her by a service provider who is in the business of obtaining client leads for profit. Such a service provider appears to be a for-profit referral service that channels professional work to the attorney in exchange for a fee. Payment of such a fee violates Colo. RPC 7.2(b).

2011-4

Issue

Does Colo. RPC 1.11(d)(2)(ii) limit the ability of a lawyer employed in a managerial capacity by a governmental agency to negotiate for private employment with a person or entity that is a party or attorney in any manner in which the agency is involved?

Facts

An attorney on inactive status who serves in a managerial capacity of a government agency (1) confers with the government's counsel (counsel) with respect to the agency's interpretation of statutes and its policies and procedures, without reference to any specific matter, person, or entity; (2) negotiates with persons or entities concerning agency procedures and advises counsel during negotiations with persons or entities as to broad policy questions without having any decision-making authority; (3) reviews counsel's motions and briefs in specific cases that are in litigation; (4) advises agency employees concerning investigations they are performing and whether to take those matters to an adversarial proceeding or litigation; and (5) prepares legal opinions concerning the construction of applicable statutes or ordinances.

Analysis

Colo. RPC 1.11(d)(2)(ii) applies to you regardless of whether (1) your responsibilities involve the practice of law; and (2) you are on active or inactive status. The rule provides that "a lawyer currently serving as a public officer or employee . . . shall not . . . negotiate for private employment with any person who is involved as a party or as a lawyer for a party in a matter in which the lawyer is participating personally and substantially. . . ." (Emphasis added.) It is not limited to lawyers employed by governmental entities as lawyers but applies to every lawyer employed by a governmental agency "as a public officer or employee."

Under Colo. RPC 1.11(d)(2)(ii), a lawyer who is a public employee may not negotiate for employment in connection with a "matter" in which the lawyer is "personally and substantially" involved. "This Rule prevents a lawyer from exploiting public office for the advantage of a private client." Cmt. 1 to Colo. RPC 1.11.

Whether a lawyer is participating "personally and substantially" in a "matter" is a highly fact-specific inquiry. Therefore, the Committee is unable to provide a definitive opinion but can provide some guidance as to the interpretation of these terms and how these interpretations might apply to your various roles with the agency.

"Matter" Under Colo. RPC 1.11. Under Colo. RPC 1.11, the term "matter" is limited to a particular matter involving a specific party. The rule states that the term "matter" includes:

> (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest *or other particular matter involving a specific party or parties*.

Colo. RPC 1.11(e) (emphasis added). The term "matter" thus "contemplates a discrete and isolatable transaction or set of transactions between identifiable parties." CBA Formal Op. 57: Conflicts of Interest (March 21, 1981, addendum 1995) (interpreting Colo. RPC 1.11(a)'s predecessor provision, DR 9-101(B), and quoting ABA Formal Op. 342) (internal quotations omitted).

Accordingly, it is a former public employee's personal knowledge "of particular background facts and data"—and not a general "knowledge of procedures and substantive law of an agency"—that gives rise to a conflict of interest under Colo. RPC 1.11. CBA Formal Op. 57. *See also* ABA Annotated Model Rules (2006) at 206 (definition of "matter" excludes legislation, rulemaking, and other policy determinations); *cf.* D.C. Ethics Op. 297 (2001) (former U.S. Department of Interior lawyer who had been actively involved in proposed regulations may represent Indian tribe in negotiated rulemaking regarding regulations; rulemaking of general application is not a "matter" within meaning of Colo. RPC 1.11(a)).

"Personal and Substantial" Participation. Although Colo. RPC 1.11 does not define "personal and substantial" participation, the term requires more than a mere "passing upon" of a matter by a government employee. CBA Formal Op. 57. "Substantial responsibility" requires that the official becomes "*personally* involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question." CBA Formal Op. 57 (quoting ABA Formal Op. 342) (emphasis added) (internal quotations omitted). *See also Osborn v. Dist. Ct.*, 619 P.2d 41, 45 (Colo. 1980). Several Colorado cases discuss the requirement of personal and substantial participation in applying the predecessor rule—DR 9-101(B)—to Colo. RPC 1.11.

In *Osborn*, a former deputy district attorney joined a firm that was retained by the defendant in a case in which she had been involved while working for the government. 619 P.2d at 44. The Colorado Supreme Court held that the attorney had personally and substantially participated in the prosecution of the defendant while working as a deputy district attorney, because the attorney interviewed the victim, the arresting officers, and important prosecution witnesses. She also discussed the case with the lead prosecutor, with whom she shared an office. *Id.* at 45.

In *Cleary v. District Court*, 704 P.2d 866 (Colo. 1985), on the other hand, the Supreme Court held that a former deputy district attorney had not had a personal and substantial participation because he had no personal involvement in the investigation, preparation, or prosecution of the case and had no discussions about the case. *Id.* at 871. The Court noted that the requirement of substantial responsibility requires actual rather than theoretical conduct and that the attorney's mere opportunities to learn facts about the case while acting as deputy district attorney were not relevant in determining whether his actions violated DR 9-101(B). *Id.* at 870-71. *See also People v. Anaya*, 732 P.2d 1241 (Colo. App.1986) (former deputy district attorney not disqualified for substantial responsibility where, although attorney engaged in informal discussions with prosecutors, the attorney had not read the defendant's file or interviewed the defendant or other witnesses), *rev'd on other grounds*, 764 P.2d 779 (Colo. 1988).

Note, however, that as to the narrow issue of negotiating employment under C.R.C.P. 1.11(d)(2)(ii), the rule applies only to "matters" on which a public officer or employee is currently working—it is not a continuing rule of disqualification. *See* C.R.C.P. 1.11(d)(2)(ii) ("a lawyer . . . shall not . . . negotiate for private employment with any person who *is involved* as a party or as a lawyer for a party in a matter in which the lawyer *is participating* personally and substantially . . .") (emphasis added).

Conclusion

In light of these interpretations of "matter" and "personal and substantial" participation, it appears that Colo. RPC 1.11(d)(2)(ii) could apply to some of the matters on which you have worked. For example, if you are personally negotiating with particular persons concerning a pending matter, contributing to briefs in pending matters in litigation, or advising agency employees about a pending matter (whether before or during litigation), those would appear to be "matters" in which you are participating "personally and

substantially"—meaning that you could not negotiate for employment with the adverse parties or their lawyers during their pendency. However, your consultations with counsel with respect to the interpretation of particular statutes, ordinances, or agency procedures would not appear to constitute "matters" in which you are participating "personally and substantially" so as to trigger Colo. RPC 1.11(d)(2)(ii)—even if those interpretations or procedures might indirectly affect particular persons. We reiterate that, for those tasks you determine to be "matters" within the meaning of Colo. RPC 1.11(d), the rule applies only for the duration of the matter.

2011-5

Facts

An attorney's office is paperless—that is, all client files, documents, information, and attorney work product (client information) is maintained electronically. The attorney has an office network that includes a network server, and the client files and records are backed up by the network at regular intervals.

Issues

1. Does the use of an Internet service for storage and backup of client files and information violate an attorney's duty of confidentiality to his or her clients?

2. Does the failure to engage such a service violate a duty to adequately protect and secure client information?

Conclusions and Analysis

A lawyer's ethical obligation with respect to maintaining the confidentiality of client information is governed by Colo. RPC 1.6, which generally provides that a lawyer shall not reveal client information except where: (1) the client gives informed consent; (2) the disclosure is impliedly authorized to carry out the representation; or (3) there are other disclosures permitted by the exceptions set forth in Rule 1.6. The Committee does not believe that the exceptions to the rule apply to this scenario. Colo. RPC 1.6, cmt. 1, states that a lawyer must act competently to safeguard the information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. Colo. RPC 1.6, cmt. 17, further provides that a lawyer must take reasonable precautions to prevent information relating to the representation of a client from going to unintended recipients when it is being transmitted.

CBA Formal Ethics Opinion 90, adopted on November 14, 1992, generally addresses the issues of preservation of client confidences in view of modern communications technology. Opinion 90 requires that attorneys use reasonable care when using electronic communications to make certain that confidential information is not disclosed to unauthorized persons. Opinion 90 further requires that a lawyer should carefully consider the methods used for the communication of confidential information and has a duty to select communication methods that are not likely to result in unintentional disclosure of protected information.

The scenario presented indicates that the client information will be stored outside the direct control of the attorney or, at a minimum, under shared control. This raises potential ethical concerns about the confidentiality and security of the client information and whether it is adequately protected. The Committee believes that if an attorney decides to use a third-party service provider for electronic storage, he or she must use reasonable care and competently safeguard the confidential information from unauthorized access or disclosure. Reasonable care requires an adequate investigation into the selection of the service provider and a contract in which the provider represents that it will keep all information confidential and protected from unauthorized access or disclosure. Acting competently in selecting a service provider would include having sufficient knowledge of the service being provided and an understanding of the access and security

provisions of the service. Although it is not possible to guarantee that client information will not be improperly accessed or disclosed, it is necessary that the attorney take reasonable care to prevent such access or disclosure.

Other state bar associations have addressed the first issue and have similarly opined. *See* State Bar Association of North Dakota Ethics Committee Opinion 99-03, dated June 21,1999; State Bar Association of Nevada Standing Committee on Ethics and Professional Responsibility Formal Opinion No. 33, issued February 9, 2006; Advisory Committee on Professional Ethics Appointed by the Supreme Court of New Jersey Opinion 701 dated April 24, 2006; and Alabama Ethics Opinion 2010-02, Retention, Storage, Ownership, Production and Destruction of Client Files.

With respect to the second question, the Committee believes that the same standards of reasonable care and competency apply in deciding whether to use a third-party Internet provider to store client information in addition to or instead of the attorney's own computer backup system. The attorney has general obligations to maintain client documents and files, which would apply to this question. The Committee expresses no opinion as to whether the attorney should use an independent storage provider in addition to his or her own office backup program.

2014-1

Statement of Facts

A lawyer's prospective client and his two partners each has a one-third interest in a company. The client has evidence that the other two partners have engaged in illegal conduct. The civil remedies available include the court's power to divest the other partners' interests in the company and award those interests to the client.

The client is unable to finance the litigation and requests a contingent fee. A favorable judgment would not result in money damages, but would result in the client obtaining his partners' interests in the company.

Issue

Does Colo. RPC 1.8(i) permit an attorney to receive a reasonable contingent fee paid by means of (a) an equity interest in a company partially owned by the client or (b) a portion of the cash value of the equity interest awarded to the client in litigation, if the company is also the subject matter of the litigation?

Conclusion

The Committee believes that Colo. RPC 1.8(i) does not prohibit a lawyer from receiving as a contingent fee either an ownership interest in a client's business that is also the subject matter of the litigation or a cash payment based on the valuation of the equity interest awarded to the client in the litigation, as long as the attorney complies with the applicable Colorado Rules of Professional Conduct, including Colo. RPC 1.8(a), 1.5, and 1.7.

Analysis

Colo. RPC 1.8(i) states:

> 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 . . . contract with a client for a reasonable contingent fee in a civil case.

The Committee believes that both of the arrangements proposed fall within the contingent fee exception of Colo. RPC 1.8.

ABA Formal Opinion No. 00-418 (2000) provides that the Model Rules of Professional Conduct do not prohibit a lawyer from acquiring an ownership interest in a client, either in lieu of a cash fee for

providing legal services or as an investment opportunity in connection with such services. The ABA stated in its opinion:

> In our view, when the corporation has as its only substantial asset a claim or property right (such as a license), title to which is contested in a pending or impending lawsuit in which the lawyer represents the corporation, [Model] Rule 1.8(j) [which is identical to Colo. RPC 1.8(i)] might be applicable to the acquisition of the corporation's stock in connection with the provision of legal services. *If the acquisition of the stock constitutes a reasonable contingent fee, however, Rule 1.8(j) would not prohibit acquisition of the stock.*

Id. at p. 9 (emphasis added). Although it did not address this issue specifically, the Committee endorsed ABA Formal Opinion No. 00-418 in its Ethics Opinion No. 109: Acquiring an Ownership Interest in a Client (2001). The ABA's conclusion is consistent with Opinion No. 94-15 of the Arizona Committee on the Rules of Professional Conduct (1994), and *Beatie v. DeLong*, 561 N.Y.S. 2d 448 (App.Div. 1990).

Although the Committee believes that Colo. RPC 1.8(i) does not prohibit either of the two proposed fee arrangements, the reasonableness and disclosure requirements of Colo. RPC 1.8(a) must be satisfied, because the proposed contingent fee involves acquiring an interest in the client's business. *See* Colo. RPC 1.8, cmts. 1 and 4. The attorney also must comply with Colo. RPC 1.5, which requires that the fee charged must be reasonable in light of the factors listed in Colo. RPC 1.5(a) and must satisfy Chapter 23.3 of the Colorado Rules of Civil Procedure, "Rules Governing Contingent Fees."

In evaluating whether the contingent fee is "reasonable" under Colo. RPC1.5(a) and 1.8(a), there must be at least a threshold determination or estimate of the market value of the equity interest at issue at the time the fee agreement is executed. Otherwise, it would be difficult to make the "reasonableness" determinations required by Colo. RPC 1.5(a) and 1.8(a). The reasonableness of the contingent fee agreement also must be assessed retrospectively at the conclusion of the matter. *See Berra v. Springer & Steinberg*, 251 P.3d 567 (Colo.App. 2010).

The attorney also needs to consider whether any concurrent conflicts of interest arise under Colo. RPC 1.7 as a result of the proposed arrangement. For example, litigation decisions impacting the management of the client's business or a discrepancy between the value of the equity interest determined at the outset of the engagement and the client's position in the litigation might present conflict issues that would have to be addressed under Colo. RPC 1.7. In addition, the attorney must continue to assess whether any conflicts of interest develop in the course of the representation as a result of future events and must remain in compliance with CRPC 1.7 and the other Colorado Rules of Professional Conduct.

2014-2

Issue

Does appellate counsel appointed by the Office of Alternate Defense Counsel (OADC) violate his or her ethical duties to a present or former client by refusing to (1) review transcripts and documents contained in the client file when the purpose of the review is to identify and, if appropriate, redact material constituting contraband under the regulations of the Department of Corrections (DOC), or (2) deliver to the client information that is barred from disclosure by law, regulation, or court order?

Statement of Facts

A. OADC counsel. OADC appellate counsel are independent contractors. They are paid a flat hourly rate, and their appointment terminates when the mandate or other order terminating the appeal is issued. Clients are typically advised at the outset of the representation that OADC counsel will review the trial transcripts but see no reason why the client needs personal copies of transcripts and documents from the court file and, if copies are requested, payment must first be made by the client to the court reporter. Nevertheless, OADC counsel receive requests from current and former clients for copies of transcripts and

other documents from their client files. Former clients routinely cite Colo. RPC 1.16 and this Committee's Formal Opinion 104 in asserting that OADC counsel are ethically required to surrender such materials to them.

B. Incarcerated clients. DOC considers certain information frequently found in transcripts and the client file (whether in electronic or printed format) to be contraband and, by regulation, provides that it is the responsibility of the inmate's counsel to redact such information before sending those materials to the inmate. However, OADC does not pay for client copies of transcripts or documents, nor does it pay appointed counsel to review and redact those transcripts and documents, both of which must be done before they can be forwarded to incarcerated clients.

DOC regulations prohibit:

> personal communications; personal pictures; maps; victim information; phone numbers, addresses, social security, SID, or FBI numbers of victims, witnesses or employees; . . . personal information regarding other incarcerated individuals; . . . training manuals, restricted regulations, security threat group identifications, etc.

Colo. DOC Admin. Reg. 750-03 (K) (L) (Jan. 15, 2011).

In addition, it is a criminal offense to introduce contraband into a correctional facility. "Contraband" is defined as:

> [a]ny article or thing that poses or may pose a threat to the security of the detention facility as determined by the administrative head of the detention facility if reasonable notice is given that such article or thing is contraband.

CRS Ann. § 18-8-204(2)(l). Because notice has been given by DOC regulation that information of this type is contraband, introduction of such information in unredacted transcripts or documents may expose counsel to prosecution for second-degree introduction of contraband. CRS § 18-8-204(1). Knowing and unlawful introduction of such contraband is a class 6 felony. CRS § 18-8-204(3). Finally, counsel could be charged with introduction of contraband in the first degree, a class 4 felony, if the attorney sends materials under 1,000 pages in CD or DVD formats, whether redacted or not, because the disc, when broken, has sharp edges and can be used as a dangerous weapon. *See* CRS Ann. § 18-8-203.

C. Other clients. In addition, counsel may, by reason of a court protective order or otherwise, be prohibited from providing unredacted documents to a current or former client, whether incarcerated or not.

Analysis

A. Former clients. Counsel's duty to provide to a former client documents from the lawyer's files for that client is addressed in Colo. RPC 1.16, which provides:

> 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. (Emphasis added.)

The Committee has previously discussed the requirements of Colo. RPC 1.16 (d) in its Opinion 104, adopted April 17, 1999. Opinion 104 states that it does not address surrender of documents in circumstances where "lawyers are subject to court orders that prohibit the disclosure of certain documents or certain information to the client." Opinion 104, footnote 5. Similarly, Opinion 104 does not expressly address the circumstance presented by an incarcerated former client's request to be provided at no charge with client file documents that would require review and perhaps redaction to comply with DOC regulations. The Committee also notes that, following the adoption of Opinion 104, Crim.P. 16, Part V(c) was amended to provide that "copies of any discovery provided to a defendant by court appointed counsel shall be paid for by the defendant."

Under the plain language of Colo. RPC 1.16, a lawyer's otherwise broad duty to surrender client file documents to former clients is tempered by the Rule's limitations that the surrender be "reasonably

practicable" and that the documents be those "to which the client is entitled." In the case of documents or information in documents subject to protective order or other prohibition against disclosure to the client, it would appear that the papers in question are not those "to which the client is entitled." Similarly, in the case of documents or information in documents (or CDs or DVDs containing documents) from which incarcerated clients are barred by DOC regulation, it would appear that the papers (or property) are not those "to which the client is entitled," nor would the surrender of those papers (or property) be "reasonably practicable."

The former client may have a legitimate interest in receiving redacted versions of the documents in question where, for example, only a portion of the content of a document contains prohibited material. However, creating such redacted versions of the materials would require the lawyer to perform additional legal services for the former client. Nothing in Colo. RPC 1.16 requires a lawyer to provide such additional legal services, whether or not the client is willing and able to pay for those services. Once the representation has terminated, and absent some prior agreement, the lawyer is not required to enter into a new engagement, even if it would be beneficial to the client for the lawyer to do so.

Accordingly, Colo. RPC 1.16 does not require a lawyer to perform the services of review and redaction of documents in the client file to produce versions of the documents that are suitable for surrender to the client under the terms of applicable law, court order, or regulation. To the extent consistent with such law, order, or regulation, nothing in this letter is intended to suggest that the lawyer may not surrender the documents to successor counsel for the purpose of performing such review and redaction. Finally, his response does not address a circumstance in which the lawyer's withdrawal or other termination of the representation occurs at a time when the client has an acutely time-sensitive need for the documents in redacted form.

B. Current clients. Colo. RPC 1.16 and Opinion 104 are inapplicable when a current client requests transcripts and documents from the client file.

With respect to the current client who is incarcerated, documents or information in documents (or CDs or DVDs containing documents) that are contraband under DOC regulations, the lawyer may not provide the relevant documents, information, or media storage devices to the client. *See* Colo. RPC 1.2 (d) ("A lawyer shall not . . . assist a client . . . in conduct that the lawyer knows is criminal. . . ."). While a lawyer is bound to promptly comply with a client's reasonable requests for information (*see* Colo. RPC 1.4(a)(4)), that obligation is not without limits. As the comments to the Rule recognize, rules or court orders may preclude disclosure of particular information supplied to the lawyer. *Id.*, cmt. 7.

Whether a lawyer is ethically required to perform the review and redaction necessary to produce versions of the documents that are suitable for surrender to the client under the terms of applicable law, court order, or regulation depends on the scope of representation. The Committee understands that the scope of representation provided by OADC does not include review and redaction services for this purpose. Accordingly, the Committee determines that the lawyer is not required to provide this service to the incarcerated client absent an agreement to do so.

Third-party payment of a defendant's legal fees can raise professional, due process, and Sixth Amendment concerns. *See Wood v. Georgia*, 450 U.S. 261,268 (1981) ("inherent dangers" arise when defense counsel is hired and paid by a third party); Ariz. Ethics Op. 2001-06 (lawyers should not contract with county to represent indigent defendant if contract might induce lawyer to act contrary to clients' interests). *See also* ABA Formal Opinion 87-355 (1987) (it is of "primary importance" that the payment of fees by a third party does not allow the third party to direct or regulate the lawyer's professional conduct). The Colorado Rules of Professional Conduct prohibit a lawyer from allowing a third party who pays for legal services on behalf of a client to interfere with the lawyer's exercise of independent professional judgment. Colo. RPC 1.8(f)(2) and 5.4(c).

The facts support the conclusion that the limitation of the scope of representation by OADC does not interfere with the exercise of independent judgment on behalf of clients. Accordingly, this limitation does not create a conflict prohibited by Colo. RPC 1.8(f)(2) or compromise the lawyer's professional independence in violation of Colo. RPC 5.4(c).

2014-3

Statement of the Facts

A law firm represents the estate of a deceased personal injury attorney who had entered into contingent fee agreements with a number of clients. These cases were transferred from the deceased attorney to the firm.

Issue

On behalf of the estate, may the firm assert retaining liens on the clients' papers prior to the completion of the contingency?

Conclusion

A retaining lien may not be asserted in a contingency fee case prior to completion of the case.

Analysis

Colorado's retaining lien statute, CRS § 12-5-120, provides that an attorney has a lien for a general balance of compensation upon any papers of his client that have come into his possession in the course of his professional employment. However, Colorado law provides that there must be fees or costs actually owed for the attorney to rightfully assert the lien and retain the client's file. *People v. Garnett*, 725 P.2d 1149 (Colo. 1986). CRCP 1.16(d) provides that, upon termination of representation, a lawyer shall surrender papers and property to which the client is entitled, but may retain papers relating to the client to the extent permitted by other law. May the firm assert a claim in *quantum meruit* and thus invoke a retaining lien for services performed prior to the completion of the contingency?

This question was determined in *Melat, Pressman & Higbie LLP v. Hannon Law Firm, LLC*, 287 P.3d 842 (Colo. 2012), which held that, prior to completion of a contingency, the reasonable value of the attorney's services is too uncertain, and so the right to recover fees, if there is a recovery, does not accrue until the case is completed. The Committee believes this is tantamount to a holding that an attorney whose representation terminates during the pendency of a contingent fee case is not entitled to fees for the reasonable value of the services until the completion of the case and then only if there is a recovery. On this basis, the Committee concludes that it would be a violation of CRCP 1.16(d) to assert a retaining lien prior to the completion of the contingency.

2014-4

Statement of Facts

A lawyer receives an e-mail from opposing counsel, who has copied his client and other office personnel as a "cc." The lawyer responds using the "reply all" function.

Issues

Does a "reply to all" e-mail, which includes a transmission of the communication to opposing counsel's client, *ipso facto* violate Colo. RPC 4.2? Can opposing counsel's consent to the communication with his client be inferred because he initiated the communication, and can he revoke that consent? What are the professional responsibilities of a lawyer in responding to future e-mails in which the opposing counsel's client is copied?

Conclusion

Absent consent by opposing counsel, any communication made to a represented party, even if inadvertent, likely would violate Colo. RPC 4.2. No bright-line rule exists for inferring consent, and implied consent should rarely, if ever, be presumed. Obtaining express consent is preferable. To avoid the risk of violating Colo. RPC 4.2, the best practice is to discontinue the use of "reply all" e-mails if the other lawyers in the subject matter of the engagement continue "cc" e-mails to their clients on group e-mails.

Analysis

Colo. RPC 4.2 provides that, in representing a client

> a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Absent consent by opposing counsel, any communication made to a person the lawyer knows to be represented in the subject matter of the representation, even inadvertent, likely would violate the first part of Colo. RPC 4.2.

The second part of Colo. RPC 4.2, however, allows a lawyer to communicate with a represented party if the lawyer representing the party consents to the communication. Neither the Rule nor the comments discuss whether the "consent of the other lawyer," as the Rule provides, must be express or may be implied. The Committee believes that Colo. RPC 4.2 permits a lawyer's consent to be implied. Therefore, if a lawyer does not want to risk the chance of impliedly consenting to opposing counsel's communication with his client by "cc-ing" his client on the e-mail communication, then the sending lawyer should be explicit. The Committee cautions, however, that because no bright-line rules exist for inferring consent, implied consent should rarely, if ever, be presumed, and obtaining express consent is far preferable for the careful practitioner.

Consent may be revoked at any time by a clear statement to that effect. Without the consent of opposing counsel—or in the event such consent is withdrawn—a lawyer should avoid knowingly communicating with a represented party and thus should not send "reply to all" e-mails that include the opposing counsel's client as a recipient. The Committee therefore suggests that if a lawyer sends e-mails to opposing counsel using the "reply all" function, then the lawyer should pay particular attention to the e-mail addresses listed in the "cc" field in all such outgoing e-mails. If an e-mail address is identified as belonging to a represented party, that e-mail address should be deleted or the lawyer should obtain explicit consent from the party's lawyer before replying to all. The Committee believes the best practice is to discontinue the use of "reply all" e-mails even if opposing counsel continues to copy their client in e-mails. Doing so eliminates a potential Colo. RPC 4.2 violation for inadvertent disclosures of attorney–client communications.

2014-5

Statement of Facts

A lawyer is engaged by an insurance carrier to serve as defense counsel to represent an insured. The answer is due, but the lawyer cannot make contact with the client.

Issue

Is it ethical for retained counsel to take action to protect the interest of the client (the insured), if the client cannot be contacted?

Conclusion and Analysis

Yes, subject to certain limitations. The lawyer must first determine whether the insurance contract permits the insurer, on behalf of its insured, to establish an attorney–client relationship between the lawyer and the insured. This is a question of substantive law.

Assuming that an attorney–client relationship is formed, the lawyer should make reasonable efforts to locate the client. If, despite such reasonable efforts, the client still cannot be contacted, the lawyer may take steps to avoid reasonably foreseeable prejudice to the client, without breaching the ethical duty of communication or violating the requirement of informed consent.

Generally speaking, the lawyer should stay in the case as long as it is feasible to do so. If the lawyer's inability to contact the client significantly compromises the lawyer's ability to effectively carry out the representation, the lawyer should withdraw. The lawyer should not mislead the court into believing that any pleadings were prepared with the client's input, but at the same time, should not disclose the client's unavailability if such disclosure would prejudice the client. The determination of what actions, if any, may be taken on the absent client's behalf will be highly dependent on the facts and circumstances of the case.

2014-6

Statement of Facts

An attorney wants to record a radio advertisement in which a local sports or radio celebrity provides listeners his practice area(s) and contact information. The advertisement would not contain an explicit endorsement or testimonial; rather, it would simply provide information about the attorney's practice.

Issues

May an attorney record a radio advertisement using a celebrity spokesperson to provide listeners the attorney's or law firm's name, practice area(s), and contact information? If so, may an attorney or law firm pay the celebrity directly or through the marketing department of the radio station?

Conclusion

A radio advertisement where a celebrity provides information about an attorney's practice area and contact information is permissible, unless it misleads consumers into thinking that the celebrity is a former client, or creates an unjustified expectation about the results that will be achieved. Because that type of radio advertisement is permissible under the Rules, an attorney or law firm may pay the celebrity directly or through the marketing department of the radio station.

Analysis

The First Amendment protects commercial speech, including attorney advertisements. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 382 (1977); *Crowe v. Tull*, 126 P.3d 196, 202 (Colo. 2006). Neither the federal courts in the Tenth Circuit nor the Colorado appellate courts have addressed the issue of attorneys using celebrity spokespersons in advertisements. However, federal courts in the Fifth Circuit recently granted broader First Amendment protection to attorney advertisements containing testimonials and spokespersons. *See Pub. Citizen Inc. v. Louisiana Attorney Disciplinary Bd.*, 632 F.3d 212, 223 (5th Cir. 2011) (holding that a blanket prohibition against any communications containing a testimonial about or a reference to past successes violates the First Amendment); *Pub. Citizen, Inc. v. Louisiana Attorney Disciplinary Bd.*, 642 F.Supp. 2d 539, 557 (E.D.La. 2009) (holding that requiring a spoken or written disclosure that the spokesperson is not a lawyer and is being paid violates the First Amendment because the state did not show that such ads are inherently misleading), *aff'd in part and rev'd in part on other grounds,* 632 F.3d 212 (5th Cir. 2011).

Consistent with First Amendment jurisprudence, Colo. RPC 7.1, cmt. 2 describes the balance between protecting truthful communications and preventing misleading statements:

> Truthful communications regarding a lawyer's services provide a valuable public service and, in any event, are constitutionally protected. False and misleading statements regarding a lawyer's services do not serve any valid purpose and may be constitutionally proscribed.

In Colorado, attorney advertisements must not be false or misleading about the lawyers or their services. Colo. RPC 7.1(a). The Colorado Rules consider the following types of statements misleading:

- implications that the client does not have to pay a fee if there is no recovery, unless there is a disclosure that the client may be liable for costs (Colo. RPC 7.1(d))
- characterizations of a lawyer's fees such as "cut-rate," "lowest," and "cheap," unless those statements can be factually substantiated (Colo. RPC 7.1, cmt. 5)
- statements that a law firm has a vast number of years of experience, by aggregating the experience of all members of the firm (Colo. RPC 7.1, cmt. 6).

Conversely, the Rules explicitly permit attorney advertisements containing a lawyer's name or firm name, address, and telephone number. Colo. RPC 7.2, cmt. 2.

Although an attorney may not pay someone to recommend his or her legal services (*see* Colo. RPC 7.2(b)), attorneys may "pay the reasonable costs of communications" permitted by the advertising rules. Colo. RPC 7.2(b)(1). *See also Pub. Citizen, Inc.*, 642 F.Supp. 2d at 557-56. Permissible advertising costs include television and radio airtime, and compensation of "agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff and website designers." Colo. RPC 7.1, cmt. 5. Although not specifically enumerated in the Colorado Rules, based on *Public Citizen, Inc.*, which permits the use of paid spokespersons, an attorney or law firm may pay the celebrity directly or through the marketing department of the radio station.

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