

**No. 2021-2. Does the execution of a release in a tort matter containing a confidentiality provision by both the plaintiff and the plaintiff’s attorney create a conflict of interest between the two?**

## **Facts**

You are a plaintiff’s lawyer. One of your clients was offered and accepted a sum of money to release his negligence claims against the defendant. Although not stated in the inquiry, you have confirmed to the Committee that there was one tortfeasor and it was a “health facility” as defined in the Candor Act (Act), CRS §§ 25-51-101 through -106, and that the settlement was reached following the procedures set forth in the Act. At the time of the offer and acceptance, the release had not been prepared nor had its language been specifically agreed to. However, the client agreed to keep the terms of the agreement confidential as part of his acceptance of the defendant’s offer.

Subsequently, a release that included a confidentiality provision was prepared and presented to you and your client, and you both signed it. The confidentiality provision prohibited public disclosure of “any information about the Candor process or any Candor compensation paid relating to the potential claims that are the subject of this Release.”

## **Issue**

Does including the confidentiality provision in the release create a conflict of interest between the lawyer and the client?

## **Analysis**

The inquiry implicates the Act and Rules 1.7 and 1.6 of the Colorado Rules of Professional Conduct (Rules or Colo. RPC).

### ***The Act***

The Act provides that “open discussion communications and offers of compensation” made pursuant to the Act are “privileged and confidential and shall not be disclosed.” CRS § 25-51-105(1)(b). The confidentiality provision contained in the release signed by you and your client appears to fall within the four corners of the Act’s confidentiality requirements.

Based on the information provided, it is the Committee’s opinion that the confidentiality provision quoted in the inquiry does not create a conflict of interest between you and your client.

### ***The Rules***

Rule 1.7 addresses concurrent conflicts of interest. It provides, in pertinent part, that a concurrent conflict of interest exists if there is significant risk that the representation of a client 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.” Colo. RPC 1.7(a)(2).

You do not raise any responsibilities to other clients or former clients, so that part of the rule is not implicated here. To the extent, if any, the confidentiality provision in the release might be construed as creating a responsibility of confidentiality to a third person who is not the lawyer’s client, namely a participant such as a “health care provider” or “health facility” as defined in the Act, your representation of the client is not materially limited by that responsibility because the Act itself mandates such confidentiality.

The release provision is also consistent with the “same ethical obligation to maintain confidentiality under Rule 1.6. Colo. RPC 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 one of the exceptions contained in paragraph (b). None of the exceptions in Rule 1.6(b) are implicated here. Rather than consenting to disclosure, the client specifically agreed to keep the terms of the agreement confidential as part of his acceptance of the defendant’s offer.

Therefore, even without the confidentiality provision in the release, you could not disclose the proceedings under the Act or the compensation offered or paid pursuant to the Act without violating both the confidentiality mandate in the Act and the lawyer’s obligation to maintain confidentiality under Colo. RPC 1.6(a). The same analysis applies to any personal interest you might have in publicly disclosing the proceedings under the Act or the compensation offered or paid pursuant to the Act.

## **Conclusion**

Because the Act on its face mandates confidentiality, the client agreed to keep the terms of the agreement confidential as part of his acceptance of the defendant’s offer, and you have an obligation under Colo. RPC 1.6(a) not to disclose information relating to the representation of the client, a conflict of interest is not created between the lawyer and the client by the inclusion in a release of the confidentiality provision.