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

[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

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

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individuals,but to represent particular types of clients who are eligible for representation under grants from or contracts with those providers.

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

[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).

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:

[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.

> 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

[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).

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

[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).

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

[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.

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

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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).

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

[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.

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]

[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

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.

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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

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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.

133 ETHICAL DUTIES OF A LAWYER WHO IS PARTY TO A MATTER SPEAKING WITH A REPRESENED 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

[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*.

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]

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[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")

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.

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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).

[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."

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.

[2] *See*, *e.g.*, CBA Op. 68 (discussing the considerations involved in parties' mutual transactional interests).

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.

[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).

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].

[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].

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

[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.

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.").

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