

A large, multi-story brick building with a fire escape and a water tower in the background. The building has several windows and a prominent corner. The water tower is labeled "BROOKE LOFTS". The brickwork is reddish-brown and shows some signs of age and wear. The sky is a clear, light blue.

CBA Real Estate Section: Ethics CLE Luncheon

Deanne Stodden & Kendra Beckwith
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MESSNER REEVES LLP



Opinion 129: Ethical Duties of Lawyer Paid by One Other than the Client

MESSNER REEVES LLP

Rule 1.8(f)

The Colorado Rules of Professional Conduct allow a lawyer to provide legal services to a client and accept payment for those services from a third party, provided Rule 1.8(f)'s criteria are satisfied:

- The client must give informed consent;
- There must be no interference with the lawyer's independence or professional judgment or with the client-lawyer relationship; and
- The confidentiality of information related to the representation must be maintained.

Best Practice

- Unequivocally and plainly identify (preferably in writing) who the client is and who the third-party payer is.
- Express (preferably in writing) the scope of the lawyer's duties owed and services to be provided to the client, the absence of any professional duties owed to the third party, and the terms of the fee arrangement with the third party.

Informed Consent

- In all situations the client must give informed consent to the third-party payer arrangement. Colo. RPC 1.8(f)(1).
- 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].

Conflict of Interest

- 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. See *also* Colo. RPC 1.8, cmt. [13].
- Most likely to arise where, in the same litigation, one client wants to pay for both his and a co-client's legal fees.

What More Must You Do

- The lawyer must analyze whether the lawyer's responsibilities to the client benefitting 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 informed client consent.
- If: (a) the conflict is consentable under Rule 1.7(b); (b) the clients have received adequate information about the risks of the dual representation; and (c) both clients have given informed consent, confirmed in writing, *then* the lawyer may represent both clients and accept payment from only one.

Additional Considerations

- Avoiding interference with the lawyer's professional judgment and independence
- Client's right to make decisions
- Client communications
- Protecting confidential information

Best Practice

- Communicate with both the client and the third party in an engagement letter signed by both parties *prior* to the payment arrangement being implemented.
- See Opinion 129 for specific discussion of what should be included in fee agreement.



Opinion 130:
Online Posting
and Sharing of
Materials Related
to the
Representation of
a Client

Information Within Opinion 130's Scope

“[M]atters communicated in confidence by the client” and “all information relating to the representation, whatever its source.” Colo. RPC 1.6, cmt. [3].

“relating to the representation of a client”

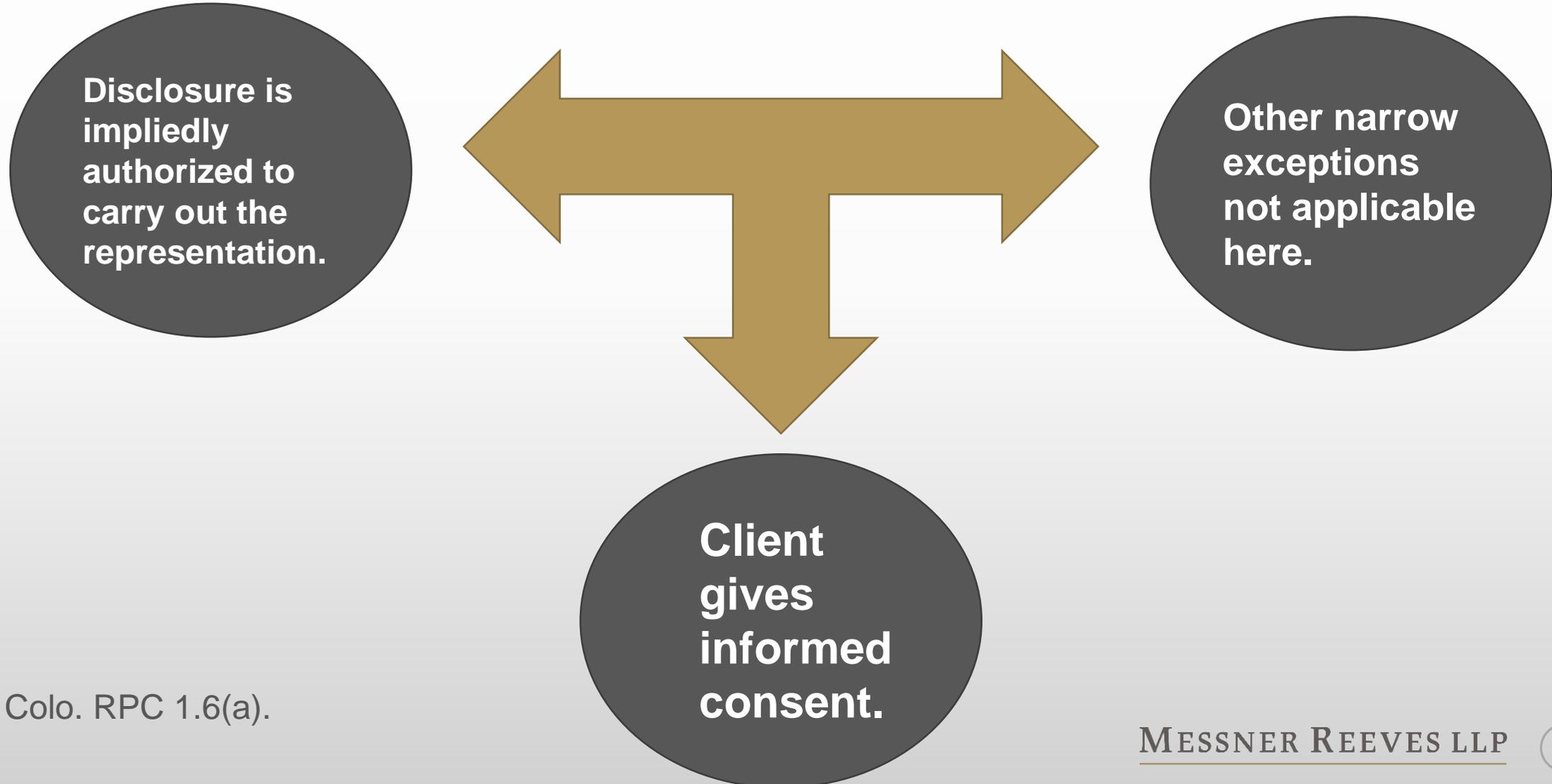
Colo.RPC 1.6(a).

“communication made by the client to [the attorney] or [the attorney’s] advice given thereon in the course of professional employment”

C.R.S. § 13-80-107(b)

Sharing Rule 1.6 Information

A lawyer shall not reveal information relating to the representation of a client unless

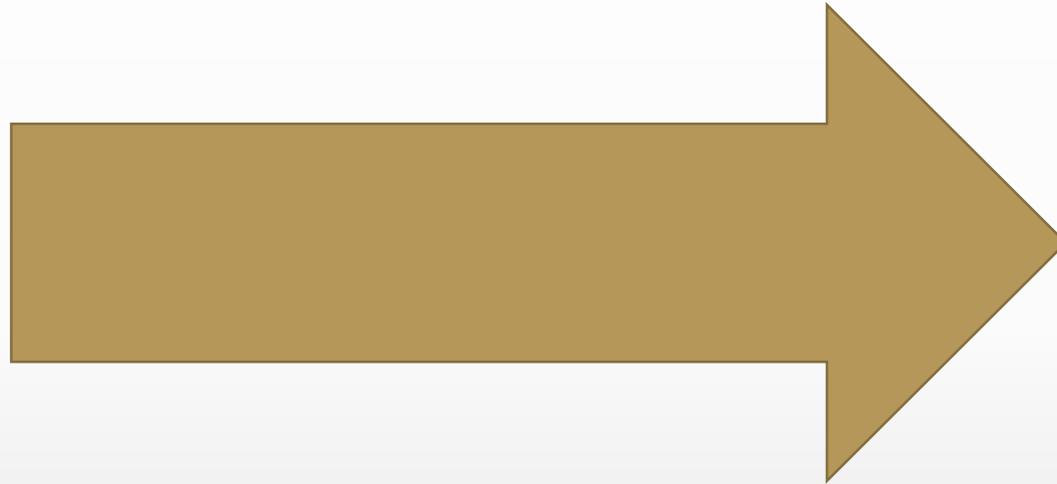


Colo. RPC 1.6(a).

The “Publicly Available” Myth

- Mere fact that information exists in public records does not permit dissemination without consent or other protective measures
- No exception exists for public records
- This includes, for example, court filings or other information that has been in the news

Key – Lawyer Shared It



So can I share anything?

- Yes - with client's informed consent
 - Colo. RPC 1.0(e)
- Yes - former client and information is “generally known”
 - Colo. RPC 1.9(c)(1)
- Yes - with sufficient redactions
 - Colo. RPC 1.6(a)

“Informed Consent”

“[C]ommunicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Colo. RPC 1.0(e).

“Informed Consent”

At a minimum:

- client understands exactly what information the lawyer proposes to publish;
- manner of publication;
- to whom the information will be available;
- foreseeable ramifications to the client and the client’s case;

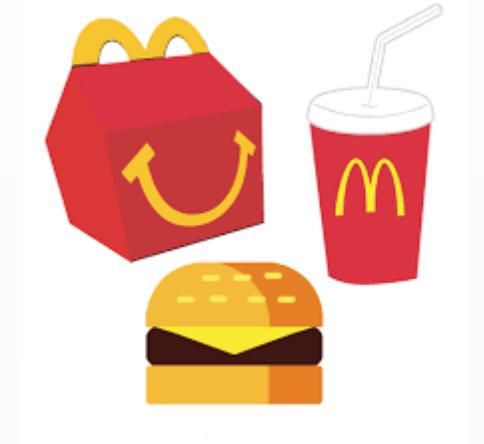
“Informed Consent”

At a minimum:

- may withhold consent;
- if unrelated to the legal matter, must disclose purpose; and
- that once the lawyer discloses the information, those receiving the information may distribute it further.

“Generally Known” – Former Clients

- No governing interpretation in Colorado
- Opinion 130 points to persuasive authority
- No just public record, but public knowledge
 - Happy Meal example
- Be cautious



“Sufficient Redactions”

- Opinion 130 suggests consent is preferred
- Redact information that would
 - Identify the client and
 - Is irrelevant for purposes of disclosure
- Safe documents
 - CVs for disclosed experts
 - Legal citations

Remember, still subject to . . .

- Court orders prohibiting disclosure
- “Material prejudice to an adjudicative proceeding” - Colo. RPC 3.6(c).
- Honest conduct rule – Colo. RPC 8.4(c)
- Embarrassing client rule – Colo. RPC 4.4(a)



Opinion 133:
Ethical Duties of a
Lawyer Who is
Party to a Matter
Speaking With a
Represented
Party

The Crux of the Issue

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.

In other words, does your status as a lawyer become irrelevant because you are a party?

Rule 4.2

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Two Scenarios

- The lawyer/party is representing himself or herself in the matter.
- The lawyer/party is represented by counsel.

Scenario One

- 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 a matter and, therefore, violated Rule 4.2 when he communicated directly with a represented adverse party.
- OPDJ concluded that Rule 4.2 applies to a lawyer's communication while acting *pro se*.
- The OPDJ identified 3 purposes of Rule 4.2

Purposes of Rule 4.2

- To provide protection of the represented person against overreaching by adverse counsel;
- To safeguard the client-lawyer relationship from interference by adverse counsel; and
- To reduce the likelihood that clients will disclose privileged or other information that might harm their interests.

Scenario Two

- Addressed in only two jurisdictions
- Connecticut: 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.
- Texas: rejected the Connecticut 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.”

Colorado

- No Colorado decision.
- The Ethics Committee concluded 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 relied 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.”



Opinion 135:
Ethical
Considerations in
the Joint
Representation of
Clients in the
Same Matter or
Proceeding

Joint Representation

- Opinion 135 generally assumes both clients have the same or similar defense interests in the facts or allegations at issue.
- Distinct from representing two clients in the same matter where the interests are different.

Joint Representation



Conflicts Check: Get Consent!

Each person for whom you are clearing conflicts is a prospective client.

Lawyers cannot represent a client with interests materially adverse to those of a prospective client in the same matter “if the lawyer received information from the prospective client that could be significantly harmful to the prospective client.” (Colo. RPC 1.18(c).)

BEST PRACTICE: 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. (Colo. RPC 1.18, cmt. [5]; Colo. RPC 1.0(e).)

Concurrent Conflicts

Representation notwithstanding concurrent conflict is permissible if:

- the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- representation is not prohibited by law, and does not involve assertion of a claim by one client against another client in the same litigation or proceeding; and
- each affected client gives informed consent, confirmed in writing.

(Colo. RPC 1.7(b).)

Informed Consent

“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).)

Joint Representation of Clients With Concurrent Conflicts

Your engagement letter should include:

- Informed consent
- Duty of loyalty
- Confidentiality and information sharing
- Attorney-client privilege
- Priority client, prospective consent
- Advice of independent counsel
- Material risks of waiving future conflicts

Conflict Arises After Engagement

- Was this contemplated in engagement letter or during the conflicts check – i.e., was there prior consent?
 - If yes, is it reliable? Was it informed?
- If not contemplated, new conflict has arisen
 - Requires informed consent, confirmed in writing
 - If clients will not consent, refer to engagement letter
 - Keep priority client, or withdraw

You're Told Not to Share Information

American Bar Association

Highly doubtful that advance/future consent is informed consent – because its not likely that there was adequate information at time of consent

If asked to withhold, you must withdraw from representing the other client

Other states

If you said you would share, you must share, regardless of what client directs (often don't address subsequent necessity of withdrawal)

The Restatement (Third) of the Law Governing Lawyers

Discretion: give limited warning that matter seriously and adversely affecting other client's interest has arisen

Further discretion: if in the lawyer's reasonable judgement, the immediacy and magnitude of risk to the affected co-client outweigh the interest of the communicating client in continued secrecy.

Likely have to withdraw from everyone, unless your engagement letter allows you to continue representation

One Client Revokes Consent

- Was there reliable prospective consent in the retention agreement?
 - If so, can stay with the priority client.
- Can you obtain informed consent from both parties to continue representation of one or both parties (if not contemplated in retention agreement)?
- If one or both clients withdraw previously provided consent to joint representation, that client becomes a former client for purposes of Rule 1.9.



QUESTIONS?

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