

Handling Electronic Documents Purloined by a Client

BY ALEC ROTHROCK

This article considers ethical issues raised when a client in pending litigation forwards her lawyer electronic documents that the client obtained without permission from the opposing party's computer.

Like the cat that capers into the house carrying a dead bird in its mouth, litigation clients believe they are being helpful when they forward emails or other documents to their lawyer that they obtained without permission from the opposing party's computer. But rather than helping, such actions plunge attorneys into an ethical morass.

The cat's owner can readily dispose of the bird's remnants. But the lawyer cannot simply delete the electronic documents and advise the client to do the same. Permanently deleting electronic information may constitute destruction of evidence of a crime or spoliation of evidence in a civil case, and it requires technological skill and effort. On the other hand, disclosing the material to the opposing party might incriminate the client, and opposing counsel might exploit the situation. The complexity of the problem increases when the purloined material consists of communications between the opposing party and her lawyer, which might be protected by the attorney-client privilege, or critical information helpful to the client's case, which the opposing party should have disclosed anyway.

The answers to such ethical quandaries lie in a mixture of legal ethics, criminal law, rules of civil procedure, and other substantive law, as applied to an infinite variety of facts. As one commentator aptly described it, thanks for the headache.¹

This article analyzes ethical issues created when clients forward to their lawyers documents that they obtained without permission from the opposing party's computer. It does this by positing a hypothetical set of facts involving a lawyer's representation in a domestic relations case. The article addresses relevant rules of professional conduct; suggests an interim protocol to contain the problem while the lawyer attempts to sort it out; and analyzes factors the lawyer should consider in deciding how ultimately to react. It concludes with recommendations to minimize the problem or avoid it altogether.

The article does not address the similar but distinct problems associated with a lawyer's responsibilities upon receipt of documents sent to the lawyer inadvertently or anonymously.²

Hypothetical Facts

Lawyer, a sole practitioner, represents husband in a dissolution of marriage action. Husband moved out of the marital home where wife continues to live. During a birthday party for the couple's child, husband went to wife's house with her permission. He claims that he passed by wife's home computer and noticed that an email was open. Husband read the email, which confirmed his suspicion that wife is having an extramarital affair.

Husband returned to and entered the marital home a few days later, when it was empty. Husband has a key, but claims the door was unlocked. Husband searched wife's inbox for similar emails and discovered several. He also discovered emails between wife and her lawyer in the dissolution of marriage case and forwarded all of them to his own computer.

Subsequently, husband forwarded all these emails to Lawyer without indicating to Lawyer what he sent. Lawyer opened one of the forwarded emails and began to read it. It is one in a chain of several emails in reverse chronological order. After reading the first paragraph, Lawyer became alarmed at the content and noticed the names of the participants, which included Lawyer's opposing counsel. He immediately stopped reading, exited the document, and called his client.

Husband explained how he came into possession of the emails. Lawyer expressed deep displeasure with husband's actions and advised him never to do this again. Lawyer also told husband that he may have committed a crime but Lawyer cannot be certain because he is inexperienced and unfamiliar with criminal law. Husband asked Lawyer whether any of the material can be used in the case. Lawyer responded that he had think about it and went home for the day.

Potentially Applicable Rules of Professional Conduct

Lawyer must consult several Colorado Rules of Professional Conduct (Colo. RPC or Rules) as a starting point to determine what to do.

Colo. RPC 1.2(d)

In relevant part, Colo. RPC 1.2(d) states that a lawyer may not "counsel a client to engage, or assist a client, in conduct that

the lawyer knows is criminal or fraudulent . . .” The threshold question is whether husband’s conduct constitutes a criminal act. Lawyer, with his lack of experience in criminal law, decides to consult with Criminal Defense Lawyer, a former district attorney who is experienced in criminal law.

Criminal Defense Lawyer considers cybercrime to be the most directly applicable criminal law. It is possible, though less likely, that husband’s conduct also falls under the federal Electronic Communications Privacy Act, which is broken down into the amended Wiretap Act and the Stored Communications Act.³ Cybercrime occurs when a person knowingly gains access to a computer without authorization, or exceeds that authorization.⁴ Cybercrime also occurs when a person knowingly gains access to a computer to commit theft.⁵

Criminal Defense Lawyer points out there is no indication that wife expressly authorized husband to access her computer or, more specifically, to read her emails. Husband’s review of the original email violated no crime, he says, because it was open on wife’s computer, similar to a letter left on a desk. Husband’s subsequent access to and acquisition of the other emails is a different matter. Husband might have committed theft, which would constitute a continuing crime as long as he maintained possession of the electronic material. However, if the value of the material as electronic data was minimal, the crime might be a petty offense. The value of the material would likely be contested.⁶

Criminal Defense Lawyer posits a potential defense: If wife’s computer is marital property, husband might have had a right of access to the computer without needing wife’s authorization. Criminal Defense Lawyer concludes by expressing his firm belief that husband may or may not have engaged in cybercrime.

Back in his office, Lawyer calls a long-time colleague to discuss Lawyer’s ethical obligations in the wake of the criminal law consultation.⁷ Colleague tells Lawyer that, given Criminal Defense Lawyer’s ambiguous opinion, he would assume that husband’s conduct constituted cybercrime or some other offense. However, because Lawyer was unaware that husband intended to gain access to wife’s computer,

Lawyer did not encourage or assist husband in violation of Colo. RPC 1.2(d).

Colleague opines that Lawyer could still violate Colo. RPC 1.2(d) depending on what he does next. A lawyer assists a client in criminal conduct if the lawyer suggests to the client how to conceal the client’s “wrongdoing.”⁸ A lawyer’s continued possession of stolen material might constitute a continuing crime.⁹ The commentary to Colo. RPC 1.2(d) states the problem succinctly:

When the client’s course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent.¹⁰

Colo. RPC 4.4

Colleague also discusses whether Colo. RPC 4.4 guides Lawyer’s future conduct. Colo. RPC 4.4(a) prohibits a lawyer from “us[ing] methods of obtaining evidence that violate the legal rights of such a person.” This includes obtaining information from third parties that invades the attorney–client privilege of one’s adversary.¹¹

Lawyer says he could not have violated Colo. RPC 4.4(a) because he had nothing to do with obtaining the emails; husband did it without his knowledge. Colleague responds that a lawyer in a 2016 Missouri attorney discipline case, *In re Eisenstein*,¹² made the same argument when bar counsel accused him of violating an identical rule in very similar circumstances. There, the husband in a domestic relations case gained access to his wife’s personal email account without her permission. He obtained his wife’s payroll documents and a list of direct examination questions her lawyer had emailed to her before trial. The husband gave the information to his lawyer, who read the documents but did not disclose them to opposing counsel. Instead, on the second day of trial, he handed the wife’s lawyer a stack of documents including the list of direct examination questions.¹³ This led to a hearing in the domestic relations case at which

both the husband and his lawyer testified, and the truth came out.

In a subsequent disciplinary case against him, the husband’s lawyer argued that he did not violate Missouri’s identical Rule 4.4(a) because he did not use improper means to obtain the documents; his client had obtained the documents. The Missouri Supreme Court rejected this argument, reasoning that “when a lawyer knows that he or she has improperly received information, ‘Rule 4–4.4 requires the lawyer to promptly notify the sender in order to permit that person to take protective measures.’”¹⁴

The Missouri Supreme Court also found that the lawyer violated two other rules with essentially identical counterparts in Colorado. “[B]y obtaining evidence procured through improper means and failing to immediately disclose the same to opposing counsel,”¹⁵ he violated Rule 4-8.4(c), which prohibits conduct involving dishonesty, fraud, deceit or misrepresentation; and “by concealing his possession of Wife’s payroll information and [her lawyer’s] direct examination questions until the second day of trial,”¹⁶ he violated Rule 3.4(a), which prohibits a lawyer from unlawfully obstructing another party’s access to evidence or unlawfully concealing documents that have potential evidentiary value. For violating these three rules, plus another rule based on unrelated conduct, the court imposed a six-month suspension, aggravated by the lawyer’s extensive prior disciplinary history.¹⁷

Colleague disagrees with the Missouri Supreme Court’s interpretation of Rule 4.4(a), not least because the passive activity of “improperly receiving evidence” from another is virtually the opposite of the active use of improper means to obtain evidence, which is what the rule proscribes.¹⁸ Colleague points out that under Colo. RPC 4.4(a) (and Missouri Rule 4.4(a)), the documents obtained using improper methods must “violate the legal rights” of the victim. The documents in *Eisenstein* included attorney work product in the form of the direct examination questions.¹⁹ Even though some of the emails included opposing counsel’s name, Lawyer does not know whether the emails include attorney work product or attorney–client

communications because he stopped reading them as soon as he realized what he was reading.

Colleague believes they must assume, for purposes of their analysis, that the emails include information protected by the work product doctrine or the attorney–client privilege. This means they must consider whether a Colorado court would follow *Eisenstein*’s interpretation of Rule 4.4(a).

Colleague then discusses Colo. RPC 4.4(b)²⁰ and (c),²¹ which address a lawyer’s obligations upon receiving documents²² sent “inadvertently” to a lawyer. Drawing on an ABA formal opinion,²³ Colleague expresses the view that neither subsection is applicable because husband did not send the documents to Lawyer *inadvertently*; he sent them quite deliberately.²⁴ This conclusion is consistent with Comment [2] to Colo. RPC 4.4, which states that the rule “does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person.”²⁵ As the ABA formal opinion states, “[w]hether a lawyer may be required to take any action in such an event is a matter of law beyond the scope of Rule 4.4(b).”²⁶

Colleague cautions, however, that this ABA opinion further states that although the application of substantive law is “beyond the scope of the Rules,” the Rules “do not exhaust the moral and ethical considerations that should inform a lawyer.”²⁷ This passage is significant, because courts in other states have treated it as an invitation to apply, through the back door of “substantive law,” the more restrictive protocol adopted in two ABA formal opinions from the 1990s that were later withdrawn in the wake of material changes to Model Rule 4.4 made in 2002 (and in 2008 in Colorado).²⁸ These courts reason that the “justifications underlying the protections afforded to inadvertent productions . . . apply with even greater, and stricter, force in connection with advertent but unauthorized disclosures.”²⁹

This logic is appealing, Colleague states, but its application departs from Rule 4.4(b), which lawyers must be able to rely on for disciplinary and civil liability purposes. And whether a court applying Colorado law would follow this minority of state courts is anyone’s guess.

Practical Considerations and Other Potentially Applicable Rules

If Colo. RPC 4.4 is inapplicable to “inappropriately obtained” emails—a conclusion compelled by Comment [2] to the Rule—it remains for Lawyer to decide what he may, must, and should do with the emails.

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No published
Colorado opinion
addresses
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authorities.
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The Initial Protocol

Colleague advises Lawyer to take the following initial steps:

- Do not read any more of the emails.
- Segregate and store husband’s email with the included emails in a separately marked electronic file, with the assistance, if necessary, of a competent information technology (IT) person and under the observation of a witness, who may be the IT person.
- Instruct all law firm personnel in writing (email is fine) to not attempt to access that electronic file.
- Direct the client in writing to immediately stop reading the emails; to refrain from destroying them, sending them to anyone

else, or allowing anyone else to read them or hear about their contents, or relocate them within their computers; and to await further instructions from Lawyer on the subject.

- Ask the IT person and the witness to prepare affidavits attesting to their observations.
- Save and store all of the foregoing emails and affidavits.

Lawyer’s use of the emails in the case may be out of the question, but that decision need not be made yet. First, Lawyer must determine what to do with them.

Is Lawyer Required to Turn Over the Emails to Law Enforcement?

Lawyer must first decide whether he has a duty to turn over the emails to law enforcement or prosecuting authorities, on the theory that the emails are or might be evidence of a crime. No published Colorado opinion addresses whether a lawyer has an obligation to turn over incriminating evidence to the authorities. In a footnote in the 1982 case *People v. Swearingen*,³⁰ the Colorado Supreme Court stated that because the lawyer in that case had voluntarily turned over certain evidence to the district attorney, it did not have to decide whether the lawyer had an affirmative duty to do so.³¹ No subsequent Colorado case has addressed the issue.

Shortly before the release of *Swearingen*, the CBA Ethics Committee issued Formal Opinion 60.³² This opinion analyzes a lawyer’s duties after a client has given the lawyer (1) possession of a gun allegedly used in a homicide, (2) possession of funds ostensibly stolen in a robbery, (3) knowledge of the location of the getaway car and the murder victim’s body, and (4) possession of a fingernail scraping recovered at the crime scene from the murder victim by the lawyer’s investigator. Although it cites various provisions of the since-repealed Colorado Code of Professional Responsibility, as well as criminal statutes related to accessories to crimes and tampering with evidence, Opinion 60 relies on some of the same sister-state cases mentioned in dictum in *Swearingen* to support its conclusion: “One principle emerges clearly from the case law: When the lawyer takes physical possession

of incriminating evidence, he has an affirmative duty to give the incriminating evidence to the proper authorities,” while maintaining the confidentiality of the client’s identity and communications with the client.³³

This broad principle is sometimes called the “*Olwell* rule” or “*Olwell* doctrine,” after the 1964 Washington Supreme Court case *State v. Olwell*. Opinion 60 does not identify the source of the *Olwell* rule, which, upon closer analysis, is essentially judge-made and not based on a particular legal ethics rule or criminal statute. A Comment to both Colorado and Model Rule 3.4 alludes to the *Olwell* rule in stating that “applicable law” may permit a lawyer to take possession of physical evidence to subject it to non-destructive testing, but that in such a case, “applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.”³⁴

It is a matter of conjecture whether the Colorado Supreme Court would hold that a lawyer has an affirmative legal duty to turn over incriminating evidence implicating a client to government authorities. If it did, the question would become *what kind* of evidence a lawyer is required to turn over. Several commentators have indicated that courts generally do not apply the *Olwell* rule to documentary evidence.³⁵ In its treatment of the subject, however, the *Restatement, Third, The Law Governing Lawyers* includes, within the types of evidence that lawyers must turn over to law enforcement authorities, documents (including those in electronic form) that are “used by the client to plan the offense, documents used in the course of a mail-fraud violation, or transaction documents evidencing a crime.”³⁶

One thing these *Restatement* categories have in common is that their content relates to criminal conduct. The content of the emails obtained by husband, in contrast, has nothing to do with criminal conduct; the documents are probative of no crime, their intrinsic value is nil, and their acquisition and possession do not alter, impair, or differ from the “originals” of those documents. It is their mere possession that represents, or may represent, evidence of a crime in the manner of obtaining them.

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Under Colo. RPC
3.3(b), a lawyer
who knows
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There are also practical complications associated with turning the documents over to law enforcement, including whether this could be done without identifying the client as the source. Even were this possible, deputizing a third party to turn them over to law enforcement anonymously, as is the tradition with some kinds of evidence,³⁷ serves no purpose if law enforcement does not understand the significance of the documents, especially when they are voluminous and there is no pending or imminent criminal proceeding in which they are relevant.

One commentator notes that “[m]ost tangible evidence of a client’s crime will fall into two broad categories: (1) contraband, instrumentalities or fruits of a crime; or (2) ordinary items that were not directly involved in the perpetration of a crime but implicate a client because of their content.”³⁸ The first category corresponds to the items discussed in Opinion 60. As to the second category, the author states that it is “not unusual for a client or third party to provide counsel with ordinary items that potentially incriminate a client, such as correspondence, emails or bank and phone records.”³⁹

Unlike contraband and fruits, mere possession of ordinary evidence is not a crime requiring counsel to stop possessing the evidence. Unlike an instrumentality, ordinary evidence usually was not directly involved in the perpetration of a crime. In most situations, counsel is not obligated to provide law enforcement with ordinary evidence unless a subpoena, court order, discovery obligation, cooperation agreement, or the like mandates disclosure. This is consistent with our adversary system in which the prosecution bears the burden of proof, and an accused has no generalized obligation to help prosecutors build their case. It also is consistent with an individual client’s Fifth Amendment right not to disclose evidence where the *act of production* could be incriminating.⁴⁰

Colleague thus advises Lawyer that he need not, and may not, turn over the emails to law enforcement.

Is Lawyer Required to “take reasonable remedial measures, including, if necessary, disclosure to the tribunal”?

Colleague raises another issue, whether Lawyer has a duty to inform the court about husband’s conduct. Under Colo. RPC 3.3(b), a lawyer who knows that a person, including a client, has engaged in criminal conduct related to a proceeding has a duty to “take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” This obligation exists even if compliance requires disclosure of privileged information or “information relating to the

representation” that Colo. RPC 1.6 otherwise requires a lawyer to treat as confidential.⁴¹ The purpose of Colo. RPC 3.3(b) is “to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process.”⁴²

The applicability of this rule depends, at least initially, on whether Lawyer “knows” that husband engaged in criminal conduct. A lawyer’s “knowledge,” in this context, “denotes actual knowledge of the fact in question,” although knowledge may be “inferred from circumstances.”⁴³ If Lawyer does not know that husband’s conduct was criminal in nature, Lawyer has no obligation under Colo. RPC 3.3(b), but if Lawyer knows husband’s conduct was criminal, Lawyer has an obligation to take “reasonable remedial measures.”

One ethics committee analyzed a lawyer’s Rule 3.3(b) obligation under similar facts, with the significant exception that the client-husband had read, but not sent to his lawyer, his opposing party-wife’s emails. Significantly, the committee appears to have assumed that the wife’s emails “related to the proceeding,” within the meaning of Rule 3.3(b), because the emails included, as they do here, emails between the wife and her lawyer.⁴⁴ The committee did not decide whether the husband’s reading of his wife’s emails constituted a crime. As far as the lawyer’s ethical obligation was concerned, the committee concluded that “[s]ince the lawyer has not gained access to the e-mails or their contents, it may be a sufficient remedial measure for the lawyer to persuade the client to cease the misconduct. If that is enough to avert harm to the client’s spouse, then the rule would not require disclosure.”⁴⁵

Colleague states that it is reasonable to infer that this same ethics committee would have reached a different conclusion if the client-husband had sent the emails to his lawyer, as husband did here. He concludes that, if husband’s conduct was criminal, “reasonable remedial measures” would require disclosure of husband’s conduct to opposing counsel. Reasonable remedial measures would not require Lawyer to disclose husband’s conduct to the court, Colleague concludes, because husband made no false representation to the

court. And opposing counsel may inform the court of husband’s conduct anyway.

Whether husband’s conduct was criminal in nature is a critical determination under Colo. RPC 3.3(b) and many other rules of professional conduct. In addition, the fact that husband sent the emails to Lawyer makes a great difference under Colo. RPC 3.3(b). Both Lawyer and husband would have been much better off if husband had not done so.

May Lawyer Destroy the Emails and Advise Husband to do the Same?

Having dismissed the idea of “returning” the emails to husband as technologically impossible, Lawyer asks Colleague whether he could simply destroy the emails and advise husband to do the same. Colleague brings up Colo. RPC 3.4(a), which, in relevant part, prohibits a lawyer from unlawfully destroying a document having “potential evidentiary value” or advising a client to do so.⁴⁶ As mentioned above, the Missouri Supreme Court held, under very similar facts, that “by concealing his possession of Wife’s payroll information and [her lawyer’s] direct examination questions until the second day of trial,” the lawyer in that case violated a rule identical to Colo. RPC 3.4(a).⁴⁷

Colo. RPC 3.4(a) requires a lawyer to consider whether the document that might be destroyed has “potential evidentiary value” and whether destroying it would be “unlawful” under “applicable law.” A document having “potential evidentiary value” covers a lot of ground. One commentator states that “[k]nowingly destroying any evidence of a crime may constitute obstruction of justice, evidence tampering, aiding and abetting, or conspiracy, depending on counsel’s or a client’s intent, and the potential or actual existence of an investigation or a proceeding.”⁴⁸ Also, the term “unlawful” in Rule 3.4 has been interpreted to mean not only the destruction of evidence in violation of a criminal law,⁴⁹ but also the destruction of evidence in violation of a lawyer’s duty under civil law, such as discovery rules or tort law.⁵⁰ As such, the rule’s breadth is sweeping.

Suggesting that a client destroy evidence is an even worse idea.⁵¹ Encouraging a client to destroy evidence would violate the Rule

1.2(d) prohibition against counseling a client to engage in criminal conduct, as well as the prohibition in Rule 3.4(a) against counseling or assisting another person to obstruct another party’s access to evidence or unlawfully destroy evidence. It could have other consequences as well, including an order prohibiting introduction of certain evidence, an adverse-inference instruction, sanctions, conflicts of interest, disqualification, attorney discipline, and establishing the crime-fraud exception to the attorney-client privilege.⁵²

These considerations are particularly apt in domestic relations cases in Colorado. CRCP 16.2 states that parties in family law cases “owe each other and the court a duty of full and honest disclosure of all facts that materially affect their rights and interests and those of the children involved in the case.”⁵³ The Colorado Supreme Court has interpreted the parties’ disclosure obligations in domestic relations cases to reflect the principle that spouses “are in a fiduciary relationship with each other.”⁵⁴ A lawyer plainly cannot comply with her disclosure obligations if she has destroyed the documents required to be disclosed. The rules of civil procedure may impose the same obligations in non-domestic relations civil cases,⁵⁵ even though the disclosure obligation is often unclear. The emails are “information relating to the representation,” which means that Colo. RPC 1.6(a) prohibits the lawyer from disclosing it unless the client consents to disclosure or an exception applies. One exception permits a lawyer to disclose information relating to the representation to comply with the law or a court order.⁵⁶ If there is no clear disclosure obligation, the decision whether to disclose must be made by the client.⁵⁷ In that instance, it is also up to the client to destroy the emails.

Quite apart from the disciplinary consequences of obstructing access to or destroying potential evidence, lawyers may be subject to discipline for failing to comply with disclosure or discovery rules.⁵⁸ If it came to light that a lawyer and his client destroyed emails obtained surreptitiously by the client from an opposing party—at the lawyer’s direction or with his knowledge and acquiescence—there may be serious consequences for the lawyer’s reputation

RECOMMENDATIONS FOR LAWYERS HANDLING POTENTIALLY STOLEN DOCUMENTS

1 Do not take possession of unknown electronic or other documents proffered by a client.¹ Even when a lawyer does not possess potentially stolen documents, the lawyer faces many of the problems identified in this article. But the lawyer lacking possession will not be so personally involved and will have more freedom in giving advice and making tactical decisions with the client.

2 Do not destroy documents or advise a client to do so.²

3 At the earliest opportunity, advise clients, in person, not to access, copy, or send the lawyer the opposing party's electronic or paper documents.³ It is appropriate and desirable to include a provision to this effect in the fee agreement. Further, call it to the client's attention.

4 Lawyers lacking experience in criminal law should consult with, or refer the client to, a competent criminal lawyer for advice on the lawfulness of the client's actions and the applicable risks and options. Lawyers without a criminal law background should be very careful about giving advice to clients on criminal law issues. In many circumstances, lawyers can provide competent advice in fields that

are novel to them.⁴ But the danger is not so much in weak research or analysis of issues as it is in failing to spot all the issues that should be researched and analyzed.⁵ When the stakes are high, associating with a competent lawyer is a type of legal malpractice insurance, especially when the other lawyer forms an attorney-client relationship with the client and perhaps with the lawyer too.⁶ More nobly, associating with competent, experienced co-counsel is a great way to discharge the duty of competence under Colo. RPC 1.1.⁷ Further, though lawyers are presumed to be aware of the rules of professional conduct and their import,⁸ they may wish to consult with more experienced colleagues for advice on ethical obligations and tort liability.

5 "Consider filing a motion to quash, seeking a protective order, and appealing any court order requiring the disclosure of evidence implicating a client where there is a legal basis for doing so."⁹

6 "Document [your] efforts to legally and ethically resolve problematic situations in order to shield [yourself] and [your] client from any claims of inappropriate conduct."¹⁰

NOTES

1. See Jenness, "Ethics and Advocacy Dilemmas—Possessing Evidence of a Client's Crime," *The Champion* 16, 19 (Dec. 2010).

2. *Id.*

3. *Id.*

4. Colo. RPC 1.1, cmt. [2].

5. *Id.*

6. It might not be necessary for the lawyer to be a client when the

questions revolve around the client's criminal exposure and future obligations. However, the lawyer may wish to be a client when asking about professional duties, including duties to turn over evidence to law enforcement.

7. *Id.*

8. *In re Fisher*, 202 P.3d 1186, 1198 (Colo. 2009).

9. Jenness, *supra* note 1 at 19–20.

10. *Id.* at 20.

and for the client's case.⁵⁹ Colleague thus strongly advises Lawyer not to destroy the emails and not to direct husband to do so.

Should Lawyer Move to Withdraw?

Lawyer asks Colleague whether he should move to withdraw from representing husband. Colleague explains that for a lawyer to withdraw from a case, there must exist grounds for withdrawal under Colo. RPC 1.16(a) (mandatory withdrawal) or Colo. RPC 1.16(b) (permissive withdrawal). The difference between mandatory

and permissive withdrawal is that when grounds for mandatory withdrawal exist, the lawyer must withdraw or, in litigation matters, file a motion to withdraw. When the grounds for withdrawal are permissive, withdrawal is within the lawyer's discretion.

Lawyer is concerned that his own interest in avoiding criminal, disciplinary, and civil repercussions may interfere with his independent judgment in representing husband. Colleague explains that if a lawyer's "personal interest" creates a "significant risk" of a "material

limitation" on the lawyer's "responsibilities" to a client, the lawyer has a conflict of interest under Colo. RPC 1.7(a)(2). In this event, the lawyer must ask the court's permission to withdraw because continued representation would cause her to violate Colo. RPC 1.7(a)(2).⁶⁰

Alternatively, if the lawyer reasonably believes she would be able to provide competent and diligent representation if she continued the representation, she must obtain the client's informed consent to the conflict, which must be confirmed in writing.⁶¹ Although clients

ordinarily can consent to a representation notwithstanding a conflict, when the lawyer's belief that she can provide competent and diligent representation is not objectively reasonable, the client cannot give consent or, if the client has already consented, the consent is invalid. The conflict is said to be "nonconsentable."⁶²

Colleague asks Lawyer whether he believes that his personal interest has already created "significant risk" of a "material limitation" on his representation of husband. Lawyer answers in the negative. Colleague suggests that there is a potential conflict but not an actual conflict. Except perhaps in criminal cases, a potential conflict does not require withdrawal or client consent.

A potential conflict may later rise to the level of an actual conflict. For example, if husband instructs Lawyer not to produce the emails or acknowledge his or husband's possession of them, Lawyer would be required to move to withdraw. Lawyer would have grounds for permissive withdrawal if husband "persist[ed] in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent," or if husband "used the lawyer's services to perpetrate a crime or fraud."⁶³

And, as stated above, failing to comply with a disclosure or discovery requirement would violate Lawyer's obligations not to "knowingly disobey an obligation under the rules of a tribunal" under Colo. RPC 3.4(c), or to "fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party," in violation of Colo. RPC 3.4(d).⁶⁴ Worse, falsely denying husband's or Lawyer's possession of the emails would violate the Colo. RPC 8.4(c) prohibition against conduct involving dishonesty, fraud, deceit, or misrepresentation. Both types of misconduct would likely also constitute conduct prejudicial to the administration of justice in violation of Colo. RPC 8.4(d).

Colorado courts typically expect lawyers to state grounds for withdrawal in a motion to withdraw. But the duty to maintain confidentiality applies regardless of the basis for withdrawal, unless the client consents to withdrawal or, less likely, to the disclosure of information supporting the basis of withdrawal. In the motion

to withdraw itself, "[t]he lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient."⁶⁵ If the lawyer is not confident that this statement alone will be enough to secure an order of withdrawal, the lawyer may offer to provide the court additional information, for example a supporting affidavit, outside the presence of the opposing party. The lawyer may also consider asking the court, in a separate motion, to transfer the case to a different judge for the sole purpose of ruling on the motion to withdraw, in which event the lawyer could ask that judge to review additional information in camera.

If husband does not try to prevent Lawyer from producing the emails or acknowledging their possession, and Lawyer's sole reason for withdrawal is the difficulty created by husband's obtaining and sending Lawyer the emails, Lawyer may have grounds for permissive withdrawal because the representation "has been rendered unreasonably difficult by the client," or because "other good cause for withdrawal exists."⁶⁶ It is also possible that withdrawal "can be accomplished without material adverse effect on the interests of the client,"⁶⁷ which is a basis for permissive withdrawal that does not depend on the lawyer's reason for desiring to withdraw.

Lawyer should also consider the possibility that the court might disqualify him anyway if husband discloses the emails and the opposing party files a motion to disqualify Lawyer. Husband's misconduct in obtaining the emails is not, standing alone, imputed to Lawyer. Even if Lawyer were found to have violated an ethics rule, that fact "is neither a necessary nor a sufficient condition for disqualification."⁶⁸

However, if the emails contain information protected by the work-product doctrine or the attorney-client privilege, and the Lawyer read them, he may have gained an "informational advantage," which, at least in Florida, can provide grounds for disqualification.⁶⁹ As one commentator has stated, "In most instances, information is received and digested to some extent before the privileged or confidential nature of the material becomes apparent to the recipient."⁷⁰

In this case, Lawyer read only the first paragraph of one of the emails. Of course, wife and her lawyer may not believe that, and this may warrant an evidentiary hearing on her motion to disqualify.

Colleague also reminds Lawyer of the Colorado Supreme Court's admonition that "an attorney who undertakes to conduct an action impliedly agrees that he will pursue it to some conclusion; and he is not free to abandon it without reasonable cause."⁷¹ Husband is likely to feel abandoned just when he most needs Lawyer's assistance. Colleague advises that, although it is possible Lawyer may not be permitted to continue the representation, Lawyer should stay the course and not seek to withdraw.

Should Lawyer Invoke Fifth Amendment Protection for the Emails?

Lawyer decides not to move to withdraw. He asks Colleague whether he should withhold production of the emails and assert the U.S. Constitution's Fifth Amendment protection, which states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."⁷²

Colleague advises that the emails might be entitled to Fifth Amendment protection even though their content is not incriminating. This is because the act of producing the emails acknowledges that husband is in possession of them.⁷³ "A party who reasonably apprehends a risk of self-incrimination may claim the privilege even though no criminal charges are pending against him . . . and even if the risk of prosecution is remote."⁷⁴

If the emails appear to come within the scope of disclosure or discovery obligations, the proper procedure is to withhold them, list them on a privilege log, and file a motion for protective order under CRCP 26(c).⁷⁵ Ordinarily, the party invoking the Fifth Amendment is required to submit the documents to the court for in camera review, or, if the documents are voluminous, submit a privilege log listing them.⁷⁶

Colleague advises that the very act of seeking Fifth Amendment protection for documents the opposing party does not know husband possesses is sure to pique the party's interest

and likely to precipitate an all-out effort by her to discover the basis for husband's concern. Also, if husband refuses to produce the emails on this basis, the court may draw an adverse inference from that fact.⁷⁷ Colleague recommends that Lawyer not assert Fifth Amendment protection because it would create an expensive tangential issue that might do more harm to husband if he lost than if he produced the emails and asserted a right to have access to them.

Should Lawyer Produce the Emails Without Waiting for a Discovery Request?

Pivoting in a different direction, Lawyer asks Colleague whether he should immediately disclose the emails to opposing counsel in the hope that it will generate a measure of goodwill. In theory, this gesture may make opposing counsel and her client less inclined to press every perceived advantage available to them to punish husband, and indirectly, Lawyer. Lawyer expresses his view that being open and honest about what happened is the morally correct course of action.

Free and open disclosure might be the best course of action, but it requires consideration of the likelihood that (1) the disclosure or discovery rules require husband to turn over the emails anyway, (2) the opposing party or someone else will report the matter to law enforcement, and (3) law enforcement will pursue charges against husband and possibly against Lawyer. Husband's exposure to sanctions or possible tort liability are other considerations, but they pale in comparison to possible criminal charges.

Lawyer is in the best position to evaluate whether CRCP 16.2 requires the emails to be disclosed. If he concludes that they need not be disclosed, there is a risk that the opposing party will send a discovery request encompassing the emails or ask husband questions in a deposition that would require him to admit his acquisition and possession of them. Husband and Lawyer must also consider whether they are willing to live with the anxiety associated with the possible discovery of the emails.

Whether the opposing party would report husband's conduct to law enforcement depends on such considerations as the level of animosity toward husband by wife or third parties (e.g.,

wife's parents, siblings, or paramour). This should be tempered by the impact of prosecution on husband's ability to earn income to pay current and future financial obligations and on the couple's children, especially minor children. Other considerations include opposing counsel's appreciation for the negative, potentially long-lasting effects of taking such a serious step, including the parties' and counsel's ability to work together and the additional legal fees this issue is sure to generate. Whether law enforcement would be likely to pursue criminal charges involves assessing the strength and seriousness of the potential criminal charges, law

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A CBA Ethics
Committee
formal opinion
concluded that
a lawyer would
violate Colo.
RPC 1.2(d)
if he tried to
use, in pending
litigation, a
surreptitious tape
recording made
unlawfully by a
client without
the lawyer's
knowledge.
”

enforcement's willingness to become involved in a messy and acrimonious domestic relations case, and husband's good faith in admitting and accepting responsibility for his actions.

Protecting the client from criminal harm is a primary consideration, but it is also important for husband to make a moral judgment about how he addresses his past folly and present peril. “Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.”⁷⁸ Lawyer can and should assist husband in making this moral judgment.⁷⁹ A client who admits the essential facts unreservedly and accepts the fair consequences of that admission may find leniency from some quarter, if not from the opposing party then from a judge or prosecutor.

Colleague likes the idea of full and affirmative disclosure. He is concerned about husband's criminal exposure, but he also believes it is unlikely law enforcement would prosecute even if someone reported husband's conduct. Colleague also senses that Lawyer likely will have to disclose the emails in the domestic relations case. Colleague discusses with Lawyer whether husband should, with the help of Criminal Defense Lawyer, make a proactive, preemptive report of his actions to law enforcement. Colleague advises Lawyer that this strategy would require further consultation with Criminal Defense Lawyer and that a better strategy might be to self-report to law enforcement only if it becomes clear that husband must disclose the emails and the opposing party or someone else is going to report to law enforcement anyway.

Should Lawyer Try to Use the Emails in the Case?

Lawyer asks Colleague whether it is possible for him to use the emails in the case. Lawyer explains that he might want to read them to ascertain the opposing party's strategy but not offer them into evidence or use them in cross-examination. Alternatively, Lawyer might want to offer the emails into evidence or use them in cross-examination.

To determine whether and how Lawyer might use the emails, Lawyer must reach a conclusion about whether husband committed a crime

in obtaining them. If husband did not break the law, Lawyer is free to use the emails as he wishes and would act accordingly in terms of his disclosure and discovery obligations under the rules of civil procedure.

If husband broke the law in obtaining the emails, Lawyer's use of them in the case could constitute assisting husband in criminal conduct in violation of Colo. RPC 1.2(d), as discussed above. A CBA Ethics Committee formal opinion concluded that a lawyer would violate Colo. RPC 1.2(d) if he tried to use, in pending litigation, a surreptitious tape recording made unlawfully by a client without the lawyer's knowledge.⁸⁰ The theory behind this conclusion seems to be that, even though the lawyer had nothing to do with the client's acquisition of the evidence, when she uses it, she assists the client in accomplishing the purpose for which the client obtained the evidence.

Other rules of professional conduct bear upon whether Lawyer should try to use the emails in the case. As discussed above, like Lawyer, the lawyer in the Missouri case was not involved with the acquisition of the emails, but the Missouri Supreme Court suspended that lawyer for receiving, not disclosing, and attempting to use, electronic materials obtained by his husband-client in violation of the Missouri equivalent of Colo. RPC 4.4(a) and 8.4(c). In addition, using privileged emails may result in disqualification.⁸¹

Real-life circumstances are usually ambiguous. Whether the client broke the law is often unclear, and a bar regulator, district attorney, or judge might see things differently than the lawyer. Also, the emails may show that the opposing party has been concealing assets or has failed to disclose information that she had a duty to disclose. Two wrongs generally do not make a right. A judge could find that one party stole evidence but that the evidence shows improper or even unlawful conduct by the other party relative to the case before the court. In uncertain circumstances, the lawyer must make a calculated decision about whether it is worth the risk—to himself and the client—to make use of the emails.


Colleague suggests that, if the conclusion is that husband did not or probably did not break

the law in obtaining the emails, Lawyer should disclose the emails and file a motion in limine seeking the court's determination of whether the evidence is admissible.

Even when there is no clear notification obligation, it often will be in the [client's] best interest to give notice and obtain a judicial ruling as to the admissibility of the [opposing party's] attorney-client communications before attempting to use them and, if possible, before the [] lawyer reviews them. This course minimizes the risk of disqualification or other sanction if the court ultimately concludes that the opposing party's communications with counsel are privileged and inadmissible.⁸²

This motion may also require the court to determine whether husband broke the law. A ruling on the legality issue would neither absolve husband if it went his way nor condemn husband for criminal liability purposes if it did not. Seeking permission rather than forgiveness, Colleague says, is a principle that applies in litigation as well as life.

Conclusion

The problem of purloined emails and documents comes up over and over. Although it can happen in any number of settings, anecdotal evidence indicates it happens most often in domestic relations and employment cases. Usually the lawyer is ignorant of the client's actions in obtaining the emails. As in so many situations, however, what matters is what the lawyer does after learning about it. 



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NOTES

1. www.abajournal.com/magazine/article/thanks_for_the_headache.
2. See Morris, Jr., *Lawyers' Professional Liability in Colorado*, Ch. 26 (CLE in Colorado, Inc. 2017); Berger and Lebeck, "Inadvertent Disclosure of Confidential or Privileged Information," 40 *Colorado Lawyer* 65 (Jan. 2011).
3. See Morgan, "Marital Cyberstalking: The Limits of Privacy in the Family Computer," 20 *J. Am. Acad. Matrim. Law.* 231, 233-38 (2007).
4. CRS § 18-5.5-102(1)(a).
5. CRS § 18-5.5-102(1)(d).
6. See generally CRS § 18-4-401.
7. See Colo. RPC 1.6(b)(5) (lawyer may reveal information relating to representation to extent necessary to obtain legal advice about lawyer's obligations under the Colo. RPC).
8. Colo. RPC 1.2, cmt. [10]. See CRS § 18-8-105:
 - (1) A person is an accessory to crime if, with intent to hinder, delay, or prevent the discovery, detection, apprehension, prosecution, conviction, or punishment of another for the commission of a crime, he renders assistance to such person.
 - (2) "Render assistance" means to: . . . (e) Conceal, destroy, or alter any physical or testimonial evidence that might aid in the discovery, detection, apprehension, prosecution, conviction, or punishment of such person.
9. See *People v. Zuniga*, 80 P.3d 965, 968-69 (Colo.App. 2003) (theft by receiving is continuing offense so long as defendant continues to possess stolen property).
10. Colo. RPC 1.2, cmt. [10].
11. See Colo. RPC 4.4, cmt. [1]; *Valassis v. Samelson*, 143 F.R.D. 118, 124-25 (E.D.Mich. 1992). See CBA Formal Op. 69, "Propriety of Communicating with Employee or Former Employee of an Adverse Party Organization," at 4 (rev. June 19, 2010) (lawyer may communicate directly with former employee of represented opposing party organization but may not "inquire into privileged attorney-client communications; nor may the inquiring attorney listen while the former constituent attempts to divulge privileged communications voluntarily"), www.cobar.org/Portals/COBAR/repository/ethicsOpinions/FormalEthicsOpinion_69_2011.pdf.
12. *In re Eisenstein*, 485 S.W.3d 759 (Mo. 2016).
13. *Id.* at 761.
14. *Id.* at 762.
15. *Id.* at 763.
16. *Id.*
17. *Id.* at 764.
18. In addition, to support its conclusion regarding Missouri Rule 4.4(a), the Missouri Supreme Court applied language from Comment [2] to Missouri Rule 4.4, which relates to subsection (b) of Rule 4.4, not subsection (a). That Court's conclusion is inconsistent with the text of Missouri Rule 4.4(a). This, in turn, is contrary to the principle stated in the Scope section of the

Missouri Rules of Professional Conduct, that the “[c]omments are intended as guides to interpretation, but the text of each Rule is authoritative.” V.A.M.R., Rules of Prof. Conduct Rule 4, Scope [8].

19. *Eisenstein*, 485 S.W.3d at 760.

20. Colo. RPC 4.4(b) (“A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.”).

21. Colo. RPC 4.4(c) (“Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer’s client and who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender’s instructions as to its disposition.”). Subsection (b) derives from ABA Model Rule 4.4(b), but subsection (c) is unique to Colorado.

22. “For purposes of this Rule, ‘document’ includes, in addition to paper documents, e-mail and other forms of electronically stored information, including embedded data (commonly referred to as ‘metadata’), that is subject to being read or put into readable form.” Colo. RPC 4.4, cmt. [2].

23. ABA Formal Op. 06-440, “Unsolicited Receipt of Privileged or Confidential Materials: Withdrawal of Formal Opinion 94-382 (July 5, 1994)” (May 13, 2006).

24. ABA Formal Op. 11-460, “Duty when Lawyer Receives Copies of a Third Party’s Email Communications with Counsel” (Aug. 4, 2011):

A “document [is] inadvertently sent” to someone when it is accidentally transmitted to an unintended recipient, as occurs when an e-mail or letter is misaddressed or when a document is accidentally attached to an e-mail or accidentally included among other documents produced in discovery. But a document is not “inadvertently sent” when it is retrieved by a third person from a public or private place where it is stored or left.

25. Colo. RPC 4.4, cmt. [2]. Although CBA Formal Op. 108, “Inadvertent Disclosure of Privileged or Confidential Documents” (May 20, 2000), predated the changes to Colo. RPC 4.4 that included the addition of the foregoing Comment sentence, endnote 1 of the opinion states that it does not address the ethical obligations of a lawyer who receives documents from a client that the client obtained purposefully, www.cobar.org/Portals/COBAR/repository/ethicsOpinions/FormalEthicsOpinion_108_2011.pdf. This conclusion is further supported by another Comment: “In the circumstances of paragraph (b), some lawyers may choose to return an inadvertently sent document. Where a lawyer is not required by applicable law or paragraph (c) to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.” Colo. RPC 4.4, cmt. [3]. It makes sense to leave to the lawyer’s discretion the decision to return a document

sent by mistake by a third party to the lawyer. It makes no sense to confer such discretion in the context of a document stolen by the client and sent to the lawyer, where returning it to the victim of the theft might incriminate the client.

26. ABA Op. 06-440.

27. *Id.* (quoting ABA Model Rules, Scope [16], whose Colorado counterpart is identical.).

28. *E.g., Chamberlain Group, Inc. v. Lear Corp.*, 270 F.R.D. 392, 398 (N.D.Ill. 2010); *Burt Hill, Inc. v. Hassan*, No. 09-1285, 2010 WL 419433 at *4 (W.D.Pa. Jan. 29, 2010). *Contra Chesemore v. Alliance Holdings, Inc.*, 276 F.R.D. 506, 515 (W.D.Wisc. 2011) (declining to follow *Burt Hill, Inc.* on grounds that, among other things, the cases it cites “rely on prior opinions of the ABA (opinions No. 92-368 and 94-382) since replaced with ABA Formal Opinion No. 06-440, which states that a ‘lawyer receiving materials under such circumstances is therefore not required to notify another party or that party’s lawyer of receipt as a matter of compliance with the Model Rules.’”).

29. *Burt Hill, Inc.*, 2010 WL 419433 at *4; *accord Chamberlain Group, Inc.*, 270 F.R.D. at 398.

30. *People v. Swearingen*, 649 P.2d 1102 (Colo. 1982). In *Swearingen*, the defendant allegedly added words to an executed deed of trust and to the promissory note secured by it, so that the deed of trust encumbered a condominium owned by the mortgagor, not just his house. When the mortgagor tried to refinance the condominium, he discovered the unauthorized encumbrance created by the alteration in the deed of trust and notified the district attorney. The district attorney undertook an investigation. The defendant retained an attorney, who solicited a meeting with the district attorney, at which he handed him the original deed of trust and promissory note. Over the attorney’s objection, the district attorney kept the originals and returned copies to him. In the criminal case that followed, the attorney moved to suppress the use of the documents based on the attorney-client privilege. The trial court granted the motion. In the prosecution’s interlocutory appeal, the Colorado Supreme Court reversed, holding that the privilege did not apply to physical evidence unless the evidence was created during the course of the attorney-client relationship.

31. *Id.* at 1105, n. 8.

32. www.cobar.org/Portals/COBAR/repository/ethicsOpinions/FormalEthicsOpinion_60_2011.pdf.

33. Opinion 60 at 4-90 (citing *People v. Meredith*, 631 P.2d 46 (Cal. 1981)) (defense investigator removed victim’s wallet from trash can as a result of client communication; court held the prosecution was entitled to be shown the location of the wallet, which was crucial to the homicide prosecution); *State v. Olwell*, 394 P.2d 681 (Wash. 1964) (counsel required to produce knife obtained from client over objection of attorney-client privilege). *Accord Bender*, “Incriminating Evidence: What to do With a Hot Potato,” 11 *Colorado Lawyer* 880, 892-93 (Apr. 1982) (lawyer turning over evidence should take steps to protect client’s identity, including, if necessary, hiring a second

lawyer to deliver the evidence).

34. Colo. RPC 3.4, cmt. [2].

35. Lepstein, “Incriminating Physical Evidence, The Defense Attorney’s Dilemma, and the Need for Rules,” 64 *N.C. L. Rev.* 897, 917 (June 1986). *Accord* Mueller and Kirkpatrick, 2 *Federal Evidence* § 5:26 (4th ed. July 2008) (“prevailing view” is that lawyer must turn over “contraband or an instrumentality or fruit of a crime”; some other courts “require defense attorneys to turn over other physical evidence as well, although generally not documentary evidence like incriminating financial records”); Reitz, “Clients, Lawyers and the Fifth Amendment: The Need for a Projected Privilege,” 41 *Duke L. J.* 572, 605 (Dec. 1991) (noting “dearth of caselaw that applies *Olwell* to documentary evidence of white-collar crime,” but stating that after the Alaska Supreme Court’s 1978 decision in *Morrell v. State*, 575 P. 2d 1200 (Ala. 1978), “other courts have also held or opined that the *Olwell* rule extends to documentary evidence,” Reitz at 587 n. 69).

36. *Restatement, Third, The Law Governing Lawyers* § 119, cmt. a (American Law Institute 2000).

37. See Jenness, “Ethics and Advocacy Dilemmas—Possessing Evidence of a Client’s Crime,” *The Champion* 16, 19 (Dec. 2010) (discussing pros and cons); Bender, *supra* note 33 at 892-93 (lawyer turning over evidence should take steps to protect client’s identity, including, if necessary, hiring a second lawyer to deliver the evidence).

38. Jenness, *supra* note 37 at 17.

39. *Id.* at 18.

40. *Id.* (emphasis in original).

41. Colo. RPC 3.3(c). See Colo. RPC 1.6(b)(8) (lawyer may reveal information relating to representation to comply with “other law”).

42. Colo. RPC 3.3, cmt. [12].

43. Colo. RPC 1.0(f).

44. N.Y. St. Bar. Ass’n Comm. Prof’l Ethics, Op. 945, 2012 WL 6087189 ¶ 1 (Nov. 7, 2012).

45. *Id.* at ¶ 7.

46. Colo. RPC 3.4(a). Destroying a document may also violate the part of the rule that prohibits a lawyer from obstructing another party’s access to “evidence,” although what constitutes “evidence” is more limited than what constitutes a document or other material having “potential evidentiary value.”

47. *Eisenstein*, 485 S.W.3d at 763.

48. Jenness, *supra* note 37 at 17.

49. “A person commits tampering with physical evidence if, believing that an official proceeding is pending or about to be instituted and acting without legal right or authority, he . . . Destroys . . . physical evidence with intent to impair its verity or availability in the pending or prospective official proceeding.” CRS § 18-8-610(1)(a).

50. Annotated Model Rules of Professional Conduct 373 (ABA 8th ed. 2015). See Solum and Marzen, “Truth and Uncertainty: Legal Control of the Destruction of Evidence,” 36 *Emory L. J.* 1085, 1132-34 (Fall 1987)

(more reasonable reading is that Rule 3.4(a) incorporates standards in jurisdiction's criminal statutes, discovery rules, and tort law).

51. Jenness, *supra* note 37 at 16, 18.

52. *Id.* at 18.

53. CRCP 16.2(e)(1). See generally Willoughby, *Lawyers' Professional Liability in Colorado*, Chap. 38 "Family Law" (CLE in Colorado, Inc. 2017).

54. *In re Marriage of Schelp*, 228 P.3d 151, 156 (Colo. 2010) (referring to CRCP 16.2(e)(1)).

55. *E.g.*, CRCP 16, 26, and 34. "Courts in this District have found that putative litigants had a duty to preserve documents once a party has notice that the evidence is relevant to litigation or when a party knew or should have known that the evidence may be relevant to future litigation." *Zbyski v. Douglas Cty. Sch. Dist.*, 154 F.Supp. 3d 1146, 1162-63 (D.Colo. 2015).

56. Colo. RPC 1.6(b)(8).

57. ABA Op. 11-460.

58. See Colo. RPC 3.4(c) (knowingly disobeying obligations under rules of tribunal); Colo. RPC 3.4(d) (failing to make reasonably diligent effort to comply with legally proper discovery request). See also Colo. RPC 8.4(d) (engaging in conduct prejudicial to the administration of justice).

59. *E.g.*, *Aloi v. Union Pac. R.R. Corp.*, 129 P.3d 999, 1000 (Colo. 2006) (no abuse of discretion to give adverse inference instruction for spoliation of evidence). See generally Martinez, *Lawyers' Professional Liability in Colorado*, Chap. 29 "Preservation and Spoliation of Evidence" (CLE in Colorado, Inc. 2017).

60. Colo. RPC 1.16(a)(1).

61. Colo. RPC 1.7(b).

62. Colo. RPC 1.7, cmts. [14] and [15].

63. Colo. RPC 1.16(b)(2) and (3).

64. *E.g.*, *People v. Clark*, 927 P.2d 838 (Colo. 1996) (90-day suspension for failing to comply with discovery requests, leading to default judgment against client).

65. Colo. RPC 1.16, cmt. [3]. See also *People v. Monroe*, 907 P.2d 690, 694 (Colo.App. 1995) (At least in criminal cases, there are many instances in which counsel may state only that there exists an irreconcilable conflict with the client, which "may mean a conflict of interest, a conflict of personality, a conflict as to trial strategy, or a conflict regarding the presentation of false evidence," quoting *People v. Schultheis*, 638 P.2d 8, 14 (Colo. 1981), *disapproved of on other grounds*, 925 P.2d 767 (Colo. 1996)).

66. Colo. RPC 1.16(b)(6) and (7).

67. Colo. RPC 1.16(b)(1).

68. *In re Estate of Myers*, 130 P.3d 1023, 1025 (Colo. 2006).

69. *E.g.*, *Castellano v. Winthrop*, 27 So.3d 134, 136-37 (Fla.App. 2010). But see *Parnes v. Parnes*, 80 A.D.3d 948, 949-53 (N.Y.App.Div. 2011) (reversing disqualification order even though lawyer used privileged emails between opposing counsel and opposing party obtained by client from opposing party's computer to question opposing party in deposition).

70. Barker, "What about Inadvertently Disclosed Documents or Information?" 60 *Def. Couns. J.* 613, 615 (Oct. 1993).

71. *Sobol v. Dist. Ct.*, 619 P.2d 765, 767 (Colo. 1980). *Accord* Colo. RPC 1.3, cmt. [4] ("Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client.").

72. U.S. Const. Amend. V. See generally Condon, "Fifth Amendment Right Against Self-Incrimination in a Civil Case," 27 *Colorado Lawyer* 83 (July 1998).

73. See *U.S. v. Fricosu*, 841 F.Supp.2d 1232, 1236 (D.Colo. 2012) ("Production itself acknowledges that the document exists, that it is in the possession or control of the producer, and that it is authentic.").

74. *Mueller Indus., Inc. v. Berkman*, 927 N.E.2d 794, 810 (Ill.App. 2010) (citation omitted), *abrogated on other grounds by People v. Radojicic*, 998 N.E.2d 1212, 1226 (Ill. 2013).

75. Jenness, *supra* note 37 at 16, 19-20 (emphasis in original).

76. *Id.* at 16. *Accord Burt Hill, Inc.*, 2009 WL 4730231 at * 3; *In re Astor*, 879 N.Y.S.2d 560, 564 (App.Div. 2009).

77. *In re Marriage of Sgarlatti*, 801 P.2d 18, 19 (Colo.App. 1990).

78. Colo. RPC 2.1, cmt. [2].

79. See Colo. RPC 2.1.

80. CBA Formal Op. 112, "Surreptitious Recording of Conversations or Statements" (July 19, 2003), www.cobar.org/Portals/COBAR/repository/ethicsOpinions/FormalEthicsOpinion_112_2011.pdf.

81. But see *Parnes*, 80 A.D.3d at 949-53 (reversing disqualification order even though lawyer used privileged emails between opposing counsel and opposing party obtained by client from opposing party's computer to question opposing party in deposition).

82. ABA Op. 11-460.



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