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## LAWYER'S DUTY TO DISCLOSE MISTAKES IN COMMERCIAL CLOSING

Adopted February 18, 1989.

Addendum issued 1995.

### *Syllabus*

In representing a client at the closing of a commercial transaction, a lawyer has both a duty of loyalty to the client and a duty of honesty and fair dealing to the other party and to the other party's attorney. If at the closing, one party or its attorney has made an undeniable mistake in the closing settlement statement regarding a basic assumption or element upon which the contract between the parties is based and silence by the other party would be conduct amounting to a knowing misrepresentation under the facts and circumstances, an attorney must advise his client to disclose the mistake rather than remain silent about the mistake and accept the benefits of it. If the client refuses disclosure, the attorney may not continue representing the client in the closing. To do so would violate DR 1-102(A)(4) and, depending on the facts, might also violate DR 7-102(A)(3), (5), (7) or (8). Whether the attorney also either is permitted or required to make disclosure to the other party depends on whether, under the facts and circumstances, the attorney's previous silence and other conduct, despite discontinuing participation in the closing, would be conduct by the attorney (i) involving dishonesty, fraud, deceit or misrepresentation, (ii) resulting in concealing or knowingly failing to disclose that which the attorney is required by law to reveal, or (iii) knowingly making a false statement of fact or law. If the attorney participates in the closing without disclosure being made and later determines disclosure should have been made, the attorney should call upon the client to rectify the error. If the client refuses, the lawyer may similarly be permitted or required to disclose the mistake to the other party, depending on the facts and circumstances.

### *Introduction and Summary of Facts*

A request has been submitted to the Ethics Committee ("Committee") for its opinion regarding a lawyer's duties in representing a client in the closing of a commercial transaction when the lawyer realizes the other party, in preparing the settlement statement, has made an undeniable mistake regarding a basic assumption or element on which the contract between the parties is based. The mistake, if not discovered, will benefit the client financially. The client requests the attorney to not disclose the mistake. While the Committee does not know all of the facts and in any event cannot make factual determinations regarding individual circumstances, the Committee assumes that the following is a reasonably accurate summary of the situation in question:

Attorney X ("Seller's Attorney") represents Client Y, a corporation ("Seller"), in the purchase and sale of Seller's assets to A, a corporation ("Buyer"), represented by B, an attorney representing Buyer ("Buyer's Attorney"). Z is the president and sole shareholder of Seller. The parties had entered into a written contract for the purchase and sale of Seller's assets. Among other typical provisions, the contract provided for the purchase price, including the assumption of certain liabilities by Buyer, and the allocation of the purchase price among the assets and assumed liabilities. It appears but it is not certain that the written contract was prepared by Buyer's Attorney. At the closing Buyer and Buyer's Attorney presented the contemplated closing documents and the closing settlement statement, apparently prepared by Buyer's Attorney. When Z and Seller's Attorney reviewed the closing settlement statement, they realized that it clearly and undeniably contained a conceptual and formatting error relating to the allocation of the purchase price. The effect of the error was that Seller would receive a net payment substantially in excess of that undeniably contemplated by and due under the sale and purchase contract. When Z and Seller's Attorney

conferred about the closing documents and the error in the closing settlement statement, they speculated that Buyer or Buyer's Attorney may have corrected or adjusted for the error in the disbursement checks to be delivered at the end of the closing. In any event Z requested of Seller's Attorney that, if at all possible, he did not wish to point out the mistake. No disclosure of the error was made. The parties proceeded with the closing. The final disbursements mirrored the closing settlement statement and the mistaken, excess payment was delivered to Seller.

All of these events occurred within a short period of time during which Seller's Attorney realized the conflict between his duty of loyalty to his client on the one hand and, on the other hand, his duty to act honestly and fairly in dealing with Buyer and Buyer's Attorney. Seller's Attorney did not know how to resolve the conflict and determine which duty was paramount and still permit the closing to occur. He states he therefore decided to participate in the closing and permit the erroneous disbursements to be made without any comment regarding the mistake, but to do so with the intent to resolve the problem after the closing.

Subsequently, in seeking guidance from various colleagues, Seller's Attorney received conflicting advice on how to assess his duties in the situation and on whether any obligation to disclose the mistake to Buyer and Buyer's Attorney existed at or after the closing. Therefore, Seller's Attorney decided to submit this inquiry to the Committee and so informed Z. In the meantime Seller's Attorney also advised Z that, should the mistake be discovered by Buyer or Buyer's Attorney, Buyer would have a good claim against Seller and Z for return of the excess money and in all likelihood they would be required to return the money. Also, Seller's Attorney advised Z to place the money in a separate account for safekeeping until this matter could be resolved.

For policy reasons the Committee frequently declines to answer requests regarding the completed conduct of a specific attorney. Completed events frequently involve many determinations of facts and applications of substantive law and require individual legal advice. Nevertheless, the Committee determined to address the general questions presented by this inquiry because they are particularly important for guidance to the bar and because this opinion may assist in the resolution of problems underlying the inquiry. The Committee offers no opinion regarding any party's duty and possible liability under applicable substantive law, for example, under principles of contract or agency law. Given the particular circumstances, the Committee also has recommended to the attorney presenting the inquiry to consider obtaining individual legal advice in this matter.

### ***Questions Presented***

1. In representing a client in the closing of a commercial transaction, what are a lawyer's duties to the client and to the other party when confronted by the other party's undeniable mistake regarding a basic assumption or element on which the contract between the parties is based, when the lawyer's client benefits financially from non-disclosure and the client requests disclosure not be made?

2. If the parties closed without disclosure having been made and in doing so the attorney had not been able to resolve the attorney's conflicting duties in the situation, what duty, if any, does that lawyer have to rectify the situation if the lawyer determines that disclosure was required at the closing?

### ***Applicable Provisions of the Code of Professional Responsibility ("Code")***

This opinion involves application of: DR 1-102(A)(4) (dishonesty, fraud, deceit or misrepresentation is misconduct); DR 4-101(B)(1) and (2) (a lawyer has the duty to maintain the confidences and secrets of his client); DR 4-101(C)(2) (when disclosure of confidences and secrets is permitted); DR 7-102(A)(3) (a lawyer shall not conceal or *knowingly* fail to disclose that which he is required by law to reveal); DR 7-102(A)(5) (a lawyer shall not *knowingly* make a false statement of law or fact); DR 7-102(A)(7) (a lawyer shall not counsel or assist his client in conduct that the lawyer *knows* to be illegal or fraudulent); DR 2-110(B) (mandatory withdrawal); and DR 2-110(C) and DR 7-101(A)(2) (permissive withdrawal).

Canon 1 states: “A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.” DR 1-102 Misconduct, in relevant part provides: “(A) A lawyer shall not . . . (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

Canon 4 states: “A Lawyer Should Preserve the Confidences and Secrets of a Client.” DR 4-101 Preservation of Confidences and Secrets of a Client, in relevant part provides: “(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly: (1) Reveal a confidence or secret of his client. (2) Use a confidence or secret of his client to the disadvantage of the client.” In DR 4-101(A) “confidence” is defined as “information protected by the attorney-client privilege under applicable law” and “secret” means “other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” However, DR 4-101(C)(2) provides: “A lawyer may reveal: . . . Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.”

Canon 7 states: “A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.” DR 7-101 Representing a Client Zealously, provides “(A) A lawyer shall not intentionally: . . . (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B) . . .” DR 7-101(B)(2) permits a lawyer to refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal. DR 7-102 Representing a Client Within the Bounds of the Law provides:

(A) In his representation of a client, a lawyer shall not: . . . (3) Conceal or knowingly fail to disclose that which he is required by law to reveal. . . . (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

Regarding a lawyer’s withdrawal from representation, DR 7-101(A)(2) provides that: “(A) lawyer shall not intentionally: . . . (2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.” DR 2-110 Withdrawal from Employment, provides: “(B) Mandatory Withdrawal. A lawyer representing a client . . . (in matters other than before a tribunal) . . . shall withdraw from employment, if: (2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.”

### ***Legal Background***

The inquiry presents the persistent problem of resolving a lawyer’s sometimes conflicting duties of loyalty to the lawyer’s client and the duties of candor and fairness when dealing with third parties. This opinion first describes the nature and scope of the applicable duties of Seller’s Attorney and then presents the analytical bases for resolving any apparent conflicts among those duties and for choosing a proper course of conduct in the situation presented.

#### *A. Description of Seller’s Attorney’s Roles as Advisor and Representative and the Responsibilities Inherent in these Functions*

Attorneys perform different functions. Depending upon the circumstances and the functions being performed, an attorney’s generally paramount duty of loyalty to the client may be affected by the client’s and the attorney’s coexisting duties to third parties or the courts. The following general examples are illustrative of the shifting circumstances. As legal advisors or counselors at law, attorneys listen to, consult with and give advice to their clients. With rare exception those communications are confidential. DR 4-101(B). As negotiators and representatives, outside the context of litigation, attorneys assist clients in solving problems or gaining opportunities. When providing such representation involves dealing with third parties, an attorney’s duties may include duties to not only the client but also to third parties. See, for example, DR 1-102(A)(3), (4) and (5), DR 4-101(B), DR 4-101(C)(2) and (3) and DR 7-102(A)(3), (7) and (8). As advocates, attorneys resolve disputes within the context of our adversary system of justice, for the most part dealing with a client’s past conduct and taking the facts as they happened. However, as an advocate, an attorney’s loyalty in representing the client is subject to rules of conduct which prohibit presenting non-meritorious claims and require the lawyer’s candor to the court. See, for example, C.R.C.P. 11 and DR 7-102.

Each of these different functions involves the lawyer-client relationship complicated to a greater or lesser degree by other varying relationships with and resulting duties to third parties or the courts. The proper course of an attorney's conduct may depend on whether the lawyer is functioning as a legal advisor, transactional negotiator or representative, or as an advocate. EC 7-3 and EC 7-5. In this case the Committee begins its analysis with the fact that Seller's Attorney functioned both as a legal advisor and as the client's representative at the closing.

As a legal advisor, Seller's Attorney's responsibility is to assist Seller in evaluating present circumstances and in determining the course of future conduct and relationships. EC 7-3. In this capacity a lawyer furthers the interests of the client by giving his professional opinion regarding the applicable principles or rules of law, the client's legal responsibilities, duties and potential liabilities under the law, by expressing what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing the client of the legal and practical effect of various courses of action. EC 7-5.

Seller's Attorney also was the client's representative at the closing. This expanded role brings the added dimension of a third party relationship with Buyer and Buyer's Attorney. In this role Seller's Attorney is both a fiduciary and an agent, actively participating in the transaction on behalf of his client, the principal. As such Seller's Attorney's conduct is subject both to the provisions of the Code as an officer of the court and to applicable principles of agency law. Restatement (Second) of Agency § 1, comment e (1958). See DR 7-102(A)(3) and (7) as examples of ethical duties depending on requirements of substantive law. (For an exposition of the law of agency's significant import, both historically and legally, in analyzing an attorney's duty of confidentiality to a client in relation to the attorney's duty of truthfulness to third parties, see American Bar Association, *Annotated Model Rules of Professional Conduct* Comment and Legal Background to Rule 1.6 Confidentiality of Information, 60-72, and Comment and Legal Background to Rule 4.1 Truthfulness in Statements to Others, 264-267 (1984).)

#### B. Lawyer's Duty of Loyalty and Confidentiality of Information

The fiduciary relationship between client and lawyer and the proper functioning of our legal system require the preservation by the lawyer of the "confidences" and "secrets" of the lawyer's client. EC 4-1. A lawyer's duty to protect a client's confidences and secrets is generally considered paramount. For example, ABA Formal Opinion 341 (1978), in balancing the lawyer's duty to preserve confidences against the obligation to reveal frauds, interpreted the phrase "privileged communication" in the 1974 Amendment to DR 7-102(B) as referring to those confidences and secrets that are required to be preserved by DR 4-101, thus substantially limiting in scope the possible disclosure mandated by DR 7-102(B). The principle requiring lawyer-client confidentiality is revered because it is recognized as serving important societal purposes. Attempts to circumvent or undermine the privilege, when properly invoked, are carefully scrutinized and exceptions narrowly construed. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (defining the scope of a corporate attorney's attorney/client privilege in light of important purposes served by the privilege).

The prohibition against disclosure of confidences extends to information which is protected by the attorney/client privilege. The existence of the attorney-client privilege in Colorado is established in C.R.S. § 13-90-107(1)(b) (1987 Repl. Vol.). A frequently quoted definition of the privilege is also found in *United States v. United Shoe Machine Corp.*, 89 F.Supp. 357, 358 (D. Mass. 1950):

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the Bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

See also 8 Wigmore, *Evidence* § 2292 (1961).

While the term “confidence” includes privileged attorney/client communications, DR 4-101(A) broadly defines “secret” to refer to “other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would likely be detrimental to the client.” Despite the broad scope of confidentiality established by the Code, the law recognizes that the rules of confidentiality may not be used to further a fraudulent or illegal purpose or to engage in conduct that would violate the Code. *See Re Antitrust Grand Jury*, 805 F.2d 155 (6th Cir. 1986); *Caldwell v. District Court of Denver*, 644 P.2d 26 (Colo. 1982); *United States v. Bartlett*, 449 F.2d 700 (8th Cir. 1971), *cert. denied*, 405 U.S. 832 (1972); *United States v. Friedman*, 445 F.2d 1076 (9th Cir.), *cert. denied*, 404 U.S. 958 (1971); *United States v. Mackey*, 405 F.Supp. 854, 860 (E.D.N.Y. 1975); *In the Matter of Callan*, 300 A.2d 868, 878 (N.J. Super. Ct. Ch. Div. 1973); *In re Selser*, 105 A.2d 395 (N.J. 1954); DR 7-102(A)(3) and (7); DR 7-102(B)(1); DR 4-101(C)(2). This legal concept is varyingly described as either an exception to the confidentiality rules or a matter outside the scope of the rules. Under either formulation, the result is the same: The confidentiality rules may be superseded by the policy of preventing conduct which is fraudulent, illegal or violates the disciplinary rules.

The facts giving rise to the instant inquiry — the discovery that Buyer or Buyer’s Attorney has made an error in the closing settlement statement benefitting Seller — involve information that the Committee considers a “secret” under Rule DR 4-101(A). Seller’s Attorney obtained the information about the error while performing work on behalf of a client. Moreover, it appears that the client does not wish the attorney to disclose the information. Accordingly, before disclosure can be required of Seller’s Attorney, an exception to the confidentiality rules must be found to be applicable.

### ***Analysis***

An attorney’s duties in any situation depend to some extent on the facts, circumstances and reasonable expectations of the parties. The setting here is the closing of the sale and purchase of a business. An important reality in any closing is that the parties already have struck a contract and the closing is to consummate that previous agreement. Under these circumstances, the parties reasonably expect that each is there to act fairly and in good faith to fulfill the ends of the agreement. See, for example, *Restatement (Second) of Contracts* § 205 (1979) and C.R.S. § 4-1-203. In this context certain actions have generally accepted meanings. For example, transfer documents are to transfer property under the terms and conditions required by the agreement. Similarly, closing settlement statements are intended in part to assist the parties in assuring each other that the agreement has been fulfilled to each party’s satisfaction. In such a setting, approval or disapproval, acceptance or rejection and affirmation or negation are the corroborative proof by which the parties measure performance. In such a setting, the attorney is a key participant and his actions, reactions or inactions may have material meaning. And, in such a setting, silence may be meaningful conduct, a form of communication indicating approval or acceptance regarding the accuracy and conformity of documents and deliveries in the transaction.

Under these circumstances rules requiring honesty have a plain meaning. C.R.C.P. 241(B)(4) requires attorneys to act in accord with the highest standards of honesty, justice and morality. DR 1-102(A)(4) prohibits conduct involving dishonesty, fraud, deceit or misrepresentation. A simple hypothetical illustrates the point. Two parties agree that in exchange for a painting, \$10 will be given. The Committee concludes it would be dishonest for the artist’s lawyer to knowingly accept, without disclosure, a \$100 bill if mistakenly delivered by the buyer instead of a \$10 bill.

In this case, the Committee assumes, the calculation and allocation of the purchase price are basic and undisputed elements of the contract between the parties. The closing was to fulfill the agreements of the parties in the contract. Given the facts in the instant case, the Committee concludes it would be dishonest for Z and Seller’s attorney to continue with the closing, to not point out the error in the closing settlement statement and to accept the overpayment.

In reaching this conclusion, the Committee also recognizes the common law standard of good faith adopted by Colorado courts. In *Ruff v. Yuma County Transp. Co.*, 690 P.2d 1296, 1298 (Colo. App. 1984), the Colorado Court of Appeals adopted *Restatement (Second) of Contracts* § 205 (1981) which re-

quires that parties dealing with one another in business transactions act in good faith. *See also* related U.C.C. provisions at C.R.S. §§ 4-1-203, 4-2-103 and 4-1-201, adopting standards of good faith and fair dealing. Similarly, under tort law, Colorado has adopted the provisions of the *Restatement (Second) of Torts* § 551 (1965) which provide in part:

(2) one party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

. . . .

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

*Bair v. Public Service Employees Credit Union*, 709 P.2d 961, 962 (Colo. App. 1985). The same ideals are recognized by the Code. The Code requires honesty and truthfulness in dealing with third parties. *See, e.g.*, DR 1-102(A)(4); DR 7-102(a)(3) and (5). *See also, People v. Berge*, 620 P.2d 23 (Colo. 1980).

Depending on the actual facts and circumstances in this or a similar situation, other provisions of the Code may apply as well. For example, DR 7-102(A)(7) prohibits a lawyer from counseling or assisting his client in conduct that the lawyer knows to be illegal or fraudulent. The Committee is of the view that “illegal conduct” means conduct in violation of the criminal laws. *See, American Bar Foundation, Annotated Code of Professional Responsibility* 11 (1979). The Committee assumes that Seller’s conduct in not rectifying the Buyer’s mistake is not criminal. The question remains whether such conduct is fraudulent. Such a determination involves deciding issues of fact and substantive law. The Code gives no guidance in applying the rule. In any event, the Committee does not make decisions of substantive law. The Committee makes no decision whether the facts involve fraud by Seller or Seller’s Attorney. However, the Committee’s research indicates almost a total absence of analytical examples of interpreting and applying Code provisions which by their terms depend on determinations of substantive law. Therefore, the Committee believes that a general summary of some of the possibly applicable principles of substantive law would by illustration assist the bar in interpreting and applying such Code provisions.

In Colorado the well-recognized, elementary constituents of fraud in a contractual relationship include concealment of a material existing fact, that in equity and good conscience should be disclosed. *Morrison v. Goodspeed*, 68 P.2d 458, 462 (Colo. 1937). Colorado recognizes that nondisclosure of a fact may result in fraudulent misrepresentation. For example, *Cahill v. Readon*, 273 P. 653 (Colo. 1929); *Bohe v. Scott*, 265 P. 694 (Colo. 1929); CJI-Civ.2d 19:2, 19:5 (1980); *Restatement (Second) of Contracts* §§ 159 and 161 (1981). In resolving the question of whether nondisclosure of a material fact is fraudulent, the Colorado Supreme Court has stated:

. . . fraud may be committed by the suppression of truth as well as the suggestion of falsehood. *The test of liability for failure to disclose facts material to the transaction is some duty, legal or equitable, arising from the relations of the parties, such as that of trust or confidence, or superior knowledge or means of knowledge.* When in the circumstances of the particular case such duty is present, failure to disclose a material fact with intention to mislead or defraud is equivalent to a fraudulent concealment of the fact, and stands no better than the affirmation of material misrepresentation. (Emphasis in original.)

*In re Cisneros*, 430 P.2d 86, 89 (Colo. 1967) quoting with approval from *Newell Bros. v. Hanson*, 97 Vt. 297, 304, 123 A. 208, 210 (1924).

Similarly, in a tort action for misrepresentation the plaintiff must prove: (1) a false representation by the defendant; (2) the defendant’s knowledge that the representation was false; (3) plaintiff’s ignorance as to the falsity of the representation; (4) defendant made the representation with the intent that plaintiff should act on it; and (5) damage to the plaintiff. *Morrison v. Goodspeed*, 68 P.2d 458, 462 (Colo. 1937). *See also* W. Prosser, *Torts* § 105 (4th Ed. 1971). Also, a false representation may be the failure to disclose

a material existing fact which in equity and good conscience should have been disclosed. *Schnell v. Gustafson*, 638 P.2d 850 (Colo. App. 1981) citing *McNeill v. Allen*, 534 P.2d 813, 818 (Colo. App. 1975). See also *Morrison, supra* at 462.

Determining the existence of fraud also may depend on other factors such as Buyer's or Buyer's Attorney's possible negligence in committing the error in the first instance and possibly related issues of justifiable reliance.

Summarizing, the critical choices for Seller's Attorney involve determining how to protect his client's confidences and secrets while not engaging in prohibited conduct in advancing the client's interests in the third party relationships with Buyer. Generally, prohibited conduct in this context would mean conduct which violates the provisions of DR 1-102(A)(4) or DR 7-102(A).

## **Conclusion**

### *A. Resolution During the Closing*

Based on the foregoing, how should Seller's Attorney proceed? Realizing that continued participation in the closing without disclosure would involve dishonesty and assisting his client in possibly fraudulent conduct, Seller's Attorney should explain to Z why disclosure is required and the possible practical and legal effects of failure to disclose. On this basis, Seller's Attorney should advise Z to point out the error in the closing settlement statement. Based on the collective experience of its members, the Committee believes most instances of this sort would be resolved at this juncture based on the attorney's professional stature and ability to influence a client to do at least what the law requires and what people reasonably expect as requirements of good faith and fair dealing.

If Z refuses and instructs Seller's Attorney not to disclose the error, Seller's Attorney must decline to do so. If Z persists, Seller's Attorney must withdraw from representation and decline to participate further in the closing. Withdrawal is mandatory under DR 2-110(B)(2) because continued representation clearly involving dishonest conduct by the lawyer would violate DR 1-102(A)(4). Depending on the facts, withdrawal also could be required if continued representation would result in violation of any of DR 7-102(A)(3), (5), (7) and (8). These provisions prohibit such conduct as knowingly failing to disclose that which is required by law to reveal, knowingly making a false statement of fact and knowingly engaging in other conduct contrary to a Disciplinary Rule.

Whether, in addition to withdrawing from representation, Seller's Attorney also is permitted or even may be required to disclose the error depends on the facts, particularly Seller's Attorney's own statements or other conduct prior to withdrawing. For example, if such conduct by Seller's Attorney was equivalent to a representation that the closing settlement statement was accurate, and Seller's Attorney knows that to be the case, disclosure is permitted under DR 4-101(c)(2) and required by DR 7-102(A)(3), (5) or (8). These rules requiring disclosure where the lawyer's own conduct is the critical question are recognized exceptions to the strict duty of confidentiality regarding communications and information.

### *B. Resolution Following the Closing*

Finally, the Committee turns to the question of Seller's Attorney's duties in the event of a completed closing, without disclosure, and delivery of the overpayment.

In this case Seller's Attorney arguably acted in good faith in proceeding with the closing without disclosure at the request of his client because he was not certain how to balance the apparently conflicting duties. Z and Seller's Attorney had a common law duty of honesty and fair dealing which may have been breached by the failure to disclose the error. Also, Seller's Attorney's conduct appears to have been inconsistent with his obligation not to engage in conduct involving dishonesty or misrepresentation insofar as he knew the truth of the error and refrained from comment, albeit only at the client's request. Under such apparent circumstances, the Committee concludes an attorney may rectify the error.

Since there may now exist differing interests between Seller and Z on the one hand and Seller's Attorney on the other hand, Seller's Attorney should so inform Z and Seller, but do so in calling upon Seller and Z to rectify the overpayment. If Seller declines, Seller's Attorney is permitted to disclose the overpayment to Buyer under DR 4-102(C)(2). The Committee reaches this conclusion for several reasons. Seller's Attorney still owes a duty of loyalty to Seller. However, withdrawal no longer is a viable means of Seller's Attorney's honoring loyalty to his client while not otherwise engaging in unethical conduct himself. The Committee recognizes that the information is a "secret" under Canon 4. However, keeping the secret "confidential" places the attorney in the possible position of a continuing violation of DR 1-102(A)(4) and DR 7-102(A)(8) and possibly DR 7-102(A)(3).

If the actual facts surrounding nondisclosure were determined to be fraudulent conduct by Seller's Attorney, the Committee's view is that disclosure would be permissible under DR 4-101(C)(2) and required by DR 7-102(A)(5). DR 7-102(A)(5) prohibits a lawyer from "knowingly mak[ing] a false statement of law or fact." Since lawyers must not engage in deliberate deception, DR 4-101 does not prevent a lawyer from correcting intentionally false or misleading statements made in violation of Rule 7-102(A)(5).

### ***Afterword***

In view of this opinion's introductory remarks emphasizing how a change in the lawyer's role or function may alter the analysis and require results different than disclosure of confidential information, two additional illustrations are offered.

The first example involves a defense lawyer's representation in a criminal case. In *People v. Schultheis*, 638 P.2d 8 (Colo. 1981), the defendant had insisted upon presenting perjured testimony through alibi witnesses. The trial court refused the defense attorney's request to withdraw. Defense counsel proceeded with the defense but refused to call the alibi witnesses. After conviction of murder in the first degree, the defendant appealed. He claimed that he was deprived of his constitutional right to effective assistance of counsel because defense counsel refused to present the testimony of the alibi witnesses.

In affirming the conviction, Justice Erickson, on behalf of a unanimous Court, illuminated the course for an attorney's resolving the difficult conflict between loyalty to the client and candor to the tribunal under these circumstances. As its beginning principle, in the interest of preserving the integrity of the American adversary system of criminal justice, the Court held that a lawyer may not offer testimony of a witness which the lawyer knows is false, fraudulent or perjured. DR 7-102(A)(4), (7) and (8). When serious disagreement occurs between defense counsel and the accused, and counsel is unable to dissuade the client from insisting that fabricated testimony be presented by a witness, counsel should request permission to withdraw from the case. DR 2-110(C)(1)(c). In making the request, the lawyer should not reveal to the trial judge the specific reason for the motion to withdraw. Rather, counsel should only state, in support of the motion to withdraw, that there exists an irreconcilable conflict with his client. If the motion to withdraw is denied, counsel must continue to serve as defense counsel, but must not present the perjured testimony. The attorney's refusal to call particular witnesses, because obedience to ethical standards prohibits presentation of fabricated testimony, does not constitute ineffective assistance of counsel. EC 7-26. This case illustrates how, in an adversarial situation, an attorney should seek to maintain client confidences while not, by his own conduct, presenting false evidence.

The second example involves a tax lawyer who, in reviewing the past tax returns of a new client, discovers that some time in the past on a concluded matter the government had made a \$100,000 error, to the client's benefit, in calculating the client's tax liability. The Chicago Bar Association Professional Responsibility Committee considered this situation in its Opinion 864 (updated). That committee opined that a lawyer whose client benefitted financially from the government's erroneous calculation of the client's tax liability is not ethically required to disclose the error to the government unless the lawyer's failure to disclose the error would perpetrate a fraud *by the lawyer* (and not the client) on the government. The lawyer may, but is not required to, disclose the government's error if the client consents to such disclosure or if disclosure is required by law. The analysis in Opinion 864 of the Chicago Bar Association Professional Responsibility Committee is consistent with the Committee's analysis in the present opinion.



While the attorney should not reveal confidential information about the client's past affairs, the attorney may not, by his own conduct, engage in dishonest, fraudulent or misleading behavior.

***1995 Addendum***

The Colorado Rules of Professional Conduct became effective on January 1, 1993, replacing the Code of Professional Responsibility. While the language of the Rules is somewhat different from the Code, the Ethics Committee considers this Opinion to continue to provide guidance to attorneys in this area. Attorneys are cautioned to review Tables A & B: Related Sections in the Colorado Rules of Professional Conduct and The Colorado Code of Professional Responsibility (found in the *Colorado Ethics Handbook*), to update the research contained in this Opinion and to conduct any independent research necessary.

Relevant provisions of the Colorado Rules of Professional Conduct, which should be examined together with this Opinion, are Rule 1.2 (regarding scope of representation); Rule 1.2(d) (which prohibits a lawyer from engaging in or assisting a client in conduct that the lawyer knows is fraudulent); Rule 1.2(e) (regarding the requirement that the lawyer shall consult with the client regarding limitations on the lawyer's conduct regarding assistance not permitted by the Rules of Professional Conduct or other law); Rule 1.6 (confidentiality of information); Rule 1.16 (declining or terminating representation); Rule 3.4 (regarding fairness to opposing party and counsel); Rule 4.1 (regarding truthfulness in statements to others); Rule 4.3 (regarding dealing with unrepresented person); Rule 8.4 (regarding misconduct) and 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation).