# Ethics 7.0


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# Ethics 7.0

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# AGENDA

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| 8:50- 9:00am | **Virtual Check in** |
| 9:00 – 9:05am | **Welcome, Introductions and Overview**<br>*Extended by **Jack Tanner, Esq.**, Fairfield and Woods, PC, Program Chair* |
| 9:05 – 9:55am | **A Brief Journey Through All of the Ethics Rules**<br>- Client/Lawyer relationship<br>- Counselor<br>- Advocate<br>- Transactions with persons other than clients<br>- Law firms and associations<br>- Voluntary pro bono services<br>- Information about legal services<br>- Maintaining integrity of the profession<br>- Bar admission/disciplinary matters<br>*Presented by **Philip R. James, Esq.*** |
| 9:55-10:00am | **On-line Chat Break; Transition to Next Session** |
| 10:00 - 10:50am | **Introduction to Navigating Ethics Minefields**<br>All licensed lawyers are required to be competent in the same substantive topic – ethics. This presentation will help you design your own protocol for handling ethics issues and introduce you to:<br>- How myths about legal ethics heighten risk<br>- What brain science explains about an attorney's struggle to adequately evaluate ethics issues |

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|---|---|
| | - Why inattention to professionalism can lead to risky behavior<br>- How basic attorney sanction principles may help attorneys manage risk<br>- Start developing an ethics management strategy and action plan<br>*Presented by **Karen A. Hammer, Esq., LL.M.**, Hammer-Law* |
| 10:50 – 10:55am | **On-line Chat Break; Transition to Next Session** |
| 10:55 – 11:45am | **Outside Counsel Guidelines (OCG): Challenges and Best Practices**<br>- Definition and background<br>- Typical components<br>- Colorado Rules of Professional Conduct and OCG<br>- Regulatory response<br>- Best practices<br>*Presented by **Eli Wald, Esq.,** Charles W. Delaney, Jr., Professor of Law, Sturm College of Law, University of Denver* |
| 11:45am – 12:30pm | **Lunch Break** |
| 12:30-1:20pm | **Engaging in Dishonesty, Fraud, Deceit and Misrepresentation in Strict Compliance with Rule 8.4(c)**<br>*Presented by the **Honorable Edward Moss,** Judge (ret.),17th Judicial District* |
| 1:20 - 1:25pm | **On-line Chat Break; Transition to Next Session** |

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| 1:25 - 2:15pm | **Current Ethical Issues for In-house Lawyers.** Discussion includes competence, scope of representation, confidentiality, fee, conflicts, dealing with third parties, supervision, and misconduct<br>*Presented by **Pamela L. Coe, Esq.**, Former Senior Executive, Legal Counsel, and Board Secretary, Liberty Media Corporation, Qurate Retail, Inc., and Former Director of Expedia, and **Jack Tanner, Esq.**, Fairfield and Woods, PC, Program Chair* |
| 2:15 - 2:20pm | **On-line Chat Break; Transition to Next Session** |
| 2:20 - 3:10pm | **Family Law: Ethically Navigating the Confluence of Law, Love, Loss, and Anger**<br>*Presented by **Russel Murray, Esq.**, Russel Murray III PC* |
| 3:10 – 3:15pm | **On-line Chat Break; Transition to Next Session** |
| 3:15 – 4:05pm | **What's New in Attorney Regulation?**<br>- New (or Newer) Colorado Rules of Professional Conduct<br>- Changes on the horizon<br>- Important or interesting decisions in Colorado attorney discipline cases<br>*Presented by **Gregory G. Sapakoff,** Deputy Regulation Counsel, Office of Attorney Regulation Counsel, Colorado Supreme Court* |
| 4:05pm | **Adjourn** |

# BIOGRAPHICAL INFORMATION

## PROGRAM CHAIR

**Jack Tanner, Esq.,** helps solve business disputes, employing traditional and atypical litigation tactics to obtain the best results for his clients. He has represented clients in all aspects of complex commercial litigation and arbitration, including contracts, business torts, receiverships, intellectual property, and construction matters. His clients have included Kinder Morgan, Noble Energy, Microsoft, and Time Warner Telecom. Mr. Tanner has served on the Colorado Bar Association Ethics Committee since 1996, and currently the vice-chair. He is a frequent lecturer on legal ethics, particularly ethics for in-house counsel. He has authored several articles on legal ethics, including "T*he New Rules of Professional Conduct: Significant Changes for In-House Counsel,*" 36 Colo. Law No. 11, p. 71 (November, 2007) and "*Top 10 Things In-House Counsel Need to Know about Ethics,*" 45 Colo. Law No. 7, p. 59. Mr. Tanner has practiced with the Denver, Colorado full-service business law firm of Fairfield and Woods since 1987. After graduating from Duke Law School (with honors) in 1986 and prior to joining Fairfield and Woods, he served as law clerk to Justice (later Chief Justice) Luis Rovira of the Colorado Supreme Court. Mr. Tanner graduated from Rice University in 1983. He has been active in Rice University's alumni activities in Colorado since his arrival here, and served a three-year term on the Board of the Association of Rice Alumni in Houston concluding in 2016. He is the commissioner of the Denver Bar Association softball league and enjoys acting as his firm's unofficial film critic.

# FACULTY

**Pamela L. Coe, Esq.,** served for many years as a senior executive, legal counsel, board secretary and a corporate director for Fortune 500 companies in the media, ecommerce and technology space. Providing sound business and legal advice in fast-paced, sophisticated and entrepreneurial business environments are hallmarks of her career. As a senior executive at Liberty Media Corporation and Qurate Retail, Inc., she was actively involved in executive leadership of the Liberty organizations. As Board Secretary to Liberty's four public company entities she was a primary contact and senior advisor to members of the Board of Directors concerning corporate governance, securities law, executive compensation and regulatory compliance matters. Ms. Coe also served on the board of directors of Expedia Group, Inc. from 2012 to 2019 and was a member of Expedia's Compensation Committee during that time. She also devotes substantial time assisting nonprofit entities, including serving as a director of the Denver Rescue Mission, a nonprofit organization serving the homeless community in the Denver metro area.

**Karen A. Hammer, Esq., LL.M.,** has lawyered for prominent boutique firms and has held senior legal positions within industry leaders and quasi-governmental organizations. These experiences inform Hammer's understanding of how individuals, businesses, lawyers, and others make active and passive choices that lead to litigation. She leads the Hammer-Law team that explains to clients, opposing counsel, and judges how common business strategies lay the foundation for disputes. Hammer serves as a mediator and also facilitates transactional and political negotiations and settlements. She is admitted to practice before the United States Supreme Court, the Tenth Circuit, the District of Colorado, and Colorado state courts. Hammer has individually been approved as a Continuing Legal Education sponsor by the Colorado Supreme Court's Office of Continuing Legal and Judicial Education and regularly provides accredited CLE programs on professionalism, as well

as ethics and other substantive law topics. She serves by invitation on the Diversity, Equity & Inclusivity Subcommittee of the Colorado Supreme Court Continuing Legal and Judicial Education Committee, developing recommendations for educating lawyers on this topic. Hammer is a graduate of Vanderbilt University School of Law and received an advanced law degree with honors in International and Comparative Law with honors from Georgetown University Law Center. At Georgetown, she studied international project finance with senior lawyers from the World Bank and the International Monetary Fund.

**Philip R. James, Esq.,** is an attorney practicing in Denver.

**Honorable Edward Moss (ret.)** was a District Court Judge for Broomfield and Adams counties for 16 years before his retirement in 2020. He received his undergraduate degree from the University of California, Santa Barbara. Judge Moss served in the U.S. Army as an armor platoon leader and armor company executive officer, after which he received his legal training at Southwestern University School of Law in Los Angeles and at the Georgetown Law Center in Washington, D.C. He was a judicial intern at U. S. Supreme Court and then served as a law clerk to Judge Sherman Finesilver in the U.S. District Court in Denver. Before joining the bench, he was in private practice for more than 25 years, primarily in the areas of oil and gas, real estate, and general commercial litigation. Before being appointed to the bench, Judge Moss was named a Metro-Denver Volunteer Lawyer of the Year and was the mayor of Westminster, Colorado. He is a member of National Center for State Court's Ethics Advisory Council and a long-time member of the Colorado Bar Association Ethics Committee (Chair, 2016-17). Judge Moss was on the faculty of the 2013 National College on Judicial Ethics in Chicago and the keynote speaker in 2015.

**Russel Murray, Esq.,** the family law practice of Russel Murray III, P.C., emphasizes Colorado, Interstate, and International Family Law, Divorce, Child Custody, Child Abductions, and all related issues. The firm has handled cases involving over 29 countries and each of the six inhabited continents. Mr. Murray is a past chair of the Family Law Section of the Colorado Bar Association (2001-2002) and remains active

in the Executive Council of the Section. He twice co-chaired the CLECI Annual Family Law Institute (2001, 1994), and has spoken locally, nationally, and internationally at more than 100 CLEs on topics of Interstate and International Child Custody and Abductions, Colorado Family Law and Domestic Relations Litigation, and Family Law Ethics. Russel is a twenty-nine-year member of the Colorado Bar Association Ethics Committee. He has been listed as an AV lawyer in Martindale-Hubbell for 28 consecutive years and as an International Family Law attorney in The Bar Register of Preeminent Lawyers. Mr. Murray serves as a referral attorney for the U.S. State Department Hague Convention Attorney Network. He was named by Lawyers Weekly USA as one of its ten lawyers of the year for 2001 for his seminal work in federal court on a Hague Convention case. Murray has also been featured in USA Today, the Denver Post, Rocky Mountain News, KMGH Channel 7 (Denver), and in various specialty publications such as FCW and Civic.com.

**Gregory G. Sapakoff** has served as Deputy Regulation Counsel in the Trial Division of the Office of Attorney Regulation Counsel since December 1, 2017. Mr. Sapakoff received his undergraduate degree from Colorado State University. He received his law degree from the University of Denver, College of Law in 1986, and was admitted to the practice of law in Colorado that same year. He is also admitted to practice in the United States District Court for the District of Colorado, the 10th Circuit Court of Appeals, and the United States Court of Federal Claims. In more than 20 years in *private* practice, Mr. Sapakoff represented clients in a variety of civil and commercial litigation matters; and represented and counseled lawyers and law firms in connection with legal ethics issues, attorney regulation proceedings, and civil matters arising from the practice of law. He worked for the Office of Attorney Regulation Counsel previously, from 1994-2005, as Assistant Regulation Counsel in the Trial Division. Mr. Sapakoff is a member of the Denver and Colorado Bar Associations, and serves on the

CBA's Ethics Committee. He is also a member of the American Bar Association, including the ABA Center for Professional Responsibility, and is a member of the National Organization of Bar Counsel. He served on the Committee on Conduct of the United States District Court for the District of Colorado from 2006-2012, and is a frequent speaker and lecturer on topics relating to legal ethics.

**Eli Wald, Esq.,** is the Charles W. Delaney Jr. Professor of Law at the University of Denver Sturm College of Law. A legal ethics and legal profession scholar, Wald has written on topics such as increased lawyer mobility, conflict of interests and attorney disqualification, lawyers' fiduciary duties to clients, the nationalization and globalization of law practice, the challenges facing lawyers representing clients in the emerging marijuana industry and, most recently, in-house lawyers. Professor Wald is a co-author of a leading casebook on the law governing lawyers. His work has appeared in leading journals such as the Fordham, Stanford, University of Colorado and Wisconsin law reviews, and the Georgetown Journal of Legal Ethics. Wald's articles have been cited in ABA ethics opinions and excerpted in legal ethics casebooks. Professor Wald's ongoing research into the causes and manifestations of explicit prejudice and implicit bias at large law firms and in-house legal departments, as well as means of overcoming discrimination, has gained national attention. His scholarship examines the structure and organization of law firms and in-house departments as well as the professional and personal identities of their lawyers to better understand the hiring and promotion patterns of law firms, and the lingering under-representation of minorities in positions of power and influence. Wald's articles have explored the rise and fall of WASP and Jewish law firms, the role of kinship and nepotism in law firms' promotion decisions, the discriminatory consequences of professional ideology, and implicit bias and structural discrimination in BigLaw and in-house legal departments. Wald is a member of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct, a member of the Colorado State Bar Association's Ethics Committee and a member of the Colorado Judicial Ethics Advisory

Board. A past member of the executive committee of the Association of American Law Schools' Professional Responsibility Section, and a longtime co-editor of the Legal Profession Section of JOTWELL – The Journal of Things We Like (Lots), Professor Wald is an expert witness in legal ethics and malpractice matters, and a frequent legal ethics CLE instructor. At the law school, his accomplishments include winning the best faculty advisor award, and being named a Chu Family Faculty Fellow and the Hughes-Ruud Research Professor. Professor Wald is an enthusiastic supporter of the performing arts. A former board member of Wonderbound, a leading Colorado modern dance company, he serves on the board of Friends of Chamber Music Denver. Prior to joining the Sturm College of Law, Professor Wald was a litigation associate at Paul, Weiss, Rifkind, Wharton & Garrison in New York City. He holds S.J.D. and LL.M. degrees from Harvard Law School, where he was a John Olin Fellow in Law and Economics, a Fellow at the Center for Ethics and the Professions, and a Clark Byse Fellow. Wald also earned LL.B. and B.A. degrees from Tel-Aviv University, where he was a law review editor and a Visiting Fellow at the Max Plunk Institutes in Hamburg and Heidelberg, Germany.

# TABLE OF CONTENTS

# SECTION 1

# A Brief Journey Through All of the Ethics Rules


*Presented by*

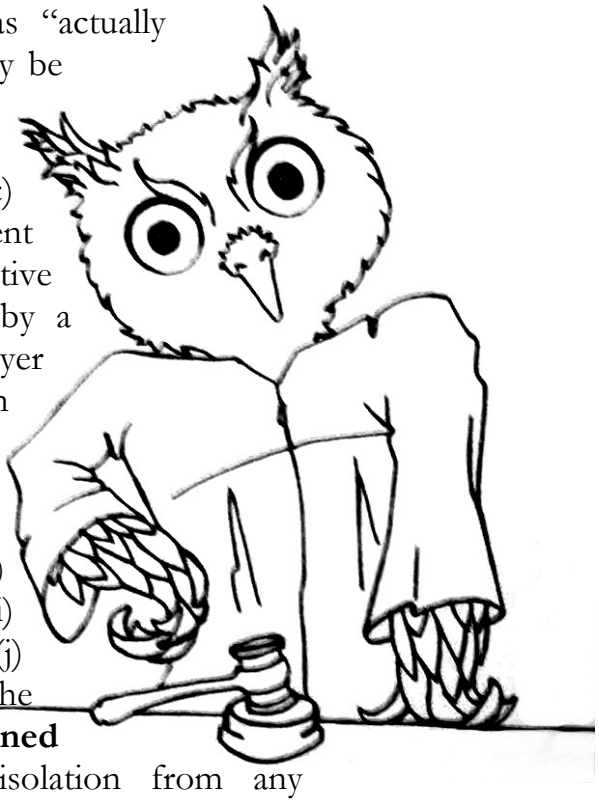
**Philip R. James, Esq.**
Denver, CO

NOTES:

## A Brief Journey Through the Ethics Rules

A handy and dandy summary (*and occasional annotation)* of
The Colorado Rules of Professional Conduct.

## Part 1—Client-Lawyer Relationship



**1.0 Terminology:** This section defines (a) **belief** as "actually suppos(ing) the fact in question to be true". Belief may be inferred.(b) **Confirmed in writing** means a writing sent to the client confirming informed consent (and does *not* mean the client signed or returned anything), (c) **law firm** includes most everything other than government employment, (d) **fraud** is a statute violation *and* deceptive behavior, (e) **informed consent** is "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct,"(so disclosure *and* agreement) (f) **knowingly** means actual knowledge and may be inferred, (g) **partner,** (h) **reasonable** is the prudent and competent lawyer, (i) **reasonable belief** means actual, reasonable belief, (j) **reasonably should know** means "ascertained by" the reasonably prudent and competent lawyer, (k) **screened** (ethical wall) means reasonably adequate, timely isolation from any participation, to protect confidential information, (l) **substantial means** material, clear, and weighty, (m) **tribunal** includes a broad range of adjudicative bodies, and (n) **a writing and signed writing** includes any media with a broad range of "signatures.". (This section has useful comments.)

**1.1 Competence:** Don't be **incompetent** for your client. Have the knowledge, skill, thoroughness, and preparation reasonably necessary.

**1.2 Scope of Representation and Allocation of Authority between Client and Lawyer:** (a) We must abide by the client's **scope and objectives**. We must **consult** as to the means. We have apparent authority. The civil client decides whether to settle. The criminal client decides whether to plead, go to jury, and testify. *See CBA Ethics Opinion 114, footnotes 14 & 15.* (b) Our representation, including appointments, is not an **endorsement**. (c) We can reasonably **limit** representation after informed consent. (*See C.R.C.P. 11(b) and 311(b) — Federal Rules contra.*) (d) We shall not knowingly

**counsel** or **assist** clients as to **criminal or fraudulent** conduct, but we may counsel and assist as to consequences and help analyze the law.

**1.3 Diligence:** Be **diligent** and prompt**.**

**1.4 Communication**: (a)(1) Promptly inform the client about "informed consent" decisions. (2) Reasonably consult about means. (3) Reasonably inform about status. (4) Promptly comply with reasonable information requests. (5) Explain relevant ethical limitations. (b) Explain to the client "to the extent reasonably necessary for informed decisions."

**1.5 Fees:** (a) Fees and expenses must be **reasonable**. Consider (1) the time and labor required, novelty and difficulty, and skill, and (2) if the client understands, the likelihood that the work will limit our other work, (3) the local customary fee, (4) the amount involved and the results (5) the time limitations, (6) the client relationship, (7) the lawyer's experience, reputation, and ability, and (8) if the fee is contingent or fixed. (b) A **writing** must **get to the client** in a **reasonable** time, describing the fee and expenses. Any **change** must be promptly **communicated in writing**. (c) **Contingent fees** are fees that are contingent on success. (1) The contingent fee agreement will be **in writing** communicated before or within a reasonable time and includes (i) the lawyer and client names (ii) the nature of the claim and events triggering payment, (iii) **how the fee will be determined**, including percentages, and who will pay (A) **costs and expenses** advanced and (B) other client costs. (iv) How the lawyer will be paid if **fired or withdrawn** prior to earning the contingent fee. (v) A statement about expenses, including (A) **an estimate**, (B)if the lawyer is authorized to advance expenses, and for how much, to be client-reimbursed, (C) and **if the client will pay expenses if no recovery**. (vi) that there's the possibility **the court could award costs or attorney's fees** against the client. (vii) that the court could award attorney's fees to the client, and how that will be handled. (viii) that **if the attorney hires associated counsel** the lawyer will promptly notify in writing and that (A) the fee will not increase and that the client has the right to approve or later terminate associated counsel. (ix) that **other persons may be entitled** to part of any recovery. (2) The agreement must be signed by the lawyer and client. (3) An agreement copy must be kept **seven years** from case resolution or lawyer withdrawal. (4) No contingent fees in (i) **criminal defense** (ii) in **domestic cases** securing a divorce or determining alimony, maintenance, or property division, (iii) or otherwise prohibited by law. (5) At case end the lawyer must send a **disbursement statement** including amounts received, costs and expenses incurred, sums to go to third parties including other firm lawyers, and computation of the contingent fee. (6) **Contingent fee not enforceable without substantial compliance with this rule.** (7) **The Form** attached to this rule is sufficient to comply with this rule, but other consistent forms

may be used. Contingent fees may be blended with other kinds of fees if the contingent part complies with this rule. (d) Except in a rule 1.17 law-practice sale, we can't **split a fee** with a **non-firm attorney**, unless the split is proportional to services or responsibility, the "client's agreement is confirmed in writing", and the total fee is reasonable. (e) **Referral fees** are prohibited. (f) Fees are **earned** when we "confer a benefit" or perform a service. **Unearned, advance fees** are client property and must be in a Rule 1.15B(a)(1) trust account, or non-cash property held separately. (g) **Nonrefundable** fees and retainers are prohibited. (*Sather case)* We can't restrict a **client's right to terminate** and can't unreasonably restrict a refund. (h) A **flat fee** is for **specific services** at a **fixed amount**, regardless of time or effort. (1) You must send the client the terms in a **written communication** before or **reasonably soon after** commencing representation, including: (i) services description, (ii) amount and timing of payments, (iii) the **amount earned during representation** after tasks completed or events, (iv) the fees amount if **representation ends before completion**. (2) If there's a **dispute**, follow Rule 1.15A(c) as to the disputed amount. *(keep it in COLTAF).* (3) The **form** in the rule is sufficient. You may use a consistent form.

**1.6 Confidentiality of Information:** (a) We **shall not** reveal information **relating to representation**, unless the client gives **informed consent**, or the disclosure is implicit. (b) We **may** disclose (1) to prevent **reasonably certain death or substantial bodily harm** (client threat of suicide), (2) the client's **criminal intent** and information necessary to prevent a crime, (3) to circumvent a client who used our services to **commit fraud** reasonably certain to cause **substantial financial injury**, (4) when we find out after the crime or fraud has been committed, (5) to get **ethical or legal advice** for ourselves, (6) to **protect ourselves**, (7) to do a conflicts check arising from **changes in employment** or firm makeup, but not if that materially prejudices the client, or (8) to "comply with **other law or a court order**." (Only to the extent necessary.) (c) We must make reasonable efforts to prevent inadvertent disclosure or unauthorized disclosure or access to confidences.

**1.7 Conflict of Interest: Current Clients** (a) No concurrent conflicts, meaning: (1) We can't represent **adverse clients**. (2) Nor if there's a significant risk representation will be materially limited by a client, a former client, a third party, or our personal interest. (b) But **concurrent conflicts are okay** if (1) we reasonably believe we can be **competent** and diligent to all, (2) there's no law against it, (3) one client isn't **claiming against another** in that litigation, and (4) everybody gives **informed consent "confirmed in writing**."

**1.8 Conflict of Interest: Current Client: Specific Rules:** (a) We can't have client **business partners** or buy client-adverse property, unless (1) it's fair and disclosed in

writing, (2) we inform in writing "the desirability" of talking to another attorney, and (3) the client gives written informed consent. (b) We can't use client information to her disadvantage without informed consent. (See Rules 1.6 Confidentiality and 3.3 Candor) (c) We can't solicit a substantial gift or draft a non-related **client will** or gift agreement to our or our relatives' substantial benefit. (d) We can't negotiate **media rights** for ourselves during employment. (e) We can't provide **up-front money** (*champerty*) except to advance litigation costs and expenses, which may be contingent on success. If the client's indigent, we ***may*** **pay** litigation costs and expenses. (f) If we are **paid by a third party**, (1) the client must give informed consent, (2) there can be no interference, and (3) we can't reveal confidences. (g) Settling one claim for **two clients** requires informed consent, a client-signed writing, and much disclosure. (h)(1) Don't **prospectively limit malpractice** unless the client has another attorney. (2) Don't **settle a claim** without written notice about consulting and reasonable time to consult another attorney. (i) Don't take a **proprietary interest** in the lawsuit, except for (1) a legal fee-lien or (2) a reasonable contingency agreement. (j) Don't sleep with clients who you weren't sleeping with before they were clients. (k) This Rule 1.8 (except a & j) is subject to vicarious prohibition in your firm.

**1.9 Duties to Former Clients:** (a) Don't represent a new client against an old client in a **substantially related** matter in which the parties are **materially adverse**, without old client consultation and informed consent, "confirmed in writing". (b) Don't **switch firms** and then knowingly represent a new client in the same or a substantially related case in which your old firm represented a client, if (1) the old client's interests are **materially-adverse**, and (2) you acquired from the old client **material 1.6 and 1.9(c) information**, unless you get old client informed consent, "confirmed in writing". *(See 1.10(b))* (c)(1) Don't use prior-client representation-related information against the client, unless it becomes public. (2) Don't reveal any information about the prior-client except as Rules *(such as 1.6 or 3.3)* would permit or require.

**1.10 Imputation of Conflicts of Interest: General Rule:** (a) If we can't represent, **our partner can't knowingly represent** either, except for one-lawyer, personal-interest, non-significant risk conflicts. This rule is **limited** to Rules 1.7 and 1.9. *But see 1.8(k).* (b) If we **leave the firm**, **the firm may then represent** adverse clients unless the matter is (1) the same or substantially related and (2) any remaining lawyer has material 1.6 (*confidentiality*) or 1.9(c)(*former client*) information. (c) Rule 1.10 disqualification can be Rule 1.7-waived. (d) Look at Rule 1.11 for government lawyer disqualification. (e) If a new lawyer to our firm is 1.9-disqualified, everybody is disqualified, unless: (1) the new lawyer didn't substantially participate, (2) the new lawyer is timely screened and gets no part of the fee, (3) the new lawyer gives prompt

written notice with screening details to the old client and his lawyers, and, (4) then new lawyer and partners reasonably believe the screen will work.

**1.11 Successive Government and Private Employment**: *(Revolving door*). Except as law may otherwise expressly permit, (a) (1) A former government attorney is subject to Rule 1.9(c). (*former client information*) (2) If he participated **personally and substantially** in a matter, he can't go private and switch sides, without **government consent**. (b) Our **new partners** can't begin or continue to be adverse, unless (1) the new lawyer is timely screened and gets no part of the fee, (2) the new lawyer gives prompt written notice with screening details to the old client and his lawyers, and, (3) then new lawyer and partners reasonably believe the screen will work. (c) Except as law may otherwise expressly permit, if we have **confidential government information** *(defined here)* from government employment about a person, we can't use it against them to their material harm, for our private client. Our **partners can't represent** that private client unless the new lawyer is timely screened and gets no part of the fee. (d) Except as law may otherwise expressly permit, (1) a current government attorney is subject to Rules 1.7 and 1.9. and (2) can't (i) participate in a matter where we had **substantial, personal, private participation** unless the government gives informed consent, confirmed in writing. (ii) We can't **negotiate** for private work with a party or party attorney if we have **substantial, personal participation** in their case, unless we are a law clerk and fit under Rule 1.12. (*Former judge*). (e)

**1.12 Former Judge, Arbitrator, Mediator, or other Third-Party Neutral:** (a) Expect as in (d) below, if we were **personally and substantially the judge** or **mediator or arbitrator,** we can't become the same-case attorney, without all-party, **informed consent**, confirmed in writing. (b) As the judge, we can't ask parties or their lawyers for a **job**. **Law clerks** can if the judge knows. (c) If we were formerly the judge, our **law partners** may also not **knowingly** represent unless (1) we are timely screened and get no part of the fee, (2) we give prompt written notice with screening details to the other parties, and, (3) we and our partners reasonably believe the screen will work. (d) A multi-member arbitration panel member/arbitrator representing a client can later represent the client.

**1.13 Organization as Client:** (a) If we work for a company, we represent the company. (b) If we catch an officer, shareholder, or etc. violating a legal obligation to the company or violating a law the company reasonably could be blamed for, and which will likely cause substantial company injury, we shall "proceed as is **reasonably necessary** in the best interest of the organization." Unless we "reasonably believe that it is not necessary in the best interest of the organization", we bump the information up the ladder, to the top if necessary. (c) Except as in (d) below, (1) if the problem is not resolved at the top and it's a clear legal violation (2) and will reasonably certain to

cause the company substantial injury, we may reveal information in addition to the Rule 1.6 (*confidences*) permissive disclosures, but only that information sufficient to prevent the substantial injury. (d) This doesn't apply to internal legal-violation investigations, or to criminal defense of the company or its agents. (e) If we are fired or quit because of (b) or (c) above, we shall act reasonably to assure that the information get to the top. (f) We shall **disclose** to shareholders, officers, etc. who have adverse interests, **that our client is the company**. (g) We may **represent an officer**, shareholder, etc. in other matters, but see Rule 1.7. If that representation requires company consent, get consent from somebody other than the new client.

**1.14 Client with Diminished Capacity**: (a) If our client's capacity to make adequately-considered representation-decisions is diminished we **shall, as far as is reasonably possible**, act as usual. (b) If our diminished-capacity client is at risk of any harm if there's no action, and he can't adequately act, we may take reasonable protective action. That includes consulting with helping agencies and seeking a guardian ad litem, conservator, or guardian. (c) This implies Rule 1.6-exception release of client information, but only to the extent necessary.

**1.15 Safekeeping Property** (COLTAF Rule – longest rule -- amended 2014)

**1.15(A) General Duties of Lawyers Regarding Property of Clients and Third Parties** (a) We must hold client property **separate**, hold client funds in a **trust account**, and keep complete records. (b) Upon receipt of client or 3rd party property, deliver it to them and do an accounting if asked. (c) If there's a **dispute**, keep it separate until resolution. (d) This rule applies to a broad range of client or third-party property.

**1.15(B) Account Requirements** (a) Every **private-practice lawyer** shall, in our name, maintain (1) a separate **trust account** where we keep entrusted funds and unearned fees and expenses, but only if we have such funds, and. (2) a **business account** containing all funds received for legal services. That account shall be **called a business account** or a similar name. (b) The trust account may be **COLTAF**. (c) The trust account shall be called a trust account or COLTAF trust account, plus any further designation that's not misleading. (d) Trust accounts shall be in **approved banks** unless we get informed consent from our clients that our overdrafts won't be reported to ARC. (e) Trust accounts shall be **interest** or dividend bearing and federally **insured**, unless the client gives informed consent. (f) We may keep **service charge amounts** in the trust account. We shall designate those amounts in our records. (g) We shall deposit entrusted funds in a COLTAF account if feasible, unless (h) the funds are deposited in a interest bearing account where interest or dividends are paid to the client or 3rd party, less service charges or fees. (i) if interest or dividends on funds do exceed costs of a client-paid, interest-bearing account, we may

apply for a **refund** from COLTAF. (j) We consent to COLTAF's bank reporting requirements and **hold the bank harmless**. (Can't sue our bank for reporting us.)

**1.15(C) Use of Trust Accounts** (a) No debit cards or ATM withdrawals. No cash withdrawals or cash back on deposits. The deposit slip must be detailed and duplicate. (b) Only a Colorado licensed lawyer or a person lawyer supervised may transfer or withdraw or be a signatory. Withdrawals may only be by check or bank or wire transfer. (c) The lawyer or supervised person must reconcile in detail quarterly.

**1.15(D) Required Records** (a) We or our firms shall retain for 7 years (1) separate client records containing: (A) & (B) (detailed records) (2) on all business bank accounts (3), (4), (5), (6), & (7) and billing records and payment records and bank records. (very detailed) (b) (sets out accounting methods and consistency; computer records okay, kept at principal office) (c) We shall maintain our own records if the firm dissolves or we or another attorney leaves. (d) We shall disclose the records when ARC sends a subpoena duces tecum. Those records will remain confidential.

**1.15(E) Approved Institutions** (Very detailed rule about the approval of banks, ARC's obligations about banks, the banks obligations, the form of the accounts, rate of interest, amount of bank account fees, and bank immunity from suit.)

**1.16 Declining or Terminating Representation**: (a) Except as in (c) below, we **must not** represent a client, or continue to represent, (1) if that **breaks an Ethics Rule or the law**, or (2) if our physical or mental condition **materially** impairs our representation, or (3) if we are **fired**. (b) We **may** withdraw or request the court to permit withdrawal (1) if there's no material adverse client effect, (2) using our services, the client's **breaking the law** or **committing fraud**, (3) the client did that in the past, (4) the client insists on repugnant or fundamentally disagreeable action, (5) the client doesn't pay after warning, (6) the employment becomes unreasonably financially burdensome or the client makes the employment **unreasonably difficult**, (7) there is other good cause. (c) We can't withdraw if the judge says no. (d) **After termination** protect the client's interests; giving reasonable notice, giving reasonable time for new counsel, surrendering papers/property, and refunding unearned fees. The **attorney's lien** is okay.

**1.16A Client File Retention**: (a) A private practice attorney shall retain client files

unless, (1) she **gives the file** to the client **or** she has **client-signed permission to destroy** and there are no legal proceedings set or threatened. (2) she gives the client **written 30-day notice** and there are no legal proceedings set or threatened. (b) She may destroy the file **without notice after ten years** after termination of the legal matter, if she hasn't agreed otherwise. (c) But **criminal attorneys** shall keep files (1) for the **client's life** if sentenced to **death, life without parole, or indeterminate**, including a life sex abuse sentence, (2) for **8 years** from sentencing if it's a **felony** sentence and **it was appealed**, (3) for **5 years** if a **felony isn't appealed**. (d)Written 30-day notice may be either in the **fee agreement** if she has a **rule-consistent file retention policy** or in a **client-delivered notice**. (e) Legal obligations, court orders, and tribunal rules **trump this rule**. (Detailed Comment 1 first requires reasonable efforts to find the client, then allows notice to the last-known address.)

**1.17 Sale of Law Practice:** We may sell or purchase a business or area of practice, including good will, if: (a) the seller quits the law or the area of law, (b) the whole business or area of practice is sold, (c) the seller gives notice to the client (at the last known address) regarding (1) the proposed sale, (2) the client's right to hire other counsel or take the file, and (3) that the client has to act within 60 days. (d) The fees can't go up.

**1.18 Duties to Prospective Clients:** (a) A prospective client is **anybody who talks to you** about possibly hiring you. (b) **Even if she doesn't hire you, you can't use or reveal** her **significantly harmful** consultation information, except under Rule 1.9 *(former clients)* (c) You then **can't represent** other clients with materially adverse interests in the same or substantially related matter. The lawyer's **partners are similarly prohibited**. (d) **But the intake lawyer may still represent** if, (1) **both** the prospective client and the adverse client give **informed consent**, confirmed in writing, or, (2) the **firm** may still represent if the **disqualified intake lawyer** reasonably took **only the minimum information** on intake, and (i) the intake lawyer is timely screened and gets no part of the fee, and (ii) written notice "is promptly given to the prospective client."

## Part 2—Counselor

**2.1 Advisor:** We shall use **independent judgment** and be **candid**. We may explore **moral, economic, social,** etc. considerations. We should advise about **ADR.**

**2.2 Intermediary:** (Repealed)

**2.3 Evaluation for Use by Third Persons:** (Opinion Letter) (a) We may do such an evaluation if we reasonably believe it is compatible with our client responsibilities. (b)

If we reasonably should know **our letter will materially affect the client**, the client must give **informed consent**. (c) Except for disclosure in the report, we must otherwise protect Rule 1.6 **confidentiality**.

**2.4 Lawyer Serving as Third-Party Neutral:** (a) That's defined as assisting two or more parties who are not clients. This may include being an **arbitrator or mediator**. (b) We must inform the parties they **aren't our clients**. If we reasonably should know they don't understand, we shall explain the difference between a third party neutral and attorney-client relationships.

## Part 3—Advocate

**3.1 Meritorious Claims and Contentions:** We shall not bring or defend, assert or controvert, **proceedings or issues** without a **non-frivolous basis**, unless we have a good faith argument for extension, modification, or reversal. In a **criminal or incarceration** case, we may defend to make the elements be proven.

**3.2 Expediting Litigation**: But only consistently with our **client's interests**.

**3.3 Candor Toward the Tribunal:** (a) We shall not **knowingly to a tribunal**, (1) falsely state material facts or law or fail to correct what we previously said, (2) fail to **disclose directly adverse, local legal authority** not disclosed by our opponents, (3) offer false evidence or **fail to reasonably remediate,** including telling the judge**,** whether previously offered by the lawyer, the client, or a client's witness. We **may** refuse to offer evidence we **reasonably believe** is false, **other than a criminal defendant's testimony**. (b) If we do a "adjudicative proceeding" we must remediate the proceeding-related criminal or fraudulent conduct of **anybody**, including telling the judicial officer. (c) These duties continue to **proceeding's conclusion** regardless of **Rule 1.6**. (*confidentiality*) (d) In an ***ex parte*** **hearing**, we shall disclose all material facts to the court, including adverse facts.

**3.4 Fairness to Opposing Party and Counsel:** We shall not (a) **unlawfully obstruct** a party's access to evidence or **alter, conceal, or destroy** evidence or get another to do that, (b) falsify evidence, **counsel or assist** witness perjury, or bribe a witness, (c) knowingly disobey a tribunal rule, except openly, (d) frivolously request discovery or fail to diligently comply with legal, proper discovery requests, (e) in trial, raise irrelevant evidence, assert personal knowledge except when a witness, or state our opinion as to the justness of a cause, witness credibility, or the culpability, guilt, or innocence of a litigant, or, (f) ask a non-client person to not talk to others unless (1) the person is a client relative, employee or agent and no other law prohibits, and (2) not talking won't harm the person's interests.

**3.5 Impartiality and Decorum of the Tribunal:** We shall not (a)(b) illegally seek to **influence,** or without legal or court authority **communicate *ex parte*** during a proceeding, with judges, jurors, prospective jurors, or officials. We may communicate *ex parte* with a judge who initiates the communication if it's reasonably within her authority. (c) We shall not communicate with **jurors after trial** if (1) prohibited by law or order, (2) the juror says no, (3) our communication involves misrepresentation, coercion, duress, or harassment, or (4) the communication is reasonably likely to demean, embarrass or criticize. (d) We shall not intentionally **disrupt a tribunal**.

**3.6 Trial Publicity:** (a) We and our **associates** can't talk outside of court to the **media** if we know or **reasonably should know** that talking will **very likely materially prejudice** an adjudicative proceeding. (b) (There are many specific exceptions.) (c) We may, if required, speak to protect our client against substantial, undue, prejudicial detriment of publicity we didn't cause, but no more than that. (d) Our associates can't either.

**3.7 Lawyer as Witness**: (a) We can't be **advocates at the trial** if we are a likely, necessary **witness**, unless (1) the testimony is **uncontested**, (2) is about **the value of our services** in the case, or (3 disqualification would be a **substantial hardship** to the client. (b) Our other **firm attorneys** may be advocates in the matter unless prohibited by Rules 1.7 (*current client loyalty*) or 1.9 (*former client loyalty*. *See generally* ***Fognani*** *v. Young*, 115 P.3d 1268 (Colo. 2005)

**3.8 Special Responsibilities of a Prosecutor:** Criminal prosecutors shall (a) require **probable cause** and (b) reasonably assure the defendant's been advised of procedures for and has had time to **obtain counsel**. (c) a prosecutor shall not try to obtain waiver of **important pretrial rights** from a ***pro se*** defendant. (d) The prosecutor shall timely disclose offense-**adverse or mitigating,** and sentence-**mitigating** evidence unless there's a protective order and (e) The prosecutor shall not **subpoena an attorney** to disclose confidential client information in a grand jury or criminal proceeding unless with reasonable belief, (1) the information is not privileged, (2) is essential to prosecution or investigation, **and** (3) there's no feasible alternative. (f) A prosecutor may inform the public of the nature and extent of the prosecution, if necessary to serve "a legitimate law enforcement purpose." Outside the courtroom, the prosecutor can't make comments substantially likely to "heighten public condemnation," and must reasonably prevent employees and others from violating Rule 3.6 or this rule.

**3.9 Advocate in Nonadjudicative Proceedings:** In legislative or administrative tribunals we must **disclose** our role as advocate. We must comply with Rules (3.3(a)(1), 3.3(a)(3), 3.3(b), and 3.4(a) and (b).

## Part 4--Transactions With Persons Other Than Clients

**4.1 Truthfulness in Statements to Others:** When representing clients (a) we shan't knowingly **lie to** a third party about facts or law. (b) We must **disclose material facts** to **third persons** so as to not knowingly assist our **client's crime or fraud**, unless the facts are confidential under **Rule 1.6**. *(c.f. Rule 3.3. which does* ***not*** *except out Rule 1.6 confidentiality for candor to* ***the court.****)*

**4.2 Communication with Person Represented by Counsel:** Without consent or legal authority, and during representation of a client, we can't **talk to a person** if they are attorney-represented in the matter, unless authorized by law or court order. *(Ethics Opinion 69— The other side's employees)*

**4.3 Dealing with Unrepresented Persons:** On behalf of a client, we can't imply to *pro se* persons that we are **disinterested**, we must reasonably correct the person's misunderstanding of our role, and we may not give them legal advice except to get an attorney, if the *pro se* person's interests are reasonably in conflict.

**4.4 Respect for Rights of Third Persons**: (a) In representation, we may not act merely to **embarrass, delay, burden, or violate** the legal rights of third persons, without **substantial purpose.** (b) If we reasonably should know a received **document about our client was mis-sent**, we shall promptly notify the sender. (c) Unless permitted by court order, if we haven't read it and the sender says it was mis-sent, we don't read it and follow the sender's instructions.

**4.5 Threatening Prosecution**: (a) In **civil** matters, we can't **threaten** criminal, administrative, or disciplinary charges to gain an **advantage** or participate in **presenting** criminal, administrative, or disciplinary charges **solely** to gain an **advantage**. (b) It's okay **to tell** the other side, reasonably, that their behavior violates rules or statutes. *(Colorado-only rule – carried over from Code – safe harbor added 1997)*

## Part 5—Law Firms and Associations

**5.1 Responsibilities of a Partner of Supervisory Lawyer:** (a) **Partners** and (b) **direct supervisors** must reasonably ensure ethical conformance in the firm. (c) The lawyer is ethically responsible if (1) he or she **orders or knowingly ratifies** the unethical conduct or (2) is a partner or supervisor, knows of the conduct in time, and **doesn't mitigate.**

**5.2 Responsibilities of a Subordinate Lawyer:** (a) The subordinate is bound by the rules regardless. *(No "just following orders" defense.)* (b) but it's okay if he or she relies on a supervisor's **reasonable resolution** of an **arguable question**.

**5.3 Responsibilities Regarding Nonlawyer Assistants:** (a) A partner or (b) a supervisor shall reasonably ensure employees conform to ethical obligations. (c) The lawyer is ethically responsible if he or she (1) **orders or knowingly ratifies** the unethical conduct or (2) is a partner or supervisor, knows of the conduct in time, and **doesn't mitigate.**

**5.4 Professional Independence of a Lawyer:** (a) We can't **split fees with non-lawyers** except (1)(2)(3) to a partner or associate or attorney-seller's estate, (4) toward **employees' retirement,** or (5) court-awarded legal fees with the employing, retaining, or recommending non-profit. (b) We can't **practice** law with **non-attorneys**. (c) **Referring persons** can't direct our work. (d) In a **for-profit** corporation a non-lawyer cannot own an interest or **direct or control a lawyer's professional judgment**. (e) **For-profit** professional corporations must comply with Rule 265 (Professional Service Corporations). (f) Suspended or disbarred or inactive attorneys are "**non-lawyers**."

**5.5 Unauthorized Practice of Law:** (a) We can't (1) **practice law here** without a Colorado license, unless authorized by **CRCP 204 or 205** or permitted by federal or tribal law, (2) practice **somewhere else** if it violates their rules, (3) **aid or abet** someone who does, or (4) have **disbarred** or seriously **suspended attorneys in the firm** name. (b) We can't let a **disbarred**, seriously suspended, or disability inactive attorney (1) **give legal advice** to our clients, (2) **appear at a hearing** (3) or **deposition** for our clients, (4) **negotiate** with others for our clients, (5) otherwise **practice law**, or (6) handle **clients funds**. (c) Subject to (d) below, we may employ a disbarred, seriously suspended, or disability inactive attorney be a **clerk, drafter, or researcher**, including: (1) drafting, (2) scheduling with clients or others, or (3) assisting an attorney at a deposition. (d) If the disbarred, seriously suspended, or disability inactive attorney has any contact with clients, we must first (1) give client notice that the attorney can't practice law and (2) retain the notice for two years after completion. (e) One-time notice under this rule or CRCP 251.28 is sufficient.

**5.6 Restrictions on Right to Practice:** We can't offer or make an employment-related agreement (a) restricting an **attorney's right to practice**, except retirement benefits, or (b) **settle a case** that restricts our practice.

**5.7 Responsibilities Regarding Law-Related Services:** (a) These ethics rules apply to law-related services if done by (1) the lawyer and are **indistinct from his**

**legal practice** or (2) by a **lawyer-controlled entity**, unless the lawyer reasonably assures that the customer knows the services aren't legal services and that the customer-protections of the ethics rules don't apply. (b) A service is **law-related** if they **"might reasonably be performed with and in substance are related to the provision of legal services"** and wouldn't be unauthorized practice if a non-lawyer did them.

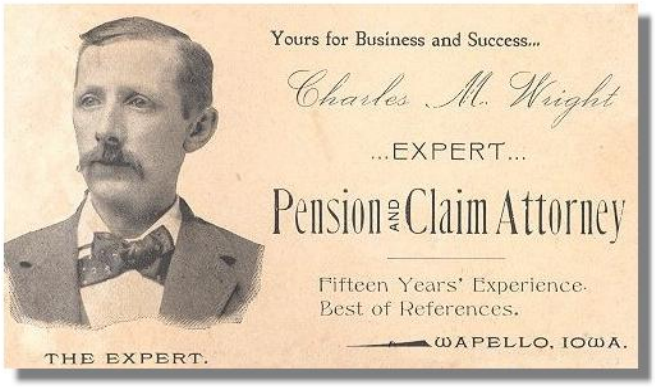
## Part 6—Voluntary Pro Bono Public Service

**6.1 Voluntary Pro Bono Publico Service:** We are obliged to do *pro bono*. We should do **50 hours pro bono** annually, (a) doing a **substantial majority without a fee**, for (1) poor folks and (2) charities, and (b) the rest at low or no fee for (1) organizations that need help or (2) poor folks, or (3) by participating in pro-law activities. We also should **send money to legal services**. If our jobs won't allow free legal work, then we should do the services or follow paragraph (b).

6.2 **Accepting Appointments:** Don't try to duck **court appointments** unless (a) it would likely **break the Rules** (including 1.1 competency) or the law, or (b) be unreasonably **financially** or oppressively burdensome or, or (c) is repugnant. *See Stern v. Court*, 773 P.2d 1074 (Colo. 1989).

**6.3 Membership in Legal Services Organization:** A lawyer may serve in a legal services organization even if it serves people's interests that are **adverse to clients**. But the lawyer can't participate in decisions or actions if (a) it breaks **Rule 1.7** or (b) it would materially cause the **staff attorney** to break Rule 1.7.

**6.4 Law Reform Activities Affecting Client Interests:** We may serve in a reform organization despite **client effects**. If there are **positive client effects**, we have to **disclose** to the organization but don't have to identify the client.

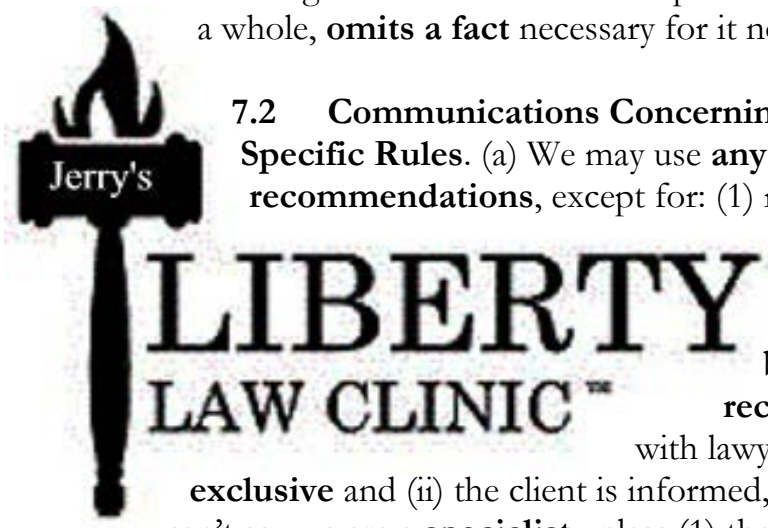



**6.5 Nonprofit and Court-Annexed Limited Legal Services Program: (**a) We may perform **short-term limited legal services** without either we or the client expecting continuing representation. (1) We are subject to Rules 1.7 and 1.9(a) only if we know of a conflict, and (2) to Rule 1.10 only if we know our partner is 1.7 or 1.9(a) disqualified. (b) Rule 1.10 only applies as in (a)(2) to these short-term limited legal services.

## Part 7—Information About Legal Services

*(Some of the previous part 7 rules were moved to the comments.)*

**7.1 Communications Concerning a Lawyer's Services:** A lawyer shall not make a **false or misleading communication** about the lawyer or the services. False or misleading means a **material** misrepresentation of facts or law … or … as a whole, **omits a fact** necessary for it not to be **materially** misleading.




**7.2 Communications Concerning a Lawyer's Services: Specific Rules**. (a) We may use **any media.** (b) We may not pay for **recommendations**, except for: (1) reasonable advertising **costs**, (2) the charges of a legal services plan or a **not-for-profit or qualified referral service**, (3) buying a law practice, (4) **reciprocal referral agreements** with lawyers or non-lawyers if (i) it's **not exclusive** and (ii) the client is informed, (5) giving **nominal gifts**. (c) We can't say we are a **specialist** unless (1) the certifying agency is approved by the state or the ABA and (2) we identify the certifying organization. (d) Our advertisements must include the name and contact information of at least **one responsible attorney**.

**7.3 Solicitation of Clients:** (a) **Solicit** means a lawyer communication to a specific person who needs specific legal services. (b)**No for-profit in-person contact** unless the contact is with: (1) a lawyer, (2) family or close friends, or (3)a business person routinely using that service. (c) No solicitation if (1) the target has said no contact, or (2) the solicitation involves coercion, duress, or harassment. (d) No soliciting for **personal injury cases** within **30 days** of the injury, unless the victim is family or a prior professional or business contact, and (1) the victim isn't already represented, and (2) if the case will be **sent out to a different lawyer** or firm, the communicate so states. (e) Communications authorized or ordered by law or a judge are okay. (f) Solicitations shall (1) say "**Advertising Material**" on an envelope, if it's a letter. If it is any other kind of solicitation it must start and end with "Advertising Material." (2) not reveal the legal issue on the outside, and (3) require a copy to be kept for **five years**. (g) Regardless, we may participate with **pre-paid or group legal plans** if they don't solicit for specific cases.

**7.4 and 7.5 repealed**

## Part 8—Maintaining the Integrity of the Profession

**8.1 Bar Admission and Disciplinary Matters**: If we apply to the bar or reapply for reinstatement, or make statements concerning an application, we can't (a) knowingly make a **false statement of material fact** (b) or fail to correct a **known misapprehension** or **fail to respond** to lawful admission or regulatory authority, except to protect Rule 1.6 (*Confidentiality*) information.

**8.2 Judicial and Legal Officials:** (a) We shall not knowingly make **false statements** or statements with **reckless disregard** about the qualifications or integrity of **judges**, adjudicatory officers, public legal officers, or candidates for judicial or legal-office election, appointment or retention. (b) A lawyer who is a candidate for judicial retention shall comply with the judicial conduct code.

**8.3 Reporting Professional Misconduct:** (a) If we have knowledge of a Rules violation that raises **substantial question** as to an attorney's **honesty, trustworthiness,** or **fitness to practice** we shall inform the **appropriate authority** or, (b) if we have knowledge of a Judicial Rules violation that raises a substantial question as to a **judge's fitness for office**, we shall notify the appropriate authority, (c) unless disclosure would violate **Rule 1.6** *(Confidentiality)* or the information came from a **peer assistance program** *(Including the Ethics Hotline.)* and would similarly be confidential.

**8.4 Misconduct:** (a) We can't violate or *attempt* to violate a rule. We can't get someone else to do what we can't do, (b) commit a crime that reflects adversely on our **honesty, trustworthiness,** or **fitness to practice,** (c) engage in conduct involving **dishonesty, fraud, deceit, or misrepresentation,** except we may "advise, direct, or supervise" clients, cops, and investigators "who **participate in lawful investigative activities**." **(pretexting)** (d) prejudice the **administration of justice**, (e), state or imply an ability to **improperly influence a judicial officer** or government agency or imply we can "achieve results" by breaking the Rules or "other law", (f) **knowingly** assist a judicial officer to **break the Judicial Rules** or "other law", (g) engage in conduct, during representation, that appeals to or engenders bias as to race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (h) engage in **any other conduct** that **wrongfully harms** others **and** adversely reflects on the lawyer's fitness to practice law. i. engage in conduct we reasonably should know is sexual harassment, if it's in connection with our professional activities.

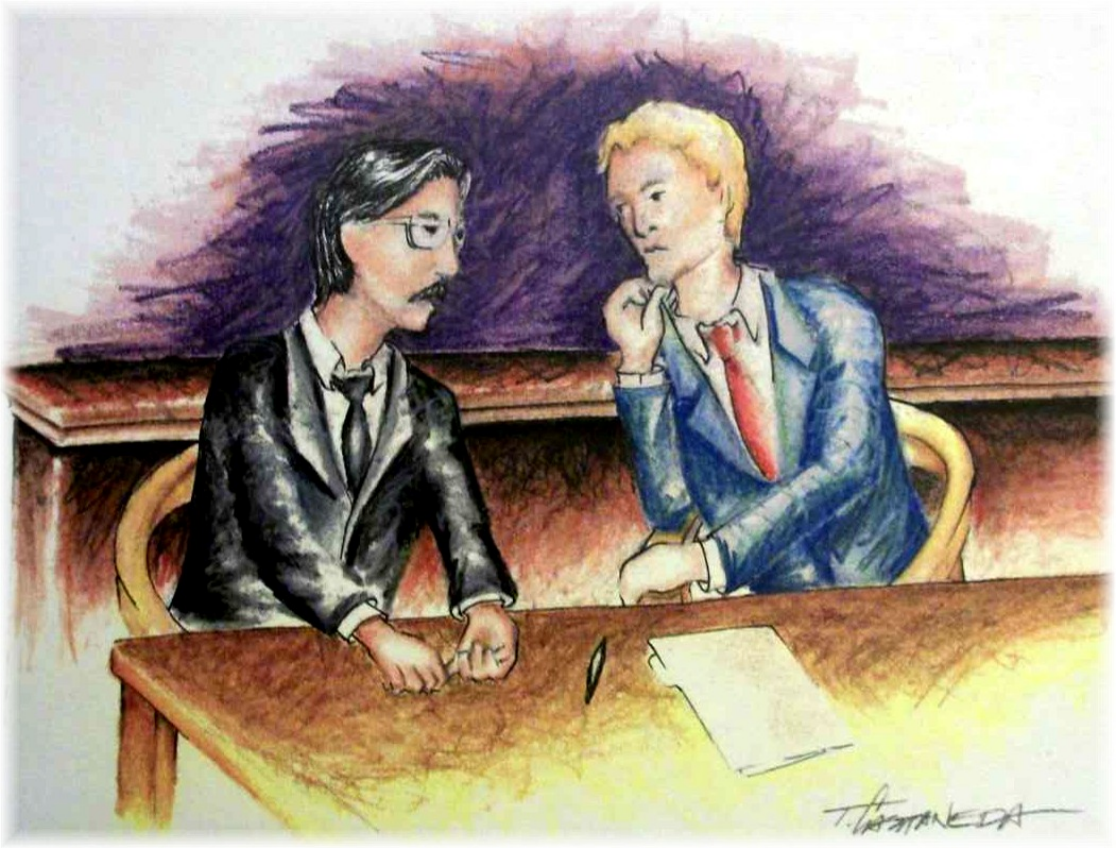
**8.5 Jurisdiction:** (a) If we **are licensed here**, we are **subject to discipline** even if we are working in Tuscaloosa. A **lawyer not admitted** here **subjects himself to**

**jurisdiction** by offering "to provide any legal services in this jurisdiction." We can be disciplined in **more than one place**. (*ethical double-jeopardy*) (b) The applicable rules are (1) for conduct in court, where the court sits, unless that court's rules say differently, (2) but otherwise where the conduct occurred or where the "**predominant effect**" occurred. We **won't be disciplined** if we reasonably believed we were complying with the rules where the predominant effect would occur. (*ethical choice of law*)

**9.0** **How Known and Cited.** You didn't know there was **a Rule 9**, did you? Don't worry. It has no substance …

… similarly perhaps to these materials by **Phil James.** Phil@Lawyer.com

Friday, October 23, 2020



Original Art 2013 by **Teresa Castaneda** www.**Paintbru.sh**

Colorado Bar Association **Ethics Hotline** --- 303.860.1115

# SECTION 2

# Introduction to Navigating Ethics Minefields

*Presented by*

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NOTES:

CBA·CLE
COLORADO BAR ASSOCIATION CONTINUING LEGAL EDUCATION

HAMMER LAW

**ETHICS** 7.0
**2020**

Karen A. Hammer, LL.M.

# INTRO: NAVIGATING ETHICS MINEFIELDS

Spot | Analyze | Manage



1

HAMMER LAW

# ethics troubleshooting

Spot | Analyze | Manage



2

Spot | Analyze | Manage

## SPOT LEGAL CONTEXT

- WHO/WHAT:
- WHERE/WHEN:
- WHY/HOW:



3

Spot | Analyze | Manage

## ANALYZE: Authorities

- SCAN
- DIP
- READ



4

Spot | Analyze | Manage

## MANAGE: Make a Record

- ESSENTIAL ELEMENTS
- RESOURCES EVALUATED
- IDENTIFY AND EVALUATE OPTIONS



5

Spot | Analyze | Manage

## MANAGE: **Process**

- CHOOSE Option
- IMPLEMENT Choice
- EVALUATE Results



6

Spot | Analyze | Manage

## MANAGE: **Fine Tune**

- PAUSE for Perspective
- SEEK Assistance
- IMPLEMENT the Fine Tune



7

Spot | Analyze | Manage

## MANAGE: **Fix Mistakes**

- PAUSE for Perspective
- REPEAT Spot, Analyze
- MANAGE the Fix



8

HAMMER
LAW

# ethics troubleshooting

Spot | Analyze | Manage



9

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10

# STANDARDS FOR IMPOSING LAWYER SANCTIONS

AS APPROVED, FEBRUARY 1986
AND AS AMENDED, FEBRUARY 1992

## I. PREFACE

### A. Background

In 1979, the American Bar Association published the Standards for Lawyer Discipline and Disability Proceedings. [The Standards for Lawyer Discipline and Disability Proceedings have been superseded by the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE)][1] That book [the Standards] was a result of work by the Joint Committee on Professional Discipline of the American Bar Association. The Joint Committee was composed of members of the Judicial Administration Division and the Standing Committee on Professional Discipline of the American Bar Association. The task of the Joint Committee was to prepare standards for enforcement of discipline in the legal community.

The 1979 standards have been most helpful, and have been used by numerous jurisdictions as a frame of reference against which to compare their own disciplinary systems. Many jurisdictions have modified their procedures to comport with these suggested standards, and the Standing Committee on Professional Discipline of the American Bar Association has assisted state disciplinary systems in evaluating their programs in light of the approved standards.

It became evident that additional analysis was necessary in one important area -- that of appropriate sanctions for lawyer misconduct. The American Bar Association Standards for Lawyer Discipline and Disability Proceedings (hereinafter "Standards for Lawyer Discipline") do not attempt to recommend the type of discipline to be imposed in any particular case. The Standards merely state that the discipline to be imposed "should depend upon the facts and circumstances of the case, should be fashioned in light of the purpose of lawyer discipline, and may take into account aggravating or mitigating circumstances" (Standard 7.1) [See generally Rule 10, ABA MRLDE].

For lawyer discipline to be truly effective, sanctions must be based on clearly developed standards. Inappropriate sanctions can undermine the goals of lawyer discipline: sanctions which are too lenient fail to adequately deter misconduct and thus lower public confidence in the profession; sanctions which are too onerous may impair confidence in the system and deter lawyers from reporting ethical violations on the part of other lawyers. Inconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems.

As an example of this problem of inconsistent sanctions, consider the range in levels of sanctions imposed for a conviction for failure to file federal income taxes. In one jurisdiction, in 1979, a lawyer who failed to file income tax returns for one year was suspended for one year,[2] while, in 1980, a lawyer who failed to file income tax returns for two years was merely censured.[3] Within a two-year period, the sanctions imposed on lawyers who converted their clients' funds included disbarment,[4] suspension,[5] and censure.[6] The inconsistency of sanctions imposed by different jurisdictions for the same misconduct is even greater.

An examination of these cases illustrates the need for a comprehensive system of sanctions. In many cases, different sanctions are imposed for the same acts of misconduct, and the courts rarely provide any explanation for the selection of sanctions. In other cases, the courts may give reasons for their decisions, but their statements are too general to be useful. In still other cases, the courts may list specific factors to support a certain result, but they do not state whether these factors must be considered in every discipline case, nor do they explain whether these factors are entitled to equal weight.

The Joint Committee on Professional Sanctions (hereinafter "Sanctions Committee") was formed to address these problems by formulating standards to be used in imposing sanctions for lawyer misconduct. The Sanctions Committee was composed of members from the Judicial Administration Division and the Standing Committee on Professional Discipline. The mandate given was ambitious: the Committee was to examine the current range of sanctions imposed and to formulate standards for the imposition of appropriate sanctions.

In addressing this task, the Sanctions Committee recognized that any proposed standards should serve as a model which sets forth a comprehensive system of sanctions, but which leaves room for flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct. These standards are designed to promote thorough, rational consideration of all factors relevant to imposing a sanction in an individual case. The standards attempt to ensure that such factors are given appropriate weight in light of the stated goals of lawyer discipline, and that only relevant aggravating and mitigating circumstances are considered at the appropriate time. Finally, the standards should help achieve the degree of consistency in the imposition of lawyer discipline necessary for fairness to the public and the bar.

While these standards will improve the operation of lawyer discipline systems, there is an additional factor which, though not the focus of this report, cannot be overlooked. In discussing sanctions for lawyer misconduct, this report assumes that all instances of unethical conduct will be brought to the attention of the disciplinary system. Experience indicates that such is not the case. In 1970, the ABA Special Committee on Evaluation of Disciplinary Enforcement (the Clark Committee), was charged with the responsibility for evaluating the effectiveness of disciplinary enforcement systems. The Clark Committee concluded that one of the most significant problems in lawyer discipline was the reluctance of lawyers and judges to report misconduct.[7] That same problem exists today. It cannot be emphasized strongly enough that lawyers and judges must report unethical conduct to the appropriate disciplinary agency.[8] Failure to render such reports is a disservice to the public and the legal profession.

Judges in particular should be reminded of their obligation to report unethical conduct to the disciplinary agencies. Under Rule 2.15 of the ABA Model Code of Judicial Conduct, a judge who receives information indicating a substantial likelihood that another judge or a lawyer has violated the applicable rules of professional conduct is obligated to take appropriate action. This action includes making a report of the violation to the appropriate authority when the violation raises a substantial question about the judge's fitness or the lawyer's honesty trustworthiness or fitness.[9] Frequently, judges take the position that there is no such need and that errant behavior of lawyers can be remedied solely by use of contempt proceedings and other alternative means. It must be emphasized that the goals of lawyer discipline are not properly and fully served if the judge who observes unethical conduct simply deals with it on an ad hoc basis. It may be proper and wise for a judge to use contempt powers in order to assure that the court maintains control of the proceeding and punishes a lawyer for abusive or obstreperous conduct in the court's presence. However, the lawyer discipline system is in addition to and serves purposes different from contempt powers and other mechanisms available to the judge. Only if all lawyer misconduct is in fact reported to the appropriate disciplinary agency can the legal profession have confidence that consistent sanctions are imposed for similar misconduct.

Consistency of sanctions depends on reporting of other types as well. The American Bar Association Center for Professional Responsibility has established a "National Lawyer Regulatory Data Bank" which collects statistics on the nature of ethical violations and sanctions imposed in lawyer discipline cases in all jurisdictions. The information available from the Data Bank is only as good as the reports which reach it. It is vital that the Data Bank promptly receive complete, accurate and detailed information with regard to all discipline cases.

Finally, the purposes of lawyer sanctions can best be served, and the consistency of those sanctions enhanced, if courts and disciplinary agencies throughout the country articulate the reasons for sanctions

imposed. Courts of record that impose lawyer discipline do a valuable service to the legal profession and the public when they issue opinions in lawyer discipline cases that explain the imposition of a specific sanction. The effort of the Sanctions Committee was made easier by the well-reasoned judicial opinions that were available. At the same time, the Sanctions Committee was frustrated by the fact that many jurisdictions do not publish lawyer discipline decisions, and that even published decisions are often summary in nature, failing to articulate the justification for the sanctions imposed.

[The Standards for Imposing Lawyer Sanctions were amended by the ABA House of Delegates on February 4, 1992. The amendments were proposed by the ABA Standing Committee on Professional Discipline as a result of its ongoing review of the courts' use of the Standards in lawyer disciplinary cases to assure their consistency with the developing case law.]

## B. Methodology

The Standards for Imposing Lawyer Sanctions have been developed after an examination of all reported lawyer discipline cases from 1980 to June, 1984, where public discipline was imposed.[10] In addition, eight jurisdictions, which represent a variety of disciplinary systems as well as diversity in geography and population size, were examined in depth. In these jurisdictions - Arizona, California, the District of Columbia, Florida, Illinois, New Jersey, North Dakota, and Utah - all published disciplinary cases from January, 1974 through June, 1984, were analyzed. In each case, data were collected concerning the type of offense, the sanction imposed, the policy considerations identified, and aggravating or mitigating circumstances noted by the court.[11]

These data were examined to identify the patterns that currently exist among courts imposing sanctions and the policy considerations that guide the courts. In general, the courts were consistent in identifying the following policy considerations: protecting the public, ensuring the administration of justice, and maintaining the integrity of the profession. In the words of the California Supreme Court: "The purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the lawyer to continue in that capacity for the protection of the public, the courts, and the legal profession."[12] However, the courts failed to articulate any theoretical framework for use in imposing sanctions.

In attempting to develop such a framework, the Sanctions Committee considered a number of options. The Committee considered the obvious possibility of identifying each and every type of misconduct in which a lawyer could engage, then suggesting either a recommended sanction or a range of recommended sanctions to deal with that particular misconduct. The Sanctions Committee unanimously rejected that option as being both theoretically simplistic and administratively cumbersome.[13]

The Sanctions Committee next considered an approach that dealt with general categories of lawyer misconduct and applied recommended sanctions to those types of misconduct depending on whether or not -- and to what extent -- the misconduct resulted from intentional or malicious acts of the lawyer. There is some merit in that approach; certainly, the intentional or unintentional conduct of the lawyer is a relevant factor. Nonetheless, that approach was also abandoned after the Sanctions Committee carefully reviewed the purposes of lawyer sanctions. Solely focusing on the intent of the lawyer is not sufficient, and proposed standards must also consider the damage which the lawyer's misconduct causes to the client, the public, the legal system, and the profession. An approach which looked only at the extent of injury was also rejected as being too narrow.

The Committee adopted a model that looks first at the ethical duty and to whom it is owed, and then at the lawyer's mental state and the amount of injury caused by the lawyer's misconduct. (See Theoretical Framework, p. 5, for a detailed discussion of this approach.) Thus, one will look in vain for a section of this report which recommends a specific sanction for, say, improper contact with opposing parties who are represented by counsel [Rule 4.2/DR 7-104(A)(1)],[14] or for any other specific misconduct. What one will

find, however, is an organizational framework that provides recommendations as to the type of sanction that should be imposed based on violations of duties owed to clients, the public, the legal system, and the profession.

To provide support for this approach, the Sanctions Committee has offered as much specific data and guidance as possible from reported cases.[15] Thus, with regard to each category of misconduct, the report provides the following:

> -discussion of what types of sanctions have been imposed for similar misconduct in reported cases;
>
> -discussion of policy reasons which are articulated in reported cases to support such sanctions; and,
>
> -finally, a recommendation as to the level of sanction imposed for the given misconduct, absent aggravating or mitigating circumstances.

While it is recognized that any individual case may present aggravating or mitigating factors which would lead to the imposition of a sanction different from that recommended, these standards present a model which can be used initially to categorize misconduct and to identify the appropriate sanction. The decision as to the effect of any aggravating or mitigating factors should come only after this initial determination of the sanction.

The Sanctions Committee also recognized that the imposition of a sanction of suspension or disbarment does not conclude the matter. Typically, disciplined lawyers will request reinstatement or readmission. While this report does not include an in-depth study of reinstatement and readmission cases, a general recommendation concerning standards for reinstatement and readmission appears as Standard 2.10.

## II. THEORETICAL FRAMEWORK

These standards are based on an analysis of the nature of the professional relationship. Historically, being a member of a profession has meant that an individual is some type of expert, possessing knowledge of high instrumental value such that the members of the community give the professional the power to make decisions for them. In the legal profession, the community has allowed the profession the right of self-regulation. As stated in the Preamble to the ABA Model Rules of Professional Conduct (hereinafter "Model Rules"), "[t]he legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."[16]

This view of the professional relationship requires lawyers to observe the ethical requirements that are set out in the Model Rules (or applicable standard in the jurisdiction where the lawyer is licensed). While the Model Rules define the ethical guidelines for lawyers, they do not provide any method for assigning sanctions for ethical violations. The Committee developed a model which requires a court imposing sanctions to answer each of the following questions:

(1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?)

(2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or

negligently?)

(3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?) and

(4) Are there any aggravating or mitigating circumstances?

In determining the nature of the ethical duty violated, the standards assume that the most important ethical duties are those obligations which a lawyer owes to clients. These include:

(a) the duty of loyalty which (in the terms of the Model Rules and Code of Professional Responsibility) includes the duties to:

(i) preserve the property of a client [Rule 1.15/DR9-102],

(ii) maintain client confidences [Rule 1.6/DR4-101], and

(iii) avoid conflicts of interest [Rules 1.7 through 1.13, 2.2, 3.7, 5.4(c) and 6.3/ DR5-101 through DR 5-105, DR9-101];

(b) the duty of diligence [Rules 1.2, 1.3, 1.4/DR6-101(A)(3)];

(c) the duty of competence [Rule 1.1/DR6-101(A)(1) & (2)]; and

(d) the duty of candor [Rule 8.4(c)/DR 1-102(A)(4) & DR7-101(A)(3)].

In addition to duties owed to clients, the lawyer also owes duties to the general public. Members of the public are entitled to be able to trust lawyers to protect their property, liberty, and their lives. The community expects lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice [Rules 8.2, 8.4(b)&(c)/DR 1-102(A)(3)(4)&(5), DR 8-101 through DR 8-103, DR 9-101(c)].

Lawyers also owe duties to the legal system. Lawyers are officers of the court, and must abide by the rules of substance and procedure which shape the administration of justice. Lawyers must always operate within the bounds of the law, and cannot create or use false evidence, or engage in any other illegal or improper conduct [Rules 3.1 through 3.6, 3.9, 4.1 through 4.4, 8.2, 8.4(d)(e)&(f)/DR7-102 through DR7-110].

Finally, lawyers owe duties to the legal profession. Unlike the obligations mentioned above, these duties are not inherent in the relationship between the professional and the community. These duties do not concern the lawyer’s basic responsibilities in representing clients, serving as an officer of the court, or maintaining the public trust, but include other duties relating to the profession. These ethical rules concern:

(a) restrictions on advertising and recommending employment [Rules 7.1 through 7.5/DR2-101 through 2-104];

(b) fees [Rules 1.5, 5.4 and 5.6/DR2-106, DR2-107, and DR3-102];

(c) assisting unauthorized practice [Rule 5.5/DR3-101 through DR3-103];

(d) accepting, declining, or terminating representation [Rules 1.2, 1.14, 1.16/DR2-110]; and

(e) maintaining the integrity of the profession [Rules 8.1&8.3/DR1-101 and DR 1-103].

The mental states used in this model are defined as follows. The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct both without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

The extent of the injury is defined by the type of duty violated and the extent of actual or potential harm. For example, in a conversion case, the injury is determined by examining the extent of the client's actual or potential loss. In a case where a lawyer tampers with a witness, the injury is measured by evaluating the level of interference or potential interference with the legal proceeding. In this model, the standards refer to various levels of injury: "serious injury," "injury," and "little or no injury." A reference to "injury" alone indicates any level of injury greater than "little or no" injury.

As an example of how this model works, consider two cases of conversion of a client's property. After concluding that the lawyers engaged in ethical misconduct, it is necessary to determine what duties were breached. In these cases, each lawyer breached the duty of loyalty owed to clients. To assign a sanction, however, it is necessary to go further, and to examine each lawyer's mental state and the extent of the injuries caused by the lawyers' actions.

In the first case, assume that the client gave the lawyer $100 as an advance against the costs of investigation. The lawyer took the money, deposited it in a personal checking account, and used it for personal expenses. In this case, where the lawyer acted intentionally and the client actually suffered an injury, the most severe sanction - disbarment - would be appropriate.

Contrast this with the case of a second lawyer, whose client delivered $100 to be held in a trust account. The lawyer, in a hurry to get to court, neglected to inform the secretary what to do with these funds and they were erroneously deposited into the lawyer's general office account. When the lawyer needed additional funds he drew against the general account. The lawyer discovered the mistake, and immediately replaced the money. In this case, where there was no actual injury and a potential for only minor injury, and where the lawyer was merely negligent, a less serious sanction should be imposed. The appropriate sanction would be either reprimand or admonition.

In each case, after making the initial determination as to the appropriate sanction, the court would then consider any relevant aggravating or mitigating factors (Standard 9). For example, the presence of aggravating factors, such as vulnerability of the victim or refusal to comply with an order to appear before the disciplinary agency, could increase the appropriate sanction. The presence of mitigating factors, such as absence of prior discipline or inexperience in the practice of law, could make a lesser sanction appropriate.

While there may be particular cases of lawyer misconduct that are not easily categorized, the standards are not designed to propose a specific sanction for each of the myriad of fact patterns in cases of lawyer misconduct. Rather, the standards provide a theoretical framework to guide the courts in imposing sanctions. The ultimate sanction imposed will depend on the presence of any aggravating or mitigating factors in that particular situation. The standards thus are not analogous to criminal determinate sentences, but are guidelines which give courts the flexibility to select the appropriate sanction in each particular case of lawyer misconduct.

The standards do not account for multiple charges of misconduct. The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct. Either a pattern of misconduct or multiple instances of misconduct should be considered as aggravating factors (see Standard 9.22).

## III. STANDARDS FOR IMPOSING LAWYER SANCTIONS: BLACK LETTER RULES

**For reference purposes, a list of the black letter rules is set out below.**

**DEFINITIONS**

**"Injury" is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates any level of injury greater than "little or no" injury.**

**"Intent" is the conscious objective or purpose to accomplish a particular result.**

**"Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.**

**"Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.**

**"Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.**

### A. PURPOSE AND NATURE OF SANCTIONS

**1.1 Purpose of Lawyer Discipline Proceedings.**

**The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession.**

**1.2 Public Nature of Lawyer Discipline.**

**Upon the filing and service of formal charges, lawyer discipline should be public, and disposition of lawyer discipline should be public in cases of disbarment, suspension, and reprimand. Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should private discipline be imposed.**

**1.3 Purpose of These Standards.**

**These standards are designed for use in imposing a sanction or sanctions following a determination by clear and convincing evidence that a member of the legal profession has violated a provision of the Model Rules of Professional Conduct (or applicable standard under the laws of the jurisdiction where the proceeding is brought). Descriptions in these standards of substantive disciplinary offenses are not intended to create grounds for determining culpability independent of the Model Rules. The Standards constitute a model, setting forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct. They are designed to promote: (1) consideration of all factors relevant to imposing the appropriate level of sanction in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.**

## B. SANCTIONS

### 2.1 Scope

**A disciplinary sanction is imposed on a lawyer upon a finding or acknowledgement that the lawyer has engaged in professional misconduct.**

### 2.2 Disbarment

**Disbarment terminates the individual's status as a lawyer. Where disbarment is not permanent, procedures should be established for a lawyer who has been disbarred to apply for readmission, provided that:**

**(1) no application should be considered for five years from the effective date of disbarment; and**

**(2) the petitioner must show by clear and convincing evidence:**

**(a) successful completion of the bar examination;**
**(b) compliance with all applicable discipline or disability orders or rules; and**
**(c) rehabilitation and fitness to practice law.**

### 2.3 Suspension

**Suspension is the removal of a lawyer from the practice of law for a specified minimum period of time. Generally, suspension should be for a period of time equal to or greater than six months, but in no event should the time period prior to application for reinstatement be more than three years. Procedures should be established to allow a suspended lawyer to apply for reinstatement, but a lawyer who has been suspended should not be permitted to return to practice until he has completed a reinstatement process demonstrating rehabilitation, compliance with all applicable discipline or disability orders, and fitness to practice law.**

### 2.4 Interim Suspension

**Interim suspension is the temporary suspension of a lawyer from the practice of law pending imposition of final discipline. Interim suspension includes:**

**(a) suspension upon conviction of a "serious crime" or,**

**(b) suspension when the lawyer's continuing conduct is or is likely to cause immediate and serious injury to a client or the public.**

**2.5 Reprimand**

**Reprimand, also known as censure or public censure, is a form of public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.**

**2.6 Admonition**

**Admonition, also known as private reprimand, is a form of non-public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.**

**2.7 Probation**

**Probation is a sanction that allows a lawyer to practice law under specified conditions. Probation can be imposed alone or in conjunction with a reprimand, an admonition or immediately following a suspension. Probation can also be imposed as a condition of readmission or reinstatement.**

**2.8 Other Sanctions and Remedies**

**Other sanctions and remedies which may be imposed include:**

**(a) restitution,**

**(b) assessment of costs,**

**(c) limitation upon practice,**

**(d) appointment of a receiver,**

**(e) requirement that the lawyer take the bar examination or professional responsibility examination,**

**(f) requirement that the lawyer attend continuing education courses, and**

**(g) other requirements that the state's highest court or disciplinary board deems consistent with the purposes of lawyer sanctions.**

**2.9 Reciprocal Discipline**

**Reciprocal discipline is the imposition of a disciplinary sanction on a lawyer who has been disciplined in another jurisdiction.**

**2.10 Readmission and Reinstatement**

**In jurisdictions where disbarment is not permanent, procedures should be established to allow a disbarred lawyer to apply for readmission. Procedures should be established to allow a suspended lawyer to apply for reinstatement.**

## C. FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS

**3.0 Generally**

**In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:**

**(a) the duty violated;**

**(b) the lawyer's mental state;**

**(c) the potential or actual injury caused by the lawyer's misconduct; and**

**(d) the existence of aggravating or mitigating factors.**

**4.0 Violations of Duties Owed to Clients**

**4.1 Failure to Preserve the Client's Property**

**Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:**

**4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.**

**4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.**

**4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.**

**4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.**

**4.2 Failure to Preserve the Client's Confidences**

**Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving improper revelation of information relating to representation of a client:**

**4.21 Disbarment is generally appropriate when a lawyer, with the intent to benefit the lawyer or another, knowingly reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.**

**4.22 Suspension is generally appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.**

**4.23 Reprimand is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client.**

**4.24 Admonition is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes little or no actual or potential injury to a client.**

**4.3 Failure to Avoid Conflicts of Interest**

**Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conflicts of interest:**

**4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):**

**(a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or**

**(b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or**

**(c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.**

**4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.**

**4.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.**

**4.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.**

**4.4 Lack of Diligence**

**Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client:**

**4.41 Disbarment is generally appropriate when:**

**(a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or**

**(b) a lawyer knowingly fails to perform services for a client and causes serious or**

**potentially serious injury to a client; or**

**(c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.**

**4.42 Suspension is generally appropriate when:**

**(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or**

**(b) a lawyer engages in a pattern of neglect causes injury or potential injury to a client.**

**4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.**

**4.44 Admonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client.**

**4.5 Lack of Competence**

**Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to provide competent representation to a client:**

**4.51 Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client.**

**4.52 Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client.**

**4.53 Reprimand is generally appropriate when a lawyer:**

**(a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or**

**(b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.**

**4.54 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether he or she is competent to handle a legal matter, and causes little or no actual or potential injury to a client.**

**4.6 Lack of Candor**

**Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client:**

**4.61 Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent**

**to benefit the lawyer or another, and causes serious injury or potential serious injury to a client.**

**4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.**

**4.63 Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.**

**4.64 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in failing to provide a client with accurate or complete information, and causes little or no actual or potential injury to the client.**

**5.0 Violations of Duties Owed to the Public**

**5.1 Failure to Maintain Personal Integrity**

**Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:**

**5.11 Disbarment is generally appropriate when:**

**(a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or**

**(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.**

**5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.**

**5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.**

**5.14 Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.**

**5.2 Failure to Maintain the Public Trust**

**Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving public officials who engage in conduct that is prejudicial to the administration of justice or who state or imply an ability to influence**

**improperly a government agency or official:**

**5.21 Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process.**

**5.22 Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.**

**5.23 Reprimand is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.**

**5.24 Admonition is generally appropriate when a lawyer in an official or governmental position engages in an isolated instance of negligence in not following proper procedures or rules, and causes little or no actual or potential injury to a party or to the integrity of the legal process.**

**6.0 Violations of Duties Owed to the Legal System**

**6.1 False Statements, Fraud, and Misrepresentation**

**Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:**

**6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.**

**6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.**

**6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.**

**6.14 Admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.**

**6.2 Abuse of the Legal Process**

**Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:**

**6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.**

**6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.**

**6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.**

**6.24 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.**

**6.3 Improper Communications with Individuals in the Legal System**

**Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving attempts to influence a judge, juror, prospective juror or other official by means prohibited by law:**

**6.31 Disbarment is generally appropriate when a lawyer:**

**(a) intentionally tampers with a witness and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or**

**(b) makes an ex parte communication with a judge or juror with intent to affect the outcome of the proceeding, and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or**

**(c) improperly communicates with someone in the legal system other than a witness, judge, or juror with the intent to influence or affect the outcome of the proceeding, and causes significant or potentially significant interference with the outcome of the legal proceeding.**

**6.32 Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.**

**6.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes**

**injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.**

**6.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in improperly communicating with an individual in the legal system, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with the outcome of the legal proceeding.**

**7.0 Violations of Other Duties as a Professional**

**Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct.**

**7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.**

**7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.**

**7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.**

**7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.**

**8.0 Prior Discipline Orders**

**Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving prior discipline.**

**8.1 Disbarment is generally appropriate when a lawyer:**

**(a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or**

**(b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.**

**8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential**

**injury to a client, the public, the legal system, or the profession.**

**8.3 Reprimand is generally appropriate when a lawyer:**

**(a) negligently violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or**

**(b) has received an admonition for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.**

**8.4 An admonition is generally not an appropriate sanction when a lawyer violates the terms of a prior disciplinary order or when a lawyer has engaged in the same or similar misconduct in the past.**

**9.0 Aggravation and Mitigation**

**9.1 Generally**

**After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.**

**9.2 Aggravation**

**9.21 Definition. Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed.**

**9.22 Factors which may be considered in aggravation.**

**Aggravating factors include:**

**(a) prior disciplinary offenses;**

**(b) dishonest or selfish motive;**

**(c) a pattern of misconduct;**

**(d) multiple offenses;**

**(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;**

**(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;**

**(g) refusal to acknowledge wrongful nature of conduct;**

**(h) vulnerability of victim;**

**(i) substantial experience in the practice of law;**

**(j) indifference to making restitution;**

**(k) illegal conduct, including that involving the use of controlled substances.**

**9.3 Mitigation**

**9.31 Definition. Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.**

**9.32 Factors which may be considered in mitigation.**

**Mitigating factors include:**

**(a) absence of a prior disciplinary record;**

**(b) absence of a dishonest or selfish motive;**

**(c) personal or emotional problems;**

**(d) timely good faith effort to make restitution or to rectify consequences of misconduct;**

**(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;**

**(f) inexperience in the practice of law;**

**(g) character or reputation;**

**(h) physical disability;**

**(i) mental disability or chemical dependency including alcoholism or drug abuse when:**

**(1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;**

**(2) the chemical dependency or mental disability caused the misconduct;**

**(3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and**

**(4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.**

**(j) delay in disciplinary proceedings;**

**(k) imposition of other penalties or sanctions;**

**(l) remorse;**

**(m) remoteness of prior offenses.**

**9.4 Factors which are neither aggravating nor mitigating.**

**The following factors should not be considered as either aggravating or mitigating:**

**(a) forced or compelled restitution;**

**(b) agreeing to the client's demand for certain improper behavior or result;**

**(c) withdrawal of complaint against the lawyer;**

**(d) resignation prior to completion of disciplinary proceedings;**

**(e) complainant's recommendation as to sanction;**

**(f) failure of injured client to complain.**

# SECTION 3

# Outside Counsel Guidelines (OCG):
## Challenges and Best Practices


*Presented by*

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NOTES:

# CBA-CLE, Ethics 7.0
# November 13, 2020

## Outside Counsel Guidelines: Challenges and Best Practices

Eli Wald, Charles W. Delaney Jr. Professor of Law
Sturm college of Law, University of Denver

This presentation will explore the rise and prevalence of Outside Counsel Guidelines ("OCG"), an important development affecting the practice of many lawyers and their interaction with their clients. Specific topics will include:

- OCG – definition and background
- Typical components of OCG
    - Fee protocols
    - Conflict of interest provisions
    - Indemnity clauses
    - Compliance with client's policies (e.g., diversity commitments)
    - Data protection
- The Colo. RPC and OCG
    - Diligence, 1.3
    - Fees, 1.5
    - Confidentiality, 1.6
    - Conflict of interest, 1.7 & 1.9
    - Noncompete clauses, 5.6
- Regulatory response – can attorneys and clients opt out of or add to the Colo. RPC?
- Best practices
    - Understanding and responding to clients' evolving notion of loyalty
    - Proactive, effective communications

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**Client-Drafted Engagement Letters and Outside Counsel Policies**

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Client-Drafted Engagement Letters and Outside Counsel Policies

By Stephen G. Masciocchi

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Corporations and other institutional clients increasingly control the terms of engagements via client-drafted engagement letters and outside counsel policies. These policies often contain contractual provisions to which Colorado lawyers cannot or should not agree, because compliance would violate ethics rules, void malpractice coverage, or present undue risks. Lawyers should vet these documents before the engagement, reject terms with which they cannot or should not agree, and institute measures to comply with the remaining terms.

Private practice lawyers who represent institutional clients—corporations, large nonprofit organizations, universities, and government entities—increasingly find that their clients attempt to dictate the terms of the engagement. Client-drafted engagement letters and outside counsel policies have become commonplace. Though labeled as "policies, " "guidelines, " or "manuals, "

outside counsel policies impose binding contractual obligations on outside counsel. The terms range from relatively simple instructions informing counsel of the client's expectations to lengthy, detailed contracts controlling virtually every aspect of the engagement: staffing, billing rates, billing process, travel expenses, insurance, confidentiality, publicity, conflicts, conflict waivers, litigation procedures, experts, third-party vendors, data security, disaster recovery, file retention, diversity requirements, and even law firm flex-time arrangements.[1]

These policies generally have two purposes: to control legal expenses and to establish standards of conduct. They require law firms to adopt many laudatory practices. But many outside counsel policy provisions do not merely supplement lawyers' duties under ethics rules and existing law; they replace them with contractual obligations that may conflict with ethical and legal norms. In their zeal to control most aspects of the client-lawyer relationship, some institutional clients attempt to bind lawyers to provisions that, if the lawyer complied, would require the lawyer to violate ethics rules, would void malpractice insurance coverage, or would create other legal and ethical dilemmas.

Many outside counsel policies do not require a countersignature; they are forms that purport to bind counsel to significant additional terms. Lawyers who remain silent & Being the representation likely accept these additional terms.[2] Those who sign the policies without scrutinizing them and negotiating sensible amendments do so at their peril.

This article discusses several typical outside policy provisions that present ethical or other dilemmas for private practice lawyers, and suggests options for amending these provisions so that institutional clients and lawyers can reach sensible resolutions to problematic terms. Colorado lawyers should never agree to comply with certain provisions that would violate the Colorado Rules of Professional Conduct (Colo. RPC or Rules) or void malpractice coverage. To comply with other terms might be onerous or impossible. Still other provisions might seem mundane but have unintended consequences. Fortunately, once apprised of unreasonable terms, institutional clients usually agree to modify them, even if the form policy purports to forbid modifications.

**Identity of Client—Corporate Affiliates as Clients**

As a general rule, absent a contrary agreement or other particular circumstances, a lawyer who represents a corporation does not thereby represent the corporation's parents, subsidiaries, or other corporate affiliates.[3] But outside counsel policies often define the client to include all corporate affiliates.[4] Some policies provide a list of affiliates, some do not. By agreeing that the client will be defined to include affiliates, a law firm might take on ethical duties to many new clients—dozens or even hundreds.

Lawyers have options to address this dilemma. One option is to modify the outside counsel policy terms such that only the directly represented corporate entity becomes a client. This might be appropriate when, for instance, the corporate client has other counsel and intends to retain the

lawyer only for a single, discrete matter. Otherwise, the lawyer will have to perform a conflict check for all affiliates and consider them all to be clients, or risk disqualification.[5] If the outside counsel policy does not list the affiliates, the lawyer must insist that the client provide a list for conflict screening purposes.

The above only addresses initial client intake. Accepting affiliates as clients also presents another dilemma. What if the corporate client merges, diversifies, or is acquired? The roster of affiliates could be a continually moving target.

There might be no practical way for outside counsel to monitor these changes in the corporate client's identity. The sensible solution is to put the onus on the corporate client to notify counsel of changes in corporate ownership. Thus, at the outset of the representation, outside counsel should explain to the client in writing that although counsel has screened the list of affiliates for conflicts, counsel expects the client to provide notice of any additional affiliated entity, and counsel must perform a supplemental conflict check before agreeing to represent any such entity. This writing will assist outside counsel in complying with the conflicts rules and in avoiding disqualification from so-called thrust-upon conflicts.[6]

**Conflicts of Interest—Broad Definitions**

Many outside counsel policies address conflicts of interest. Lawyers' duties to avoid conflicts are set forth in Colo. RPC 1.7 through 1.12.But the policies typically go well beyond the rules and define conflicts much more broadly. The policies thus purport to bind lawyers to an enhanced duty of loyalty. The following are some of the more common provisions.

***Competitors***

Under the Rules, "simultaneous representation in unrelated matters of clients whose interests are only economically adverse" does not ordinarily create a conflict of interest.[7] Yet many outside counsel policies deem it to be a conflict of interest for a firm to represent one of its competitors, even in matters unrelated to firm's work for the client. Some policies provide long lists of names of competitors that the firm will need to screen for conflicts.[8] Others simply warn that the lawyer must not represent competitors and instruct the lawyer to contact in-house counsel with questions.[9]

Aside from the expansive notion of conflicts this policy provision entails, many policies also require outside counsel to disclose the identities of any competitors counsel represents, with a description of the nature of the representation.[10] Colo. RPC 1.6(a), however, prohibits a lawyer from making such a disclosure without the consent of the lawyer's client.

Rule 1.6(a) is broad. It protects from disclosure "information relating to the representation of a client^.]"[11] The rule applies "not only to matters communicated in confidence by the client but

to all information relating to the representation, whatever its source."[12] The rule has no exception permitting disclosure of one client's identity to another client. State bar ethics committees, including the CBA Ethics Committee, have thus opined that lawyers cannot or should not disclose the identities o f their clients to third parties absent informed consent.[13] Informed consent means consent obtained "after the lawyer has communicated adequate information and explanation about the material risks and reasonably available alternatives of the proposed course of conduct."[14]

How do private practice lawyers and law firms resolve this dilemma if they represent a competitor? There are two options. They could inform the prospective client: "We represent or have represented one or more entities on your list. The Colorado Rules of Professional Conduct prohibit us from disclosing their identities." If the prospective client deems this insufficient, the lawyer would have to obtain the competitor's consent to disclose its identity.

This presents a chicken-and-egg problem. Which party—prospective or existing client—does the lawyer ask first for informed consent? Both should reasonably expect that their identities and the nature of the lawyer's actual or proposed representation will remain confidential.[15] A sensible approach would be to first ask the prospective client who is demanding disclosure. Of course, the existing client still could withhold consent, and the prospective client would have to decide whether to proceed with the representation notwithstanding its policy concerning competitors.

***Potential, Ephemeral, and Positional Conflicts***

The Rules recognize that a lawyer can have a conflict even if there is no "direct adverseness."[16] A lawyer must avoid representations that carry a
significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client[, ] or a third person[, ] or by a personal interest of the lawyer.[17]

This prohibition against material limitation conflicts does not extend to representations involving the mere possibility of future harm to a client.[18]

Most outside counsel policies attempt to contractually expand the scope of this duty. Various policies extend the concept of what constitutes a conflict of interest—requiring disclosure and consent—to potential conflicts, the appearance of a conflict, and representations adverse to the client's business interests or corporate values.[19] It is an open question whether these vague concepts constitute enforceable standards. How is outside counsel to know when a corporate client would deem another representation to create the appearance of a conflict or to conflict with its corporate values? Even if counsel could discern when a representation might involve such an ephemeral "conflict, " other issues would arise.

To the extent these broad provisions trigger disclosure and consent obligations, they encounter the same roadblock discussed above: under Rule 1.6(a), a lawyer must keep

confidential information concerning the lawyer's representation of other clients, including their identities.[20] Outside counsel thus would be well advised not to merely accept such amorphous terms, but instead to describe what conflict checking they will do and to inform the client about the limitation imposed by Rule 1.6(a).

Many policies also require outside counsel to avoid positional conflicts.[21] This presents an interesting dilemma for outside counsel. One hallmark of a good lawyer is the ability to argue both sides of an issue. Lawyers thus are generally permitted by the Rules to argue "inconsistent legal positions in different tribunals at different times on behalf of different clients."[22] Lawyers must, however, eschew narrow types of positional conflicts. For example, lawyers must avoid situations where successfully advocating a legal position on behalf of one client "will create a precedent likely to seriously weaken the position taken on behalf of the other client."[23] But an outside counsel policy's undefined prohibition against positional conflicts arguably expands the lawyer's obligation to avoid taking inconsistent positions. This could create a conflict screening nightmare. Again, outside counsel's best option is to communicate with the client and attempt to reach a mutually agreeable understanding about the scope of this contractual duty.

***Advance Waivers***

On the positive side of the conflict equation, though most outside counsel policies reserve the client's right to be informed of and consent to conflicts, some grant prospective consent to conflicts of interest in specific types of future matters.[24] These advance consents are typically limited to transactional matters or specific, low-stakes litigation matters.[25] They provide welcomed flexibility to outside counsel and save in-house counsel the time and effort needed to consider and address multiple requests for conflict waivers. The best polices clearly communicate the corporate client's expectations and explain what specific types of conflicts have been waived and what types must be discussed with in-house counsel.[26]

Under the Colorado Rules, consents to specific future conflicts are enforceable.[27] Indeed, even general, open-ended advance consents are effective when the client is a sophisticated user of legal services, the client is independently represented in giving consent, and consent is limited to matters unrelated to the subject of the representation.[28] Given these predicates, advance consents contained in outside counsel policies are plainly enforceable: the clients are highly sophisticated legal consumers, they are represented by in-house counsel who drafted the consents, and the consents are limited. Outside counsel therefore are entitled to rely on them. It is in-house counsel who must ensure that their corporate clients gave informed consent, meaning that they have discussed with their clients the risks and available alternatives.[29]

**Indemnification Clauses**

Indemnification clauses have become increasingly common in outside counsel manuals.[30] These clauses typically require outside counsel to "indemnify and hold harmless" the client, its

employees, and its agents from all claims, damages, liabilities, and losses based on or arising out of outside counsel's performance or lack of performance under the outside counsel agreement.[31] The danger created for outside counsel by this type of clause is that any indemnified loss or cost would not be covered by counsel's malpractice insurance coverage.

The requirement to contractually indemnify and hold harmless the client conflicts with several separate provisions of a standard malpractice policy. First, malpractice policies typically exclude coverage for contractual liabilities or cover contractual liability only to the extent that liability would have attached absent an agreement.[32] Accordingly, a lawyer cannot, by entering into an agreement with a client, expand coverage beyond non-contractual claims. If a lawyer became obligated to pay a claim only because the lawyer had agreed to indemnify a client, malpractice coverage would be excluded.

Second, malpractice policies contain cooperation clauses that require lawyers to cooperate with the insurer in defending a claim.[33] If an indemnification clause creates an easier-to-prove contract claim, coverage might not be available due to lack of cooperation. By converting a tort claim into a contract claim, an indemnification clause also might deprive the insurer of the benefit of certain defenses, such as a shorter statute of limitations period.[34] This too could be deemed a violation of the cooperation clause.

Third and finally, malpractice policies typically prohibit a law firm from impairing the insurer's right of subrogation.[35] If outside counsel agrees to "hold harmless" the client, its employees, or agents, counsel may impair the insurer's subrogation rights by agreeing that those parties will not be responsible for their share of liability. In short, lawyers should check with their malpractice insurer before agreeing to any indemnification clause. If the clause could or would void malpractice coverage, the lawyer should either insist that the clause be removed or negotiate alternative language that is mutually acceptable to the client, lawyer, and insurer.

The wisdom of such clauses is suspect not only for outside counsel but also for their corporate and institutional clients. While malpractice insurance directly benefits lawyers by protecting their assets, it indirectly benefits clients by giving them an additional, solvent source of recovery. It is difficult to fathom why a corporate client would insist on a clause that deprives it of this substantial benefit. Given that Colorado lawyers are not required to carry malpractice insurance, [36] the better practice would be for the client to insist that lawyers maintain such insurance in minimum amounts. Yet, such clauses are rarer in outside counsel policies.[37]

**"Most Favored Nations" Clauses**

Virtually all outside counsel policies address billing and expense rates, as well as billing procedures.[38] Although these provisions restrict fees and expenses and add administrative burdens, most raise no ethical issues for outside counsel.

But one provision does. Many outside counsel policies contain a "most favored nations" clause— whether or not labeled as such—that requires counsel to confirm that the economic terms or billing rates counsel charges the institutional client are at least as favorable as those counsel offers any other client (except *pro bono* clients).[39] In other words, counsel cannot give better terms or charge lower rates to other paying clients.

Unless outside counsel has a very limited client base and works exclusively on an hourly fee basis, it is difficult to see how counsel could agree to this restriction. Private practice lawyers represent clients under a host of fee arrangements—hourly rates, flat fees to handle particular matters, flat fees for categories of matters, contingency fees, blended fees (for example, a reduced hourly rate plus a "success fee"), and so on. Comparing the economic benefits of such arrangements to an hourly fee engagement for an institutional client is impracticable.

The same is true with respect to expenses. For instance, in contingency-fee matters, a client's obligation to repay advanced litigation expenses can be contingent on the outcome, [40] which means that the client might pay no expenses at all. Thus, if the outside counsel policy allows the lawyer to seek reimbursement for expenses, the contingency-fee client arguably gets better terms, no matter how low the policy's expense reimbursement rate is. Lawyers, therefore, should either reject most favored nations clauses or propose alternative language to account for the myriad varied fee and expense arrangements they offer their clients.

**One-Lawyer Rule**

Most outside counsel polices address staffing, and one such provision raises serious ethical concerns. Many policies provide that the corporate client will pay for only one lawyer's time to participate in specified activities, such as conferences, mediations, depositions, motions hearings, or other court appearances.[41] These provisions raise potential ethical dilemmas for outside counsel concerning competence and truthfulness. Under Colo. RPC 1.1, Colorado lawyers must "provide competent representation to a client." If one lawyer is simply insufficient to handle a particular task or event such as a deposition of a major witness, a hearing, or a trial, outside counsel should seek the client's consent to have additional lawyers assist with the event.

If the client still forbids the law firm to charge for more than one lawyer's attendance, then the firm, having agreed to this contractual provision, would have no choice but to staff the matter adequately, even if this means having several lawyers attend the event and bill for only one lawyer's participation. It may be tempting to have the second or third lawyers prepare false or vague time entries so that the firm receives compensation for their participation, but this would involve serious breaches of Rules 4.1 and 8.4(c), which require truthfulness in statements to others and avoidance of dishonesty, fraud, deceit, and misrepresentation.

**Governing Law and Standards**

Another common clause in outside counsel policies fixes the governing law or standard. Some polices select another state's law to govern a matter. This selection might appear innocuous, but such a provision could be read to incorporate a foreign state's rules of professional conduct. Other outside counsel policies expressly provide for application of another state's rules of conduct or a national code, such as the ABA Model Rules.[42]

The problem with these provisions is that the Colorado ethics rules are unique. Another jurisdiction's rules might impose standards that are higher, lower, nonsensical, or contradictory, given the dictates of the Colorado's Rules. Fortunately, when apprised of the issue, institutional clients will almost always agree to apply the Colorado Rules to a Colorado matter.

Finally, outside counsel policies occasionally impose contractual standards above and beyond a duty of ordinary care, such as the "highest standard" or "highest level" of care expected of lawyers in a community.[43] As explained earlier, because this would expand liability under tort law, it might impair or void the lawyer's malpractice coverage. Lawyers should therefore propose alternative language that memorializes an insurable standard of care.

**Conclusion**

Outside counsel policies have become an increasingly common feature of private practice. Although these policies have many salutary goals and impacts, they contain provisions that raise ethical and other dilemmas for outside counsel. Colorado lawyers ignore these provisions at their peril. Lawyers should carefully review polices and discuss troublesome aspects with their prospective client, their malpractice insurer, or an ethics expert. When the lawyer communicates effectively with the prospective corporate or institutional client about problematic provisions, the client will often agree to drop or modify the requirements.

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Notes:

[s1] See, *e.g.,* New York University Guidelines for Outside Counsel, *www.nyu.edu/about/leadership*-university-administration/off ice-of-the-president/general-counsel/redirect/using-outside-counsel, html (NYU Policy) (simpler type of policy); Wal-Mart Outside Counsel Guidelines (June 1, 2007), *www.acc.com/legalresources/resource.cfm?show=40433* (Wal-Mart Policy) (very detailed policy). See *also* Smith, "Wal-Mart Will Slash Firms That Don't Have Flex-Time Policies, " *Business Insider* (Oct. 27, 2009), *www.businessinsider.com/wal-mart-will-slash-firms-that-dont-have-flex-time-policies-2009*-10.

[2] See *Restatement (Second) of Contracts* §§ 59 and 69(1) (1981) (discussing acceptance of new terms by silence). *Cf. John F. Ervin Testamentary Trust v. Bank One Trust Co.,* 2005 Mich.App.

LEXIS 528 at *6-7 (Mich.App. Feb. 24, 2005) (lawyer's written assent to outside counsel policy contractually bound the lawyer. even though the corporate client didn't Asian the policy.

[3] See Colo. RPC 1.7, cnt. [34] ("A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary."). See *also* ABA Committee on Ethics & Professional Responsibility Formal Op. 95-390, Conflicts of Interest in the Corporate Family Context at 3 (Jan. 25, 1995) (lawyer who represents corporate client does not necessarily represent affiliates; instead, it "will depend on the particular circumstances"); *GSI Commerce Solutions, Inc. v. Baby center, L.L.C.,* 618 F.3d 204, 209-12 (2d Cir. 2010) (agreeing generally with ABA Opinion 95-390 but adopting a two-part test, with multiple sub-factors, to determine whether a representation adverse to a client's corporate affiliate constitutes a conflict of interest).

[4] *E.g.,* Wal-Mart Policy, *supra* note 1 at 6 ("the term 'Wal-Mart' refers both to 'Wal-Mart and its subsidiaries'"); *id.* at ex. D (listing principal subsidiaries); Wells Fargo Conflict of Interest Policy at ex. A, *www.wellsfargo.com/downloads/pdf/about/corporate/legal/conflicts_policy.pdf* (Wells Fargo Policy) (defining "Wells Fargo" to include all its subsidiaries and employees). See *John F. Ervin Testamentary Trust,* 2005 Mich.App. LEXIS 528 at *6 (bank's outside counsel guidelines provided in part that "all of Bank One's subsidiaries and affiliates should be treated as clients for purposes of [Rule] 1.7").

[5] *John F. Ervin Testamentary Trust,* 2005 Mich.App. LEXIS 528 at *7, *11 (affirming lower court's decision to grant bank's motion to disqualify law firm, where firm represented bank's affiliate, and under outside counsel policy, firm was bound to consider bank and all affiliates as common clients). See *also Commonwealth Land Title Ins. Co. v. St. Johns Bank & Trust Co.,* 2009 U.S. Dist. LEXIS 87151 at *6-8, 10-15 (E.D.Mo. Sept. 22, 2009) (court disqualified law firm from suing title insurer because firm concurrently represented insurer's sister subsidiary; it reasoned that holding company's outside counsel guidelines established common litigation practices and procedures applying to representations of all affiliated insurers, and in-house claims counsel provided central oversight of litigation for all affiliates).

[6] If a conflict is thrust upon a law firm when its adversary merges with another client, most courts will decline to disqualify the firm but will require the firm to cure the conflict, meaning either (1) the firm must withdraw from representing the moving party or (2) the firm must choose which client to continue representing. *See, e.g., Gould, Inc. v. Mitsui Mining & Smelting Co.,* 738 F.Supp. 1121, 1126-27 (N.D. Ohio 1990).

[7] Colo. RPC 1.7, cmt. [6].

[8] See Wal-Mart Policy, *supra* note 1 at 12 and ex. E.

[9] *See Medtronic Outside Counsel Policy* 5-6 (July 26, 2013), *www.medtronic.com* (Medtronic

Policy).

[10] *See Wal-Mart Policy*, *supra* note 1 at 12; Medtronic Policy, *supra* note 9 at 6.

[11] Colo. RPC 1.6(a).

[12] *Id.* at cmt. [3].

[13] See CBA Ethics Committee Formal Opinion 99, Use of Credit Cards to Pay for Legal Services (May 10, 1997) (lawyer should obtain client consent before disclosing client's identity to credit card company to obtain payment for legal fees); Utah Ethics Opinion 97-06 (same); Illinois Ethics Opinion 97-1 (1997) (lawyer representing bank can give bank names of lawyer's other clients only with their consent).

[14] Colo. RPC 1.0(e).

[15] See Colo. RPC 1.18(b) (confidentiality rules apply to prospective clients).

[16] Colo. RPC 1.7, cmt. [8].

[17] Colo. RPC 1.7(a)(2).

[18] Colo. RPC 1.7, cmt. [8].

[19] *E.g.,* FDIC Outside Counsel Conflicts of Interest Procedures, ¶ III.A., *www.fdic.gov/buying/legal/ebilling/oc_conflicts_interest.html*; Medtronic Policy, *supra* note 9 at 6; General Electric Outside Counsel Policy, ¶ X, reprinted in 19 Of Counsel 5 (May 15, 2000).

[20] See discussion of competitors, *supra.*

[21] *E.g.,* Medtronic Policy, *supra* note 9 at 6.

[22] Colo. RPC 1.7, cmt. [24].

[23] See *id.*

[24] See, *e.g.,* Wells Fargo Policy, *supra* note 4 at 2-4 and ex. C.

[25] *See Id.*

[26] *See Id.*

[27] See Colo. RPC 1.7, cmt. [22]

[28] *See id. See a/so ABA Committee on Ethics & Professional Responsibility,* Formal Opinion 05-436, Informed Consent to Future Conflicts of Interest: Withdrawal of Formal Opinion 93-372 (May 11, 2005); *Galderma Laboratories, LP. v. Actavis Mid Atlantic LLC,* 927 F.Supp.2d 390, 399-406 (N.D.Tex. 2013) (refusing to disqualify law firm because sophisticated corporate client represented by in-house counsel gave general, open-ended consent to future conflicts of interest); *Macy's Inc. v. J.C. Penney Corp.,* 968 N.Y.S.2d 616, 616-17 (N.Y.App.Div. 2013) (denying motion to disqualify because corporate client agreed to broad, open-ended waiver of future conflicts in any unrelated matter).

[29] See Colo. RPC 1.0(e).

[30] *E.g.,* Port of Los Angeles Draft Bond Counsel Agreement at 4-5, *www.portoflosangeles.com*. Other examples of corporate and government entity indemnification clauses are on file with the author.

[31] *See id. In*demnification clauses vary greatly but typically include these two elements.

[32] *See, e.g., Continental Casualty Co.* Specimen Lawyer's Professional Liability Policy, ¶ IV.D. (Continental Specimen Policy), *reprinted in Lawyers Professional Liability in Colorado: Preventing Legal Malpractice and Disciplinary Actions* at 12-29 to 12-46 (CBA-CLE, Inc., 2d ed. 2011).

[33] *See id.* at ¶ V.G; Attorneys' Liability Assurance Society Specimen Professional Indemnity Policy ¶ IV-5(d) (ALAS Specimen Policy) (on file with author).

[34] For example, in Colorado, the statute of limitations for negligence and most other tort claims is two years after a cause of action accrues. CRS § 13-80-102(l)(a). By contrast, the statute of limitations for a contract claim is three years after accrual. CRS § 13-80-101(l)(a).

[35] See Continental Specimen Policy, *supra* note 32 at ¶ V.I; ALAS Specimen Policy, *supra* note 33 at ¶ IV-9.

[36] See CRCP 265(a)(2) (providing that Colorado lawyers who practice in a professional corporation that does not have malpractice insurance at the time of the act or omission have joint and several liability); *id.* at § (a)(3) (setting forth minimum amounts of insurance to avoid joint and several liability). *But see Gutrich v. LaPlante,* 942 P.2d 1266, 1270 (Colo.App. 1996) (to avoid joint and several liability under Rule 265, a professional corporation need only have insurance at the time of the act or omission, not at the time a claim is made), *aff'd on other grounds,* 961 P.2d 1115 (Colo. 1998).

[37] Some policies include both indemnification and malpractice insurance clauses. See, e.g., Port of Los Angeles Draft Bond Counsel Agreement, *supra* note 30 at 4-6. In these instances, the entity requires insurance coverage with one clause but renders the coverage void with another.

[38] *E.g.,* Wal-Mart Policy, *supra* note 1 at 29-42.

[39] *E.g.,* Port of Los Angeles Draft Bond Counsel Agreement, *supra* note 30 at 14-15. Numerous other examples are on file with the author.

[40] Colo. RPC 1.8(e)(1).

[41] *E.g.,* Wal-Mart Policy, *supra* note 1 at 13. *See also Medtronic Policy*, *supra* note 9 at 7.

[42] *E.g.,* Port of Los Angeles Draft Bond Counsel Agreement, *supra* note 30 at 8.

[43] *See, e.g.*, *id.* at 1.

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# The New Battle Over Conflicts of Interest: Should Professional Regulators—or Clients—Decide What Is a Conflict?

**By Anthony E. Davis and Noah Fiedler**

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## INTRODUCTION[1]

In our earlier article about indemnity provisions in client outside counsel guidelines ("OCGs")[2] we noted how the balance of power between attorneys and their clients has changed, and that today the power lies largely in the hands of the clients—especially when they are large corporations controlling significant amounts of legal work to be assigned to outside counsel. In connection with the increasingly common imposition of indemnity provisions in their OCGs, we noted that inside counsel have increasingly taken advantage of this change in the balance of power to impose their own rules on the outside counsel relationship, thereby significantly limiting outside counsels' independence.

In this article we show how this process has gone even further in the area of conflicts of interest. Where "long ago, in a galaxy far, far away" the boundaries of what constituted a conflict were defined by the regulators of the legal profession and the courts, today this function has been usurped by large corporate clients. In this article we examine the different ways in which clients have sought to expand the definition of conflicts of interest, and will show how, in doing so, they are seriously undermining the ability of law firms to operate, and how in the long run, clients are acting contrary to their own best interests.

We will also demonstrate that these OCGs frequently create serious ethical issues, and not only in connection with the rules governing conflicts of interest. The examples we present and discuss include provisions that would—if accepted and adhered to by outside counsel—require violations of ethical duties of confidentiality, diligence and competence, as well as violations of the basic fiduciary duty of loyalty. Such provisions inevitably present outside counsel with serious dilemmas as to how to address them, and how to respond to clients that make these demands. In many instances, these provisions arguably expose the inside counsel who promulgate them to jeopardy of professional discipline just as much as any outside counsel who agree and adhere to them.

It is not an exaggeration to say that lawyers' independence is under attack. The most destructive weapons in this battle are OCGs that redefine conflicts of interest so broadly that they significantly impair lawyers' ability to make decisions (both legal and business-related) as to what clients they may

represent and matters they may work on, and to act as trusted and independent counselors on behalf of those self-same clients. Finally, after considering the cumulative effects of these changes on both the legal profession and the clients themselves, we offer a suggestion for how the regulators of the profession could revise the rules of professional conduct in a way that would roll back and prospectively limit this wholesale redefinition of what is a conflict, thereby protecting lawyers' professional independence in the future. Importantly, we believe that the changes we propose also inure to the long term interests and benefit of the clients themselves, in preserving their ability to exercise their own choice of lawyers for future matters.

We begin by demonstrating the three principal ways that clients are using OCGs to redefine what constitutes a conflict of interest:

- By expanding the definition of who is the client (far beyond the bounds of prevailing case law);
- By explicitly limiting the universe of other clients from whom lawyers and their firms may accept work; and
- By expanding the definition of "interest" and "positional" conflicts in order to prevent lawyers and firms from undertaking or continuing to work for other clients that may take public positions on issues that the client unilaterally—and often ex post facto—deems adverse to its own interests.

## THE EXAMPLES

### *OCGs That Expand the Definition of Who Is the Client*

The most common OCG provisions inflate the definition of client for purposes of conflicts analyses. By agreeing to such provisions, lawyers create a variety of problems for themselves, the most obvious being greatly increased difficulty in screening for conflicts, along with an increased likelihood of becoming conflicted out of a future representation where current law would not recognize a conflict.

Here are two examples:[3]

> 1. It is BIG BANK'S policy that, notwithstanding ABA Ethics Opinion 95-390 (January 25, 1995) or similar regulations applicable in the jurisdiction concerned, outside counsel must treat BIG BANK and each of its subsidiaries as if they are one entity for the purpose of all conflicts of interest analyses. For purposes of trying to identify potential conflicts of interest, BIG BANK is deemed to include any entity listed on Appendix X, or any list of BIG BANK entities delivered after the date hereof.
>
> 2. Please note that we will not permit any firm to represent a party adverse to ZEUSS, Inc. or any entity on Attachment A without prior written consent, and in no event will we allow representation of an adverse party in litigation. Attachment A is an extremely confidential list of entities for your firm's use in screening for conflicts. This list includes (a) multiple names for some entities, (b) some entities that are no longer owned or controlled, but which may have been at a relevant time, (c) entities that may be affiliated with ZEUSS, Inc.'s parent companies, and (d) entities that may

> not be controlled by ZEUSS, Inc. or its parent companies, but in which they may have an ownership interest. Although lengthy, this list will assist us in identifying potential conflicts so that they may be addressed expeditiously.

As the first example itself points out, such an agreement is contrary to ABA Ethics Opinion 95-390.[4] In addition, the provision is also inconsistent with Model Rule 1.7, Comment 34, which provides that a "lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary."[5]

These client guidelines, which do not permit any investigation or consideration of specific facts, also conflict with the normal rational inquiry by courts, which focus "on the reasonableness of the client's belief that counsel cannot maintain the duty of undivided loyalty it owes a client in one matter while simultaneously opposing that client's corporate affiliate in another." *GSI Commerce Solutions, Inc. v. Babycenter, L.L.C.*[6] The analysis is fact-specific, and courts tailor it to the particular set of facts at issue, "generally focus[ing] on: (i) the degree of operational commonality between affiliated entities, and (ii) the extent to which one depends financially on the other."[7]

By removing a fact-specific determination of the actual connection between the client and its affiliates, OCG provisions like the ones above attack the prevailing narrow (and rational) notion of client identity. What ought to be an objective inquiry based upon the specific situation of the client and its subsidiaries is instead replaced by a generalized and wholesale expansion of the meaning of what is the "client." By imposing this hugely expansive definition (and burdensome enlargement of the conflict checking process by law firms), the "client" enormously narrows the universe of other possible clients whom the lawyer could represent.

This expansion of the definition of what is the client also creates serious subordinate problems. For example, through corporate actions, the identity of the OCG-defined client can and does change frequently, and with no notice to, or input from, the lawyer. The law firm is now required to run a new conflicts check every time the "real" client merges with, buys, sells, or creates a new subsidiary.[8] Realistically, however, because the lawyer often has little or no contact with the subsidiary/OCG defined clients, the lawyer will have no idea when a new conflicts check is required, and can fall into a disqualifying conflict despite the best of intentions and the most sophisticated conflict system in existence. This is precisely what happened in the GSI case.[9]

### *OCGs That Limit The Universe of Other Clients From Whom Law Firms Are Permitted to Accept Work*

Another group of OCG provisions shows that clients have not fully considered the potential harm expansive conflict provisions may create for the clients themselves. For example, for many years clients understood that a lawyer who was knowledgeable about the client's industry because the firm represented multiple entities with similar businesses was, as a result, able to provide more complete and comprehensive service, often identifying and understanding issues because of deep experience and

years of practice. That has changed dramatically with the genesis of OCG provisions that define the representation of a client's competitor as a conflict, notwithstanding the fact that the rules of professional conduct consider and reject this position.

Here are two examples:

> 1. As part of confirming the absence of any conflicts, the Firm should inform NEMESIS CO. of any situations where outside counsel either individually or through the outside counsel firm represents clients that are business competitors of NEMESIS CO. or affiliates of NEMESIS CO.
>
> 2. GIANT CO. may conclude that an actual conflict of interest exists if Outside Counsel or Outside Counsel's law firm represents a significant competitor of GIANT CO. or its subsidiaries or affiliates. A list of GIANT CO.'S principal subsidiaries is attached as Exhibit D. As a pre-condition of engagement, Outside Counsel must disclose in writing the identity of any national or regional retailers or any significant competitors of GIANT CO. or its subsidiaries or affiliates (see Exhibit E for examples) that the Outside Counsel firm represents, together with a general description of the type of legal services that the Outside Counsel firm provides to such client(s). If Outside Counsel concludes that it would be improper to provide this information to the Company, Outside Counsel should decline the engagement.

This type of provision conflicts with Rule 1.7, Comment 6 of the Model Rules, which states that "simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients."[10]

By expanding conflicts to include economic competitors, clients hurt not only the law firm, but themselves as well. Enforcing such an expansive definition of conflict limits the ability of lawyers to understand industry-wide issues from multiple perspectives, and ultimately makes it more difficult for lawyers to provide the best possible, and most informed, service to the client.

These provisions also ultimately threaten the economic viability of law firms in at least two ways. First, by excluding the firm's ability to represent competitors in an industry in which the firm has experience, these provisions tend to make firms much more dependent upon a single client. This, by definition, reduces the firm's utility to the client as an unbiased, independent counsellor. Firms that rely primarily on a single client can be tempted to provide advice based not on what is best for the client, but on what is most likely to keep the relationship (and therefore the firm) alive. Second, by significantly limiting the firm's ability to attract and serve other clients, the client robs the firm of power to manage its own practice and financial future. In the end, if the firm fails, the client will be required to go out and find itself a new captive law firm, with all the costs and difficulty that entails. In fact, clients are best served by firms that are economically stable and that can provide independent advice, based on a breadth of experience unaffected by extravagant definitions of conflicts that unnecessarily threaten their financial viability and limit their ability to manage their business.

### *OCGs That Redefine "Interest" and "Positional" Conflicts*

These provisions seemingly portend the limitless expansion of the definition of positional or interest conflicts. Typically, these clauses require the outside lawyer simultaneously to read the client's mind and to accurately predict what type of issue might (at some point in the future) be adverse to the client, or to forecast what position the client might (at some point in the future) consider to be a conflict. In addition, as we shall show, these provisions explicitly demand that lawyers and firms continuously violate their ethical and fiduciary obligations to their other clients.

Here are three examples:

> 1. In addition to actual conflicts of interest, the Firm may be asked to represent a person(s) or entity that raises an issue conflict with Client. That is, there may also be situations in which the Firm may be asked to take positions on behalf of a person or entity tha*t could be contrary to* a position Client is currently asserting, or one that Client mig*ht take on* an issue affecting the industry. Even if the ethical rules do not prohibit the Firm from representing such a person or entity, as a partner with Client the Firm agrees not take positions on behalf of other clients that are or may *be co*ntrary to Client's positions on issues affecting the industry. If the Firm is asked to represent a client on an issue affecting the industry and the Firm is not familiar with Client's position on the issue(s), the Firm mus*t contact one of the individuals at Client identified to determine its position before undertaking that representation. I*f the Firm undertakes representation of a client, then discovers that the position(s) on an issue affecting the industry it would have to take on behalf of that client are contrary to Client's position on the issue, then the Firm must notify Client through one of the individuals identified within fifteen (15) days of discovering the issue conflict and *withdraw if requested by* Client. If the rules of ethics prohibit the Firm from advising Client of the issue conflict, then the Firm agrees to withdraw from representing the other client with respect to the issue. (Emphasis added.)
>
> 2. Outside counsel sho*uld advise of an*y positions it has taken in the recent past or is presently taking on issues that may *be ad*verse, harmful or otherwise prejudicial to the interests of Client. This includes, without limitation, positions taken by Outside Counsel before administrative and regulatory agencies, bodies or other tribunals. (Emphasis added.)
>
> 3. Outside counsel are required to search for and disclose to HEPHAESTUS, Inc. any actual or potential conflicts of interest prior to accepting an engagement. Outside counsel sho*uld identify and disclose to* HEPHAESTUS, Inc. any existing or prospective engagement by another client that cou*ld create an* actual or potential conflict of interest with counsel's representation of HEPHAESTUS, Inc. (or the appearance thereof). (Emphasis added.)

The ethical and legal dilemmas created by these provisions are significant and troubling. When retained under these terms, lawyers must decide whether to breach the engagement agreement with the client imposing the guidelines, or breach their ethical and fiduciary duties to other clients. In order to comply with the requirements of this contractual provision, a law firm and its lawyers would have to breach the fundamental duties to preserve client confidences under Model Rule 1.6, as well as their fiduciary duties

of loyalty to their other clients. In so doing, the firm and the lawyers risk professional discipline, loss of client relationships, demands for fee disgorgement, and civil liability to the other clients, as well as potentially devastating reputational injury.

This type of provision goes well beyond, and indeed is flatly inconsistent with the rules of professional conduct that define conflicts of interest. For example, Rule 1.7, Comment 24 makes clear that issue or positional conflicts are not conflicts at all, unless certain specific factors exist:

> Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest.[11]

This has always been the law. Lawyers are, by definition, advocates. The positions they advance on one day, on a given set of circumstances, necessarily differ from positions that may be appropriate for them to take on behalf of other clients, at another time, under different circumstances.

In addition to requiring lawyers and firms to breach their Rule 1.6 duty of confidentiality, the contractual requirement here could create a Rule 1.7(a)(2) material limitation on representation of other clients. By requiring withdrawal, these OCG provisions also violate the limitations placed on a lawyer's ability to withdraw, under Rule 1.16. Other Model Rules of Professional Conduct are also implicated, depending upon the exact language of the OCG provision: 1.9 (former client conflicts), 1.10 (imputation), and 1.18 (duties to prospective clients).[12] For these reasons, agreeing to these requirements with a client puts lawyers and firms in an untenable position—breach the engagement agreement with the client imposing the guidelines or breach the rules of professional conduct and fiduciary duties to other clients. The potential domino effect of these provisions is nothing less than devastating.

Cumulatively, the unilateral expansion of the definition of what constitutes conflicts of interest undermines lawyers' independence to manage their legal practice, and to provide unbiased, impartial advice to all of their clients.

Abiding by the expanded conflicts provisions also creates administrative headaches and vastly increased expense for law firms on which they are imposed. In one example the authors learned of, a mid-sized US law firm landed what appeared to be a significant new client engagement to represent in litigation a local subsidiary of a US-based Fortune 500 global conglomerate. The company had in-house legal teams in almost 40 countries around the world. After a conflict check, the firm contacted the general counsel of the local subsidiary, and received permission to proceed with the representation.

Then the nightmare began for the firm (and potentially for the client). Because the matter involved more than one jurisdiction, the client's OCG conflict management rules required approval from each one of the nearly 40 local general counsel around the world. Assuming that it would even be possible to get a response from a local general counsel in, for example, Peru, to a conflicts inquiry from a mid-size

US law firm with respect to a matter having no possible connection with Peru, the process would take months, filled with countless hours of administrative (unbillable) time for the firm. The representation thus came at an enormous cost to the firm of time, expense, and difficulty. But clients also suffer.

In this example, the ability of a firm to move rapidly and effectively on its client's behalf is compromised when it needs to obtain client consent in a way that requires months of global email exchanges, in circumstances where all but a very few of those contacted have absolutely nothing to do with the matter under discussion, and have no incentive to provide any kind of response at all, let alone a positive one. Evidently—at least to an outside observer—the client had given no thought to the impact of its conflicts requirements on the ability of its chosen counsel to react with speed and efficiency on the matter for which it was being engaged.

This situation, among others, demonstrates that corporations seeking to impose these requirements have often not considered the ramifications of these expanded and onerous conflicts provisions. In their single-minded desire to keep their lawyers loyal to them (which the Rules of Professional Conduct already require), clients have created a Catch-22 situation in which the clients themselves prevent the lawyer or firm from providing effective representation. A conflicts provision like the one described above could (and many risk managers would argue, should) prevent the law firm from accepting the representation. The client has effectively obviated its own ability to obtain the counsel of its choosing.

## RESPONSE BY THE PROFESSION

As shown by the examples above, and the additional examples included in Attachment A, OCG conflicts provisions enormously expand what is identified as a conflict under the Rules of Professional Conduct. These expansive conflict of interest provisions restrict the lawyer's ability to represent other clients in many situations where there is no conflict under the Model Rules or governing case law.

This situation raises a critical question: is there anything that the profession and its regulators can do to protect lawyers and firms from the deeply troubling consequences of these OCG provisions? Equivalent language to these OCG provisions, relating to what clients the law firm could or could not represent in the future, were they contained in settlements of client controversies, would incontrovertibly contravene Rule 5.6, which provides as follows:

> Rule 5.6 Restrictions On Right To Practice
>
> A lawyer shall not participate in offering or making:
>
> (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
>
> (b) an agreement in which a restriction on the lawyer's right to practice is part of the terms of engagement of a lawyer by a client or of the settlement of a client controversy.[13]

The history of Model Rule 5.6 reveals two policy justifications, which are both mentioned in its comments. One justification is "to ensure the freedom of clients to select counsel of their choice."[14] The second policy justification is to promote a "lawyer's personal autonomy by allowing the lawyer some freedom of movement."[15]

The profession has hitherto jealously guarded lawyers' autonomy to represent clients of their own choosing, and to protect potential clients' rights to choose representation as they see fit (in the absence of a disqualifying conflict—as defined in the applicable rules of professional conduct). Even when considered in terms of a garden-variety employment restriction, the 1969 notes to the Model Code of Professional Responsibility condemn "unwarranted restriction[s] of the right of the lawyer to choose where he will practice and [they are] inconsistent with our professional status."[16]

We contend that a coordinated response to the assault on lawyers' independence is required of the profession and its regulators. Only through the bar associations, as its representative organizations, and its regulators does the profession have the ability to address this problem, and we contend that these institutions have an obligation to do so.

We suggest that an effective response to the increasing threat to lawyers' independence posed by OCG conflicts provisions like those highlighted here would be to revise Rule 5.6 to explicitly prohibit lawyers and law firms from agreeing to any and all OCG provisions that have the effect of limiting their ability to represent other clients beyond what is already encompassed in the Model Rules generally and in the conflicts provisions specifically. To that end, we propose that Rule 5.6 be amended to read as follows (added language underlined):

> Rule 5.6 Restrictions on Right to Practice
>
> A lawyer shall not participate in offering or making:
>
> (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
>
> (b) an agreement in which a restriction on the lawyer's right to practice is part of the terms of engagement of a lawyer by a client or of the settlement of a client controversy.

Alternatively, subsection (b) could be amended to read simply "an agreement containing a restriction on the lawyer's right to practice."

If adopted, either amended version of Rule 5.6 would enable firms to respond to corporate counsel who press outside counsel guidelines that seek to define conflicts in ways that far exceed the purview of the Model Rules, so their guidelines are unethical as proposed, and firms are therefore unable to agree to them. Such an amendment to Rule 5.6 would enable the profession to take a principled position that would empower individual firms to fight back on a stronger footing—without running afoul of anti-trust

law. This approach should be effective even when the client proposing the guideline is not a GC or a lawyer, because the law firm can explain that it may not bind the lawyers in the firm to a provision that is unethical, and because such a provision restricts other clients' ability to choose one of the firm's lawyers to represent them where the firm would otherwise be permitted to do so under the Rules.

A counter argument to this proposed change that is likely to be advanced is that it may be viewed as preventing clients from taking the "Coke/Pepsi" position—namely that if outside counsel represents 'Coke,' then it may not also represent 'Pepsi'. But such requirements may properly be based not on expanded definitions of conflicts of interest, but rather on concerns that the engagement of the client will involve outside counsel in learning highly confidential and trade secret information that no amount of screening can ensure will be protected from being used, or even passing to the rival entity. This type of very narrow, confidence and secrets based enforcement of a client's right to secure its secrets as part of the conditions of a law firm's engagement should not be seen as violating the revised version of the Rule because the purpose of the restriction is to protect the client's valuable secrets, not to expand outside counsel's duty of loyalty or otherwise restrict outside counsel's freedom to practice law. If need be, a comment can be included to clarify how firms and their clients may deal with these situations.

Rule 5.6 has been the subject of five Formal ABA Formal Ethics Opinions.[17] Formal Opinion 94-381, Restrictions on Right to Practice, appears to be the most relevant to the topic of outside counsel guidelines. This opinion supports the position advocated here, that the proposed revision would comport with the Rule's intent and provide protections on the freedom of clients and lawyers to enter into representations as they see fit, within the Rules.

In Formal Opinion 94-381 the Committee considered two questions:

> (1) whether a corporation's in-house counsel may offer or an outside lawyer may accept an agreement making the representation in a specific matter contingent upon an agreement by the outside lawyer never to represent anyone against the corporation in the future, and (2) whether such an in-house counsel may offer or a lawyer may accept in-house employment contingent upon the same agreement.[18]

According to the opinion, the proposed restriction on representation would prevent representation where the Rules would not, because it would have the effect of "prohibiting the lawyers involved from representing others in any matter adverse to the corporation, even if that matter were unrelated to any representation of the corporation in which the lawyers had been involved."[19]

The opinion relied on the two reasons for Model Rule 5.6:

> First, such an agreement would limit a lawyer's 'professional autonomy.' Second, a restrictive covenant barring future adverse representations would limit 'the freedom of clients to choose a lawyer.'[20]

For these policy reasons, the Committee found the proposed restrictions run "afoul of Model Rule 5.6" because they prohibit future adverse representation in unrelated matters. Most importantly for purposes of our proposal, the opinion recognizes that a proposal "restricting a lawyer from ever representing one whose interests are adverse to a former client would impermissibly restrain a lawyer from engaging in his profession."

Ultimately, the Committee concluded the agreements contemplated by the inquiries would violate Rule 5.6 because "an agreement denying the lawyer the opportunity to represent any interest adverse to a former client is an overbroad and impermissible restriction on the right to practice."

We believe that this opinion provides support for the revision proposed here to Rule 5.6. The concern regarding limitations on practice has been relevant for years. That concern should now be addressed given the proliferation of OCGs like those highlighted here that incorporate ever more expansive conflicts language. In attachment A, the authors include a variety of additional conflicts provisions taken directly from client-generated OCGs. Each of these provisions—some of which are very lengthy—pose some (or in several cases, all) of the problems identified in this article. We invite our readers to review them and identify the problems they present to law firms that are asked to agree to them.

We suggest that there exists today a critical need to restore the traditional balance between what clients can legitimately define as their expectation regarding the loyalty of their outside counsel, and lawyers' (and other clients') ability to act independently and to accept engagements permitted under the existing definitions of conflicts under the Rules of Professional Conduct. We assert that the proposed amendment to Rule 5.6 would enable—and require—clients and law firms to abide by the existing rules defining what is—and is not—a conflict of interest, and to require firms to reject all attempts by individual clients to enlarge that definition. For all the reasons set out above, we believe that such a restoration of the traditional balance would benefit all clients, as well as the profession, by preserving the professional independence of lawyers.

## ATTACHMENT A

## EXAMPLES[21]

*Example 1*
It is BIG BANK'S policy that, notwithstanding regulations and cases applicable to outside counsel, outside counsel must treat BIG BANK and each of its subsidiaries as if they are one entity for the purpose of all conflicts of interest analyses. In transactional matters, consent to a waiver request by a law firm will ordinarily be given where it is clear that BIG BANK'S interests will not be impaired.

For purposes of trying to identify potential conflicts of interest, BIG BANK is deemed to include any entity listed in Appendix X, or any list of BIG BANK entities delivered subsequently.

*Example 2*
Potential conflict of interest situations may include:

- Representation of another party in any contested matter, for other clients, in which Outside Counsel argues positions on policy or legal principles that are adverse to Client's interests, whether covered by the applicable code of professional conduct or not.

*Example 3*
Outside counsel must advise [CLIENT] of any positions it has taken in the recent past or is presently taking on issues that may be adverse, harmful or otherwise prejudicial to the interests of Client, including, without limitation, positions taken by Outside Counsel before administrative and regulatory agencies, bodies or other tribunals. In addition, Outside Counsel agrees to take all reasonable steps to ensure its lawyers not take positions that may be adverse to the interests of Client.

*Example 4*
**Conflicts of Interest**

Any potential conflict of interest must be disclosed to ZEUSS, Inc. and waived in writing prior to beginning work on a matter. Requests for any conflict of interest waivers must be made in writing and addressed to []. Please note that we will not permit any firm to represent a party adverse to ZEUSS, Inc. or any entity on Attachment A without prior written consent, and in no event will we allow representation of an adverse party in litigation. Attachment A is an extremely confidential list of entities for your firm's use in screening for conflicts. This list includes (a) multiple names for some entities, (b) some entities that are no longer owned or controlled, but which may have been at a relevant time, (c) entities that may be affiliated with ZEUSS, Inc.'s parent companies, and (d) entities that may not be controlled by ZEUSS, Inc. or its parent companies, but in which they may have an ownership interest. Although lengthy, this list will assist us in identifying potential conflicts so that they may be addressed expeditiously.

*Example 5*
You will not act in relation to a matter where there is a conflict of interest in relation to that matter, or a related matter, or there is a significant risk that there is a conflict of this kind unless you have our written consent. We expect that you would discuss any possible conflict with us in advance, wherever possible. You agree that you will not undertake, or continue any engagement with any person in any claim, complaint, action or proceedings brought against us or any of our affiliates. A conflict may also exist if you act on a transaction for a party negotiating against us or where there could be a conflict of duties. You agree that, wherever possible, unless precluded from doing so by the duty of confidentiality you owe to another client, you will obtain our prior written approval before undertaking any such engagement.

You acknowledge that there are certain companies where a perceived conflict may exist or arise if you were to act for them. In respect of these companies you agree to enter into an agreement to enhance and ensure the confidentiality and appropriate screens. You also acknowledge that there are some companies where we would deem it an outright conflict were you to act for any such company on any matter. Currently, these companies are ABC, XYZ, 123, 456 and 789, and we may notify you of others or changes from time to time.

*Example 6*
**Conflicts of Interest**

Outside counsel seeking to represent and representing MegaManufacturer must avoid any actual or potential conflict of interest. Engagements which MegaManufacturer considers as creating a potential conflict include those engagements which:

(1) limit the ability of outside counsel from zealously representing the interests of MegaManufacturer;

(2) compromise or place at risk MegaManufacturer's proprietary or confidential information such as where outside counsel's representation of a third party might cause him/her to rely upon MegaManufacturer' s confidential or proprietary information to effectively represent the third party; or,

(3) inappropriately require outside counsel to rely upon or use the proprietary or confidential information of a third-party in order to effectively represent MegaManufacturer.

Even though an actual conflict or potential conflict may be too remote to cause a court to order counsel disqualified, nor be significant enough for an attorney licensing authority to take remedial action, MegaManufacturer may (in its discretion) nevertheless deny a conflict waiver request.

A conflict of interest may arise in litigation or in a non-litigated matter. A conflict may also arise when outside counsel fail to reasonably cooperate with MegaManufacturer in the resolution of any dispute regarding fees for legal services provided MegaManufacturer.

For purposes of conflict analysis only, representation of a MegaManufacturer Company (e.g., a subsidiary or business unit) constitutes representation of the Corporation. For example, absent written disclosure and written waiver consistent with this policy, a firm which represents one MegaManufacturer business unit or subsidiary may not represent a MegaManufacturer Competitor on a matter adverse to a different MegaManufacturer business unit or subsidiary. This provision does not preclude MegaManufacturer from limiting the scope of outside counsel's retention (e.g., by limiting the retention to representation of just a MegaManufacturer subsidiary, business unit or MegaManufacturer employee), and excluding from the scope of that representation other areas (e.g., representation of a different MegaManufacturer subsidiary, business unit, employee or the Corporation itself).

Concurrent with seeking any representation of MegaManufacturer (whether initiated by a firm, or as may be initiated by MegaManufacturer ), outside counsel must execute a "MegaManufacturer Outside Legal Services 'No Conflict' Acknowledgement" form to certify that the law firm does not have any actual or potential conflict of interest. Lawyers or firms seeking to represent MegaManufacturer must also acknowledge that they have adequate systems in place to receive, monitor, track and manage information regarding MegaManufacturer Companies and potential MegaManufacturer competitors so as to insure avoidance of any conflict of interest and so as to seek, where appropriate, waivers from MegaManufacturer.

Even after a conflict has been reported or a waiver granted, outside counsel representing MegaManufacturer must notify the MegaManufacture Risk Manager or in-house MegaManufacturer attorney working on the matter of any material change in facts.

***a. Required Disclosures***

Outside counsel representing or seeking to represent MegaManufacturer must provide MegaManufacturer Timely Disclosure of any actual or potential conflict of interest. Any such disclosure must be made to the MegaManufacturer attorney with whom you are working on the form provided with this policy; that in-house MegaManufacturer attorney will, in tum, provide the information to the MegaManufacturer Risk Manager for appropriate internal review.

Required disclosures include, but are not limited to, the following:

- Whether your firm represents or has represented within the last 5 years any interest adverse to any of the MegaManufacturer Companies;
- Whether your firm represents or has represented in the last 5 years any MegaManufacturer competitor;
- Whether there exists a conflict of interest between your firm or any member thereof and any current member of the MegaManufacturer Board of Directors or current employer of any member of the MegaManufacturer Board of Directors;
- Whether, in the last 4 years, your firm or any member thereof has issued, prepared or provided a written legal opinion challenging the validity of any intellectual property owned by or licensed to MegaManufacturer;
- Whether in the last 10 years your firm or any current member thereof has ever been disciplined, sanctioned, suspended, disbarred, or had any other adverse action taken against it by the SEC, DOJ, FDA, HHS, FTC, OIG or similar US or foreign agency;
- Whether in the last 10 years your firm or any current member thereof has been convicted of a felony or is currently a party to an administrative or judicial proceeding in which fraudulent activity is alleged;
- Whether your firm or any current member thereof has been adjudicated to have committed malpractice within the last 5 years;

and

- Whether you are aware of any other matter which should be disclosed to MegaManufacturer in order to allow MegaManufacturer to have adequate informed consent about the existence of an actual or potential conflict of interest;
- Whether your firm has an obligation to a MegaManufacturer competitor to keep confidential the mere fact of the firm's representation of the competitor.

In checking or clearing for conflicts, it is not adequate for outside counsel to rely only on the representative list of MegaManufacturer Companies or representative list of medical device companies. Outside counsel must also independently assess whether an actual or potential conflict exists or may arise in connection with their representation of a non-MegaManufacturer individual or entity.

***b. Conflict Determination & Waiver Authorization***

It is solely within the discretion of the MegaManufacturer General Counsel, or his/her designee(s), to determine whether an actual or potential conflict exists. Conflicts of interest may only be waived, in writing, by the MegaManufacturer General Counsel or his/her designee, and may only be validly granted following appropriate written disclosure by outside counsel of all material information regarding the actual or potential conflict. Inadequate disclosure invalidates any waiver granted.

***c. Specific Waivers, "Blanket" & "Implied Waivers"***

Waivers may be granted to individual attorneys or to specific law firms. Waivers granted to law firms do not apply to others with whom the law firm may associate with during the representation of MegaManufacturer, unless otherwise expressly agreed, in writing, by MegaManufacturer. Waivers granted by MegaManufacturer also do not automatically apply to any other class of professional that may directly, or indirectly through outside legal counsel, provide services to MegaManufacturer, such as expert witnesses, third-party examiners or testing facilities, judicial personnel, or arbitrators, mediators, or other ADR neutrals who may be required to clear conflicts prior to involvement in a matter involving MegaManufacturer.

Requests for waivers are considered only on a case-by-case basis. Except in particularly extraordinary circumstances, and upon full written disclosure and written approval of the General Counsel or his/her designee, MegaManufacturer will not grant requests for waivers covering multiple, prospective, unidentified, blanket, "implied," or hypothetical matters.

Any waiver granted will not be deemed a blanket or implied waiver.

***d. Assignment & Transfer***

Waivers granted by MegaManufacturer are not assignable or transferable. Waivers granted to an individual attorney will not transfer from one firm to another if that lawyer changes firms or the firm changes its organizational status (e.g., by merger with another firm).

***e. "Conflict Screens" or "Conflict Walls"***

If a waiver has been granted to an individual attorney, and not to the attorney's law firm, the attorney must take appropriate steps to ensure there are internal processes and controls to create a "Conflict Screen" or "Conflict Wall" around that attorney and other members of the law firm, as well as around any work product or documents (paper or electronic) which relate to the representation, including client documents as well as non-public or confidential portions of briefs, affidavits, depositions, etc.

### *f. Waiver Request & Decision Notification Process*

Other than as the MegaManufacturer General Counsel may prescribe, the process for outside counsel seeking a waiver is as follows:

1. Immediately telephone or email the MegaManufacturer attorney with whom you are working or seek to work with to notify that person of any actual or potential conflict which has arisen.

2. Prepare a written disclosure of the conflict on the form provided with this policy, describing, where relevant:

- the nature of the conflict;
- the parties, entities and individuals involved;
- the nature of the work that has been, and/or currently is being, performed for MegaManufacturer; and,
- other relevant facts which would allow for "informed consent" in considering the request.

Upon receipt of the disclosure and waiver request, the MegaManufacturer Risk Manager will submit the waiver request to the MegaManufacturer Conflict Review Committee ("MCRC") and the Vice President & Senior Legal Counsel for the functional area or business unit affected by the representation or sought representation, for a recommendation on whether to grant or deny the request. The Chair of the MCRC shall submit the recommendation to the General Counsel or his/her designee for a determination of whether to grant or deny the waiver. The Chair of the MCRC will advise you whether the requested waiver is granted, denied, modified/limited, or if more information is needed.

3. Expedited Review: If outside counsel believes it is necessary for MegaManufacturer to act on the waiver request within 24 hours, counsel should request "Expedited Review" on the waiver request form. The MegaManufacturer Risk Manager will use his/her best efforts to act on the request within 24 hours. The failure to act on the request within 24 hours should not be interpreted as having either granted or denied the request.

### *g. Factors Considered In Granting Waiver Requests*

When a waiver is requested, the MCRC will balance the need to have adequate representation of MegaManufacturer with all relevant factors. Without regard to priority or "weight," some factors considered may include, but are not limited to:

- The nature of the conflict (e.g., MegaManufacturer would unlikely grant a waiver to any firm who has ever sued MegaManufacturer, whether any subsequent representation concerned the same or similar matter or presented an actual conflict or not);
- Whether granting a waiver would present unreasonable risk to MegaManufacturer;
- How promptly counsel notified MegaManufacturer of a conflict;
- How fully the conflict was disclosed;
- Whether the conflict concerns current or former matters;
- Whether the firm or attorney seeking to represent MegaManufacturer has expertise in a particular area that may not exist among other lawyers or in other law firms;
- Whether a third party has been granted, or refused to grant, a waiver, and whether such an act is or was legally or ethically required;
- Whether the conflict could affect the ability of outside counsel to zealously represent the interests of MegaManufacturer;
- Whether the conflict was "inherited" by the firm (e.g., through imputed disqualification provisions of state bar and ABA Model Rules) with the employment of an attorney or arose independent of any such circumstances;
- The size of the firm and the potential efficacy of "conflict screening" mechanisms;
- Whether the conflict concerns a "major" versus "minor" competitor of MegaManufacturer;
- The extent to which MegaManufacturer is a significant client of the firm.

Neither this policy, nor any of the illustrative considerations listed above, provide outside counsel with any right to a waiver. MegaManufacturer's grant of a waiver to one firm or attorney on a matter is no guarantee that MegaManufacturer would grant that same firm or attorney a future waiver on a similar matter.

Each conflict must be separately disclosed. Each waiver request will be determined on a case-by-case basis.

*Example 7*
**Initial Conflicts Check**

Outside Counsel shall thoroughly check for actual or potential conflicts of interest that may arise from counsel's representation of the Company, as defined in these Guidelines or in any applicable code of professional responsibility or rules of professional conduct. Giant Co. expects Outside Counsel to use their best efforts to identify and discuss with the Giant Risk Manager any potential conflicts of a philosophical or policy-driven nature that may compromise a position taken by the Company.

Any conflict must be discussed with the Giant Co. Risk Manager as soon as it becomes known. Giant Co. reserves the right to make an independent determination whether Outside Counsel has an actual or potential conflict of interest. The obligation to disclose actual and potential conflicts of interest continues throughout the term of the representation. Outside Counsel must review conflicts of interest on an ongoing basis as new matters are opened. Any new attorney/client relationships that create a conflict shall be reported to the Company immediately.

*The acceptance of an engagement on a matter by Outside Counsel without written disclosure of any conflicts and the written waiver by Giant Co. of all conflicts disclosed constitutes a representation by Outside Counsel that a conflicts check has been conducted and that there are no conflicts.*

**Conflicts of Interest Defined**

Known and actual conflicts of interest involve a law firm' s representation of a client in a matter in which the other client's interests *are* or *become* adverse to Giant Co.. Giant Co. classifies these as actual conflicts of interest.

Potential conflicts of interest generally occur when a law firm's representation of a client in a matter, though not actually adverse to Giant Co., has the potential of becoming adverse during the course of the law firm's representation. Giant Co. classifies these as potential conflicts of interest.

Actual and potential conflicts of interest are treated the same for purposes of these Guidelines. Law firms representing Giant Co. *shall not* represent a client in any matter in which the other client's interests are in actual or potential conflict to Giant Co.'s interests, unless Giant Co. has waived the conflict of interest consistent with the processes and procedures outlined herein.

**Conflict Waiver Requests**

Giant Co. expects a strong degree of loyalty from its Outside Counsel. Conflict waiver requests are not preferred and should be used only when absolutely required by the circumstances.

Requests to waive an actual or potential conflict shall be made by the law firm at the earliest possible time after discovery, via a signed letter on law firm letterhead. The conflict waiver request letter should be in the format of the standard letter attached hereto as Exhibit C.

No general, prospective or unlimited waivers will be considered and should not be requested. All conflict waivers must be approved by the Executive Vice President and General Counsel.

The letter should be submitted by e-mail, in PDF or MS Word format, to the Giant Co. General Counsel and shall set forth *all* relevant facts about all aspects of the conflict. The letter shall include a specific discussion of each of the Relevant Facts listed below and shall state affirmatively and with particularity each Representation listed below.

**Relevant Facts**

The identity of the other client;

The specific work to be performed for the other client (after obtaining the client's authorization to make such disclosure);

The type of work performed by the law firm for Giant Co.;

Whether the law firm has obtained the written consent of the other client;

The identity of individuals within the firm who will perform the engagement for the other client and their location (e.g., Chicago office);

The individuals within the firm who perform, and will perform (to the extent known), work for Giant Co.;

Whether the adverse representation concerns subject matter or substantive law that may be important to Giant Co.;

A discussion of the law firm's analysis, under the applicable code of professional responsibility or rules of professional conduct, that a waiver is consistent with the rules of ethics applicable to the particular jurisdiction; and

A list of all in-house Giant Co. counsel whose matters may be affected by the conflicts waiver request.

**Representations**

The matter is not related to, does not arise out of, and will not result in a litigated matter between Giant Co. and the other client;

The matter involves an area of practice in which the law firm does not represent and has not represented Giant Co.;

The law firm has not learned anything through its course of representing Giant Co. that is substantially related to the subject of the representation of the other client;

It appears that the representation of the other client will not adversely affect the relationship between Giant Co. and the law firm or dilute the law firm's loyalty to and zeal in its representation of Giant Co.;

The law firm's other client is a pre-existing client of the law firm in the practice area for which the waiver is sought;

Failure to grant the waiver will cause an unreasonable hardship for the law firm's other client (for example, where the law firm acts as the other client's *de facto* real estate department, and it would cost the client a significant amount of money to bring another law firm up to speed on the transaction);

It appears there is no chance of the parties becoming fundamentally antagonistic, or that Giant Co.'s interests could in any way be prejudiced;

The law firm agrees that it will withdraw completely from the matter if litigation ensues between Giant Co. and the other client or if Giant Co. subjectively believes that the parties have become fundamentally antagonistic, or that it will suffer prejudice;

A confirmation by the law firm that a conflicts waiver by Giant Co. does not waive the law firm's duty to keep confidential all information about Giant Co. that is obtained during the representation of the Company; and

Giant Co. and the other client consent to the waiver.

**Cost of Determining Conflict**

Time spent investigating, reporting and resolving actual and potential conflicts or preparing conflict waiver requests is not billable.

**Representing Significant Competitors**

Giant Co. may conclude that an actual conflict of interest exists if Outside Counsel or Outside Counsel's law firm represents a significant competitor of Giant Co. or its subsidiaries or affiliates. A list of Giant Co.'s principal subsidiaries is attached as Exhibit D. As a pre-condition of engagement, Outside Counsel must disclose in writing the identity of any national or regional retailers or any significant competitors of Giant Co. or its subsidiaries or affiliates (*see* Exhibit E for examples) that the Outside Counsel firm represents, together with a general description of the type of legal services that the Outside Counsel firm provides to such client(s). If Outside Counsel concludes that it would be improper to provide this information to the Company, Outside Counsel should decline the engagement.

**Multiparty Representation**

The approval of the Giant Co. General Counsel is needed in all situations where it is proposed that a single law firm represent both Giant Co. and other parties in a matter. All requests for approval of such representations must be submitted in writing and should contain statements from Outside Counsel describing: (a) the extent and nature of the proposed joint representation, (b) the steps that the law firm will take to protect proprietary or confidential Giant Co. information from being disseminated to jointly represented clients, and (c) the likelihood for adversity among the proposed clients. As a rule, such engagements will be approved only where the potential for adversity is remote and where all parties agree in writing in advance that in the event of a conflict that the law firm will either withdraw completely or continue solely representing Giant Co..

**Representing Giant Co. in Bankruptcy Proceedings**

A law firm representing Giant Co. as a creditor or party-in-interest in connection with a bankruptcy proceeding may concurrently represent other creditors and parties in interest in the case, provided that the representation is disclosed to Giant Co., the other clients are similarly situated to Giant Co., and the representation does not result in positional adversity to Giant Co..

The Giant Co. General Counsel should be informed of any such representation.

*Example 8*

Conflict Checks. You will: (a) remain free of conflicting interests and the appearance of impropriety at all times; (b) thoroughly check for actual or potential conflicts of interest; (c) review Exhibit 21.1 to Company's U.S. Securities and Exchange Commission Form 10-K, which lists Company's subsidiaries, and request an up-to-date listing of subsidiary companies to facilitate a conflicts check; (d) immediately advise us upon your discovery of a conflict or potential conflict, even if you believe that the matter does not amount to a directly adverse potential conflict; (e) immediately bring the matter to the attention of the Company Lead and resolve the actual or potential conflict prior to providing any services to Company (or any additional services should the conflict or potential conflict be discovered after commencing work for Company); (f) immediately advise us of actual or potential representations that may be or may become adverse to the interests of Company (including its interests in a fiduciary capacity) or of any situation that you know or have reason to know may involve a conflict of interest, *before* any representation commences or continues; and (g) prior to accepting any engagement and during such engagement, provide Company at no expense with any publications, presentations or other public writings by any member of your organization that directly relate to the facts at issue in the engagement or that might negatively impact the engagement.

By accepting an engagement from Company, you represent that a conflict check has been conducted, that all disclosures required by this Section 1.3.1 have been and will be made, that no actual or potential conflict of interest exists. Accepting additional engagements from Company constitutes your continuing representation that conflict checks have been conducted as to each matter and that no conflicts of interest exist. Actual and potential conflicts of interest are treated the same way for purposes of this Policy.

Third party subpoenas seeking information from Company constitute potential conflicts. Prior to sending such subpoenas, you will discuss the matter with Company's Legal Counsel (LegalCounsel@XXXXXX.com).

1.3.2. Conflict Waivers. Requests to waive an actual or potential conflict must be made at the earliest possible time after discovery of the conflict, via a signed letter on your letterhead or by an email to the Company Lead. Conflict waiver request letters will set forth *all* relevant facts about the conflict, including the following: the identity of the other client; the specific work to be performed for the other client (after obtaining the client's authorization to make such disclosure); the type of work performed by your organization for Company; whether your organization has obtained written consent of the other client, in accordance with laws and rules; the identity of individuals within or for your organization who will perform the engagement for the other client and their location; the individuals within your organization who perform, and will perform (to the extent known), work for Company; whether the adverse repre-

sentation concerns subject matter or substantive law that may be important to Company; a discussion of your analysis, under the applicable code of professional responsibility or rules of professional conduct, that a waiver is consistent with the rules of ethics applicable to the particular jurisdiction; and a list of all Company legal department personnel whom you know to be working on the matter for which the conflict waiver request is sought.

Any conflict waiver will be conditioned on the following: (a) Company's right to reconsider its consent to the conflict waiver if the interests of outside counsel's other client or Company materially change; (b) no personnel involved in, or previously involved in, performing work for Company will work on the matter in conflict; (c) personnel working on the matter in conflict will, in the course of such work, neither consult with personnel involved or previously involved in performing work for Company, nor access such personnel's Company-related work product or files, including but not limited to imposition of an ethical screen acceptable to Company which appropriately restricts access to Company documents on your network (electronic and hard copy); (d) your organization will not represent Company or its conflicted client as litigation or dispute resolution counsel in any dispute arising from or out of the conflicting matter; (e) there is no chance of the parties becoming fundamentally antagonistic, or that Company's interests could in any way be prejudiced by granting the waiver; (f) confirmation that a conflicts waiver by Company does not waive your organization's duty to keep confidential all information about Company that is obtained during the representation of Company and with respect to such information, extends beyond any termination of the attorney-client relationship; and (g) such other conditions as Company, in its sole discretion, may require.

**Endnotes**

1. The authors are indebted to James Jones (Senior Fellow at the Center for the Study of the Legal Profession at Georgetown University Law Center in Washington, D.C.), Martin I. Kaminsky, General Counsel of Greenberg Traurig, LLP, for their insights, and numerous other law firm general counsel who have provided us—anonymously—with examples of provisions from clients' OCGs, and to our partner Janis Meyer for her invaluable comments. Marquette University law student Andrew Trevino provided invaluable research assistance. However, the views expressed are entirely our own.
2. Anthony E. Davis & Noah Fiedler, *Indemnity Provisions in Outside Counsel Guidelines: A Tale of Unintended Consequences,* 23 PROF.LAW. no. 4, 2016, at 1.
3. These are excerpts from real-world OCGs. Other examples are set forth in full in Attachment A.
4. According to the Opinion, a lawyer who represents a corporate client is not by that fact alone barred from representation adverse to a corporate affiliate of that client in an unrelated matter. The Opinion provides a number of factual considerations in the analysis, including the reasonable expectation of the client, the obligation of a corporation to keep the lawyer apprised about changes in affiliates, the nature of the work performed, and whether confidential information was ever obtained from an affiliate.
5. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. [34] (2016).
6. 618 F.3d 204, 210 (2d Cir. 2010).
7. *Id.*
8. *See,e.g.*, the provision in Attachment A, Example 8, which requires outside counsel to review the client's 10-k filings in order to ascertain the client's current subsidiaries.

9. *Id.*
10. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. [6] (2016).
11. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. [24] (2016).
12. MODEL RULES OF PROF'L CONDUCT R. 1.9, 1.10 & 1.18 (2016).
13. MODEL RULES OF PROF'L CONDUCT R. 5.6 (2016).
14. Neil W. Hamilton, *Are We A Profession or Merely A Business? The Erosion of Rule 5.6 and the Bar Against Restrictions on the Right to Practice*, 22 WM. MITCHELL L. REV. 1409, n. 10 (1996) (citing GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 824, 824.5 (2d ed. Supp. 1996) (explaining that if lawyers are not permitted to compete openly for the business of clients, "client choice" becomes an empty idea)); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-381 (1994) (Restrictions on Right to Practice).
15. Hamilton, *supra* note 14, at n. 13 (citing Committee on Prof'l Responsibility, Ass'n of the Bar of City of N.Y., *Ethical Issues Arising When a Lawyer Leaves a Firm: Restrictions on Practice*, 20 FORDHAM URB. L.J. 897, 909 (1993)); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-381, *supra* note 14.
16. MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110, n. 105 (1969).
17. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-381, *supra* note 14, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-371 (1993), ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-444 (2006), ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-394 (1995), ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 00-417 (2000).
18. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 94-381, *supra* note 14.
19. *Id.*
20. *Id.*
21. A number of law firm general counsel were helpful in providing material (on an anonymous basis—both as to the identity of the firms providing the information and as to the source of the provisions) for the conflicts provisions included in this Attachment or referred to in this article. Some of the examples have been edited (without affecting the purport of the provisions) so as not to reveal the identity of the firm providing the information or the source of the provisions.

# SECTION 4

## Engaging in Dishonesty, Fraud, Deceit and Misrepresentation in Strict Compliance with Rule 8.4(c)

*Presented by*

**Honorable Edward Moss, Judge (ret.)**
17th Judicial District, State of Colorado
Brighton, CO

NOTES:

# *Ethics 7.0*

## *Engaging in dishonesty, fraud, deceit and Misrepresentation in strict compliance with Rule 8.4(c)*

*Judge Edward Moss (retired)*
*Colorado Bar Association Ethics Committee*
*Denver, Colorado - November 13, 2020*

## I. Some rules and other things

### a. CRPC 4.1, Truthfulness in statements to others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person….

### b. *CRPC 4.2, Communication with person represented by counsel*

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

**Application to criminal investigations**

"The overwhelming preponderance of federal and state court decisions hold that the restriction… does not apply during the investigative stage of criminal proceedings and prior to arrest or indictment….

"Such contacts may take the form of attempts to interview the suspect about the matter being investigated, undercover activity designed to elicit information from the suspect, or simple observation of the allegedly unlawful behavior. On the other hand, a prosecuting attorney or government lawyer may not engage in deceit or misrepresent the lawyer's role in the matter."

CBA Ethics Op. 96 (2012) *citing* ABA Formal Ethics Op. 95-396 (1995).

### c. *CRPC 4.4, Respect for rights of third parties*

(a) In representing a client, a lawyer shall not … *use methods of obtaining evidence that violate the legal rights of such a person.*

### d. *CRPC 3.3, Candor to the tribunal*

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

### e. CRPC 5.3, Responsibilities regarding nonlawyer assistants

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

## II. The old CRPC 8.4(a) and (c)

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

## III. Deceit in pretext investigations

"A prosecutor would not be doing his job effectively if he or she refused… to help an officer prepare to conduct a lawful covert operation."

H. Swigle & L. Feature, Big Lies and Prosecutorial Ethics, 69 J. Mo. Bar 84 (2013).

"A lawyer's involvement in a criminal or civil regulatory investigation may help ensure that the criminal and/or civil regulatory investigation complies with constitutional constraints as well as high professional standards."

CBA Ethics Op 96 (2012).

"While recognizing the value of deception as a tool for law enforcement and of lawyer oversight of such investigations, courts have drawn a clear line between a lawyer advising and supervising covert activities and personally participating in them."

CBA Ethics Op. 137 (2019)

**Internet solicitation of a minor**

*For example, People v. Douglas*, 2012 COA 57 (Undercover police officer investigates internet posting for sex with a minor).

**Housing discrimination**

*Havens Realty Corp v. Coleman*, 455 U.S. 363, 373 (1982) ("The complaint alleged that … the black tester was told by Havens that no apartments were available, but the white tester was told that there were vacancies").

**Intellectual property**

*See* R. Camaggio, *Pretext Investigations: An Ethical Dilemma for Intellectual Property Attorneys,* The Colorado Lawyer (June 2010).

*Gidatex v. Campaniello Imports, Ltd.,* 82 F.Supp.2d. 119 (SDNY, 1999) ("Plaintiff's counsel had to hire investigators to pose as interior designers to prove that defendants were luring customers with signs and ads bearing plaintiff's trademark."

*But see Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147, (D.S.D. 2001), aff'd 347 F.3d 693 (8th Cir. 2003) (Lawyer sanctioned and evidence excluded when lawyer had a private investigator to visit the opposing party's showroom and covertly record discussions).

## IV. Excerpts, *In re Mark Pautler*, 47 P.3d 1175 (Colo. 2002)

Chief Deputy District Attorney Mark Pautler arrived at a crime scene where three women lay murdered. All died from blows to the head with a wood splitting maul. The killer was William Neal.

Neal apparently abducted the three murder victims one at a time, killing the first two over a three-day period. One of the witnesses at the apartment, J.D.Y., was the third woman he abducted. Neal tied her to a bed using eyebolts he had screwed into the floor specifically for that purpose.

While she lay spread-eagled on the bed, Neal brought a fourth woman to the Chenango apartment. He taped her mouth shut and tied her to a chair. As J.D.Y. watched, Neal split the fourth woman's skull with the maul. That night he raped J.D.Y.

The next morning, Neal returned with J.D.Y. to the apartment. Two of J.D.Y.'s friends arrived. Neal left the apartment, leaving instructions with to contact police and page him when the police arrived. A deputy s arrived and paged Neal. The ensuing conversation lasted three-and-a-half hours, during which Neal described his crimes.

The deputy developed a rapport with Neal and continuously encouraged his peaceful surrender. Neal made it clear he would not surrender without legal representation. Law enforcement officials testifying in Pautler's defense, said they would not have allowed a defense attorney to speak with Neal because they needed the conversation to continue until they could apprehend Neal.

Deputy District Attorney Pautler called Neal's former attorney, but received a recorded message indicating the telephone was no longer in service. Instead of contacting the Public Defender's office, Pautler offered to impersonate a public defender. The law enforcement agents agreed.

**Supreme Court's holding:** Pautler violated CRPC Rules 8.4(c) and 4.3.

## V. Other state's amendments to CRPC 8.4(c)

a. **Alabama Rule 3.8(2)(a) (2008): a "prosecutor may order, direct, encourage and advise with respect to any lawful governmental action… [to] accommodate the prosecutor's special responsibility in governmental law enforcement."**

b. **Alaska comment [4] (2009): Rule 8.4(c) "does not prohibit a lawyer from advising and supervising lawful covert activity in the investigations of violations of criminal law or civil or constitutional rights….**
**"Though the lawyer may advise and supervise others… the lawyer may not participate directly in the lawful covert activity."**

c. **Ohio comment [2A] (2007): Rule 8.4(c) "does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity or violations of constitutional or civil rights when authorized by law."**

d. **Oregon Rule 8.4(b) (2009): lawyers are permitted to "advise clients or others about or to supervise lawful covert activity in the investigations of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct."**

e. **Iowa comment [6] (2005): "It is not professional misconduct for a lawyer to *advise* clients or others about or *to* supervise *or participate in* lawful covert activity in the investigations of civil or criminal law or constitutional rights… provided the lawyer's conduct is otherwise in compliance with these rules."**

f. **Florida Rule 8.4(c) (2010): "[I]t shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to ADVISE others about or to supervise another in an undercover investigation… and**

**"it shall not be professional misconduct for a lawyer *employed other than as a lawyer* by a criminal law enforcement agency or regulatory agency to PARTICIPATE in an undercover investigation…."**

## VI. Colo.S.Ct. Standing Comm on the Rules of Prof. Conduct

**The "Pretexting Subcommittee" 2012 recommendations for Rule 8.4(c)**

a. **Minority recommendation:**

"It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that ***a lawyer representing the government*** may

- advise, direct, or supervise others,
- including clients, law enforcement officers,
- **or investigators**,
- who participate in lawful investigative activities.

b. **Majority recommendation:**

"It is professional misconduct for a lawyer to:

(d) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that ***a lawyer*** may

- advise, direct, or supervise others
- including clients, law enforcement officers,
- **or investigators,**
- who participate in lawful investigative activities.

c. **The 2012 deadlock:** https://www.courts.state.co.us/userfiles/file/7-13-12%20minutes(1).pdf

## VIII. The 2016 CHEEZO complaint to Office of Attorney Regulation

https://www.thedenverchannel.com/news/local-news/jefferson-county-internet-crime-unit-cheezo-shut-down-for-alleged-ethical-violations

"A crime investigation unit created to stop internet luring and exploitation of children is suspending undercover operations after an ethics complaint…. People going undercover online worked for the district attorney's office and pretended to be children. However, ethics rules state that members of the district attorney's office cannot engage in any deceit."

## VII. Colorado Supreme Court's 2017 amendment

"It is professional misconduct for a lawyer to:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation, except that a lawyer may advise, direct, or supervise others, including clients, law enforcement officers, and investigators, who participate in lawful investigative activities.

Rule changes 2017(09) and 2019(17).

## VIII. CBA Ethics Opinion 137 (May 2019)

*"Advising, Directing and Supervising Others in Lawful Investigative Activities that Involve Dishonesty, Fraud, Deceit or Misrepresentation"*

a. **Personal participation**. Remains prohibited.

b. **Coercive lawful investigations.** Lawyers must take care not to induce or coerce the target of an investigation into making statements he or she otherwise would not have made to a member of the public.

c. Relevant considerations in a **civil investigation** include whether the investigation was a 'straightforward effort to gather evidence'; whether the investigation is designed to reproduce the subject's usual behavior or was designed to trick the subject into doing something atypical; and whether a supervisory lawyer has reviewed and approved the investigation.

d. **Specific controls over general**. Rule 8.4(c)'s express authorization for a lawyer to advise, direct or supervise others controls over application of the general anti-circumvention rule, so long as the advice, etc., occurs in furtherance of a lawful investigative activity.

e. **Rule 4.1 (false statements or omissions of material facts).** Because Rule 8.4(c) does not permit a lawyer to personally engage in conduct involving dishonesty, etc., Rule 4.1 and the *Pautler* decision are unaffected.

f. **Rule 4.2 (communication with represented person).** The Committee believes that Rule 8.4(c) does not otherwise alter Rule 4.2's requirements.

g. **Rule 4.3 (dealing with unrepresented persons).** Because rule 4.3 applies to personal contact by a lawyer, it is unaffected by Rule 8.4(c).

h. **Rule 5.3 (non-lawyer assistant's conduct compatible with lawyer's obligations).** Lawyer's obligation includes the determination whether the conduct the lawyer is recommending, directing or advising is in furtherance of lawsuit investigative activity. Reasonable efforts may include reviewing the substantive law re: whether an investigative activity is lawful.

i. **Social media.** Rue 8.4(c) permits a lawyer to ethically advise, direct, etc., investigators to use deceptive means to gather information from a restricted portion of a social medial profile or website in the course of a lawful investigative activity.

Compare the pre-amendment conclusion:
"A lawyer must never use any form of deception to gain access to a restricted portion of a social media profile or website."

CBA Ethics Op. 127, Use of Social Media for Investigative Purposes (Sept. 2015).

## IX. CAVEAT! It's you responsibility to ensure the activity is "lawful"

The amended rule: "… except that a lawyer may advise, direct, or supervise others, including clients… or investigators, who participate in ***lawful*** investigative activities.

"Investigators in Colorado are not bound by any ethical rules or guidelines. As a result, absent illegal conduct, there is virtually no limit to what an investigator conducting an investigation on behalf of a private citizen can do."

Payne, Investigative Tactics, The Colorado Lawyer (Jan. 2006).

## X. Is it malpractice to *NOT* direct or supervise Rule 8.4 conduct?

## XI. Does the Supreme Court really mean what 8.4(c) says?

*See, Catholic Health Initiatives Colorado v. Earl Swensson Assocs.*, 2017 CO 94, 403 P.3d 185.

Rev. 10/1/2020

# SECTION 5

# Current Ethical Issues for In-house Lawyers


*Presented by*

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NOTES:

FAIRFIELD AND WOODS P.C.

# Current Ethical Issues for In-House Lawyers
# November 13, 2020

Presented By:
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## Ethics for In-House Counsel

- Numbers of in-house counsel growing greatly of late. Based on a quick computer search:
- First reported case involving ethics and in-house counsel was in 1989.
- This was a case involving unethical conduct by outside counsel toward in-house counsel.



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## Ethics for In-House Counsel

- First reported case involving ethical conduct of in-house counsel was in 1991; case arose after in-house counsel had left in-house job and regarded scope of his conflict.
- First reported case involving contemporaneous ethical issue for in-house counsel was in 1995.
- First reported malpractice case against in-house counsel was in 1998.



## The Rules Apply to In-House

- *Kaye v. Rosefielde*, 75 A.3d 1168 (N.J. Super. Ct. App. Div. 2013).
- "No rational basis" to argue ethical rules do not apply to in-house counsel.
- But see discussion of Rule 5.6 below.
- Also rejected argument that in-house counsel was "wearing a different hat" when he violated the ethical rules.

## Definitions and Scope

- Rules can now be used directly in non-disciplinary proceedings.
- "Firm" includes in-house department of a company.
- This is one of only two places in-house counsel is mentioned in Rules.



## Rule 1.1 Competence

- You have to be competent.
- In-house counsel may be asked to work on everything from anti-trust to zoning.
- You may want to use Rule 1.1 to pushback against owners who ask too much of you.

## Rule 1.2 Scope

- Client decides goals; lawyer decides means and methods.
- Cannot advise client to commit crime nor help client do so (exception for marijuana).



## Rule 1.5 Fees

- Rule 1.5 (a): "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee . . . ."
- Cases say reasonableness of fees should be judged at time contract is made.
- However, several factors listed in Rule 1.5 can only be judged in hindsight.

## Rule 1.5 Fees

- Ethics 2000 rule changes went from "a lawyer's fee shall be reasonable" to the new "a lawyer shall not . . . collect an unreasonable fee."
- Argument that fee is judged at time collected made stronger by this change.
- If in-house lawyer has stock options that are worthless when issued but valuable when vest, this could be Rule 1.5 violation.



## Rule 1.5 Fees

- Danger is generally not risk of a grievance from the same management that agreed to the fee.
- Danger is derivative suit from disgruntled shareholder when you cash out just before company tanks.
- Against all management disgruntled shareholder can argue management "looted the company," but against lawyer can also argue "unethical conduct."
- Cases have voided unethical fees.

## Rule 1.6 Confidentiality

- Most commonly-violated rule of ethics.
- Cannot talk about client information.
- Doesn't matter if it is not "confidential."
- This is particularly tricky for in-house, because everyone knows who your client is (you have no hypothetical clients to ask questions regarding).



## Rule 1.6 Confidentiality

- Ethical Rule different than attorney-client privilege, but Ethics 2000 changes make it more consistent with "crime-fraud" exception in rules of evidence.
- Now allowed to disclose client information "to prevent, mitigate or rectify substantial injury to financial interests . . . that has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."

## Rule 1.6 Confidentiality

- Other exceptions include:
  - To prevent death or serious bodily injury;
  - To prevent a crime;
  - To prevent fraud where lawyer's services used;
  - To get own legal advice;
  - To establish claim or defense in dispute with client; and
  - To comply with Court order.



## Rule 1.7 Conflicts

- Two types of conflicts:
  - Directly adverse conflicts under Rule 1.7(a)(1); and
  - Material limitation conflicts under Rule 1.7(a)(2).
- Both are real conflicts and have to be treated as such.

## Rule 1.7 Conflicts

- Directly adverse rare for in-house, but not impossible.
- Often in-house counsel works for the owner of the company or related companies.
- Once you do this, they are all your clients.
- This can create directly-adverse conflict.



## Rule 1.7 Conflicts

- Conflicts also possible if you do personal legal work for employees or officers.
- *Dinger v. Allfirst Fin., Inc.*, 82 Fed. Appx. 261 (3d Cir. 2003) (where in-house lawyer gave legal advice to officers, he owed them duties and could be sued for malpractice).

## Rule 1.7 Conflicts

- *Yanez v. Plummer*, 164 Cal. Rptr. 3d 309 (Cal Ct. App. 2013) (where in-house lawyer was also lawyer for bystander witness/employee, he had conflict when the witness's story changed to detriment of company).





## Rule 1.7 Conflicts

- More likely to arise is a material limitation conflict (Rule 1.7(a)(2)).
- Anytime something materially limits your ability to give objective advice.

## Rule 1.7 Conflicts

- If you have either type, you have to go through the same conflict waiver analysis.
- Consent from a client must be confirmed in writing.
- "Confirmed in writing" means:
  - Client sends writing to you (email fine).
  - You have oral conversation with client, and then you confirm to client in writing within reasonable time.



## Rule 1.8 Conflicts

- Rule 1.8(a): "A lawyer shall not enter into a business relationship with a client unless . . . (1) the transaction and terms . . . are fair . . . in writing . . . [and] can be understood by the client; (2) the client is advised in writing . . . [and given time] to seek . . . independent counsel; the (3) the client gives informed consent in writing."

## Rule 1.8 Conflicts

- This was actual rule Mr. Rosefielde violated.
- Have to advise client in writing to have another lawyer look at deal when getting an equity interest in client.
- Multiple cases where in-house lawyer sanctioned for not doing this.
- *Odish v. Cognitive Code Corp*., 2015 U.S. Dist. LEXIS 68630 (C.D. Cal. 2015) (lawyer who violated Rule 1.8 lost equity stake in business).



## Rule 1.9 Former Clients

- Rule 1.6 duties of confidentiality remain unchanged for former clients.
- If matter for new client is "substantially related" to matter for former client, then conflict exists and lawyer must get a waiver.
- If two matters are not "substantially related," then no conflict (and no waiver needed).

## Rule 1.9 Former Clients

- You cannot "use" information of a former client unless:
  - The former client is not disadvantaged thereby; or
  - The information has become generally known.

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## Rule 1.10 Imputed Conflicts

- If one person in a firm is disqualified for a business reason entire firm is disqualified.
- Comments remind us that "firm" includes in-house department (second place in the Rules in-house counsel is mentioned.

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## Rule 1.10 Imputed conflicts

- Ethics Wall (Confidentiality Wall) only works for lawyers coming from government.
- If lawyer coming from another company or private practice "personally and substantially" worked on the matter at the prior employer, entire in-house department is disqualified.



## 1.13 Organization as client

- Organization, not constituents you deal with, is client.
- "Up the ladder" reporting is required when company is engaged in unlawful conduct or constituent is violating duties to client.
- May have to report to the highest authority within the organization if conduct continues.

## 1.13 Organization as client

- If "up the ladder" reporting does not work, you may report outside the organization "only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization" even in violation of Rule 1.6.
- This will likely get you sued for malpractice, so make sure it is worth it.
- If you get fired for "up the ladder" reporting, you have to report that.





## 1.13 Organization as client

- If fired for up-the-ladder reporting, any recourse?
- Cases all over the place on whistle blower protection for fired in-house lawyers.
- If protection is federal, it trumps state ethics rules on standard Supremacy Clause analysis.
- If protection is state, state has to decide which policy is more important (protecting whistle blowers vs. protecting client's right to fire lawyer).

## 1.13 Organization as client

- Claims for malpractice against in-house lawyers on the rise.
- Many in-house lawyers rely on company's D&O.
- Beware: many D&O policies exclude professional services, and there are numerous cases enforcing such exclusions.
- You may be able to get a rider for next to nothing.



## Rule 4.2 Communications with Represented Persons

- You cannot communicate with person you know to be represented without lawyer's consent.
- Doesn't matter who initiates the contact.
- You can go around outside-counsel to get to in-house counsel

## Rule 4.2 Communications with Represented Persons

- Hypothetical: You are negotiating a contract, and business person you dealing with on other side says, “Before we finalize this, I’ll have to run the warranty issue past legal.”
- Do you have to cease communication because this a “represented person?”





## Rule 4.2 Communications with Represented Persons

- No.
- Representation for purposes of Rule 4.2 is on a matter-by-matter basis.
- You do not “know” (within the meaning of the Rules) that the other side is currently represented on this matter.

## Rule 4.2 Communications with Represented Persons

- Hypothetical #2: You are negotiating a contract, and business person you dealing with on other side says, "I was talking with Susan in legal about this warranty issue last night, and she said . . . ."
- Do you have to cease communication because this a "represented person?"



## Rule 4.2 Communications with Represented Persons

- Yes. You now know there is a lawyer involved.
- More on extent of representation of a company in CBA Ethics Opinion 69.

## Rule 4.3 Communications with Unrepresented Persons

- Hypothetical #3
- You are negotiating contract with unrepresented person. He asks, "What does this warranty provision in our draft contract mean?"
- Can you answer?



## Rule 4.3 Communications with Unrepresented Persons

- Very bad idea to do so.
- You may well be giving legal advice and putting yourself in conflict situation.
- Best, "You need to get your own lawyer for that."
- Perhaps acceptable: "I am not your lawyer and do not represent you. But here is what it means to means to me . . ."
- If going this route, doing it in writing is best.

## Rule 4.4 Respect for Third Persons

- Cannot do things with no purpose other than embarrassment, delay, or burden.
- If you get document apparently not intended for you, only duty is to give notice.



## Rules 5.1 and 5.3 Supervisory Responsibilities

- Generally, senior lawyer's obligation to make sure junior lawyers and subordinates act consistently with rules.
- Areas of emphasis are confidentiality, conflicts, and avenues to express ethical concerns confidentiality.

## Rule 5.4 Professional Independence

- (c) "A lawyer shall not permit a person who recommends, employs, or pays the lawyer . . . for another to direct or regulate the lawyer's professional judgment."
- "for another" in the context of in-house counsel includes an employee who is not "the client."
- Thus lawyers reporting to non-lawyers, except at the highest level, is a problem.



## Rule 5.6 Restrictions on Practice

- Covenants not to compete are prohibited.
- Application to in-house hot issue now.
- Several state ethics opinions have said "in-house lawyer cannot sign covenant not to compete."
- At least two cases have said this Rule does <u>not</u> apply to in-house counsel.

## Rule 5.7 Law-related services

- When you are in a law-related service, the Rules still have some application.
- If services "not distinct" from legal services, then Rules generally still apply.
- You can essentially "opt out" of Rules by advising the customers (not clients) that you are not acting as a lawyer and the attorney-client privilege does not apply.



## Rule 5.7 Law-related services

- Many in-house lawyers are often asked to give business advice.
- Attorney-client privilege does not apply when legal advice is not being given.

## Rule 5.7 Law-related services

- There are many cases requiring in-house lawyers to testify about communications with company officers because conversation was about business, not legal issues.
- Good idea (if not ethically required) to let client asking business advice know that the conversation may not be privileged.



## Rule 6.1 Voluntary Pro Bono Service

- This is aspirational goal of 50 hours per year of work without fee to persons of limited means.
- Most commentators expect at some point it will become mandatory.

## Rule 7.1—7.5 Advertising

- Have to be truthful.
- Cannot make real-time contact with person you don't know to get business.
- Advertisements must be labeled as such.





## Rule 8.3 Reporting Misconduct

- Required to report misconduct of other lawyers if:
  - Other lawyer's conduct "raises substantial question as to the lawyer's honesty, trustworthiness, or fitness to practice law."
- Generally this is:
  - Serious crimes;
  - Misuse of client funds;
  - Substance abuse.

## Rules 8.4 Misconduct

- Many in-house lawyers are not licensed in the states where they practice.
- Issues vary state-to-state, but remember:
  - UPL is a crime.
  - UPL is an ethical violation in the state where you are licensed.
  - UPL can get your colleagues in ethical trouble.
  - UPL can affect the client's attorney-client privilege.



## Rules 8.4 Misconduct

- Many in-house lawyers do not have malpractice insurance (this is not ethical misconduct).
- May try and rely on D&O policy, but many such policies have exceptions for professional services.
- If this is your firm, you may want to get an in-house rider (they are very inexpensive).

# Questions?

- Ask Jack.
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# SECTION 6

# Family Law:
## Ethically Navigating the Confluence of Law, Love, Loss, and Anger


*Presented by*

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NOTES:

# Family Law:
# Ethically Navigating the Confluence of Law, Love, Loss, and Negativity


## Presented by: Russel Murray


**November 13, 2020**

## I. What is Family Law?

### a. Various Definitions

Let's start with the question, What is Family?

A group of one or more parents and their children living together as a unit; a group of people related by blood or marriage; the children of a person or couple being discussed; a local organizational unit of the Mafia or other large criminal group; all the descendants of a common ancestor; a group of peoples from a common stock; a group of related things; a principal taxonomic category that ranks above genus and below order; all the languages ultimately derived from a particular early language, regarded as a group. Source: Oxford Dictionary of English.

A collective body of persons who live in one house and under one head or management. *Tahoe v. Jarboe*, 100 Mo. App. 459, 79 S. W. 1162; *Dodge v. Boston &T. R. Corp*., 154 Mass. 299, 28 N. E. 243, 13 L. R. A. 318; *Tyson v. Reynolds*, 52 Iowa,431, 3 N. W. 469.A family comprises a father, mother, and children. In a wider sense, it may include domestic servants; all who live in one house under one head. In a still broader sense, a group of blood-relatives; all the relations who descend from a common ancestor, or who spring from a common root. *See* Civil Code La. art. 3522, no. 16; 9 Ves. 323.A husband and wife living together may constitute a "family," within the meaning of that word as used in a homestead law. *Miller v. Finegan*, 26 Fla. 29, 7 South. 140, 6 L.R. A. 813."Family," in its origin, meant "servants;" but, in its more modern and comprehensive meaning, it signifies a collective body of persons living together in one house, or within the curtilage, in legal phrase. *Wilson v. Cochran*, 31 Tex. 677. 98 Am. Dec. 553."Family" may mean children, wife and children, blood-relatives, or the members of the domestic circle, according to the connection in which the word is used. *Spencer v.Spencer*, 11 Paige (N. Y.) 159."Family," in popular acceptation, includes parents, children, and servants. Source: TheLawDictionary.org, featuring Black's Law Dictionary free online legal dictionary.

Having established those, now let's turn to the question of, What is Family Law?

"Family law is a legal practice area that focuses on issues involving family relationships, such as adoption, divorce, and child custody, among others. ... Some family law attorneys even specialize in adoption, paternity, emancipation, or other matters not usually related to divorce." Choosing-the-right-lawyer/family-law, findlaw.com, Oct 10, 2018

"This area of practice is described in many ways, including "divorce," "domestic relations" and "family law." In the absence of a universally accepted designation, the choice was the term used by the AAML—"Matrimonial law." The Bounds of Advocacy, American Academy of Matrimonial Lawyers (AAML), 9 J. Am. Acad. Matrim. Law. 1, at 3, Fall, 1992, ©

1992 by the American Academy of Matrionial Lawyers (hereinafter, "Bounds," or "Bounds of Advocacy").

Family Law covers legal assistance relating to the structure of the family, particularly divorce, and the associated area of support and child custody. Ethical Guidelines for AttorneyMediators: Are Attorneys Bound by Ethical Codes for Lawyers When Acting as Mediators? (1997), Furlan, Fiona, Blumstein, David, Hofstein, David, https://cdn.ymaws.com/aaml.org/resource/collection/1B92015E-12A2-4666-A450-0ED5697134B7/EthicalGuidelinesforAttorneyMediators.pdf

**a. How does Family Law differ from "regular" law?**

"As family law is most often filled with high emotion and clients who may never have needed to use a legal professional so don't really understand the "law…." Ethics in Family Law, Grant Gisondo, gisondolaw.com, 09/14/2020.

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"Small firms and individual practitioners do not typically represent institutional clients, such as large businesses and governmental entities. When corporate clients become dissatisfied with their legal representation, they present their dissatisfaction to a senior partner, supervising lawyer, or simply go to another large firm. By comparison, small firms and solo practitioners generally represent individuals that have no experience with the legal system, other than what they have seen in the movies or on television. When these clients become unhappy or have an unacceptable outcome, the result is often the filing of a disciplinary complaint." Ethical Issues in Family Law, Fitzgerald, Charles G., Dist. Ct. Judge, 15th JDC – Div. M, Lafayette Bar Association CLE, 12/20/2017

"Lawyers have numerous clients; however, each client's case is probably the only legal matter that client has. Lawyers need to recognize this, as well as the fact that divorce proceedings are extremely emotional." 34 Colo. Law. 67 (November, 2005), Nancy L. Cohen, Esq.

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Before I begin, an examination of the difference between family law disputes and civil disputes is likely worthwhile. Civil disputes usually involve strangers in arm's-length relationships, whose legal relationship will conclusively wrap up at the expiry of the applicable appeal period. Trials generally concern closed events that occurred in the by-then distant past, and revolve around concrete facts susceptible to measurement and empirical analysis. Pre-trial applications are few and far between and tend to concern disclosure and preservation, while post-trial applications are all but unheard of. The available remedies are remedial in nature and when a conduct order, such as an order for specific performance, are inadequate, damages – a monetary payment intended to restore the plaintiff to the position they would have been in had it not been for the bad act – will be awarded.

Family law disputes, on the other hand, concern people in intimate relationships that will continue, especially if the parties have children, well beyond the end of any appeal. Trials concern a sequence of events that began in the past and continue to the date trial commences, and the quality of evidence offered is often of a he-said/she-said variety, presenting competing views of indeterminate issues and intangible facts that are insusceptible to measurement and concrete analysis, other than by the varying opinions of varying experts. Pre- and post-trial applications are commonplace, and are rife among those in particularly elevated degrees of conflict. Other than an order for divorce, few final orders in family law disputes are in fact "final," partly because the available orders concern financial and parenting obligations that endure into the indefinite future with all the unknown changes the future may bring. Moreover, family law cases have an emotional spillover effect that can profoundly impact the wellbeing of the parties, their children, and any other family members and friends who are caught up in the dispute.

The Meaning of Justice in Family Law Disputes, Boyd, John-Paul, QC, Slaw, Canada's Online Legal Magazine, slaw.ca, http://www.slaw.ca/2019/11/29/the-meaning-of-justice-in-family-law-disputes/ 11/29/2019

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**b. Review the numbers of Family Law cases in Colorado Courts**

## II. What are Family Law Ethics?

**a. Do Family Law Ethics differ from "general" legal ethics? If so, how?**

Existing codes often do not provide adequate guidance to the matrimonial lawyer. First, their emphasis on zealous representation of individual clients in criminal and some civil cases is not always appropriate in family law matters. Second, the existing codes delineate the minimum level necessary to avoid professional discipline, rather than describe optimum ethical behavior toward which attorney should strive. Third, the rules are often vague and provide contradictory guidelines in some of the most difficult family law situations. The Standards of Conduct are an effort to provide clear, specific guidance in areas most important to matrimonial lawyers.

In many ways, matrimonial practice is unique. Family disputes occur in a volatile and emotional atmosphere. It is difficult ***3** (reference omitted) for matrimonial lawyers to represent the interests of their clients without addressing the interests of other family members. Unlike most other concluded disputes in which the parties may harbor substantial animosity without practical effect, the parties to matrimonial disputes may be required to interact for years to come. In addition, many matrimonial lawyers believe themselves obligated to consider the best interests of children, regardless of which family member they represent. A survey of Academy Fellows indicated that the harm to children in an acrimonious family dispute was seen as the most significant problem for which there is insufficient guidance in existing ethical codes. Bounds of Advocacy at 2.

## III. A disciplinary review of Family Law practice

**"**Client complaints against domestic relations attorneys range from neglect and failure to communicate to incompetence, conversion, and making misrepresentations to the courts and third parties. Attorneys who practice in the domestic relations field were the subject of more complaints than attorneys in any other field of practice." 34 Colo. Law. 67 (November, 2005), Nancy L. Cohen, Esq. From our review, we see the same holds true for every year since, as well, and the areas of complaint, while remaining generally similar, seem to enlarge every year.

### a. The one year review

**2019**

The 2019 Annual Report of the Office of Attorney Regulation (OARC Report) indicates that 23% of active Colorado attorneys are solo practitioners and that 19% are private attorneys working with small firms (with small firms defined as firms with 2-10 attorneys). 2019 Annual Report Office of Attorney Regulation at 60. It is safe to say that those two numbers encompass virtually all family law practitioners in Colorado, though it is notable that in recent years more mid- and large-firms have added family law practice to their workload.

In 2019, the OARC Report (at 64) reflected 3,400 complaints filed. Of those, far and away the greatest number of complaints, 606, were designated as having come from family law, an astonishing 18% (.178). (OARC Report at 71). This is 167 more than the next practice area listed, general civil law and almost 400 more than those lodged against private practitioners in criminal law (392). What causes this? A further review of OARC numbers provides insight.

The OARC Report (at 71) lists the nature of complaints received by the Central Intake Division. In descending order, these are (rounded numbers):

Strategy/Tactics of Opposing Counsel (563)(17%)
Strategy/Tactics of Own Counsel (424)(13%)
Diligence/Neglect (288)(9%)
Communication (268)(8%)
Dishonest Conduct (234)(7%)
Fee Issues (215)(6%)
Unprofessional Conduct (173)(5%)
Total of 7 highest categories (2165)(64%)
Eighteen additional categories comprise the remaining 1235 (36%) of complaints

If we assume the numbers break down in the respective practice areas similarly, that would suggest that in family law the following form the basis for complaints in this practice area:

Strategy/Tactics of Opposing Counsel (103)(17%)
Strategy/Tactics of Own Counsel (79)(13%)
Diligence/Neglect (55)(9%)
Communication (48)(8%)
Dishonest Conduct (42)(7%)

Fee Issues (36)(6%)
Unprofessional Conduct (30)(5%)
Total of 7 highest categories (393)(64%)
Eighteen additional categories comprise the remaining 213 (36%) of complaints

We'll address these categories and their applicability to the practice of family law below, as we review recent and historic reported disciplinary cases.

**b. The ten-year review**

**2018**

The 2018 Annual Report of the Office of Attorney Regulation (OARC 18 Report) indicates that 23% of active Colorado attorneys are solo practitioners and that 18% are private attorneys working with small firms (with small firms defined as firms with 2-10 attorneys). 2018 Annual Report Office of Attorney Regulation at 60. These closely, but not exactly, track the 2019 numbers. As done throughout this piece, it is noted that your author believes it is safe to say that those two numbers encompass virtually all family law practitioners in Colorado.

In 2018, the OARC Report (at 66) reflected 3,586 complaints filed. As in 2019, and really, throughout this review of the OARC Annual Reports, far and away the greatest number of complaints, 608, were designated as having come from family law, once again, an eye-popping 17% of all complaints. (OARC Report at 69). As in all instances, this greatly leads the next-highest practice area, general civil law, by a considerable number, 159. Hereafter, we address these same numbers and categories in a simplified outline.

| | | | |
|---|---|---|---|
| **2017** | Total Complaints | 3477 | OARC Report 17 at 87 |
| | Family Law | 765 | OARC Report 17 at 90 |
| | Family Law % | 22% | |
| **2016** | Total Complaints | 3549 | OARC Report 16 at 64 |
| | Family Law | 571 | OARC Report 16 at 71 |
| | Family Law % | 19% | Pie and Bar Graphs do not calculate |
| **2015** | Total Complaints | 3505 | OARC Report 15 at 78 |
| | Family Law | 604 | OARC Report 15 at 83 |
| | Family Law % | 21% | Pie and Bar Graphs do not calculate |
| **2014** | Total Complaints | 3528 | OARC Report 14 at 58 |
| | Family Law | 593 | OARC Report 14 at 62 |
| | Family Law % | 21% | Pie and Bar Graphs do not calculate |
| **2013** | Total Complaints | 3883 | OARC Report 13 at 55 |
| | Family Law | 692 | OARC Report 13 at 59 |
| | Family Law % | 22% | Pie and Bar Graphs do not calculate |

| | | | |
|---|---|---|---|
| **2012** | Total Complaints | 3983 | OARC Report 12 at 5 |
| | Family Law | | OARC Report 12 Family Law Not Shown |
| | Family Law | 797 | Estimate using 7 year average of 20% of all |
| **2011** | Total Complaints | 4081 | OARC Report 11 at 5 |
| | Family Law | | OARC Report 11 Family Law Not Shown |
| | Family Law | 816 | Estimate using 7 year average of 20% of all |
| **2010** | Total Complaints | 4089 | OARC Report 10 at 5 |
| | Family Law | | OARC Report 12 Family Law Not Shown |
| | Family Law | 817 | Estimate using 7 year average of 20% of all |

**2010 – 2019 Totals**

| | |
|---|---|
| Complaints | 37081 |
| Family Law | 6869 |
| Overall % | 18.5% |

**IV. Family Law Disciplinary Cases** (Appendix A)

**a. Recent years**

**b. Historically**

**V. Rules of Professional Conduct of particular note for Family Law Practitioners** (with the understanding that ALL the Rules of Professional Conduct are ALWAYS important to know- See Appendix B)

a. **The 1's Client-Lawyer Relationship**

Rule 1.1. Competence
Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer
Rule 1.3. Diligence
Rule 1.4. Communication
Rule 1.5. Fees
Rule 1.6. Confidentiality of Information
Rule 1.7. Conflict of Interest: Current Clients
Rule 1.8. Conflict of Interest: Current Clients: Specific Rules
Rule 1.9. Duties to Former Client
Rule 1.14. Client with Diminished Capacity
Rule 1.15A. General Duties of Lawyers Regarding Property of Clients and Third Parties
Rule 1.15B. Account Requirements
Rule 1.15C. Use of Trust Accounts
Rule 1.15D. Required Records
Rule 1.16 Declining or Terminating Representation

Rule 1.16A. Client File Retention
Rule 1.18. Duties to Prospective Client

**The 2's Counselor**
Rule 2.1. Advisor

**The 3's Advocate**
Rule 3.1. Meritorious Claims and Contentions
Rule 3.2. Expediting Litigation
Rule 3.3. Candor Toward the Tribunal
Rule 3.4. Fairness to Opposing Party and Counsel
Rule 3.5. Impartiality and Decorum of the Tribunal
Rule 3.7. Lawyer as Witness

**The 4's Transactions with Persons Other than Clients**
Rule 4.1. Truthfulness in Statements to Others
Rule 4.2. Communication with Person Represented by Counsel
Rule 4.3. Dealing with Unrepresented Person
Rule 4.4. Respect for Rights of Third Persons
Rule 4.5. Threatening Prosecution

**The 5's Law Firms and Associations**
Rule 5.1. Responsibilities of a Partner or Supervisory Lawyer
Rule 5.2. Responsibilities of a Subordinate Lawyer
Rule 5.3. Responsibilities Regarding NonLawyer Assistants
Rule 5.4. Professional Independence of a Lawyer
Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

**The 6's Public Service**
Rule 6.1. Voluntary Pro Bono Publico Service
Rule 6.2. Accepting Appointments
Rule 6.3. Membership in Legal Services Organization
Rule 6.5. Nonprofit and Court-Annexed Limited Legal Services Programs

**The 7's** (New Rules Effective September 10, 2020 in Appendix C)
Rule 7.1. Communications Concerning a Lawyer's Services
Rule 7.2. Communications Concerning a Lawyer's Services: Specific Rules
Rule 7.3. Solicitation of Clients

**The 8's Maintaining the Integrity of the Profession**
Rule 8.1. Bar Admission and Disciplinary Matters
Rule 8.3. Reporting Professional Misconduct
Rule 8.4. Misconduct

**Rule 9. Title – How Known and Cited**
These rules shall be known and cited as the Colorado Rules of Professional Conduct or Colo. RPC.

## VI. Anecdotal Observations

a. From judicial officers
b. From practitioners
c. From legal support staff (legal assistants and paralegals)
d. From law professors, APRL, and the ABA
e. From consumers of legal services (clients)

## VII. Ethical Rules, Codes, and Reference Sites of Family Law-Related Organizations

Colorado Supreme Court
https://www.courts.state.co.us/Courts/Supreme_Court/Index.cfm

Colorado Supreme Court Office of Attorney Regulation Counsel
https://coloradosupremecourt.com/index.asp

Colorado Rules of Professional Conduct
https://www.cobar.org/rulesofprofessionalconduct

Colorado Code of Judicial Conduct
https://www.courts.state.co.us/userfiles/file/Code_of_Judicial_Conduct.pdf

ABA American Bar Association
https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/

ABA CPR American Bar Association Center for Professional Responsibility
https://www.americanbar.org/groups/professional_responsibility/

APRL Association of Professional Responsibility Lawyers
https://aprl.net

NOBC National Organization of Bar Counsel
https://www.nobc.org

MDIC Metro Denver Interdisciplinary Committee
https://metrodenveridc.com

BIDC Boulder Interdisciplinary Committee
https://www.thebidc.org

CCDB Colorado Criminal Defense Bar
https://ccdb.org

ABA American Bar Association Standards of Conduct for Mediators
https://www.americanbar.org/groups/dispute_resolution/policy_standards/

JAMS Mediation and Alternative Dispute Resolution
https://www.jamsadr.com/mediators-ethics/

NALA National Association of Legal Assistants
https://www.nala.org/certification/nala-code-ethics-and-professionalresponsibility

APA American Psychological Association
https://www.apa.org/ethics/code

AAMFT American Association for Marriage and Family Therapy
https://www.aamft.org/Legal_Ethics/Code_of_Ethics.aspx

ACA American Counseling Association
https://www.counseling.org/Resources/aca-code-of-ethics.pdf

AMA American Medical Association
https://www.ama-assn.org/delivering-care/ethics/code-medical-ethics-overview

AICPA American Institute of CPAs
https://www.aicpa.org/research/standards/codeofconduct.html

NASW National Association of Social Workers
https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English

NACVA National Association of Certified Valuators and Analysts
https://www.nacva.com/content.asp?contentid=424

ASA American Society of Appraisers
https://www.appraisers.org/About/standards-ethics-conduct

## VIII. Conclusions

## Family Law and Domestic Relations Related Disciplinary Cases of Note

**People v. Dawson, 20 PDF 061**, September 17, 2020. Reg. No. 05136

In February 2018, Respondent agreed to represent a client in a marriage dissolution and child custody case. Respondent did not promptly communicate with his client, as he took anywhere between three days and one month to respond to the client's questions. During the representation, Respondent submitted a settlement proposal to opposing counsel without obtaining his client's agreement. His client disagreed with aspects of the proposal and later counterproposals, which ultimately were rejected by the other party. Respondent later attempted to obtain his client's signature on answers to interrogatories after opposing counsel filed a motion to compel discovery responses. His client disagreed with some of the responses and refused to sign the verification page. Nevertheless, Respondent served the responses to opposing counsel with a verification page containing his client's signature. Neither Respondent nor his paralegal admitted to attaching the verification page. At a status conference held the day after Respondent served the interrogatory responses, he informed the court that his client had signed the responses. Respondent also explained at the conference that he failed to file his client's trial management certificate due to his own personal circumstances. Shortly after, Respondent filed amended answers to the interrogatories, again without obtaining his client's signature, because he felt that his client was not being cooperative with review and approval. Respondent believed the answers were correct but later learned that his client disagreed with certain statements in the amended answers. Communications between Respondent and his client broke down, and his client asked to end the representation. Respondent then moved to withdraw but failed to inform the court that his client had objected to the filed interrogatory responses.

Through this conduct, Respondent violated Colo. RPC 1.2(a) (a lawyer must abide by the client's decisions concerning the objectives of a case and consult with the client regarding the means to achieve the objectives); Colo. RPC 1.4(a) (a lawyer shall reasonably communicate with the client); Colo. RPC 1.4(b) (a lawyer shall explain a matter so as to permit the client to make informed decisions regarding the representation); Colo. RPC 3.3(a)(1) (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal); and Colo. RPC 8.4(c) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). **Result**: Conditional admission of misconduct and sixty-day suspension.

**People v. Goff, 20 PDJ 032**, May 29, 2020. Reg. No. 19348. Conditional admission of misconduct. Respondent committed multiple instances of misconduct while representing a client in dissolution of marriage post-decree disputes. The client had two children, one a minor and one who required ongoing child support due to a disability. Respondent failed to read or respond to the opposing party's motion for post-trial relief. After the court granted the motion Respondent filed three post-trial motions of his own, one of which the court deemed meritless. On another occasion, the opposing party filed a proposed amended support order with which Respondent did not disagree. But when the court approved the order, then promptly filed a motion to reduce child support. Also during the representation, Respondent moved to withdraw and asked to continue a conference to allow the client to prepare to represent himself. The same day the court granted the motion to withdraw, he re-entered his appearance and filed another motion to continue the conference so the client could prepare to represent himself.

Respondent failed to advise his client about legal requirements for relocating out of state with the minor child; the client later chose to relocate without the minor child due to complications occasioned by attorney's delays. Respondent moved to appoint guardian ad litem for the client's older child, even though no statutory authority permitted such an appointment. Later, in a dispute about payment of medical expenses, the court instructed Respondent to submit a proposed order, but he never did so. Without researching the issue, Respondent moved that Child Support Services collect payment for unpaid medical expenses, which that agency cannot do.

Respondent failed to timely complete the client's sworn financial statement. Later, the court ordered the parties to update their financial disclosures two weeks prior to the hearing date. Attorney filed six substantially similar sworn financial statements in a three-month period, without explanation for why he filed multiple affidavits or how they differed. To prepare one of these sworn financial statements, Respondent emailed the client what he thought was a blank template though it was actually a statement completed by another of his clients that contained confidential information.

The court set a hearing on support modification and on a contempt motion against the client. At the hearing, attorney failed to make many arguments the client wanted him to make about support. After the hearing, attorney filed a motion for sanctions against the opposing party against his client's wishes. The client asked attorney to withdraw the motion and Respondent refused. Later, he filed a second motion for sanctions, also against the client's wishes.

The client erroneously believed that he had to support his eldest child because the child was protected by a guardianship. Respondent did not correct this misapprehension. Instead, he moved to end the guardianship in the post-decree case, not in the guardianship case. The motion was denied because it was filed in the wrong case. He did not refile in the correct case.

Through this conduct, Respondent violated Colo. RPC 1.1 (a lawyer shall competently represent a client); Colo. RPC 1.2(a) (a lawyer must abide by the client's decisions concerning the objectives of a case and consult with the client regarding the means to achieve the objectives); Colo. RPC 1.3 (a lawyer shall act with reasonable diligence and promptness when representing a client); Colo. RPC 1.4(a) (a lawyer shall reasonably communicate with the client); Colo. RPC 1.4(b) (a lawyer shall explain a matter so as to permit the client to make informed decisions regarding the representation); Colo. RPC 3.1 (a lawyer shall not assert frivolous claims); and Colo. RPC 8.4(d) (providing that it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice). **Result**: Suspended for 11 months, with the requirement that he petition for reinstatement, if at all, under C.R.C.P. 251.29(c).

**People v. Efe, 18 PDJ 041** (Consolidated with 19 PDJ 002), April 4, 2020. Reg. No. 38357. Respondent committed misconduct in two separate client matters. In one matter, he placed a client's retainer directly into his operating account without earning the funds, neglected to notify the client of the basis of his fee in writing, and knowingly failed to return unearned funds to the client for six months. Through this conduct, Respondent violated Colo. RPC 1.5(b) (a lawyer who has not regularly represented a client must communicate to the client in writing the basis or rate of the lawyer's fees within a reasonable time after beginning the representation); Colo. RPC 1.15A(a) (a lawyer must hold the property of a client separate from the lawyer's own property); and Colo.

RPC 1.16(d) (on termination of the representation, a lawyer shall take steps to the extent reasonably practicable to protect the client's interests, including refunding any advance payment of fees that have not been earned).

In the second matter, Respondent filed frivolous and groundless motions and caused unnecessary delays that slowed the progress of the case. As a result, Respondent personally was sanctioned $33,000.00 to cover the opposing party's attorney's fees. Respondent failed to satisfy that award for seventeen months, refusing to pay until he was held in contempt, arrested, and jailed. Through this conduct, Respondent violated Colo. RPC 3.1 (a lawyer is prohibited from bringing or defending a proceeding, or asserting or controverting an issue in that proceeding, unless there is a basis in law and fact for doing so that is not frivolous); Colo. RPC 3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal); and Colo. RPC 8.4(d) (it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice). **Result**: suspended from the practice of law for one year and one day, effective August 3, 2020. To be reinstated, Respondent will bear the burden of proving by clear and convincing evidence that he has been rehabilitated, has complied with disciplinary orders and rules, and is fit to practice law. **Note**: Not noted in opinion as to family law as the area(s) of practice but the violations and citations fall squarely into common family law disciplinary issues.

**People v. Fillerup, 19 PDJ 054**, December 17, 2019. Reg. No. 43282. In one matter, Respondent delayed returning a client's original documents for eight months after representation ended because he misplaced the documents. In a second client matter, Respondent did not return a client's original wedding photographs after termination of the representation, and to date still has not returned the photographs. Respondent also failed to respond to the People's many attempts to contact him during their investigation of the second client matter.

Through this conduct, Respondent violated Colo. RPC 1.16(d) (a lawyer shall protect a client's interests upon termination of the representation, including returning any papers and property to which the client is entitled) and Colo. RPC 8.1(b) (a lawyer shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority). **Result**: Public censure.

**People v. Sherer, 452 P.3d 218** (Colo. 2019). Reg. No. 42639. In matters involving divorce, relocation, child support, and other domestic relations issues, violations for neglecting clients' cases, diligence, promptness, and failures to sufficiently explain matters to client, failure to refund unearned fees, and for charging unreasonable fee, dishonesty, fraud, deceit, or misrepresentation. **Result**: Disbarred.

**People v. Korn, 18 PDJ 048, July 30, 2018**. Reg. No. 06011. Respondent took a deposition in his law office in San Miguel County. The deposition became contentious, and he left the room to cool down. When he reentered the room, opposing counsel had moved his chair, partially blocking the door. Respondent forcefully reentered the room, hitting the chair. He then placed opposing counsel in a headlock and brought his fist close to opposing counsel's face. As a court reporter present at the time recounted, Respondent told opposing counsel, "This is how we settle cases around here." Respondent was charged with harassment but was permitted to enter a diversion agreement.

Through this conduct, Korn violated Colo. RPC 8.4(b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects) and Colo. RPC 8.4(d) (a lawyer shall not engage in conduct prejudicial to the administration of justice). **Result**: Conditional admission of misconduct. Public Censure.

**People v. Barson, 18 PDJ 045**, July 19, 2018. Reg. No. 23529. Not Reported in Pac. Rptr. 2018. Six-month suspension. Trust account practices, in part, related to personal divorce.

**People v. Kreis, 17 PDJ 036, November 27, 2017**. Reg. No. 23999. Respondent was retained in a divorce matter. Though Respondent and the client agreed that her hourly rate was $250.00, she did not provide the client a written fee agreement, nor did she issue an accounting of her fees for a full year after she was retained. During the representation, proceeds from the sale of the client's house and two vehicles were escrowed to Attorney's COLTAF account.

The client's divorce case was assigned to a judge whom Attorney believed was biased against her. Based on this perceived conflict, she advised her client that she would need to withdraw before the permanent orders hearing. Attorney filed a substitution of counsel but stayed on to help prepare the case. After the permanent orders hearing, Attorney issued her first attorney's fee invoice, which spanned 43 pages and charged her client a total of $131,461.33. Attorney created this invoice based largely on her review of emails, case filings, and her calendar, and in the absence of contemporaneous time records. The invoice did not provide sufficient detail. Respondent later prepared a more detailed invoice, which revealed that she was charging unreasonable fees for tasks that did not take nearly as much time to complete as her billing entries stated.

Later, when permanent orders were handed down, the court directed Attorney to distribute the remaining escrowed funds in her COLTAF account. Attorney filed a charging lien against her client and then released all non-disputed funds; although the charging lien did not state that Attorney refused to distribute the proceeds, her client was aware that she was retaining his funds. Attorney then assigned the matter to collections. Other client matters involved, as well, involving failure to reasonably communicate with clients and about her fees and charging of unreasonable fees. **Result**: Conditional admission of misconduct with six-month suspension with ninety days to be served and the remainder stayed on successful completion of fan eighteen-month probation, with conditions.

**People v. Lesuer, 17 PDJ 014, August 11, 2017**. Reg. No. 18379. In January 2014, a temporary protection order was entered against Respondent, forbidding him to contact his ex-wife. In March 2014, Respondent sent his ex-wife a text message. He was arrested, was convicted of a violation of the protection order, and received a deferred judgment. In November 2014, Respondent contacted his ex-wife by email. He was again arrested and was convicted of violating a criminal protection order, a class-one misdemeanor. He was sentenced to sixty days in jail and two years of supervised probation. His deferred judgment was also revoked. Respondent failed to report both of his convictions to disciplinary authorities.

In October 2016, Respondent violated a protection order by contacting his ex-wife via an online mail service. He was arrested, charged with violating a protective order, and released on bond. He then emailed his ex-wife again in November 2016. He was again arrested and charged. In April

2017, Respondent pleaded guilty to violating a protective order in one case in exchange for the dismissal of the second case. He was sentenced in June 2017 to 120 days in jail. He was later placed on work release.

In this matter, Respondent violated Colo. RPC 8.4(b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); C.R.C.P. 251.5(b) (any criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer amounts to grounds for discipline); and C.R.C.P. 251.20(b) (a lawyer shall notify disciplinary authorities of any conviction within fourteen days of the conviction). **Result**: Suspended for six months.

**People v. Kelley, 17 PDJ 050, July 10, 2017**. Reg. No. 02457. Through family members, Respondent was retained to handle a divorce case by a Mexican citizen who had been deported. Respondent accepted a $3,600.00 retainer, though he never spoke with the client. Keeping $300.00, he deposited the remainder of the retainer into his operating account on the day he received the funds. He then paid a translator another $300.00 by check. Less than a week later, the client's family instructed him to stop work on the case.

Attorney's COLTAF account was later overdrawn, and his operating account dipped to $902.35. Attorney thereby recklessly converted money from the unearned retainer. The client's family eventually requested an accounting and a return of unearned funds; when the request was repeated, Respondent sent a check for $1,000.00 but did not include an accounting. The family then demanded the return of an additional $1,600.00. The client's family did not receive additional funds for another three months, until after the family grieved attorney. Respondent's counsel later provided what amounted to an accounting as part of the disciplinary process.

In these matters, Respondent violated Colo. RPC 1.4(a)(4) (a lawyer shall promptly comply with reasonable requests for information); Colo. RPC 1.5(f) (a lawyer does not earn fees until a benefit is conferred on the client or the lawyer performs a legal service); Colo. RPC 1.8(f)(1) (a lawyer shall not accept compensation for representing a client from someone other than the client unless the client gives informed consent); Colo. RPC 1.15A(a) (a lawyer shall hold client property separate from the lawyer's own property); Colo. RPC 1.15A(b) (upon receiving funds or other property of a client or third person, a lawyer shall promptly deliver to the client or third person any funds or property that person is entitled to receive); Colo. RPC 1.15D (a lawyer shall maintain trust account records); Colo. RPC 1.16(d) (a lawyer shall protect a client's interests upon termination of the representation, including by returning unearned fees); and Colo. RPC 8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). The sanction took into account five mitigating factors and a sole aggravating factor. **Result**: Conditional admission of misconduct with one year and one day suspension, all to be stayed on successful completion of a two-year period of probation, with conditions to include financial monitoring.

**People v. Breuer, 16 PDJ 084, June 28, 2017, 470 P.3d 706 2017.** Reg. No. 28558. Attorney failed to transfer money that divorce client had deposited in attorney's trust account according to divorce decree, who consumed the entirety of client's money that client had deposited into attorney's trust account, who failed to respond to client, opposing counsel, tribunal, or disciplinary

authority, but did not withdraw from case, and who withdrew money from trust account in light of attorney's dishonest motive, her refusal to acknowledge wrongful nature of her conduct, her substantial experience in the law, and her indifference to making restitution, even though attorney did not have a disciplinary record. **Result**: Disbarred.

**People v. Qin, 16 PDJ 017, August 26, 2016**. Reg. No. 48461. In September 2015, Respondent physically assaulted his wife during an argument. While his wife was holding their son, who was almost two years old, Respondent lost his temper and grabbed his wife's pajama top. The garment ripped, leaving a gaping hole. He also tore out some of her hair. The wife ran upstairs to the bathroom, where she locked the door and called the police. Respondent followed her and opened the bathroom door with a knife. At the time, the couple's other two children, aged four and six, were also at home.

Respondent pleaded guilty to a class-two misdemeanor offense of child abuse, knowingly or recklessly – no injury, and a class-one misdemeanor offense of assault in the third degree. That conduct violated Colo. RPC 8.4(b), which provides that it is professional misconduct for a lawyer to commit a criminal act reflecting adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. **Result**: Suspended for three months.

**People v. Isaac, 15 PDJ 099, July 29, 2016**. In February 2018. Reg. No. 22918. Attorney posted public, online responses to two negative client reviews on the internet. His responses included numerous pieces of information relating to his representation of the two clients, including the nature of the underlying cases against his clients, details of the representation, how he was paid, and allegations that one of the clients engaged in criminal conduct. Attorney's disclosure of this information—most particularly his disclosure of client confidences—ran contrary to his duty of loyalty to his clients and violated Colo. RPC 1.6(a), which prohibits lawyers from revealing information relating to the representation of a client unless the client gives informed consent. In imposing the sanction, the hearing board was influenced by the nature of Respondent's misconduct, coupled with his failure to recognize the wrongful nature of his actions and extensive disciplinary history. Result: Suspended for six months, with the requirement that he petition for reinstatement, if at all, under C.R.C.P. 251.29(c), noting that in such a proceeding, Attorney will bear the burden of proving by clear and convincing evidence that he has been rehabilitated, has complied with disciplinary orders and rules, and is fit to practice law. Not a family law-related case but a case that bears noting due to contemporary and very common nature of underlying reasons for suspension.

**People v. Olson II, 15 PDJ 062**, July 25, 2016, 470 P.3d 789 2016 Reg. No. 37227. Respondent's misconduct consisted of his conviction for disorderly conduct stemming from a domestic dispute with his then-wife, and his subsequent witness tampering, in attempting to induce his former wife to absent herself from his pending disciplinary proceeding or to change her testimony by "softening" her description of the underlying incident; although acts of witness tampering struck at the very core of the legal profession and impugned the integrity of the legal system as a whole, attorney fell victim to the circumstances of his personal life, acting in furtherance of his own interests during the dissolution of his marriage, rather than while representing a client, and attorney's witness tampering appeared to be atypical when viewed in the context of his character witnesses' testimony and his lack of prior discipline. **Result**: 30-month suspension.

**West v. People, 15 PDJ 104**, April 18, 2016, 470 P.3d 670 2016. Reg. No. 23435. Reinstatement hearing. Following a reinstatement hearing, a hearing board denied West reinstatement to the practice of law under C.R.C.P. 251.29. West may not file another petition for reinstatement for two years. In 2015, West violated terms of his disciplinary probation when he missed two hearings in a domestic relations representation. As a result, he was required to serve the stayed portion of a one-year-and-one-day suspension originally levied in 2009. West's reinstatement petition was not granted because he failed to present clear and convincing evidence that he has been rehabilitated from his prior misconduct. In reaching that determination, the hearing board focused on West's long and varied history of misconduct, his failure to pinpoint the causes of that misconduct, and the limited evidence of meaningful changes in his life.

**Price v. People, 15 PDJ 038, December 9, 2015**, 364 P.3d 506 (Colo. 2015). Reg. No. 10652. Non-Domestic Relations related matter. Reinstatement Hearing. To be reinstated to the state bar, an attorney who has been suspended for longer than one year must prove by clear and convincing evidence that the attorney has been rehabilitated, has complied with applicable disciplinary orders and rules, and is fit to practice law; failure to prove even one requirement is fatal to a petitioner's reinstatement. Rules Civ.Proc., Rule 251.29(b). To decide whether a technical violation of disciplinary orders and rules should bar a suspended attorney's reinstatement, the Hearing Board must examine the nature of the violation, including whether the violation affected clients or opposing parties and whether it caused harm or potential harm. Suspended attorney's failure to pay $843 incurred as costs in connection with his suspension rendered him ineligible for reinstatement to practice of law; while such failure had not affected any client, attorney had made no effort to pay the costs for almost two years and made a misrepresentation about the costs in his hearing brief. Rules Civ.Proc., Rule 251.29(b).

**People v. Weatherford, 15 PDJ 015**, August 11, 2015, 357 P.3d 1251 2015. Reg. No. 33328. Disbarment was appropriate sanction for attorney's conduct in failing to file any court documents after client paid retainer for representation in divorce case, failing to respond to client, and conversion of client's funds to attorney's own use; attorney's conduct violated six professional rules, client lost $1,750 and testified that this harmed her as she needed the money to pay her daughter's college bills, attorney acted with dishonest and selfish motive, and attorney had practiced law for over ten years. Rules of Prof.Conduct, Rules 1.3, 1.4(a)(3, 4), 8.1(b), 8.4(c); Rules of Prof.Conduct, Rule 1.15(a) (Repealed).

**People v. Quigley, 14 PDJ 020**, September 18, 2014. Following the dissolution of his marriage in 2007, Respondent was ordered to pay $2,000.00 per month in child support. In 2011, he moved to modify that order, and then reduced his monthly support payments without court approval. More than a year later, a magistrate ruled on Respondent's motion, ordering him to pay child support arrearages of more than $11,000.00 but reducing his monthly payments to approximately $650.00. Respondent's petition for review of these orders was denied. He then unilaterally reduced his payments even further, to about $150.00 per month. As of the date of his disciplinary hearing, he had not paid anything toward the arrearages.

Because Respondent knows he was obligated to pay approximately $650.00 a month in child support and more than $11,000.00 in arrearages yet has not complied with either obligation, he

contravened Colo. RPC 3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal). By knowingly failing to satisfy the arrearages and to pay the monthly child support amounts, Respondent also breached Colo. RPC 8.4(d) (a lawyer shall not engage in conduct prejudicial to the administration of justice). **Result**: Suspended one year and one day, for which early reinstatement may be sought if Respondent comes into compliance with the court-ordered child support and with a three-year period of probation.

**People v. Stokes, 13 PDJ 078, August 26, 2014**. Reg. No. 20506. Involved three matters. The second client matter involved modification of custody and a protection order. Although Respondent's efforts on the protection order were successful, she ceased communicating with her client about the custody matter, leading the client to settle that matter on his own. When the client terminated the representation, she agreed to refund unearned fees, yet she never did so, amounting to conversion of the client's funds.**Result**: Suspended three years with conditions on reinstatement.

**People v. Fain, 08 PDJ 002, January 25, 2010**, 229 P.3d 302 (Colo. 2010). Respondent, a Wyoming attorney, charged a Colorado client an unreasonable fee, disclosed client confidences, and published false statements about her client to third parties. She also failed to present mitigating evidence or otherwise participate in these proceedings. Her misconduct admitted by default constituted grounds for the imposition of discipline pursuant to C.R.C.P. 251.5 and violated Colo. 1.5(a), 1.6(a), and 8.4(c). **Result**: Suspended from practice of law in Colorado for one year and one day.

**People v. Beecher, 07 PDJ 081, February 3, 2009**, 224 P.3d 442 (Colo. 2009). Reg. No. 12722. Following a hearing pursuant to C.R.C.P. 251.18, a Hearing Board suspended Respondent from the practice of law for a period of one year and one day, all but ninety days stayed upon the successful completion of a two-year period of probation with conditions. The Colorado Supreme Court affirmed the Hearing Board's sanction on November 2, 2009, and the ninety-day suspension commenced on December 3, 2009. Respondent was disqualified from representing a client after he carried on an intimate (albeit non-sexual) relationship with her in a divorce where the legal issues involved division of property and maintenance. He conducted depositions of witnesses (client's husband and adult son) at the behest of the client in efforts to uncover alleged sexual misconduct during the course of the twenty-four year marriage-including alleged sexual conduct involving a minor daughter, depositions that served no substantial legal purpose and which did, rather, create unnecessary animus amongst the parties. Respondent's misconduct constituted grounds for the imposition of discipline pursuant to C.R.C.P. 251.5 and violated Colo. RPC 4.4, 1.7(b), and 8.4(d).

**People v. Sweetman, 07 PDJ 031**, 218 P.3d 1123 (Colo. 2008). Reg. No. 15265. Client was a high school graduate employed by Wal-Mart. She hired Respondent for a dissolution matter, on June 8, 2005. Shortly thereafter, she paid Respondent a $1,899.00 retainer fee, which client understood would fully cover the cost of the uncontested dissolution matter.

Respondent originally agreed to only represent client (wife) in the dissolution matter. However, on or about June 22, 2005, Respondent and her husband, both signed a second fee agreement for the purpose of performing and "amicable dissolution." This agreement also quoted a retainer fee of $1,899.00. Respondent advised the "clients" that there would probably be enough retainer funds

left over to cover fees for Respondent to represent husband in a bankruptcy case. Thereafter, husband signed yet another fee agreement with Respondent to file a Chapter 7 Bankruptcy for a flat fee of $600.00. The wife and husband only provided the original $1,899.00 retainer fee and not any additional funds to Respondent.

Following their meeting with Respondent on June 22, 2005, wife discovered Respondent had not filed the petition in the dissolution matter. Wife made several appointments to meet with Respondent, but Respondent missed approximately six appointments with the pair. Respondent's secretary once advised wife that Respondent missed a meeting because her mother needed care. In another attempt to reach Respondent, wife went to Respondent's office and left a note on her door when she found no one present. The note detailed wife's numerous efforts to contact Respondent about her case.

After Respondent failed to respond to her, wife filed her own pro se dissolution petition. She also sent Respondent a certified letter, terminated her services, and requested a full refund on or about August 4, 2005. Wife later received a letter dated July 27, 2005, in which Respondent explained that she had tried to file the petition, but that the clerk's office did not have it. She also thanked wife for "rescheduling" her appointment and referenced a settlement agreement, which Respondent said she would send to Ms. Southcotte after returning to her office. Wife testified that she received this letter after sending her certified letter to Respondent. **Result**: Along with three other cases involved here, Respondent was disbarred.

**People v. Fisher, 06 PDJ 038 (w/06 PDJ 104), October 30, 2007**, 202 P.3d 1186 (Colo. 2007). Reg. No. 14996. Following a hearing pursuant to C.R.C.P. 251.18, a Hearing Board suspended Respondent from the practice of law for a period of six months, all stayed upon the successful completion of a two-year period of probation with conditions. The Colorado Supreme Court affirmed the Hearing Board's sanction on February 9, 2009. Respondent secured a deed of trust from his client to assure payment of his fees while representing her in a divorce proceeding. He thereafter exercised his rights in the deed but failed to follow through with the steps necessary to secure court ordered benefits for his client. Respondent's misconduct constituted grounds for the imposition of discipline pursuant to C.R.C.P. 251.5 and violated Colo. RPC 1.1, 1.3, 1.8(a) and 1.8(j).

**People v. Schoedel, 04 PDJ 113, August 4, 2005**, 119 P.3d 1116 (Colo. 2005). Reg. No. 26248. Entered on default for non-participation by Respondent. Throughout a highly contested domestic relations case Respondent represented mother, but ultimately moved out of state, did not provide any forwarding address to client, failed to contact the court, failed to file any motion to withdraw, and failed to prepare and file court orders as directed. Issues included are related to receiving funds for which no accounting was presented and failure to return unearned fees. Colo. RPC 1.3, neglect, Colo. RPC. 1.4(a); failure to keep client reasonably informed of status and requests for information; failure to render full accounting, Colo. RPC 1.15(b); upon termination failure to take steps to protect client's interests and surrender papers and property, Colo. RPC 1.16(d); knowingly disobeying an obligation under the rules of a tribunal. Colo. RPC. 3.4(c); conduct involving dishonesty, fraud, deceit, or misrepresentation, Colo. RPC. 8.4(c). This case also involved multiple clients in domestic relations matters for which similar issues existed in a 408 paragraph complaint. **Result**: Disbarred.

**People v. Roose, 01 PDJ 078 (w/ 01 PDJ 097 and 01 PDJ 108), April 16, 2002**. Reg. No. 30750. The Hinsdale County District Court in Colorado appointed Respondent as attorney for the mother in a dependency and neglect matter. During the second day of the jury trial, Roose moved for a mistrial on the grounds that she was generally providing ineffective assistance to her client. The court denied the motion and appointed co-counsel. Respondent left the courtroom despite the court's ordering her to remain. The court discharged respondent from representation and appointed replacement counsel. Thereafter, respondent filed a notice of appeal representing to the Court of Appeals that she was counsel for the mother in the underlying proceeding and making several other materially false statements which respondent knew were false at the time she made them. A termination hearing was subsequently scheduled regarding the mother's compliance with her treatment plan. At the hearing, the mother was represented by court-appointed counsel, but refused to participate unless she could be represented by respondent. The hearing went forward and the mother's parental rights were terminated. Respondent's conduct violated Colo. RPC 3.3(a)(1), Colo. RPC 3.4(c), Colo. RPC 8.4(d), Colo. RPC 1.1. **Result**: Disbarred.

**People v. Milner, 99 PDJ 030 and 99 PDJ 093, August 7, 2001**, 35 P.3d 670 (Colo. 2001). Reg. No. 21384. In multiple cases (14) involving child support, visitation, divorce, TRO, wage assignments, bankruptcy and divorce, and child custody. At various stages of the cases Respondent was found to have violated Colo. RPC 1.1, failure to provide competent legal advice; Colo. RPC. 1.15(b) by failing to deliver to the client or third person funds or other property that the client or third person was entitled to received and provide an accounting; Colo. RPC 1.16(d) failure to take reasonable steps to protect the client's interests upon termination; Colo. RPC 1.3, failing to act with reasonable diligence and promptness and neglecting legal matters entrusted to her; Colo. RPC 1.4(a) failure to keep clients reasonably informed of the status of their matter; Colo. RPC 1.5(a) charging an unreasonable fee; Colo. RPC 1.5(b) failing to communicate the basis of rates and fees in writing before or within a reasonable time after commencing representation; Colo. RPC 5.3(b) failing to provide proper oversight to nonlawyers; Colo. RPC 5.5(b) by assisting a person in the unauthorized practice of law; Colo. RPC. 8.4(c) engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; Colo. RPC 8.4(d) engaging in conduct prejudicial to the administration of justice; and Colo. RPC 8.4(h), engaging in conduct that adversely reflects on the lawyer's fitness to practice law. **Result**: Disbarred.

**People v. Cardwell, 00 PDJ 074, July 11, 2001**. Reg. No. 12743. Respondent represented a client in a matter involving an alcohol-related driving offense and illegal use of a weapon charge pending in Jefferson County. Shortly thereafter, he represented the client in a matter pending in Arapahoe County involving another alcohol-related driving offense. Respondent negotiated a plea agreement for the client with the Arapahoe County District Attorney but failed to inform the district attorney's office of the Jefferson County case. Respondent and the client both signed a motion to settle the Arapahoe County charges by plea agreement, stating that the client had "no prior or pending alcohol-related driving offenses in this or any other state." While appearing before the Arapahoe County court, respondent and the client represented to the court that the client had had no prior alcohol-related driving offenses. The client entered a plea of guilty to a reduced charge of DWAI -- first offense -- with respect to the Arapahoe County charges. The client was sentenced as a first-time offender. Later, the court had to correct the improper plea and sentence entered on the basis of the misrepresentations. Respondent stated that he mistakenly believed the case in Jefferson County was not final at the time the client entered his plea in Arapahoe County.

The Arapahoe County District Attorney subsequently brought charges against respondent, and respondent pled guilty to perjury in the second degree and improperly attempting to influence an official. Respondent's conduct violated Colo. RPC 1.1, Colo. RPC 8.4(d), Colo. RPC 1.2(d), Colo. RPC 3.3(a)(1), Colo. RPC 3.3(a)(2), Colo. RPC 4.1(b), Colo. RPC 8.4(c) and Colo. RPC 8.4(b) constituting grounds for discipline pursuant to C.R.C.P. 251.5(b). **Result**: Three-year suspension with eighteen months stayed.

**People v. Tidwell, 00 PDJ 094, June 25, 2001**, 35 P. 3d 624 (Colo. 2001). Reg. No. 10724. Multiple matters. Representation in post-decree matter was undertaken and work performed. However, following an additional dispute in the case, Respondent agreed to take specific actions but failed to do so, failed to advise the client of the status of the case for several months, and in another case, took no action on behalf of client at all, failed to appear in court, and when a default judgment was entered against client, failed to advise client of that fact. Respondent failed to withdraw in pending cases and failed to return client's files. **Result**: Disbarred.

**People v. Espinoza, 00 PDJ 044 (consolidated with 00 PDJ 051), January 30, 2001**, 35 P.3d 552 (Colo. 2001). Registration No. 28034. Respondent failed to respond to complaint. Failure to properly handle a motion to dismiss a Petition for Dissolution, took no further action, and failed to make contact with the client for nearly six months. Respondent misrepresented the status of the case to the client, inflated amounts on billing statements, and failed to refund unearned fees. Along with other cases in which Respondent violated the Colo. RPC. **Result**: Disbarred.

**People v. Levin, 00 PDJ 041**, May 24, 2000. Reg. No. 23544. Respondent failed to take action in a matter resulting in the matter being dismissed by the court, failed to inform his client that the matter had been dismissed, failed to take steps to file the matter again, and, in a separate action, failed to timely draft an agreement regarding a change of custody in violation of Colo. RPC 1.3. Respondent failed to keep his client reasonably informed about the status of these matters and promptly comply with requests for information in violation of Colo. RPC 1.4(a). **Result**: The respondent was ordered to pay the costs of these proceedings. Conditional admission with suspension for thirty days, with thirty days stayed followed by a probation period of one year.

***People v. Nelson*, 941 P.2d 922 (Colo. 1997)**. Admitted, 1985. Respondent was retained to represent husband in an action for dissolution of marriage. In language showing extreme consideration for the difficulties commonly encountered by domestic relations practitioners, the court reports that,

> the dissolution was very contentious and acrimonious [and] many issues that would normally be resolved by compromise had to be litigated. The contentious nature of the parties eventually damaged the relationship between the lawyers, which became strained. The hearing board determined that the Respondent's client was very difficult, and was, in fact, the most difficult client the Respondent has ever represented.

At an appearance on a contempt citation brought by the wife, the following occurred: Respondent's client, who had been drinking, became very agitated on the way to the hearing, causing the

Respondent, himself, to become agitated and upset. The two arrived a few minutes late for the hearing, and upon arrival, were met at the courtroom door by counsel for the wife. Following a brief series of miscommunications between his client and counsel for the wife, Respondent loudly announced, "I'm tired of this shite," and got up to leave the courtroom, told wife's counsel, who was still standing in the doorway to "get out of my way," and pushed wife's counsel with his forearm. Wife's counsel fell and injured his back. As a result of the foregoing, Respondent was charged and convicted of Third-Degree Assault, a Class 1 Misdemeanor. Respondent did not notify the Office of Disciplinary Counsel of the conviction within ten days but did do so during the appeal of the conviction. The hearing board found that the failure to timely report was due to incorrect advice from Respondent's attorney. It was determined that the Respondent violated Colo. RPC 8.4(h) (conduct adversely reflecting on fitness to practice), and C.R.C.P. 241.6(5) (violating the criminal laws). With a finding of aggravating factors (prior discipline), the court also found mitigating factors consisting of emotional problems, including depression, as well as attention deficit disorder (ADD). **Result**: Thirty days suspension, with the additional requirements that Respondent obtain psychiatric or psychological counseling, and find an independent lawyer to function as a monitor of Respondent's law practice for six months.

***People v. Bauder,* 941 P.2d 282 (Colo. 1997)**. Admitted, 1976 (Pro Se). In somewhat unusual circumstances in a divorce proceeding, Respondent represented the husband, who, with his (husband's) girlfriend, lived in the marital residence with the children of the marriage. The wife, while visiting from out of state, stayed at the same residence as the husband and girlfriend. During the visit by the wife, Respondent allegedly called the residence to speak with his client (husband), was told he (husband) was not there, and, thereafter, proceeded to turn the conversation (with the wife) to sexual matters, eventually proposing that he (Respondent) and the two women (wife and girlfriend) meet for a sexual rendezvous. The wife also testified that the Respondent asked the price the women would charge him for sexual favors. Subsequently, the incident was reported by the women to the client (husband) who terminated the lawyer-client relationship by retaining another lawyer. The hearing panel found that the dissolution proceeding was ultimately concluded by way of agreement between the parties and that neither party suffered any actual harm as a result of the Respondent's telephone call. Despite vigorous denials by Respondent, the hearing board found the testimony of the women more credible than that of the Respondent. This behavior was found to have violated C.R.S § 18-7-202(1)(a) (prohibiting the solicitation of prostitution), Colo. RPC 1.7(b) (representing a client when the representation may be materially limited by the lawyer's own interests), Colo. RPC 8.4(b) (committing a criminal act that reflects adversely on lawyer's honesty), C.R.C.P. 241.6(3) (misconduct involving any act of omission violating the highest standards of honesty), and C.R.C.P. 241.6(5) violating the criminal laws of a state or the United States). **Result:** Public Censure.

***People v. Draizen*, 941 P.2d 280 (Colo. 1997)**. Respondent was convicted of second-degree murder in the State of Hawaii after stabbing the victim, his girlfriend, more than twenty times. This conduct was found by the Court to have violated Colo. RPC 8.4(b)(committing criminal act that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer, and C.R.C.P. 241.6(5) (violating the laws of a state or of the United States. The board, and the court, found that despite an absence of prior discipline, the conviction for second-degree murder warranted disbarment in Colorado.

***People v. Swan,* 938 P.2d 1164 (Colo. 1997)**. Admitted, 1983 (Pro se). Respondent was retained in a dissolution of marriage action for a $400.00 advance fee. After certain initial work was performed, Respondent failed to follow up on or complete the dissolution, and failed to respond to or advise client of the existence of motions filed by opposing counsel, including motions to modify custody and parenting time; for attorney fees; and to remove Respondent's client's name from a vehicle. Client was assessed costs and fees, though he was never made aware of the assessment until his subsequent attorney advised him of that fact. Additionally, Respondent never advised client of the hearing date on the motions, and client was out of the country at the time, thus requiring client to have to request a continuance, which, though granted, included an award of attorney fees to opposing counsel. Further, Respondent was suspended from the practice of law during the pendency of the dissolution and related matters, and did not notify his client, opposing counsel, or the Court of his suspension, thus violating C.R.C.P. 241.21(b)(c), and did not deliver client's papers to client as required under C.R.C.P. 241.2l{b), nor file an affidavit with the Court listing the matters he had pending in violation of C.R.C.P. 241.2l{d). Respondent was found to have violated R.P.C. 1.3 (neglect); and R.P.C. 1.4(a) (failing to keep a client reasonably informed about the status of a matter). **Result:** Disbarred

***People v. Fager,* 938 P.2d 138 (Colo. 1997)**. Admitted, 1979 (No Appearance by Respondent). While under administrative suspension for failure to comply with CLE requirements, under C.R.C.P. 260.6(10), Respondent was retained for representation in a post-dissolution matter. This violated R.P.C. 5.5(a) (practicing law in violation of the regulations of the legal profession); R.P.C. 8.4(d) (conduct prejudicial to the administration of justice); C.R.C.P. 241.6(6) (violating the rules regarding lawyer discipline or an order of discipline}; and C.R.C.P. 241.21(a)-(d) (setting out the steps a lawyer must take following suspension). In a separate post- dissolution action, Respondent was retained for $300.00 to collect debts previously ordered paid by client's former husband. Though Respondent prepared a document and had the client sign it, nothing was filed and no other work was performed by Respondent on behalf of client. This violated R.P.C. 1.4((a) (failing to communicate with a client); and R.P.C. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). Additional, violations involving R.P.C. 5.5(a); 8.4(d); 8.4(h); 1.3; 1.4(a); 1.16(d); 8.4(b); and 8.4(c); lead to the **Result:** Disbarred.

***People v, Harding, III,* 937 P.2d 393 (Colo.1997)**. Admitted, 1983 (pro se). In two separate child support matters one, a modification, the other, attempts to resolve a judgment on arrearages, Respondent failed to perform work for which he was retained, in violation of R.P.C. 1.3 (neglect); failed to keep the client reasonably informed about the matters, in violation of R.P.C. 1.4(a); did not explain the matter to permit the client to make informed decisions, in violation of R.P.C.1.4(b); and, for actions prior to January 1, 1993 (the date of adoption of the Colorado Rules of Professional Conduct, violated DR 7-l0l(A)(2) (intentionally failing to carry out a contract of employment), and DR6-l0l(A)(3)(neglect). **Result:** Suspended for thirty days, with monitoring of the Respondent's practice for one year by an attorney.

***People v. Wallace,* 936 P.2d 1282 (Colo. 1997)**. Admitted, 1989 (Kerry S. Hada, counsel). In a dissolution of marriage action, Respondent failed to prepare the written form of Permanent Orders as directed by the Court, nor did he ever file a motion to withhdraw. In a subsequent suit against the dissolution client for a debt she owed, Respondent indicated to her he would represent her, and did not offer any assistance. Thus, Respondent violated R.P.C. 1.3 (neglect of a legal matter); R.P.C. 1.4(a) (failure to keep the client reasonably informed); R.P.C.

1.16(d) (failing to take steps to protect the client's interests upon termination of representation); and R.P.C. 8.4(d) (engaging in conduct prejudicial to the administration of justice). In various other matters, client failed to deposit advance fees into trust accounts, knowingly converted client funds to his own use, and neglected various personal injury matters. **Result:** Disbarred.

***People v. Scott,* 936 P.2d 573 (Colo. 1997) Admitted, 1968 *(pro se)*.** In a dissolution of marriage proceeding, Respondent violated R.P.C. 1.3 (neglecting a legal matter) and R.P.C. 1.4(a) (failing to keep a client reasonably informed) when Respondent did not prepare the written form of Permanent Orders as the Court directed, thus causing the client to have to pay $200.00 to another lawyer to do so. Includes other matters, as well. **Result:** Suspended for one year and one day.

***People v. Boyer,* 934 P.2d 1361 (Colo. 1997)**. Admitted 1985). In a dissolution of marriage and separation proceeding, Respondent engaged in sexual relations with his client, during the same period of time Respondent engaged in sexual intercourse with another woman he met at a restaurant who had just been served with an action for dissolution along with a concurrent criminal action, in which the Respondent represented the woman (it was stipulated in the case that Respondent believed he had not undertaken representation of the woman when sexual contact occurred, though it was also stipulated that the woman believed such representation had been undertaken. **Result**: Suspended for one hundred eighty days (note Justice Scott's dissent as too lenient.

***People v. Lavenhar,* 934 P.2d 1355 (Colo. 1997)**. Admitted, 1982 (Nancy L. Cohen, Phillip S. Figa, Frank Plaut, counsels for Respondent, consecutive Court appointments re disability). Following representation in a dissolution proceeding, Respondent failed to comply with client's repeated requests for copies of her Decree and Separation Agreement, and by failing to communicate with [former?] client for an extended period of time, Respondent violated DR 6-l0l(A)(3) (neglect). In other cases, by incurring $6800.00 in fees relating to an attempt to withdraw, Respondent violated DR 2-106(A) (clearly excessive fee); by using lawfirm's letterhead containing his own name in correspondence, Respondent violated DR 3-l0l(B) (practicing law in violation of regulations of legal profession); and by engaging in various other violations. **Result:** Disbarred.

***People v. Reynolds*, 933 P.2d 1295 (Colo. 1997)**. Respondent was hired in an interstate custody dispute involving client's former husband, and the states of South Dakota and Idaho. In an Idaho default action, former husband gained custody of the minor child in part, through the neglect of the Respondent. In a separate matter, Respondent was retained to commence an action for dissolution of marriage, and husband was served within three weeks of the initial retention, the matter was not filed with the court until five months later and following that, no further action on the case was taken for five months. Other cases/issues involved, as well, including aiding a nonlawyer in the unauthorized practice of law. **Result**: Suspended for three years and thirty days.

***People v. Rivers, Jr.,* 933 P.2d 6 (Colo. 1997)**. Admitted, 1987 *(Pro se)*. Respondent accepted his fee from his client's girlfriend without disclosing potential of interest, in a case wherein Respondent represented client, who was on probation for domestic violence, in the prosecution of new domestic violence charge where the original offense and subsequent alleged offenses were committed against the girlfriend. Respondent was also engaged to prepare a new will for the girlfriend. Thus, Respondent violated R.P.C. 1.8(f)(2) (a lawyer shall not accept compensation

for representing a client from one other than the client unless: (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship). Additionally, Respondent violated R.P.C. 1.15(b) by failing to refund to the girlfriend the unearned portion of the fee upon termination of the representation; R.P.C. 1.4(a) and 1.16(d)(failing to keep a client reasonably informed about the status of the matter and failing to take reasonable steps to protect client's interests upon terminating representation, when Respondent failed to contact client to determine if client still wanted Respondent to represent him or to notify client when girlfriend terminated representation. Additionally, while under administrative suspension for failure to comply with mandatory CLE requirements (C.R.C.P. 260.6(10)), Respondent represented one of the parties in a dissolution of marriage action, thus violating R.P.C. 5.5(a)(practicing law in a jurisdiction where doing so violates the regulations of the legal profession) and C.R.C.P. 241.21(a-d)(requirements for lawyers when suspended), and C.R.C.P. 227(A)(2)(b) and 241.6(6)(failing to maintain a current address with Attorney Registration). **Result:** Suspended for one year and one day.

***People v. Paulson,* 930 P.2d 582 (Colo. 1997)**. Admitted, 1987. Neglect of four separate legal matters involving 1) grandparent visitation, 2) paternity, 3) dissolution of marriage, and 4) grandparent custody, and failure to communicate with clients caused immediate suspension under C.R.C.P. 241.8, and was deemed to have violated R.P.C. 1.3 (a lawyer shall not neglect a legal matter entrusted to that lawyer); R.P.C. 1.4(a)(a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information); and R.P.C. l.15(b)(a lawyer shall promptly deliver to the client any funds or other property that the client is entitled to receive and render a full accounting upon request). **Noteworthy:** Footnote 1, at 583, wherein the Court states: Count II of the formal complaint charged the respondent with failing to deposit an unearned advance fee into his trust account. Even though the respondent defaulted by not answering the complaint, the assistant disciplinary counsel moved to dismiss Count II because "the issue of whether respondent should have put nonrefundable retainers into his trust account instead of his operating account should be fully litigated before disciplinable conduct is determined, and not be determined as a result of respondent's default." The hearing board granted the motion to dismiss. We therefore do not address this issue, nor do we express any opinion on whether the Rules of Professional Conduct ever permit such "nonrefundable retainers." **Result:** Suspended for one year and one day, followed by C.R.C.P. 241.22(b)-(d) reinstatement proceedings.

***People v. Barr,* 929 P.2d 1325 (Colo. 1996)**. Admitted, 1970. Court accepted the conditional admission stipulated to by Respondent and the assistant disciplinary counsel, pursuant to C.R.C.P.241.18, in which Respondent admitted that a one-time sexual intercourse with his dissolution of marriage client violated R.P.C. l.7(b){a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's own interests); R.P.C. l.16{a){l)(a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the representation will result in violation of the Rules of Professional Conduct or other law); R.P.C. 8.4(h){a lawyer is guilty of professional misconduct if he or she engages in conduct that adversely reflects on the lawyer's fitness to practice law). Citing *People v. Good,* the Court reiterated, "[A] sexual relationship between lawyer and client during the course of the professional relationship presents significant dangers, including, at the least, the potential that the client will be injured by the lawyer's conduct." As an aggravating factor, the Court noted that the client was particularly vulnerable at the time of the misconduct,

*citing* ABA *Standards* 9.22{h). **Result:** Suspended for three months.

**People v. Chappell, 927 P.2d 829 (Colo. 1996)**. Admitted, 1977. Respondent and her client (wife) were advised by the custody evaluator of the evaluator's adverse recommendation (which recommendation, if accepted and ordered, would have changed custody from Respondent's client to the opposing party, the husband), two days prior to the temporary orders hearing at which the same was to be presented. Immediately thereafter, Respondent advised wife that as wife's attorney, Respondent would recommend that wife should stay; but that as a mother, wife should run. Respondent advised the client of the network of safehouses for people in wife's situation, and helped wife liquidate wife's assets and empty wife's bank accounts. Thereafter, Respondent made representations to the District Court which the District Court at a later hearing found to be perpetration of a fraud upon the Court (some of which appear to have been made as offers of proof to the Court by the Respondent, in the absence of her client (wife), and some of which concern Respondent's actions. These include Respondent stating to the District Court that the child was doing well in its own (wife's) home; Respondent requesting (and obtaining an agreement that) support, including maintenance payments of $1500.00 previously Ordered made by the husband continue to be made by the husband, through the Registry of the Court, despite the immediate change in custody from the wife to the husband which had by then been made an Order of the District Court; Respondent's assisting the wife in moving all property (including certain of husband's) from the marital residence and into storage). Wife was ultimately charged with a Class 5 Felony, under C.R.S § 18-3-304(2), Violation of Custody, to which the wife plead guilty on a three-year deferred judgment and sentence. The Respondent was found to have engaged in conduct which violated R.P.C. l.2(d) (a lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client); R.P.C. 8.4(b) (it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). The Court, while noting that the Respondent was not charged or convicted of any criminal offense, references C.R.C.P. 241.6(5), (any act or omission violating the criminal laws of a state or of the United States constitutes ground for lawyer discipline; provided that conviction thereof in a criminal proceeding shall not be a prerequisite to the institution of disciplinary proceedings, and provided further that acquittal in a criminal proceeding shall not necessarily bar disciplinary action, citing, *People v. Morley*, 725 P.2d 510, 514 (Colo. 1986)). **Result**: Disbarred. (Query? Why no violation of R.P.C. 3.3, 3.4, 3.7, 4.1, 4.4, 8.4(a), 8.4(c), 8.4(d), 8.4(g), 8.4(h)?

***People v. Theodore*, 926 P.2d 1237 (Colo. 1996)**. After entering his appearance in a post-decree modification of custody proceeding, Respondent engaged in sexual relations with his client. In subsequent matters, Respondent neglected client matters and court orders. Respondent also drove a client by his marital residence, despite a restraining order disallowing client's presence at the residence. With other cases and matters involved, **Result**: Disbarred.

***People v. Dawson*, 894 P.2d 756 (Colo. 1995)**. Respondent sexually assaulted a 17 year old filing clerk at this law firm and engaged in sex with a client. **Result**: Disbarred.

***People v. Good*, 893 P.2d 101** (Colo. 1995). Respondent engaged in sexual relationship with client. **Result**: Suspended for one year and one day.

***People v. Bergner*, 873 P.2d 726 (Colo. 1994)**. Respondent engaged in a conversation with his client about sexual matters and extramarital affairs, while they were in the Respondent's vehicle and traveling to the client's dissolution of marriage hearing. **Result**: Public censure.

***People v. Barr*, 855 P.2d 1386 (Colo. 1993)**. Respondent failed to prepare written court orders in a domestic relations action. **Result**: Suspended for ninety days.

***People v. Smith*, 847 P.2d 1154 (Colo. 1993)**. Respondent neglected a dissolution matter for nearly one year. The court noted that this was mitigated by Respondent's lack of prior discipline, his full and free disclosure of his misconduct, and his inexperience. **Result**: Public censure.

***People v. Anderson*, 828 P.2d 228 (Colo. 1992)**. Respondent failed to file affidavit required under grandparent visitation statute. Respondent was also intoxicated at the settlement conference. **Result**: Suspended for three years.

***People v. Bannister*, 814 P.2d 801 (Colo. 1991)**. Respondent filed disciplinary complaints against a judge and then offered to withdraw them in exchange for a favorable ruling. This was couple with other improper behavior in this case. **Result**: Disbarred.

***People v. Koeberle*, 810 P.2d 1072 (Colo. 1991)**. Respondent represented conflicting interests in a dissolution proceeding. Respondent represented the wife in the dissolution while he was still representing the husband in post-dissolution proceedings relating to the husband's first marriage. **Result**: Suspended for one year and one day.

***People v. Flores*, 804 P.2d (Colo. 1991)**. After filing a petition for dissolution of marriage, Respondent took no further action on his client's case. Respondent also failed to reply to the court's order to show cause why this case should not be dismissed. **Result**: Suspended for one year and one day.

***People v. Fahrney*, 791 P.2d 1116 (Colo. 1990)**. In one matter, Respondent signed his client's name to a separation agreement without the client's authorization. In another dissolution proceedings, Respondent failed to file a Petitioner for Dissolution and refused to refund the client's retainer. **Result**: Disbarred.

***People v. Belina*, 782 P.2d 26 (Colo. 1989)**. Respondent filed a dissolution petition but never served process upon the husband. The case was dismissed but Respondent told his client that he had obtained a dissolution decree and that she could, therefore, remarry. After the client remarried, Respondent sent her a forged dissolution decree. **Result**: Disbarred.

***People v. Barnthouse*, 775 P.2d 545 (Colo. 1989)**. Respondent represented himself in his dissolution proceeding. During the course of the proceeding, Respondent's conduct included dilatory acts and motions for the sole purpose of delay, personal attacks on his wife's attorney and guardian ad litem, violation of court orders concerning transfer of property, and making false statements on his financial affidavits. **Result**: Suspended for one year and one day.

***People v. Felker*, 770 P.2d 402 (Colo. 1989)**. Respondent permitted nonlawyer to render legal

advice to a client in a dissolution proceeding. Respondent also failed to adequately prepare for a permanent orders hearing since his only preparation took place in a care on the way to the courthouse. **Result**: Disbarred.

***People v. Zinn*, 746 P.2d 970 (Colo. 1987)**. Respondent spoke with opposing party in a dissolution case without the consent of her attorney. Respondent spoke with the opposing party about several matters involved in a pending temporary orders hearing. **Result**: Suspended for ninety days.

***People v. Blanck*, 713 P.2d 832 (Colo. 1985)**. Respondent altered authentic dissolution decrees by changing the names on them to the names of clients, thereby representing to these clients that their marriage had been legally terminated. **Result**: Disbarred.

***People v. Roehl*, 655 P.2d 1381 (Colo. 1983)**. Respondent advertised his fee for a divorce in a deceptive and misleading way. Respondent also sold packages of standardized divorce forms which, due to extreme carelessness in composition, created a potential hazard for those who used them. **Result**: Suspended for three years.

***People v. Selby*, 396 P.2d 598 (Colo. 1964)**. Respondent spoke with opposing party in a divorce case outside the presence of her attorney. Respondent also prepared and filed a motion on behalf of the opposing party in which that party: confessed her marital guilt, asked her husband to forgive her, recommended to the trial judge that he grant a divorce to her husband, and castigated her former attorneys. **Result**: Public reprimand.

***People ex rel. Colorado Bar Association v. Humbert,* 117 P. 139 (Colo. 1911)**. Respondent received money from a client he was representing in a divorce case. The money was to be used in part to pay alimony to the client's wife. Respondent deposited the money in a bank account in his own name. This account was later attached and Respondent was unable to secure the funds. The Court held that Respondent's actions did not warrant disbarment. **Result:** Case dismissed.

***People ex rel. Colorado Bar Association v. Taylor,* 75 P. 914 (Colo. 1904)**. Respondent advertised through the public press as a divorce lawyer. **Result:** Disbarred.

***People ex rel. Colorado Bar Association v. Mead,* 68 P. 241 (Colo. 1902)**. Respondent told his client that he had commenced and was prosecuting her divorce action. When his client found out that this was not true, she hired another attorney who procured her divorce. Respondent refused to return the money the client had paid him as a retainer. **Result:** Disbarred.

***People ex rel. Attorney General v. Maccabe,* 32 P. 280 (Colo. 1893)**. Respondent advertised to the public that he could obtain divorces very quietly. The court noted that it considered this grounds for disbarment. However, the Court found several mitigating factors: Respondent had been ignorant of the wrongfulness of his ad; Respondent ceased to so advertise once the disciplinary proceeding commenced; and, this was a case of first impression. **Result:** Suspended for six months.

# The Colorado Rules of Professional Conduct

As adopted by the Colorado Supreme Court on April 12, 2007,
effective January 1, 2008,
and amended through April 6, 2016

## SYNOPSIS

MAINTAINING THE INTEGRITY OF THE PROFESSION

Appendix C



2020 COLORADO COURT ORDER 0062 (C.O. 0062)

COURT RULES

NOTICE: Rules and related materials supplied by the courts are included inthis database. Because all changes may not have been supplied, thecourt clerk should be consulted to determine current rules.Pub. Note: Additions are indicated by **Text**; deletions by~~Text~~ .Stricken material is indicated by ~~**Text**~~ .

CO ORDER 0062
C.O. 0062
COURT RULES

Effective: Effective September 10, 2020 to Effective September 10, 2020

STATE OF COLORADO
CODE OF PROFESSIONAL CONDUCT

Effective September 10, 2020

RULE CHANGE 2020(29)

COLORADO RULES OF PROFESSIONAL CONDUCT

Rules 7.1, 7.2, 7.3, 7.4, and 7.5

<< CO ST RPC Rule 7.1 >>

Rule 7.1. COMMUNICATIONS CONCERNING A LAWYER'S SERVICES
A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment
**[1]** This Rule governs all communications about a lawyer's services, including advertising. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

**[2]** Misleading truthful statements are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

**[3]** A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

  

[3A] Any communication that states or implies the client does not have to pay a fee if there is no recovery must also disclose that the client may be liable for costs or the adverse party's attorney fees if ordered by a court. This provision does not apply to communications that state only that contingent or percentage fee arrangements are available, or that state only that the initial consultation is free.

**[4]** It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

**[5]** Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

**[6]** A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm must indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

**[7]** Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

**[8]** It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

<< CO ST RPC Rule 7.2 >>

Rule 7.2. COMMUNICATIONS CONCERNING A LAWYER'S SERVICES: SPECIFIC RULES

**(a)** A lawyer may communicate information regarding the lawyer's services through any media.

**(b)** A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;

(3) pay for a law practice in accordance with Rule 1.17;

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; and

(ii) the client is informed of the existence and nature of the agreement; and

  

(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

**(c)** A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

**(d)** Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

Comment

[1] This Rule permits public dissemination of information concerning a lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1) through (b)(5), lawyers are not permitted to pay others for recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible “recommendations.”

[3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(d) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of “recommendation”). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4 (a) (duty to avoid violating the Rules through the acts of another).

  

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Qualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(d), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer “concentrates in” or is a “specialist,” practices a “specialty,” or “specializes in” particular fields based on the lawyer's experience, specialized training or education, but such communications are subject to the “false and misleading” standard applied in Rule 7.1 to communications concerning a lawyer's services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

[11A] In any advertisement in which a lawyer affirmatively claims to be certified as a specialist in any area of the law, such advertisement shall contain the following disclosure: “Colorado does not certify lawyers as specialists in any field.” This

  

disclaimer is not required where the information concerning the lawyer's services is contained in a law list, law directory or a publication intended primarily for use of the legal profession.

Required Contact Information

[12] This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

<< CO ST RPC Rule 7.3 >>

Rule 7.3. SOLICITATION OF CLIENTS

**(a)** "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

**(b)** A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

**(c)** A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

**(d)** A lawyer shall not engage in solicitation by any media for professional employment, concerning personal injury or wrongful death of any person. See § 13–93–111, C.R.S. This Rule 7.3(d) shall not apply if the lawyer has a family or prior business or professional relationship with the person or if the communication is issued more than 30 days after the occurrence of the event for which the legal representation is being solicited. Any such communication must comply with the following:

(1) no such communication may be made if the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter; and

(2) if a lawyer other than the lawyer whose name or signature is contained in the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any such communication shall include a statement so advising the prospective client.

**(e)** This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

**(f)** Every communication from a lawyer soliciting professional employment shall:

(1) include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (b)(1), (b)(2) or (b)(3);

  

(2) not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the nature of the person's legal problem; and

(3) be maintained for a period of five years from the date of dissemination of the communication, and include a copy or recording of each such communication and a sample of the envelope, if any, in which the communication is enclosed, unless the recipient of the communication is a person specified in paragraphs (b)(1), (b)(2) or (b)(3).

**(g)** Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] “Live person-to-person contact” means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

  

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3(c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (g) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (g) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(c).

<< CO ST RPC Rule 7.4 >>

Rule 7.4. RESERVED

<< CO ST RPC Rule 7.5 >>

Rule 7.5. RESERVED

**By the Court:**

**Monica M. Márquez**

**Justice, Colorado Supreme Court**

CO ORDER 20-0062

**End of Document**

# SECTION 7

# What's New in Attorney Regulation?


*Presented by*

**Gregory G. Sapakoff**
Deputy Regulation Counsel,
Office of Attorney Regulation Counsel
Colorado Supreme Court
Denver, CO

NOTES:

# WHAT'S NEW IN ATTORNEY REGULATION?

By Gregory G. Sapakoff, Deputy Regulation Counsel

Colorado Supreme Court, Office of Attorney Regulation Counsel

## I. NEW OR REVISED RULES OF PROFESSIONAL CONDUCT

The Colorado Supreme Court has been quite busy over the past year or so with considering and approving a number of revisions to the Colorado Rules of Professional Conduct, including some entirely new provisions. Some of the significant changes are discussed herein, and the new or revised rules (some of which are not effective until January 1, 2021), are included in the Appendix to these materials.

### Colo. RPC 1.5(c) – Contingent Fees.

Effective January 1, 2021, the Court has repealed Chapter 23.3 of the Colorado Rules of Civil Procedure, which is the Rules Governing Contingent Fees. The substance of the Rules Governing Contingent fees will now be housed within the Colorado Rules of Professional Conduct, at Rule 1.5(c). An approved contingent fee form is also part of the revised Rule 1.5(c), as is an approved final disbursement statement. This revision to Rule 1.5(c) will essentially consolidate all of the obligations of lawyers concerning fees and fee agreements in one location. It also clarifies the notion that the obligations formerly set forth in Chapter 23.3 are ethical duties, in addition to being necessary for enforcement of obligations flowing from client to attorney under contingent fee arrangements. The revised Rule 1.5(c) includes most of the provisions of Chapter 23.3, including those concerning circumstances in which contingent fees are prohibited, and the express statement that "No contingent fee agreement shall be enforceable unless the lawyer has substantially complied with all of the provisions of this Rule." Notably, the provisions from Chapter 23.3 regarding disclosures to be separately provided prior to entering into a contingency fee agreement are not included in the context of a separate disclosure form. Rather, all required provisions and disclosures are incorporated into the rule itself, and the approved Form Contingent Fee Agreement. New Comments to Rule 1.5 also provide greater guidance with respect to conversion clauses in contingent fee agreements – clauses that seek to define the rights and obligations of the parties in the event representation is terminated prior to completion of the representation.

### Colo. RPC 1.5(h) – Flat Fees.

The revisions to Colo. RPC 1.5(h) are not as new (they were approved and became effective on January 31, 2019, but many Colorado lawyers still seem to be unaware of some of the provisions of this rule. Most importantly, Rule 1.5(h) makes clear that the terms of all flat

fee agreements must be communicated in writing, and that such agreements must contain certain terms. These terms include:

- a description of the services the lawyer agrees to perform;
- the amount to be paid to the lawyer and the timing of payment for the services to be performed;
- if any portion of the flat fee is to be earned by the lawyer before conclusion of the representation, the amount to be earned upon the completion of specified tasks or the occurrence of specified events; and
- the amount or the method of calculating the fees the lawyer earns, if any, should the representation terminate before completion of the specified tasks or the occurrence of specified events.

The Court has also approved a Form Flat Fee Agreement, which is included with the rule as adopted. As with the court-approved contingent fee form, use of this form is not mandatory.

**Colo. RPC 1.6 – Confidentiality of Information; Colo. RPC 1.15A – Duties Regarding Property of Clients and Third Parties.**

Effective January 1, 2021, revisions to the Comments to Rules 1.6 and 1.15A will become effective that are intended to facilitate and recognize the creation of a central repository for unclaimed trust and estate documents pursuant to the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act, C.R.S. 15-23-101, *et seq.* This bill creating the Act was signed by Governor Polis on May 22, 2019. It establishes a system for custodians of an original will to free themselves of such document by electronically depositing it with the Colorado State Court Administrator after a diligent search fails to locate its creator. The revisions to the Comment to Rule 1.6 acknowledge a lawyer's implied authorization to make disclosures of otherwise confidential materials pursuant to this Act. The revised Comment to Rule 1.15A clarifies that a lawyer's compliance with this Act is consistent with the lawyer's duty to safeguard property under Colo. RPC 1.15A(a).

**Colo. RPC 7.1 through 7.3 – Communications Concerning a Lawyer's Services and Solicitation of Clients.**

Effective September 10, 2020, the Colorado Supreme Court repealed Colo. RPC 7.1 through 7.5, and reenacted the new Rules 7.1 through 7.3. These are what have traditionally been referred to as the advertising rules. Through these revisions, the rules that apply to the ethics of lawyer advertising have been streamlined and modernized. The actual substance of Rule 7.1 itself has been trimmed down to the following: "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading." The rule also addresses only the general *content* of communications concerning a lawyer's services. Much of

the former content of Rule 7.1 has been moved to the Comments to the new rule. The new Comment section to Rule 7.1 also clarifies that the determination of what is "misleading" will be based on a "reasonable person" standard.

There is no longer a separate rule concerning firm names. Instead, this topic is covered by the more general rule, and the guidance provided through Comments 5 through 8 to Rule 7.1. These comments are substantially similar to the substance of former Rule 7.5.

Rule 7.2 now deals with some of the more specific issues relating to communications concerning a lawyer's services, including some of the matters previously addressed in Rules 7.1, 7.2 and 7.4. The new rule, and Comments thereto, is an effort to recognize many of the new types of media used for advertising lawyer services, and to eliminate some of the more archaic views regarding lawyer advertising that had been carried over from the early years of lawyer advertising. All issues relating to payment of compensation to anyone for recommending the lawyer's services are now in Rule 7.2, as are the provisions relating to referral arrangements, those relating to communications about fields of practice and those stating or implying that the lawyer is certified as a specialist in any field. Many of these provisions are not significantly different than under the prior rules. There are, however, some material changes regarding referral services in the Rule itself, and significant changes within the Comments to Rule 7.2. Some of the revisions recognize the significant role the internet and other electronic media now play in communicating about nearly all services provided in the world.

The new rule introduces the concept of a "qualified lawyer referral service," and expressly permits lawyers to pay the usual charges of a "legal service plan or a not-for-profit or qualified lawyer referral service." Comment 6 to Rule 7.2 defines a legal service plan as "a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation." The Comment defines qualified referral services generally as "consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements." The Comment further defines a "qualified lawyer referral service" as "one that is approved by an appropriate regulatory authority as affording adequate protections for the public." The Comment does not, however, specify a particular service as being approved or what would constitute an "appropriate regulatory authority" other than to generally defer to further guidance contained in the ABA Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act.

Comment 5 to Rule 7.2 now clarifies the circumstances and conditions in which lawyers are permitted to pay others for generating client leads, including internet-based client leads. These conditions include compliance with Rule 1.5(d)(division of fees) and 5.4(professional independence of the lawyer), and Rule 7.1 (in terms of the lead generator's communications concerning the lawyer's services). Also, the lawyer must not pay the lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral.

New Rule 7.3 deals with solicitation of clients, as did the prior Rule 7.3, but with some differences. The new rule starts off by providing a definition for "solicitation" or "solicits," and states that these terms "denote a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter." After providing this definition, the new rule essentially restates the prior prohibition against solicitation of professional employment for pecuniary gain through "live person-to-person contact" except in specific, limited circumstances. There is still an exception if the person being solicited is also a lawyer, or a person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm. But the new rule also adds an exception allowing this type of solicitation with a "person who routinely uses for business purposes the type of legal services offered by the lawyer."

The Comment 2 to new Rule 7.3 also provide greater clarification for what is meant by "live person-to-person contact." The term includes in-person, face-to-face, live telephone and other "real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection." Thus, for example, this would include Zoom and other similar platforms that have become so common during the global pandemic of 2020. The Comment states, however, that "live person-to-person contact" does not include "chat rooms, text messages or other written communications that recipients may easily disregard." Even when solicitation is not otherwise prohibited, such communications are prohibited if the person makes it known that they do not want to be solicited or the solicitation involves coercion, duress or harassment.

The new rule also maintains the specific prohibition against solicitation "by any media" for professional employment concerning personal injury or wrongful death of a person within 30 days after the occurrence of the event for which the representation is being solicited, except when the lawyer has a family or prior business or professional relationship with the person. After the 30 day period from the date of the occurrence, there are still restrictions beyond those in place for other types of representation. Communications may not be made if the lawyer knows or reasonably should know the person is already represented by another attorney, or if someone other than the lawyer initiating the communication will be representing the person.

The new rule retains prior requirements for labeling of advertising materials, and for maintaining copies of any such communications for a period of five years.

## Colo. RPC 8.4(i) – Sexual Harassment

Effective September 19, 2019, the Colorado Supreme Court adopted Rule 8.4(i), to expressly provide that it is professional misconduct for a lawyer to "engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment where the conduct

occurs in connection with the lawyer's professional activities." The Court also adopted the new Comment 5A to Rule 8.4, which explains the prohibited conduct may include, but is not limited to "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that a reasonable person would perceive as unwelcome." The Comment also indicates that the substantive law of employment discrimination may guide, but does not limit application of this new rule. Finally, the Comment clarifies that "professional activities" are not limited to those that occur in a client-lawyer relationship. While the new rule does not extend to completely private conduct, it is certainly not limited to conduct in the office or conduct directed at a client, co-worker, or subordinate. The rule would extend to conduct directed toward many others with whom a lawyer might deal in a professional capacity, including individuals such as court personnel, court reporters or other contractors used by a lawyer, witnesses, and many others lawyers contact in a professional setting. The rule would also apply to a lawyer while attending a professional conference or CLE program. It would include interactions with after-hours custodial staff or security personnel at a lawyer's office building.

The new Rule 8.4(i) is a clear signal from the Colorado Supreme Court that sexual harassment by lawyers will not be tolerated. However, there has not yet been a case prosecuted under this new rule that has resulted in either an opinion from a Hearing Board in a disciplinary matter, much less an opinion from the Supreme Court itself.

## II. IMPORTANT DISCIPLINARY CASE DECISIONS

**Colorado Supreme Court Opinion in *In the Matter of Betterton-Fike.***

In *In the Matter of Betterton-Fike,* 2020 CO 19 (March 9, 2020), the Colorado Supreme Court, in an attorney discipline matter, considered whether the majority of the Hearing Board erred in finding that a lawyer violated Colo. RPC 8.4(d) (conduct prejudicial to the administration of justice) by failing to pay for deposition services and transcripts provided by a court reporting service at the lawyer's request for more than two years, and only after the court reporting service filed a civil suit against the lawyer. The lawyer argued that he requested the services in his capacity as attorney and agent for his clients, and that the agreement between the lawyer and his clients required the clients to pay the depositions costs. He offered evidence that the clients did not pay him for these costs until after the court reporting service filed the civil suit. Based on these facts, he argued, among other theories, that he had neither a legal nor an ethical obligation to pay the court reporting service until after he was paid by the clients.

The majority of the three-person hearing board found that the lawyer violated Rule 8.4(d), relying upon case law from other jurisdictions, and prior Colorado Supreme Court decisions in which lawyers were disciplined for violating Rule 8.4(d) for failing to pay court reporters. *See, e.g., People v. Whitaker,* 814 P.2d 812, 814-16 (Colo. 1991)(lawyer disciplined for conduct prejudicial to the administration of justice for failing to pay a court reporter despite repeated promises to pay); *People v. Goens,* 803 P.2d 480, 481-82 (Colo. 1990)(affirming a

hearing board's conclusion that an attorney who had indicated that his client would pay costs engaged in conduct prejudicial to the administration of justice by failing to pay a Division of Labor court reporter despite "many phone messages and a letter inquiring about payment."

On appeal, the Colorado Supreme Court, while acknowledging why the hearing board would have relied on these prior cases, distinguished them based on the fact that the attorneys in *Whitaker* and *Goens* had not responded to the complaints filed against them and, therefore, the allegations that they had engaged in conduct prejudicial to the administration of justice were not challenged. The Court also noted that in *Whitaker*, they emphasized the lawyer's dishonesty in failing to pay despite repeated promises to do so. *Betterton-Fike* at para. 33. There were no findings of dishonest conduct with respect to the lawyer in this case. Beyond that, the Court determined there was no evidence establishing that the lawyer expressly agreed or otherwise indicated that he would pay for the services himself. The Court reached this conclusion despite the fact that the lawyer initiated the communications with the court reporting service and specifically requested services, and ordered transcripts. To the extent a verbal contract was formed, the Court held that the evidence supported a conclusion that the lawyer was acting on behalf of a client and did not personally obligate himself. *Id.* at para. 34.

In reversing the finding that the lawyer violated Rule 8.4(d), and expressing concerns about court reporters automatically turning to the Office of Attorney Regulation Counsel to assist in collecting unpaid invoices from lawyers, the Court stopped short of saying a lawyer's failure to pay for court reporting services could never violate Rule 8.4(d). Rather, the Court stated: "We don't mean to suggest that court reporters should never notify OARC of ethical concerns that arise when they aren't paid for their services. Failing to pay for court-reporting services coupled with other circumstances could amount to a Rule 8.4(d) violation. And in this case, it is disturbing that Betterton-Fike waited over two years to settle his client's account and failed to facilitate any payment from his clients during this time. But where, as here, there is no evidence that the attorney had any legal obligation to pay, an attorney's alleged failure to pay a court reporter does not constitute conduct prejudicial to the administration of justice." *Betterton-Fike* at para. 37.

**Hearing Board Opinion in *People v. Abrams.***

In *People v. Abrams,* Case No. 19PDJ036, a hearing board in an attorney discipline case found that a lawyer's client sent an email to the lawyer seeking information about what had occurred during a court proceeding and why there appeared to be some hostility between the lawyer and the judge presiding over the civil action. The lawyer sent a responsive email in which he stated to his client, among other things: "While I was getting your case dismissed, I was getting yelled at by Fatso. The judge is a gay, fat f[*]g, now it's out there." Notwithstanding the lawyer's First Amendment challenge, and his argument that he did not intend any of these words to relate to sexual orientation, the hearing board found, in an order dated February 12, 2020, that the lawyer violated Colo. RPC 8.4(g).

Rule 8.4(g) states that it is professional misconduct for a lawyer to "engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process."

For this and other professional misconduct, the hearing board ordered the lawyer suspended from the practice of law for three months, with the suspension fully stayed during an eighteen-month period of probation, with conditions including successful completion of OARC's Ethics School program, and eight hours of cultural awareness and sensitivity training. The hearing board's order is now on appeal, and briefing is nearly complete. It is not likely that there will be a decision from the Colorado Supreme Court before the end of the year. In attorney discipline cases, the Court can simply affirm the order entered by the hearing board, or it can issue a full opinion. As there are no Colorado Supreme Court opinions construing the current version of Rule 8.4(g) in this context, it seems likely the Court will issue a full opinion and provide some precedent for future cases.

## III. PROPOSED OVERHAUL OF THE PROCEDURAL RULES GOVERNING ATTORNEY DISCIPLINE AND DISABILITY PROCEEDINGS, AND UNAUTHORIZED PRACTICE OF LAW PROCEEDINGS

A proposed overhaul of the entire Colorado Rules of Procedure Regarding Attorney Discipline and Disability Proceedings, C.R.C.P. 251.1, *et seq.*, is currently pending before the Colorado Supreme Court. If this proposal is approved, this entire existing set of procedural rules will be repealed, and replaced by an entirely new and re-numbered set of rules. The scope and substance of these revisions is significant and beyond the scope of this presentation. Similarly, a complete overhaul of the Unauthorized Practice of Law Rules, C.R.C.P. 228 – 240.2, has been proposed. The proposed changes have been published on the Colorado Supreme Court's website, and the public comment period has closed. The Court will likely act on these proposals late this year or early next year. All attorneys should be watching for news about this, and for information about the final version of the rules adopted by the Colorado Supreme Court in this area.

# Colo. RPC 1.5(c)

## Rule 1.5. Fees

**(a) – (b)** [NO CHANGE]

**(c)** A "contingent fee" is a fee for legal services under which compensation is to be contingent in whole or in part upon the successful accomplishment or disposition of the subject matter of the representation.

(1) The terms of a contingent fee agreement shall be communicated in writing before or within a reasonable time after commencing the representation and shall include the following information:

(i) The names of the lawyer and the client;

(ii) A statement of the nature of the claim, controversy or other matters with reference to which the services are to be performed, including each event triggering the lawyer's right to compensation;

(iii) The method by which the fee is to be determined, including the percentage or amounts that will accrue to the lawyer in the event of settlement, trial or appeal, or other final disposition, and whether the contingent fee will be determined before or after the deduction of (A) costs and expenses advanced by the lawyer or otherwise incurred by the client, and (B) other amounts owed by the client and payable from amounts recovered;

(iv) A statement of the circumstances under which the lawyer may be entitled to compensation if the lawyer's representation concludes, by discharge, withdrawal or otherwise, before the occurrence of an event that triggers the lawyer's right to a contingent fee;

(v) A statement regarding expenses, including (A) an estimate of the expenses to be incurred, (B) whether the lawyer is authorized to advance funds for litigation-related expenses to be reimbursed to the lawyer from the recovery, and, if so, the amount of expenses the lawyer may advance without further approval, and (C) the client's obligation, if any, to pay expenses if there is no recovery;

(vi) A statement regarding the possibility that a court will award costs or attorney fees against the client;

(vii) A statement regarding the possibility that a court will award costs or attorney fees in favor of the client, and, if so, how any such costs or attorney fees will be accounted for and handled;

(viii) A statement informing the client that if the lawyer wishes to hire a lawyer in another firm to assist in the handling of a matter ("associated counsel"), the lawyer will promptly inform the client in writing of the identity of the associated counsel, and that (A) the hiring of associated counsel will not increase the contingent fee, unless the client otherwise agrees in writing, and (B) the client has the right to disapprove the hiring of associated counsel and, if hired, to terminate the employment of associated counsel; and

(ix) A statement that other persons or entities may have a right to be paid from amounts recovered on the client's behalf, for example when an insurer or a federal or state agency has paid money or benefits on behalf of a client in connection with the subject of the representation.

(2) A contingent fee agreement must be signed by the client and the lawyer.

(3) The lawyer shall retain a copy of the contingent fee agreement for seven years after the final resolution of the case, or the termination of the lawyer's services, whichever first occurs.

(4) No contingent fee agreement may be made
(i) for representing a defendant in a criminal case,
(ii) in a domestic relations matter, where payment is contingent on the securing of a divorce or upon the amount of maintenance or child support, or property settlement in lieu of such amounts, or
(iii) in connection with any case or proceeding where a contingency method of a determination of attorney fees is otherwise prohibited by law.
(5) Upon conclusion of a contingent fee matter, the lawyer shall provide the client a written disbursement statement showing the amount or amounts received, an itemization of costs and expenses incurred in handling of the matter, sums to be disbursed to third parties, including lawyers in other law firms, and computation of the contingent fee.
(6) No contingent fee agreement shall be enforceable unless the lawyer has substantially complied with all of the provisions of this Rule.
(7) The form Contingent Fee Agreement following the comment to this Rule may be used for contingent fee agreements and shall be sufficient to comply with paragraph (c)(1) of this Rule. The authorization of this form shall not prevent the use of other forms consistent with this Rule. Nothing in this Rule prevents a lawyer from entering into an agreement that provides for a contingent fee combined with one or more other types of fees, such as hourly or flat fees, provided that the agreement complies with this Rule insofar as the contingent fee is concerned.

**(d) – (h)** [NO CHANGE]

**COMMENT**

**[1]** – [2] [NO CHANGE]

**[3]** Repealed.

**[4]** – **[5]** [NO CHANGE]

*Contingent Fees*
**[6]** Contingent fees, whether based on the recovery or savings of money, or on a nonmonetary outcome, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. *E.g.*, 28 U.S.C. § 2678 (limiting percentage of fees in Federal Tort Claims Act cases); C.R.S. § 8-43-403 (limiting percentage of contingent fee in certain worker's compensation cases). The prohibition on contingent fees in certain domestic relations matters does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, maintenance or other financial orders because such contracts do not implicate the same policy concerns.

[6A] The scope of representation in a contingent fee agreement should reflect whether the representation includes the handling of counterclaims, third-party claims to amounts recovered, and appeals.
[6B] A lawyer may include a provision in a contingent fee agreement setting forth the lawyer's agreement to reimburse the client for any attorney fees and costs awarded against the client. A provision in a contingent fee agreement in which the client must reimburse the lawyer for any attorney fees or costs awarded against the lawyer may be improper.

[6C] Nothing in this Rule prohibits a lawyer from arranging, in the contingent fee agreement or otherwise, for a third party to guarantee some or all of the financial obligations of the client in the contingent fee agreement.

[6D] Third parties often hold claims to amounts recovered by the lawyer on behalf of the client. The lawyer may be required, as a matter of professional ethics, to pay these amounts from the proceeds of a recovery and not to disburse them to the client.

[6E] A tribunal may award attorney fees to the client under a fee-shifting provision of a contract or statute or as a sanction for discovery violations or other litigation misconduct. The fee agreement may provide for a different allocation of such an award of fees as between the client and the lawyer depending on the circumstances giving rise to the award, such as whether the fees are awarded as a sanction for improper conduct that necessitated additional effort by the lawyer, or whether the fees are awarded under a contractual or statutory fee-shifting provision. This rule does not limit the ways in which clients and lawyers may contract to allocate awards of attorney fees; however, the lawyer must comply with the reasonableness standard of paragraph (a) of this Rule.

[6F] A conversion clause is a provision in a contingent fee agreement that notifies clients they may be liable for attorney fees in quantum meruit or on another alternate basis if the contingent fee agreement is terminated before the occurrence of the contingency. See, form Contingent Fee Agreement, ¶ (4). A conversion clause that requires payment of the alternate fee immediately upon termination, and regardless of the occurrence of the contingency, would discourage most clients from discharging their lawyer. Few clients have the financial means to pay a contingent fee from their own resources, with no guarantee of replenishment by a recovery from a third party. Therefore, a conversion clause that requires payment of the alternate fee immediately upon termination may be appropriate only if (a) the client is sophisticated in legal matters, has the means to pay the fee regardless of the occurrence of the contingency, and has specifically negotiated the conversion clause; and (b) the contingent fee agreement expressly requires payment of the alternate fee immediately upon termination.

**[7] – [18]** [NO CHANGE]

**FORM CONTINGENT FEE AGREEMENT**

Dated _____, 20___

_____ (Client), retains _____ (Lawyer) to perform the legal services described in paragraph (1) below. The Lawyer agrees to perform them faithfully and with due diligence.

(1) The claim, controversy, and other matters with reference to which the services are to be performed are: _____. The representation (will) (will not) [indicate which] include the handling of counterclaims, third-party claims to amounts recovered, and appeals.

(2) The contingency upon which compensation is to be paid is the Client's recovery of funds by settlement or judgment.

(3) The Client will pay the Lawyer __ percent of the (gross amount collected) (net amount collected) [indicate which]. ("Gross amount collected" means the amount collected before any subtraction of expenses and disbursements) ("Net amount collected" means the amount of the collection remaining after subtraction of expenses and disbursements [including] [not including] costs or attorney fees awarded to an opposing party and against the Client.) [indicate which]. "The amount collected" (includes) (does not include) [indicate which] specially awarded attorney fees and costs awarded to the Client and against an opposing party.

(4) The Client is not to be liable to pay compensation otherwise than from amounts collected for the Client by the Lawyer, except as follows: In the event the Client terminates this contingent fee agreement without wrongful conduct by the Lawyer which would cause the Lawyer to forfeit any fee, or if the Lawyer justifiably withdraws from the representation of the Client, the Lawyer may ask the court or other tribunal to order that the Lawyer be paid a fee based upon the reasonable value of the services provided by the Lawyer. If the Lawyer and the Client cannot agree how the Lawyer is to be compensated in this circumstance, the Lawyer will request the court or other tribunal to determine: (1) whether the Client has been unfairly or unjustly enriched if the Client does not pay a fee to the Lawyer; and, if so (2) the amount of the fee owed, taking into account the nature and complexity of the Client's case, the time and skill devoted to the Client's case by the Lawyer, and the benefit obtained by the Client as a result of the Lawyer's efforts. Any such fee shall be payable only out of the gross recovery obtained by or on behalf of the Client and the amount of such fee shall not be greater than the fee that would have been earned by the Lawyer if the contingency described in this contingent fee agreement had occurred.

(5) A court or other tribunal may award costs or attorney fees to an opposing party and against the Client.

(6) The Client will be liable to the lawyer for reasonable expenses and disbursements. Such expenses and disbursements are estimated to be $ _____. The Client authorizes the Lawyer to incur expenses and make disbursements up to a maximum of $ _____. The

Lawyer will not exceed this limitation without the Client's further written authority. The Client will reimburse the Lawyer for such expenditures (upon receipt of a billing), (in specified installments), (upon final resolution), (etc.) [indicate which].

(7) If the Lawyer wishes to hire a lawyer in another firm to assist in the handling of a matter (called an "associated counsel"), the Lawyer will promptly inform the Client in writing of the identity of the associated counsel and that the hiring of associated counsel will not increase the contingent fee, unless the Client otherwise agrees in writing. The Client has a right to disapprove the hiring of associated counsel and to terminate the employment of associated counsel for any reason.

(8) Other persons or entities may have a right to be paid from amounts recovered on the Client's behalf. The Client (authorizes) (does not authorize) [indicate which] the Lawyer to pay from the amount collected the following: (e.g., all physicians, hospitals, subrogation claims and liens, etc.). The Lawyer may be legally required to pay the claims of third parties out of any monies collected for the Client, and not to disburse them to the Client. However, if the Client disputes the amount or validity of the third-party claim, the Lawyer may deposit the funds into the registry of an appropriate court for determination. Any amounts paid to third parties (will) (will not) [indicate which] be subtracted from the amount collected before computing the amount of the contingent fee under this agreement.

WE HAVE EACH READ THE ABOVE AGREEMENT BEFORE SIGNING IT.

(Signature of Client)

(Signature of Attorney)

**FINAL DISBURSEMENT STATEMENT FOR CONTINGENT FEE AGREEMENTS**

GROSS RECOVERY $_____

Itemization of expenses incurred in handling of case:

_____ $_____

_____ $_____

_____ $_____

_____ $_____

Total Expenses $_____

Amount of Expenses Advanced by Lawyer $_____

Amount of Expenses Paid by Client $_____

NET RECOVERY

$_____

Computation of Contingent Fee:

_____% of (Net) (Gross) Recovery = $ _____

Total Fee (and expenses advanced by Lawyer)*

DISBURSEMENT TO CLIENT $_____

* (If fee is on "Net Recovery" and Lawyer has advanced expenses which are being reimbursed from the "gross recovery.")

(Signature of Lawyer)

(Signature of Client)

By signature Client acknowledges receipt of a copy of this disbursement statement.

**FORM FLAT FEE AGREEMENT**

[NO CHANGE]

**Amended and Adopted by the Court, En Banc, October 1, 2020, effective January 1, 2021.**

**By the Court:**

**Monica M. Márquez**
**Justice, Colorado Supreme Court**

# Colo. RPC 1.5(h)

**Rule 1.5. Fees**

(a) – (g) [NO CHANGE]

(h) A "flat fee" is a fee for specified legal services for which the client agrees to pay a fixed amount, regardless of the time or effort involved.

(1) The terms of a flat fee shall be communicated in writing before or within a reasonable time after commencing the representation and shall include the following information:

(i) A description of the services the lawyer agrees to perform;

(ii) The amount to be paid to the lawyer and the timing of payment for the services to be performed;

(iii) If any portion of the flat fee is to be earned by the lawyer before conclusion of the representation, the amount to be earned upon the completion of specified tasks or the occurrence of specified events; and

(iv) The amount or the method of calculating the fees the lawyer earns, if any, should the representation terminate before completion of the specified tasks or the occurrence of specified events.

(2) If all or any portion of a flat fee is paid in advance of being earned and a dispute arises about whether the lawyer has earned all or part of the flat fee, the lawyer shall comply with Rule 1.15A(c) with respect to any portion of the flat fee that is in dispute.

(3) The form Flat Fee Agreement following the comment to this Rule may be used for flat fee agreements and shall be sufficient. The authorization of this form shall not prevent the use of other forms consistent with this Rule.

COMMENT

Reasonableness of Fee and Expenses

[1] [NO CHANGE]

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible, but when there has been a change from their previous understanding the basis or rate of the fee should be promptly communicated in writing. In a new client-lawyer relationship,

the basis or rate of the fee must be promptly communicated in writing to the client. When the lawyer has regularly represented a client, they ordinarily will have reached an understanding concerning the basis or rate of the fee; but, when there has been a change from their previous understanding, the basis or rate of the fee should be promptly communicated in writing. All contingent fee arrangements must be in writing, regardless of whether the client-lawyer relationship is new or established. See C.R.C.P., Ch. 23.3, Rule 1. A written communication must disclose the basis or rate of the lawyer's fees, but itthe communication need not take the form of a formal engagement letter or agreement, and it need not be signed by the client. Moreover, it is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, to identify the factors that may be taken into account in finally fixing the fee, or to furnish the client with a simple memorandum or the lawyer's customary fee schedule. When developments occur during the representation that render an earlier disclosure communication substantially inaccurate, a revised written disclosure communication should be provided to the client. All flat fee arrangements must be in writing and must comply with paragraph (h) of this Rule. All contingent fee arrangements must be in writing, regardless of whether the client-lawyer relationship is new or established. See C.R.C.P., Ch. 23.3, Rule 1.

[3] – [4] [NO CHANGE]

[5] An A fee agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[6] – [10] [NO CHANGE]

[11] To make a determination of when an advance fee is earned, the written statement of the basis or rate of the fee, when required by Rule 1.5(b) or (h), should include a description of the benefit or service that justifies the lawyer's earning the fee, the amount of the advance unearned fee, as well as a statement describing when the fee is earned. Whether a lawyer has conferred a sufficient benefit to earn a portion of the advance fee will depend on the circumstances of the particular case. The circumstances under which a fee is earned should be evaluated under an objective standard of reasonableness. Rule 1.5(a).

*Rule 1.5(f) Does Not Prohibit Lump-sum Fees or Flat Fees*

[12] Advances of unearned fees, including "lump-sum" fees and "flat fees," advances of all or a portion of a flat fee, are those funds the client pays for specified legal services that the lawyer has agreed to perform in the future. Pursuant to Rule 1.151.5(f), the lawyer must deposit an advance of unearned fees in the lawyer's trust account. The funds may be earned only as the lawyer performs specified legal services or confers benefits on the client as provided for in the

written statement of the basis of the fee, if a written statement is required by Rule 1.5(b). See also Restatement (Third) of the Law Governing Lawyers §§ 34, 38 (1998). Rule 1.5(f) does not prevent a lawyer from entering into these types of arrangements.

[13] [NO CHANGE]

[14] ~~Alternatively,~~ A lawyer and client may agree that a flat fee or a portion of a flat fee is earned in various ways. For example, the lawyer and client may agree to an advance ~~lump-sum or~~ flat fee that will be earned in whole or in part based upon the lawyer's completion of specific tasks or the occurrence of specific events, regardless of the precise amount of the lawyer's time involved. For instance, in a criminal defense matter, a lawyer and client may agree that the lawyer earns portions of the ~~advance lump-sum or~~ flat fee upon the lawyer's entry of appearance, initial advisement, review of discovery, preliminary hearing, pretrial conference, disposition hearing, motions hearing, trial, and sentencing. Similarly, in a trusts and estates matter, a lawyer and client may agree that the lawyer earns portions of the ~~lump-sum or~~ flat fee upon client consultation, legal research, completing the initial draft of testamentary documents, further client consultation, and completing the final documents.

[15] The portions of the advance ~~lump sum or~~ flat fee earned as each such event occurs need not be in equal amounts. However, the fees attributed to each event should reflect a reasonable estimate of the proportionate value of the legal services the lawyer provides in completing each designated event to the anticipated legal services to be provided on the entire matter. See Rule 1.5(a); Feiger, Collison & Killmer v. Jones, 926 P.2d 1244, 1252-53 (Colo. 1996) (client's sophistication is relevant factor).

[16] "[A]n 'engagement retainer fee' is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required. An engagement retainer must be distinguished from a lump-sum fee [*i.e.*, a flat fee] constituting the entire payment for a lawyer's service in a matter and from an advance payment from which fees will be subtracted (see § 38, Comment g). A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed." Restatement (Third) of the Law Governing Lawyers § 34 Comment e. An engagement retainer fee agreement must comply with Rule 1.5(a), (b), and (g), and should expressly include the amount of the engagement retainer fee, describe the service or benefit that justifies the lawyer's earning the engagement retainer fee, and state that the engagement retainer fee is earned upon receipt. As defined above, an engagement retainer fee will be earned upon receipt because the lawyer provides an immediate benefit to the client, such as forgoing other business opportunities by making the lawyer's services available for a given period of time to the exclusion of other clients or potential clients, or by giving priority to the client's work over other matters.

[17] – [18] [NO CHANGE]

**Form Flat Fee Agreement**

The client _____ ("Client") retains _____ ("Lawyer" [or "Firm"]) to perform the legal services specified in Section I, below, for a flat fee as described below.

**I. Legal Services to Be Performed.**

In exchange for the fee described in this Agreement, Lawyer will perform the following legal services ("Services"): [*Insert specific description of the scope and/or objective of the representation. Examples:* Represent Client in DUI criminal case in Jefferson County; Prepare a Will [or Power of Attorney or contract]]

**II. Flat Fee.**

This is a flat fee agreement. Client will pay Lawyer [or Firm] $_____ for Lawyer's [or Firm's] performance of the Services described in Section I, above, plus costs as described in Section VI, below. Client understands that Client is NOT entering into an hourly fee arrangement. This means that Lawyer [or Firm] will devote such time to the representation as is necessary, but the Lawyer's [or Firm's] fee will not be increased or decreased based upon the number of hours spent.

**III. When Fee Is Earned.**

The flat fee will be earned in increments, as follows:

Description of increment: _____ Amount earned: _____

Description of increment: _____ Amount earned: _____

Description of increment: _____ Amount earned: _____

Description of Increment: _____ Amount earned: _____

Description of increment: _____ Amount earned: _____

_____ [*Alternatively:* The flat fee will be earned when Lawyer [or Firm] provides Client with [*Select one:* the Will, the Power of Attorney, the contract, *other specified description of work*].

**IV. When Fee Is Payable.**

Client shall pay Lawyer [or Firm] [*Select one:* in advance, as billed, or as the services are completed]. Fees paid in advance shall be placed in Lawyer's [or Firm's] trust account and shall remain the property of Client until they are earned. When the fee or part of the fee is earned pursuant to this Agreement, it becomes the property of Lawyer [or Firm].

**V. Right to Terminate Representation and Fees on Termination.**

Client has the right to terminate the representation at any time and for any reason, and Lawyer [or firm] may terminate the representation in accordance with Rule 1.16 of the Colorado Rules of Professional Conduct. In the event that Client terminates the representation without wrongful conduct by Lawyer [or Firm] that would cause Lawyer [or Firm] to forfeit any fee, or Lawyer [or Firm] justifiably withdraws in accordance with Rule 1.16 from representing Client, Client shall pay, and Lawyer [or Firm] shall be entitled to, the fee or part of the fee earned by Lawyer [or Firm] as described in Section I, above, up to the time of termination. In a litigation matter, Client shall pay, and Lawyer [or Firm] shall be entitled to, the fee or part of the fee earned up to the time when the court grants Lawyer's motion for withdrawal. If the representation is terminated between the completion of increments described in Section III above, Client shall pay a fee based on [an hourly rate of $_____] [the percentage of the task completed] [*other specified method*]. However, such fees shall not exceed the amount that would have been earned had the representation continued until the completion of the increment, and in any event all fees shall be reasonable.

**VI. Costs.**

Client is liable to Lawyer [or Firm] for reasonable expenses and disbursements. Examples of such expenses and disbursements are fees payable to the Court and expenses involved in preparing exhibits. Such expenses and disbursements are estimated to be $_____.

Client authorizes Lawyer [or Firm] to incur expenses and disbursements up to a maximum of $_____, which limitation will not be exceeded without Client's further written authorization. Client shall reimburse Lawyer for such expenditures [*Select one:* upon receipt of a billing, in specified installments, or upon completion of the Services].

Dated: _____

CLIENT: ATTORNEY [FIRM]:

_____ _____

Signature Signature

**Rule 1.5. Fees**

(a) – (g) [NO CHANGE]

(h) A "flat fee" is a fee for specified legal services for which the client agrees to pay a fixed amount, regardless of the time or effort involved.

(1) The terms of a flat fee shall be communicated in writing before or within a reasonable time after commencing the representation and shall include the following information:

(i) A description of the services the lawyer agrees to perform;

(ii) The amount to be paid to the lawyer and the timing of payment for the services to be performed;

(iii) If any portion of the flat fee is to be earned by the lawyer before conclusion of the representation, the amount to be earned upon the completion of specified tasks or the occurrence of specified events; and

(iv) The amount or the method of calculating the fees the lawyer earns, if any, should the representation terminate before completion of the specified tasks or the occurrence of specified events.

(2) If all or any portion of a flat fee is paid in advance of being earned and a dispute arises about whether the lawyer has earned all or part of the flat fee, the lawyer shall comply with Rule 1.15A(c) with respect to any portion of the flat fee that is in dispute.

(3) The form Flat Fee Agreement following the comment to this Rule may be used for flat fee agreements and shall be sufficient. The authorization of this form shall not prevent the use of other forms consistent with this Rule.

COMMENT

Reasonableness of Fee and Expenses

[1] [NO CHANGE]

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible, but when there has been a change from their previous understanding the basis or rate of the fee should be promptly communicated in writing. In a new client-lawyer relationship,

the basis or rate of the fee must be promptly communicated in writing to the client, but the communication need not take the form of a formal engagement letter or agreement, and it need not be signed by the client. Moreover, it is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, to identify the factors that may be taken into account in finally fixing the fee, or to furnish the client with a simple memorandum or the lawyer's customary fee schedule. When developments occur during the representation that render an earlier communication substantially inaccurate, a revised written communication should be provided to the client. All flat fee arrangements must be in writing and must comply with paragraph (h) of this Rule. All contingent fee arrangements must be in writing, regardless of whether the client-lawyer relationship is new or established. See C.R.C.P., Ch. 23.3, Rule 1.

[3] – [4] [NO CHANGE]

[5] A fee agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[6] – [10] [NO CHANGE]

[11] To make a determination of when an advance fee is earned, the written statement of the basis or rate of the fee, when required by Rule 1.5(b) or (h), should include a description of the benefit or service that justifies the lawyer's earning the fee, the amount of the advance unearned fee, as well as a statement describing when the fee is earned. Whether a lawyer has conferred a sufficient benefit to earn a portion of the advance fee will depend on the circumstances of the particular case. The circumstances under which a fee is earned should be evaluated under an objective standard of reasonableness. Rule 1.5(a).

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[13] [NO CHANGE]

[14] A lawyer and client may agree that a flat fee or a portion of a flat fee is earned in various ways. For example, the lawyer and client may agree to an advance flat fee that will be earned in

whole or in part based upon the lawyer's completion of specific tasks or the occurrence of specific events, regardless of the precise amount of the lawyer's time involved. For instance, in a criminal defense matter, a lawyer and client may agree that the lawyer earns portions of the flat fee upon the lawyer's entry of appearance, initial advisement, review of discovery, preliminary hearing, pretrial conference, disposition hearing, motions hearing, trial, and sentencing. Similarly, in a trusts and estates matter, a lawyer and client may agree that the lawyer earns portions of the flat fee upon client consultation, legal research, completing the initial draft of testamentary documents, further client consultation, and completing the final documents.

[15] The portions of the advance flat fee earned as each such event occurs need not be in equal amounts. However, the fees attributed to each event should reflect a reasonable estimate of the proportionate value of the legal services the lawyer provides in completing each designated event to the anticipated legal services to be provided on the entire matter. See Rule 1.5(a); Feiger, Collison & Killmer v. Jones, 926 P.2d 1244, 1252-53 (Colo. 1996) (client's sophistication is relevant factor).

[16] "[A]n 'engagement retainer fee' is a fee paid, apart from any other compensation, to ensure that a lawyer will be available for the client if required. An engagement retainer must be distinguished from a lump-sum fee [*i.e.*, a flat fee] constituting the entire payment for a lawyer's service in a matter and from an advance payment from which fees will be subtracted (see § 38, Comment g). A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed." Restatement (Third) of the Law Governing Lawyers § 34 Comment e. An engagement retainer fee agreement must comply with Rule 1.5(a), (b), and (g), and should expressly include the amount of the engagement retainer fee, describe the service or benefit that justifies the lawyer's earning the engagement retainer fee, and state that the engagement retainer fee is earned upon receipt. As defined above, an engagement retainer fee will be earned upon receipt because the lawyer provides an immediate benefit to the client, such as forgoing other business opportunities by making the lawyer's services available for a given period of time to the exclusion of other clients or potential clients, or by giving priority to the client's work over other matters.

[17] – [18] [NO CHANGE]

**Form Flat Fee Agreement**

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*representation. Examples:* Represent Client in DUI criminal case in Jefferson County; Prepare a Will [or Power of Attorney or contract]]

**II. Flat Fee.**

This is a flat fee agreement. Client will pay Lawyer [or Firm] $_____ for Lawyer's [or Firm's] performance of the Services described in Section I, above, plus costs as described in Section VI, below. Client understands that Client is NOT entering into an hourly fee arrangement. This means that Lawyer [or Firm] will devote such time to the representation as is necessary, but the Lawyer's [or Firm's] fee will not be increased or decreased based upon the number of hours spent.

**III. When Fee Is Earned.**

The flat fee will be earned in increments, as follows:

Description of increment: _____ Amount earned: _____

Description of increment: _____ Amount earned: _____

Description of increment: _____ Amount earned: _____

Description of Increment: _____ Amount earned: _____

Description of increment: _____ Amount earned: _____

[*Alternatively:* The flat fee will be earned when Lawyer [or Firm] provides Client with [*Select one:* the Will, the Power of Attorney, the contract, *other specified description of work*].

**IV. When Fee Is Payable.**

Client shall pay Lawyer [or Firm] [*Select one:* in advance, as billed, or as the services are completed]. Fees paid in advance shall be placed in Lawyer's [or Firm's] trust account and shall

remain the property of Client until they are earned. When the fee or part of the fee is earned pursuant to this Agreement, it becomes the property of Lawyer [or Firm].

**V. Right to Terminate Representation and Fees on Termination.**

Client has the right to terminate the representation at any time and for any reason, and Lawyer [or firm] may terminate the representation in accordance with Rule 1.16 of the Colorado Rules of Professional Conduct. In the event that Client terminates the representation without wrongful conduct by Lawyer [or Firm] that would cause Lawyer [or Firm] to forfeit any fee, or Lawyer [or Firm] justifiably withdraws in accordance with Rule 1.16 from representing Client, Client shall pay, and Lawyer [or Firm] shall be entitled to, the fee or part of the fee earned by Lawyer [or Firm] as described in Section I, above, up to the time of termination. In a litigation matter, Client shall pay, and Lawyer [or Firm] shall be entitled to, the fee or part of the fee earned up to the time when the court grants Lawyer's motion for withdrawal. If the representation is terminated between the completion of increments described in Section III above, Client shall pay a fee based on [an hourly rate of $_____] [the percentage of the task completed] [*other specified method*]. However, such fees shall not exceed the amount that would have been earned had the representation continued until the completion of the increment, and in any event all fees shall be reasonable.

**VI. Costs.**

Client is liable to Lawyer [or Firm] for reasonable expenses and disbursements. Examples of such expenses and disbursements are fees payable to the Court and expenses involved in preparing exhibits. Such expenses and disbursements are estimated to be $_____. Client authorizes Lawyer [or Firm] to incur expenses and disbursements up to a maximum of $_____, which limitation will not be exceeded without Client's further written authorization. Client shall reimburse Lawyer for such expenditures [*Select one:* upon receipt of a billing, in specified installments, or upon completion of the Services].

Dated: _____

| CLIENT: | ATTORNEY [FIRM]: |
| --- | --- |
| _____ | _____ |
| Signature | Signature |

**Amended and Adopted by the Court, En Banc, January 31, 2019, effective immediately. This applies only to flat fee agreements entered into on or after the effective date.**

**By the Court:**

**Monica M. Márquez**
**Justice, Colorado Supreme Court**

# Colo. RPC 1.6 and 1.15A

# Comments

## Rule 1.6. Confidentiality of Information

(a) – (c) [NO CHANGE]

**Comment**

[1] – [4] [NO CHANGE]

*Authorized Disclosure*

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter, including disclosures made by the lawyer pursuant to the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

*Disclosure Adverse to Client*

[6] – [20] [NO CHANGE]

## Rule 1.15A. General Duties of Lawyers Regarding Property of Clients and Third Parties

(a) – (d) [NO CHANGE]

**Comment**

Note: The following ~~six~~eight comments are applicable to this Rule 1.15A and to Rule 1.15B, Rule 1.15C, Rule 1.15D, and Rule 1.15E.

[1] – [7] [NO CHANGE]

[8] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. A lawyer's compliance with the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act is consistent with the lawyer's duty to safeguard property in paragraph 1.15A(a).

## Rule 1.6. Confidentiality of Information

(a) – (c) [NO CHANGE]

**Comment**

[1] – [4] [NO CHANGE]

*Authorized Disclosure*

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter, including disclosures made by the lawyer pursuant to the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

*Disclosure Adverse to Client*

[6] – [20] [NO CHANGE]

## Rule 1.15A. General Duties of Lawyers Regarding Property of Clients and Third Parties

(a) – (d) [NO CHANGE]

**Comment**

Note: The following eight comments are applicable to this Rule 1.15A and to Rule 1.15B, Rule 1.15C, Rule 1.15D, and Rule 1.15E.

[1] – [7] [NO CHANGE]

[8] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. A lawyer's compliance with the Colorado Electronic Preservation of Abandoned Estate Planning Documents Act is consistent with the lawyer's duty to safeguard property in paragraph 1.15A(a).

**Amended and Adopted by the Court, En Banc, May 14, 2020, effective January 1, 2021.**

**By the Court:**

**Monica M. Márquez**
**Justice, Colorado Supreme Court**

# Colo. RPC 7.1 through 7.3

## Rule 7.1. Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment

[1] This Rule governs all communications about a lawyer's services, including advertising. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Misleading truthful statements are prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[3A] Any communication that states or implies the client does not have to pay a fee if there is no recovery must also disclose that the client may be liable for costs or the adverse party's attorney fees if ordered by a court. This provision does not apply to communications that state only that contingent or percentage fee arrangements are available, or that state only that the initial consultation is free.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by

a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm must indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

### Rule 7.2. Communications Concerning a Lawyer's Services: Specific Rules

(a) A lawyer may communicate information regarding the lawyer's services through any media.

(b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;

(3) pay for a law practice in accordance with Rule 1.17;

(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(i) the reciprocal referral agreement is not exclusive; and

(ii) the client is informed of the existence and nature of the agreement; and

(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

Comment

[1] This Rule permits public dissemination of information concerning a lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1) through (b)(5), lawyers are not permitted to pay others for recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client-development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(d) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal

problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4 (a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Qualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(d), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer "concentrates in" or is a "specialist," practices a "specialty," or "specializes in" particular fields

based on the lawyer's experience, specialized training or education, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

[11A] In any advertisement in which a lawyer affirmatively claims to be certified as a specialist in any area of the law, such advertisement shall contain the following disclosure: "Colorado does not certify lawyers as specialists in any field." This disclaimer is not required where the information concerning the lawyer's services is contained in a law list, law directory or a publication intended primarily for use of the legal profession.

Required Contact Information

[12] This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

## Rule 7.3. Solicitation of Clients

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(d) A lawyer shall not engage in solicitation by any media for professional employment, concerning personal injury or wrongful death of any person. See § 13-93-111, C.R.S. This Rule 7.3(d) shall not apply if the lawyer has a family or prior business or professional relationship with the person or if the communication is issued more than 30 days after the occurrence of the event for which the legal representation is being solicited. Any such communication must comply with the following:

(1) no such communication may be made if the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter; and

(2) if a lawyer other than the lawyer whose name or signature is contained in the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any such communication shall include a statement so advising the prospective client.

(e) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(f) Every communication from a lawyer soliciting professional employment shall:

(1) include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (b)(1), (b)(2) or (b)(3);

(2) not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the nature of the person's legal problem; and

(3) be maintained for a period of five years from the date of dissemination of the communication, and include a copy or recording of each such communication and a sample of the envelope, if any, in which the communication is enclosed, unless the recipient of the communication is a person specified in paragraphs (b)(1), (b)(2) or (b)(3).

(g) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their

members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3(c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This Rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (g) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (g) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter, but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(c).

**Rule 7.4. Reserved**

**Rule 7.5. Reserved**

**Amended and Adopted by the Court, En Banc, September 10, 2020, effective immediately.**

**By the Court:**

**Monica M. Márquez**
**Justice, Colorado Supreme Court**

# Colo. RPC 8.4(i)

## Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) – (f) [NO CHANGE]

(g) engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process;

(h) engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law; or

(i) engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment where the conduct occurs in connection with the lawyer's professional activities.

### COMMENT

[1]-[5] [NO CHANGE]

[5A] Sexual harassment may include, but is not limited to, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that a reasonable person would perceive as unwelcome. The substantive law of employment discrimination, including anti-harassment statutes, regulations, and case law, may guide, but does not limit, application of paragraph (i). "Professional activities" are not limited to those that occur in a client-lawyer relationship.

**Amended and Adopted by the Court, En Banc, September 19, 2019, effective immediately.**

**By the Court:**

**Monica M. Márquez**
**Justice, Colorado Supreme Court**

# WHAT'S NEW IN ATTORNEY REGULATION?

A PRESENTATION BY GREGORY G. SAPAKOFF, DEPUTY REGULATION COUNSEL, OFFICE OF ATTORNEY REGULATION COUNSEL



## New or Revised Rules of Professional Conduct

- Colo. RPC 1.5(c) – Contingent Fees
- Colo. RPC 1.5(h) – Flat Fees
- Colo. RPC 1.6 – Confidentiality of Information
- Colo. RPC 1.15A – Duties Regarding Property of Others
- Colo. RPC 7.1 – 7.3 – Communications Concerning a Lawyer's Services and Solicitation of Clients
- Colo. RPC 8.4(i) – Sexual Harassment

# Colo. RPC 1.5(c) – Contingent Fees

- Revised effective January 1, 2021.
- Replaces C.R.C.P. Chapter 23.3, Rules Governing Contingent Fees, in its entirety. Chapter 23.3 repealed.
- Incorporates much of the substance of Chapter 23.3.
- Clarifies that compliance with these provisions regarding the form and content of contingent fee agreements is an ethical obligation.
- "No contingent fee agreement shall be enforceable unless the lawyer has substantially complied with all of the provisions of this Rule"
- Moves all required disclosures into the fee agreement itself rather than suggesting a separate disclosure statement.



# Colo. RPC 1.5(c) Cont...

- New Comments to Rule 1.5 provide further guidance regarding conversion clauses in contingent fee agreements – clauses that seek to define the rights and obligations of the parties in the event representation is terminated prior to completion or the representation.
- Includes an approved contingent fee agreement form, and an approved final disbursement statement form.

# Colo. RPC 1.5(h) – Flat Fees

- Approved and effective January 31, 2019, so not so new.
- Clarifies that the terms of all flat fee agreements must be communicated in writing, and must include:
  - Description of services the lawyer agrees to perform;
  - Amount to be paid to the lawyer and timing of payment for those services;
  - If any portion of the flat fee is to be earned before conclusion of representation, the amount to be earned upon completion of specified tasks or occurrence of specified events; and
  - Amount or method of calculating fees earned, if any, if representation terminates before completion of specified tasks or occurrence of specified events.



# Colo. RPC 1.5(h) cont…

- Court has also included with the rule an approved form of flat fee agreement.

# Rules 1.6 – Confidentiality; and 1.15A – Property of Others

- Effective January 1, 2021, Comments to both rules revised to facilitate and recognize creation of a central repository for unclaimed trust and estate documents pursuant to Colorado Electronic Preservation of Abandoned Estate Planning Documents Act.
- The new Act allows custodians of wills and estate planning documents to electronically deposit them with the Colorado State Court Administrator after diligent search for their creator fails.
- Revise Comment to Rule 1.6 acknowledges implied authorization to disclose confidential materials in compliance with Act.
- Revised Comment to Rule 1.15A clarifies that depositing such third party property in compliance with Act is consistent with this rule.



# Rules 7.1 – 7.3 – Communications re Services and Solicitation of Clients

- Effective September 10, 2020, Rules 7.1 -7.5 repealed, and replaced by Rules 7.1 – 7.3.
- The advertising rules.
- Rules have been streamlined and some terms and references updated.
- Rule 7.1: : "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."
- Much of former Rule 7.1 is now relegated to Comment to this rule.

# Rules 7.1 – 7.3 cont…

- Comments to Rule 7.1 clarify that what is considered "misleading" is based on a "reasonable person" standard.
- Firm names covered in Comments 5-8 to Rule 7.1 – No longer covered in a separate rule, but substance of these comments substantially the same as former Rule 7.5.



# Rules 7.1 – 7.3 cont…

- Rule 7.2 deals with more specific issues relating to communications concerning a lawyers services, including some matters previously address in former Rules 7.1, 7.2 and 7.4.
- Recognizes many newer forms of media used for advertising and attempts to modernize the rules in this regard.
- Covers payment of compensation to others for recommending the lawyer's services, and referral arrangements.
- Covers communications re fields of practice and being certified as a specialist.
- Introduces the concept of a "qualified lawyer referral service" and allows payment of usual charges to such a service.

# Rules 7.1 – 7.3 cont…

- Rule 7.2 also deals with lawyer participation in legal service plans.
- Comment 5 to Rule 7.2 clarifies when lawyers may pay others for generating client leads, including internet-based lead generators.
- Rule 7.3 deals with solicitation of clients, as did the prior Rule 7.3, but there are some differences.
- The new Rule 7.3 includes a definition for "solicitation" or "solicits" and says the terms "denote a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter."



# Rules 7.1 – 7.3 cont…

- Live person-to-person solicitation for pecuniary gain still prohibited, with limited exceptions including one new exception - a "person who routinely uses for business purposes the type of legal services offered by the lawyer."
- Comment 2 to Rule 7.3 helps clarify what is "live person-to-person contact."
  - In-person face-to-face
  - Live telephone
  - Other "real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection."

# Rules 7.1 – 7.3 cont…

- Live person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard.
- Solicitation not otherwise prohibited still not permitted if the person makes it known that they do not want to be solicited or the solicitation involves coercion, duress or harassment.
- The new rule kept the specific prohibition against solicitation "by any media" for professional employment concerning personal injury or wrongful death of a person within 30 days after the occurrence of the event for which the representation is being solicited, except when the lawyer has a family or prior business or professional relationship with the person.



# Rules 7.1 – 7.3 cont…

- For solicitation of this type of personal injury client, there are still additional restrictions even after the initial 30 day period expires, including that communications may not be made if the lawyer knows or reasonably should know the person is already represented by another attorney, or if someone other than the lawyer initiating the communication will be representing the person.
- New Rule 7.3 retains prior requirements for labeling of advertising materials, and for maintaining copies of such communications for five years.

# Colo. RPC 8.4(i) – Sexual Harassment

- Rule 8.4(i) adopted by the Supreme Court effective September 19, 2019, so also not brand new.
- Clarifies that it is professional misconduct for a lawyer "engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment where the conduct occurs in connection with the lawyer's professional activities."
- New Comment 5A to Rule 8.4:
  - Explains the prohibited conduct may include, but is not limited to "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that a reasonable person would perceive as unwelcome."



# Colo. RPC 8.4(i) cont…

  - Indicates that the substantive law of employment discrimination may guide, but does not limit application of this new rule.
  - Clarifies that "professional activities" are not limited to those that occur in a client-lawyer relationship.
- The rule applies to conduct both within and away from the office, and would include that directed a variety of individuals, including, but not limited to:
  - Clients and witnesses;
  - Co-workers, employees or subordinates;
  - Contractors the lawyer deals with in a business or professional capacity such as sales representatives, court reporters, expert witnesses, investigators, and process servers;

# Colo. RPC 8.4(i) cont...

- Court personnel;
- Opposing attorneys or parties;
- Judges;
- Office building staff, including after-hours security and custodial staff;
- Persons encountered at professional conferences or CLE programs;
- Anyone else a lawyer deals or communicates with in a professional setting or while acting in circumstances in which he or she will be viewed as a lawyer.



# IMPORTANT DISCIPLINARY CASE DECISIONS

- Colorado Supreme Court Opinion in *In the Matter of Betterton-Fike,* 2020 CO 19 (March 9, 2020), dealing with a lawyer's ethical obligation to pay court reporters and Colo. RPC 8.4(d).
- Hearing Board decision in *People v. Abrams*, 19PDJ036, February 12, 2020, dealing with remarks made by a lawyer in the representation of a client found to have exhibited bias on account of a person's sexual orientation, in violation of Colo. RPC 8.4(g). The Hearing Board's order is now on appeal to the Colorado Supreme Court.

# WHAT ELSE IS COMING?

- A complete overhaul of the procedural rules governing attorney discipline and disability proceedings – C.R.C.P. 251.1, et seq. – has been proposed and is being considered by the Court.
- A complete overhaul of the Unauthorized Practice of Law Rules, C.R.C.P. 228 – 240.2, has been proposed and is being considered by the Court.
- These changes would be significant, and are expected to be acted upon late this year or early next year. STAY TUNED!!!
- The proposed changes have been published on the Colorado Supreme Court's website, but the period of public comment has expired.

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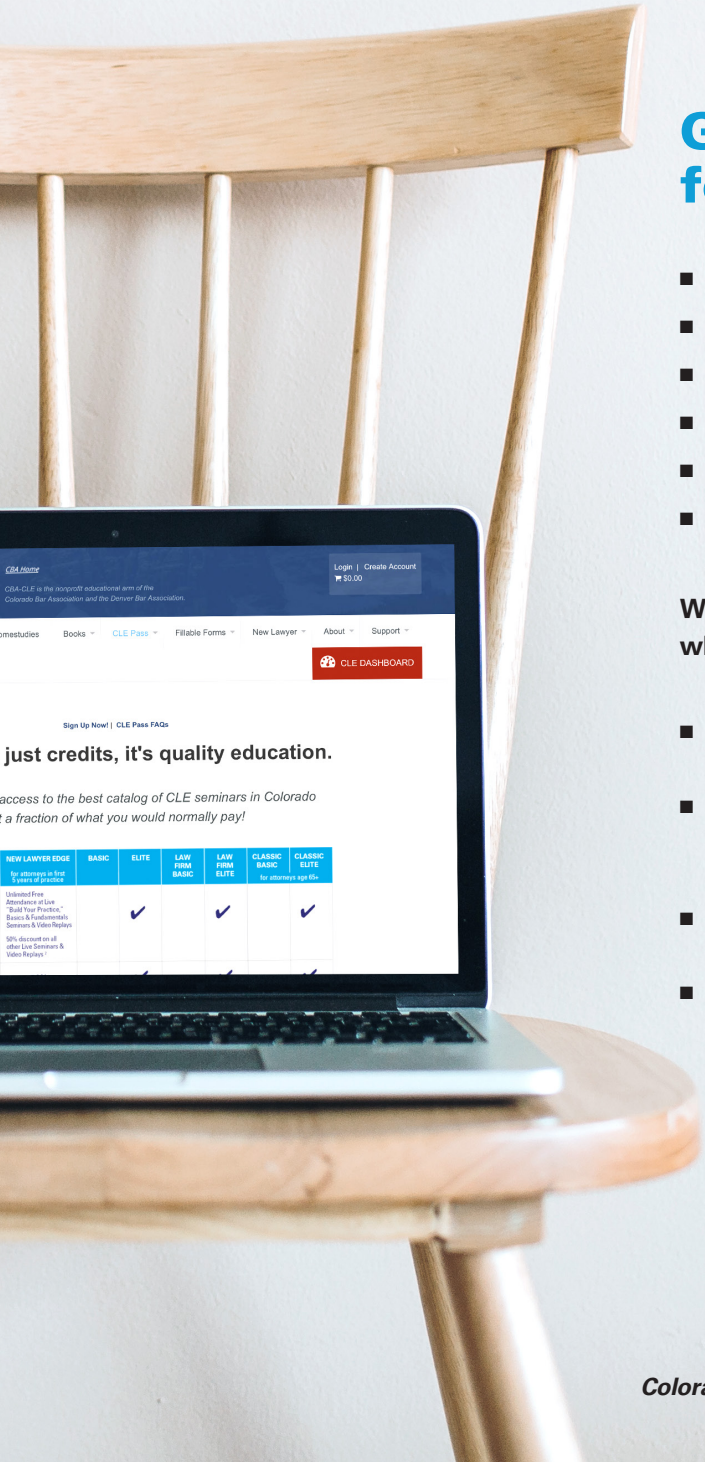


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