

**Colorado Bar Association
Combined Meeting of the
Tax, Business, Real Estate, and Trust and Estates Sections**

ETHICAL CONSIDERATIONS

Developments in 2011

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The Attorney/Client Relationship

Whether an attorney-client relationship exists is a question of fact, and the attorney-client relationship, itself, has a number of issues that must be considered. It is important to note that no formal engagement letter or writing is necessary to create an attorney-client relationship.¹ A putative client's reasonable, subjective belief that he is being represented by an attorney may be sufficient to give rise to the attorney-client relationship and the duties imposed by the Rules of Professional Conduct on the lawyer in such a relationship. In *People v. Bennett*,² The Colorado Supreme Court held:

“An attorney-client relationship is ‘established when it is shown that the client seeks and receives the advice of the lawyer on the legal consequences of the client’s past or contemplated actions.’ The relationship may be inferred from the conduct of the parties. The proper test is a subjective one, and an important factor is whether the client believes that the relationship existed. Further, ‘[t]he attorney-client relationship is an ongoing relationship giving rise to a continuing duty to the client unless and until the client clearly understands, or reasonably should understand, that the relationship is no longer to be depended on.’”
[Citations omitted]

As stated in § 14 of The Restatement of the Law Governing Lawyers, when a putative client manifests to a lawyer the person's interest that the lawyer provide legal services to the

¹ If the attorney expects to be paid for his or her services, Rule 1.5(b) requires that the basis for compensation be communicated to the client in writing, when the attorney has not previously regularly represented the prospective client.

² 810 P.2d 661, 664 (Colo. 1991).

person and the lawyer fails to manifest lack of consent to do so, the lawyer-client relationship may arise.

Potential Liability to Non-Clients.

In 2011, the Colorado Supreme Court considered whether an attorney can be liable to a non-client for the tort of negligent misrepresentation. In *Steele v. Allen*,³ an injured motorist consulted an attorney regarding legal options against the other driver. During the initial consultation, plaintiff claimed that the attorney advised him of an erroneous statute of limitations. The plaintiff (Steele) never retained the attorney and did not allege that an attorney-client relationship was ever established. When Steele sought advice from another attorney, the statute of limitations had expired and he lost his claim. He then sued the attorney for professional negligence and negligent misrepresentation. The district court dismissed the case on motion, the Court of Appeals reversed, relying in part on *Mehaffy, Rider Windholz & Wilson v. Central Bank of Denver, N.A.*,⁴ and the Supreme Court reversed the Court of Appeals, reinstating the trial court's dismissal.⁵ The Supreme Court said that "[i]n Colorado, attorneys 'do not owe a duty of reasonable care to non-clients,' including prospective clients. . . . An attorney may be liable for legal malpractice only if the plaintiff has proven the existence of an attorney-client relationship."⁶ The Supreme Court went on to say that, "[w]here non-clients are concerned, an attorney's liability is generally limited to a narrow set of circumstances in which the attorney has committed fraud or a malicious or tortious act, including negligent misrepresentation." In defining the elements of a claim of negligent misrepresentation, the Supreme Court said:

- (1) one in the course of his or her business, profession or employment;
- (2) makes a misrepresentation of a material fact, without reasonable care;
- (3) for the guidance of others in their business transactions;
- (4) with knowledge that his or her representations will be relied upon by the injured party; and

³ 252 P.3d 476, (Colo, 2011), , 226 P.3d 1120, 2009 WL 399992 (Colo. App. 2009), rev'd. The Supreme Court granted *certiorari* on the following issues:

* Whether the court of appeals erred in imposing liability on attorneys to non-clients for negligent misrepresentation in light of *Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver*, 892 P.2d 230 (Colo. 1995).

* Whether the court of appeals erred in relying on Restatement (Third) of the Law Governing Lawyers section 15 (2000) as a basis for establishing a duty of care on a lawyer to a non-client.

⁴ 892 P.2d 230 (Colo. 1995).

⁶ *Allen v. Steele*, 252 P.3d 476, 482, (Colo., 2011) citing *Mehaffy*, 892 P.2d at 239-240, and C.R.P.C. Rule 1.18.

- (5) the injured party justifiably relied on the misrepresentation to his or her detriment.

The Supreme Court determined that a prospective client consulting an attorney to discuss a possible civil suit does not meet the requirement of clause (3) – that the consultation be for the guidance of the client in their business transactions. “Because the Steeles did not sufficiently plead the ‘business transactions’ element as a matter of law, we do not address whether their complaint satisfied the other elements of negligent misrepresentation.”⁷

Had the *Allen v. Steele* case involved a business transaction and not civil litigation, the result may have been different, and the Court of Appeals’ expansion of the duty of attorneys to non-clients and its expressed *dictum* would be relevant:

We note that the specter of potential liability to an unlimited number of third parties, which concerned the court in *Mehaffy* is alleviated by the requirement in a claim for negligent misrepresentation that the plaintiff show that the defendant supplied false information in the context of a business transaction regarding the representation of a potential client. However, informal statements by an attorney in a social setting would generally not result in a viable claim against the attorney.⁸

The Colorado Supreme Court’s decision in *Allen v. Steele* case highlights two important practice reminders:

- (a) Don’t give legal advice to potential clients regarding business or commercial transactions; and
- (b) If you have an initial consultation and the client does not retain you or you choose not to represent the client, confirm in writing that the potential client never retained you – a “non-engagement letter” contemplated in CRPC Rule 1.16.

⁷ 252 P.3d 485-86

⁸ The Court of Appeals went on to cite Restatement (Second) of Torts §552 cmt. d, and concluded, “Thus, whether statements are made during an initial consultation for legal services or in a casual manner in a social setting may ultimately be determinative of whether a lawyer is liable for negligent misrepresentation.”

Fees and Fee Agreements – Midstream Fee Modification.

Colorado Rule 1.5 governs fees and retainer agreements. Rule 1.5(b) was amended July 1, 2011, to address the situation where the attorney changes fees during the representation – a midstream fee modification.⁹ Under prior Rule 1.5(b), “[e]xcept as provided in a written fee agreement, any material changes to the basis or rate of fee or expenses are subject to Rule 1.8(a)” [business transactions with a client]. Comment 3[A] explained that “material” met any change that would increase the cost of the representation to the client. Revised Rule 1.5(b) now provides:

“Any changes in the basis or rate of the fee or expenses shall also be promptly communicated to the client in writing.”

Rule 1.5(b) no longer requires the application of Rule 1.8(a) and no longer has a materiality threshold.¹⁰

A few weeks after the Colorado Supreme Court effectively changed Colo. RPC 1.5(b) to revert to ABA Model 1.5(b), the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 11-458, “Changing Fee During Representation,” dated August 4, 2011. The opinion begins by warning that modifications of existing fee agreements are suspect and that lawyers are not “free to change existing fee arrangements simply by giving notice to clients” in compliance with Rule 1.5(b). In some respects, however, its conclusions are equally applicable to a lawyer’s initial fee agreement. For example, a modified fee arrangement, like an initial fee agreement, must be reasonable, as required by Rule 1.5(a). Reasonableness is determined based on the circumstances existing at the time of the modification, just as the reasonableness of the initial fee is “typically” determined at the time of the original fee agreement (a doubtful proposition in Colorado in the wake of *Berra, supra*). Lawyers may not unilaterally impose additional charges, and they must comply with Rule 1.8(a) if they acquire an interest or an additional interest in the client’s property to secure payment.

In another respect, however, the opinion imposes on the lawyer a greater burden and gives the client correspondingly greater protection in these circumstances. The lawyer’s obligation under Rule 1.5(b) to promptly communicate to the client any changes in the basis or rate of the fee is “reinforced” by the obligation in Rule 1.4(b) to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”¹¹ Together, Rule 1.5(b) and Rule 1.4(b) mean that an “explanation of the lawyer’s proposed modification of a fee arrangement, including the advice that the client need not agree to pay the modified fee to have the lawyer continue the representation, is necessary to

⁹ This may also include a modification on how the attorney charges the client for expenses.

¹⁰ For a more detailed discussion of the Rule 1.5(b) changes, see Marcy G. Glenn, *Midstream Fee and Expense Modifications Under the Colorado Ethics Rules*, 40 Colo. Law. 79 (Aug. 2011) and ABA Comm. On Ethics and Prof’l Responsibility, Formal Opinion 11-458, (2011), *Changing Fee Arrangements During Representation*.

¹¹ ABA Model Rule 1.5(b).

enable the client to make an informed decision about the client's ability and willingness to pay the modified fee for continued representation.”¹²

One change specifically discussed in ABA Formal Opinion 11-458 is periodic increases in billing rates. Lawyers may increase their hourly rates without negotiating each increase with each client, as long as this practice is communicated clearly to the client at the outset of the representation. The opinion does not require the communication to be in writing, but it places responsibility squarely on the lawyer for showing that the client was adequately informed of the lawyer’s billing practice and consented to it, and that the increase is reasonable under Rule 1.5(a). While hourly rate increases are always subject to reasonableness under Rule 1.5(a), including a provision in the fee agreement that contemplates periodic hourly rate increases would be likely to satisfy the lawyer’s obligations under Rules 1.4(b) and 1.5(b) and remove the increases altogether from the category of “changes to fee arrangements.”

Confidentiality in the Electronic World

The advent of the electronic age has generated a number of new issues to be addressed by the Colorado Rules of Professional Conduct. In 1992, the Ethics Committee published Formal Opinion 90, entitled “*Preservation of Client Confidences In View Of Modern Communications Technology.*”¹³ What was a modern form of communication in 1992 included cordless telephones (which could be intercepted by AM radios), analog cell phones and facsimile transmissions (which could also be intercepted) and voice mail (accidentally left for the wrong person) – by no means modern in the 21st Century. Nevertheless, the summary of Opinion 90 is *apropos* today as it was in 1992:

A lawyer must exercise reasonable care when selecting and using communications devices in order to protect the client’s confidences or secrets from unintended disclosure.

Today our means of communication far surpasses that imagined by all but the most far-sighted 1992 techno-geeks.¹⁴ Today, a Blackberry, iPhone, or Android has far more power, memory and capabilities than the most sophisticated desktop computer in 1992. Microsoft Outlook is the ubiquitous e-mail program that has replaced courier service, messenger service, even the U.S. mail, and even the telephone in a number of circumstances. While providing convenience and utility to attorneys and others who use them, they also provide significant risk. In 1999, the ABA’s Standing Committee on Ethics and Professional Responsibility issued a

¹² ABA Ethics Comm., Formal Op.11-458 (Aug. 4, 2011).

¹³ Ethics Committee, Colorado Bar Association, Formal Opinion 90 (Nov. 14, 1992) available at <http://www.cobar.org/index.cfm/ID/386/subID/1811/CETH/>.

¹⁴ According to *PC Magazine*, IBM introduced the *Thinkpad* in the summer of 1992 and reinvented mobile computing with a 1200 baud internal modem. In February 1992, William Zachmann, a *PC Magazine* columnist noted that Windows 3.0 was attractive, but stated “I still think OS/2 is the odds-on favorite to replace DOS as the dominant desktop operating system,” he wrote. “I see a big change toward OS/2 and away from Windows over the next year.” See <http://www.pcmag.com/article2/0,2817,2124406,00.asp>.

formal opinion providing that unencrypted email sent through the internet was an acceptable means of transmitting confidential client information.¹⁵

Caution With Email Transmissions. Accidental or inadvertent transmissions is a significant issue. The Outlook toolbar automatically completes names of addresses it has seen before or are included in the Outlook contacts file. Type a “be” in the address line, and a number of alternatives will likely be presented as happened for an attorney in Los Angeles who was providing information about a possible settlement of a billion dollar investigation by the FDA. Unfortunately the “be” that Outlook automatically completed for the attorney was not his colleague, but a reporter for the *New York Times*. Without noticing the difference, the attorney pushed “send.” A significant breach of confidentiality.¹⁶ Had the transmission occurred between attorneys, perhaps Rule 4.4(b) (discussed further below) would have saved the day. The reporter was not an attorney, was not bound by the Rules of Professional Conduct, and made use of the information he received. There are a number of safeguards that an attorney can install in Microsoft Outlook to make it less likely to make such a significant error.

PDA's, the personal digital assistant such as the Blackberry, iPhone, or Droid, are also capable of causing problems for attorneys – and the problems can be as significant as the benefits they provide. Among the problems, of course, is 24 hour accessibility for the person carrying the PDA. That is not, however, an ethical problem (except, of course, in a conjugal relationship). The ethical problems result from the information the PDA contains and the ability to send e-mails.

- Many PDA's send e-mails, and lawyers who are very conscious of including a signature, confidentiality notice, and Circular 230 notice in their Outlook files do not do so in their PDA. The message from most PDA's simply says, “sent from my Goodlink server,” “Sent from Don's iPhone,” or “Sent from my Blackberry.” Each of the Blackberry, iPhone, and Droid can be set up to include a signature and disclaimers – and should be. If it is important enough for Outlook, it is important enough to do so in your PDA.
- Forwarding e-mails from your PDA may avoid metadata scrubbing and, therefore, risk violation of the requirements of Formal Opinion 119 discussed below.
- Loss of the PDA may compromise client information. All of us can misplace a PDA as we occasionally do our wallet and keys. Were a PDA to be lost, confidential client e-mail communications and attachments, personal names, addresses, and telephone numbers, and other confidential information could be subject to inadvertent

¹⁵ ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999). In support of the opinion, the Committee considered “current technology and law,” and reasoned that the internet afforded the same expectation of privacy as U.S. mail, commercial courier service, telephone transmissions, facsimile, and other means of communication. See Megan E. McEnroe, *E-mail in Attorney-Client Communications; A Survey of Significant Developments, April 2009-June 2010*, 66 Bus. Law. 191 (Nov. 2010).

¹⁶ Debra C. Weiss, “*Did Lawyer's E-Mail Goof Land \$1B Settlement on NYT's Front Page?*”, posted Feb. 6, 2008 in ABA Journal Law News Now, avail. at http://abajournal.com/news/lawyers_e_mail_goof_lands_on_nyts_front_page/.

disclosure to whomever finds the PDA. This could subject an attorney to sanctions for violation of Rule 1.6, and could mean that the attorney would be forced to admit the loss of information to his or her clients under Opinion 113, *Ethical Duty of Attorney to Disclose Errors to Client*.¹⁷ This can be easily be protected by using a password with the PDA. While inconvenient because we are mostly accustomed to instant gratification, it can be a great protection. Admittedly most people finding a cell phone or PDA will try to return it to the owner rather than retrieve and use confidential information. The PDA owner can simply add a name-address-telephone label on the back of the PDA to aid the person finding the PDA to return it to the rightful owner.

ABA Formal Opinion 11-459. Similar to the concern of misdirected communications addressed above are properly-addressed communications, but which are attorney-client communications to a client using a shared computer. The client may use the computer for another business which has a right of access to emails, or may share the computer with colleagues or family members. An employee may store personal emails on a business laptop, smart phone, or tablet, or may use the employee's business email account or equipment for personal attorney-client communications. Employers may take advantage of that opportunity to obtain an employee's communications from employer resources in various contexts, such as when the employee is engaged in an employment dispute or when the employer is monitoring employee emails as a part of its compliance responsibilities or conducting an internal investigation relating to the employee's work. Even when the employer is not involved in the dispute, the employer's records may be subject to third party subpoena and, because of employer access to these private attorney-client communications, may not be entitled to the attorney-client privilege. Similarly communications between an attorney and client may be compromised when they use a public computer such as found in a library or hotel, or a borrowed computer, smartphone or tablet. Clients may not realize the risk of the loss of attorney-client privilege in communications in this context. ABA Formal Opinion 11-459 (*Duty to Protect the Confidentiality of Email Communications with One's Client*)¹⁸ raises the concern that it may be the lawyer's obligation to advise the client as to the risks associated with the possible loss of the attorney-client privilege in these circumstances. Relying on Model Rule 1.6 (and specifically comments [16] and [17]), Formal Opinion 11-459 specifically states:

Given these risks, a lawyer should ordinarily advise the employee-client about the importance of communicating with the lawyer in a manner that protects the confidentiality of e-mail communications, just as a lawyer should avoid speaking face-to-face with a client about sensitive matters if the conversation might be overheard and should warn the client against discussing their communications with others. In particular, as soon as practical after a client-lawyer relationship is established, a lawyer typically should instruct the employee-client to avoid using a workplace device or system for sensitive or substantive communications, and perhaps for any attorney-client

¹⁷ Ethics Committee, Colorado Bar Association, Formal Opinion 113 (Nov. 19, 2005) available at <http://www.cobar.org/index.cfm/ID/386/subID/7502/CETH/>.

¹⁸ ABA Comm. on Ethics and Prof. Responsibility, Formal Opinion 11-459 (2011).

communications, because even seemingly ministerial communications involving matters such as scheduling can have substantive ramifications.

Footnote 7 to Formal Opinion 11-459 specifically states that “if the lawyer becomes aware that a client is receiving personal e-mail on a workplace computer or other device owned or controlled by the employer, then a duty arises to caution the client not to do so, and if that caution is not heeded, to cease sending messages even to personal e-mail addresses.” Under the Formal Opinion (which has not been adopted in Colorado), it is the lawyer’s obligation to protect the client from his or her own careless acts.

The issues in Formal Opinion 11-459 may be warnings that attorneys may want to consider including in their engagement letters.¹⁹ Where an attorney is representing an employee in transition from one employer to another employer, the need for the transitioning employee to use separate and personal, non-employer-related, electronic communication facilities, is even heightened.

The Continuing Saga of Metadata. Metadata is also a problem created by the digital age. Metadata are hidden files embedded in a document and can include such information as the dates and times that the document was created, modified, and accessed, and the names of the persons who created the document and who last edited the document. Metadata can also include embedded user comments or the edit history of a document, including redlined changes showing additions and deletions of text. Metadata in spreadsheets include the formulas used to arrive at the numbers displayed in a table. Metadata is generally invisible to the casual user, but can

¹⁹ Language such as the following could be included in an engagement letter for a transactional matter undertaken on behalf of a business as a result of Formal Opinion 11-459:

Communications between clients and attorneys are generally privileged and cannot be inquired into by third parties. That privilege may be lost, however, if you disclose the contents of otherwise privileged communications to other people or if you do not take reasonable steps to protect the confidentiality of our communications.

- You should refrain from disclosing to third parties the contents of any of the written or oral communications you have with us.
- If we communicate with you by email, you should never forward our emails to anyone else or to your non-business account.
- If we represent your business, you should only communicate with us, and receive email communications from us, on your business email account, and not on computers that are shared with other users (such as public computers at a library or hotel business center, or shared home computers).
- Do not store our attorney-client communications relating to your business matters on any computer to which others have access.
- Do not access any documents from us (such as Word documents, Excel spreadsheets, or PDF documents) on any shared computer.

Any of the foregoing which results in third parties potentially having access to confidential attorney-client communications could, if proven, lead a court to a finding that you have waived the confidentiality of and the privileged associated with our communications as your business’ attorneys.

easily be retrieved if sought. Formal Opinion 119 (*Disclosure, Review, and Use of Metadata*)²⁰ addresses the ethical obligations of the “sending lawyer” who transmits electronic documents containing metadata to a third party, including the lawyer for an adverse party. Opinion 119 also addresses the ethical obligations of the “receiving lawyer” who receives electronic documents containing metadata from a third party, including the lawyer for an adverse party or a non-lawyer third party.

According to Opinion 119, any lawyer (or staff person) who transmits electronic documents or files has a duty to use reasonable care to guard against the disclosure of metadata containing confidential information. The definition of reasonable care will depend on the facts and circumstances of each case. Opinion 119 makes it clear that the duty under Rule 1.1 to provide competent representation (as required by Rule 1.1) requires each lawyer sending electronic information “to ensure that he or she is reasonably informed about the types of metadata that may be included in an electronic document or file and the steps that can be taken to remove metadata if necessary.” Within a law firm, a supervising lawyer has a duty to ensure that appropriate systems are in place so that the supervising lawyer, any subordinate lawyers, and any non-lawyer assistants are able to control the transmission of metadata.

Any lawyer who receives electronic documents or files generally may search for and review metadata. However, if the lawyer receiving the electronic files “knows or reasonably should know that the metadata” may contain or constitute confidential information, the receiving lawyer should assume that the confidential information was transmitted inadvertently, unless he or she knows that confidentiality has been waived. When in receipt of confidential information, Rule 4.4(b) and Formal Opinion 119 makes it clear that the lawyer receiving the confidential information must promptly notify the sending lawyer and take certain other actions.²¹

The good news is that, if “before examining metadata in an electronic document or file, the [r]eceiving [l]awyer receives notice from the sender that Confidential Information was inadvertently included in metadata in that electronic document or file, the [r]eceiving [l]awyer must not examine the metadata and must abide by the sender’s instructions regarding the disposition of the metadata.” This may be accomplished by a general warning, such as the following “confidential information” warning attached to many e-mails (emphasis provided):

CONFIDENTIALITY NOTICE: This message, the attachments, *and any metadata contained in any attachments* may be confidential and may be privileged. *Do not review any metadata contained herein or in any attachments.* If you believe that this email has been sent to you in error, please reply to the sender that you received the message in error; then please delete this e-mail.

Where an attorney has specific knowledge that confidential metadata (or other confidential information) has been sent, the sending attorney should immediately send notification to the recipients.

²⁰ Ethics Committee, Colorado Bar Association, Formal Opinion 119 (May 17, 2008) available at <http://www.cobar.org/index.cfm/ID/386/subID/23789/CETH/>.

²¹ See also Ethics Committee, Colorado Bar Association, Formal Opinion 108, “*Inadvertent Disclosure of Privileged or Confidential Documents*” (May 20, 2000), avail. at <http://www.cobar.org/index.cfm/ID/386/subID/1830/CETH/>.

Rule 1.13 and Rule 1.6 – Representation of Organizations and Confidentiality

Colorado substantially revised its rules regarding confidentiality (Rule 1.6) and representation of entities (Rule 1.13) effective January 1, 2008. These rules are similar to the rules proposed by the Kutak Commission in 1982 which were rejected by the ABA's House of Delegates when considering revisions to the Model Rules of Professional Conduct. Similar proposals were rejected by the House in 1991 and again when proposed by ABA's Ethics 2000 Commission in August 2001.²² Thereafter significant events in the corporate governance landscape occurred. These events were named Enron, Worldcom, HealthSouth, Tyco CEO Dennis Kozlowski, and too many others. Senators and the public were shouting "where were the lawyers?"²³ As a result a committee of the ABA reconsidered the proposals received a year previously from the Ethics 2000 Commission, proposed them again to the ABA's House of Delegates, which adopted them in August 2002.

Rule 1.13 makes it clear that where the client is an entity, the attorney must always be aware that the entity is a collection of individuals. As stated in Rule 1.13 (both before and after amendment), where the entity is the client, the attorney for an entity "owes allegiance to the organization itself and not [to] its individual stockholders, directors, officers, employees, representatives or other persons connected with the entity." During the entity's operations over a period of time, the attorney will unquestionably develop close relationships with the individuals associated with the entity with whom the attorney is working. That relationship, no matter how friendly, cannot affect the attorney's representation of the entity or further corporate scandals are likely to occur.

One of the provisions of the Sarbanes-Oxley Act was § 307 which required the SEC to "issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers."²⁴ The SEC adopted its attorney conduct rules effective in August 2003.²⁵ Most financing and merger and acquisition transactions involve the offer, purchase, or sale of securities and, consequently, the SEC's attorney conduct rules will

²² See Stephen Gillers and Roy D. Simon, *Regulation of Lawyers: Statutes and Standards* 69-71 (Aspen Publishers 2005 ed.) cited in Association of the Bar of the City of New York *Report of the Task Force on the Lawyer's Role in Corporate Governance* at 77 (November 2006) avail. at http://www.abcnyc.org/pdf/report/CORPORATE_GVERNANCE06.pdf.

²³ See, e.g., Remarks of Senator John Edwards, 148 Cong. Rec. S6552 (daily ed. July 10, 2002) and Remarks of Senator Michael Enzi, 148 Cong. Rec. S6576 (daily ed. July 10, 2002). These remarks were made during the debate surrounding the adoption of the Sarbanes-Oxley Act of 2002, and specifically § 307 thereof.

²⁴ 15 U.S.C. § 7245 (2002).

²⁵ 17 C.F.R. § 205.1 (2003). Note that the term "appearing and practicing before the SEC" is interpreted very broadly and includes attorneys representing private issuers in transactions involving the issuance or transfer of securities. See Herrick K. Lidstone, Jr., *THE SECURITIES LAW DESKBOOK* (Bradford Publishing Co. 2007) at § 13.6 and § 13.7; Herrick K. Lidstone, Jr., "Sarbanes-Oxley Act of 2002: Impact on Private Companies and their Attorneys," 33 *COLO. LAW.* 73 (July 2004).

likely apply. Even where the SEC's attorney conduct rules do not apply, Rule 1.13 imposes obligations on attorneys representing entities.

Under Colorado Rule 1.13, where counsel to an entity knows that a person associated with that entity:

1. is engaged, intends to act or refuses to act in a manner;
2. related to the representation;
3. that is a violation of a legal obligation to the entity or a violation of law which might reasonably be imputed to the entity; and
4. is likely to result in substantial injury to the entity,

the attorney must proceed as reasonably necessary in the best interests of the entity, giving consideration to:

- a) the seriousness of the violation and its consequences;
- b) the scope and nature of the lawyer's representation;
- c) the responsibility and the motivation of the person involved; and
- d) other relevant considerations.

Where the attorney has concerns in this regard, there are many actions the attorney can take to fulfill his or her legal duties. These include:

- Asking for reconsideration of the matter;
- Seeking a separate legal opinion; or
- Referring the matter to a higher authority at the entity/

Where the entity continues to act in the objectionable manner which the lawyer determines is a violation of law and is likely to result in substantial injury to the entity, the lawyer may resign.²⁶ Under 2008 changes, attorney's duty to report within the organization continues:

- If the lawyer reasonably believes that he was discharged by the client because of his compliance with Rule 1.13, or

²⁶ The duties of attorneys representing entities that file reports under the Securities Exchange Act of 1934 or which have filed registration statements under the Securities Act of 1933 have enhanced duties imposed by §307 of the Sarbanes-Oxley Act of 2002 and the rules the SEC has adopted thereunder. See Herrick K. Lidstone, Jr., *Am I My Brother's Keeper? Redefining the Attorney-Client Relationship*, 32 COLO. LAW. 11 (Apr. 2003).

- If the lawyer withdrew under circumstances that required the lawyer to report corporate wrongdoing.

Colorado Rule 1.13(c) permits the lawyer to reveal information related to the representation of the entity to third parties irrespective of whether such disclosure would violate Rule 1.6. Disclosure under Rule 1.13(c) is only permitted when, in the lawyer's judgment, disclosure is necessary to prevent substantial injury to the organization. Note that Rule 1.13 focuses the emphasis of the disclosure on injury to the organization.

Rule 1.6(b) permits (but does not require) disclosure by an attorney of the confidences of a client, when the attorney believes it necessary:

- To prevent reasonably certain death or substantial bodily harm;
- To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another **and** in furtherance of which the client used or is using the lawyer's services; or
- To prevent, mitigate or rectify substantial injury to the financial interests or property of another" resulting from a crime or fraud "in furtherance of which the client has used the lawyer's services."

The focus of Rule 1.6(b) is not the attorney's client. The focus of Rule 1.6(b) is to protect third parties. Notably the rules do not require attorney disclosure in the circumstances outlined in the rule; disclosure is instead permissible. Where the attorney becomes aware of one of the matters that may be subject to disclosure under Rule 1.6(b), the attorney's interests may diverge from the client as the attorney considers how to address the issues to his or her client and whether to make disclosure under Rule 1.6. One of the concerns an attorney in such a position may have is potential aiding and abetting liability if the attorney is publicly silent in the face of such knowledge.²⁷ Even though the rules state that violation "should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached,"²⁸ it is likely that plaintiffs will argue that the rules reflect the standard of care in the community. Recently the Colorado Court of Appeals determined that attorneys could be held liable for aiding and abetting the breach of fiduciary duties. The Colorado Supreme Court overturned the appellate court's decision on other grounds, but specifically left open the issue of whether an attorney can be held liable for an aiding and abetting the breach of

²⁷ Consider the case where an attorney finds out about events in which a client participated which ultimately prove to have been fraudulent (although the attorney and the client may disagree with that characterization at the time). The attorney considers his or her Rule 1.6 obligations and determines not to make the permissive disclosure but simply resigns. Even though that failure to make permissive disclosure cannot be subject to a disciplinary proceeding, might it be sufficient for the attorney to be held responsible for aiding and abetting the client's fraud?

²⁸ Colo. Rules of Prof'l Conduct Preamble and Scope, Comment 20.

fiduciary duties.²⁹ Regardless of civil liability, however, there is clear precedent that a lawyer may be disciplined for aiding and abetting a client's financial crimes.³⁰

The 2008 amendments to Rules 1.13 and 1.6 make representation of organizations more difficult. When the impact of these new rules is fully understood, individuals associated with organizations may be less forthcoming with their legal counsel, concerned about the attorney's duties to make disclosure, even when voluntary.

In 2003 the SEC proposed a requirement that attorneys, in circumstances similar to new Rule 1.6(b), make a 'noisy withdrawal' when the situation is such that the attorney can no longer represent the client.³¹ As described above,³² following the disclosure of the Ponzi scheme operated by Allen Stanford, his former attorneys effected a noisy withdrawal, advising the SEC in writing that:

"I disaffirm all prior oral and written representations made by me and my associates to the SEC staff regarding Stanford Financial Group and its affiliates."

The Department of Justice revised its guidelines for deciding when to seek an indictment of a corporation following the corporate scandals of the early 2000's, culminating in the McNulty Memorandum,³³ which became effective in 2006. The McNulty Memorandum provided that waivers of attorney-client privilege would be viewed favorably by prosecutors, and a failure to waive corporate attorney-client privilege would be viewed negatively in making decisions whether to charge a corporation or in determining the terms of a settlement.

In 2008 (before the economic crisis that hit in September 2008), the pendulum swung back toward the protection of attorney-client privilege for corporations. After significant

²⁹ *Alexander v. Anstine*, 152 P.3d 497 (Colo. 2007).

³⁰ *In re DeRose*, 55 P.3d 126 (Colo. 2002) (Attorney was convicted of a felony charge of aiding and abetting when, on behalf of his clients, he engaged in eleven separate financial transactions structured to avoid federal financial reporting requirements. Through his criminal conduct, the attorney violated C.R.C.P. 251.1(b) and Rule 8.4(b), and was therefore disbarred.)

³¹ The Commission proposed rules under § 307 of the Sarbanes-Oxley Act of 2002 on November 6, 2002. SEC Rel. No. 33-8150, 2002 WL 31627090 (Nov. 21, 2002) and adopted final rules on January 29, 2003. SEC Rel. No. 33-8185, 2003 WL 193527 (Jan. 29, 2003). Although the rules as proposed included the provision for a "noisy withdrawal," the Commission deferred consideration of those rules. SEC Rel. No. 33-8186, 2003 CL 203262 (Jan. 29, 2003). The Commission itself acknowledges that the "noisy withdrawal" proposal went beyond the requirements of Sarbanes-Oxley. Both Senators Edwards and Enzi made it clear in their remarks that § 307 "would not require the attorneys to report violations to the [Commission], only to corporate legal counsel or the CEO, and ultimately to the board of directors." 148 Cong. Rec. S6555 (Daily ed., July 10, 2002). Nevertheless, the proposed rules have not been withdrawn as of August 1, 2011. See Herrick K. Lidstone, Jr. "Am I My Brother's Keeper? Redefining the Attorney-Client Relationship," 32 COLO. LAW. at 11 (April 2003).

³² See text at notes 23-26.

³³ Memorandum dated December 12, 2006, from Paul J. McNulty, Deputy Attorney General, U.S. Department of Justice, available at www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf.

Congressional pressure, the Justice Department determined it may have gone too far in essentially forcing corporations to waive attorney-client privilege or work-product as a condition to cooperation credit. In a memo by Deputy Attorney General Mark R. Filip,³⁴ the Department announced significant changes in its policies defining cooperation in the Department's corporate charging policy:

- Credit for cooperation will not depend on whether a corporation has waived attorney-client privilege or work product. Prosecutors will provide credit based on the corporation's disclosure of relevant facts.
- Prosecutors are forbidden from asking for non-factual attorney-client privileged communications and work-product, such as legal advice.
- In assessing credit for cooperation, prosecutors may not consider whether the corporation advanced or paid attorneys' fees for employees, officers, or directors unless the payment "would rise to the level of criminal obstruction of justice" which would not generally be the case.
- In assessing credit for cooperation, prosecutors may not consider whether the corporation disciplined or terminated employees considered to be at fault for the alleged violations.

Deputy Attorney General Filip added that, "[n]o corporation is obligated to cooperate or to seek cooperation credit by disclosing information to the government. Refusal by a corporation to cooperate, just like refusal by an individual to cooperate, is not evidence of guilt... It simply means that the corporation will not be entitled to mitigating credit for cooperation...." These principles are now included in the United States Attorneys' Manual at Chapter 9-28.000. In step with the Justice Department, the SEC revised its Enforcement Manual in October 2008. The new SEC guidance directs staff to consider that "[a] party's decision to assert a legitimate privilege will not negatively affect their claim to credit for cooperation."³⁵ These moves by federal enforcement agencies may eventually lead to further changes in the Rules of Professional Conduct to strengthen the attorney-client privilege which was weakened by the 2008 version of the Rules.

Rule 2.3 – Evaluation for Use by Third Parties (e.g., Legal Opinions)³⁶

Colorado Rule 2.3 has generally been interpreted to allow attorneys for clients to issue legal opinions to third parties in connection with the closing of a transaction or in other circumstances. A legal opinion places the lawyer in the odd position of issuing legal advice to a

³⁴ Aug. 28, 2008, avail. at www.justice.gov/dag/readingroom/dag-memo-08282008.pdf.

³⁵ SEC Enforcement Manual, §4.3, revised August 2, 2011, avail. at www.sec.gov/divisions/enforce/enforcementmanual.pdf.

³⁶ For a discussion of Colorado legal opinion practice within the national scope, see Herrick K. Lidstone, Jr. and Colleen R. Belak, *Danger Ahead! Legal Opinions for Colorado Lawyers*, 38 COLO. LAW. 25 (Apr. 2009).

person not his or her client and generally disclosing confidences about the client. The principal change between the current Colorado rule and the new rule is that, under new Rule 2.3(b), the client's "informed consent" is required only when the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely. As described in Paragraph [5] of the Comment to this rule:

When a client requests a lawyer to provide an opinion for the benefit of third parties and the opinion is consistent with the client's interests, there is no good reason to require the client's consent.

Rendering a legal opinion to third parties also invokes other Rules of Professional Conduct:

- The lawyer must be competent to render the opinion (Rule 1.1), which includes an understanding of customary practice as defined by the literature and elsewhere;³⁷
- The lawyer must preserve the confidentiality of client information (Rule 1.6);
- The lawyer's conduct must conform to the requirements of the law and must be characterized by independent judgment and truthfulness (Rules 1.2, 2.1 and 4.1); and
- The lawyer must avoid conflicts of interest (Rules 1.7 and 1.9).

8.11 Rule 4.4 – Respect for Rights of Third Persons

Colorado Rule 4.4(b) and associated Paragraphs [2] and [3] of its comment wade into one of the more vexing problems facing lawyers and the courts. Modern technologies, such as email, facilitate both the communication of information and the erroneous transmission of confidential information to those who should not have access to that information. Inevitably, the question arises as to the lawyer's ethical and legal duties upon receipt of information that was transmitted by mistake to the lawyer.

Colorado Rule 4.4(b) addresses this issue by requiring prompt notice to the sender if a lawyer receives a document which the lawyer knows was inadvertently sent relating to the representation of the lawyer's client. Model Rule 4.4 imposes no further ethical duties.

³⁷ This literature is easily available and much of it can be found in the ABA's legal opinion resource center. <http://apps.americanbar.org/buslaw/tribar>. The website of the American College of Real Estate Lawyers (www.acrel.org) includes valuable information for persons writing legal opinions in real estate transactions. Of these, the ABA's "Guidelines for the Preparation of Legal Opinions," 57 Bus. Law. 875 (2002) and "Legal Opinion Principles," 53 Bus. Law. 831 (1998), are among the most significant, as are the reports prepared by the TriBar Opinion Committee. There are also numerous treatises available, including contributions from a number of Colorado lawyers in Holderness and Wunnicke, *Legal Opinion Letters Form Book* (Aspen Publishers, 2nd Ed. 2003). Chapter 1B of the 2008 Supplement is a primer for lawyers not experienced in opinion practice. Donald W. Glazer, et al., *Glazer and Fitzgibbon on Legal Opinions: Drafting, Interpreting, and Supporting Closing Opinions in business Transactions* (Aspen Publishers, 3rd ed. 2008) is another valuable resource for legal opinion preparers.

However, a majority of the Standing Committee believed that the ABA had not addressed this problem satisfactorily.³⁸

The Colorado rule incorporates the requirements of Formal Opinion 108 that when a lawyer actually knows of the inadvertence of the disclosure before examining the privileged or confidential documents, including when the sender notifies the recipient of the erroneous transmission, the lawyer should not examine the documents and must abide by the sending lawyer's instructions as to their disposition. The Colorado Rule added section (c) to the Model Rules which reads as follows:

(c) Unless otherwise permitted by court order, a lawyer who receives a document relating to the representation of the lawyer's client and who, before reviewing the document, receives notice from the sender that the document was inadvertently sent, shall not examine the document and shall abide by the sender's instructions as to its disposition.

Formal Opinion 119, *Disclosure, Review, and Use of Metadata*,³⁹ addresses the ethical obligations of the "sending lawyer" who transmits electronic documents containing metadata to a third party, including the lawyer for an adverse party. It also addresses the ethical obligations of the lawyer who receives electronic documents that contain confidential metadata. As noted, Rule 4.4(b) makes it clear that the lawyer receiving the confidential information must promptly notify the sending lawyer.⁴⁰ Once the receiving lawyer has notified the sending lawyer, the lawyers may, as a matter of professionalism, discuss whether a waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the sending lawyer or the receiving lawyer may seek a determination from a court or other tribunal as to the proper disposition of the electronic documents or files, based on the substantive law of waiver. Where a lawyer has sent metadata that contains confidential information, however, the provisions of Opinion 113 may require the lawyer to admit the mistaken transmission to his or her client.⁴¹

³⁸ This comment by the Colorado Standing Committee was made before the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 11-460 "*Duty when Lawyer Receives Copies of a Third Party's E-mail Communications with Counsel*" (2011).

³⁹ Ethics Committee, Colorado Bar Association, Formal Opinion 119 (May 17, 2008) avail. at <http://www.cobar.org/index.cfm/ID/386/subID/789/CETH//>.

⁴⁰ See also Ethics Committee, Colorado Bar Association, Formal Opinion 108, "*Inadvertent Disclosure of Privileged or Confidential Documents*" (May 20, 2000), avail. at <http://www.cobar.org/index.cfm/ID/386/subID/1830/CETH//>.

⁴¹ Charles F. Luce, *What's the Matter With Metadata*, 36 COLO. LAW. 113 (Nov. 2007). Mr. Luce also concluded that metadata mining (adverse counsel retrieving and using metadata from sent documents) is permissible under the Colorado Rules of Professional Conduct. The District of Columbia Bar Association Legal Ethics Committee addressed this issue in its Ethics Opinion 341. The Committee noted that lawyers who send electronic documents outside of discovery or subpoena have a duty under Rule 1.6 to take reasonable steps to maintain the confidentiality of the documents, including removing potentially harmful metadata before sending the documents. This requires that the lawyers understand the software they use or they have employees who can safeguard against unintended disclosures. However, there is also a duty upon receiving lawyers who actually know that a sender has inadvertently included metadata along with a document. The opinion held that the receiving lawyer should not

Record-Keeping

An attorney's obligation to retain records of the client is a matter of contract as well as Rule 1.16A.⁴² The contractual right is usually set forth in the engagement letter. Rule 1.16A provides that an attorney who has the contractual right to destroy files must provide at least 30 days' notice to the client. Where there is no contractual right, a lawyer has the right after ten years to destroy a client's files without notice "provided there are no pending or threatened legal proceedings known to the lawyer that related to the matter." This ten year period is not applicable if the lawyer has agreed to a longer period, and there are additional exceptions for files related to criminal matters. Where the attorney has represented the client in a matter that may be subject to a statute of limitations (such as tax or estate representation), competence in the representation under Rule 1.1 may require the attorney to keep the client's records for a substantially longer period of time unless the client assumes custody of the records.

Importantly Rule 1.16A provides that a lawyer may comply with his/her record retention requirements by maintaining a client's files in, or converting the files to, electronic form provided that the lawyer is capable of producing a paper version if necessary.

review the metadata without contacting the sending lawyer and abiding by the sender's instruction. This gives the sender the opportunity to determine if the metadata includes work product or confidential information of the sender's client. In all other circumstances, however, the receiving lawyer is free to review the metadata contained in electronic files provided by an adversary.

⁴² Effective February 10, 2011.

As importantly, though, is the attorney's obligation to surrender records to the client upon termination of the representation. This is addressed, at least in part, in Formal Opinion 104.⁴³ Formal Opinion 104 does not address the circumstance where, at the termination of the representation, the attorney is owed fees by the client. The right of an attorney to assert a lien against a client's papers is addressed in Formal Opinion 82.⁴⁴

Colo. RPC 1.16(d) states (*emphasis added*):

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, *surrendering papers and property to which the client is entitled* and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law.

Except in the non-payment/lien case, there are two primary areas in which the lawyer properly retains papers and documents which do not constitute papers and property to which the client is entitled.

One includes documents, used by the attorney to prepare initial documents for the client, in which a third party, *e.g.*, another client, has a right to non-disclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the present client. However, the product drafted by the lawyer may not be withheld.

The second area involves those documents that would be considered personal attorney-work product, and not papers and property to which the client is entitled. Certain documents may be withheld: for example, internal memoranda concerning the client file, conflicts checks, personnel assignments, and lawyer notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney-work product that is not needed to protect the client's interests, and does not constitute papers and property to which the client is entitled.

⁴³ Ethics Committee, Colorado Bar Association, Formal Opinion 104 (Apr. 17, 1999) *Surrender of Papers to the Client Upon Termination of the Representation*, avail. at <http://www.cobar.org/index.cfm/ID/386/subID/1825/CETH/>.

⁴⁴ Ethics Committee, Colorado Bar Association, Formal Opinion *** *Assertion of Attorney's Retaining Lien on Client's Papers*, (Apr. 15, 1989, addendum issued, 1995) avail. at <http://www.cobar.org/index.cfm/ID/386/subID/1803/CETH/>.