



**Arapahoe County Bar Association  
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**CONFIDENTIALITY IN THE ELECTRONIC WORLD**

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The practice of law, whether in an adversarial setting or in an environment of planning and negotiating, is tied to ethical conduct. A lawyer, even in his or her personal life, remains subject to the Rules of Professional Conduct. Even more so, as seen in recent years, financial markets, capital raising, corporate governance, and many other aspects of our nation's economic performance are directly or indirectly in the hands of lawyers. Lawyers have unfortunately been at the forefront of too many news stories:

On May 3, 2010, G. David Gordon, an Oklahoma attorney, was convicted on 21 counts of securities fraud and related charges including money laundering, wire fraud, and one count of providing false information to the SEC. The charges were related to a pump-and-dump scheme operated between 2004 and 2006.<sup>1</sup>

Joseph Collins, formerly a partner with Mayer Brown & Rove partner, was found guilty on July 10, 2009 after a nine week trial over his role aiding and abetting the \$2.4 billion Refco Inc. fraud. After the January 2010 sentencing, U.S. Attorney Preet Bharara said that Collins "was more than a corrupt attorney who turned a blind eye to his client's actions. He played an instrumental role in Refco's staggering fraud and epic collapse. In his position both as Refco's long-term counsel and within the legal community, Collins was uniquely placed to lend his hand to truth or treachery."<sup>2</sup>

On January 27, 2010, Scott Rothstein, formerly a high-profile south Florida attorney, pleaded guilty to five criminal counts for orchestrating a \$1.2 billion Ponzi scheme that induced investors to buy interests in non-existing civil case settlement awards. In addition to pleading guilty, Mr. Rothstein agreed to forfeit \$1.2 billion, including real

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<sup>1</sup> *U.S. v. Gordon*, N.D.Ok, 10-cr-Ñ.A. (5/3/2010), reported at 42 Sec. Reg. & L. Rep. (BNA) 911 (5/10/2010).

<sup>2</sup> *United States v. Collins*, No. 07-CR-1170 (SDNY 1-14-2010); see article at 42 Sec. Reg. & L. Rep. (BNA) 186 (2-1-2010).

estate, boats, luxury cars, sports memorabilia, business interests, bank accounts and more.<sup>3</sup>

Steven Eugene “Gene” Cauley, an Arkansas lawyer was named one of the nation’s top young attorneys in 2005 by the *National Law Journal*. In June 2009 he pleaded guilty to stealing \$9.3 million from an escrow fund containing proceeds from a class-action settlement and, on November 23, 2009, he was sentenced to 86 months in prison with 3 years’ supervised release after prison. Cauley also was ordered to pay an additional \$8.8 million in restitution. He had already paid \$50,000 in restitution. As an explanation to the judge, Cauley said: “I built several businesses. I went through a cash-flow crisis. Rather than swallow my pride and lay off dozens of people, rather than embarrassing myself, this is what I did.”<sup>4</sup>

December 11, 2008: “Lawyer Charged With Huge Fraud Is Denied Bail” – about Harvard and Yale-educated Marc Dreier, head of a 280 lawyer firm, Dreier LLP, who allegedly “used guile, a box of cell phones and a series of phony Web sites and e-mail addresses to steal more than \$380 million” from hedge funds and other investors.<sup>5</sup> On May 11, 2009, Dreier pleaded guilty to eight charges in the [United States District Court for the Southern District of New York](#),<sup>6</sup> including one count of conspiracy to commit [securities fraud](#) and [wire fraud](#), one count of [money laundering](#), one count of securities fraud and five counts of wire fraud. On July 13, 2009, Dreier was sentenced to 20 years in federal prison,<sup>7</sup> was disbarred in New York, and suspended from appearing or practicing before the SEC under Rule 102(e).<sup>8</sup> In a related case reported by [www.law.com](#), Robert Miller, a former SEC enforcement attorney, pleaded guilty for helping Dreier to sell a \$44.7 million note to two investment funds. He claimed that

<sup>3</sup> *U.S. v. Rothstein*, No. 0:09-CR-60331-JIC (SDFla 1/27/2010). See article at 42 SEC. REG. & L. REP. (BNA) 190 (2-1-2010).

<sup>4</sup> Bloomberg.com, November 23, 2009, available at <http://www.bloomberg.com/apps/news?pid=20601127&sid=acQHa52.tizo>.

<sup>5</sup> <http://www.nytimes.com/2008/12/12/nyregion/12lawyer.html?scp=1&sq=dreier&st=nyt>.

<sup>6</sup> <http://www.usdoj.gov/usao/nys/pressreleases/May09/Dreier.%20Marc%20Plea%20PR.pdf>. At his plea hearing on May 11, 2009, Judge Rakoff said, “He has disgraced the honorable profession of law.” <http://www.nytimes.com/2009/05/12/nyregion/12dreier.html?em>.

<sup>7</sup> <http://www.nytimes.com/2009/07/14/nyregion/14dreier.html>.

<sup>8</sup> Rel. 34-62002 (April 29, 2010).

Dreier paid him \$100,000 for phone sessions in which he impersonated a representative of a Canadian pension fund and then an Icelandic hedge fund.<sup>9</sup>

June 17, 2008: “The best-known shareholder law firm in the country agreed on Monday to pay \$75 million to dodge a criminal trial, ending a seven-year investigation that tarnished the profession’s image.”<sup>10</sup> As the article goes on to say, “One of its most famous partners, William S. Lerach, is in prison, and the other, Melvyn I. Weiss, is headed there under previously announced guilty pleas.”

Colorado amended its rules of professional conduct effective as of January 1, 2008 to address a number of problems that were perceived under the former rules, with the most substantial and far-reaching amendments found in Rule 1.6 – confidentiality, and Rule 1.13 – representing business organizations. These rules are not only disciplinary in nature, although without question attorneys who violate the rules can be disciplined. Attorneys can use these rules as a protective mechanism, too. As reported in the *Wall Street Journal* on February 19, 2009 and discussed in the *Law Blog*,<sup>11</sup> following the disclosure of the Ponzi scheme operated by Allen Stanford, his former attorneys effected a noisy withdrawal – something that would not have been permitted under the pre-January 1, 2008 Rules of Professional Conduct as in effect in Colorado. In their withdrawal on February 14, 2009, Thomas Sjoblom of the Proskauer Rose law firm advised 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.”<sup>12</sup>

In making the noisy withdrawal, Mr. Sjoblom referenced SEC Rule 205.3<sup>13</sup> that had been adopted by the SEC under the mandate of § 307 of the Sarbanes-Oxley Act of 2002.<sup>14</sup> Such a noisy withdrawal is also contemplated under Rule 1.13 and is not inconsistent with Rule 1.6.

<sup>9</sup> <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202435311372>, Nov. 10, 2009 (© ALM Media Properties, LLC). According to his plea agreement, Mr. Miller recognized that he was liable for up to 25 years in prison as a result of his plea. *See, also*, 41 Sec. Reg. & L. Rep. (BNA) 2091 (11-16-2009).

<sup>10</sup> <http://www.nytimes.com/2008/06/17/business/17legal.html?scp=2&sq=lerach&st=nyt>.

<sup>11</sup> *See* discussion in The Conglomerate, <http://www.theconglomerate.org/2009/02/page/2/>, a blog published by professors associated with the University of Illinois School of Law.

<sup>12</sup> For an interesting discussion of the fall-out from this action by the former chief investment officer for Steinfeld Financial Group, Lauren Pendegast-Holt, *see* “*Corporate Miranda*,” 19 *Business Law Today* (ABA) at 51 (Sept. - Oct. 2009). Ms. Holt filed a \$20,000,000 legal malpractice claim against Sjoblom and the Proskauer firm.

<sup>13</sup> 17 C.F.R. §205.3.

<sup>14</sup> Pub. L. No. 107-204, 116 Stat. 745, codified at 15 U.S.C. § 7245.

Any attorney assisting his or her client in business transactions, in litigation, or in day-to-day representation must consider whether their actions are consistent with the highest standards expected of officers of the court under the Colorado Rules of Professional Conduct. Unfortunately, this also requires some distrust of our clients, but also continuing awareness of our own actions, both within and outside the practice of law.

### **The Attorney/Client Relationship**

Many of the Rules of Professional Conduct, and especially the confidentiality requirements of Rule 1.6, depend on whether there is an attorney-client relationship. If there is no attorney-client relationship, then the duty of confidentiality does not arise under the Rules. If there is an attorney-client relationship, a “lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.”<sup>15</sup>

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. The client must be identified, and the identification of the client has certain complexities when an attorney is dealing with an organization, or individuals who want to form an entity. There are times when a person other than the client will be paying fees on behalf of the client, and those issues must be addressed. All attorneys owe their clients a specific fiduciary duty of care, and this duty even includes prospective clients in certain circumstances. Finally, attorneys must be aware of the proper procedure for declining or terminating representation. These topics are addressed individually below.

***The Attorney-Client Relationship, In General.*** First, it is important to note that no formal engagement letter or writing is necessary to create an attorney-client relationship.<sup>16</sup> 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*,<sup>17</sup> The Colorado Supreme Court held:

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<sup>15</sup> Rule 1.6. Rule 1.0(e) defines “informed consent” as follows: “‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

<sup>16</sup> 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.

<sup>17</sup> 810 P.2d 661 (Colo. 1991).

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

**Potential Liability to Non-Clients.** This goes even further in the opinion of one panel of the Colorado court of appeals, applying the tort of negligent misrepresentation in a case where there was admittedly no attorney-client relationship. In *Steele v. Allen*,<sup>18</sup> 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, but the Court of Appeals reversed, relying in part on *Mehaffy, Rider Windholz & Wilson v. Central Bank of Denver, N.A.*,<sup>19</sup> affirming a Court of Appeals ruling finding that attorneys could be liable to non-clients for negligent misrepresentation.<sup>20</sup> The Court of Appeals went on to say:

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<sup>18</sup> 2009 WL 399992 (Colo. App. 2009), *cert granted* Mar. 22, 2010 (09SC263, 2010 WL 1011037) 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.

<sup>19</sup> 892 P.2d 230 (Colo. 1995); the Court of Appeals decision is at 865 P.2d 862 (Colo. App. 1993).

<sup>20</sup> 865 P.2d at 865. The Court of Appeals also cited Section 15 of the Restatement (Third) of the Law Governing Lawyers and Colo. R.P.C. 1.18 which impose certain obligations on lawyers deal with prospective clients. As stated in a commentary by Anthony Davis, the court could have reached a similar conclusion if it had reviewed the facts and concluded that the lawyer had established an attorney-client relationship and gave the client (allegedly) bad advice knowing that the client would rely on it. Compensation to the lawyer is not material to the

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.<sup>21</sup>

In a 2009 case, a law firm sought a motion to dismiss a suit brought against it in a case where there allegedly existed conflicts of interest in its representation of both a lender and a borrower.<sup>22</sup> As alleged in the complaint, Dury loaned funds to a group of businesses (the “Trinity Entities”) which then failed to repay Dury the monies borrowed. After Dury filed an action against the Trinity Entities, they filed for bankruptcy protection. At the time of the initial transaction, Dury retained the law firm and attorney Miller (a partner of the firm) to draft the promissory notes and other documents. At the time, the firm was also representing the Trinity Entities and two of their founders. During the course of representing Dury, the complaint alleges that the defendant firm and attorney took positions contrary to Dury’s interests and disclosed privileged information to at least one of the founders of the Trinity Entities. Dury alleged that the attorney and the firm failed to disclose the conflicts of interest to him and that, if the attorney and the firm were not acting as counsel to Dury (because they were acting as counsel to their other clients instead), they had “tortiously failed to disclose this fact to [Dury].” In denying the attorneys’ motion for dismissal the District Court said (in part):

“[A]n attorney can be liable for negligent nondisclosure when he fails to exercise reasonable care or competence in communicating materially incomplete information to a non-client regarding a matter in which the attorney should reasonably foresee the non-client will rely on the incomplete information.”<sup>23</sup>

***Declining and Terminating Representation; Prospective Clients. Rule 1.16 – Declining or Terminating Representation.*** As indicated in the *Bennett* case, once the attorney-client

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establishment of the attorney-client relationship. Davis, *Duties to Prospective and Pro Bono Clients*, 242 N.Y. Law J. (Jul. 6, 2009) at col. 1 (© The New York Law Pub. Co.).

<sup>21</sup> 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.”

<sup>22</sup> *Dury v. Ireland, Stapleton, Pryor & Pascoe, P.C.*, 2009 WL 2139856 (D. Colo., 7-14-2009).

<sup>23</sup> Citing *Smith v. Boyett*, 908 P.2d 508, 513-14 (Colo. 1995) and *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.*, 892 P.2d 230, 236-37 (Colo. 1995).

relationship has commenced, the question of whether the attorney-client relationship has concluded can be difficult. As quoted above, *Bennett* says clearly:

‘The 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.’

Rule 1.16 discusses when and how a lawyer may decline or terminate a representation, and what obligations flow from the termination. Generally the 2008 rule is similar to the former rule. Rule 1.16(b)(1) is a significant, positive, change for lawyers, and is equivalent to a “no fault divorce” between the lawyer and client. Former Rule 1.16 did not permit a lawyer to withdraw solely on the grounds that “withdrawal can be accomplished without material adverse effect on the interests of the client.” Under new Rule 1.16, no other reason is necessary. The right to withdraw may be limited if the attorney’s withdrawal may materially adversely affect the client.

Rule 1.16(d) requires that, upon termination of representation, the lawyer must take steps “to the extent reasonably practicable” to protect a client’s interests. These steps may include “allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred.” The Colorado Bar Association Ethics Committee issued letter opinion 2007-2<sup>24</sup> which addressed the obligation of an attorney surrendering paper and property to the client. An estate planning attorney asked whether the obligation included an obligation to surrender digital files “in accessible electronic format, if so maintained,” so that the client could “save . . . money during the revision process” by new counsel. The Ethics Committee concluded that delivering electronic files “is a reasonably practical step that [the attorney] should take to enable the continued protection of your former client’s interests within the meaning of C.R.P.C. 1.16(d).”

The letter opinion leaves a number of questions unaddressed. For example, the letter opinion does not address whether an attorney can claim a lien on the client’s digital files as the attorney can on paper files. To the extent that an attorney has the right to retain paper files pursuant to an attorney’s lien for unpaid fees, the attorney should have the same right to retain digital files.<sup>25</sup>

The letter opinion also does not address whether any portion of the digital files may be considered to be “work product” which, under Formal Opinion 104, attorneys are not obligated

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<sup>24</sup> Abstract available at 36 THE COLO. L. (CBA) No. 11 at 17 (Nov. 2007).

<sup>25</sup> See Formal Opinion 82, CBA Ethics Committee, April 15, 1989, addendum issued 1995, available at <http://www.cobar.org/index.cfm/ID/386/CETH/Formal-Ethics-Opinions-Index/>.

to turn over to clients.<sup>26</sup> Formal Opinion 104 does not address whether (for example) special formatting of a document for printing that may have been accomplished by the attorney or his or her staff is “work product” or client’s property.<sup>27</sup> Can an attorney deliver a text-readable version of the document in Adobe Acrobat format to meet the Rule 1.16(d) requirement? While all of the words are generally available in such a format, transforming the document into a word processing accessible document loses all formatting codes and requires a significant amount of “clean up” work by the successor attorney or his or her staff.

Formal Opinion 104 provides that, to the extent the attorney retains drafts in the client file, the client is entitled to receive those drafts. The same should apply to digital drafts of documents.

Another question for which answers are yet to be given is the ability of an attorney, before turning over documents, to scrub metadata from the documents. This would include things like revision schedules, authors working on the document, redline-strikeout codes, and other hidden information. Metadata<sup>28</sup> is a known feature of MS Word, and can only be removed

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<sup>26</sup> See Formal Opinion 104, CBA Ethics Committee, April 17, 1999, available at <http://www.cobar.org/index.cfm/ID/386/CETH/Formal-Ethics-Opinions-Index/>.

<sup>27</sup> Formal Opinion 104 provides the following as an example of attorney work product which may be withheld from a client when turning over records: “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.” The Formal Opinion concludes with the statement that “The lawyer should err on the side of production.”

<sup>28</sup> The Southern District of New York engaged in an in depth discussion of metadata in the context of litigation in *Aguilar v. Immigration and Customs Enforcement*, 255 F.R.D. 350 (SDNY 2008). It identified three types of metadata: substantive, system and embedded:

Substantive metadata was identified as data “created as a function of the application software used to create the document or file,” such as prior edits or editorial comments.

System metadata was defined as data that “reflects information created by the user or by the organization’s information management system,” such as data concerning author, date and time of creation and modification.

Embedded metadata was defined as consisting of “text, numbers, content, data or other information that is directly or indirectly inputted into a [n]ative [f]ile by a user and which is not typically visible to the user viewing the output display,” such as spreadsheet formulae.

In *Dahl v. Bain Capital Partners, LLC*, 2009 WL 1748526 (D.Mass., 2009), the court denied plaintiffs’ motion requesting the production of all metadata associated with emails and MS Word documents produced by the defendants. The court advised the plaintiffs that, instead of making “sweeping requests for metadata,” such requests should be tailored to specific documents which would in turn reduce the costs and burdens associated with

by special metadata scrubbers or by converting the document to a read-only format such as Adobe. In an article addressing metadata, the author concluded that when sending documents to third parties on behalf of the client, metadata scrubbing is consistent with the attorney's duty of confidentiality under C.R.P.C. Rule 1.6(a).<sup>29</sup> What if the client specifically requests the attorney to leave metadata in the document? This question is not addressed by letter opinion 2007-2 or by Formal Opinion 104.

Colorado Rule 1.16(d) requires that, when terminating the representation of a client, a lawyer take steps necessary to protect the client's interests including (without limitation) "giving reasonable notice to the client" of the termination. Comment [1] to Rule 1.16 provides that "[o]rdinarily, representation in a matter is completed when the agreed-upon assistance has been concluded." Even then, notification under Rule 1.16(d) is required unless the termination of the representation upon conclusion of the matter at hand was clearly set forth in the engagement letter. As stated in a 1994 article<sup>30</sup> which is still good guidance:

"Due to the discrepancies and different standards being applied by the courts today in the determination of when the attorney-client relationship terminates, attorneys should take extra precautions to make sure that there is a clear, unambiguous end to the attorney-client relationship. Attorneys should make sure that the relationship's termination is evidenced in writing and in such a manner that neither the client nor a tribunal can question the relationship's termination."

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electronic discovery. The court denied the defendant's request to shift the costs of discovery to the plaintiffs, but said that if the plaintiffs wanted to change the data into a format other than the form maintained by the defendants, the plaintiffs would have to bear the burden of that cost.

<sup>29</sup> Luce, "What's the Matter With Metadata," 36 THE COLO. L. (CBA) No. 11 at 113 (Nov. 2007). Mr. Luce also concluded that metadata mining (adverse counsel retrieving and using metadata from sent documents) is permissible under the pre-2008 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 lawyer should not 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. *See, also*, Colorado Ethics Committee Formal Opinion 119 (May 17, 2008) published at 37 THE COLO. L. (CBA) No. 8 at 59 (Aug. 2008).

<sup>30</sup> Sutton, *How Long Does an Attorney-Client Relationship Last?*, Journal of the Legal Profession (1994) 277, at 287.

*Rule 1.18 – Prospective Clients.* Rule 1.18 has no counterpart in the pre-2008 rules. This new rule prohibits an attorney using information gained from dealing with a prospective client against that person’s interests – whether or not the prospective client becomes an actual client. The new rule provides an exception to the prohibition when, during the course of the interview, “the lawyer who received the information took reasonable steps to avoid disclosure to more disqualifying information.” This protects the situation where the lawyer, in a client intake interview, realizes that there may be conflicts with existing clients or other interests of the attorney or the law firm. The rule goes on to require that, for the exception to be applicable, the lawyer receiving the information from the prospective client must be “screened from further participation in the matter and is apportioned no part of the fee therefrom.”<sup>31</sup> Additionally, written notice must be given to the prospective client.

Most requirements of this rule are achievable. However, given the compensation structure of most law firms, it is likely not possible to avoid apportioning a portion of the fee from any specific representation to any specific attorney.<sup>32</sup> Thus the effect of this new rule is that a prospective client can effectively disqualify an unsuspecting law firm should the prospective client desire to do so. Attorneys must be alert to potential conflicts of interest very early in the intake process. Otherwise, this may give less reputable plaintiffs or defendants the opportunity to go “attorney shopping,” provide disqualifying information during the initial interview, and thereby prevent an attorney or firm from representing even a long-term client in adverse litigation.

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<sup>31</sup> Similarly, under Rule 1.10(e), when an attorney moves laterally to a new firm, circumstances exist where the firm can represent a client adverse to a client of the former firm even where the new lawyer had minimal involvement in the representation. This requires that the new firm take appropriate screening measures and again ensures that the new lawyer “is apportioned no part of the fee therefrom.”

<sup>32</sup> One ethics opinion has been found under Rule 1.10 that discusses this “no apportionment requirement. State of Washington Informal Opinion 1498 (1992) distinguishes between a partner and an associate moving laterally and dealing with the 1.10 consequences:

“The Committee was of the opinion that a personally disqualified associate may be paid a regular salary, but may not share in any bonus or any other additional payment based upon the fee received in the case from which he or she is screened.”

“The Committee was of the opinion that in the case of a personally disqualified partner, the law firm must put into place an accounting practice to ensure that the gross income received from the case is handled in such a way that the personally disqualified partner does not share in it in any way. The Committee was further of the opinion that the law firm must document that accounting because the rule places the burden of proof of compliance upon the law firm.”

Surprisingly, this point and the mechanics of accomplishing this “non-apportionment” requirement are not discussed in the comments to Rule 1.10 or Rule 1.18.

**Who Is the Client?** When an attorney represents a legal entity such as a corporation, limited liability company, or other entity, the attorney must identify the client at the inception of the representation. It is frequently important to reconsider the issue from time-to-time during the representation because, as noted above in *Bennett*, the attorney-client relationship can evolve and take different forms.

An entity is a legal fiction – it is a ‘person’ for legal purposes, but it cannot take any action except through the efforts of its managers, officers, members, directors, or other human beings. Frequently representation of an entity over time results in a close relationship between the attorney and certain of these human beings. The attorney must always remember that, when representing the organization these individuals are not the attorney’s client – the client is the organization.

Colo. RPC Rule 1.13 makes it clear that that 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.” Rule 1.13 of the ABA’s Model Rules of Professional Conduct is identical.

While Rule 1.13 makes it clear that the attorney must recognize the entity as his or her client, Rule 1.13 does not prevent the attorney-client relationship from evolving to include constituents, as well. This can happen when the attorney is not careful, or it may occur intentionally. During the representation, the relationship may evolve and the entity’s constituent (officer, director, or other) may “seek[] and receive[] the advice of the lawyer on the legal consequences of the client’s past or contemplated actions.” As the court in *Bennett* said, this is a subjective analysis and depends in large part upon the belief of the putative client.

The client may intentionally evolve. For example, during a merger or acquisition transaction, an attorney for the target may also be representing the officers in negotiating employment contracts. Conflicts of interest rules under Colo. RPC 1.7 must be considered, but this may be a waivable conflict. Of course, the tougher the attorney is in negotiating the employment contract (or other economic terms outside of the target’s interest), the less value may remain for the target and its equity holders. Thus, depending on the facts and circumstances, the conflict may not be waivable.

Thus, the attorney must make clear to all relevant parties, not only at the commencement of the representation but during the progress of the representation, where the attorney-client relationship lies.

When a dispute develops that involves the entity and certain of its constituents, the attorney for the entity must be on a heightened awareness. Formal Opinion 120<sup>33</sup> reiterates Rule 1.13 that the attorney representing the organization owes his or her duties to the organization. The Formal Opinion goes on to provide that representing the organization does not necessarily mean that the attorney is also representing any of the constituents (stockholders, members, officer, directors, or managers). Consequently, the attorney representing the organization cannot assert that he or she is also representing any constituent unless the attorney reasonably believes that he or she has been retained to represent the constituent. “Knowingly making such an assertion without having [such] a reasonable belief . . . would violate Rule 4.1 on truthfulness in statements to others.”

Formal Opinion 120 goes on to discuss the situation where the interests of the organization are potentially adverse to the interests of its constituents. In that case, the attorney must clarify his or her role and advise the constituents that the attorney-client relationship flows to the organization and that the constituent may want to obtain independent representation. The other consequence is that there would not be confidentiality or attorney-client privilege in communications between the attorney and the constituent.

Finally, Formal Opinion 120 reminds attorneys that, under Rule 3.4(f), an attorney is prohibited from requesting that a person (other than a client) refrain from providing non-privileged information to another party except where both: (1) the person is a relative or employee or other agent of the client and the lawyer is not prohibited by other law from making the request **and** (2) the lawyer reasonably believes the person’s interest will not be adversely affected by refraining from giving such information.

**Forming an Entity – Who Is the Client?** During the pre-formation period, the attorney is working with individuals to form an entity. If the entity will be the ultimate client, the lawyer must recognize that the entity does not yet exist. But the lawyer must make it clear to the individuals that none of them is individually, his client. The Colorado rules do contemplate this representation, but the attorney must recognize, and must advise his or her clients, that there are significant potential conflicts of interest in almost any entity formation. As only a single example, when the clients are valuing their respective contributions to the entity, each time a share or percentage is issued to one person, that share or percentage is not available to another. There are many more subtle decisions that must be made in the formation of an entity, the drafting of a buy-sell or other agreement among the equity holders, and in the continuing representation where one decision may favor one of the constituents and disadvantage another. Thus the issues discussed below surrounding 1.7 (conflicts of interest) and 4.3 (dealing with

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<sup>33</sup> Colorado Bar Association Ethics Committee, adopted May 17, 2008 (published at 37 THE COLO. L. (CBA) No 8 at 62 (Aug. 2008)).

unrepresented persons) must be considered (among others). In considering these issues, note Comments [8] and [28] to Rule 1.7:

“[8] . . . For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer’s ability to recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of [one of the clients].”

“[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties’ mutual interests. Otherwise each party might have to obtain separate representation, with the possibility of incurring additional cost, complication, or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.”

While it may be the clients’ preference that the lawyer acts for all of them, the lawyer would frequently be better served by identifying and acting for a single client, even if it may be the entity that does not yet exist. In any event, the attorney must advise the individuals involved as to the attorney-client relationship with the recommendation (in writing) that each of the individuals consult with their own attorney if they determine it to be necessary or appropriate in the circumstances.<sup>34</sup>

The Arizona State Bar has expressed the opinion that it is permissible for a lawyer to represent an entity that does not yet exist:

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<sup>34</sup> See Colo. RPC 4.3, Dealing with Unrepresented Persons.

As long as the incorporators understand that they are retaining counsel on behalf of the yet-to-be-formed entity and will need to ratify this corporate action, *nunc pro tunc*, once the entity is formed.<sup>35</sup>

The Arizona Opinion goes on to say that it is the lawyer's duty to clarify at the outset whom the lawyer represents.

Colo. RPC 4.3 (effective January 1, 2008) permits a lawyer to give legal advice to an unrepresented person so long as the lawyer does not know (and has no reason to know) of a conflict between the interests of the lawyer's client and the unrepresented person. Paragraph [2] of the Comment explains the reasons for this expansion of the lawyer's permissible communications with unrepresented persons:

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel.

This protects a lawyer when, for example, the lawyer is meeting with several individuals about the formation of a new business. Depending on the identification of the lawyer's client in such a circumstance, all of the other parties at the meeting are technically unrepresented. However, where the parties are all pursuing the same goal on an amicable basis, little purpose can be served by advising everyone else at the table to "obtain your own counsel." This is a beneficial clarification under the 2008 rules. Other states have reached a similar conclusion, although in some cases using a retroactive application of the entity rule<sup>36</sup> to do so.

<sup>35</sup> Ariz. Opinion No. 02-06 at 3 (Sept. 2003).

<sup>36</sup> The entity rule, which derives from CRPC Rule 1.13, holds that the lawyer represents the entity, not the individual constituents. *See, for example, Jesse v. Danforth*, 485 N.W.2d 63 (Wis. 1992), which offered the following guideline:

[W]here (1) a person retains a lawyer for the purpose of organizing an entity and (2) the lawyer's involvement with that person is directly related to that incorporation and (3) such entity is eventually incorporated, the entity rule applies retroactively such that the lawyer's pre-incorporation involvement with the person is deemed to be representation of the entity, not the person.

*See also Manion v. Nagin*, 394 F.3d 1062 (8<sup>th</sup> Cir. 2005). *See also McKinney v. McMeans*, 147 F.Supp.2d 898 (W.D. Tenn. 2001) (following *Jesse*, denying motion to disqualify plaintiff's attorney, who prepared shareholder agreement, represented the corporation, then filed suit on behalf of one shareholder against the other); *In re Ireland*, 706 P.2d 352 (Ariz. 1985) (disciplining lawyer for conflict of interest for failing to disclose to corporation one incorporator's improper use of funds, where evidence showed that lawyer represented corporation in formation and operation); B. Wunnicke, *Ethics Compliance for Business Lawyers* §§ 8.4 and 8.5 (1987) ("The appealing reality is that often the lawyer who is organizing a corporation is representing the group.") (*quoted with approval in Meyer v.*

The engagement letter for the representation is usually the first time the attorney has to clarification the focus of the representation and to identify the client. When drafting any further agreement that defines the relationship among the unrepresented persons and the represented entity it is important to be clear that each unrepresented person should consult with his or her own legal advisors if they determine it to be necessary. It is not the attorney's choice whether such consultation is necessary – it is a decision that should be made by the unrepresented person, whether a member or manager of the LLC, partner of a partnership, or an officer, shareholder, or director of a corporation.<sup>37</sup>

***Duty of Care.*** An attorney owes a duty of care to each client<sup>38</sup> and (under cases like *Steele v. Allen* and *Dury* discussed above<sup>39</sup>) potentially to non-clients as well. The duty of care requires that an attorney act with reasonable diligence and promptness in attending to the client's

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*Mulligan*, 889 P.2d 509, 514 (Wyo. 1995)); “An Expectations Approach to Client Identity,” 106 *Harv. L. Rev.* 687, 691, 696 (Jan. 1993) (*Jesse* comports with the “reasonable constituent’s expectation approach”; “Treating pre-incorporation individual representation, absent evidence to the contrary, as entity representation accords with an organizer’s reasonable expectations during the incorporation phase of the company’s existence.”); T. Thompson, “What is an Entity? – Entity-in-Formation,” 6 *Ariz. Prac. Corporate Practice* § 2.5 (2004 ed.) (citing *Jesse* for proposition that treatment of entity-in-formation as person capable of being a client has become “well settled”).

<sup>37</sup> For example, see the following disclaimer published in Lidstone, “*Form of Stock Redemption and Cross Purchase Agreement*” (ch. 23) in Rozansky and Reichert, PRACTITIONER’S GUIDE TO COLORADO BUSINESS ORGANIZATIONS (Colorado Bar Assn. 2010)

**Section 15.6. Professional Advisors.** The Parties understand, acknowledge, and agree that the law firm of \_\_\_\_\_, P.C. represents only the Company with respect to this Agreement and has offered no legal, tax, or other advice to any Stockholder. The Stockholders further acknowledge and agree that: They have been advised to retain independent legal, tax, and accounting advice of their own choosing for purposes of representing their individual interests with respect to the subject matter hereof; They have been given reasonable time and opportunity to obtain such advice; and They have obtained such independent advice as they have deemed necessary and appropriate in the circumstances.

<sup>38</sup> Restatement of the Law Governing Lawyers § 483, cmt. e. *Miller v. Byrne*, 916 P.2d 566, 579 (Colo. Ct.App. 1995). Generally, a fiduciary duty arises between individuals through a relationship where one party is empowered with a high level of control, trust, confidence or reliance. *Bailey v. Allstate Ins. Co.*, 844 P.2d 1336, 1339 (Colo. Ct.App. 1992). Certain relationships give rise to fiduciary duties as a matter of law. *Id.* Due to the high degree of control, level of trust and level of confidence empowered to an attorney, the attorney-client relationship gives rise to fiduciary obligations as a matter of law. *See Id.*; Restatement of the Law Governing Lawyers § 49. Legal malpractice actions based on breach of fiduciary duty involve violations of standards of conduct. *Smith v. Mehaffy*, 30 P.3d 727 (Colo. Ct.App. 2000). In order to establish a breach of a fiduciary duty, the plaintiff must demonstrate “that [1] the plaintiff incurred damages, and [2] that the [attorney’s] breach of fiduciary duty was the cause of the damages sustained.” *Miller*, 916 P.2d at 575.

<sup>39</sup> See discussion at notes 18-23.

needs.<sup>40</sup> An attorney must employ that degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession at the time the task is undertaken.<sup>41</sup> If a dispute arises, the trier of fact determines whether the attorney has breached any duty.<sup>42</sup>

The duty of care requires an attorney to “protect a client in every possible way.”<sup>43</sup> In *O’Melveny*, the court denied summary judgment in favor of a law firm because a triable issue of fact existed as to why the law firm failed to provide accurate opinion letters for two private offerings. The court explained that within the context of the private offerings, the law firm had a duty to make a “reasonable, independent investigation.” The court also noted an expert witness’ testimony arguing that the law firm’s failure to contact their client’s former counsel and accountants was a breach of the duty of due care. The plaintiff, the Federal Deposit Insurance Corporation, did not allege that the law firm had been aware of the fraud nor did the court’s conclusion rest on the law firm’s awareness of the fraud. The court in *O’Melveny* set forth that an attorney fulfills the duty of due care by performing with “such skill, prudence, and diligence as attorneys of ordinary skill and capacity commonly possess.”<sup>44</sup>

An important aspect of the Rules of Professional Conduct is their availability to private litigants. The Rules of Professional Conduct are primarily directed toward attorney conduct and disciplinary matters before the state organization (Supreme Court or other appropriate body) that regulates discipline of lawyers.<sup>45</sup> The Colorado commentary states that “[v]iolation of a Rule 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.”<sup>46</sup> However, most courts permit the use of the applicable rules of professional conduct as evidence of the lawyer’s standard of

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<sup>40</sup> Colo. RPC 1.3 (noting that an attorney cannot neglect legal matters entrusted to the attorney).

<sup>41</sup> *McCafferty v. Musat*, 817 P.2d 1039, 1043-44 (Colo. App. 1990) (finding professional negligence where an attorney recommended settling a case before performing any discovery); *See also* Restatement of the Law Governing Lawyers § 52.

<sup>42</sup> *McCafferty*, 817 P.2d at 1044.

<sup>43</sup> *FDIC v. O’Melveny & Meyers*, 969 F.2d 744, 748 (9<sup>th</sup> Cir. 1992), rev’d on other grounds *O’Melveny & Myers v. FDIC*, 114 S.Ct. 2048 (1994) (quoting *Day v. Rosenthal*, 170 Cal App. 3d 1125, 1143 (1985)).

<sup>44</sup> *Id.* at 748 (quoting *Lucas v. Harem*, 15 Cal.2d 583, 591 (1961)). *Temple Hoyne Buell Foundation v. Holland & Hart*, 851 P.2d 192, 198 (Colo. Ct. App. 1992).

<sup>45</sup> *See Astarte, Inc. v. Pac. Indus. Sys., Inc.*, 865 F. Supp. 693 (D. Colo. 1994) stating that under Colorado law, ethics codes for lawyers neither prescribe civil liability standards nor create private causes of action. *See other cases cited in the Annotated Model Rules of Professional Conduct* (Fifth Ed.) (Center for Professional Responsibility, American Bar Association, at pages 6-7).

<sup>46</sup> Preamble and Scope to the Colorado Rules of Professional Conduct, Comment [20], first sentence.

care in cases involving malpractice and breach of fiduciary duty.<sup>47</sup> The Colorado commentary goes on to say that, “since the Rules do establish standards of conduct by lawyers, in appropriate cases a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.”<sup>48</sup>

### **Rule 1.6 – Confidentiality; For the Protection of Whom?**

Colorado substantially revised its rules regarding confidentiality (Rule 1.6) and representation of entities (Rule 1.13) effective January 1, 2008. The rules as adopted 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. They were again proposed and rejected when proposed by ABA’s Ethics 2000 Commission in August 2001.<sup>49</sup> 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?”<sup>50</sup> 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.

The focus of Rule 1.6(a) was not significantly amended, although the words were. It now provides that “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).” The exceptions set forth in paragraph 1.6(b) swallow the Rule, itself.

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<sup>47</sup> See cases cited in the *Annotated Model Rules of Professional Conduct* (Fifth Ed.) (Center for Professional Responsibility, American Bar Association, at pages 7-8).

<sup>48</sup> Preamble and Scope to the Colorado Rules of Professional Conduct, Comment [20], last sentence. Some courts take a more cautious approach, permitting ethics rules to be considered in cases to the extent an expert witness has used them in reaching a conclusion in the case regarding legal malpractice, and a small number of courts do not permit the use of the rules to show evidence of malpractice. See *Annotated Model Rules of Professional Conduct* (Fifth Ed.) (Center for Professional Responsibility, American Bar Association, and cases cited therein at page 8-9).

<sup>49</sup> See Stephen Gillers and Roy D. Simon, *Regulation of Lawyers: Statutes and Standards* 69-71 (2005 ed.) cited in *Report of the Task Force on the Lawyer’s Role in Corporate Governance* at 77 (November 2006) by the Association of the Bar of the City of New York.

<sup>50</sup> 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. See text at notes 8-9, above.

In addition to certain other exceptions, 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.<sup>51</sup> 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,"<sup>52</sup> 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 fiduciary duties.<sup>53</sup> Regardless of civil liability, however, there is clear precedent that a lawyer may be disciplined for aiding and abetting a client's financial crimes.<sup>54</sup>

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<sup>51</sup> 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?

<sup>52</sup> Colo. RPC Preamble and Scope, Comment [20].

<sup>53</sup> *Alexander v. Anstine*, 152 P.3d 497 (Colo. 2007).

<sup>54</sup> *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

Rule 1.13, dealing with attorney representation of organizations, is even more expansive when permitting an attorney to disclose client confidences, although the focus is more limited. 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 and Formal Opinion 119 – 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*."<sup>55</sup> 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 21<sup>st</sup> 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.<sup>56</sup> Today, a Blackberry, iPhone, or Droid 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, 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, these communication methods also provide significant risk.

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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.)

<sup>55</sup> Ethics Committee, Colorado Bar Association, Formal Opinion 90 (Nov. 14, 1992) available at <http://www.cobar.org/index.cfm/ID/386/subID/23920/CETH//>.

<sup>56</sup> 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>.

Accidental or inadvertent transmission 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 occurred.<sup>57</sup> 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:

- You can eliminate the name suggestion feature of Outlook in *Tools:Options: Preferences: E-mail Options: Advanced E-Mail Options*; simply uncheck “*suggest names while completing To, Cc, and Bcc fields.*” That means that you have to type in each e-mail address, but you are less likely to choose the wrong address.
- You can provide for a delay in your outbox – so that messages are not sent when you push “send.” A ten minute delay can be quite useful when you are writing an e-mail in haste, you think of additional information to include, or you want to delete or add an addressee after sending. You can set a delay from the time you push “send/receive” and the time the message is actually sent from the outbox at *Tools:Options:Mail Setup*. Uncheck “*send immediately when connected.*” Proceed to “*send/receive*” and under “settings for group ‘All Accounts’,” check “*schedule an automatic send/receive every \_\_\_ minutes*” and set the desired number of minutes. If you want to send something immediately, you can still easily do so even after setting up a delay – by clicking “send/receive” on the outlook tool bar. If you want to correct a message you have sent before it has left the outbox, simply go to the outbox and retrieve the message.
- You can include an automatic signature that includes your name, address, confidentiality disclosure, and tax (Circular 230) disclosure.<sup>58</sup> You can automatically

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<sup>57</sup> “*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/](http://abajournal.com/news/lawyers_e_mail_goof_lands_on_nyts_front_page/).

<sup>58</sup> Typical disclosure is as follows: **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

add that signature to replies and forwards as well at *Tools:Options: Mail Format: Signatures*. You will have to type or copy your signature and disclaimers, but once added they are added to each e-mail you write and (if you select) reply to or forward.

- Each e-mail should be written carefully and formally – including a greeting to the intended addressee. That, itself, would be notice to a person other than the intended addressee that the message may have been inadvertently sent. Additionally, on confidential and privileged documents, a special notation in a different color could be included before the greeting: “Attorney-Client Privileged and Confidential Information.”

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 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*

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error, please reply to the sender that you received the message in error; then please delete this e-mail. Thank you.

**IRS CIRCULAR 230 DISCLOSURE:** This e-mail and any attached documents may contain provisions concerning a federal tax issue or issues. This e-mail and any attached documents are not intended or written to be used, and cannot be used, by any taxpayer for the purpose of avoiding penalties that may be imposed on any taxpayer by the Internal Revenue Service.

*Attorney to Disclose Errors to Client.*<sup>59</sup> 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.

Finally, think about the flash drive or disks that you are bringing with you that include your material client files. Would a loss of the flash drive or disks risk violating client confidentiality? MS Word allows an easy method to pass-word protect your MS Word files that you carry with you or that you send by e-mail. In Word, go to *Tools: Options: Security* and then include a *password to open*. Of course, do not include the password to open in the same e-mail in which you send the file.

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 easily be retrieved if sought. Formal Opinion 119, *Disclosure, Review, and Use of Metadata*,<sup>60</sup> 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

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<sup>59</sup> Ethics Committee, Colorado Bar Association, Formal Opinion 119 (May 17, 2008) available at <http://www.cobar.org/index.cfm/ID/386/subID/23920/CETH/>.

<sup>60</sup> Ethics Committee, Colorado Bar Association, Formal Opinion 120 (May 17, 2008) available at <http://www.cobar.org/index.cfm/ID/386/subID/23920/CETH/>.

non-lawyer assistants are able to control the transmission of metadata. These systems include metadata scrubbers that are commercially available, but also include simple settings on your MS Word and MS Outlook programs:

- In MS Word, you can remove personal information from your file. Under *Tools: Options: Security*, turn on “*Remove personal information from file properties on save.*”
- In MS Word, you can also minimize the risk of sending a marked-up document thinking it is a clean document. Under *Tools: Options: Security*, turn on “*make hidden markup visible when opening or saving.*”
- In MS Outlook, do not enable “reply with changes.” Under *Tools: Options: E-mail Options: Advanced E-mail Options*, uncheck “*Add Properties to Attachments to Enable Reply With Changes.*”

Another method of removing metadata is to save documents for transmission as .RTF (rich text format) documents or .PDF (adobe acrobat) documents. Even then, you should review documents before sending to ensure that only the desired information is being transmitted.

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 (discussed below) makes it clear that the lawyer receiving the confidential information must promptly notify the sending lawyer and take certain other actions.<sup>61</sup>

The metadata issue raises a number of other problems for the attorney. First of course is the proper configuration of the Outlook program. Second is the installation of a metadata scrubber that removes metadata from all outgoing files. Even the installation of a metadata scrubber does not resolve all issues, however. A metadata scrubber will not remove metadata from files that are sent through other servers – such as the lawyer’s PDA or home computer.

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

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<sup>61</sup> See also Ethics Committee, Colorado Bar Association, Formal Opinion 108, “*Inadvertent Disclosure of Privileged or Confidential Documents*” (May 20, 2000), available at <http://www.cobar.org/index.cfm/ID/386/subID/23920/CETH/>.

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.

#### **Rule 4.1 – Truthfulness in Statements to Others**

Rule 4.1 requires that lawyers be truthful in their statements to others. This applies not only in the courtroom, but (when combined with Rule 8.4(c)) in all aspects of the attorney's practice and life, and may include social networking sites.

Even apart from ethical obligations, assisting client's misdeeds may lead to civil, criminal, or administrative liability to attorneys. In *Thompson v. Paul*,<sup>62</sup> the Ninth Circuit surveyed case law from the Third, Fifth, Sixth, and Seventh Circuits seeking to hold attorneys liable for actions of their client in the context of securities representation. The Ninth Circuit found that a clear rule emerges:

An attorney who undertakes to make representations to prospective purchasers of securities is under an obligation, imposed by Section 10(b), to tell the truth about those securities. That he or she may have an attorney-client relationship with the seller of the securities is irrelevant under Section 10(b).<sup>63</sup>

Although *Thompson v. Paul* was a securities case, this could also lead to lawyer liability as a result of a real estate or other business closing, or in other circumstances where an attorney is perceived as making representations to help the deal along.

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<sup>62</sup> 547 F.3d 1005 (9th Cir. 2008).

<sup>63</sup> Notably it is also irrelevant under the Rules of Professional Conduct that governs lawyers in all 50 states. Rule 2.3 of the ABA's Model Rules (adopted in most states) is entitled "*Truthfulness in Statements to Others.*" An attorney assisting a client in a crime or fraud, including a violation of SEC Rule 10b-5, is also breaching his or her ethical obligations. When the attorney speaks to third parties, the attorney has a duty to speak truthfully. It is preferable not to speak at all when there is any doubt.

### **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 or reasonably should know was inadvertently sent relating to the representation of the lawyer's client. Model Rule 4.4 imposes no further ethical duties. However, a majority of the Standing Committee believed that the ABA had not addressed this problem satisfactorily.

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*,<sup>64</sup> 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.<sup>65</sup> Once the receiving lawyer has notified the sending lawyer, the

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<sup>64</sup> Ethics Committee, Colorado Bar Association, Formal Opinion 120 (May 17, 2008) available at <http://www.cobar.org/index.cfm/ID/386/subID/23920/CETH/>.

<sup>65</sup> See also Ethics Committee, Colorado Bar Association, Formal Opinion 108, "*Inadvertent Disclosure of Privileged or Confidential Documents*" (May 20, 2000), available at <http://www.cobar.org/index.cfm/ID/386/subID/23920/CETH/>.

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.<sup>66</sup>

### **Formal Opinion 113 – Ethical Duties to Disclose Errors to the Client**

Ethics Opinion 113 issued on November 19, 2005 by the Ethics Committee of the Colorado Bar Association reminds lawyers that it is their duty under Rule 1.4 to inform clients about material developments in the subject matter of the representation.<sup>67</sup> Opinion 113 states that this includes “material adverse developments . . . resulting from the lawyer’s own errors.” The lawyer is not obligated to disclose all errors – only errors that clearly prejudice a client’s claim or rights must be disclosed under Opinion 113. Where the lawyer is in doubt about the obligation to disclose, it would be prudent for the lawyer to seek outside counsel. Consulting with lawyers in the same firm may not be appropriate because they each have the same problem vicariously.

Where the lawyer can fix the error without (or prior to) disclosure, then the Opinion provides that disclosure is not necessary. The cure, however, cannot lead to any further prejudice to the client.

After the lawyer has disclosed the error, the lawyer “may continue to represent the client in . . . compliance with Colo. RPC 1.7(b).” The opinion goes on to acknowledge that “in many if not most circumstances, the interest of the attorney in avoiding liability will be consistent with

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<sup>66</sup> Luce, “*What’s the Matter With Metadata*,” 36 THE COLO. L. (CBA) No. 11 at 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 lawyer should not 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.

<sup>67</sup> See Houghtaling, *Disclosing Mistakes in Light of Ethics Opinion 113*, 35 THE COLO. L. No. 4 at 89 (Apr. 2006) for a good discussion of Opinion 113.

the interest of the client in a successful representation.” There are potentially cases where the lawyer’s interest in avoiding liability might influence his or her willingness to pursue a strategy that would avoid the attorney’s liability at the expense of the success of the representation – in that case, continued representation by the lawyer would be improper under Rule 1.7(b).

Ethics opinion 113 goes on to state that, when admitting an error to a client, the attorney should also give consideration to notifying the attorney’s malpractice insurance carrier. Finally, the opinion notes that it does not consider whether an attorney’s failure to notify a client of an error gives rise to a cause of action against the lawyer, separate and apart from any cause of action arising from the error itself. Paragraph [20] of the scope of the Rules of Professional Conduct does state:

“Violation of a Rule should not 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.”

In attempting to rectify the results of the error, an attorney may not obtain a release of liability from the client except in compliance with Rule 1.8(h).

#### **Rule 8.4 – Private Conduct Not Related to the Practice of Law: Convictions, Child Support, and Dishonest Conduct and Discipline in Other Jurisdictions**

Conduct outside the practice of law and conduct as an attorney in other jurisdictions may subject an attorney to discipline. Attorneys are required to report any criminal conviction to Attorney Regulation within ten days of their conviction.<sup>68</sup> Similarly, any attorney who has been disciplined by any other jurisdiction must notify Attorney Regulation within ten days of such action.<sup>69</sup>

The reporting requirement under C.R.C.P. Rule 251.20 includes convictions for substance abuse, including driving under the influence, and domestic violence. Driving under the influence convictions can result in the suspension of the attorney’s license to practice law.<sup>70</sup> The Colorado Supreme Court’s Presiding Disciplinary Judge disbarred an attorney for creating

<sup>68</sup> C.R.C.P. 251.20(b). The self-reporting requirement does not include traffic offenses where drugs or alcohol are not present.

<sup>69</sup> C.R.C.P. 251.21(b).

<sup>70</sup> See, e.g., *People v. Hendrick*, No. 08PDJ072, in which the attorney was suspended for thirty days after a conviction for driving under the influence; *People v. Coulter*, No. 08PDJ078 (8-22-2008), in which the attorney received a public censure after pleading guilty to two DUI’s within a week; and *People v. Horwath*, No. 08PDJ081 (9-3-2008), in which the attorney received a six month suspension and a requirement of reinstatement following pleading guilty to third-degree assault following an arrest for DUI (which charge was dismissed in the plea bargain) and violation of a protection order. Substance abuse issues are surprisingly common among attorneys, and can result in the attorney being placed on disability inactive status and/or facing disciplinary charges.

and promoting what was found to be an illegal tax shelter after he was convicted for tax fraud.<sup>71</sup> If a grievance is filed against an attorney that provides the facts to support the conviction for a crime, an attorney can be disciplined even though not convicted of the alleged crime.<sup>72</sup>

The reporting requirement under C.R.C.P. Rule 251.21 includes all other jurisdictions including other state and federal bars and “a federal agency, such as the United States Patent and Trademark Office” (“USPTO”).<sup>73</sup> Although the Colorado courts have only dealt with this issue regarding the USPTO, the ruling and the requirements of C.R.C.P. Rule 251.21 most likely extends to discipline by other federal agencies, such as the Internal Revenue Service<sup>74</sup> and the Securities and Exchange Commission.<sup>75</sup>

Dishonest conduct while not practicing law can also lead to discipline. Attorneys have been disciplined for lying on their personal credit applications, bankruptcy schedules, and about whether they held auto insurance.<sup>76</sup> Theft, whether from a client or a third party, is also serious misconduct. Attorneys have been disciplined for shoplifting, as well as for taking funds from their buddies which were supposed to be used for purchasing baseball season tickets.<sup>77</sup>

Attorneys are required to report on their annual registration statements whether they have any child support obligations and whether they are current on those obligations. Failure to pay child support will also lead to discipline and can result in the lawyer’s license to practice law being summarily suspended.<sup>78</sup>

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<sup>71</sup> *People v. Evanson*, 2009 WL 2994546 (Colo. OPDJ, Aug. 4, 2009).

<sup>72</sup> C.R.C.P. 251.5(b).

<sup>73</sup> *People v. Bode*, 119 P.3d 1098 (Colo. OPDJ, Jul. 21, 2005). Respondent in this case did not participate in the hearing. *See, also, People v. Isaac*, 2009 WL 725567 (Colo. OPDJ, Mar. 20, 2009).

<sup>74</sup> Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, and Appraisers before the Internal Revenue Service, 31 C.F.R. Part 10, available at <http://www.irs.gov/pub/irs-pdf/pcir230.pdf>.

<sup>75</sup> The SEC has the authority to discipline attorneys and other professionals appearing and practicing before the SEC under its Rule of Practice, Rule 102(e), 17 CFR § 201.102(e). *See* Lidstone, *The Securities Law Deskbook* ([www.bradfordpublishing.com](http://www.bradfordpublishing.com)) at § 13.2.

<sup>76</sup> *People v. Kiely*, 968 P.2d 110 (Colo. 1998) (credit application); *People v. Kolbjornsen*, 35 P.3d 181 (Colo. O.P.D.J. 1999) (bankruptcy); *People v. Small*, 962 P.2d 258 (Colo. 1998) (insurance).

<sup>77</sup> *People v. Barnthouse*, 948 P.2d 534 (Colo. 1997) (shoplifting); *People v. Rishel*, 50 P.3d 938 (Colo. O.P.D.J. 2002).

<sup>78</sup> *E.g., In re Green*, 982 P.2d 838 (Colo. 1999) (attorney failed to make child and spousal support payments, eventually becoming over \$30,000 in arrears, then failed to file his annual registration statement. The court found the attorney had violated Rules 8.4(d) and (h) and suspended the lawyer for one year and one day). An attorney

Under Rule 8.4(h), an attorney can be disciplined when he or she engages “in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer’s fitness to practice law.” The comment to the rule goes on to state that lawyers “should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.”<sup>79</sup> The language in Rule 8.4(h) is quite broad since there are many kinds of conduct can be argued to reflect on a lawyer’s fitness to practice law. This broad definition of personal conduct for which lawyers can be disciplined indicates that lawyers, as officers of the court, are held to a higher standard than the general public even when they are not actively engaged in the practice of law.

### **Conclusion**

In conclusion, it is important for attorneys to appreciate that their actions as business or transactional lawyers are subject to the Rules of Professional Conduct as are all other lawyers, and occasionally in ways that may not be obvious. Integrity and competence are crucial to the practice of law in all settings, but even honest lawyers have been implicated in ethical violations. As complicated as the ethics rules are, and given the recent changes effective January 1, 2008, it is important for each attorney practicing law in Colorado to bring himself or herself up to date.

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behind on child support payments can also be immediately suspended from the practice of law, pursuant to C.R.C.P. 251.8.5.

<sup>79</sup> Comment [2] to Rule 8.4.

CERTAIN OF THE COLORADO RULES OF PROFESSIONAL CONDUCT

EFFECTIVE JANUARY 1, 2008

**RULE 1.0. TERMINOLOGY**

(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

**RULE 1.1. COMPETENCE**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

**RULE 1.2. SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER**

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope or objectives, or both, of the representation if the limitation is reasonable under the circumstances and the client gives informed consent. A lawyer may provide limited representation to pro se parties as permitted by C.R.C.P. 11(b) and C.R.C.P. 311(b).

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

**RULE 1.6. CONFIDENTIALITY OF INFORMATION**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) To prevent reasonably certain death or substantial bodily harm;
- (2) To reveal the client's intention to commit a crime and the information necessary to prevent the crime;
- (3) To prevent the client from committing a 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 has used or is using the lawyer's services;
- (4) To prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (5) To secure legal advice about the lawyer's compliance with these Rules, other law or a court order;
- (6) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (7) To comply with other law or a court order.

**RULE 1.8. CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES**

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

- (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the

client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client

unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (b) through (i) that applies to any one of them shall apply to all of them.

#### **RULE 1.13. ORGANIZATION AS CLIENT**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) Despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) The lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to the information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

#### **RULE 1.16. DECLINING OR TERMINATING REPRESENTATION**

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) The representation will result in violation of the Rules of Professional Conduct or other law;
- (2) The lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) The lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) Withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) The client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) The client has used the lawyer's services to perpetrate a crime or fraud;
- (4) The client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) Other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) 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 or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

#### **RULE 1.18. DUTIES TO PROSPECTIVE CLIENT**

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to the prospective client, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) Both the affected client and the prospective client have given informed consent, confirmed in writing; or

(2) The lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) The disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) Written notice is promptly given to the prospective client.

**RULE 2.3. EVALUATION FOR USE BY THIRD PERSONS**

- (a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.
- (b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.
- (c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

**RULE 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; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

**RULE 4.3. DEALING WITH UNREPRESENTED PERSON**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

**RULE 7.2. ADVERTISING**

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.
- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
  - (1) pay the reasonable costs of communications permitted by this Rule;
  - (2) pay the usual charges of a not-for-profit lawyer referral service or legal service organization.
  - (3) pay for a law practice in accordance with Rule 1.17; and
  - (4) refer clients to another lawyer or a nonlawyer 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.

(c) Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

### **RULE 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS**

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

- (1) Is a lawyer; or
- (2) Has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment from a prospective client by written, recorded or electronic communication or by in-person, telephone or realtime electronic contact even when not otherwise prohibited by paragraph (a), if:

- (1) The prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) The solicitation involves coercion, duress or harassment.

(c) A lawyer shall not solicit professional employment from a prospective client believed to be in need of legal services which arise out of the personal injury or death of any person by written, recorded, or electronic communication. This Rule 7.3(c) shall not apply if the lawyer has a family or prior professional relationship with the prospective client 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 resented 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.

(d) Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter 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 (a)(1) or (a)(2);

(2) Not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the nature of the prospective client's legal problem.

A copy of or recording of each such communication and a sample of the envelopes, if any, in which the communications are enclosed shall be kept for a period of four years from the date of dissemination of the communication.

(e) Notwithstanding the prohibitions in paragraph (a), 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 in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

#### **RULE 8.4. MISCONDUCT**

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;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

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

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

(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; or

(h) engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law.

**Colorado Rules of Civil Procedure**  
**RULE 251.20. ATTORNEY CONVICTED OF A CRIME**

**(a) Proof of Conviction.** Except as otherwise provided by these Rules, a certified copy of the judgment of conviction from the clerk of any court of criminal jurisdiction indicating that an attorney has been convicted of a crime in that court shall conclusively establish the existence of such conviction for purposes of disciplinary proceedings in this state and shall be conclusive proof of the commission of that crime by the respondent.

**(b) Duty to Report Conviction.** Every attorney subject to these Rules, upon being convicted of a crime, except those misdemeanor traffic offenses or traffic ordinance violations, not including the use of alcohol or drugs, shall notify the Regulation Counsel in writing of such conviction within ten days after the date of the conviction. In addition, the clerk of any court in this state in which the conviction was entered shall transmit to the Regulation Counsel within ten days after the date of the conviction a certificate thereof.

**(c) Commencement of Disciplinary Proceedings Upon Notice of Conviction.** Upon receiving notice that an attorney subject to these Rules has been convicted of a crime, other than a serious crime as hereinafter defined, the Regulation Counsel shall, following an investigation as provided in these Rules, make a determination as provided in C.R.C.P. [251.11](#) or refer the matter to the committee for further proceedings consistent with C.R.C.P. [251.12](#).

If the conviction is for a serious crime as hereinafter defined, the Regulation Counsel shall obtain the record of conviction and prepare and file a complaint against the respondent as provided in C.R.C.P. [251.14](#).

If a complaint is filed against a respondent pursuant to the provisions of this Rule, the Regulation Counsel shall present proof of the criminal conviction and may present any other evidence which the Regulation Counsel deems appropriate. If the respondent's criminal conviction is either proved or admitted, the respondent shall have the right to be heard by the Hearing Board only on matters of rebuttal of any evidence presented by the Regulation Counsel other than proof of the conviction.

**(d) Conviction of a Serious Crime -- Immediate Suspension.** The Regulation Counsel shall report to the Supreme Court the name of any attorney who has been convicted of a serious crime, as hereinafter defined. The Supreme Court shall thereupon issue a citation directing the convicted attorney to show cause why the attorney's license to practice law should not be immediately suspended pursuant to C.R.C.P. [251.8](#). Upon full consideration of the matter, the Supreme Court may either impose immediate suspension for a definite or indefinite period or may discharge the rule to show cause. The fact that a convicted attorney is seeking appellate review of the conviction shall not limit the power of the Supreme Court to impose immediate suspension.

**(e) Serious Crime Defined.** The term serious crime as used in these Rules shall include:

- (1) Any felony; and
- (2) Any lesser crime a necessary element of which, as determined by its statutory or common law definition, involves interference with the administration of justice, false swearing, misrepresentation, fraud, willful extortion, misappropriation, or theft; or an attempt or conspiracy to commit such crime; or solicitation of another to commit such crime.

**Rule 251.21. Discipline Imposed by Foreign Jurisdiction**

**(a) Proof of Discipline Imposed.** Except as otherwise provided by these Rules, a final adjudication in another jurisdiction of misconduct constituting grounds for discipline of an attorney shall, for purposes of proceedings pursuant to these Rules, conclusively establish such misconduct.

**(b) Duty to Report Discipline Imposed.** Any attorney subject to these Rules against whom any form of public discipline has been imposed by the authorities of another jurisdiction, or who voluntarily surrenders the attorney's license to practice law in connection with disciplinary proceedings in another jurisdiction, shall notify the Regulation Counsel of such action in writing within ten days thereof.

\* \* \*

**(d) Commencement of Proceedings Upon Notice of Discipline Imposed.** Upon receiving notice that an attorney subject to these Rules has been publicly disciplined in another jurisdiction, the Regulation Counsel shall obtain the disciplinary order and prepare and file a complaint against the attorney as provided in C.R.C.P. 251.14. If the Regulation Counsel intends either to claim that substantially different discipline is warranted or to present additional evidence, notice of that intent shall be given in the complaint.

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