



ETHICS RULES LAWYERS SHOULD REMEMBER 2015-2016 UPDATE¹

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The Colorado Rules of Professional Conduct (the “Colo. RPC”), the comments to the Colo. RPC, and the interpretations provided by the courts and the Ethics Committee of the Colorado Bar Association govern lawyers practicing law in Colorado, and in some cases are impacted even when Colorado lawyers are not practicing law. This is merely intended to be a summary of some of the rules most likely to impact lawyers and is intended only to serve as a reminder, and not an extensive discussion. I have offered references where further discussion is desired, including to chapter 17 (*Ethical Considerations*) of a book I wrote with Allen Sparkman, *LIMITED LIABILITY COMPANIES AND PARTNERSHIPS IN COLORADO* (CLE in Colorado 2015) (“*LLCS IN COLORADO*”) where there is an extensive discussion of some of the issues raised.

The vast majority of disciplinary cases in 2015, as in prior years, were as a result of lawyer neglect of client matters, failure to communicate, and mishandling client funds.

Introduction

A. “[I]n appropriate cases, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.” Scope Comment [20]

Rule 1.0 Terminology

A. “Confirmed in writing” means signed by client or you sent writing close in time to oral conversation.

B. Cannot be assumptive (*i.e.*, “If I do not hear from you, I will take that as a waiver of the conflict I have described above.”).

C. “Informed Consent” means the lawyer has to explain to the client the consequences of the action sought, the material risks, and the alternatives.² In some

¹ Presented to the Denver Association of Oil & Gas Title Lawyers on February 16, 2016.

² *LLCS IN COLORADO*, § 17.1.9 (*What Must Be Communicated to Clients To Obtain Informed Consent*).

rules, informed consent must be confirmed in writing by the lawyer; the client's signature is not required. Additional issues arise when seeking "informed consent" from a client with diminished capacity.³

D. "Client" –

1. Who Is the Client? Need to accurately and carefully identify and pay attention to client. *LLCS IN COLORADO*, § 17.1.2, § 17.1.6. This is a matter of law and not legal ethics.

2. Representation of multiple clients – Formal Opinion 68 and *LLCS IN COLORADO*, § 17.1.3 (*Representation of Multiple Clients – Conflicts of Interest*) and § 17.1.6 (*Potential issues in multiple representation*)

3. This is not necessarily a function of "who is paying the bill," but where the client is not paying the bill, compliance with Colo. RPC Rule 1.8(f) is required.

4. Privity – *Baker v. Wood, Ris & Hames, P.C.*, Colo. S.Ct. no. 13SC554 (Jan. 19, 2016). *Baker* is an estate planning case where beneficiaries of a will attempted to sue the estate planning lawyer for malpractice claiming that their inheritance shrank because of negligence by their parents' lawyers. The Colorado Supreme Court reaffirmed the "strict privity" rule that prevents nonclients from suing for malpractice except where the lawyer acts fraudulently or tortiously. While a large number of U.S. jurisdictions have abandoned strict privity (allowing non-clients to sue for malpractice under liberalized exceptions such as "third party beneficiary"), Colorado chose not to follow the trend. This can be applied to other areas of law where lawyers take actions and there may be intended, or unintended, beneficiaries other than their clients – such as issuing title opinions.⁴

Rule 1.1 Competence

A. You have to be competent. Do not take on work you cannot and do not have anyone to train you to do.

B. This does not mean a lawyer cannot migrate to new areas of law, but the lawyer must ensure that he or she has adequate resources available (co-counsel, CLE courses, mentors, other training) to be competent.

³ See Rule 1.14 and Formal Opinion 126 (*Representing the adult client with diminished capacity*).

⁴ Admittedly there is usually a limitation in a title opinion on reliance, but this case might fill a hole where there is no such limitation.

C. Part of being competent is keeping up with legislative changes.

a. For title lawyers, consider Colorado S.B. 2015-049 (*Concerning the vesting of title to real estate in a grantee that is an entity that has not yet been formed once the entity has been formed*) amending C.R.S. § 38-34-105.⁵

b. For all lawyers representing organizations that may have merged, consider the applicability of the attorney-client privilege as explained by H.B. 2015-1071 (*Concerning clarification that, following a merger of entities, the surviving entity is entitled to control the premerger attorney-client privileges of a constituent entity*) amending C.R.S. § 7-90-204(1)(a).

D. Proposed addition to Comment to Rule 1.1 (Competence): “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, practice, and changes in communications and other relevant technologies. . . .” *Proposed New Rules of Professional Conduct or Comments under Consideration by Colorado Supreme Court (Public Hearing November 4, 2015)*.⁶

Rule 1.2 Scope

A. Client decides the goals of the representation; the lawyer decides the means and methods.

B. Be very careful of “unbundling” legal services; sometimes it cannot be done.

C. A lawyer cannot give a client advice on how to commit a crime. Colorado has, of course, the marijuana exception in comment [14], which remains a federal offense, although banking of funds derived from marijuana business is still not permissible.⁷

Rules 1.3 & 1.4 Diligence/Communication

A. It is a good idea to put everything on your calendar. We all carry our calendars in our pockets, on our belts or in our purses. Is there ever a reason to miss an appointment in 2016?

⁵ My paper on this subject was presented to the CBA NREL luncheon on February 10, 2015 and is available at <http://www.bfwlaw.com/articles/deeds-to-non-existent-entities-and-senate-bill-15-049/>.

⁶

https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Rule_Changes/Proposed/2015%20Proposed%20Rule%20Changes/Rules%20of%20Professional%20Conduct%20redlined.pdf.

⁷ See *People v. Furtado*, 45 The Colo. L. (CBA) no. 1 at 99 (Jan. 2015).

B. Communication. Keep your client informed! Send copies of all documents and letters or emails in or out your office to your client (but do so carefully so there is no breach of confidentiality⁸). Return your clients phone calls and emails promptly (same day if you can). Besides complying with the Rule, this practice:

1. Keeps client informed about the matter.
2. Keeps client informed about the work involved and the fees likely to be charged. Client will understand the reasons behind a larger bill.
3. Protects the lawyer if a dispute later arises where you can show client was informed.

C. Part of diligence and communication is disclosure to clients when a lawyer has made a mistake. Formal Opinion 113 (updated in 2015) reminds lawyers that it is their duty under Rule 1.4 to inform clients about material developments in the subject matter of the representation – including “material adverse developments . . . resulting from the lawyer’s own errors.”⁹

Rule 1.5 Fees

A. Fee agreements with new clients need to be communicated in writing (do not have to be signed by the client except contingency fee agreements, which do have to be signed by the client and there is a whole special rule regarding).

B. Fees and costs have to be reasonable.

C. You cannot mark-up costs, except a nominal amount to cover administrative overhead relating to them.

D. You must return unearned fees immediately at end of engagement.

1. See *In re Gilbert*, 346 P.3d 1018, 1027 (Colo. 2015), where an immigration lawyer had accepted a \$3,550 flat fee that was paid over several months to represent a foreign national, Peters, in an immigration matter. Gilbert was retained to perform three tasks as part of the representation: (1) represent Peters at a hearing, (2) assist with the filing of an I-130 Petition for an Alien

⁸ See New York State Bar Ass’n Comm. On Prof’l Ethics, Op. 1076 (Dec. 8, 2015), 32 Law. Man. Prof. Conduct 70. This opinion recommends against attorneys sending emails to opposing counsel with a “cc” or a “bcc” to the sending attorney’s client. If a “cc” is used, it may be considered implied authority for opposing counsel to communicate directly with the client or, more significantly, it may be disclosure to opposing counsel of an email address that the client wants to keep private. In either case (“cc” or “bcc”), the recipient client may erroneously respond to her own counsel by clicking “reply all” rather than simply “reply.”

⁹ *LLCS IN COLORADO*, § 17.4 (*Formal Opinion 113 – Ethical duties to disclose errors to the client*).

Relative, and (3) accompany Peters to an interview conducted by the U.S. Citizenship and Immigration Services. Gilbert represented Peters at the hearing.

2. Approximately five months later, Peters terminated Gilbert's services and asked for a refund. Peters agreed that Gilbert was entitled to payment for representation at the hearing, which Peters believed equaled one hour of work. After the immigration court granted her motion to withdraw, Gilbert sent an accounting to the client outlining the services performed, which totaled 4.41 hours of legal work. Gilbert retained \$1,114.14 and refunded the remainder of the flat fee. Gilbert based her retaining a portion of the fee on a rate of \$250 per hour, which was not made part of the fee agreement but was discussed and shared with Peters at the initial consultation.

3. The Court reasoned that in these circumstances *quantum meruit* recovery was appropriate. Noting that contingent fee agreements are governed by Colorado Rules Governing Contingent Fees, the Court rejected OARC's argument that flat-fee arrangements should be treated the same as contingent-fee agreements for purposes of including the concept of *quantum meruit* in a flat-fee agreement. The Court further noted that "we do not intend to suggest that lawyers may unilaterally determine what they believe they are owed under *quantum meruit*." However, the Court's discussion of *quantum meruit* in *Gilbert* seems to suggest that where a client is tacitly aware of the basis for recovery (i.e., a lawyer's hourly rate), lawyers can fairly withhold a corresponding fee without having to refund the entirety of the fee to the client.

E. Promptly inform client of any change in fee amount. Put in your engagement letter that you can change your rates whenever you darn well please.

F. Accepting an ownership interest in a client for fees is seldom (never?) a good idea.¹⁰

Rule 1.6 Confidentiality

A. Do not disclose "information relating to the representation of a client" absent implied or express client consent or other narrow exceptions.¹¹

B. This includes any client information, not just "confidential" information; this is much broader than what is protected by the attorney-client privilege.

C. The rule bars disclosure of clients' names to third parties without the client's consent unless the fact of the representation is generally known.

¹⁰ *LLCS IN COLORADO*, § 17.2.1 (*Accepting an ownership interest for fees*).

¹¹ *LLCS IN COLORADO*, § 17.3 (*Confidentiality – The lawyer's obligation to keep a client's secrets*).

D. It also prohibits disclosure of information in court pleading files, subject to the exceptions found in Rule 1.6(b).

E. The exceptions found in Rule 1.6(b) swallow the rule. Under the exceptions, a lawyer MAY reveal information relating to the representation of a client to the extent the lawyer reasonably believes to be necessary:

(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 in furtherance of which the client has used or is using the lawyer’s services”; and

(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 or is using the lawyer’s services”;

(5) “To detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information is not protected by the attorney-client privilege and its revelation is not reasonably likely to otherwise materially prejudice the client.” *Proposed New Rules of Professional Conduct or Comments under Consideration by Colorado Supreme Court (Public Hearing November 4, 2015)*.

(6) “To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.” NOTE that this permits a lawyer to use client confidences under Rule 1.6 in an **offensive** manner (such as in suing for fees) in addition to using confidences in a **defensive** manner (defending a malpractice action). Rule 1.6(b)(6) also allows the lawyer to reveal client confidences “to respond to allegations in any proceeding concerning the lawyer’s representation of the client.”

PLEASE NOTE: The focus of many of the exceptions to Rule 1.6 (which allow the lawyer to make disclosure) is on injury to another - not the lawyer’s client. What if the lawyer and client disagree on “substantial injury” or “crime of fraud”? What if the lawyer is seeking to defend himself/herself from claims of aiding and abetting?

F. Electronic communications and “cloud-based” electronic file storage provides significant risk of breach of an attorney’s confidentiality obligation.¹² As noted in the article, disclosure of confidential information can be the result of:

¹² See Kilgore and Willson, *E-mail Security: The Scary Truth for Lawyers and What to Do About It*, 44 The Colo. L. (CBA) no. 5 at 69 (May 2015). See also Lidstone, *Using the Cloud: Trade Secrets and Confidential Information Aren’t So Secret*, available at <http://ssrn.com/abstract=2358472>.

1. Sender mistake – including the wrong addressee in the address block or as a copy addressee. Does the typical email disclaimer (“If you have been sent this message in error . . .”) protect the sender? Probably not.¹³

2. Device/hack attack, which the 2015 news reveals that the electronic records of the government and the largest corporations were breached. Law firms need to up their protections, both with software and staff training. (Think ransom ware).

3. Lost or stolen devices – password protection is critical, and the ability to wipe devices clean is basic.

4. Losses from internet service providers - including hack attacks and subpoenas – where is your data located?

E. A few tips on how to avoid violating Rule 1.6:

1. Do not “drop names” of clients, especially on social media (or at social events). In social media, once it is out in cyberspace, you can never retrieve it.

2. Do not discuss clients or matters in public places, including busses, airplanes, bars, restaurants, elevators, on social media, etc.

3. Do not discuss client matters on cordless phones (cell phones are okay).¹⁴

4. Do not leave work unattended and in plain view in public places (e.g., laptop screen, lying on table at coffee shop, or even face-up in a public hallway at your firm).

5. Some matters may be so sensitive that you should not discuss them even within a large firm.

6. All contemporaneous soft documents (not discovery production) going to the other side have to go through a meta-data scrubber.¹⁵

7. Use encrypted email and internet connections when available.

¹³ See Lidstone, *E-mail Disclaimers – A Worthwhile Endeavor or a Waste of Electronic Ink?*, available at <http://ssrn.com/abstract=2656466>.

¹⁴ Formal Opinion 90 (*Preservation of Client Confidences in View of Modern Communication Technology*).

¹⁵ Formal Opinion 119 (*Disclosure, Review and Use of Metadata*).

8. Do not send messages by using “Reply All,” and be cautious when accepting email addresses that automatically populate.¹⁶

9. Do not send emails to opposing counsel with a “cc” or a “bcc” to the sending attorney’s client. If a “cc” is used, it may be considered implied authority for opposing counsel to communicate directly with the client or, more significantly, it may be disclosure to opposing counsel of an email address that the client wants to keep private. In either case (“cc” or “bcc”), the recipient client may erroneously respond to her own counsel by clicking “reply all” rather than simply “reply.”¹⁷

8. “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.” *Proposed New Rules of Professional Conduct or Comments under Consideration by Colorado Supreme Court (Public Hearing November 4, 2015)*.

F. Attorney client privilege belongs to the client. In business representation, it belongs to the entity.

1. If a receiver takes over a business, the receiver has the right to all prior “privileged” communications between the entity and the lawyer, including the advice that the lawyer may have been giving to officers and directors that may not have been in the current best interests of the entity. (See Rule 1.13)

2. If an entity merges into another entity, “all of the rights, privileges, ***including specifically the attorney-client privilege***, and powers of each of the merging entities, . . . vest as a matter of law in the surviving entity . . .” C.R.S. § 7-90-204(1)(a). H.B. 2015-1071 added the italicized portion, effective Sept. 1, 2015.

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

¹⁷ See New York State Bar Ass’n Comm. On Prof’l Ethics, Op. 1076 (Dec. 8, 2015), 32 Law. Man. Prof. Conduct 70.

Rule 1.7 Conflicts of interest—general rule

A. Two types of conflicts: Directly Adverse (cannot be opposite your client) or Material Limitation (business conflict, personal conflict, etc.)

B. Material Limitation is just as real a conflict as a Directly Adverse situation, and the same steps have to be taken to avoid.

C. If you are hanging up your own shingle, put conflicts check system in place from Day 1—do not rely on your memory.

D. Consider conflict of interest issues with co-counsel relationships. At what point do two law firms become responsible for conflicts arising from the other law firm's representations?

E. Always run a conflicts check as soon as the possibility of a legal representation becomes a possibility.

Rule 1.8 Conflicts—current clients—specific rules

A. This rule used to be called “prohibited transactions.”

B. Getting paid in anything other than fees is a “business transaction” with a client and the attorney has to comply with Rule 1.8.

1. This would include receiving a note and deed of trust for unpaid fees.

2. It would also include receiving an equity interest in the client for fees, or as an investment.¹⁸

C. A North Carolina case holds that a lawyer's violation of Rule 1.8 makes the business deal with the client void.¹⁹ In that case, an attorney had entered into an “alternative fee arrangement” for patent work, and expected to receive 25% of the revenues generated. While Priest testified that he had “orally” advised Coch to seek legal advice, he could not provide any documentation to that effect. When Coch sold the patent for \$1 million, Priest tried to collect his 25% but the courts said “no” and also rejected a *quantum meruit* argument that the lawyer made.

¹⁸ See Formal Opinion 109 (*Acquiring an ownership interest in a client* – updated 2015). *LLCs IN COLORADO*, § 17.2. See, especially, § 17.2.4 – *Invest In The Client; Do Not Take Ownership Interest For Fees*.

¹⁹ *Law Offices of Peter H. Priest, PLLC v. Coch*, 2015 BL 377579 (N.C.Ct.App. no COA15-254, 11/17/2015).

Rule 1.9 Duties to former clients

A. If new matter is not “substantially related” to matter with former client, no conflict waiver is necessary, but you still cannot use Rule 1.6 information against your former client (which may beg the question as to whether it is a truly “unrelated” matter).

B. If new matter is “substantially related” to matter with former client, and new and old clients’ interests are materially adverse, lawyer must decline or withdraw from representation—except in unlikely event former client gives consent to the conflict.

C. A lawyer may not **use** information gained during the representation to the disadvantage of a former client unless information is “generally known” or as Rule 1.6 would permit with respect to a current client. A lawyer may not **reveal** such information except as Rule 1.6 would permit with respect to a current client.

D. “In contrast to both the attorney-client privilege . . . and Rule 1.9(c)(1) . . ., Rule 1.6 contains no exception permitting disclosure of information previously disclosed or publicly available.”²⁰

F. In *M’Guinness v. Johnson* (Cal. App., No. H040614, 12/30/15) the California Court of Appeals disqualified a law firm, from representing a shareholder of a company in a cross-complaint against the other two shareholders because of the law firm’s former representation of the company (TLC) itself. The successful arguments to the California Court included the argument that, even if the firm were no longer TLC’s counsel, its representation of the cross-complainant constituted a subsequent conflict of interest because of the overlap between its prior corporate representation and the current lawsuit.

Rule 1.10 Imputation of Conflicts of interest—general rule

A. Typically, if one person at a firm is disqualified, then the whole firm is disqualified. If one person is disqualified for a personal reason (*e.g.*, a personal relationship with opposing counsel, giving rise to a material limitation conflict), then the entire firm is not usually disqualified.

B. “Confidentiality Walls” do not always work—depends on several factors, including:

1. Whether the incoming law firm attorney “personally and substantially” worked on matter;
2. Whether the attorney gained Rule 1.6 protected information; and/or

²⁰ *Annotated Model Rules of Professional Conduct* 109 (8th ed. 2015).

3. Whether the attorney came from a government office, legal or nonlegal.

C. “Confidentiality Walls” should be in place before the first day of the conflict.

D. While there do not appear to be cases on the subject, it appears from an interpretation of the rules that the “Firm” that can be disqualified may include in-house legal department.

Rule 1.13 Organization as client

A. Obligations are to the organization itself.²¹

B. If your contact at the organization becomes confused about this, you have to explain it.

C. If your contact at the organization is violating his duty to the organization, or if the organization is pursuing a criminal course of action, then you may report “up the ladder” within the organization.

D. If fired for reporting up, then you may have to report further up.

E. This only applies to current/prospective conduct, not past conduct.

F. You never have a duty to report outside the organization, but it may be permitted if you are “reasonably certain” that it will result in “substantial injury” to the organization. **NOTE**, unlike Rule 1.6, the focus is on injury to the client – the organization.

Rule 1.14 Client with Diminished Capacity.

A. If you develop a “reasonable belief” that the client has diminished capacity or is otherwise at risk of physical, financial, or other harm, you can share information otherwise to protected by Rule 1.6 to get the client help.²²

B. Until you develop such a reasonable belief, you cannot violate Rule 1.6 even to get help for the client.

C. This also raises questions whether a client with diminished capacity can give informed consent.

D. Differences may arise between the lawyer and client regarding whether or to what extent the client’s capacity is diminished, whether the lawyer should disclose

²¹ *LLCs IN COLORADO*, § 17.1.5.

²² *See* Formal Opinion 126 (*Representing the adult client with diminished capacity*).

information regarding the client's condition despite the client's lack of consent to such disclosure, or whether the lawyer should take any action to protect the client. These differences may present conflicts between the client's and the lawyer's respective interests, and the lawyer must assess whether those conflicts will materially limit the representation of the client.

Rule 1.15A-1.15E Safekeeping property

- A. Do not move money out of trust account and into operating account until it is earned.
- B. Do not let trust account go below zero (no excuses).
- C. There is no such thing as a “nonrefundable retainer.”
- D. Use of credit cards for retainers is complicated—*see* Formal Opinion 99 (*Use of credit cards to pay for legal services*).
- E. Return unearned fees promptly at end of representation.

Rule 1.16 Declining or terminating representation

A. File belongs to the client and must be returned upon request. Lawyer may not charge client to make copy of file. At his or her expense, lawyer may make a copy of the file before turning it over. Lawyer may withhold notes or law firm's internal administrative processes (such as conflicts check). *See* Formal Opinion 104 (*Surrender of papers to client upon termination of representation*). Retaining lien can allow you to keep file until you are paid. But there are several ethical exceptions to a lawyer's statutory right to assert a retaining lien.²³

- B. When matter is over, send a letter saying so.
- C. When you turn down an engagement, send a letter saying you are not the potential client's lawyer, and urge the potential client to find a lawyer promptly.
- D. To show the value of a writing terminating representation of a client, *see M'Guinness v. Johnson* (Cal. App., No. H040614, 12/30/15) where the California Court of Appeals disqualified a law firm, from representing a shareholder of a company in a cross-complaint against the other two shareholders because of the law firm's former representation of the company (TLC) itself. The successful arguments to the California Court included:
 - That the firm had never been discharged or withdrawn as counsel, and that as such, it had a conflict of interest that required its disqualification; and

²³ *See* Formal Opinion 82 (*Assertion of attorney's retaining lien on client's papers*).

- Alternatively, even if the firm were no longer TLC's counsel, its representation of cross complainant constituted a subsequent conflict of interest because of the overlap between its prior corporate representation and the current lawsuit.

Rule 1.16A File retention

A. Can destroy after 10 years or, with notice, 30 days, so long as no related actions pending or threatened. Lawyer may always agree in the engagement agreement to hold a file for a longer period of time.

B. Thirty-day notice may be included in the engagement agreement.

Rule 1.18 Duties to prospective clients

A. You owe most of the same duties regarding confidentiality to a prospective client that you owe to an actual client—this is why you run the conflicts check first.

B. “Cocktail party” exception, but only in some cases – *Allen v. Steele* – *dicta* from the court of appeals suggests that “informal statements by an attorney in a social setting would *generally* not result in a viable claim against the attorney” [*emphasis supplied*].²⁴

Rule 3.3 Candor to the Tribunal

A. Do not lie to any tribunal

B. If you know that your client is lying (or intends to lie) (that is “criminal or fraudulent conduct”) the lawyer **MUST** take reasonable remedial measures, including, if necessary, disclosure to the tribunal. Willful blindness to the client’s actions probably will not protect the lawyer.

Rule 4.1 Truthfulness in statements to others

A. In the course of representing a client, a lawyer **MUST NOT** knowingly

1. Make a false statement of material fact or law to a third person; or
2. 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.

B. When would such disclosure be prohibited by Rule 1.6? [When it includes information relating to the representation and no Rule 1.6(b) exception is applicable.] “The confidentiality rule, for example, applies not only to matters

²⁴ See *LLCS IN COLORADO*, § 17.1.2 (*Who is the client – Potential Liability to Non-clients*).

communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.”²⁵

C. Lawyers negotiating on behalf of clients may have some issues when the lawyer intentionally misstates the client’s position—for example, where the client has a bottom line of \$1 million, and the lawyer insists that her client will not accept a settlement below \$2 million. According to the ABA and (more recently) California,²⁶ there is a fine line between permissible “statements that constitute acceptable exaggeration, posturing or ‘puffing’ in negotiations” and “statements that constitute impermissible misrepresentations of material fact upon which the opposing party is intended to rely.” Among the impermissible statements are:

1. An assertion by plaintiff’s counsel (who failed to locate any eyewitness) that he has an eyewitness to the event;
2. An attempt by counsel to inflate damages by asserting that client’s salary was \$25,000 higher than the lawyer knew it to be;
3. Counsel’s assertion that client’s insurance coverage topped out at \$50,000 when the lawyer knew the policy limit was \$500,000.
4. Counsel’s statement that client will file for bankruptcy if he loses at trial when counsel knows the client “is not legally eligible to file for bankruptcy.”
5. Client’s statement in the lawyer’s presence) that she had not found a job (thereby mitigating damages) when the lawyer knew that client had accepted a new job for a higher (or even the same) salary.

Rule 4.2 Communication with person represented by counsel

- A. Do not do without other counsel’s consent.
- B. Where organization involved, representation of organization covers:
 1. one who supervises, directs, or regularly consults with lawyer regarding the matter;
 2. one who can bind the organization regarding the matter; or

²⁵ Cmt. [3], Colo. RPC 1.6.

²⁶ ABA Formal Ethics Op. 06-439, 22 Law. Man. Prof. Conduct 235 (2006) and Cal. Stat Bar Standing Comm. On Prof’l Responsibility & Conduct, Formal Op. 2015-194, 32 Law. Man. Prof. Conduct (BNA) 44.

3. one whose acts are attributable to the organization regarding the matter.²⁷

C. Does not matter who initiates the conversation.

D. Okay to go around outside counsel to in-house counsel (ABA opinion and case law on point).

E. Okay to inform client that this is an ethical rule for lawyer and client can directly contact other side directly. Where lawyer is directing the client in these contacts, there can be problems.

Rule 4.3 Dealing with unrepresented person

A. Be very careful not to even come close to giving legal advice other than “get a lawyer” “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.”

1. Consider the group organizing a new business.²⁸

2. Considering the group organizing to bring litigation.

B. Remind other side often and in writing that you are lawyer for your client; if you do that, then you can (for example) describe what contract term means to you.

Rule 4.4 Respect for rights of third parties (and Formal Opinion 119)

A. Except if sender catches you before you read it, if you receive what appears to be an inadvertently sent document, whether or not it is privileged, only duty is notice to other side.²⁹

B. Metadata is treated similarly.³⁰

C. *See* Formal Opinion 127 (*Use of social media for investigative purposes*).

1. Formal Opinion 127 addresses ethical issues that arise when lawyers, either directly or indirectly, use social media to obtain information

²⁷ Also see Formal Opinion 69 (*Propriety of communicating with an employee or former employee of an adverse party organization*).

²⁸ See *LLCS IN COLORADO*, § 17.1.4 (*Representation Of An Entity To Be Formed*) through § 17.1.7 (*May the lawyer represent only the entity to be formed?*).

²⁹ Formal Opinion 108 (*Inadvertent disclosure of privileged or confidential documents*).

³⁰ Formal Opinion 119 (*Disclosure, review, and use of metadata*).

regarding witnesses, jurors, opposing parties, opposing counsel, and judges. The opinion also addresses circumstances in which lawyers seek to access restricted portions of a person's social media profile or website that ordinarily may be viewed only by permission.

2. Formal Opinion 127 provides that a lawyer may always view the public portion of a person's social media profile and any public posts made by a person through social media.

3. A lawyer acting on behalf of a client may request permission to view a restricted portion of a social media profile or website of an unrepresented party or unrepresented witness only after the lawyer identifies himself or herself as a lawyer, and discloses the general nature of the matter in which the lawyer represents the client.

4. A lawyer acting on behalf of a client may not request permission to view a restricted portion of a social media profile or website of a person the lawyer knows to be represented by counsel in that same matter, without obtaining consent from that counsel.

Rule 4.5 Threatening prosecution

A. Cannot threaten criminal prosecution or grievance to get advantage in a civil case.

B. Can simply inform other side that its conduct may violate a law or Rule of Professional Conduct.

Rule 5.1 Responsibilities of supervising lawyer

A. Managing partners: have protocols in place so all lawyers in the firm comply with the Colo. RPC.

B. Each supervising attorney must make sure subordinate attorneys comply with the Rules.³¹

Rule 5.2 Responsibilities of subordinate lawyer

A. With one thin exception, "subordinate lawyers" are responsible for their ethical violations, even if done at the direction of a partner.

³¹ See *People v. Ruybalid IV*, 44 The. Colo. L. (CBA) no. 4 at 91 (April 2015).

B. “A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.” Colo. RPC 5.2(a). But the fact that the subordinate lawyer acted at the direction of a supervisor can bear on the question of whether the subordinate lawyer had the requisite knowledge to render his or her conduct a violation of the Rules.

Rules 5.3 Supervisory duties to non-lawyers

A. Make sure you have protocols in place consistent with the Rules, particularly confidentiality and conflicts.

B. Partners and other lawyers with “comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer.” Colo. RPC 5.3(a).

C. “Supervision of a non-lawyer must often be more extensive and detailed than of a supervised lawyer because of the presumed lack of training of many non-lawyers on legal matters generally and on such important duties as those on dealing properly with confidential client information, and with client funds and other property, which may be different from duties generally imposed in non-law practices and businesses.”³²

Rule 5.4 Professional independence of a lawyer

A. Generally cannot share legal fees with a non-lawyer.

B. Generally cannot partner with non-lawyer.

C. Generally cannot report to a non-lawyer, except at the client level.

Rule 5.6 Restrictions on right to practice

A. Unethical to sign a covenant not to compete except as part of retirement.

B. May include financial restrictions on future competition – such as receiving a return of an equity owner’s investment

Rule 5.7 Responsibilities regarding law-related services

A. If you do not separate your law practice from your “law-related” practice, all ethical rules likely apply.

³² *Restatement of the Law Governing Lawyers*, § 11 cmt. f (2000).

B. See also Formal Opinion 98 (updated in 2015) - *Ethical responsibilities of lawyers who engage in other businesses*. Utilizing the framework of Rule 5.7, this opinion discusses specific issues relating to a lawyer’s provision of law-related services, including what services constitute law-related services and what reasonable measures a lawyer should take to avoid confusion about whether a lawyer–client relationship exists when a lawyer is providing law-related services. This opinion also discusses the potential applicability of Rule 5.7 in the context of lawyers who provide mediation, arbitration, or expert witness services. The Formal Opinion goes on to state that “most of the Rules apply to a lawyer in such a circumstance, including those relating to conflicts of interest (Colo. RPC 1.7, 1.8, 1.9, and 1.10); disclosure of confidential information (Colo. RPC 1.6); reasonable fees (Colo. RPC 1.5); sharing legal fees or forming a partnership with non-lawyers (Colo. RPC 5.4(a) through (d)); and lawyer advertising, solicitation, and communication about legal services (Colo. RPC 7.1, 7.2, and 7.3). Although a lawyer’s obligations necessarily will depend on the factual setting—whether the law-related services are being provided in a sufficiently distinct manner and whether the lawyer has taken reasonable measures to avoid confusion about whether a client–lawyer relationship exists—any lawyer engaged in a law-related business should take care to follow the strictures of Colo. RPC 5.7(a)(1) through (2).”

Rules 7.1, 7.2, 7.3, & 7.4 Advertising

- A. Always must be truthful.
- B. Do not hold yourself out as an “expert” or “certified” with a few exceptions.
- C. Okay to pay for advertising, not okay to pay for referrals—*see* Formal Opinion 122 (*The applicability of Colo. RPC 7.2 to internet-based lawyer marketing programs*) for the distinction.
- D. Not okay to “cold call” lay person you do not know to get their legal work, unless you do it in writing and put “Advertising Material” on the writing. There is a special rule for personal injury cases in Colo. RPC 7.3(c).
- E. It is no longer required that you keep a copy of every advertisement you make, but still may be a good idea.
- F. Social networking—very tricky—you should assume it will be viewed with 20/20 hindsight by disgruntled client/jury/attorney regulation counsel.

Rule 8.3 Reporting misconduct

- A. Only required when conduct raises a “substantial question” about the other lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.

- B. Lawyers may have a duty to self-report their own ethical misconduct.
- C. If not required, generally a bad idea while litigation is pending.

Rule 8.4 Deceitful conduct

A. This rule always applies—even if you are not acting as a lawyer. This includes:

- 1. Theft;
- 2. COLTAF violations.
- 3. DWAI, DUI convictions;
- 4. Willful failure to file tax returns;
- 5. Domestic abuse;
- 6. “A pattern or repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.”
Comment [2].

B. Lawyers have been disbarred for deceitful conduct that had nothing to do with their work as a lawyer. For example, payment of child support obligations is important. See *People v. Quigley* (No. 14PDJ020, 09/18/2014) and *People v. Logan* (No. 15PDJ026, 04/16/2015) where both attorneys were suspended when they failed to satisfy the arrearages and to pay the monthly child support amounts. In doing so, Quigley and Logan contravened Colo. RPC 3.4(c) (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal) and Colo. RPC 8.4(d) (a lawyer shall not engage in conduct prejudicial to the administration of justice). The PDJ did not find it to be convincing that the parties claimed financial inability to make the required payments.

C. Do not secretly tape conversations, notwithstanding Formal Opinion 112 (*Surreptitious recording of conversations or statements*).

D. Per Formal Opinion 124 (*A lawyer’s use of marijuana – updated in 2015*), it is not an ethical violation to use marijuana if it does not interfere with your competence in the practice of law. However, lawful use of marijuana does not protect a lawyer, or other employee, from discharge where such use violates the employer’s policies. See *Coats v. Dish Network, LLC*, 2015 CO 44 (June 15, 2015) where the Colorado Supreme Court upheld Dish’s termination of an employee who tested positive for marijuana use, finding that “unlawful” included federal law, not just state law. This was a sympathetic case where Brandon Coats, a quadriplegic, was an employee of Dish,

had good evaluations over three years and no disciplinary actions, but failed a drug test for his Colorado-legal use of medical marijuana at night and not on Dish premises.

PRACTICAL ADVICE FOR RISK MANAGEMENT

- A. Know who your client is.
- B. Perform conflicts checks.
- C. Get informed consent if there is a conflict of interest that is waivable.
- D. Send fee agreements.
- E. If other specialists are needed, know who is retaining them.
- F. Bill regularly.
- G. Communicate, communicate and communicate.
 - 1. Document major discussions and advice.
 - 2. Send disengagement letters confirming that the matter is closed or that the attorney is no longer representing the client on the matter. Include:
 - (a) Nature of the representation; and
 - (b) Statement that the attorney's responsibility is at an end.
 - 3. When you make a mistake, admit it and deal with it; trying to cover it up will only compound the error.