

## Chapter 5

# CONFLICTS OF INTEREST

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## **§ 5.1 INTRODUCTION**

Conflicts of interest present some of the most common, difficult, and dangerous problems confronting lawyers. The problems are common because conflicts of interest must be assessed with every new client. The problems are difficult because the ethics rules are complex and confusing. The problems are dangerous because the post-Enron public is very aware of self-dealing by lawyers, politicians, and others.

People understand loyalty. They also understand when a lawyer has been disloyal. Few accusations will inflame a jury more than the charge that a defendant-lawyer has betrayed his or her client. The charge plays into the public mythology that lawyers are dishonest and avaricious. While the mythology may be just that, when there is credible

evidence in a legal malpractice trial that the defendant lawyer was disloyal to the client, the charge will resonate with the jury.

This Chapter discusses the current law of conflicts of interest as it applies to Colorado lawyers. It draws upon the newly revised Colorado Rules of Professional Conduct, effective January 1, 2008 (*hereinafter*, Colo. RPC or the Colorado Rules); the former Colorado Rules of Professional Conduct, effective through December 31, 2007 (*hereinafter*, former Colorado Rules or former Colo. RPC); Colorado appellate decisions; ethics opinions; the Ethics 2000 revisions to the ABA Model Rules of Professional Conduct (sometimes referred to as the “new ABA Model Rules”); the *Restatement (Third) of the Law Governing Lawyers* (sometimes, *hereinafter*, the *Restatement*); and other resources.

## **§ 5.2 POLICY CONSIDERATIONS BEHIND THE CONFLICT OF INTEREST RULES**

The rules regulating lawyers’ conflicts of interest arise out of a number of competing policy concerns. The first, and most important, policy concern is the belief that a client has a right to a lawyer who will be loyal to the client and in whom the client can trust.<sup>1</sup> The conflict of interest rules seek to promote trust between the client and the lawyer. Loyalty and trust are ends in themselves.<sup>2</sup>

A client benefits from the ability to trust his or her lawyer because the client can be assured that the lawyer will provide legal advice untainted by the claims or interests of another, and that the lawyer will be the client’s advocate and protector. The client also benefits because the client can feel free to confide in the lawyer, know that the lawyer will keep those communications confidential, and know that the lawyer will provide legal advice based upon all of the facts, rather than on incomplete facts.

A lawyer also benefits from a client’s trust. The lawyer benefits because trust creates an environment in which the client will confide in the lawyer and share all of the pertinent facts. A client’s candor and full disclosure permit the lawyer to properly evaluate the facts, to provide the best possible legal advice to the client and, ultimately, to protect the client.

The second policy concern behind the conflict of interest rules is closely related to the first. That policy concern is the interest in enhancing effective legal representation.<sup>3</sup> Conflicts of interest undermine a lawyer’s independence and professional judgment.<sup>4</sup> If a lawyer’s professional judgment is influenced by personal, financial, or professional concerns that compete with the client’s, the lawyer may, consciously or unconsciously, fail to provide the client with accurate or complete legal advice. Indeed, the lawyer’s ability to provide effective representation depends upon a client’s trust. If a client does not fully trust the lawyer because of concerns about the lawyer’s loyalty, the client may not disclose all

necessary information to the lawyer and, thus, may indirectly prevent the lawyer from providing accurate and complete legal advice.

The third policy concern is that a lawyer be a client's protector and vigorous advocate. A conflict of interest may deter a lawyer from representing a client with the appropriate vigor.<sup>5</sup> When a lawyer is tugged by competing loyalties, the lawyer may be tempted to "pull her punches" for a client. The lawyer may not disclose to the client all options, may fail to sue all of the appropriate parties, may fail to assert all of the appropriate claims or defenses, or may fail to make all of the arguments that the lawyer should make under the circumstances.

In short, conflicts of interest undermine a client's *expectation* of effective legal representation and undermine a lawyer's *ability to provide* effective legal representation.<sup>6</sup>

### **§ 5.3 WHAT IS A CONFLICT OF INTEREST?**

#### **§ 5.3.1—What Conflicts Of Interest Matter?**

Not all differences among clients rise to the level of prohibited conflicts of interest. Some clients may dislike each other. Generally, a lawyer is not prohibited from concurrently representing clients merely because they are antagonistic to each other.<sup>7</sup> Clients may compete in the marketplace and, thus, have conflicting economic interests. Should their competition prohibit a lawyer from representing marketplace competitors? Should a company be precluded from hiring a lawyer with special expertise merely because a competitor retained the lawyer first? In certain practice areas, such as entertainment or sports law, clients may wish to hire a lawyer precisely *because* of the lawyer's other clients and contacts within the industry. Do the usual conflict of interest rules apply to lawyers in such practice areas?

Should a lawyer in a small town refuse to shop at a local store simply because the merchant is a client? A lawyer may have a significant difference of opinion with clients regarding matters of community-wide concern. Should a lawyer's vocal participation in a community issue prevent him or her from representing a client with whom the lawyer disagrees on a public issue?

These are difficult, but real-life, questions. Thus, there must be some objective and reasonable standards for analyzing conflicts of interest and for determining when a conflict of interest disqualifies a lawyer from a representation.

#### **§ 5.3.2—The Standard For Determining Whether A Conflict Of Interest Exists — Generally**

The *Restatement (Third) of the Law Governing Lawyers* states that a conflict of interest arises when:

. . . there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person.<sup>8</sup>

The key words and phrases here are “interests,” “substantial risk,” and “materially and adversely affected.” Thus, conflict-of-interest analysis involves considering (1) what interest is at stake; (2) what is a “substantial risk”; and (3) what does “materially and adversely affected” mean under the circumstances.

The *Restatement* identifies four questions to ask when evaluating a conflict of interest standard. Those questions are:

- 1) What kind of effect is prohibited?
- 2) How significant must that effect be?
- 3) What probability must there be that the effect will occur? and
- 4) From whose perspective are conflicts of interest to be determined?<sup>9</sup>

### § 5.3.3—What Effect Are The Conflict Of Interest Rules Attempting To Prevent?

The first question is, in essence, what evils are the conflict of interest rules attempting to prevent? Do the conflict of interest rules preclude a lawyer from representing clients with differing interests regardless of whether the differences are of consequence, or are the rules attempting to prevent an actual harm?

The ethics rules have evolved to recognize that almost all clients and lawyers have “differing interests” to some degree. The “differing interests” standard used by early versions of the ABA Model Code of Professional Responsibility was eventually discarded as overbroad and unworkable.<sup>10</sup> The current ABA Model Rules of Professional Conduct and the case law have settled on a standard of an “adverse effect” on a lawyer’s representation of a client. Thus, differences between the interests of clients do not rise to the level of a prohibited conflict of interest unless the differing interests adversely affect the lawyer’s representation of a client.

The Comment to the *Restatement* states that “[u]nless there is a risk that the lawyer’s representation would be affected ‘adversely,’ there is no conflict of interest.”<sup>11</sup> Note that the standard does not consider an adverse effect *on the client* as determinative of whether there was a prohibited conflict of interest. Rather, the standard addresses an adverse effect *on the lawyer’s representation of the client*. The conflict of interest rules do not examine the *result* of the representation, but the *quality* of the representation, regardless of the result.<sup>12</sup>

Why this distinction? The distinction acknowledges that certain things are unknowable. A lawyer might have an egregious conflict of interest, and yet achieve a result satisfactory to all clients. But, while the clients may be satisfied with the outcome despite the lawyer’s conflict, generally the clients cannot know what the outcome would have been without the lawyer’s conflict. Thus, the standard objectively examines the incentives and

pressures on a lawyer, before and during the representation, likely to affect the quality of the lawyer's representation, regardless of the result.<sup>13</sup>

The conflict of interest rules do not seek a blanket prohibition of a lawyer representing concurrent clients whose interests conflict in some minor or immaterial way. Rather, the rules bar a lawyer's conflict of interest when it matters: when the conflict would adversely affect the lawyer's representation of any client.

#### **§ 5.3.4—How Significant Must The Adverse Effect Be?**

A prohibited conflict of interest must matter. This means, generally, that the conflicting interests must be "material" to the representation.<sup>14</sup> "Materiality" is determined by examining the obligations assumed by the lawyer, either by the nature of the representation or by agreement with the client.<sup>15</sup>

An otherwise immaterial conflict may be material if, for example, a client tells the lawyer that he or she considers the conflict a serious matter.<sup>16</sup> In other words, even if a client is unreasonable and the conflicting interests are insignificant, the conflict *might* be material merely because the client thinks it material. Whether the client is right or wrong is beside the point. Rather, what is important is the overriding goal of the conflict of interest rules: that is, to foster a client's trust and confidence in the lawyer and the lawyer's loyalty to the client.

#### **§ 5.3.5—What Is The Probability Of An Adverse Effect?**

The rules do not prohibit a lawyer from representing a client if there is virtually no chance that a conflict of interest will adversely affect the lawyer's representation of the client.

If, for example, a lawyer can limit the scope of the representation of a new client to eliminate the conflict of interest with an existing client, the lawyer might be able to represent the new client despite the conflict; there would be no reasonable chance that the conflict would adversely affect the lawyer's representation.<sup>17</sup> But, even if a lawyer seemingly eliminates the conflict, the lawyer must still consider whether, as a practical matter, he or she will be required to communicate information to one client that, despite the limited representation, will somehow adversely affect the other client at a later point. Similarly, a lawyer must consider the risk of whether the lawyer's knowledge of a client's confidential information may inadvertently benefit the new client and injure the existing client. In either case, the lawyer's possession of a client's confidential information might adversely affect a client, and the lawyer may be prohibited from undertaking the new representation despite attempts to limit the scope of representation.

The relevant factors in determining whether a conflict of interest may adversely affect a lawyer's representation of a client include (1) the duration and intimacy of the lawyer's relationship with the involved client or clients; (2) the work to be performed by the lawyer; (3) the likelihood that actual conflict will arise; and (4) the likely prejudice to the client from the conflict if it does arise.<sup>18</sup> The question is often one of proximity and degree.<sup>19</sup>

### **§ 5.3.6—From Whose Perspective Are Conflicts Of Interest To Be Determined?**

The standard for determining whether a conflict exists is not the “appearance of an impropriety” standard.<sup>20</sup> That old standard is overbroad and not particularly useful.<sup>21</sup> The conflict of interest analysis should consider only the facts and circumstances that the lawyer knows, or reasonably should know, at the time.<sup>22</sup> The conflict should not be evaluated in light of information that became known only later and that could not have been reasonably anticipated. In other words, the perspective considers what did the lawyer know and when did he or she know it?<sup>23</sup>

## **§ 5.4 GENERAL PRINCIPLES OF COLORADO’S CONFLICT OF INTEREST RULES**

### **§ 5.4.1—Loyalty To The Client**

The touchstone behind all of the conflict of interest rules is loyalty to the client.<sup>24</sup> The Colorado Supreme Court has stated that a lawyer is required to “maintain a *paramount* duty of loyalty to the client.”<sup>25</sup> Comment 1 to Rule 1.7 of the new Colorado Rules of Professional Conduct emphasizes this concern: “Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”<sup>26</sup> The Colorado Bar Association’s Ethics Committee recognized many years ago that “a lawyer’s prime concern should be ensuring that . . . loyalty to . . . clients is not diluted by the interest of other clients.”<sup>27</sup> And, finally, the *Restatement (Third) of the Law Governing Lawyers* recognizes that the first policy concern underlying the rules prohibiting conflict of interests is loyalty to the client:

The prohibition against lawyer conflicts of interest reflects several competing concerns. First, the law seeks to assure clients that their lawyers will represent them with undivided loyalty. A client is entitled to be represented by a lawyer whom the client can trust. Instilling such confidence is an objective important in itself.<sup>28</sup>

While it is clear that the law seeks to promote a lawyer’s loyalty to the client, what is less clear is what constitutes disloyalty to the client. The authorities seek to provide a structure for analyzing conflicts of interest and, thus, disloyalty.

The Comment to Colo. RPC 1.7 observes:

a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited because of the lawyer’s other responsibilities or interests.<sup>29</sup>

The Comment to the former Colo. RPC 1.7 identified several questions a lawyer should ask when analyzing the lawyer’s duty of loyalty in the context of conflicts of interest:

- What is the likelihood that a conflict will develop?
- If a conflict does develop, will it materially interfere with the lawyer's independent professional judgment in considering an alternative course of action?
- Will a conflict foreclose a course of action that the lawyer should reasonably pursue on behalf of a client?
- Does the client wish to accommodate the interests involved?<sup>30</sup>

There are, in essence, four general circumstances in which prohibited conflicts of interest arise: first, and most obviously, conflicts in which clients are directly adverse to each other in a transaction or litigation; second, conflicts in which the lawyer's own personal or financial interests may impair the lawyer's ability to represent the client and, thus, may adversely affect the client; third, conflicts in which clients may not be directly adverse to each other, but there is a risk that the lawyer's duty of loyalty to another client may impair the lawyer's ability to properly represent the new client and, thus, adversely affect either the new client or another client or both; and fourth, conflicts in which the lawyer's duties to a third person may significantly impair the lawyer's ability to represent the client and, thus, adversely affect the client.<sup>31</sup>

The overriding concerns in each of these four circumstances are (1) loyalty to the client, and (2) protecting the client's confidences and secrets. Closely related is concern about maintaining a lawyer's professional independence. The conflicts that arise in each of these circumstances, to some degree, impair a lawyer's ability to properly represent the client, create a risk that a client will be adversely affected by the conflict, and compromise a lawyer's professional independence.

#### **§ 5.4.2—Colorado's Conflict Of Interest Rule**

Colorado's general conflict of interest rule is set out in Rule 1.7 of the Colorado Rules of Professional Conduct:

##### **RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS**

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.<sup>32</sup>

Paragraph (a)(1) of Colo. RPC 1.7 pertains to a lawyer representing clients with *directly* conflicting or adverse interests, such as representing opposing parties in litigation, negotiations, or business transactions.<sup>33</sup>

The issues in paragraph (a)(2) are more subtle than in paragraph (a)(1). Paragraph (a)(2) pertains to a lawyer simultaneously representing parties who, while perhaps on the same side of a matter, may have conflicting or divergent interests. Paragraph (a)(2) also refers to possible conflicts with the lawyer's own interests. Paragraph (a)(2) differs from paragraph (a)(1) in that its focus is the extent to which the *quality* of the lawyer's representation is likely to be limited by competing interests, either other clients' interests or the lawyer's own interests.<sup>34</sup>

## **§ 5.5 CONFLICTS OF INTEREST AMONG CLIENTS**

This section addresses the conflict of interest rules that apply to conflicting interests among a lawyer's concurrent clients.

### **§ 5.5.1—Direct Adversity Among Concurrent Clients**

The most apparent conflict of interest problems are, seemingly, conflicts in which the interests of concurrent clients are directly adverse. In fact, it is not always obvious when clients have directly adverse interests, particularly in litigation. To determine whether clients have directly conflicting interests, the lawyer must examine the context of the lawsuit.<sup>35</sup> A lawyer is almost always prohibited from representing parties who are directly adverse. Each client has an "institutional interest" in vigorous development of his or her position when aligned directly against each other in the same matter.<sup>36</sup> The Colorado Rules of Professional Conduct generally prohibit such directly adverse representation:

#### **RULE 1.7. CONFLICTS OF INTEREST: CURRENT CLIENTS**

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if :

(1) the representation of one client will be directly adverse to another client;

\* \* \*

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: . . .

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal. . . .<sup>37</sup>

A lawyer is prohibited from undertaking a representation directly adverse to a current client even if the new matter is unrelated to the matter for which the lawyer is representing the original client.<sup>38</sup> The overriding principle is, again, loyalty to client and concern that the client might feel betrayed, even if the client consents to the conflict.<sup>39</sup>

While the principles of Colo. RPC 1.7(a) might seem self-evident, numerous lawyers have run afoul of its principles. In *People v. McDowell*,<sup>40</sup> the Colorado Supreme Court suspended a lawyer after he represented both the buyer and the seller in the sale of a small business. The clients had reached a very general agreement concerning the sale and purchase of the business. The lawyer, McDowell, had represented the corporation in the past and had also provided legal services to both the buyer and seller on unrelated matters. The buyer testified that he and the seller had given McDowell the bare essentials of their agreement to transfer the business and had told McDowell that they wanted the sale “done right.”

McDowell told his clients that as long as they had agreed in this fashion, he could prepare documents that would “protect both parties” fully. The contract documents contained many boilerplate provisions that had not been discussed or negotiated by the parties or explained by McDowell prior to the closing. Within the boilerplate were representations that the information disclosed by the seller to the buyer was complete and accurate, and that the corporation was not in default on any of its contracts. McDowell knew that there were three unsatisfied judgments against the corporation, but failed to disclose the information to the buyer. After the closing, the buyer learned of the three judgments and that the corporation owed \$20,000 to trade creditors. The buyer retained another lawyer. McDowell continued to represent the seller in negotiating with the buyer’s new lawyer. After negotiations broke down, McDowell filed a lawsuit on behalf of the seller, alleging a breach of the very contract that he had prepared for both parties.

At the inevitable disciplinary hearing, Mr. McDowell contended that he had not provided legal advice to his clients, but was merely doing what they wanted him to do. The supreme court was unimpressed, finding that McDowell’s actions had violated several disciplinary rules. The court stated:

The evidence in this case clearly demonstrates that both the [buyer] and [seller] expected the respondent to act as more than a mere scrivener or intermediary in the sale and purchase of the corporate business . . . . In

agreeing to represent both [seller] and [buyer], therefore, the respondent had an obligation to fully disclose at the outset the nature of any potential conflict of interest and the possible effect of such multiple representation on the exercise of [the lawyer's] independent professional judgment on behalf of both [seller] and [buyer].<sup>41</sup>

The court also held that McDowell's refusal to recognize the conflicts of interest, even after hostilities arose between the clients, demonstrated a "callous disregard" of the Code of Professional Responsibility.<sup>42</sup>

### § 5.5.2—Conflicts Of Interest That Affect The Quality Of Representation — Generally

The subtler conflict of interest problems arise in the context of representing multiple clients, in the same or unrelated matters, where the clients do not have *directly* adverse interests but may have *indirectly* adverse interests. These conflicts also arise when a representation indirectly affects the interests of a lawyer, his or her family, or the lawyer's law firm. Thus, the indirect conflict of interest problems may affect *how* or *to what degree* the lawyer advocates for the client. This indirect conflict of interest is sometimes described as a conflict that "materially limits" a lawyer's ability to represent the client. In other words, the indirect conflict of interest affects the *quality* of the lawyer's legal services.

Colo. RPC 1.7 prohibits conflicts of interest affecting the quality of the lawyer's services, absent full disclosure to and an informed consent by the client. Rule 1.7(a) applies to direct conflicts of interest as well as conflicts that materially limit the lawyer's representation of the client, or indirect conflicts:

#### RULE 1.7 CONFLICTS OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

\* \* \* \*

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.<sup>43</sup>

The *Restatement (Third) of the Law Governing Lawyers* also recognizes the general prohibition of indirect conflicts of interest:

#### § 121. The Basic Prohibition of Conflicts of Interest

Unless all affected clients and other necessary persons consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent a client if the representation would involve a conflict of interest. A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and

adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.<sup>44</sup>

While the primary concern behind the rule is promoting loyalty to the client,<sup>45</sup> the rule is also concerned with preserving a lawyer's independent professional judgment.

Colo. RPC 1.7(a)(2) applies to conflicts between a lawyer's joint clients in litigation.<sup>46</sup> The rule applies to conflicts that may arise among clients who are generally aligned in negotiations for the purchase or sale of a business. Such conflicts may arise when a corporation's lawyer represents the directors or shareholders, personally, as well as the company.<sup>47</sup> The conflicts may involve the lawyer's own familial, financial, or professional interests.<sup>48</sup>

In each case, the question raised by Colo. RPC 1.7(b) is, "Can the lawyer *adequately* represent each client without adversely affecting the material interests of the other clients or the lawyer's interests?"

The Colorado Court of Appeals addressed the material limitations concerns in *People in the Interest of J.A.M.*<sup>49</sup> In *J.A.M.*, the court of appeals overturned a juvenile court judgment in a dependency and neglect proceeding terminating a mother's legal parent-child relationship between the mother and her four-year-old child. The mother contended that the child's guardian *ad litem* (GAL) had a conflict of interest because the GAL had entered into a contract with the Denver Department of Social Services to provide legal services to the Department in other dependency and neglect proceedings. The mother argued that the GAL's contractual obligations to the department created a conflict in terms of determining whether it was in the child's best interest to terminate the parental relationship. The court of appeals agreed. Citing the former version of Colo. RPC 1.7(b), the court held that the GAL's obligation to the department "materially limited" her representation of the child in violation of the rule.<sup>50</sup> The court also found that the conflict of loyalties inherent in the GAL's dual roles as representative of the child's best interest and as an employee of the department cast doubt on the fairness and impartiality of the legal system.<sup>51</sup>

The Minnesota Supreme Court, in *Hill v. Okay Construction Company*,<sup>52</sup> has stated a good rule of thumb that lawyers should follow: when representing multiple parties in any type of legal relationship, the lawyer "must protect the interests of each as zealously as if their interests were his sole responsibility."

The traps for the unwary lawyer are many.<sup>53</sup> Indeed, a major risk is that the lawyer will fail to recognize such subtle conflicts at all and the issue will not surface until the lawyer is ensnared in a conflict of interest that harms the client.<sup>54</sup> At that point, it may be too late.

### **§ 5.5.3—Representing Co-Parties In Civil Litigation**

Colo. RPC 1.7(a)(2) governs a lawyer's simultaneous representation of multiple parties in litigation.<sup>55</sup> When a lawyer represents multiple clients in a matter, the lawyer has a separate client-lawyer relationship with each member of the group.<sup>56</sup> Thus, when a lawyer

simultaneously represents multiple parties to litigation, such as co-plaintiffs or co-defendants, the representation has the potential for conflicts of interest. The risk of conflicts is particularly great if all of the clients are not exactly aligned or the clients have differing positions on settlement, different damages or injuries, different memories of the facts, or differing degrees of culpability or exposure to a judgment.<sup>57</sup>

Parties often request lawyers to represent multiple clients in litigation for very practical reasons. Often, the clients wish to avoid the expense of each aligned party retaining separate counsel. Sometimes the clients cannot individually afford the litigation, but they can afford to jointly hire a lawyer. Sometimes, for strategic reasons, the clients desire to present a united front. It is often appropriate and desirable for one lawyer or law firm to represent multiple clients in a lawsuit.

Before agreeing to represent multiple clients, however, the lawyer must very carefully assess the actual and potential conflicts of interest among the clients, and determine whether the clients can properly waive actual or potential conflicts under Colo. RPC 1.7(b)(4). The lawyer must make the necessary disclosures to the clients and obtain written consents to the conflicts of interest. (See § 5.10, below, discussing client consent to conflicts of interest.)

Section 128 of the *Restatement (Third) of the Law Governing Lawyers* specifically addresses conflicts of interest in the context of litigation:

#### § 128. Representing Clients with Conflicting Interests in Civil Litigation

Unless all affected clients consent to the representation under the limitations and conditions provided § 122, a lawyer in civil litigation may not:

- (1) represent two or more clients in a matter if there is a substantial risk that the lawyer's representation of one client would be materially and adversely affected by the lawyer's duties to another client in the matter; or
- (2) represent one client to assert or defend a claim against or brought by another client currently represented by the lawyer, even if the matters are not related.<sup>58</sup>

When a lawyer represents multiple clients in litigation, there are four sometimes-competing interests that the lawyer must consider. First, the lawyer may not intentionally or inadvertently use a client's confidential information on behalf of another client that will adversely affect the first client.<sup>59</sup> Second, a client's faith in the lawyer's loyalty will be tested if the lawyer must also be loyal to another client whose interests are materially adverse to the first client.<sup>60</sup> Third, a court or tribunal has an interest that its own processes are not compromised or delayed because a lawyer can provide less than vigorous advocacy, or because the lawyer must withdraw.<sup>61</sup> Fourth, clients may reasonably desire to reduce litigation costs or obtain the benefits of a coordinated position.<sup>62</sup>

A lawyer can sometimes represent only one human being in a lawsuit and still become ensnared in a conflict of interest. This bizarre circumstance arises when the client is sued personally and is also sued in an official or representative capacity. Persons sued individually as well as in their official capacity are two different legal personages for purposes of the lawsuit.<sup>63</sup>

In an interesting case involving a lawyer's *refusal* to represent adverse co-defendants who happened to be the same person, the Tenth Circuit Court of Appeals held that a lawyer violated the Rules of Professional Conduct when the lawyer represented the person in one capacity, but left the person unrepresented in his other capacity.<sup>64</sup>

The client, a county sheriff, was sued for sexual harassment both in his official capacity and in his individual capacity. The lawyer was retained to represent the sheriff in his official capacity only, because the defenses to be asserted by the sheriff in his official capacity were potentially inconsistent with the defenses that the sheriff might wish to raise in his individual capacity. The lawyer declined to represent the sheriff individually, because of the potential for the conflict of interest. However, the sheriff remained unrepresented in his individual capacity and attempted to represent himself *pro se*, quite unsuccessfully. In a lengthy opinion, U.S. District Judge Kane found that the lawyer had violated the Rules of Professional Conduct (Colo. RPC 1.1 — Competence) and struck the lawyer's appearance in the case.<sup>65</sup>

The Tenth Circuit Court of Appeals affirmed Judge Kane's ruling that the lawyer had violated the Rules of Professional Conduct, but on slightly different grounds. The court found that "[t]hrough separate representation is permissible, an attorney may not undertake only the official capacity representation at his or her sole convenience." The court outlined the disclosures that a lawyer must make when representing clients sued in dual capacities.<sup>66</sup>

#### **§ 5.5.4—Conflicts Of Interest In Criminal Cases**

Criminal defense lawyers are prohibited from representing a client if the lawyer has a conflict of interest.<sup>67</sup> The right to effective assistance of counsel includes the right to conflict-free counsel.<sup>68</sup> The Colorado Supreme Court observed that "[t]he need for defense counsel to be completely free from a conflict of interest is of great importance and has a direct bearing on the quality of our criminal justice system."<sup>69</sup>

Thus, when the issue on appeal of a criminal conviction is ineffective assistance of counsel, the defense lawyer who represented the defendant at trial is precluded from representing the defendant in the appeal because the defense lawyer's personal and professional interests are at stake.<sup>70</sup> And if the disqualified lawyer is a public defender, the other lawyers within the Office of the Public Defender are also disqualified by the doctrine of imputed disqualification.<sup>71</sup> (See discussion of imputed disqualification at § 5.11, below). The Office of the Public Defender may also be disqualified from representing a criminal defendant when the office represents another defendant in an unrelated matter who may be a witness in the first client's criminal case.<sup>72</sup>

A Colorado Supreme Court case illustrates the conflicts that can arise when a lawyer represents multiple defendants in a criminal case, and when the lawyer's duty of loyalty to one client is materially limited by his or her duty of loyalty to another client. In *People v. Chew*,<sup>73</sup> the lawyer simultaneously represented a father and a son in a criminal case, both charged with arson and conspiracy. The lawyer clearly considered the conflict of interest, discussed the conflict with his clients, and obtained written waivers from both. As the case developed, it became apparent that the father and son had different degrees of culpability for the criminal conduct.

When it became clear that the conflict of interest issues were going to be insurmountable, the father waived the conflict of interest problems a second time. The trial court appointed the father his own lawyer. The lawyer continued to represent the son. When the prosecution offered a plea to the son that would substantially reduce the son's sentence if he testified against his father, the trial court appointed a special counsel to convey the offer. Eventually, both father and son pleaded guilty, with the father receiving a 16-year sentence and the son receiving a five-year sentence.

Despite all of the precautions, the Colorado Supreme Court still disciplined the lawyer. The court found that the waivers did not satisfy the first requirement of the former DR 5-105(C), which permitted the lawyer to represent multiple clients only if it was "obvious" that the lawyer could "adequately" represent the interests of each client.<sup>74</sup> The court found that the lawyer could not adequately represent the interests of each client because of the different degrees of culpability. In other words, the lawyer's duty of loyalty to the son required him to advise the son to testify against the father and the lawyer's duty of loyalty to the father required him to resist such efforts.<sup>75</sup>

The Colorado Supreme Court recently addressed the issue of whether a district attorney's office was disqualified from prosecuting a minor in *People ex rel. N.R.*<sup>76</sup> In *N.R.*, a 16-year-old male passenger in an automobile abandoned the 15-year-old female driver pinned under the car when they were involved in a rollover accident and the male passenger did not notify anyone of the accident. The female driver later died. The district attorney refused to prosecute the boy, so the parents of the deceased girl filed a motion Petition for Order Requiring District Attorney to Explain Refusal to Prosecute under C.R.S. § 16-5-209 (2005). There were hearings on the issue. Several months later, the district attorney was voted out of office; the new district attorney received substantial political support from the deceased girl's parents.

Once elected, the new district attorney filed criminal charges against the boy. The boy's attorney filed a motion to disqualify the entire district attorney's office, claiming a conflict of interest on two grounds: first, that the district attorney had a personal interest in the outcome of the criminal prosecution because his campaign had received political and financial support from the deceased girl's parents; and second, the statements and positions earlier taken by the district attorney's office in connection with hearings on the motion filed by the deceased girl's parents contradicted the current positions of the office.

The trial court considered C.R.S. § 20-1-107(2), which authorizes disqualification of a district attorney when the court finds “that the district attorney has a personal or financial interest or finds special circumstances that would render it unlikely that the defendant would receive a fair trial.” Applying the statute to the case, the trial judge ruled that the district attorney’s office did not have a personal or financial interest in the case that required its disqualification. However, the trial judge disqualified the office on the “special circumstances” grounds, *i.e.*, that given the political support given by the deceased girl’s parents, in the context of the rather strong position *against* prosecution taken by the prior district attorney, there was an appearance of impropriety that required disqualification.

The Colorado Supreme Court, with a partial dissent by Justice Bender, joined by Justices Mullarkey and Martinez, disagreed with the trial court. The court found that a 2002 amendment to C.R.S. § 20-1-107(2) eliminated the “appearance of impropriety” provision. In strictly applying the statute to the case, the court held that the deceased girl’s financial and political support of the district attorney’s campaign did not amount to a personal or financial interest that disqualified the district attorney’s office. Similarly, the court held that despite the political support of the deceased girl’s parents, the circumstances were not such that the defendant boy would not receive a fair trial.<sup>77</sup>

In his dissent, Justice Bender argued that the majority was too narrowly construing the grounds by which a district attorney could be disqualified pursuant to C.R.S. § 20-1-107(2), and, although the “appearance of impropriety” standard was no longer part of the statute, the courts had the inherent power to regulate conduct of the lawyers before them, including the conduct of district attorneys. In addition to raising a Separation of Powers argument, Justice Bender noted that pursuant to the former Colo. RPC 1.9(a), a trial court has the inherent power to disqualify a district attorney where the prosecutor may have represented a defendant on another matter and the defendant had waived the conflict of interest. Justice Bender argued that the trial court’s decision should be upheld because the fact that the district attorney:

who enjoyed substantial political support from the mother of the victim, reversed the rather strongly held position of [his predecessor] relative to the prosecution of this case would tend to lead average members of the community [to believe] that [the district attorney] was somehow beholden to the victim’s family, leading to a political payoff in this case.<sup>78</sup>

In a case issued on the same day as *People ex rel. N.R.*, the supreme court addressed the issue of whether a district attorney’s office should be disqualified from a prosecution when (a) the defendant minor child and her family had been represented by three members of the district attorney’s office while in private practice (and still maintained the files) and (b) the defendant and her family were suing other members of the district attorney’s office on civil rights claims.<sup>79</sup>

Again strictly construing C.R.S. § 20-1-107(2), the court refused to disqualify the district attorney’s office, but sent the matter back to the trial court because it could not determine the basis for the qualification based on the record.<sup>80</sup> Again, Justice Bender

dissented, again joined by Justices Mullarkey and Martinez. Citing his dissent in *People ex rel. N.R.*, Justice Bender noted that there was a clear conflict of interest, as three members of the district attorney's office had personally represented the defendant child:

[T]hese circumstances support the trial court's decision to disqualify the district attorney's office pursuant to its constitutional authority to protect the integrity and appearance of integrity of the court and the judicial process, and therefore his order to disqualify the district attorney's office does not constitute an abuse of discretion.<sup>81</sup>

### **§ 5.5.5—Conflicts Of Interest When Representing Organizations**

Lawyers who represent organizations, such as corporations, non-profits, or government agencies, often encounter conflict-of-interest problems. These problems typically arise when a lawyer is asked to represent the individuals associated with the client-organization. The individuals may be owners, officers or directors, or family members of the controlling persons. These circumstances are rife with possible conflicts of interest between the lawyer's duties of loyalty to the organization, and the duties of loyalty to the individual client. The representation is often complicated because the individual client, particularly if an owner or control-person, may not understand (or care) about the distinction between the individual and the organization.

A lawyer may also encounter a conflict of interest between a lawyer's organizational client, and the organization's affiliates or subsidiaries.<sup>82</sup> Sometimes conflicts can develop because of a corporate merger or sale.<sup>83</sup>

A lawyer for a corporation generally does not have a client-lawyer relationship with the shareholders, officers, or directors, barring other facts.<sup>84</sup> Similarly, a lawyer does not have a client-lawyer relationship with each of the partners or members of the organization.<sup>85</sup> A lawyer who represents an organization will not necessarily also represent the individuals running the organization. The former Colo. RPC 1.13 explicitly states that a lawyer representing the organization represents the organization, and not those persons affiliated with the organization.<sup>86</sup> The revised Rule 1.13 softened that position to acknowledge that lawyers sometimes represent both the organization and its constituent members, such as officers, directors, members, shareholders, and employees.<sup>87</sup>

The *Restatement (Third) of the Law Governing Lawyers* and the Colorado Rules of Professional Conduct both address the special problems that arise when lawyers represent organizations. The *Restatement* discusses the conflict of interest rule as follows:

#### **§ 131. Conflicts of Interest in Representing an Organization**

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent both an organization and a director, officer, employee, shareholder, owner, partner, member, or other individual or organization associated with the organization if there is a substantial risk that the lawyer's representation of

either would be materially and adversely affected by the lawyer's duties to the other.<sup>88</sup>

When a lawyer does represent both an organization and associated individuals, a conflict-of-interest problem often arises when a lawyer obtains confidential information from the organizational client and also obtains confidential information from the individual client. The confidential information from either client may impact the lawyer's representation of the other, and require the lawyer to withdraw from representing both.<sup>89</sup> Lawyers who represent organizations should be particularly careful when asked to represent individuals who are even remotely connected with the client organization.

## **§ 5.6 CONFLICTS BETWEEN A LAWYER'S PERSONAL INTERESTS AND A CLIENT'S INTERESTS**

### **§ 5.6.1—Conflicts With The Lawyer's Interests — Generally**

A lawyer must consider whether a client's interests conflict with the lawyer's personal or business interests. Again, the issues directly relate to the lawyer's duty of loyalty to the client. When a lawyer's own interests are implicated in the representation, the lawyer must take particular care not to use his or her knowledge of confidential client information to the client's disadvantage. This type of conflict of interest implicates the lawyer's duty of loyalty, the lawyer's duty to maintain the client's confidences and secrets, and the lawyer's obligation to exercise professional independence.

If a lawyer's personal or financial interests will materially limit the lawyer's ability to represent the client, then Colo. RPC 1.7 prohibits the lawyer from undertaking or continuing the representation:

#### **RULE 1.7 CONFLICTS OF INTEREST: CURRENT CLIENTS**

(a) Except as provided in paragraph (b), *a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if :*

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a *significant risk* that the representation of one or more clients will be *materially limited* by the lawyer's responsibilities to another client, a former client or a third person *or by a personal interest of the lawyer.*<sup>90</sup>

Rule 1.7 emphasizes that the analysis of any conflict of interest, including a conflict between a lawyer's interest and the client's interest, must be considered *at the time* the lawyer undertakes the representation, and must be analyzed in light of the potential risk to the client. If there is a "significant risk" that the lawyer's interest in the matter will cause the

lawyer to materially limit the representation of the client, then there is a conflict and the lawyer may not undertake the representation absent informed consent from the client.

This principle is even more specifically articulated in the *Restatement (Third) of the Law Governing Lawyers*:

§ 125. A Lawyer's Personal Interest Affecting the Representation of a Client

Unless the affected client consents to the representation under the limitations and conditions provided in § 122 [pertaining to client consent to a conflict of interest], a lawyer *may not* represent a client if there is a *substantial risk* that the lawyer's representation of the client would be *materially and adversely affected* by the lawyer's financial or other interests.<sup>91</sup>

There are numerous circumstances in which the lawyer and client may have conflicting interests. The conflict may be as innocuous as the lawyer owning stock in a large corporation that a client intends to sue or as suspect as the lawyer having an undisclosed interest in a business in which the client intends to invest.<sup>92</sup> The lawyer's conflicting personal interest may be altruistic, such as involvement with a charity,<sup>93</sup> or familial, or may arise from a lawyer's strongly held religious or political beliefs.<sup>94</sup>

Colo. RPC 1.7 must be read in conjunction with Colo. RPC 1.8(b), which discusses the lawyer's use of information about a client "related to" the representation:

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

(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.<sup>95</sup>

Note that Colo. RPC 1.8(b) does not limit its application to only client-lawyer privileged information or client secrets or confidences. Rather, Colo. RPC 1.8(b) is broadly written to encompass *all* information that the lawyer learns about the client relating to his or her representation of the client.<sup>96</sup> (See Chapter 4, "Privileges and Confidentiality," in Volume I of this book for a more thorough discussion of the scope of a lawyer's obligation to protect the client's confidential information.) Thus, a lawyer is prohibited from using information to the lawyer's advantage and to the disadvantage of the client *even if* the information is public and is widely disseminated. An example provided in the Comment to Rule 1.8 illustrates the point: "For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another make such a purchase."<sup>97</sup>

Colo. RPC 1.7(b) permits the lawyer to undertake the representation notwithstanding the conflict with the lawyer's personal interest when (1) the lawyer

*reasonably* believes that he or she can adequately represent the client, (2) the representation is not prohibited by law, and (3) the client consents after full disclosure.

### **§ 5.6.2—Transactions With Clients — Generally**

Neither the former code nor the current rules absolutely prohibit a lawyer from engaging in business dealings with a client. Indeed, it is often impractical for a lawyer not to transact business with a client.<sup>98</sup> In *Lindsay v. Marcus*,<sup>99</sup> the Colorado Supreme Court held that “[b]usiness dealings between attorneys and their clients are generally subject to searching scrutiny, but when fair, are upheld as other contracts.”<sup>100</sup> Contracts between lawyers and clients are not void but are voidable.<sup>101</sup>

While business dealings with clients are not *per se* improper, they are subject to extraordinary scrutiny and second-guessing, and a lawyer engages in business transactions with a client at his or her peril. Business investments with a client are an invitation for a malpractice lawsuit for reasons often unrelated to a lawyer’s actual conduct. If the investment fails, the lawyer is often the only party with assets (*i.e.*, a professional liability insurance policy) and the lawyer is a tempting target regardless of whether at fault or not.

### **§ 5.6.3—Business Transactions With Clients**

Colo. RPC 1.8(a) provides specific guidance for lawyers who enter business transactions with clients. The key principles are that the transaction be fully disclosed to the client and that the transaction be fair and reasonable to the client:

(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.<sup>102</sup>

Section 126 of the *Restatement (Third) of the Law Governing Lawyers* closely follows the principles of Colo. RPC 1.8:

§ 126. Business Transactions Between a Lawyer and a Client

A lawyer may not participate in a business or financial transaction with a client, except a standard commercial transaction in which the lawyer does not render legal service, unless:

- (1) the client has adequate information about the terms of the transaction and the risks presented by the lawyer's involvement in it;
- (2) the terms and circumstances of the transaction are fair and reasonable to the client; and
- (3) the client consents to the lawyer's role in the transaction under the limitations and conditions provided in § 122 after being encouraged, and given a reasonable opportunity, to seek independent legal advice concerning the transaction.<sup>103</sup>

Business transactions between lawyers and clients are the subject of considerable civil litigation and numerous disciplinary actions. In most of the published decisions, the lawyer has in some way violated at least one of the principles of Colo. RPC 1.8 and *Restatement* § 126. For example, in *People v. Nutt*,<sup>104</sup> a lawyer was suspended after helping clients obtain financing for a construction project. The lawyer and his mother-in-law provided the funds for the loan without disclosing the source of the funds or disclosing that the lawyer received a \$5,000 loan origination fee. The loan was secured by real property. The clients would not have been likely to obtain financing through conventional sources. The Colorado Supreme Court held that, as a lender and a holder of a long-term mortgage on the client's property, the lawyer's interests were necessarily adverse to his clients' interests. The lawyer argued that since the clients could not have obtained financing elsewhere, they were not harmed by his undisclosed conflict and, in fact, received a benefit from the loan. The supreme court agreed that the terms of the loan were fair and that the clients had suffered no harm, but the court was unimpressed by the "no harm, no foul" argument. The court held that "assuming the client is not prejudiced by the lawyer's violation of the Code, that fact is only one of mitigation."<sup>105</sup>

In *People v. Wright*,<sup>106</sup> the Colorado Supreme Court suspended a lawyer for, in part, investing a client's trust funds in a mining venture that the lawyer represented and in which the lawyer was also heavily invested. The lawyer failed to disclose his personal investment in the venture to the clients. The mining venture failed, and the client's trust funds were lost. The court found that the lawyer had "allowed his personal interests to affect the exercise of his professional judgment on behalf of his client in violation of DR 5-101(A)."<sup>107</sup> Because of the conflict of interest and other ethical lapses, the lawyer received a two-year suspension.<sup>108</sup>

Lawyers' business transactions with clients continue to be a fertile ground for legal malpractice claims and disciplinary actions.<sup>109</sup> While clients often invite lawyers to invest with them, lawyers should very carefully comply with the requirements of Colo. RPC 1.8(a) and *Restatement* § 126.

#### **§ 5.6.4—Loans From Clients**

Lawyers who borrow money from clients are especially at risk for a malpractice lawsuit or discipline, particularly when the loan is not memorialized by a promissory note or the terms of the promissory note are inadequate or unfavorable to the client.<sup>110</sup>

#### § 5.6.5—Gifts From Clients

The Rules of Professional Conduct restrict lawyers from accepting gifts from clients, particularly if a lawyer drafts the instruments effecting the gift. Colo. RPC 1.8(c) prohibits such gifts, with very limited exceptions:

(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 relatives or individual with whom the lawyer or client maintains a close, familial relationship.<sup>111</sup>

The *Restatement (Third) of the Law Governing Lawyers* echoes Colo. RPC 1.8(c)'s restrictions, but discusses the prohibition and exceptions in more detail:

#### § 127. A Client Gift to a Lawyer

(1) A lawyer may not prepare any instrument effecting any gift from a client to the lawyer, including a testamentary gift, unless the lawyer is a relative or other natural object of the client's generosity and the gift is not significantly disproportionate to those given other donees similarly related to the donor.

(2) A lawyer may not accept a gift from a client, including a testamentary gift, unless:

(a) the lawyer is a relative or other natural object of the client's generosity;

(b) the value conferred by the client and the benefit to the lawyer are insubstantial in amount; or

(c) the client, before making the gift, has received independent advice or has been encouraged to, and given a reasonable opportunity, to seek such advice.<sup>112</sup>

The rationale behind Colo. RPC 1.8(c) and *Restatement* § 127 is that “[a] client’s valuable gift to a lawyer invites suspicion that the lawyer overreached or used undue influence.”<sup>113</sup> The Comment to the *Restatement* § 127 notes, somewhat wryly, that “[i]t would be difficult to reach any other conclusion when a lawyer has solicited the gift.”<sup>114</sup> Testamentary gifts are particularly concerning because clients are often old and feeble when

the lawyer drafts the will; elderly clients may be particularly susceptible to even modest influence by the lawyer or others, and it is difficult to ascertain the client's true intentions after the client has died.<sup>115</sup>

Note that the *Restatement* § 127 expands on the principles of Colo. RPC 1.8(c) when a lawyer is related to the donor-client. Even when a lawyer is a natural object of the client's affection, if the lawyer drafts the instrument, the gift may not be disproportionate to gifts to other relatives similarly related to the donor.<sup>116</sup> The rationale behind this rule is that a disproportionate gift to the lawyer-relative invites suspicion of undue influence and overreaching; the lawyer then bears the burden of proving that he or she did not unduly influence the client.<sup>117</sup>

The Colorado Supreme Court has stated that other than in exceptional circumstances, a lawyer should insist that another lawyer selected by the client prepare an instrument in which the client desires to beneficially name the lawyer.<sup>118</sup> The penalties for failing to insist that the client obtain another lawyer to draft the instrument can be quite severe.<sup>119</sup>

A lawyer may generally accept a gift from a client if the gift has nominal or insubstantial value.<sup>120</sup>

#### **§ 5.6.6—Sex With Clients**

Sexual relationships with clients raise serious ethical, moral, and legal issues. A lawyer who engages in sexual relations with a client may open himself or herself to civil liability or a disciplinary action.

Colorado appellate courts have not addressed a lawyer's civil liability for engaging in a sexual relationship with a client. They have, however, considered such conduct in a disciplinary context.<sup>121</sup> The Colorado Supreme Court has held, in essence, that sex with a client is a *per se* violation of the Rules of Professional Conduct.<sup>122</sup>

If there was before any doubt that the Colorado Supreme Court discourages sex with clients, that doubt has been removed by the Comments to the recently revised Rules of Professional Conduct. Rule 1.8(j) now explicitly prohibits a lawyer from engaging in a sexual relationship with a client unless a consensual sexual relationship predated the representation.<sup>123</sup>

A lawyer is prohibited from representing a client with whom the lawyer has a sexual relationship, in most circumstances, because the lawyer's representation of the client is materially limited by the lawyer's own interests.<sup>124</sup> A sexual relationship may violate numerous professional rules, including Colo. RPC 1.7(a)(2) (lawyer shall not represent the client if representation may be materially limited by lawyer's own interests); Colo. RPC 3.7(a) (lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness); and Colo. RPC 8.4(h) (a lawyer shall not engage in conduct that adversely reflects on the lawyer's fitness to practice law).<sup>125</sup>

In 1992, the ABA issued a formal opinion concluding that a sexual relationship between a lawyer and client could impair the lawyer's ability to represent the client competently.<sup>126</sup> The ABA further opined that a sexual relationship between lawyer and client is improper because the "inherently unequal" balance of power between a lawyer and client allows the lawyer to exploit and manipulate the client. While lawyers do not always have more power than the client and, indeed, the reverse may be true, a lawyer's sexual involvement with a client does implicate a lawyer's obligation of loyalty to the client and to have the client's interests foremost in the lawyer's mind. A lawyer, being human, cannot give the clear and objective advice to which a client is entitled if the lawyer is sleeping with the client.

Thus, a lawyer should avoid sexual involvement with a person with whom the lawyer has a pre-existing client-lawyer relationship. The risks to the lawyer (and the client) can be quite serious. If the client is unhappy with the relationship *or* the representation, the lawyer is at risk for discipline or for a malpractice claim. Even if the relationship and the representation are successful, the client-lover's former spouse or significant other may sue or grieve the lawyer. And, the fact that a lawyer has had a sexual relationship with the client will almost always significantly complicate any legal malpractice action.

#### **§ 5.6.7—Other Transactions With Clients**

Colo. RPC 1.8 also regulates transactions with clients involving a lawyer's interest in the media or literary rights to a client's story,<sup>127</sup> financial assistance to a client during litigation,<sup>128</sup> compensation from third parties for the representation,<sup>129</sup> aggregate settlements,<sup>130</sup> and prospective limitation of a lawyer's liability to the client.<sup>131</sup> Each of these types of transactions implicates a lawyer's duties of loyalty and confidentiality to the client, and a potential conflict between the lawyer's interest and the client's interest.

### **§ 5.7 CONFLICTS WITH FORMER CLIENTS**

Lawyers often encounter potential conflicts of interest with former clients. The general rule is that a lawyer may not represent a new client who is materially adverse to a former client when the subject of the representation is "substantially related" to the lawyer's prior representation. The primary purpose of the "substantial relationship" test is to protect the secrets and confidences of the former client to which the lawyer was privy. In other words, the former client should not be disadvantaged because of his or her lawyer's new representation.

Colo. RPC 1.9 sets out the "substantial relationship" test:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rule 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter and whose present or former law firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.<sup>132</sup>

Comment 1 to Colo. RPC 1.9 states uncategorically that “[a]fter termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may *not* represent another client except in conformity with this Rule.” (emphasis added). The Comment states, by way of example:

Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.<sup>133</sup>

The “substantial relationship” test turns on whether the former and present representations are substantially related, so that confidences received during the first representation will not be imparted to the former client’s detriment during the second representation.<sup>134</sup>

The *Restatement* also relies on the substantial relationship test:

§ 132. A Representation Adverse to the Interests of a Former Client.

Unless both the affected present and former clients consent to the representation under the limitations and conditions provided in § 122, a lawyer who has represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the

interests of the former client are materially adverse. The current matter is substantially related to the earlier matter if:

(1) the current matter involves the work the lawyer performed for the former client; or

(2) there is the substantial risk that the representation of the present client will involve the use of the information acquired in the course of representing the former client, unless that information has become generally known.<sup>135</sup>

The Colorado courts have mostly addressed the substantial relationship test in the context of motions to disqualify.<sup>136</sup> The party seeking disqualification under Colo. RPC 1.9 must provide the court with specific facts to show that disqualification is necessary, and he or she cannot rely on speculation or conjecture.<sup>137</sup> Specifically, the moving party must show that (1) a client-lawyer relationship existed in the past; (2) the present litigation involves a matter that is substantially related to the prior litigation; (3) the present client's interests are materially adverse to the former client's interests; and (4) the former client has not consented to the disputed representation after consultation.<sup>138</sup>

In *Crystal Homes v. Radetsky*,<sup>139</sup> a legal malpractice case, the Colorado Court of Appeals stated that a lawyer is not always precluded from representing a client in a transaction with a former or currently inactive client.<sup>140</sup> Whether a lawyer properly may do so depends upon the nature and extent of the former legal work performed for the previous client, as well as the possible relationship between the two transactions.<sup>141</sup>

In *People v. Frisco*,<sup>142</sup> the Colorado Supreme Court analyzed the issue of what facts a trial court must consider when determining whether there was a "substantial relationship" between a criminal defense lawyer's representation of a former client and the lawyer's representation of a current client when the former client was a prosecution witness against the current client.

In *Frisco*, the criminal defense lawyer had represented the prosecution witness, Mangeris, against charges of manufacturing and conspiring with a third person over a three-day period to manufacture and distribute methamphetamine. The lawyer's representation largely consisted of arranging for Mangeris's continued release on bond. When Mangeris failed to appear at a hearing, his bond was revoked and he was arrested. At that point, other defense counsel began representing Mangeris and the first lawyer withdrew.

As part of a broader plea agreement, the drug charges on which the lawyer had represented Mangeris were dismissed, and Mangeris became a prosecution witness. As part of his grand jury testimony, Mangeris testified against Frisco about crimes unrelated to the charges against Mangeris, but also involving the distribution of methamphetamine. Moreover, Mangeris testified that he supplied Frisco with product, methamphetamine, and to pay Mangeris, Frisco supplied the funds used to obtain Mangeris's release bond. (There was no allegation that Mangeris's lawyer knew anything of the arrangement.)

A grand jury indicted Frisco on numerous charges. Frisco retained Mangeris's former lawyer. The district attorney moved to disqualify Frisco's lawyer pursuant to the former Colo. RPC 1.9(a), arguing that because the lawyer had previously represented Mangeris, and because the lawyer's prior representation of Mangeris was substantially related to the lawyer's current representation of Frisco, and the lawyer had not obtained a waiver from Mangeris, the lawyer had a conflict of interest that required disqualification. The district court agreed, ruling only that Colo. RPC 1.9(a) imposed a duty on the lawyer to obtain the consent of his former client, Mangeris, before representing Frisco, and disqualified the lawyer. The trial court found that the lawyer's representation of Frisco was substantially related to the lawyer's representation of Mangeris because both representations involved controlled substances and because of the "facts and circumstances" that would be at issue in Frisco's case.

Frisco filed a C.A.R. 21 petition. The supreme court issued a rule to show cause why the trial court's decision to disqualify the lawyer should not be reversed. In its decision, the court discussed the analysis that the trial court must conduct to determine whether a lawyer's representation is substantially related to another representation. In reversing the decision of the district court, the supreme court made the rule absolute.

The supreme court held that it was unreasonable to find a substantial risk that confidential information as would normally have been obtained by counsel in the prior representation would materially advance the current client's interests, based upon the existing record. The court discussed what the trial court must consider in analyzing whether two matters are substantially related:

The [former Colo. RPC 1.9(a)] obviously does not require the consent of a former client to all future representation but only to the representation of "another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client." Because the use of information from a prior representation to the disadvantage of the former client is separately restricted by [former] Rule 1.9(c), Rule 1.9(a) applies only to situations involving an inherent and substantial risk of violating an attorney's duty of loyalty to former clients. Its prohibition is therefore limited to representations that combine the same or substantially related legal disputes with a motive to harm a former client, in order to advance the interests of a current client.

Unless both matters involve the same transaction or legal dispute, they are considered "substantially related" only if there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. *See* Model Rules of Professional Conduct Rule 1.9 cmt. 3 (2002); *see also Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1266 (7th Cir. 1983); *Koch v. Koch Indus.*, 798 F. Supp. 1525, 1536 (D. Kan. 1992); *see generally Restatement (Third) of the Law Governing*

*Lawyers* § 132 cmt. d(iii) (2000). Any meaningful assessment of this risk cannot be limited to the consideration of ultimate legal issues, but must account for facts and circumstances, legal theories and strategies, and even the nature and scope of the attorney's involvement in the former representation.

Although there appears to be no clear consensus about precisely how the "substantial relationship" test should be applied without simultaneously exposing the very matters to be protected, see generally ABA/BNA *Lawyers' Manual on Professional Conduct* 51:2203-25 (2002), assessing whether the two representations are "substantially related" has been described as a process of factual reconstruction, see *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221, 225 (7th Cir. 1978); see generally Charles W. Woofram, Symposium: Restatement of the Law Concerning Lawyers, 10 *Geo. J. Legal Ethics* 677 (Summer 1997). It necessarily entails some consideration of the likelihood that the attorney would have been exposed to confidential client information relevant to the prior matter, as well as the likelihood that such confidential material will be relevant to the later representation. *Westinghouse*, 588 F.2d at 225. Unless both cases involve an identical legal dispute or the same factual events, making it obvious that matters relevant to both would normally have been discussed in the earlier representation, evaluating the relationship between the representations will therefore generally require some factual inquiry and the identification of confidential factual information that would normally be obtained in the former representation and disadvantage the former client in the current representation.

Current clients are protected from conflicts of interest by other provisions of the rules. See, e.g., C.R.P.C. 1.7 (Conflict of Interest: General Rule) and 1.8 (Conflict of Interest: Prohibited Transactions). And courts clearly have the responsibility to ensure that a criminal defendant receives a fair trial (even where that requires disqualification of his counsel of choice), as well as the latitude to ensure the integrity, and appearance of integrity, of the process. With regard to Rule 1.9(a)'s specific protection of the interests of former clients, however, adversity of interests between former and current clients, standing alone, is insufficient to justify disqualification of counsel. The sweeping disqualification remedy of C.R.P.C. 1.9(a) applies only upon the identification of confidential factual information that would normally have been obtained in a former representation and would also materially advance the adverse interest of a client in a subsequent matter.<sup>143</sup>

The supreme court observed that the lawyer's prior representation of Mangeris did not involve the same crimes with which Frisco was charged, or even crimes allegedly committed in coordination with or at the direction of Frisco, and the facts pertaining to Frisco's involvement in other crimes were not the type that Mangeris would have normally disclosed to his lawyer.<sup>144</sup>

## **§ 5.8 CONFLICTS BETWEEN A CLIENT'S INTERESTS AND DUTIES OWED TO THIRD PARTIES**

Lawyers sometimes encounter conflicts of interest between the interests of their clients and the interests of third parties to whom the lawyer may owe duties.<sup>145</sup> These duties may include duties to former clients,<sup>146</sup> or the duties could arise out of fiduciary duties, such as duties arising from a lawyer's service as a trustee, executor, guardian, or corporate director.<sup>147</sup>

## **§ 5.9 POSITIONAL OR "ISSUE" CONFLICTS**

Lawyers increasingly encounter positional or "issue" conflicts. A law firm may be representing unrelated clients in unrelated matters, and yet a conflict develops because it may be necessary for the law firm to take a position on a legal issue in one case and take a contrary position on the same legal issue in another case.

To confuse matters further, "issue conflicts" are not readily detectable by systems to screen for conflicts; in larger law firms, lawyers may not know what position other lawyers in the firm are taking on disputed issues of law, or it may not become clear that the law firm will need to take a different position on an issue of law until well into a representation.

The rules and the case law give only very general guidance on how to handle issue conflicts. The best guide appears to be Colo. RPC 1.7(a)(2)'s admonition that a lawyer shall not represent a client if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client. . . ." Comment 24 to Colo. RPC 1.7 addresses issue conflicts and the risk factors to consider:

Ordinarily, a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable

expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations from one or both matters.<sup>148</sup>

The rationale behind the comment appears to be that, if the legal position is legitimately in dispute, a trial court's decision in one case is not going to bind another trial court deciding the same legal issue in another case. Once the issue goes before the appellate court, however, the position for which the lawyer is arguing, if successful, may injure another client taking a contrary position.

The Comments to the *Restatement (Third) of the Law Governing Lawyers* generally track the Comments to Colorado Rule 1.7.<sup>149</sup>

Note that even if the two cases are in two different trial courts, a client may be prejudiced by which case is decided first. A copy of a trial court order received in one case can prove very embarrassing when attached by a clever opposing counsel to a motion filed in the second case.

Lawyers' responsibilities with respect to "issue conflicts" are largely unsettled. For example, the California State Bar Committee on Professional Responsibility and Conduct has concluded that a client should make no reasonable expectation that lawyers will not take inconsistent legal positions on behalf of another client.<sup>150</sup> The same committee has stated that a lawyer may ethically argue conflicting sides of the same legal issue before the same judge.<sup>151</sup> Indeed, it is sometimes a point of pride among lawyers to be able to effectively argue both sides of the same issue.

In short, the best lawyers can do is be aware of the issue, review the requirements of Colo. RPC 1.7 and Comment 24, and consider each matter on a case-by-case basis.

## **§ 5.10 CLIENT CONSENT TO CONFLICTS OF INTEREST**

### **§ 5.10.1—Introduction**

Lawyers are not always prohibited from representing clients with conflicting interests. The rules permit a lawyer to undertake or continue a representation under certain circumstances *if* each affected client is fully informed of the nature and risks of the conflict and consents.

There are many reasons that clients may wish to consent to a conflict of interest. For example, the conflict of interest may concern an insignificant matter not central to the representation. A client may wish to procure the services of a particular lawyer, and may need consent to secure the lawyer's representation.<sup>152</sup> In a lawsuit involving multiple plaintiffs or defendants, clients may wish to avoid the costs entailed in retaining separate lawyers for each of the aligned parties.<sup>153</sup>

The key in obtaining effective consent to a conflict of interest is that *each* affected client must be fully informed of the possible adverse consequences of the conflict, and *each* must agree. But, even if each of the affected clients is fully informed of and agrees to the conflict, each one's informed consent *still* may not be enough in certain circumstances.

### § 5.10.2—General Rule Of Client Consent Or Waiver

Colo. RPC 1.7 prohibits a lawyer from representing clients with conflicting interests, except when certain criteria are fulfilled under Colo. RPC 1.7(b).

The former Colo. RPC 1.7(a) seemed to provide an exception for representing clients with directly conflicting interests if the lawyer reasonably believed the representation will not adversely affect the relationship with the other client; and each client consented after consultation.<sup>154</sup>

Note that there were three elements to the exception: first, the lawyer must have “reasonably believed” that the representation would not “adversely affect” the relationship with the other client; second, each affected client must have been consulted about the conflict; and third, each affected client must have consented to the conflict.

The former Colo. RPC 1.7(b)'s exception for representing clients when the lawyer's representation might be “materially limited” by competing interests was similar to Colo. RPC 1.7(a)'s exception:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) *the lawyer reasonably believes the representation will not be adversely affected*; and

(2) *the client consents after consultation*. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.<sup>155</sup>

The former Colo. RPC 1.7(b)'s exception contains the same three elements as Colo. RPC 1.7(a)'s exception. However, Colo. RPC 1.7(b) elaborated on the lawyer's obligation to consult with the affected clients when the lawyer contemplated common representation of multiple clients in a single matter, *e.g.*, multiple defendants or plaintiffs in litigation or multiple parties to a business transaction.

The revisions to the Colorado Rules of Professional Conduct (effective January 1, 2008) devote the entirety of the new Rule 1.7(b) to discussing a client's consent to a conflict of interest:

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

The new Rule 1.7 clarifies, rather than substantively changes, the requirements for obtaining a consent to a conflict of interest. The new requirement to obtain the consent to the conflict of interest in writing, while implied by former Rule 1.7 or suggested by good practice, is now made explicit.

While Colorado's former Rule 1.7(a) appeared to permit a lawyer to represent clients who were directly adverse to each other if the criteria of Rule 1.7(a)(1) and (2) were met, as a practical matter it would be extremely rare that a lawyer could *ever* fulfill such requirements. Indeed, it would be almost impossible to properly represent directly adverse clients in either a business transaction<sup>156</sup> or in litigation.<sup>157</sup> And, with the inclusion of former Rule 1.7(c) in the Colorado Rule (see discussion in § 5.10.3, below), the Rules Committee of the Colorado Supreme Court emphasized that representation with direct adversity is almost never permitted. The new Rule 1.7(b) makes explicit what, as a practical matter, has long been the rule in Colorado: that a lawyer can *never* obtain a proper client consent to a conflict of interest where there is direct adversity, at least in the context of litigation.<sup>158</sup>

The *Restatement (Third) of the Law Governing Lawyers* also provides that a lawyer may represent conflicting interests in certain circumstances, provided that there is informed consent:

#### § 122. Client Consent to a Conflict of Interest

- (1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the lawyer's representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.
- (2) Notwithstanding the informed consent of each affected client or former client, a lawyer may not represent a client if:

- (a) the representation is prohibited by law;
- (b) one client will assert a claim against the other in the same litigation; or
- (c) in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.<sup>159</sup>

The Comment to *Restatement* § 122 notes that the client has veto power over the lawyer's representation of conflicting interests:

In effect, the consent requirement means that each affected client or former client has the power to preclude the representation by withholding consent.<sup>160</sup>

*Restatement* § 122 closely tracks the concepts outlined in Colo. RPC 1.7(b).

Colo. RPC 1.8 (prohibited transactions between a lawyer and a client) allows a lawyer to enter into a transaction with a client under certain circumstances when (1) the client is fully informed about the nature of the conflicting interests, and (2) the terms are fair and reasonable to the client.<sup>161</sup> Colo. RPC also 1.8 requires the client's consent to the conflict of interest to be in writing.<sup>162</sup>

Colo. RPC 1.9 (conflicts of interests with former clients) permits a lawyer, under certain circumstances, to represent a new client with interests adverse to those of a former client provided, however, that the lawyer obtains the informed consent of both clients.<sup>163</sup>

The Colorado and federal appellate decisions addressing client waivers of lawyers' conflicts of interest most often arise in the context of criminal cases. The cases tend to have a similar fact pattern: a criminal defendant waives his or her lawyer's conflict of interest, is convicted, and appeals the conviction based upon ineffective assistance of counsel arising from the conflict. On appeal, the appellate court focuses on whether the client was fully informed of the conflict and made an uncoerced decision. Most often, the convicted client loses the appeal.

For example, in a case in which a criminal defendant's lawyer began dating the prosecutor after the client's trial and conviction but before sentencing, the client appealed his conviction on the grounds of ineffective assistance of counsel arising from his lawyer's conflict of interest. The lawyer had disclosed his new romance to both the client and the trial court. The trial court had held a hearing, and the client had waived the conflict despite being closely questioned by the court.<sup>164</sup> The court of appeals affirmed the conviction. The court held that a defendant in a criminal case may waive a conflict of interest if the defendant is fully informed of the conflict and agrees to it.<sup>165</sup> The court found that a waiver is voluntary, knowing, and intelligent when the defendant is aware of and understands the various risks and pitfalls, has the rational capacity to make a decision on the basis of this information, and states clearly and unequivocally a desire to proceed regardless of those dangers.<sup>166</sup> The

record must affirmatively show that the trial court fully explained the nature of the conflict and the difficulties defense counsel faced in effective advocacy for the defendant.<sup>167</sup> A waiver is not knowing and intelligent, however, when a defendant gives *pro forma* answers to the court's *pro forma* questions.<sup>168</sup> The trial court is required to elicit the defendant's narrative response on the record, stating his or her understanding of the right to conflict-free representation and a description of the conflict at issue.<sup>169</sup> A waiver is valid even though the defendant might receive representation less effective than that provided by conflict-free counsel. Absent an abuse of discretion, the trial court's determination that a waiver is valid will not be disturbed on review.<sup>170</sup>

Of course, while the client's waiver may withstand scrutiny for purposes of appealing a criminal conviction, it may not withstand scrutiny of the lawyer's conduct in a disciplinary proceeding. There are some conflicts that simply cannot and should not be waived, as will be discussed in the next section.

### **§ 5.10.3—When The Client May Not Properly Consent To The Conflict**

As the ethics rules have evolved, it has become more and more clear that a client may not properly consent to a conflict of interest if the client's interests might be materially injured by the consent, even if the client is fully informed of the consequences.

The Colorado Supreme Court has been proactive about protecting the interests of clients from the adverse effects of conflicts of interest, even when clients were willing to consent to the conflicts. The former Colo. RPC 1.7 included a provision that was part of the comment to the former ABA Model Rule. The court incorporated the comment directly into the former Rule 1.7 as section (c):

(c) For purposes of this Rule, a client's consent cannot be validly obtained in those instances in which a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances of the particular situation.<sup>171</sup>

The Colorado Rules Committee noted that the reason for incorporating the Comment directly into the Colorado Rule was for added protection of the client.<sup>172</sup> The supreme court's published decisions bear out that its prime concern, when considering client waivers of conflicts, is to protect the client.

The new ABA Model Rule 1.7 and the new Colorado Rule 1.7 make even more explicit that there are some circumstances under which a client may never properly consent to the conflict of interest. Specifically, the new Rules prohibit lawyers from representing fully informed clients who have consented to conflicts *only* when (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; and (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.<sup>173</sup>

The first limitation is the more difficult to analyze. This is the circumstance where the lawyer's ability to provide effective representation to one client is somehow materially impaired because of responsibilities to another client. The Committee Comment to the new Colorado Rule 1.7(b)(1), citing Rule 1.1 (competence) and Rule 1.3 (diligence), states that the representation is prohibited if "in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation."<sup>174</sup> The emphasis, again, is on protecting the client.

The second limitation — that the consent to the conflict is ineffective if the representation is prohibited by law — seems self-evident. Examples of this type of conflict would be, in some states, a statute that prohibits a criminal defense lawyer from representing multiple clients in a capital case.<sup>175</sup>

The third limitation also seems self-evident: lawyers should not represent clients who are asserting claims against each other in litigation. The Comment notes that these sorts of conflicts are "nonconsentable" because of "institutional interests in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal."<sup>176</sup> The Comment notes that whether the clients are directly adverse in litigation is not always obvious: "[w]hether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding."<sup>177</sup> Indeed, while this exception to the client's ability to consent seems self-evident, in litigation it can be very tricky where a lawyer's joint clients might have or should assert cross-claims against each other, or in circumstances where the jury may be required to apportion fault among a lawyer's multiple clients, and it is in the interest of each client to minimize the apportionment of fault.<sup>178</sup>

The Comment to § 122 of the *Restatement* also identifies circumstances under which a lawyer may not properly obtain the client's consent. In addition to the circumstances identified in new Rule 1.7, the Comment to § 122 notes that a consent to the conflict will not be effective if (1) the client inadequately understands the nature and severity of the conflict;<sup>179</sup> (2) the client lacks the capacity to consent for some reasons;<sup>180</sup> or (3) the consent is in any way coerced.<sup>181</sup>

In summary, a Colorado lawyer with a conflict of interest likely cannot represent a client, even after full disclosure, informed consent, and a written waiver, when the lawyer's conflict might prove harmful to the client.

#### **§ 5.10.4—Informed Consent Requirement**

Colo. RPC 1.7(b) generally permits clients to consent to a lawyer's representation with conflicts of interest when "each affected client gives informed consent, confirmed in writing."<sup>182</sup> This exception raises the issue of what constitutes "informed consent."

#### **Adequate Disclosure for Informed Consent**

The revisions to Colorado's Rules specifically define "informed consent":

Rule 1.0: Terminology

(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 and reasonably available alternatives to the course of conduct.<sup>183</sup>

Comment 18 to new Rule 1.7 elaborates on the requirement for an informed consent and full disclosure:

Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of the client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.<sup>184</sup>

The *Restatement* also discusses the nature of the disclosures necessary to obtain an informed consent from the client:

#### § 122. Client Consent to a Conflict of Interest

(1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the lawyer’s representation. *Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.*<sup>185</sup>

The Comments to the *Restatement* § 122 explain in some detail that in a multiple-client situation, the information normally should address:

- The interests of the lawyer and/or other clients giving rise to the conflict;
- Contingent, optional, and tactical considerations and alternative courses of action that would be foreclosed or made less readily available by the conflict;
- The effect of the representation or the process of obtaining other clients’ informed consent upon confidential information of the client;
- Any material reservations that a disinterested lawyer might reasonably harbor about the arrangement if such a lawyer were representing only the client being advised; and
- The consequences and effects of a future withdrawal of consent by any client, including, if relevant, the fact that the lawyer would withdraw from representing all clients.<sup>186</sup>

The lawyer is responsible for ensuring that each client has the necessary information to make a fully informed consent to a conflict of interest.<sup>187</sup> A lawyer who does not personally inform the client assumes the risk that the client is inadequately informed and

that the consent is invalid.<sup>188</sup> A lawyer's failure to inform the clients might also bear on the motive and good faith of the lawyer.<sup>189</sup>

### **Circumstances When Adequate Disclosure Is Prohibited**

A purpose of the conflict-of-interest rules is to protect the confidences and secrets of clients. Thus, a lawyer's obligation to maintain the secrets and confidences of a client may prevent the lawyer from making the disclosures necessary to obtain an informed consent from other clients.

A lawyer is prohibited from disclosing information about one client or prospective client to another if the necessary information is confidential.<sup>190</sup> The affected clients may consent to the disclosure of confidential information, but a lawyer must also consider whether the client should, in fact, disclose such confidential information. It also might be possible for a lawyer to explain the nature of undisclosed information in a manner that provides a client with an adequate basis for informed consent, while still maintaining the confidences of the other client.<sup>191</sup> But, if a lawyer cannot provide adequate disclosure to the client from whom he or she is requesting the consent without disclosing confidential information about another client, the lawyer may simply be unable to obtain a valid consent to the conflict and must decline the representation.<sup>192</sup>

### **§ 5.10.5—Restrictions On Obtaining Consent**

Even if a lawyer obtains an adequate informed consent to a conflict of interest from all affected clients, the lawyer may still be precluded from undertaking the representation. The Colorado Supreme Court, applying DR1-102(A)(6) and DR6-101(A)(3) of the former Code of Professional Responsibility, suggested that when a lawyer purports to represent two or more clients in a matter, the lawyer must not favor the interest of one client over the other.<sup>193</sup>

When a lawyer represents multiple plaintiffs in litigation, a fee agreement that deprives each client of the right to individually determine whether to settle the client's claim is unenforceable, and the lawyer may be disqualified because of a conflict of interest.<sup>194</sup>

In short, there are some conflicts that simply may not be waived.<sup>195</sup>

## **§ 5.11 IMPUTED CONFLICTS OF INTEREST**

### **§ 5.11.1—Introduction To Imputed Conflicts Of Interest**

Lawyers associated with law firms are frequently confronted with imputed conflicts of interest. These problems can be particularly significant in a large law firm. Often, the conflict check system reveals a potential conflict of interest because of a representation by another lawyer in a completely unrelated matter. In large law firms, the lawyer representing the other client may be in a different city or state or, indeed, a different country.

In some cases, the conflict check will reveal that another lawyer in the firm may be a witness in litigation.<sup>196</sup>

These scenarios raise the specter of imputed conflicts of interest or imputed disqualification. If the conflict of one lawyer is, in fact, imputed to the other lawyers in the firm, the law firm may be required to decline the representation.

The rule of imputed conflicts of interest seems to work well in the context of small or mid-size law firms, where lawyers within the firm may have direct access to, if not actual knowledge of, confidential information about another's clients. It becomes more problematic in larger firms where, as a practical matter, lawyers within a firm may not have access to confidential information about a client represented by a lawyer in a distant office. It also becomes very problematic in firms where lawyers frequently float among different private law firms, government service, or corporate general counsel's offices and bring their conflict of interest problems with them.

These problems have consequences. The problems may interfere with lawyers' efforts to build practices or provide full service to existing clients. The law firm may have to turn down a desirable case or transaction because of some minor representation by a partner in a distant city. These chronic conflict of interest problems can cause talented lawyers to leave the law firm in frustration, often taking clients and other lawyers with them. The consequences of imputed disqualifications are not simply that a law firm is deprived of a lucrative fee; the client may suffer as well. The client may be as distressed as the law firm by the conflict because the client is then deprived of access to its chosen counsel and the counsel's expertise in a critical matter.

Law firms have attempted various means of addressing the conflict-of-interest problems, such as screening or "confidentiality walls." When the problems are ignored or handled improperly, the consequences can ensnare the law firm in unpleasant and embarrassing litigation.

#### **§ 5.11.2—Rule Of Imputed Disqualification — Rationale**

A lawyer is obligated to maintain a paramount duty of loyalty to the client.<sup>197</sup> When a lawyer associates with a law firm, the principle of loyalty to the client extends beyond the individual lawyer and applies with equal force to the other lawyers practicing in the firm.<sup>198</sup> This principle is known as the "rule of imputed disqualification."<sup>199</sup> The rule acknowledges the close personal and financial relationships that exist between a lawyer and other members of a law firm.<sup>200</sup> The rule is based on the presumption that lawyers in a law firm have access to confidential information about each other's clients.<sup>201</sup>

The rule of imputed disqualification is intended to apply the principle of loyalty to the client vicariously to lawyers who practice in a law firm or other association.<sup>202</sup> The rule treats all lawyers in a law firm as one lawyer for purposes of applying principles of loyalty to a client.<sup>203</sup>

#### **§ 5.11.3—Colorado Rule On Imputed Disqualification — Generally**

Colo. RPC 1.10 addresses imputed conflicts of interest and, thus, the rule of imputed disqualification. Colo. RPC 1.10 provides that all lawyers in a law firm are disqualified from representing a client when one lawyer associated with the firm is disqualified under Colo. RPC 1.7 (conflicts of interest) or Colo. RPC 1.9 (conflicts of interest with former clients).<sup>204</sup> The rule of imputed disqualification applies to both private firms and public law firms such as a district attorney's office or the Office of the State Public Defender.<sup>205</sup>

The rule that all lawyers in a law firm are disqualified from representing a client if one lawyer is disqualified is a rebuttable rule, at least in federal court.<sup>206</sup> In determining whether the presumption of imputation has been rebutted, the court should consider the firm's size, structural divisions, likelihood of any contact between the "infected" lawyer and lawyers responsible for the new representation, and the existence of rules preventing the infected lawyer from gaining access to files concerning the present litigation.<sup>207</sup> Where the lawyer who performed the earlier work has left the firm and no lawyer remaining in the firm has any material information relating to the representation, disqualification cannot be imputed to the firm as a whole.<sup>208</sup> But, because Colo. RPC 1.10(a) emphasizes loyalty as well as confidentiality, an "ethical wall" of silence between lawyers will not necessarily prevent the disqualification of all of the members of the firm if the circumstances of the conflict fall within the scope of the rule.<sup>209</sup>

#### **§ 5.11.4—Colorado's New Rule Of Imputed Disqualification**

The recently enacted Colorado Rule 1.10 tracks the former ABA Model Rule 1.10 (upon which Colo. RPC 1.10 is based), with some clarifying additions helpful to lawyers:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(e) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the matter is not one in which the personally disqualified lawyer substantially participated;

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

(3) the personally disqualified lawyer gives prompt written notice (which shall contain a general description of the personally disqualified lawyer's prior representation and the screening procedures to be employed) to the affected former clients and the former clients' current lawyers, if known to the personally disqualified lawyer, to enable the former clients to ascertain compliance with the provisions of this Rule; and

(4) the personally disqualified lawyer and the partners of the firm with which the personally disqualified lawyer is now associated reasonably believe that the steps taken to accomplish the screening of material information are likely to be effective in preventing material information from being disclosed to the firm and its client.<sup>210</sup>

The revised Rule 1.10(a) is intended to accommodate a lawyer's strong political or religious views or other personal interests that do not implicate loyalty to the client by other members of the firm and do not risk protection of the client's confidential information.<sup>211</sup> While the lawyer's views or interest might ordinarily disqualify the lawyer from representing a client under Rule 1.7(b), as materially limiting the lawyer's ability to adequately represent the client, the thinking is that the *other* lawyers in the law firm who do not share such interests should not be disqualified when there is no risk to a current or former client.<sup>212</sup>

#### **Applicability of Rule When Lawyer Has Left the Firm**

Colo. RPC 1.10(b) provides that the rule of imputed disqualification generally does *not* apply to law firms, under certain circumstances, when the lawyer who was privy to the confidential information has left the law firm and is no longer associated with the firm:

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.<sup>213</sup>

Thus, the rule of imputed disqualification may not apply if the lawyer who had represented the adverse client has left the law firm, provided, however, that certain conditions have been met. The conditions are:

- The law firm does not currently represent the client whose interests are adverse to the current client;
- The lawyer who represented the adverse former client is no longer with the law firm;
- No lawyer remaining with the firm has information protected by Colo. RPC 1.6 (confidentiality) or Colo. RPC 1.9(c) (also pertaining to confidential information); and
- The new representation is not the same or substantially related to the prior representation of the adverse former client.<sup>214</sup>

The exception to the imputed conflict-of-interest rule is designed to ascertain whether, in fact, lawyers *currently* with the law firm have confidential information about the adverse former client. If they do not, then the former client's rights of confidentiality are not impaired and the former client is protected.<sup>215</sup> Whether the exceptions of Colo. RPC 1.10(b) apply, or whether the clients may effectively waive the conflict, depends on the specific facts.

#### **Applicability of the Rule to Law Firm Staff**

Colo. RPC. 1.10(b) does not apply to law firm staff members, such as secretaries or paralegals, who were involved in the former representation and are still employed by the firm. The reasoning is that law firm staff members are unlikely to have as intimate a knowledge of confidential and privileged information as lawyers might have.<sup>216</sup> The reasoning is suspect. The rule contemplates that law firm staff members who were privy to confidential information about the former client should be screened from the new representation.<sup>217</sup>

#### **§ 5.11.5—“Confidentiality Walls” Or Screening For Imputed Disqualification**

Many law firms have attempted to address imputed conflicts of interest by constructing “confidentiality walls” or “screening,” with mixed success. Colo. RPC 1.10 and the Comments do not suggest any mechanism for building a confidentiality wall. The Colorado cases discussing confidentiality walls send mixed signals about whether such screening is permissible. While screening is certainly feasible, the Colorado Supreme Court seems more concerned about the principle of loyalty to the client than whether client information actually passes to a screened lawyer.

The Colorado Supreme Court suggested in a footnote that it might be possible for the Colorado Public Defender's Office to erect a confidentiality wall by adopting internal procedures in its regional offices to restrict access to clients' confidential information among the various offices.<sup>218</sup> The Colorado Court of Appeals implicitly approved, in *dicta*, a confidentiality wall within the Colorado Attorney General's Office that permitted the Attorney General's Office to represent the Colorado Real Estate Commission and also prosecute licensing violations before the commission.<sup>219</sup> However, the supreme court implicitly disapproved of a confidentiality wall in a private law firm in a criminal case.<sup>220</sup> The court noted that the "ethical wall" of silence between lawyers within the private law firm "will not necessarily prevent" disqualification of all members of the law firm "[b]ecause Rule 1.10(a) emphasizes loyalty as well as confidentiality. . . ."<sup>221</sup> The court refused to address the issue of whether the presumption that all lawyers within a law firm would be disqualified under the imputed disqualification doctrine, despite the confidentiality wall, was a rebuttable presumption.<sup>222</sup>

Despite the dearth of authority in Colorado, there is substantial authority from other sources discussing confidentiality walls. While it has no force of law, in 1991 the Colorado Bar Association Ethics Committee issued a Formal Opinion discussing the use of confidentiality walls within large law firms.<sup>223</sup>

Large law firms have exerted significant pressure for approval of confidentiality walls. This influence is reflected in the revised ABA Model Rules, as well as the recent revisions to the Colorado Rules, both of which specifically define a "screened" lawyer:

#### Rule 1.0: Terminology

(k) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.<sup>224</sup>

The lengthy Comments to the ABA Model Rule 1.0(k) and to Colo. RPC 1.0(k) discuss the reasons and procedures for an effective screen:

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written

undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.<sup>225</sup>

Similarly, the *Restatement* also permits removing imputed disqualification by screening in certain circumstances:

#### § 124 Removing Imputation

(2) Imputation specified in § 123 does not restrict an affiliated lawyer with respect to a former-client conflict under § 132, when there is no substantial risk that confidential information of the former client will be used with material adverse effect on the former client because:

- (a) any confidential client information communicated to the personally prohibited lawyer is unlikely to be significant in the subsequent matter;
- (b) the personally prohibited lawyer is subject to screening measures adequate to eliminate participation by that lawyer in the representation; and
- (c) timely and adequate notice of the screening has been provided to all affected clients.<sup>226</sup>

The reasoning behind *Restatement* § 124 is that if a lawyer's involvement with a former client has been so minor that the lawyer was not exposed to significant confidential information, the lawyer's conflict of interest and disqualification should not be imputed to the rest of the law firm.<sup>227</sup> Whether the disqualified lawyer was privy to significant client information and cannot be appropriately screened, or was privy to insignificant client information and can thus be properly screened, depends on a number of factors. These factors include:

- (1) [W]hether the value of the information as proof or for tactical purposes is peripheral or tenuous;
- (2) whether the information in most material respects is now publicly known;
- (3) whether the information was of only temporary significance;
- (4) the scope of the second representation; and
- (5)

the duration and degree of responsibility of the personally prohibited lawyer in the earlier representation.<sup>228</sup>

If the disqualified lawyer had more substantial contact with the former client, screening might be an appropriate mechanism to remove the disqualification from the rest of the law firm. An example might be a very junior lawyer who peripherally assists a partner at a former law firm on a matter for the client, but has no direct exposure to the client's confidential information.<sup>229</sup> But in some circumstances, a lawyer's involvement with the former client might have been of such significance that screening will not remove the imputed disqualification from the rest of the law firm.<sup>230</sup> Again, the analysis depends on the specific facts of each case.<sup>231</sup>

Screening is a practical method of protecting the confidential information of current or former clients while acknowledging the realities of modern law practice. To be effective, however, law firms must thoroughly analyze each case that is contemplated to be screened, and the lawyers involved must scrupulously observe the screening procedures.

## **§ 5.12 SUMMARY**

A lawyer should analyze all conflict of interest issues through the prism of (1) loyalty to the client; (2) maintaining the client's trust; (3) protecting the client's confidences and private information; and (4) maintaining the lawyer's professional independence. When confronted with a possible conflict of interest, a lawyer analyzing the conflict should ask the following practical questions:

If I undertake this representation —

- 1) Are my personal interests or my law firm's interests such that I may be tempted to "pull my punches" or fail to vigorously advocate for the client?
- 2) Are the interests of another existing or former client such that I may be tempted to fail to vigorously advocate for the new client?
- 3) If I fail to assert a position on behalf of a new client because of a conflict with my interests or the interests of my law firm or another client, will that failure adversely and materially affect the interests of the new client?
- 4) If I vigorously assert a position on behalf of the new client, will that vigorous advocacy adversely and materially affect the interests of an existing or former client?
- 5) Is there a risk that I will need to use (or may use) information about a current or former client in a way that materially disadvantages that client?

If the answer to any of these questions is “yes,” then the lawyer may have a conflict of interest and the lawyer should think very carefully about the proposed representation.

Each lawyer should possess that quiet, nagging, internal voice that signals a potential problem. If that internal voice suggests that there may be a problem with a conflict of interest, then there usually is a problem. A lawyer ignores that internal voice at his or her peril.

## NOTES

1. Cmt. 1, Colorado Rule of Professional Conduct (*hereinafter*, Colo. RPC) 1.7 (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”); Cmt. a, 2 *Restatement (Third) of the Law Governing Lawyers (hereinafter, Restatement)*, § 121, p. 245; *Restatement* § 128, p. 338 (2002).
2. *Id.*
3. Cmt. a, *Restatement* § 121, p. 245.
4. *Id.*
5. *Id.*
6. *See Restatement* § 16, p. 146.
7. Cmt. c(iii), *Restatement* § 121.
8. *Restatement* § 121, pp. 244-45.
9. Cmt. c, *Restatement* § 121, p. 247.
10. *See, e.g.*, Disciplinary Rule 5-105(A), ABA Model Code of Professional Responsibility (1969).
11. Cmt. c(i), *Restatement* § 121, pp. 247-48.
12. *E.g., In re Cimino*, 3 P.3d 398, 401 (Colo. 2000) (“The absence of injury does not negate the violations of Colo. RPC 1.7(b) or 1.8(a)”).
13. *Id.*
14. Colo. RPC 1.7(a)(2).
15. Cmt. c(ii), *Restatement* § 121, p. 248.
16. *Id.*; *see also* Cmt. 6, Colo. RPC 1.7. *See* Chapter 2, “The Client-Lawyer Relationship,” in Volume I of this book for a more thorough discussion about problems inherent in limiting the scope of a lawyer’s representation.
17. Cmt. c(iii), *Restatement* § 121, pp. 248-49.
18. Cmt. 26, Colo. RPC 1.7; Cmt. 26, ABA Annotated Model Rules of Professional Conduct 1.7, 5th ed. (American Bar Association Center for Professional Responsibility, 2002) (*hereinafter*, ABA Model Rules).
19. *Id.*
20. Cmt. c(iv), *Restatement* § 121, pp. 250-51.
21. *Id.*
22. *Id.*
23. Cmt. d, *Restatement* § 121, p. 251.
24. Cmt. 1, “General Principles,” Colo. RPC 1.7; Cmt. 1, “General Principles,” ABA Annotated Model Rules, p. 107.
25. *People ex rel. Peters v. District Court*, 951 P.2d 926, 929-30 (Colo. 1999) (emphasis added); Cmt. 1, “General Principles,” Colo. RPC 1.7 (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”).
26. Cmt. 1, Colo. RPC 1.7.
27. Syllabus, CBA Ethics Committee Formal Opinion 57 (March 21, 1981) (emphasis added).

28. Cmt. b, *Restatement* § 121, pp. 245-57.
29. Cmt. 8, former Colo. RPC 1.7 (“As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client’s consent.”); *see also* Cmt. 3 “Loyalty to a Client,” former Colo. RPC 1.7 (“Loyalty to the client is . . . impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer’s other responsibilities or interests.”); *accord* Code of Professional Responsibility, DR-5-105(A) (“A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interest . . .”).
30. *See* Cmt. 5, “Loyalty to a Client,” former Colo. RPC 1.7.
31. *See* CBA Ethics Committee Formal Opinion No. 57 (March 21, 1981), for a similar list of such situations.
32. Colo. RPC 1.7.
33. Cmts. 6 and 7, “Identifying Conflicts of Interest: Directly Adverse,” Colo. RPC 1.7.
34. Cmt. c(i), *Restatement* § 121, p. 247 (“‘Adverse’ effect relates to the quality of the representation, not necessarily the quality of the result obtained in a given case.”).
35. Cmt. 17, Colo. RPC 1.7; Cmt. 17, ABA Model Rule 1.7.
36. *Id.*
37. Colo. RPC 1.7; *see also* ABA Model Rule 1.7; former Colo. RPC 1.7(a); Cmt. 3, “Loyalty to the Client,” former Colo. RPC 1.7(a).
38. Cmt. 6, Colo. RPC 1.7; *see also* Cmt. 6, ABA Model Rule 1.7.
39. *Id.*
40. *People v. McDowell*, 718 P.2d 541 (Colo. 1986).
41. *Id.* at 545.
42. *Id.*; *see also People v. Koeberle*, 810 P.2d 1072 (Colo. 1991) (lawyer represented wife in divorce while simultaneously representing husband in post-dissolution matters arising from an earlier marriage).
43. Colo. RPC 1.7(a); *see also* ABA Model Rule 1.7(a).
44. *Restatement* § 121.
45. Cmt. 1, “General Principles,” Colo. RPC 1.7 (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”); *see also* Cmt. 1, ABA Model Rule 1.7.
46. Cmts. 23-25, Colo. RPC 1.7.
47. Cmts. 26-28, Colo. RPC 1.7.
48. Cmts. 10-12, Colo. RPC 1.7.
49. *People in the Interest of J.A.M.*, 907 P.2d 725 (Colo. App. 1995).
50. *Id.* at 726.
51. *Id.*
52. *Hill v. Okay Constr. Co.*, 252 N.W.2d 107, 117 (Minn. 1977).
53. *See, e.g., People v. Chew*, 830 P.2d 488 (Colo. 1992).
54. *See, e.g., People v. Cozier*, 74 P.3d 531 (Colo. PDJ 2003) (lawyer disbarred after he drafted the decedent’s will and trust, had himself appointed as personal representative of the decedent’s estate, and then individually represented devisees and beneficiaries of the trust, when there were significant conflicts among the devisees and beneficiaries).
55. Cmts. 23-25, Colo. RPC 1.7.
56. *Abbott v. Kidder Peabody, Inc.*, 42 F. Supp.2d 1046, 1050 (D. Colo. 1999).
57. Cmts. 23 and 4, Colo. RPC 1.7.
58. *Restatement* § 128, p. 338.
59. Cmt. b, *Restatement* § 128, pp. 338-39.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 543 n. 6 (1986).
64. *Johnson v. Board of County Comm’rs*, 85 F.3d 489 (10th Cir. 1996).

65. *Johnson v. Board of County Comm'rs*, 868 F. Supp. 1226 (D. Colo. 1994).
66. *Johnson*, 85 F.3d at 493-94.
67. *McCall v. District Court*, 783 P.2d 1223, 1227 (Colo. 1989).
68. *People v. Preciado-Flores*, 66 P.3d 155, 167 (Colo. App. 2002), citing *Holloway v. Arkansas*, 435 U.S. 475 (1978).
69. *McCall*, 783 P.2d at 1227; citing *Allen v. District Court*, 519 P.2d 351, 352-53 (Colo. 1974).
70. *People ex rel. Peters v. District Court*, 951 P.2d 926, 930 (Colo. 1999); *McCall*, 783 P.2d at 1227; *Allen*, 519 P.2d at 352-53; see also *People v. Castro*, 657 P.2d 932, 943-45 (Colo. 1983). This is true even though some defense counsel regard raising such a defense on appeal as a badge of honor.
71. *McCall*, 783 P.2d at 1227-29.
72. *Allen*, 519 P.2d at 353.
73. *People v. Chew*, 830 P.2d 488 (Colo. 1992).
74. *Id.* at 489.
75. *Id.*
76. *People ex rel. N.R.*, 139 P.3d 671 (Colo. 2006).
77. *Id.* at 677-78.
78. *Id.* at 684-85.
79. *People ex rel. E.L.T.*, 139 P.3d 685 (Colo. 2006).
80. *Id.* at 687.
81. *Id.* at 688.
82. Cmt. d, *Restatement* § 131, pp. 367-68; Cmts. 34 and 35, "Organizational Clients," Colo. RPC 1.7.
83. Cmt. 5, Colo. RPC 1.7; see also Cmt. 5, ABA Model Rule 1.7.
84. Cmt. 34, Colo. RPC 1.7; Cmt. 2, Colo. RPC 1.13.
85. *Turkey Creek, LLC v. Rosania*, 953 P.2d 1306, 1311 (Colo. App. 1998); *Zimmerman v. Dan Kamphausen Co.*, 971 P.2d 236, 241 (Colo. App. 1998); Cmt. 34, Colo. RPC 1.7.
86. Former Colo. RPC 1.13 states: "(a) A lawyer employed or retained by an organization represents the organization which acts through its duly authorized constituents, and the lawyer owes allegiance to the organization itself, and not its individual stockholders, directors, officers, employees, representatives or other persons connected with the entity."
87. Colo. RPC 1.13(g).
88. *Restatement* § 131, p. 365.
89. See ABA Formal Opinion 91-361 (1991); Cmts. 5 and 34, Colo. RPC 1.7; Cmts. 5 and 34, ABA Model Rule 1.7.
90. Colo. RPC 1.7(a); see also ABA Model Rule 1.7(a) (emphasis supplied).
91. *Restatement* § 125, p. 312 (emphasis supplied).
92. See, e.g., *People v. Schmad*, 793 P.2d 1162 (Colo. 1990) (lawyer failed to advise his client of possible conflict between her interests and his interests in how personal injury settlement was to be paid).
93. See, e.g., Cmt. c, *Restatement* § 125, pp. 313-14.
94. *Id.*
95. Colo. RPC 1.8(b).
96. See Cmt. 3, Colo. RPC 1.6 ("... The confidentiality rule, for example, applies not only to matters 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."); see also Cmt. 6, "Confidentiality," former Colo. RPC 1.6 ("The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard confidential information of the client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.").
97. Cmt. 5, Colo. RPC 1.8.
98. Cmt. 1, Colo. RPC 1.8.

99. *Lindsay v. Marcus*, 325 P.2d 267 (Colo. 1958).
100. *Id.* at 272.
101. *O'Byrne v. Scofield*, 212 P.2d 867, 870 (Colo. 1949).
102. Colo. RPC 1.8(a); *see also* ABA Model Rule 1.8(a).
103. *Restatement* § 126, p. 322.
104. *People v. Nutt*, 696 P.2d 242 (Colo. 1984).
105. *Id.* at 246, *quoting People v. Gibbons*, 685 P.2d 168, 174 (Colo. 1984).
106. *People v. Wright*, 698 P.2d 1317 (Colo. 1985).
107. *Id.* at 1320.
108. *Id. People v. Mason*, 938 P.2d 133 (Colo. 1997) (lawyer suspended after he took an interest in a client's mountain cabin that was the subject of litigation); *People v. Bennett*, 843 P.2d 1385 (Colo. 1993) (lawyer disbarred).
109. *See, e.g., In re Quiat*, 979 P.2d 1029 (Colo. 1999); *see Mason*, 938 P.2d 133 (lawyer suspended after he took an interest in a client's mountain cabin that was the subject of litigation); *People v. Bennett*, 843 P.2d 1385 (Colo. 1993) (lawyer disbarred).
110. *See, e.g., People v. Robinson*, 853 P.2d 1145 (Colo. 1993) (lawyer was suspended after he borrowed money from client but failed to disclose the differing interests involved and failed to collateralize the loan); *People v. Schindelar*, 845 P.2d 1146 (Colo. 1993) (lawyer was disbarred after he borrowed funds from vulnerable client, failed to disclose inadequacy of security for the loans, failed to provide appropriate legal documents to ensure repayment, and failed to discuss conflicts of interest with client); *see also, e.g., People v. Potter*, 966 P.2d 1060 (Colo. 1998); *People v. Barbieri*, 61 P.3d 488 (Colo. PDJ 2000); *People v. Attorney B*, Case No. 00SA338 (Nov. 20, 2001); *People v. Doering*, 35 P.3d 719 (Colo. PDJ 2001); *In re Cimino*, 3 P.3d 398 (Colo. 2000).
111. Colo. RPC 1.8(c).
112. *Restatement* § 127.
113. Cmt. b, *Restatement* § 127, p. 331.
114. *Id.*
115. *Id.*; *see also In re Polevoy*, 980 P.2d 985, 987-88 (Colo. 1999) ("The conflict of interests, the incompetency of an attorney-beneficiary to testify because of a transaction with the deceased, the possible jeopardy of the will if its admission to probate is contested, the possible harm done to other beneficiaries and the undermining of the public trust and confidence in the integrity of the legal profession, are only some of the dangers which a lawyer must consider."); *State v. Horan*, 123 N.W.2d 488, 490 (Wis. 1963) (citation omitted); *see generally* R.E. Barber, Annotation, "Drawing Will or Deed Under Which He Figures as Grantee, Legatee, or Devisee as Grounds of Disciplinary Action Against Attorney," 98 A.L.R.2d 1234 (1964).
116. *Restatement* § 127, p. 330.
117. Cmt. e, *Restatement* § 127, pp. 332-33.
118. *In re Polevoy*, 980 P.2d at 987.
119. *Id.* (lawyer suspended for a year and a day where the lawyer prepared a will for a client and named herself a devisee); *People v. Berge*, 620 P.2d 23 (Colo. 1980).
120. *Restatement* § 127(2)(b), p. 330; Cmt. 6, Colo. RPC 1.8.
121. *See, e.g., People v. Boyer*, 934 P.2d 1361 (Colo. 1997); *People v. Good*, 893 P.2d 101 (Colo. 1995); *People v. Zeilinger*, 814 P.2d 808 (Colo. 1991); *People v. Gibbons*, 685 P.2d 168 (Colo. 1984).
122. *People v. Riddle*, 35 P.3d 146, 149-51 (Colo. PDJ 1999); *see also Good*, 893 P.2d at 104.
123. Colo. RPC 1.8(j); *see also* Cmt. 12, Colo. RPC 1.7.
124. Colo. RPC 1.7(a)(2).
125. *See, e.g., Riddle*, 35 P.3d 146, *People v. Easley*, 956 P.2d 1267 (Colo. 1998); *People v. Bauder*, 941 P.2d 282 (Colo. 1997); *People v. Barr*, 929 P.2d 1325 (Colo. 1996).
126. ABA Comm. On Professional Ethics and Grievances, Formal Opinion 364 (1982).
127. Colo. RPC 1.8(d).
128. Colo. RPC 1.8(e).
129. Colo. RPC 1.8(f).

130. Colo. RPC 1.8(g).
131. Colo. RPC 1.8(h).
132. Colo. RPC 1.9.
133. Cmt. 1, Colo. RPC 1.9.
134. Cmt. 3, Colo. RPC 1.9; Cmt. 3, ABA Model Rules 1.9.
135. *Restatement* § 132, p. 376-77.
136. *See, e.g., English Feedlot, Inc. v. Norden Lab, Inc.*, 833 F. Supp. 1498 (D. Colo. 1993); *Funplex Partnership v. F.D.I.C.*, 19 F. Supp.2d 1202 (D. Colo. 1998); *F.D.I.C. v. Sierra Resources, Inc.*, 682 F. Supp. 1267 (D. Colo. 1987); *Cole v. Ruidoso Municipal Schools*, 43 F.3d 1473 (10th Cir. 1994).
137. *Funplex Partnership*, 19 F. Supp.2d at 1206.
138. *Id.*
139. *Crystal Homes v. Radetsky*, 895 P.2d 1179 (Colo. App. 1995).
140. *Id.* at 1182; *see also In re King Resources Co.*, 20 Bankr. 191 (D. Colo. 1982).
141. *Radetsky*, 895 P.2d at 1182; *see also* Code of Professional Responsibility DR 5-105(3).
142. *People v. Frisco*, 119 P.3d 1093 (Colo. 2005).
143. *Id.* at 1096.
144. *Id.* at 1098.
145. Cmt. 9, Colo. RPC 1.7; Cmt. 9, ABA Model Rules 1.7.
146. Colo. RPC 1.9; Cmt. 9, Colo. RPC 1.7.
147. Cmt. 9, Colo. RPC 1.7; Cmt. 9, ABA Model Rules 1.7.
148. Cmt. 24, Colo. RPC 1.7; *see also* Cmt. 24, ABA Model Rules 1.7.
149. Cmt. f, *Restatement* § 128, pp. 343-44; *see also* ABA Formal Opinion 93-377 (October 16, 1993) (positional conflicts).
150. California State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion 1989-108 (1989).
151. *Id.*; *see contra* Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 1990-4 (May 22, 1990).
152. Cmt. b, *Restatement* § 122, pp. 265-66.
153. *Id.*
154. Former Colo. RPC 1.7(a) (emphasis added).
155. Former Colo. RPC 1.7(b) (emphasis added).
156. *See, e.g., People v. Chew*, 830 P.2d 488 (Colo. 1992).
157. *See, e.g., People v. Koeberle*, 810 P.2d 1072 (Colo. 1991).
158. Colo. RPC 1.7(b)(3) and Cmt. 6; *see also* ABA Model Rule 1.7(b)(3).
159. *Restatement* § 122, p. 264.
160. Cmt. b, *Restatement* § 122, pp. 264-65.
161. Colo. RPC 1.8(a).
162. Colo. RPC 1.8(a)(3).
163. Colo. RPC 1.9.
164. *People v. Preciado-Flores*, 66 P.3d 155, 167-68 (Colo. App. 2002).
165. *Id.* at 167-68.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 167.
171. Former Colo. RPC 1.7(c).
172. Colorado Committee Cmt., former Colo. RPC 1.7 (“The rule adopted is identical to [former] Model Rule 1.7 except for section (c), which the Committee felt was necessary in order to provide more protection for a client whose consent is sought as a way of resolving a conflict of interest between the lawyer and client.”).
173. Colo. RPC 1.7(b); *see also* ABA Model Rule 1.7(b).
174. Cmt. 15, Colo. RPC 1.7; *see also* Cmt. 15, ABA Model Rule 1.7.

175. Cmt. 16, Colo. RPC 1.7; *see also* Cmt. 16, ABA Model Rule 1.7.
176. Cmt. 17, Colo. RPC 1.7; *see also* Cmt. 17, ABA Model Rule 1.7.
177. *Id.*
178. C.R.S. § 13-21-111.5 (2005).
179. Cmt. g(i), *Restatement* § 122.
180. Cmt. c, *Restatement* § 122, pp. 266-68.
181. Cmt. b, *Restatement* § 122, pp. 265-66.
182. Colo. RPC 1.7(b)(4).
183. Colo. RPC 1.0(e); *see also* ABA Model Rule 1.0(e).
184. Cmt. 18, Colo. RPC 1.7; *see also* Cmt. 18, ABA Model Rule 1.7.
185. *Restatement* § 122 (emphasis added).
186. Cmt. c(i), *Restatement* § 122, pp. 266-68.
187. *Id.*
188. *Id.*
189. *Id.*
190. Cmt. 6, “Consultation and Consent,” former Colo. RPC 1.7; Cmt. c(i), *Restatement* § 122, pp. 266-68.
191. Cmt. c(i), *Restatement* § 122, pp. 266-68.
192. *Id.*
193. *See, e.g., People v. Bollinger*, 681 P.2d 950 (Colo. 1984) (lawyer censured for assuring real-estate buyers that he would represent their interests as well as those of his seller-client, but when problem later arose between seller and earlier lien holder that resulted in foreclosure, lawyer failed to inform the buyers or help them solve the problem).
194. *Abbott v. Kidder Peabody & Co.*, 42 F. Supp.2d 1046 (D. Colo. 1999).
195. *See, e.g., Grogan v. Taylor*, 877 P.2d 1374, 1383 (Colo. App. 1993) (“[W]e hold that, under Colorado Rules of Professional Conduct Rule 1.7, the conflict of interest between Grogan and his attorneys is not waivable and that Grogan’s consent to continued representation by these attorneys in this proceeding cannot be validly obtained.”).
196. *See, e.g., Fognani v. Young*, 115 P.3d 1268 (Colo. 2005).
197. *People ex rel. Peters v. District Court*, 951 P.2d 926, 929-30 (Colo. 1998); *see Hutchinson v. People*, 742 P.2d 875, 881 (Colo. 1987).
198. *Peters*, 951 P.2d at 930.
199. *Id.*
200. *Id.*; *see Wright v. District Court*, 731 P.2d 661, 663 (Colo. 1987); *see generally* ABA Standards for Criminal Justice, Prosecution and Defense Function 4-3.5(a) (3d ed. 1993) (“Defense Counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests.”).
201. *Peters*, 951 P.2d at 930.
202. Cmt. 2, Colo. RPC 1.10; *Peters*, 951 P.2d at 929-30.
203. Colo. RPC 1.0(c) (defines “firm” or “law firm”); Cmt. 1, Colo. RPC 1.10 (same); Cmt. 2, Colo. RPC 1.10 (“Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client. . . .”); *Peters*, 951 P.2d at 930.
204. Colo. RPC 1.10; *Peters*, 951 P.2d at 930; *McCall*, 783 P.2d at 1227 (discussing imputed disqualification in the context of DR 5-105(D)).
205. *Peters*, 951 P.2d at 930; *see McCall*, 783 P.2d at 1227.
206. *SLC Ltd. v. Bradford Group West, Inc.*, No. 92-4225 (10th Cir. 1993), slip op. at 6-9; *English Feedlot, Inc. v. Norden Labs, Inc.*, 833 F. Supp. 1498, 1507 (D. Colo. 1993), *but see Peters*, 951 P.2d at 930 n. 6.
207. *Smith v. Whatcott*, 757 F.2d 1098, 1101 (10th Cir. 1985); *English Feedlot, Inc.*, 833 F. Supp. at 1507.
208. *English Feedlot, Inc.*, 833 F. Supp. at 1507.
209. *Peters*, 951 P.2d at 930.
210. Colo. RPC 1.10.

211. Cmt. 3, Colo. RPC 1.10; *see also* Cmt. 3, ABA Model Rule 1.10.
212. *Id.*
213. Colo. RPC 1.10(b) and (c).
214. Colo. RPC 1.10(b) and Cmt. 5, generally.
215. *Restatement* § 124(1), p. 297.
216. Cmt. f, *Restatement* § 123. In this author's experience, however, an experienced secretary or paralegal sometimes may have as much or *more* intimate knowledge of the former client's confidential information than the lawyers who handled the representation.
217. Cmt. 4, Colo. RPC 1.10; *see also* Cmt. 4, ABA Model Rule 1.10.
218. *McCall*, 783 P.2d at 1228 n. 6.
219. *Ranum v. Colorado Real Estate Comm'n*, 713 P.2d 418, 420 (Colo. App. 1985).
220. *Peters*, 951 P.2d at 930.
221. *Id.*
222. *Id.* at 930 n. 6.
223. CBA Ethics Committee Formal Opinion (1991, amended 1992).
224. Colo. RPC 1.0(k); ABA Model Rule 1.0(k).
225. Cmts. 9 and 10, Colo. RPC 1.0; *see also* Cmts. 9 and 10, ABA Model Rule 1.0.
226. *Restatement* § 124, pp. 297-98.
227. Cmt. d(i), *Restatement* § 124, pp. 300-303.
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.*