The Duty of Competence in the New Normal

BY WILLIAM D. HAUPTMAN AND KENDRA N. BECKWITH

This article discusses the ethical duty of competence and how lawyers can satisfy it when the legal profession or their practices change.

The year 2020 was one of upheaval. The COVID-19 pandemic and resulting economic recession pushed lawyers to the brink, both professionally and personally, testing their resilience in new and unexpected ways. At the same time, a nationwide civil rights movement brought once-in-a-generation legislative reform in Colorado, and a presidential election transferred power to another political party. Cumulatively, these events led some lawyers to transition to new jobs, resulted in others seeking different career paths, and forced all to adjust to a "new normal" for the practice of law.

Lawyers now find themselves in uncharted territory. The pandemic has created new substantive laws and forced lawyers to deal with new realities as to where and how they practice. These shifts trigger important ethical considerations for lawyers, such as whether they are equipped to transition from one area of law to another, to address new trends or theories in the law, or to abandon brick-and-mortar office space for the flexibility of a virtual practice.

This article provides a framework for answering such questions under the Colorado Rules of Professional Conduct (Rules). It first examines Rule 1.1's duty of competence and the consequences of deviating from it. The article then discusses issues that may arise when the legal profession or a lawyer's practice changes and offers strategies for ethically managing those issues. Finally, the article discusses how to competently handle technology and practice management when running a virtual practice.

Overview of the Duty of Competence

Rule 1.1 states that a lawyer "shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." This was not an explicit ethical requirement until the 1970s, when the American Bar Association's (ABA) Model Code of Professional Responsibility became widely adopted.[1]

The Rules do not define "competent."[2] Rule 1.1's comments, while not binding, provide guidance on its meaning and application.[3] The comments explain that competence requires the proficiency of a general practitioner.[4] Thus, basic skills like analyzing precedent and legal drafting are required and expected, while special training or prior experience with a legal problem is not. A lawyer can provide adequate representation in a novel field through study or association with "a lawyer of established competence."[5] A lawyer's failure to comply with duties under other ethics rules may constitute a lack of competence.[6]

Deviating from Rule 1.1

There are regulatory consequences for breaching Rule 1.1's duty of competence. Under the Rules, the "[f]ailure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process."[7] Whether discipline is warranted, and the severity of the sanction, depend on the circumstances.[8] Uniform standards and a large body of case law offer insight into what sanction might apply.

Colorado courts and the Office of the Presiding Disciplinary Judge (PDJ) rely on the ABA *Standards for Imposing Lawyer Sanctions* (ABA Standards)[9] when imposing or reviewing sanctions for lawyer misconduct.[10] Under the ABA Standards, the presumptive sanction depends on the lawyer's mental state, the seriousness of

the misconduct, and the amount of harm to the client.[11] On one end of the spectrum, lawyers who fail to "understand the most fundamental legal doctrines or procedures" and cause actual or potential injury to a client can be disbarred.[12] On the other end, lawyers who engage in an isolated instance of negligence in determining their competence to handle a matter and cause little or no actual or potential injury to the client might receive only an admonishment.[13] Conduct that falls in between generally warrants suspension or reprimand.[14]

Cases involving failures of competence arise in Colorado with some frequency. Since 2020, a lawyer's competence was at issue (either in charged Rules violations or because the PDJ was considering prior misconduct) in at least five published disciplinary proceedings.[15] Going back five years, competence was at issue for the same reasons in about 32 PDJ opinions.[16] These cases reveal that lengthy suspensions—ranging from 30 days to an indefinite term, and often exceeding one year—are routinely imposed for lack of competence.

With some frequency, the lawyer sanctioned for breaching the duty of competence ventured into a new practice area without making adequate preparations or taking other measures to ensure competence. For example, the PDJ has sanctioned lawyers who filed actions of a type they had never filed before and which they admitted they should not have filed,[17] represented clients without properly analyzing relevant law and procedures,[18] did not affiliate with more experienced counsel when representing a client in a complicated matter outside their experience,[19] or waded into civil litigation involving a technical subject matter despite being unfamiliar with it and having experience primarily in criminal or immigration matters.[20]

Violating Rule 1.1 in this manner can result in more than regulatory sanctions. Although a Rules violation does not by itself give rise to a civil cause of action or create a presumption of the breach of a legal duty,[21] "a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct,"[22] and a lawyer who does not "employ that degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession" can be liable for malpractice.[23] The interplay between the Rules and the law of legal professional liability—which itself is addressed in a whole body of case law—is outside this article's scope.

> "A lawyer's decision to enter a new practice area without taking adequate measures to attain competence is a key factor that regulatory bodies consider in evaluating Rule 1.1 violations. The Rules advise, and case law confirms, that a lawyer can provide competent representation in a new field through study or the association with a lawyer already competent in the field."

Competence in Application

The following examples illustrate how issues involving competence and other ethical obligations can arise when the legal profession is changing or when a lawyer's practice changes.

COVID-19's Novel Legal Issues

The COVID-19 pandemic created a number of novel employment issues. Consider a lawyer who provides general advice to business or government clients on matters such as employment disputes and contract negotiations. As the client prepares for its employees to return to the office, a new issue arises: It wants to explore implementing a COVID-19 vaccination requirement for its employees and wants to know what could happen if an employee objects to this requirement. What might the lawyer do to comply with Rule 1.1 in advising the client on those topics?

The lawyer must take steps to attain competence in the new subject matter.[24] A lawyer's decision to enter a new practice area without taking adequate measures to attain competence is a key factor that regulatory bodies consider in evaluating Rule 1.1 violations.[25] The Rules advise, and case law confirms, that a lawyer can provide competent representation in a new field through study or the association with a lawyer already competent in the field.[26] In this situation, consulting counsel competent in the areas of health and privacy law might be prudent.

Dabbling in a New Practice Area

A lawyer exploring a new practice area must be mindful not only of the duty of competence but also of related ethical issues. Consider a lawyer who decides to represent a client in a matter outside of the lawyer's area of expertise. To attain the requisite proficiency, the lawyer consults with another lawyer who is more experienced in that area, which the Rules and case law suggest is sufficient to satisfy the lawyer's duty of competence.[27]

But competence is not the only applicable ethical requirement. If the more experienced lawyer practices at a different firm, the less experienced lawyer must also comply with Rule 1.6's requirement to protect client confidences during the consultation.[28] Similarly, the more experienced lawyer should be mindful that, depending on the depth of the information that the less experienced lawyer discloses under Rule 1.6, the more experienced lawyer may be disqualified from future representations adverse to the less experienced consulting lawyer's client.[29] Even if there is no prior conflict issue, a lawyer-as-witness issue could arise under Colo. RPC 3.7.[30] Regardless, these examples show that lawyers must be mindful that their efforts to attain competence can trigger other thorny issues.

High Caseloads

Changing times may cause caseload spikes, especially for government and public interest lawyers, as witnessed recently. At his February 18, 2021 State of the Judiciary address, Chief Justice Boatright warned of "an unprecedented backlog of jury trials."[31] Because the pandemic effectively halted in-person trial court proceedings, a "tsunami of jury trials" awaits.[32] Currently, there are between four and five times as many criminal jury trials scheduled than are typically tried in a year.[33] And speedy trial rights,[34] which require prioritization on court dockets, complicate this situation.

The forthcoming surge of jury trials will no doubt give rise to competence and other ethical issues as lawyers are pressed to meet deadlines.[35] Neither Rule 1.1, which requires lawyers to provide competent representation, nor Rule 1.3, which requires lawyers to act with reasonable diligence, has an exception for lawyers with significant caseloads. And although a lawyer can avoid appointment by a tribunal to represent a client if the representation will likely "result in violation of the Rules of Professional Conduct or other law,"[36] at least one lawyer has been sanctioned for seeking to avoid representation based on the lawyer's inability to provide competent representation.[37] Lawyers with high caseloads therefore must consider whether they can satisfy their obligations of competence and diligence; if they cannot, they must reduce their caseloads or withdraw.[38] This almost certainly would require coordination with and approval by supervisors.

> "Rule 1.3's diligence requirement necessitates that lawyers must not only engage in the usual preparation for court appearances (e.g., reviewing the record, reading pertinent cases, and analyzing necessary evidence) but also become competent in using the necessary videoconferencing platform."

Competence in Managing Virtual Practice

Rule 1.1's requirement that a lawyer "shall provide competent representation" extends beyond substantive legal knowledge and adequate preparation.[39] It also requires lawyers to keep "abreast of changes . . . in communications and other relevant technologies[.]"[40] This requirement is particularly salient in the virtual environment, where lawyers are being asked to both manage their practice and represent their clients virtually. Where a lawyer cannot fulfill this duty, withdrawal is mandatory.[41]

The American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility recently published Formal Opinion 498 on virtual practice.[42] That opinion addresses ABA Model Rule 1.1's duty of competence requirement as well as the duties of diligence, communication, and competence in a virtual environment.[43] Consistent with this opinion, and to ensure competence in a post-COVID-19 virtual environment, lawyers should incorporate the following strategies into their practice.

Ensure Fluency with Web-Based Court Proceedings

The advent of WebEx, Zoom, and other videoconferencing platforms has made virtual court appearances and proceedings far easier than previously envisioned. Virtual proceedings also mandate heightened attention to ethical details.

Rule 1.3's diligence requirement necessitates that lawyers must not only engage in the usual preparation for court appearances (e.g., reviewing the record, reading pertinent cases, and analyzing necessary evidence) but also become competent in using the necessary videoconferencing platform.[44] This likely requires, at minimum, knowing how to mute and unmute oneself, properly set audio and visual properties, turn the video feed on and off, and change the display from "speaker" to "tile" to ensure that all participants are visible.[45]

Lawyers should also review the platform's terms of service to "ensure that using the virtual meeting or videoconferencing platform is consistent with the lawyer's ethical obligations."[46] Lawyers should access the platforms solely through accounts protected by strong passwords, and, where feasible, should consider acquiring a license for an enterprise (or similar) platform that provides greater encryption and security than the standard consumer, free-to-use access.[47] Doing so helps protect client information and prevents uninvited or unwanted participants

from invading client conferences, court appearances, and virtual depositions.

Additionally, because virtual proceedings have made out-of-state appearances easier, lawyers should be aware of each remote jurisdiction's requirements concerning admission to the bar, temporary practice by out-of-state lawyers, and remote virtual practice.[48] Virtual practice from out of state may constitute the unauthorized practice of law, so lawyers must familiarize themselves with the jurisdiction's temporary practice rules and affiliate with local counsel as necessary.[49]

Ensure Confidentiality

Lawyers must ensure that all client communications remain confidential, even those communications transmitted over videoconferencing or other virtual platforms. Rule 1.6 requires that a lawyer not reveal "information relating to the representation of a client," and a lawyer is not alleviated of this duty simply because the communication is no longer in person. Lawyers must, at a minimum, "make reasonable efforts to prevent the inadvertent disclosure or unauthorized disclosure of . . . information relating to the representation of a client."[50] This includes careful use of the "cc" and "bcc" email functions. For example, refraining from including a client on a cc or bcc list will help prevent the client from inadvertently hitting "reply all" and disclosing confidential information.[51] Similarly, paying attention to auto fill functions on draft emails will help to avoid the inadvertent disclosure of confidential information to unintended recipients.

Reasonable efforts to maintain confidentiality during meetings include holding client meetings in private spaces versus public places like coffee shops or open coworking spaces; using headphones or earbuds during client calls; using a separate room away from other household or office members to communicate with clients; ensuring a secure, encrypted connection; using a password-protected Wi-Fi network; and hosting videoconferences only on secure platforms. Absent these types of precautions, lawyers place themselves at risk of violating Rule 1.6.[52] The ABA also recommends disabling the listening capacity of smart speakers, virtual assistants, and other listening-enabled devices (e.g., Alexa) during communications on client matters.[53]

> "Lawyers who transition their practice to a virtual environment with legal assistants, associates, and other subordinate employees must 'adopt and tailor policies and practices' to ensure that the managing lawyer's ethical obligations of supervision are satisfied."

These efforts should ensure that best practices are employed in the use of the videoconferencing software. Indeed, the COVID-19 pandemic brought with it an increase in the risk of teleconference and online platform hacking.[54] The Pennsylvania Bar Association recently published the following best practices for videoconferencing security:

- Do not make meetings public.
- Require a meeting password or use other features that control admittance of guests.
- Do not share a link to a conference on an unrestricted publicly available social media post.
- Provide the meeting link directly to specific people.
- Manage screen-sharing options, such as allowing only the host to share a screen.
- Ensure that users are using the most up-to-date software.[55]

Additionally, lawyers should ensure that any virtual document and data exchange platforms, as well as client emails, are secure, appropriately archived, and encrypted as necessary.[56]

Lawyers appearing virtually in out-of-state proceedings should also research and address conflict-of-law issues concerning confidentiality of attorney-client or other communications. For example, in the non-virtual context, the Tenth Circuit permitted discovery of mediation communications that would have been confidential under Colorado law because the lawsuit was filed in Wyoming, which did not afford the same protections.[57]

Ensure Proper Supervision of Subordinate Lawyers and Nonlawyers

Rules 5.1 and 5.3 make lawyers responsible for actions of their subordinate staff and nonlawyer assistants.[58] Lawyers who transition their practice to a virtual environment with legal assistants, associates, and other subordinate employees must "adopt and tailor policies and practices" to ensure that the managing lawyer's ethical obligations of supervision are satisfied.[59] This duty requires regular interaction with other partners, associates, legal assistants, and paralegals. This interaction allows managing and supervising lawyers to confirm compliance with ethical obligations. It also allows managing lawyers to check in on the mental health and well-being of their team members—a matter of significant importance as the legal profession transitions out of the pandemic lockdown and begins to deal with its aftermath.[60]

The duty of supervision has particular significance when mentoring and training new lawyers.[61] Lack of competence may be a particular problem for new or inexperienced lawyers, solely due to their inexperience. As noted above, inexperienced lawyers are more

likely to violate Rule 1.1's duty of competence without appropriate oversight, so their access to experienced lawyers helps ensure that all lawyers' ethical obligations are satisfied.

Conclusion

Even in normal times, the legal profession is challenging. As substantive law requirements and the practice model change, lawyers must be especially mindful of their ethical duty to acquire competence in novel or unfamiliar areas. Fortunately, lawyers can avoid some of the most common pitfalls by following the strategies outlined above. CL


William D. Hauptman is an associate at Wheeler Trigg O'Donnell LLP. He defends lawyers and law firms in complex professional liability matters and represents corporate clients in commercial disputes—hauptman@wtotrial.com. **Kendra N. Beckwith** is a partner at Messner Reeves LLP and leads the firm's appellate practice group. Her practice focuses on appellate and complex litigation in state and federal courts throughout the country—kbeckwith@messner.com. The authors thank Sara Van Deusen for sharing her rich knowledge of legal ethics.

Coordinating Editors: Steve Masciocchi, smasciocchi@hollandhart.com; Joseph G. Michaels, joseph.michaels @coag.gov

NOTES

1. Bennett and Gunnarsson, *Annotated Model Rules of Professional Conduct* 21 (ABA 9th ed. 2019) (noting that competence under the Model Rules is broken into four "ingredients—knowledge, skill, thoroughness, and preparation."). *See also* ABA Model Code DR 6-101(A) (1969) (providing that lawyers "shall not" handle a matter they know or should know they are not competent to handle without associating with a competent lawyer, handle a matter without adequate preparation, or neglect a matter entrusted to them).
2. *See* Colo. RPC 1.0.
3. Colo. RPC Scope [14].
4. Colo. RPC 1.1, cmt [1] (listing "relevant factors" for determining "whether a lawyer employs the requisite knowledge and skill in a particular matter").
5. Colo. RPC 1.1, cmt. [2].

6. *See* Bennett and Gunnarsson, *supra* note 1 at 26.

7. Colo. RPC Scope [19].

8. *Id.*

9. Am. Bar Ass'n, *Annotated Standards for Imposing Lawyer Sanctions* (2015 ed.) (ABA Standards).

10. *E.g.*, *People v. Felker*, 770 P.2d 402, 406–08 (Colo. 1989) (noting that the ABA Standards "provide guidelines to be used by courts in imposing sanctions following a determination of lawyer misconduct" and citing ABA Standard 4.53, among other standards, to determine the appropriate sanction); *People v. Ziankovich*, 474 P.3d 253, 258 (Colo. O.P.D.J. 2020) (relying on ABA Standards to determine the sanction for misconduct); *People v. Bernal*, 452 P.3d 270, 272–73 (Colo. O.P.D.J. 2019) (same).

11. ABA Standards 4.51–4.54.

12. ABA Standard 4.51. *See also, e.g.*, *People v. Varallo*, 61 P.3d 38, 41–42 (Colo. O.P.D.J. 2002) (disbarring a lawyer for a pattern of incompetence and neglect).

13. *See generally* ABA Standard 4.54.

14. ABA Standards 4.52 ("Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client.") and 4.53 (reprimand is appropriate when a lawyer "demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client" or "is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client"). *See also People v. Cole*, 293 P.3d 604, 615–16 (Colo. O.P.D.J. 2011) (citing ABA Standards 4.52 and 4.53 and imposing a 90-day suspension on a lawyer whose Rule 1.1 violation "caused serious potential injury," rather than "significant actual injury").

15. *People v. Maynard*, No. 20PDJ018, 2021 WL 1096659 (Colo. O.P.D.J. Jan. 7, 2021) (considering a prior Rule 1.1 violation and disbarring the lawyer); *People v. Efe*, 477 P.3d 807 (Colo. O.P.D.J. 2020) (finding a violation of Rule 1.1, among other rules, and imposing a one-year suspension); *People v. Field*, No. 20PDJ047, 2020 WL 4920987 (Colo. O.P.D.J. July 27, 2020) (finding a violation of Rule 1.1, among other rules, and imposing a suspension of one year and one day); *People v. Schaeffer*, No. 20PDJ040, 2020 WL 4050234 (Colo. O.P.D.J. June 24, 2020) (finding a violation of Rule 1.1, among other rules, and imposing a six-month suspension, with part of the suspension to be stayed upon the completion of probation); *People v. Goff*, No. 20PDJ032, 2020 WL 3414800 (Colo. O.P.D.J. May 29, 2020) (finding a violation of Rule 1.1, among other rules, and imposing an 11-month suspension).

16. To be clear, these cases also involved violations of other Rules. *See Maynard*, 2021 WL 1096659; *Efe*, 477 P.3d 807; *Field*, 2020 WL 4920987; *Schaeffer*, 2020 WL 4050234; *Goff*, 2020 WL 3414800; *People v. Streker*, No. 19PDJ063, 2019 WL 4571820 (Colo. O.P.D.J. Aug. 21, 2019) (public censure for Rules violations); *People v. Elinoff*, No. 19PDJ004, 2019 WL 3943022 (Colo. O.P.D.J. Aug. 6, 2019) (180-day suspension for Rules violations); *People v. Pope*, No. 18PDJ004, 2018 WL 4002131 (Colo. O.P.D.J. July 19, 2018) (six-month suspension for Rules violations); *People v. Andrews*, No. 18PDJ034, 2018 WL 3476473 (Colo. O.P.D.J. July 10, 2018) (six-month suspension for Rules violations); *People v. Belair*, 413 P.3d 357 (Colo. O.P.D.J. 2018) (disbarring lawyer for Rules violations); *People v. Rose*, No. 18PDJ006, 2018 WL 998513 (Colo. O.P.D.J. Feb. 12, 2018) (three-year suspension for Rules violations); *People v. Braham*, 409 P.3d 655 (Colo. O.P.D.J. 2017) (disbarring lawyer for Rules violations); *People v. Calvert*, No. 17PDJ070, 2017 WL 4750708 (Colo. O.P.D.J. Oct. 12, 2017) (public censure for Rules violations); *People v. Kaufman*, Nos. 16PDJ004, 17PDJ023, 2017 WL 4173807 (Colo. O.P.D.J. Sept. 19, 2017) (three-year suspension for Rules violations); *People v. Thai Soo Kim*, No. 17PDJ061, 2017 WL 4173684 (Colo. O.P.D.J. Aug. 24, 2017) (public censure for Rules violations); *People v. Vanderhoofven*, No. 16PDJ076, 2017 WL 3588714 (Colo. O.P.D.J. Aug. 18, 2017) (suspending lawyer for an indefinite term for Rules violations); *People v. Flores*, No. 17PDJ045, 2017 WL 3113418 (Colo. O.P.D.J. June 22, 2017) (nine-month suspension for Rules violations); *People v. Taggart*, 470 P.3d 699 (Colo. O.P.D.J. 2017) (two-year suspension for Rules violations); *People v. Bontrager*, 407 P.3d 1235 (Colo. O.P.D.J. 2017) (nine-month suspension for Rules violations); *People v. Sunoo*, No. 16PDJ083, 2017 WL 1426733 (Colo. O.P.D.J. Apr. 3, 2017) (three-year suspension for Rules violations); *People v. Rose*, No. 17PDJ008, 2017 WL 691599 (Colo. O.P.D.J. Feb. 17, 2017) (30-day suspension for Rules violations); *People v. Sarpong*, 470 P.3d 1075 (Colo. O.P.D.J. 2017) (disbarring lawyer for Rules violations); *People v. Ward*, 470 P.3d 1053 (Colo. O.P.D.J. 2017) (disbarring lawyer and considering a prior Rule 1.1 violation); *People v. Carlson*, 470 P.3d 1016 (Colo. O.P.D.J. 2016) (disbarring lawyer for Rules violations); *People v. Romero*, No. 16PDJ057, 2016 WL 7383813 (Colo. O.P.D.J. Dec. 9, 2016) (one-year suspension for Rules violations); *People v. Al-Haqq*, 470 P.3d 885 (Colo. O.P.D.J. 2016) (24-month suspension for Rules violations); *Brenner v. People*, 470 P.3d 679 (Colo. O.P.D.J. 2016) (denying petition for reinstatement and considering a prior Rule 1.1 violation); *West v. People*, 470 P.3d 670 (Colo. O.P.D.J. 2016) (same); *People v. Sadler*, No. 15PDJ087, 2016 WL 1120768 (Colo. O.P.D.J. Mar. 22, 2016) (suspending lawyer for one year and one day for Rules violations); *Christman v. People*, 367 P.3d 1204 (Colo. O.P.D.J. 2016) (denying petition for reinstatement and considering a prior Rule 1.1 violation); *People v. Harrison*, No. 15PDJ020, 2016 WL 687199 (Colo. O.P.D.J. Feb. 8, 2016) (six-month suspension for Rules violations); *People v. Tinder*, No. 15PDJ082, 2016 WL 687210 (Colo. O.P.D.J. Jan. 26, 2016) (suspending lawyer for one year and one day for Rules violations).

17. *Rose*, 2017 WL 691599 at *1.

18. *Bontrager*, 407 P.3d at 1271.

19. *Cole*, 293 P.3d at 612.

20. *People v. Baca*, 363 P.3d 211, 213 (Colo. O.P.D.J. 2015).

21. Colo. RPC, Scope [20].

22. *Id.*

23. *Hopp & Flesch, LLC v. Backstreet*, 123 P.3d 1176, 1183 (Colo. 2005) (quoting *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 83 (Colo. 1999)).

24. *See In re Fisher*, 202 P.3d 1186, 1194 (Colo. 2009) (affirming a finding of a Rule 1.1 violation by a lawyer who represented a client in a matter outside the lawyer's traditional practice area and who did not take sufficient steps to attain competence).

25. *See, e.g.*, *Baca*, 363 P.3d at 217 (considering a lawyer's lack of experience in civil matters in sanctioning the lawyer for a violation of Colo. RPC 1.1); *Cole*, 293 P.3d at 612–13 (highlighting the fact that the case in which the lawyer's competence was at issue was that lawyer's "first case" in that subject matter).

26. Colo. RPC 1.1, cmt. [2]. *See also, e.g.*, *Al-Haqq*, 470 P.3d at 902 (considering a lawyer's failure to consult with an experienced immigration lawyer or perform adequate research before representing a client in an immigration matter).

27. *See* Colo. RPC 1.1, cmt. [2]. *See also, e.g.*, *Cole*, 293 P.3d at 612 (admonishing a lawyer for having "failed to affiliate with a more experienced practitioner"); Romero, "The Four "Cs" of Courtroom Presentation," 35 *Colo. Law.* 81, 82 (July 2006) ("If an attorney is appearing before a specialty court, or is acting as the attorney for a litigant in a highly specialized area of law, he or she should seek competent co-counsel.").

28. *See* Colo. RPC 1.6(a) ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by [Rule 1.6(b)].").

29. In these circumstances, if the less experienced lawyer discloses extensive information protected by Rule 1.6(a), an attorney-client relationship might be created between the client and the more experienced lawyer if the client reasonably assumes the more experienced lawyer has provided the client legal advice. As a result, the more experienced lawyer might encounter either a Rule 1.7(a)(1) or 1.9(a) conflict if the lawyer later takes a position adverse to the client, regardless of whether there still exists an attorney-client relationship.

For example, if the more experienced lawyer later appeared on the other side of a case arising out of the less experienced lawyer's advice, the more experienced lawyer might have a Rule 1.7(a)(1) conflict. If that lawyer instead took a position materially adverse to the former client in a different but substantially related matter, the lawyer might have a Rule 1.9(a) conflict. There are numerous articles describing situations that might give rise to these so-called "accidental clients." *See, e.g.*, Martyn, "Accidental Clients," 33 *Hofstra L. Rev.* 913 (2005); Hoy, "Watch What You Say: Avoiding the Accidental Attorney-Client

Relationship," 93 *Ill. B.J.* 22 (Jan. 2005).

30. *See* Colo. RPC 3.7(a) (subject to certain exceptions, a "lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness").

31. Chief Justice Boatright, Colo. Supreme Court, State of the Judiciary at 16 (Feb. 18, 2021), https://www.courts.state.co.us/userfiles/file/Media/Education/State%20of%20the%20Judiciary%20Feb_%2018%202021%20BDB.pdf.

32. *Id.* at 16–17.

33. *See id.* at 16.

34. *See id.* at 17 (discussing the statutory right to trial within six months of a not guilty plea). *See also* CRS § 18-1-405 (providing a six-month speedy trial right).

35. Another related issue, the Sixth Amendment right to effective assistance of counsel, is beyond the scope of this article.

36. Colo. RPC 6.2(a).

37. *See In re Roose*, 69 P.3d 43 (Colo. 2003) (affirming finding of ethics rules violations based on, among other things, a lawyer's refusal to proceed with trial on the basis that she was inexperienced with jury trials and could not competently represent her client).

38. Colo. RPC 1.3, cmt. [2] ("A lawyer's work load must be controlled so that each matter can be handled competently."); Colo. RPC 1.16(a)(1) (providing that a lawyer "shall not represent a client" or "shall withdraw from the representation of a client" if "the representation will result in violation of the Rules of Professional Conduct or other law").

39. Colo. RPC 1.1.

40. Colo. RPC 1.1, cmt. [8].

41. Colo. RPC 1.16(a)(1) (requiring a lawyer to withdraw where "the representation will result in violation of the Rules of Professional Conduct or other law[.]").

42. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498 (2021) (ABA Formal Op. 498).

43. *Id.* at 2.

44. *See* Colo. RPC 1.1, cmt. [8].

45. Courts across the country have attempted to make this process as user-friendly and accommodating as possible. Colorado courts, for example, have issued WebEx instructions for participants in court hearings held by video. *E.g.*, 17th Judicial District, 17th J.D. Webex Instructions for Court Hearing Participants (Nov. 12, 2020), https://www.courts.state.co.us/userfiles/file/Court_Probation/17th_Judicial_District/Adams/17th%20JD%20WebEx%20Instructions%20for%20Participants.pdf.

46. ABA Formal Op. 498, *supra* note 42 at 5.

47. *Id.*

48. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 495 (2020) (ABA Formal Op. 495) (explaining that whether remote practice of law violated Model Rule 5.5 is determined based on the rules applicable in the jurisdiction in which the remote practice occurs).

49. *See* Colo. RPC 5.5(a) (prohibiting practice of law in Colorado without a license); ABA Model Rule of Prof'l Conduct 5.5(a) (same). *See also* ABA Formal Op. 495, *supra* note 48 (discussing ethical considerations for a lawyer working remotely).

50. Colo. RPC 1.6(c).

51. *See, e.g.*, Alaska Bar Ass'n, Ethics Op. 2018-1 at 2–3 (2018) (explaining that lawyers should avoid using "cc" or "bcc" to include clients on emails to avoid risk of client hitting "reply all" to respond to the lawyer); Ky. Bar Ass'n, Formal Ethics Op. KBA E-442 at 3 (2017) (recommending forwarding emails to clients rather than "ccing" or "bccing" them). Alaska R. Prof'l Conduct 1.6 and Ky. SCR 3.130(1.6) are analogous to Colo. RPC 1.6.

52. *See, e.g.*, CBA Formal Ethics Op. 90 (rev. 2018) (setting out methods of ensuring that client confidences are secure).

53. ABA Formal Op. 498, *supra* note 42 at 6. *See also* Lidstone Jr., "Can Attorneys Guarantee Confidentiality in the Era of Smartphones and Voice-Activiated Devices?," CBA Bus. Law Section Newsletter (June 2019), https://www.cobar.org/Portals/COBAR/Repository/Sections/business/Client_Confidentiality_and_Voice_Activated_Devices_Lidstone_June_2019_Newsletter.pdf (summarizing trends in voice-activated technology and providing suggestions for securing voice-activated devices to comply with Colo. RPC 1.6).

54. *See* Fed. Bureau of Investigation, Cyber Actors Take Advantage of COVID-19 Pandemic to Exploit Increased Use of Virtual Environments (Apr. 1, 2020), https://www.ic3.gov/Media/Y2020/PSA200401 (identifying techniques cyber actors employ to exploit telework vulnerabilities); U.S. Attorney's Office, E.D. Mich., Federal, State, and Local Law Enforcement Warn Against Teleconferencing Hacking During Coronavirus Pandemic (Apr. 3, 2020), https://www.justice.gov/usao-edmi/pr/federal-state-and-local-law-enforcement-warn-against-teleconferencing-hacking-during (warning of "Zoom-bombing," in which a person disrupts a video conference by displaying offensive or harmful content, and offering tips to mitigate teleconferencing threats); Setera, Fed. Bureau of Investigation, FBI Warns of Teleconferencing and Online Classroom Hijacking During COVID-19 Pandemic (Mar. 30, 2020), https://www.fbi.gov/contact-us/field-offices/boston/news/press-releases/fbi-warns-of-teleconferencing-and-online-classroom-hijacking-during-covid-19-pandemic (same).

55. Pa. Bar Ass'n Comm. on Legal Ethics and Prof'l Resp., Formal Op. 2020-300 at 12 (2020). *See also* ABA Formal Op. 498, *supra* note 42 at 5 n.21 (citing same as authority).

56. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 477R (2017) (concerning securing communication of protected client information and advising that transmission of information related to the representation of a client over the internet may be accomplished without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access).

57. *See, e.g.*, *Larson v. Larson*, 687 F. App'x 695 (10th Cir. 2017) (not published) (affirming order allowing discovery of confidential mediation communications under Wyoming law even though the parties had mediated in Colorado and agreed that mediation-related communications "are confidential by this agreement and the Colorado Dispute Resolution Act"). *See also Matter of People v. PriceWaterhouseCoopers, LLP*, 150 A.D.3d 578 (N.Y.App.Div. 2017) (applying New York law, which does not recognize an accountant-client privilege, despite the appellants' argument that the communications at issue occurred in Texas, which does recognize such a privilege).

58. *See* Colo. RPC 5.1 (placing on managing and supervising lawyers the duty to "make reasonable efforts to ensure" that other lawyers conform to the Rules of Professional Conduct); Colo. RPC 5.3 (imposing same duty as to nonlawyer assistants).

59. ABA Formal Op. 498, *supra* note 42 at 6.

60. *See* Sanders, "Pandemic Fuels Mental Health Crisis for Young Attorneys," Law 360 (Jan. 25, 2021), https://www.law360.com/articles/1346967/pandemic-fuels-mental-health-crisis-for-young-attorneys (observing that "[o]ften isolated from friends and family, less-established lawyers may lack the same support structures that law firm leaders, partners or older colleagues benefit from, making them more susceptible to depression, anxiety, stress, substance use and other mental health struggles that are already pervasive in the legal profession"); Krill et al., "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys," 10 *J. Addiction Med.* 46, 51 (Jan./Feb. 2016) (concluding that lawyers in their first 10 years of practice are most susceptible to behavioral health problems and demonstrate the highest incidence of these problems, including alcohol use disorders).

61. This is at least in part because recent law school graduates typically have very little practical experience. *See* Getches, "What's New in Legal Education—Experiential Learning," 38 *Colo. Law.* 13, 13–14 (Apr. 2009) (noting criticisms that law schools give inadequate attention to preparing law students to practice law).