Letter Abstracts

The CBA Ethics Committee (Committee) has issued the following letter abstracts in response to requests for ethical guidance. They are issued for advisory purposes only and are not binding on the Colorado Supreme Court or the Office of Attorney Regulation Counsel.

No. 2015-1. Can a lawyer whose practice is limited to family law in a law firm structured as an LLC in which fees are not shared remain in the firm with a part-time county court judge whose private practice is limited to immigration law?

Facts

You are practicing law in a two-member LLC, and the other member (the judge) has been recently appointed to a part-time county court judge position and will remain in the firm. You indicate there is no sharing of fees and you practice is separate and distinct fields. As a preliminary matter, the Committee concludes that your relationship with the judge is a "firm" or "law firm" as defined by the Colorado Rules of Professional Conduct (Colo. RPC or the Rules). Colo. RPC 1.0(c), (g).

Issues

With respect to that relationship, you pose two questions:

1. Is it improper for a partner or member in a law firm with a judge to practice only divorce and family law in the district court in the D-classification county in which the judge is a part-time county and municipal court judge?
2. In a two-party non-fee-sharing LLC, where a part-time county and municipal court judge has retired from the firm and from practicing law in the district in which he or she is a judge, but is still practicing federal immigration law, may the judge's name be retained in the firm's name and letterhead but specified as retired, or, in the alternative, state "practice limited to immigration law"?

Analysis and Conclusions

Question 1

Rule 5.5(a)(2) provides that a lawyer shall not practice law in a jurisdiction in which doing so violates the regulations of the legal profession in that jurisdiction. CRS § 12-5-118 provides: "A judge shall not have a partner acting as attorney or counsel in any court in his judicial district, county, or precinct." The meaning and effect of this statutory provision is a question of law, which the Committee historically declines to address, and declines to address here.

To the extent CRS § 12-5-118 means that a judge may not have a partner acting as a lawyer in *any* court anywhere within the judge's county, it prohibits you from acting as a lawyer in that county as long as you remain in a firm with the judge. To the extent CRS § 12-5-118 means that a lawyer may not practice in either a district court *or* a county court when the lawyer's partner is a judge within the same district court *or* county court in which his or her partner is serving as a county court judge, it does not prohibit you from appearing as counsel in district court for that county. Further, you have advised the committee that the Colorado Supreme Court Judicial Ethics Advisory Board (in an unpublished opinion) had reached the same conclusion as to the judge under CRS § 12-5-118 as we reach here as to you under the Rules of Professional Conduct.

In Opinion 45, the Committee further concluded that a lawyer whose partner is a part-time judge may not accept or continue employment with respect to any matter that has derived from or was incident to a matter that has or is likely to come before the part-time judge. While Opinion 45 was based on the disciplinary rules, and in particular those rules pertaining to conflicts of interest and imputation of conflicts of interest, the Committee concludes that it remains ethically impermissible under the current Rules to represent a client in a matter previously pending before the lawyer's partner sitting as a judge. *See* Colo. RPC 1.7(a)(2), 1.10, 1.11(d).

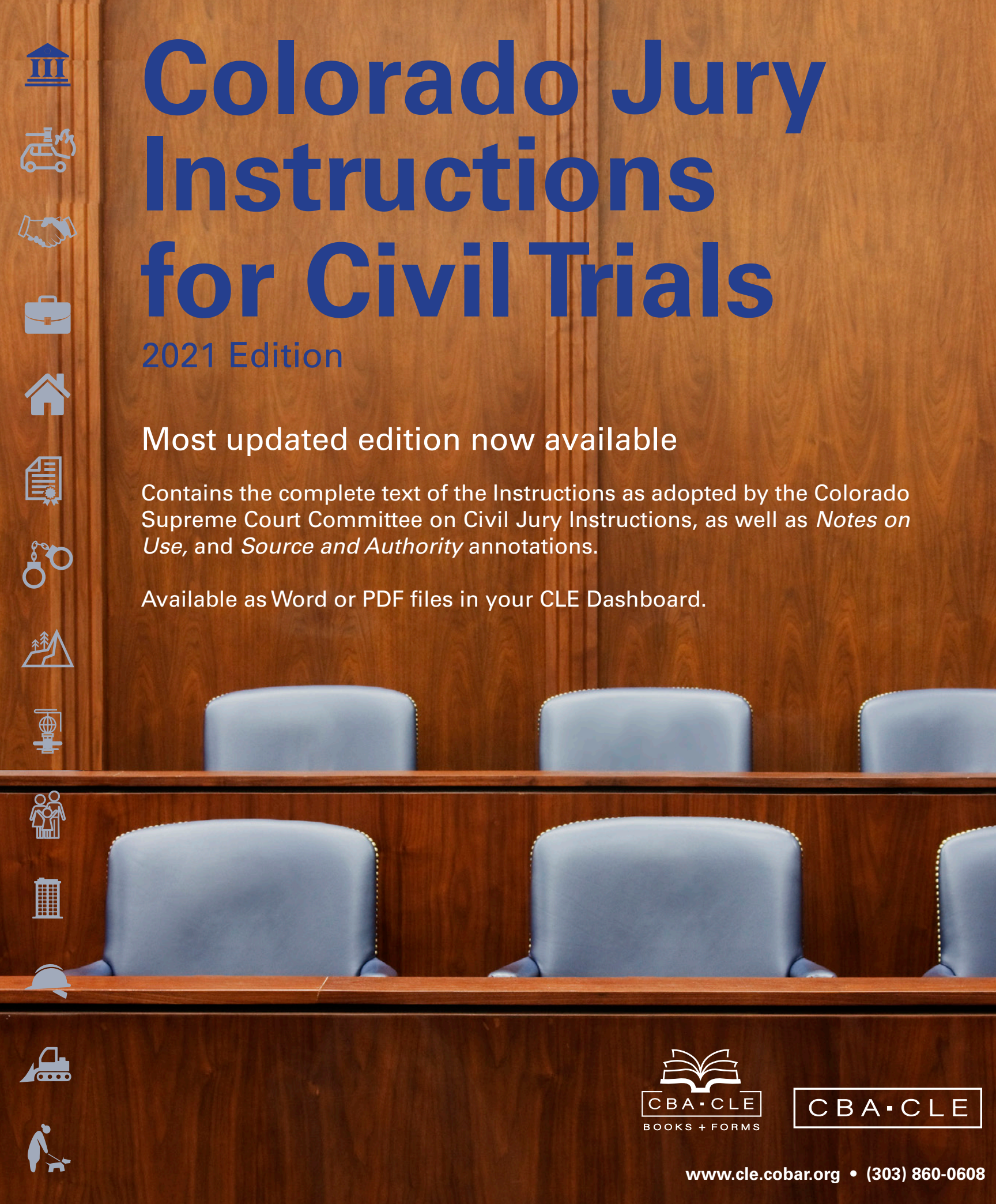
Question 2

Your inquiry is premised on the judge's retirement from the law firm, but you indicate that the judge will continue to practice federal immigration law presumably with the firm. Rule 7.5(c) states: "The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm." Provided the judge is "actively and regularly practicing with the firm," the judge's name may be used in the name of the firm. If the judge is not "actively and regularly practicing with the firm," the judge's name may not be used within the firm name even if the judge is designated as retired because the judge will not be retired but rather serving as a judge. *See* Colo. RPC 7.1(a)(1), 7.5(c); Va. Legal Ethics Op. 1376.

No. 2016-1. A lawyer may not report a client's failure to pay for professional services rendered to a credit reporting agency absent the client's informed consent, which would be difficult, if not impossible, to obtain.

Facts

The inquirer states that his law firm has a number of clients who have outstanding bills for



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services rendered. The firm has attempted to collect these past-due amounts through letters, telephone calls, and offers of payment plans, with limited success.

Issue

You have inquired as to whether the firm may ethically report the delinquent clients to credit reporting agencies when other attempts to collect from the clients have failed.

Analysis and Conclusions

The Committee concludes that a lawyer may not disclose information about present or former clients to a credit reporting agency without the fully informed consent of the client.

A lawyer's ethical obligation with respect to maintaining the confidentiality of client information is governed by Colo. RPC 1.6. Rule 1.6(a) states that a lawyer "shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by [the exceptions set forth in Rule 1.6(b)]." Comment [3] further states that this confidentiality obligation "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."

The Committee concludes that information regarding the client's payment or nonpayment of invoices is information "relating to the representation" of the client and therefore constitutes confidential information for purposes of Rule 1.6. The question then becomes whether the rule permits a lawyer to disclose that information. Disclosure of a client's delinquency to a credit reporting agency is not "impliedly authorized in order to carry out the representation." Accordingly, Rule 1.6(a) only permits disclosure if either the client gives informed consent or the disclosure is permitted by one of the Rule 1.6(b) exceptions.

The only Rule 1.6(b) exception that might arguably apply to this situation is 1.6(b)(6), which states in pertinent part that a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes the disclosure is necessary "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client[.]" Comment [11] further notes that "[a] lawyer entitled to a fee is permitted by paragraph (b)(6) to prove the services rendered in an action to collect it. . . ." Comment [14] cautions, however, that "[i]n any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose."

The Committee concludes that the Rule 1.6(b)(6) exception does not permit you to report delinquent clients to credit reporting agencies. Our conclusion is guided by the distinction between undertaking direct efforts to collect from a delinquent client (for example, by bringing suit or using a collection agency), and reporting a delinquent client to a credit reporting agency. Reporting a delinquent client to a credit reporting agency does not require the lawyer to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client," and does not in and of itself constitute collection of a debt. Although the reporting may create pressure on the client to pay the unpaid fees due to the threat of a negative impact on the client's credit rating, this pressure comes from the coercive effect of a bad credit report and may be entirely unrelated to the merits of the claim for fees. Moreover, in contrast to a court proceeding, which provides procedural safeguards for the client, reporting a client to a credit reporting agency automatically becomes a stain on the client's credit record that may exist for many years, and long after the lawyer's ability to collect the fee has been barred by the applicable statute of limitations. Reporting a client thus has a punitive effect on the client and is beyond the permissible bounds of Rule 1.6.

Although Rule 1.6(a) in theory permits a lawyer to obtain the client's informed consent to report the client to a credit reporting agency, in practice there will be few circumstances in which a lawyer can validly obtain informed consent. "'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Rule 1.0(e). "Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives." Rule 1.0, comment [6]. The committee believes that informed consent under these particular circumstances would include an explanation that the lawyer is ethically precluded from reporting the client to a credit reporting agency unless the client consents.

Many other state bar associations have considered the issues raised in your inquiry, and with near uniformity, they have similarly concluded that lawyers may not report information about present or former clients to a credit bureau without the informed consent of the client. *E.g.*, Alaska Bar Ethics Op. 2000-3; State Bar of Ga. Formal Advisory Op. No. 07-1; S.C. Bar Advisory Op. 94-11; Mass. Bar Ethics Op. 00-3; Mont. Ethics Op. 001027; N.Y. State Bar Ass'n Op. 684; State Bar of Mich. Op. RI-335. *But see* Fla. Bar Op. 90-2 (permitting reporting of a delinquent former client, but only if the debt is not in dispute and confidential information unrelated to the collection of the debt is not disclosed). We agree with the majority view.

No. 2017-1. What are the ethical considerations in serving as a town attorney and as county commissioner of the county in which the town is located?

Facts

In your request, you state you are a town attorney and you are considering running for election to the office of county commissioner of the county that includes the town.

Issues

Your inquiry concerns the implications of holding the dual roles simultaneously, more specifically, whether potential conflicts of interest arise from the dual roles. You have acknowledged needing to recuse yourself from any "actual or perceived conflicts between the Town and the County." Finally, you identified an obvious conflict of interest—i.e., that the town contracts with the county for police protection by the sheriff's office—and you stated that you plan to recuse yourself from that transaction.

Analysis and Conclusions

From the outset, the Committee notes that you would not have two clients by being the town attorney and a county commissioner simultaneously. That is, the county would not be your client. Nevertheless, the Committee concludes that the following rules provide appropriate direction.

Under Rule 1.7, a "lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Such a conflict exists where (1) the representation of one client is directly adverse to another, or (2) there is "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." Colo. RPC 1.7(a)(1)–(2). This latter consideration will likely impact your continued representation of the town in your position as county commissioner. The limitation based on a "third person" would be impacted by your responsibilities to the county, just as the limitation based on "personal interests" would apply to your responsibilities as county commissioner. Continued representation would require diligence on your part.

A lawyer may nevertheless represent a client notwithstanding the existence of a concurrent conflict of interest, provided the following all occur:

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.
4. Each affected client gives informed consent, confirmed in writing.

Colo. RPC 1.7(b).

Several comments to Rule 1.7 provide useful guidance. Comment 3 states that a conflict of interest may exist "before representation is undertaken," in which case the representation either must be declined or the lawyer must obtain the informed consent[1] of each client as required under Rule 1.7(b). Comment 4 states that conflict can arise "after representation has been undertaken," in which case the lawyer again

must either withdraw or obtain the informed consent of each client. And Comment 8 advises scrutinizing "the likelihood that a difference in interests will eventuate," as well as that difference's impact on the lawyer's representation.

Comment 28 reiterates that "a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic," but suggests that such representation may be "permissible where the clients are generally aligned in interest." *See also* cmt. [23] ("[C]ommon representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met."). However, Comment 16 counters that some government agencies have limitations on the ability to consent to conflicts.

Additional rules governing conflicts of interest with current clients can be found in Colo. RPC 1.6, 1.8, 1.9, and 1.11. Collectively, these rules address the duties of loyalty and client confidentiality, including to former clients; require the lawyer's continued exercise of independent judgment; and recognize that duties to former clients or personal interests may limit the lawyer's ability to continue representation.

Several formal ethics opinions discuss conflicts of interest. CBA Comm. on Ethics, Formal Op. 48, "Representation of Public Body, Conflict of Interest" (1972) (rev. 1997) highlights that a "county attorney has the same ethical responsibilities as a public official." And CBA Comm. on Ethics, Formal Op. 68, "Conflicts of Interest: Propriety of Multiple Representation" (1985) (rev. 2011) addresses scenarios of multiple representation, emphasizing caution in doing so in the strongest terms.

However, the rules, comments, and opinions discussed above do not end the inquiry. Additional considerations guide this inquiry. The first is a legal one, originating in the fiduciary duties owed by public officers and government officials, as set forth in "Standards of Conduct" for state government public office, CRS §§ 24-18-101 et seq. The Committee trusts you are familiar with these rules and will conduct yourself accordingly; however, as any application of these rules involves a legal question, specific application of these rules is beyond this Committee's scope.

The Committee notes that the conflict-of-interest rules under the Colo. RPC, and ethics opinions addressing the same, apply to you only as town attorney because it is only in this capacity that you represent a client. In contrast, the statute articulating your fiduciary duties applies to your role as county commissioner. Consequently, a related concern is the interplay between your fiduciary duties and your ethical obligations in representing the town while also performing your role as county commissioner. This dual relationship between the town and county may impact your ability to work for both effectively.

For example, you will no doubt be called upon to allocate resources on a county-wide basis that may negatively impact the town or simply not benefit the town in a manner the town would prefer. Or the town may request that you, as town attorney, pursue a legal matter that would conflict with your role as county commissioner. The Committee further foresees instances where your role as county commissioner will require not allocating resources in a manner that would directly benefit the town, or, in the alternative, where your role as county commissioner could either suggest the ability to award un-merited resources to the town or present such an opportunity where those resources could arguably be better allocated elsewhere.

Because these are not present conflicts and because the Rules do not encompass the appearance of impropriety as conflicts, the Committee does not opine on such latent issues that may arise. Suffice it to say, however, that these will trigger both your ethical and fiduciary responsibilities that may not be reconcilable while holding both offices. In this respect, because there are numerous situations where recusal could be required, informed consent by the town may be required. The likelihood of a non-waivable conflict looms large.

In addition, the nature of your personal interests, apart from acting as county commissioner, are unknown to the Committee. However, as county commissioner, your role would carry responsibilities that potentially could implicate both your personal interests and as-yet-unknown third-party interests in a way that your role as the town's attorney has not. Similarly, your role as county commissioner could impact your personal interests in a way potentially in conflict with your responsibilities as the town attorney. The Committee would strongly caution you to exercise continuing diligence in acknowledging any such conflicts consistent with your obligations under the rules of professional conduct. If a conflict cannot be consented to, recusal would be required. *See Restatement (Third) of the Law Government Lawyers*, § 122. *See also* Colo. RPC 1.7, and cmts. [16], [28].

You have proposed to recuse yourself from transactions where your role as the town's attorney would conflict with your role as county commissioner. Under the Colo. RPC, as well as prior opinions from this Committee, this is a prudent course of action. *See, e.g.*, Colo. RPC 1.7, cmt. [7]. In addition, you must stay vigilant as to how your role as county commissioner may impact both third-party interests and your own personal interests. Provided you exercise diligence and professional judgment in assessing potential conflicts, the Committee does not see a problem with your dual roles as town attorney and county commissioner. CL

NOTE

1. "Informed consent" requires the "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information[.]" Colo. RPC 1.0(e).