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. 2017-2. Is an estate planning lawyer required, upon request, to provide a former client with estate planning documents in an electronic and editable format? Further, can an estate planning lawyer copyright a client's estate planning documents?

Facts

Your practice is concentrated in estate planning. A former client contacted you requesting that you provide the client with estate planning documents in an electronic and editable format (the format). We assume for purposes of this opinion that the requested documents exist in the client's file in the format at the time your representation was terminated.

Issues

1. When documents are in the format, must the lawyer comply with the request?
2. May a lawyer assert a copyright over documents maintained in the format?

Analysis and Conclusions

Question 1

The crux of your letter concerns whether a lawyer is required under the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) to provide a former client with documents maintained in the format when they exist in that format in the file. The Committee answers the first issue in the affirmative and concludes that the Rules require that, when a former client requests the documents in the format and they exist in that format, the lawyer is obligated to provide them.

Colo. RPC 1.16(d) states:

> Upon termination of representation, a lawyer shall take steps to the extent practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, *surrendering papers and property to which the client is entitled* and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law. (Emphasis added.)

This rule was "not intended to impose an obligation on a lawyer to preserve documents that the lawyer would not normally preserve, such as multiple copies or drafts of the same document." Colo. RP.C 1.16A, cmt [1]. As used in this rule, a client's file "consist[s] of those things, such as papers and electronic data, relating to a matter that the lawyer would usually maintain in the ordinary course of practice." *Id.* Colo. RPC 1.4(a)(4) further requires a lawyer to "promptly comply with reasonable requests for information."

As referenced in your letter, CBA Formal Opinion 104 addresses, in detail, a lawyer's duty upon termination of the representation to surrender the client's papers. *See generally* CBA Formal Op. 104, "Surrender of Papers to the Client Upon Termination of the Representation" (1999). Formal Opinion 104 makes clear that the definition of "papers" under Colo. RPC 1.16(d) "must be derived from the purpose of the rule, which is furtherance of the lawyer's principal ethical duty reasonably to protect the client's interests." *Id.* at 4-314–15. It makes equally clear that Colo. RPC 1.16(d)'s use of the term surrender "is intentional and establishes an affirmative obligation upon the lawyer to relinquish possession after demand," and that "[t]he lawyer should err on the side of production." *Id.* at 4-315.

Private Letter Opinion 2007-02 addresses a lawyer's "Duty to Surrender Client Documents in Electronic Format" and is particularly salient here, given that it addresses estate planning documents. Private Letter Opinion 2007-02 extends Formal Opinion 104's rationale to "documents in accessible electronic format" and concludes that providing documents in that format at the client's request "is a reasonably practical step [a lawyer] should take to enable the continued protection" of the former client's interests. *Id.* While Private Letter Opinion 2007-02 addresses a lawyer's duty to provide documents in "accessible electronic format," without discussion of whether they must be "editable," the Committee finds its rationale persuasive here.

The Committee discerns no meaningful distinction between provision of a client's documents in "accessible electronic format" and "editable electronic format." You do not question that the client is entitled to receive the documents in an uneditable, electronic format (i.e., as PDFs). The distinction is then one of format, and not substance, since the client can simply retype or optimize (i.e., OCR) a PDF to make it "editable." Accordingly, providing the documents as requested is a "reasonably practicable step" a lawyer must take under Colo. RPC 1.16(d) and places the documents within the scope of "papers" that must be surrendered under the same rule. *See* Colo. RPC 1.16(d) (requiring surrender of "papers and property to which the client is entitled").

The Committee appreciates your concern that, as a result of the format, a client may be more likely to use the documents in a manner

for which you did not intend them, such as modifying them himself, using them for family members, or turning them over to new counsel. However, what the client intends to do with the documents does not relieve the lawyer from the responsibility to provide them. The same risks are present when a lawyer provides noneditable documents and can be appropriately addressed through a termination letter that complies with Colo. RPC 1.16. And because the client is a former client rather than a current client, you have no obligation to determine his capacity. *See* Colo. RPC 1.14 (limiting duty to determine client's capacity to "decisions in connection with a representation").

The Committee equally appreciates your concern that in some practices, lawyers subscribe to services that provide copyrighted templates or impose restrictions on use under a licensing agreement. Use of any such services or forms must be consistent with the Rules and does not form a basis for withholding or destroying client files. Accordingly, the Committee interprets "papers" under Colo. RPC 1.16(d) to require only surrender of those editable, electronic forms that have been specifically modified to the client's circumstances. It does not read Colo. RPC 1.16(d) as requiring a lawyer to disclose the unedited or unmodified forms from which those documents originated.

The Committee further cautions that its opinion here should not be read to encourage deleting the editable versions of documents to, as you state in your letter, "avoid the ethical dilemmas outlined" therein. The Committee does not agree that provision of editable electronic documents presents any such ethical dilemma that supports the premature destruction of any client files. Nor would such a practice be permitted under the Rules. *See* Colo. RPC 1.16(a) ("A lawyer in private practice shall retain a client's files respecting a matter unless" certain exceptions not at issue here apply). Presumably, the editable, electronic version of any final document exists within the client's file and must be maintained in accordance with the Rules.

However, the Committee is of the opinion that Colo. RPC 1.16(d) does not require the surrender, in any format, of internal firm administration documents (i.e., conflicts checks, personnel assignments, or documents that were intended for law office management or use); documents protected from disclosure based on third-party interests; and, arguably, personal lawyer notes (especially those containing personal impressions and comments). *See generally* Formal Op. 104. *But see Restatement (Third) of the Law Governing Lawyers* § 90, cmt. c. The Committee is also of the opinion that the lawyer is obligated to provide only those editable electronic documents maintained in the ordinary course of practice that exist in the client's file as of the date the lawyer–client relationship was terminated. *See* Colo. RPC 1.16A, cmt [1].

The Committee's answer here is consistent with other jurisdictions that have addressed similar questions. *See* New York City Bar Ass'n Comm. on Prof'l & Judicial Ethics Formal Op. 2008-01, "A Lawyer's Ethical Obligations to Retain and to Provide a Client with Electronic Documents Relating to a Representation" (2008) (stating lawyers have an obligation to provide clients with electronic documents created and contained within the client's file in that format); State Bar of California Formal Op. 2007-174 (emphasis in original) (concluding "the *form* of the items in question [] proves immaterial" to a lawyer's obligation to return client papers upon termination of representation); Illinois State Bar Association Advisory Op. on Prof'l Conduct No. 01-01 ("It is also the Committee's opinion that the request to have the client file materials downloaded onto disk is a 'reasonable' request as set forth in Rule 1.4(a), and that the client is entitled to receive his or her files in the format in which the lawyer or law firm maintains such files.").

Finally, because your letter does not express any concern regarding disclosure of the metadata contained within those electric documents, or the expense of producing those documents where they exist in solely paper format, we do not address those concerns here.

Question 2

Your second issue raises a legal rather than an ethical question. Pursuant to the Committee's bylaws, the Committee is tasked with providing ethics advice and is not obligated to respond to questions about law. Accordingly, and respectfully, the Committee declines to address that issue. *See* Rules of the Standing Committee on Ethics of the Colorado Bar Ass'n (last amended April 2007), § F, Rule F-3(e) (stating the Committee "shall not be obliged to answer" an inquiry that involves "opinions on questions of law, other than those arising under the Colorado Rules").

2021-1. What ethical considerations exist when a lawyer is employed by a law enforcement agency as a peace officer and legal advisor, and also practices law with a private law firm?

Facts

It is our understanding that you are considering employment with the County Sheriff's Office (CSO) as a certified peace officer and that you will use your legal skills and knowledge to assist the CSO in legal training, criminal investigations, prosecutions, and internal affairs investigations. You state that you would not be "formal legal counsel for the CSO as those duties are the function of the County Attorney's Office." However, you have advised the Committee that your job at the CSO will include serving as the department's "in house" legal adviser. You should not overlook your relationship, if any, with the district attorney and other prosecuting authorities with respect to legal training, criminal investigations, and prosecutions.

While you are serving as a peace officer and legal adviser with the CSO, you also intend to engage in the part-time practice of law with a new firm located within the county either as a partner or as of counsel to the firm. The firm will engage in a wide practice, including criminal law, family law, trusts and estates, and other civil litigation. You have further informed the Committee that you would not being doing any litigation and will limit your practice to transactional matters.

It is anticipated that other lawyers in the firm would be involved in dependency and neglect cases, serving as guardians ad litem (GALs) through the Colorado Office of the

Child's Representative (OCR), and as respondent parent counsel through the Colorado Office of Respondent Parents' Counsel (ORPC). Partners in the new firm would also seek contract work representing peace officers through the Fraternal Order of Police (FOP).

Issues

Your question seeks guidance as to various ethical questions that may arise from your dual role as a peace officer and a lawyer in a firm. Your questions mainly concern conflicts of interest arising from your prospective employment by a CSO while also working in a private law firm. Because the Committee's role is limited to ethical considerations, this letter does not consider or opine on any statutory or other authority that may be relevant to your query.

Analysis

No Rule Bars a Peace Officer from Working in a Law Firm

In answer to your general question, the Committee advises that no rule in the Colorado Rules of Professional Conduct (Rules or Colo. RPC) bars an active peace officer from working in a private law firm. The Rules do, however, address conflicts of interest that could prohibit you from representing certain people or entities. Some conflicts of interest you may have would be imputed to lawyers who work in your firm. The remainder of this letter identifies some of the ethical rules that may bear on your planned employment.

Attorney-Client Relationship with the CSO

Based on your description of your work at the CSO, the Committee assumes that you will have an attorney-client relationship with the CSO. The Committee does not express an opinion on this issue because the Rules do not address the formation of an attorney-client relationship. *See* Colo. RPC 1.3 Scope, cmt. 17. However, for your information, the Committee notes that case law establishes that an attorney-client relationship is formed when a client seeks and receives the advice of a lawyer on legal consequences of the client's past or contemplated actions. *People v. Bennett*, 810 P.2d 661, 665 (Colo. 1991) (attorney-client relationship may be inferred from the conduct of the parties and the proper test is a subjective one—an important factor is whether the client believes that the relationship existed.); *People v. Morley*, 725 P.2d 510, 517 (Colo. 1986) ("A client is a person who employs or retains an attorney for advice or assistance on a matter related to legal business."); *People v. Chavez*, 139 P.3d 649, 655 (Colo. 2006) ("Under longstanding Colorado law the attorney-client relationship arises when a [person] consults with an attorney about his case."); *Losavio v. Dist. Court*, 188 Colo. 27, 133, 533 P.2d 32, 35 (1975) (the attorney-client privilege is established by the act of a client seeking professional advice from a lawyer.)

Possible Concurrent Conflicts of Interest

A concurrent conflict of interest prohibits a lawyer's representation in two circumstances. The first is when representing one client will be directly adverse to another client. The second is when there is a significant risk that representation of one or more clients will be materially limited by the lawyer's responsibility to a current or former client, to a third person, or by the lawyer's own personal interest. Colo. RPC 1.7(a)(1) and (2). This rule recognizes "the unimpaired loyalty a defendant is constitutionally entitled to expect and receive from his attorney." *Cuyler v. Sullivan*, 446 U.S. 335, 356 (1980) (Marshall, J., concurring in part and dissenting in part). *See also People v. Isaac*, 470 P.3d 837, 843 (Colo. O.P.D.J. 2016) ("Lawyers' most important ethical obligations are those owed to clients, and the keystone of those obligations is loyalty."); *Hutchinson v. People*, 742 P.2d 875, 881 (Colo. 1987) ("In carrying out his duty to provide effective legal assistance, counsel owes his client a paramount duty of loyalty."). "A lawyer should act with commitment and dedication to the interest of the client and with zeal in advocacy on the client's behalf." Colo. RPC 1.3, cmt. 1.

Under narrow circumstances, clients may give informed written consent to waive a lawyer's concurrent conflict of interest. Colo. RPC 1.7(b). However, such consent must be disclosed to and approved by the court in a case that is filed in court before the representation of each client may continue. "Although Colo. RPC 1.7(b) permits conflicts under the rules to be waived, the trial court must still decide whether such waiver would impact the fairness of the proceedings." *Liebnow by and through Liebnow v. Boston Enterprises Inc.*, 296 P.3d 108, 117 (Colo. 2013).

In assessing whether a conflict is waivable, the question is "whether a disinterested lawyer would conclude that the conflict would result in an adverse effect on the lawyer's relationship with or representation of either client." CBA Formal Ethics Op. 68. "Another factor to be considered is the duration and intimacy of the lawyer's relationship with one or both of the clients. A long-standing relationship with one client may make it difficult for the lawyer to believe reasonably that he or she will be able to represent both parties diligently. The lawyer's personal and financial interest in maintaining that relationship may materially interfere with the lawyer's independent professional judgment." *Id.*

While you are associated with a law firm, any conflict you have under Colo. RPC 1.7 is imputed to all other members of the firm, unless the conflict arises solely from your personal interest and does not run a significant risk of materially limiting representation by other lawyers in the firm. Colo. RPC 1.10. Further, a lawyer may not "state or imply an ability to influence improperly a judge, judicial officer, government agency or official[.]" Colo. RPC 8.4(e). Lawyers who work for government agencies "must be ever mindful of the public's perception of their ability to influence government." CBA Formal Ethics Op. 46. When a lawyer acts as both a public servant and a private advocate, there is a "real potential for public misunderstanding and mistrust[.]" *Id.*

1. Imputation of conflicts under Colo. RPC 1.10. You have said that you will not represent criminal defendants who are being investigated by CSO, and you will not handle any litigation including but not limited to dependency and neglect cases, or delinquency cases. However, you inquire whether lawyers in your firm would be able to represent individuals in cases involving CSO criminal investigations. Your inquiry focuses on imputation of conflicts of interest you would have to lawyers in your firm.

Imputation is based on the principle that a firm of lawyers is essentially one lawyer for the purpose of rules governing loyalty to the client. Colo. RPC 1.10, cmt. 2. Therefore, in a matter in which the CSO has any involvement, every lawyer in your firm would be prohibited from representing an individual in that matter while you are an attorney for the CSO. This conclusion flows from analyzing conflicts you would have, as discussed below, that are imputed to those other lawyers.

2. Representing a suspect, a defendant, or a witness in a criminal matter investigated by the CSO. Colo. RPC 1.7(a)(1) prohibits your representation of another client whose interests are directly adverse to those of the CSO. As a lawyer in private practice, if you represented a defendant in a criminal matter that involved[1] CSO personnel, there would be direct adversity between the two clients. The same would be true if you represented a person who had not yet been charged, or if you represented a witness in a criminal matter. In each situation, the interests of the CSO and the individual client are directly adverse. This is true without regard for whether you were directly involved in a particular case in your work for the CSO, because direct adversity between the interests of two clients can arise even when the lawyer represents them on unrelated matters. Colo. RPC 1.7 cmt. 7.

For example, if you or lawyers in your firm represented a person in a criminal case involving CSO personnel, it is quite possible you or they would need to cross-examine one or more CSO personnel. The Committee concludes that the interests of the CSO and the individual in the criminal matter would be directly adverse. *See* ABA Formal Ethics Op. 92-367 (1992) (a lawyer who in the course of representing a client examines another client as an adverse witness in a matter unrelated to the lawyer's representation of the other client will likely face a conflict that is disqualifying in the absence of appropriate client consent. Any such disqualification will also be imputed to other lawyers in the lawyer's firm.)

Loyalty and independence are essential elements in the lawyer's relationship to a client. Colo RPC 1.7, cmt. 1. That duty and the duty of communication under Colo. RPC 1.4 would require you as attorney for the CSO to disclose all information to the CSO that you learned from the individual client in the criminal case. However, such a disclosure would violate your obligation of confidentiality to the individual client under Colo. RPC 1.6, which prohibits disclosure of any information learned in the course of representation, regardless of its source, absent the client's prior informed consent. At the same time, your duty of communication would require you to divulge to the individual client any information you learned through your involvement with the CSO and would present the same problem.

Colo. RPC 1.7(b) allows a lawyer to represent clients with concurrent conflicts of interest upon the written informed consent of each affected client in narrow circumstances, if three factors are satisfied and all affected clients give informed consent in writing. The first factor requires the lawyer to reasonably believe he/she will be able to provide competent and diligent representation to each affected client. Colo. RPC 1.7(b)(1). This is an objective test, assessed from the perspective of a reasonably competent and diligent lawyer, rather than from the subjective belief of the lawyer involved. The Committee concludes that a reasonable lawyer would not believe you could provide competent, diligent representation to both the CSO and an individual client in a case in which the CSO has played any role. Such a situation would require you to serve two masters and for that reason, the Committee advises that you could not represent both clients under Colo. RPC 1.7(b).

The second factor of Colo. RPC 1.7(b)(2)—a representation prohibited by law—is something that requires a case-specific analysis including statutory construction and so cannot be addressed here.

The third factor requires that the representation not involve one client's assertion of a claim against another client in the same proceeding. Colo. RPC 1.7(b)(3). Representation of an individual in a criminal case may require the lawyer to assert claims against the CSO; for example, that the CSO violated one or more of the individual's constitutional rights. Such a claim by one client against another client would prohibit the representation of both under Colo. RPC 1.7(b)(3).

Further, while it is the district attorney who brings criminal charges, if any employee of the CSO has knowledge material to the case, the CSO is an agent of the prosecution. *See* Colo. Crim. P. 16(I)(a)(3); *Kyles v. Whitley*, 514 U.S. 419. 437–38 (1995). "Thus, the prosecution has a duty to learn of any evidence favorable to the defense which is known to others acting on the government's behalf in the case." *People v. Corson*, 411 P.3d 28, 33 (Colo.App. 2013), *rev'd on other grounds*, 379 P.3d 288 (Colo. 2016). This agency relationship with the prosecution also makes it impossible to satisfy Colo. RPC 1.7(b)(3).

3. Representing a criminal defendant in a case not involving the CSO. In a case in which the CSO has absolutely no involvement, it is possible that your representation of the defendant or a suspect would not be directly adverse. If you represented an individual in such a case, under Rule 1.7(a)(1), the Committee's view is that there would not be direct adversity, and neither you nor a lawyer in your firm would be prohibited from representing the individual under Rule 1.7(a)(1). However, there could well be a conflict of interest under Rule 1.7(a)(2).

Under Colo. RPC 1.7(a)(2), a conflict could arise if your own interest—based on your employment with CSO—creates a significant risk of materially limiting your responsibilities to the client being prosecuted or investigated, unless a reasonable lawyer would believe it possible to represent each affected client competently and diligently. For example, if another law enforcement agency investigated a case, you might feel some affinity with or respect for that other agency. This is especially true if the CSO regularly shares resources with that agency (e.g., the Forensics Laboratory, the Drug Task Force, or the Colorado Bureau of Investigation). The Committee also expresses its concern that you may be called upon to give advice to other agencies or their individual members as part of intergovernmental arrangements. Your relationships could interfere in a decision to file a motion to suppress evidence illegally seized. Or you may not want to embarrass the

other agency by filing such a motion. In that case, your independence in representing the individual would be materially limited by your personal interest in not embarrassing the other agency. A personal interest like that would raise the issue of a prohibited conflict of interest under Colo. RPC 1.7(a)(2).

In addition to your personal interest giving rise to a conflict, there is also the possibility that your judgment in representing a client would be materially limited by your representation of the CSO even if the client's case did not involve the CSO. For instance, you may have difficulty in filing a motion for a defendant, if it would affect the way the CSO operated. This type of conflict would likely not be based on a personal interest but on representation of another client as contemplated by Colo. RPC 1.7(a)(2). It is important to keep in mind those conflicts are imputed to other lawyers in your firm under Colo RPC 1.10(a).

If your personal conflict of interest prohibited you from representing a client under Colo. RPC 1.7(a)(2), that type of conflict is not imputed to others in your firm. Colo. RPC 1.10(a)(1). Therefore, the other lawyers would be permitted to represent the defendant or suspect, even if you could not do so under Rule 1.7(a)(2). However, lawyers in your firm who do represent a client not investigated by the CSO would be required to independently determine whether they have a conflict under Colo. RPC 1.7(a)(2) based on their relationship with you and your employment at the CSO. For example, that lawyer's representation of an individual in a criminal matter may be materially limited by not wanting to take a position that could be seen as hostile toward law enforcement in general that could affect you and your employment at the CSO. The lawyer may not want to jeopardize his or her personal or professional relationship with you in that manner.

In your letter you ask under what circumstances screening might be implemented to address conflicts of interest, particularly with regard to OCR, ORPC, or FOP cases. Screening is a process that can only be applied in cases involving former clients. Colo. RPC 1.10(e)(2) and 1.11(b)(1). The term "screened" is defined in Colo. RPC 1.0(k). The circumstances about which you have inquired do not raise the question of conflicts of interest with former clients, because you intend your work at the CSO to be ongoing.

4. Representing a respondent parent or being a GAL in a dependency and neglect case in which the CSO was involved. The same analysis under Colo. RPC 1.7(a)(1) would apply as above for a criminal defendant, if you represented a respondent parent or you were a GAL in dependency and neglect or delinquency proceedings in which CSO personnel were involved. GALs are held to the same ethical standards and expectations as any attorney who is licensed to practice law in Colorado. CJD 4-06 (2019). It is not unusual for a dependency and neglect case to arise out of an investigation by a law enforcement agency, and while criminal charges are not always filed, there is often a companion criminal case. The interest of the CSO in such cases is directly adverse to those of a respondent parent. And while the CSO may perceive its interests as identical to the best interests of the child, the CSO is under no obligation to ascertain and act in the best interests of the child in either a dependency and neglect or a delinquency proceeding, while a GAL is expressly required to do so. The Committee believes that Rule 1.7(a) prohibits you from working as either respondent parent's counsel or as a GAL while you are employed by the CSO in any case in which CSO personnel are involved, and this direct adversity would be imputed to the other lawyers in your firm. The Committee does not believe the concurrent conflicts of interest in these cases could be waived pursuant to Rule 1.7(b).

5. Representing a respondent parent or serving as a GAL in cases not involving the CSO. Similar to a criminal case investigated by an agency other than the CSO, it is possible that your representation of a respondent parent or a GAL in a delinquency or dependency and neglect case would not involve direct adversity and therefore would not prohibit the representation. However, a conflict for you in such a case could arise under Colo. RPC 1.7(a)(2), if your own interest—based on your employment with CSO—would materially limit your responsibilities to a parent, or as GAL in a case in which no CSO personnel are involved.

6. Law firm contracts with the Fraternal Order of Police to represent peace officers. The Committee believes that your firm's representation of peace officers, through a contract with the FOP, could involve a concurrent conflict of interest prohibited by Colo. RPC 1.7. However, the many permutations of such representation make it impossible to give a general response.

Here are some possibilities:

- An officer is sued by a criminal defendant for violation of Fourth Amendment rights.
- An officer is sued and/or investigated and/or charged for use of excessive force against an individual in his or her official capacity.
- An officer is sued and/or investigated and/or charged with sexual misconduct while working in his or her official capacity.
- An officer sues his/her department for disciplinary action it took.

These are just a few examples. None of them raise an absolute bar to your firm's representation of the officer while you are representing the CSO; but depending on the facts, each could involve a prohibited conflict of interest. For example, if the case against an officer for use of excessive force also involves the CSO as a defendant, the interests of the officer and those of the CSO may be directly adverse. In that case, Colo. RPC 1.7(a)(1) would prohibit you and lawyers in your firm from representing the officer. In another example, if a CSO officer is subject to internal investigation and discipline for sexual misconduct, this would result in a concurrent conflict of interest that would not fit the exception of Colo. RPC 1.7(b). You and the lawyers in your firm would be prohibited from representing the officer.

Conclusion

Your employment with the CSO while being a lawyer in a firm raises several ethical issues, primarily related to conflicts of interest. While there is no bar to your dual roles, being a lawyer for the CSO would lead to conflicts that prohibit you from representing certain clients, and many of those conflicts would be imputed to the other lawyers in the law firm.

NOTE

1. While your letter inquiry seeks to distinguish those cases investigated by the CSO and those that "involve" CSO personnel, the Committee sees no difference between those two situations for purposes of an ethical analysis.

No. 2021-2. Does the execution of a release in a tort matter containing a confidentiality provision by both the plaintiff and the plaintiff's attorney create a conflict of interest between the two?

Facts

You are a plaintiff's lawyer. One of your clients was offered and accepted a sum of money to release his negligence claims against the defendant. Although not stated in the inquiry, you have confirmed to the Committee that there was one tortfeasor and it was a "health facility" as defined in the Candor Act (Act), CRS §§ 25-51-101 through -106, and that the settlement was reached following the procedures set forth in the Act. At the time of the offer and acceptance, the release had not been prepared nor had its language been specifically agreed to. However, the client agreed to keep the terms of the agreement confidential as part of his acceptance of the defendant's offer.

Subsequently, a release that included a confidentiality provision was prepared and presented to you and your client, and you both signed it. The confidentiality provision prohibited public disclosure of "any information about the Candor process or any Candor compensation paid relating to the potential claims that are the subject of this Release."

Issue

Does including the confidentiality provision in the release create a conflict of interest between the lawyer and the client?

Analysis

The inquiry implicates the Act and Rules 1.7 and 1.6 of the Colorado Rules of Professional Conduct (Rules or Colo. RPC).

The Act

The Act provides that "open discussion communications and offers of compensation" made pursuant to the Act are "privileged and confidential and shall not be disclosed." CRS § 25-51- 105(1)(b). The confidentiality provision contained in the release signed by you and your client appears to fall within the four corners of the Act's confidentiality requirements.

Based on the information provided, it is the Committee's opinion Committee that the confidentiality provision quoted in the inquiry does not create a conflict of interest between you and your client.

The Rules

Rule 1.7 addresses concurrent conflicts of interest. It provides, in pertinent part, that a concurrent conflict of interest exists if there is significant risk that the representation of a client 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 l.7(a)(2).

You do not raise any responsibilities to other clients or former clients, so that part of the rule is not implicated here. To the extent, if any, the confidentiality provision in the release might be construed as creating a responsibility of confidentiality to a third person who is not the lawyer's client, namely a participant such as a "health care provider" or "health facility" as defined in the Act, your representation of the client is not materially limited by that responsibility because the Act itself mandates such confidentiality.

The release provision is also consistent with the "same ethical obligation to maintain confidentiality under Rule 1.6. Rule l.6(a) provides, "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 one of the exceptions contained in paragraph (b). None of the exceptions in Rule l.6(b) are implicated here. Rather than consenting to disclosure, the client specifically agreed to keep the terms of the agreement confidential as part of his acceptance of the defendant's offer.

Therefore, even without the confidentiality provision in the release, you could not disclose the proceedings under the Act or the compensation offered or paid pursuant to the Act without violating both the confidentiality mandate in the Act and the lawyer's obligation to maintain confidentiality under Colo. RPC l .6(a). The same analysis applies to any personal interest you might have in publicly disclosing the proceedings under the Act or the compensation offered or paid pursuant to the Act.

Conclusion

Because the Act on its face mandates confidentiality, the client agreed to keep the terms of the agreement confidential as part of his acceptance of the defendant's offer, and you have an obligation under Colo. RPC l.6(a) not to disclose information relating to the representation of the client, a conflict of interest is not created between the lawyer and the client by the inclusion in a release of the confidentiality provision.

CORRECTION NOTICE

The online version of "Undaunted: The Story of Colorado's First Black Lawyers" (https://cl.cobar.org/departments/undaunted) has been revised to reflect the most accurate historical records available. Specifically, records show that John Henry Stuart received his law degree in 1875 and George Gallious Ross, Jr. was admitted to the Colorado bar in 1906. Thank you to Anna N. Martinez, who penned "Six of the Greatest" profiles on Stuart and Ross (in 2016 and 2015, respectively), for supplying this information.