



Ethics and GALs: Trending Topics Fall 2020 Part 1

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TOPICS


- ✓ Confidentiality
- ✓ Represented Parties
- ✓ Unrepresented Parties
- ✓ Conflicts
- ✓ Professionalism
- ✓ File Retention





FOR GALs, ANALYSIS INCLUDES:

- ✓ **CJ Directive 04-06**
- ✓ **Colorado Rules of Professional Conduct**
- ✓ **Case Law**
- ✓ **OCR Contract**
- ✓ **CBA Ethics Opinions**

A black and white photograph of a wooden door with a metal padlock and chains. The door is made of vertical wooden planks. A heavy metal chain is attached to the top of the door, and a padlock is in the center. Another chain is attached to the right side of the door. In the lower right corner, there are two metal keyholes. A large, semi-transparent blue circle is overlaid on the center of the image, containing white text.

Confidentiality
CJ Directive 04-06
Rule 1.6
Statutory provisions

CONFIDENTIALITY ADDRESSED BY THE DIRECTIVE

B. All attorneys appointed as GALs or CLRAs shall be subject to all of the rules and standards of the legal profession. The unique statutory responsibilities of a GAL and a CLR do not set forth a traditional attorney-client relationship between the appointed attorney and the child; instead, the “client” of a GAL or a CLR is the best interests of the child. The ethical obligations of the GAL or CLR, under the Colorado Rules of Professional Conduct, flow from this unique definition of “client.” Because of this unique relationship, an attorney’s obligation not to reveal confidential information provided by the child does not apply if the information must be revealed to ensure the child’s best interests. A determination by the GAL or the CLR of a child’s best interests must include consultation with the child in a developmentally appropriate manner and consideration of the child’s position regarding the disposition of the matter before the court. A GAL or a CLR must also explain to the child the limitations on confidentiality. GALs and CLRAs must maintain reasonable caseloads that support full compliance with their ethical obligations and the practice standards set forth in this Directive. At no point should an attorney performing work under the Directive carry a caseload greater than a full-time caseload of 100 children. (emphasis added)

Colo. RPC 1.6

- Colo. RPC 1.6 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 paragraph (b).
- Subsection (b) provides limited permissible disclosures a lawyer may make.





BREADTH OF CLIENT CONFIDENTIALITY

Colo. RPC 1.6 Confidentiality

- “...applies not only to matters communicated in confidence to the client but also to all information relating to the representation, whatever its source.” Cmt. 3 to Rule 1.6.





CONFIDENTIALITY: COMMON ISSUES

Sharing materials related to the representation

- Strategy discussion
 - Colo. RPC 1.6, Cmt. 4
 - Use of hypotheticals is permissible, provided “there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.”



CONFIDENTIALITY: COMMON ISSUES

Sharing materials related to the representation

- Listserv
 - CBA Ethics Op. 130 Online Posting and Other Sharing of Materials Relating to the Representation of a Client
 - No exception to confidentiality for revealing information for educational purposes, to assist another lawyer, or because it's newsworthy.
 - No exception for disclosing information that is in public records or publicly available.



SUPERVISE STAFF

Duty to supervise lawyer and non-lawyer support staff:

- Colo. RPC 5.1 and 5.3

Staff conduct must comply with your professional obligations.

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, **whether employees or independent contractors**, act for the lawyer in rendition of the lawyer's professional services. **A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client**, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. (emphasis added) Cmt. 3 to Colo. RPC 5.3

REPRESENTED PARTIES

Colo. RPC 4.2 Communication With Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.



REPRESENTED PARTIES

Comments to Rule 4.2

- ✓ Even if represented party initiates the communication, it is prohibited
- ✓ Lawyer may not make a communication prohibited by Rule 4.2 through the acts of another
- ✓ A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order





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RECAP

- ✓ Confidentiality
 - ✓ Breadth and CJD 04-06
 - ✓ Mentors
 - ✓ Hypotheticals
 - ✓ Supervision
- ✓ Represented Parties
 - ✓ Application of Rule 4.2
 - ✓ CJD 04-06 obligations and guidance
 - ✓ Seeking court order



TODAY WE'LL COVER

- ✓ Unrepresented Parties
- ✓ Conflicts
- ✓ Professionalism
- ✓ File Retention



UNREPRESENTED PARTIES

Colo. RPC 4.3 – Dealing with an Unrepresented Party

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

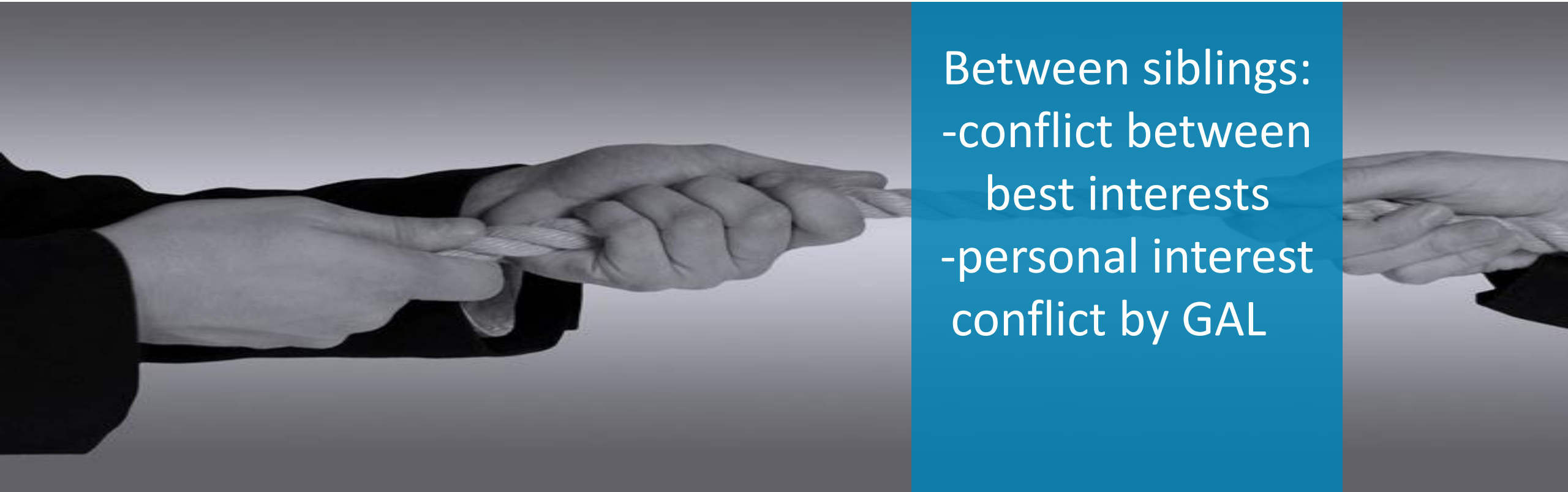


UNREPRESENTED PARTIES

Comments to Colo. RPC 4.3

- ✓ In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person.
- ✓ Distinguishes between situations where interests are adverse; most cautious approach: assume adverse
- ✓ When adverse, no advice, except to retain counsel
- ✓ “So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.”

CONFLICTS: WHAT ARE THE ISSUES?



Between siblings:
-conflict between
best interests
-personal interest
conflict by GAL

THE ANALYSIS

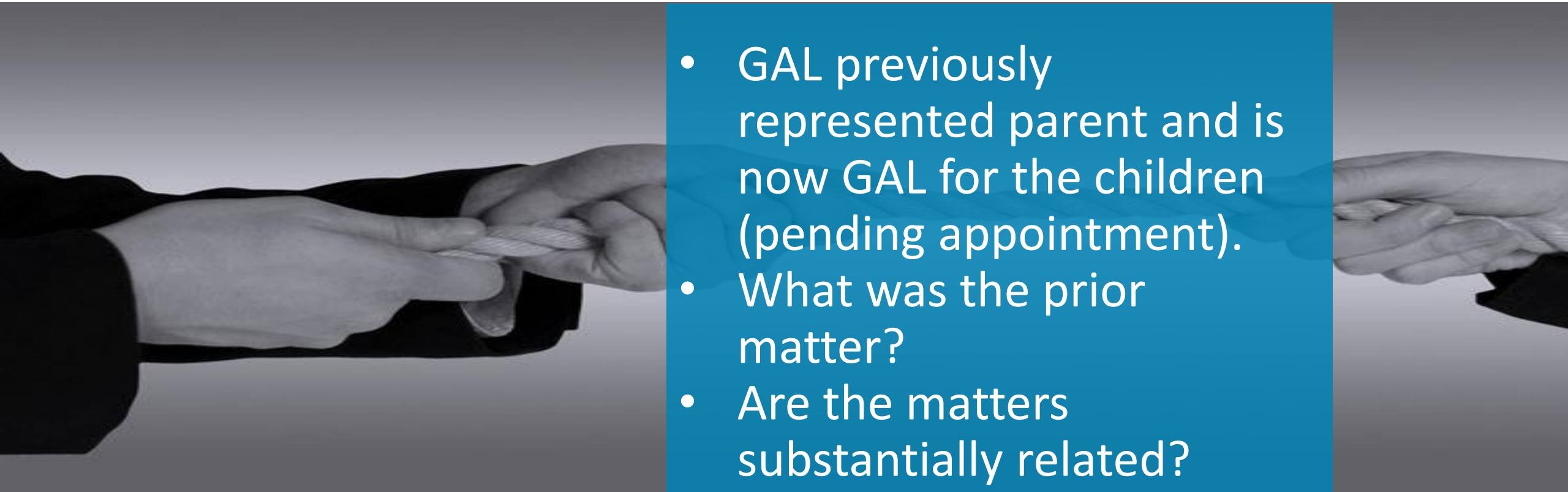
**Identify the client/clients.
Unique to this role: BEST INTEREST**

**Colo. RPC 1.7 provides:
No direct adversity
OR
Significant risk that representation will be materially limited by lawyer's responsibilities to another client, former client or third person or personal interest of lawyer**

**Are the best interests conflicted?
Do you, as the lawyer, have a personal interest conflict?**

- ✓ **Withdraw from one?**
- ✓ **Withdraw from all?**
- ✓ **Make record to court (cite 1.16)**
- ✓ **Court may order GAL to continue**
- ✓ **Fact-specific analysis**

CONFLICTS: WHAT ARE THE ISSUES?

- 
- A black and white photograph showing two hands, one from the left and one from the right, holding a thick, braided rope. The hands are positioned as if they are about to pull on the rope, creating a sense of tension or conflict. The background is a plain, light color.
- GAL previously represented parent and is now GAL for the children (pending appointment).
 - What was the prior matter?
 - Are the matters substantially related?
 - Are interests materially adverse such that informed consent is required?

THE ANALYSIS

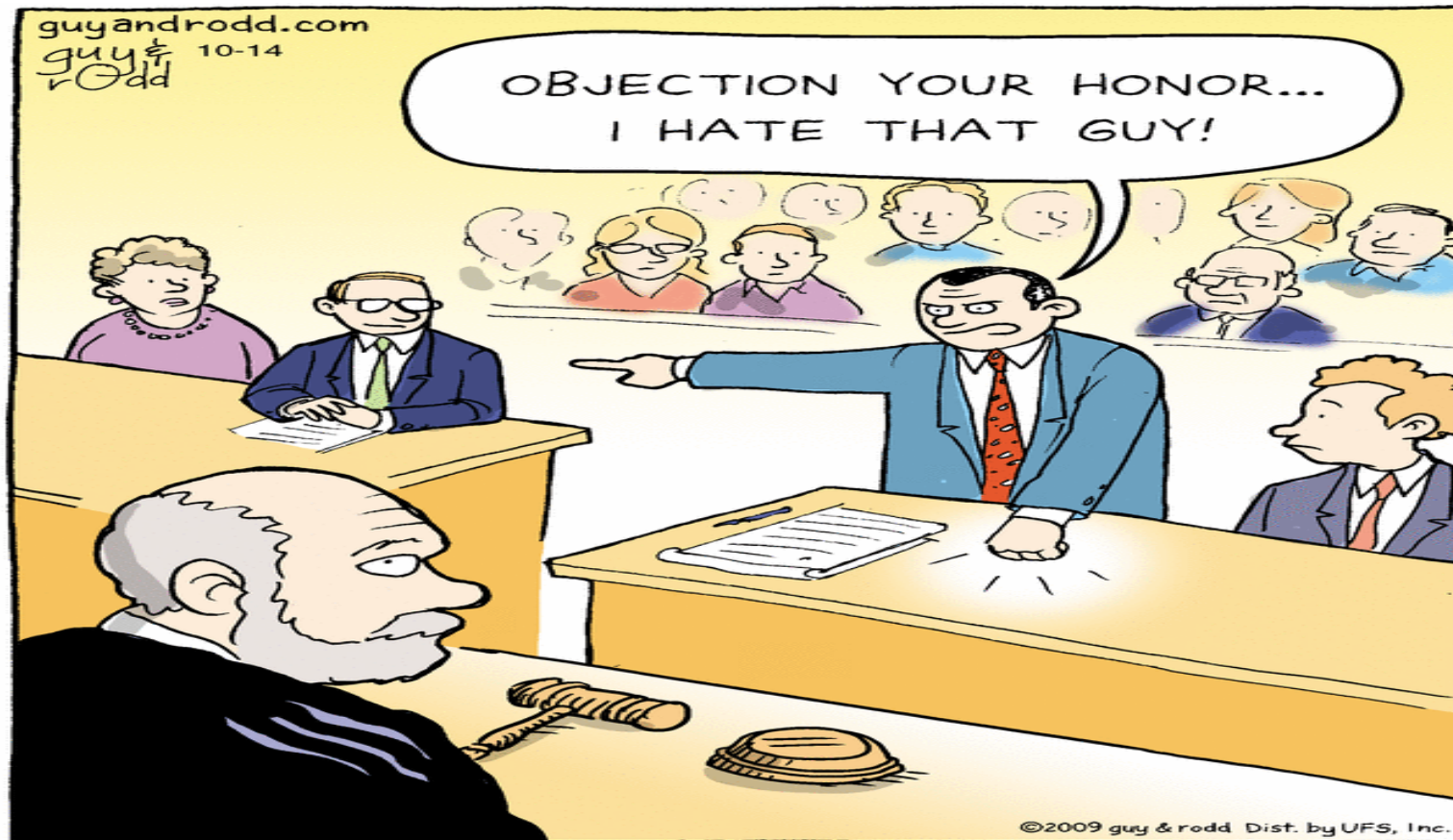
Duty to current client under Colo. RPC 1.7 (best interest) and former client under Colo. RPC 1.9 (parent as former client)

Can't represent new client in same or substantially related matter if the new client's interests are materially adverse to the interests of the former client unless former client gives informed consent, confirmed in writing (1.9(a))

Can't use information to disadvantage of former client except as Rules permit or require, or when information has become generally known; can't reveal information relating to the representation except as Rules would permit or require (1.9(c))

- ✓ Analysis should be done at outset of the GAL appointment
- ✓ Underscores the importance of a reliable conflicts-check system

PRACTICING WITH PROFESSIONALISM



PROFESSIONALISM AND THE RULES: DURING THE REPRESENTATION

Colo. RPC 4.4(a)(in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person)

Colo. RPC 8.4(g)(it is professional misconduct to engage in conduct, in the representation of a client, that exhibits or is intended to appeal to or engender bias against a person on account of that person's race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process)

PROFESSIONALISM AND THE RULES: “INTENTIONALLY” AND “ADVERSELY REFLECTS”

Colo. RPC 8.4(h)(it is professional misconduct to engage in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law)

PROFESSIONALISM AND THE RULES: SEXUAL HARASSMENT

Colo. RPC 8.4(i)(it is professional misconduct for a lawyer to engage in conduct the lawyer knows or reasonably should know constitutes sexual harassment where the conduct occurs in connection with the lawyer's professional activities)

Comment to 8.4(i)

[5A] Sexual harassment may include, but is not limited to, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that a reasonable person would perceive as unwelcome. The substantive law of employment discrimination, including anti-harassment statutes, regulations, and case law, may guide, but does not limit, application of paragraph (i). "Professional activities" are not limited to those that occur in a client-lawyer relationship.

Unprofessional Conduct and Discipline

- Case nos. 08PDJ060 and 09PDJ029 (2009): unprofessional conduct towards court staff, opposing counsel, court security and judicial officers resulted in 60-day stayed suspension, three-year period of probation. **(3.5(d), 4.4(a), 8.4(d), 8.4(h))**
- Case no. 10PDJ067 (2011): referring to female judge with gender-based epithet resulted in public censure. **(8.4(g))**
- Case no. 17PDJ021 (2017): comments to client's son about "behaving like some kid out of the ghetto" resulted in public censure. **(4.4(a), and 8.4(g))**
- Case no. 18PDJ048 (2018): putting opposing counsel in headlock during deposition resulted in public censure. **(8.4(b) and 8.4(d))**

Unprofessional Conduct and Discipline

- Case no. 19PDJ036 (2020): in speaking with clients, lawyer referred to judge with a derogatory slur on the basis of sexual orientation; lawyer also charged clients for responding to grievance and didn't reverse the charges for thirteen months, resulting in **suspension for three months all stayed during eighteen-month probationary period with conditions, including cultural sensitivity training.**

Rule violations:
Rule 8.4(g)
Rule 1.5(a)

FILE RETENTION

CJ Directive

“Attorneys shall maintain records of all work performed relating to court appointments and shall make all such records available to the OCR and/or to the court for inspection, audit and evaluation in such form and manner as the OCR or court may require, subject to the attorney work product doctrine and any other applicable privileges.”

04-06, IV. B(3)

OCR Contract

“Accurately maintain all records of all work performed pursuant to this Agreement...”

Colo. RPC 1.16A Client File Retention

Must retain, unless:

- deliver file to client
- client authorizes destruction
- lawyer gives notice before destroying (no less than 30 days)
- expiration of ten years

For criminal matters, see 1.16A(c)

Note: other retention requirements may apply

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