Colorado Supreme Court
Attorney Regulation Counsel
Ethics and Sibling Conflicts
OARC and OCR
Fall 2022
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1

OARC ANALYSIS

- ✓ Rules implicated
- ✓ By clear and convincing evidence

<u>And also</u>, importantly, lawyer's mental state and process

2

GOVERNING AUTHORITIES:

- ✓ **CJ Directive 04-06 (amended effective January 9, 2023)**
- ✓ **Colorado Rules of Professional Conduct**
- ✓ **Case Law**
- ✓ **OCR Contract**
- ✓ **CBA Ethics Opinions**

3

PREAMBLE AND SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constructive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[19] (provides in part) The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation.

DUTY OF LOYALTY: COLO. RPC 1.7

Colo. RPC 1.7 Conflicts of Interest: Current Clients

1.7(a)(1) A concurrent conflict is where there is **"direct adversity"** or (2)"a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer"

5

DUTY OF LOYALTY: COLO. RPC 1.7

Concurrent Conflict of Interest: Direct Adversity

C v. A
Lawyer represents C against A.

A v. B
In an unrelated matter, Lawyer represents A.

Cmt. 6 to Rule 1.7 explains that absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in another matter, even if the matters are wholly unrelated.

6

DUTY OF LOYALTY: COLO. RPC 1.7

Direct Adversity, Cmt. 6

Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client.

DUTY OF LOYALTY: COLO. RPC 1.7

Colo. RPC 1.7 Conflicts of Interest: Current Clients

A concurrent conflict is where there is "direct adversity" or "a significant risk that the representation of one or more clients will be **materially limited** by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer"

DUTY OF LOYALTY: COLO. RPC 1.7

Material Limitation

Cmt. 8: "Even where there is no direct adversity, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as result of the lawyer's other responsibilities or interests."

DUTY OF LOYALTY: COLO. RPC 1.7

Personal Interest Conflicts, Cmts. 10 and 11

Examples:

- Possible employment with opposing counsel
- Referring client to enterprise in which the lawyer has an undisclosed financial interest
- Lawyer representing clients in same matter are related or cohabitating

Cmt. 10 refers to "detached advice"

10

DUTY OF LOYALTY: COLO. RPC 1.7

Colo. RPC 1.7(b)

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

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

DUTY OF LOYALTY: COLO. RPC 1.7

Colo. RPC 1.7(b)

1.0(e): "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

1.0(b): "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

DUTY OF LOYALTY: COLO. RPC 1.9

Colo. RPC 1.9 Duties to Former Clients

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

DUTY OF LOYALTY: COLO. RPC 1.9

Colo. RPC 1.9 Duties to Former Clients (subsection "c" addresses information)

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

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

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

DUTY OF CONFIDENTIALITY: COLO. RPC 1.6

Colo. RPC 1.6 Confidentiality of Information

(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 paragraph (b).

Cmt. 3: The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.

DUTY OF LOYALTY: COLO. RPC 1.8

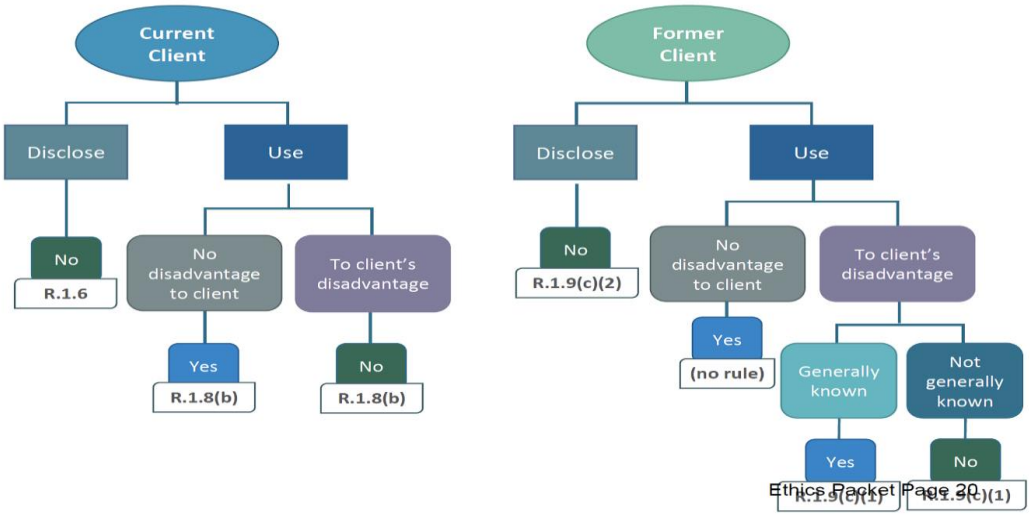
Colo. RPC 1.8 Conflict of Interest; Current Clients; Specific Rule

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

Cmt. 5: The Rule does not prohibit uses that do not disadvantage the client.

Permissible Disclosures of Info Related to Representation of a Client
MGGlenn Cheat-Sheet - June 2018

Assuming (1) No client consent; (2) not impliedly authorized; and (3) no Rule 1.6(b) exceptions.



Created by Marcy Glenn, June 2018

AMENDED CJD: TRANSITION FROM GAL TO CFY ROLE

The possibility/actuality that the attorney will take positions as CFY contrary to previous provisions the attorney took as GAL or that the attorney shared information about the child as GAL does **not** by itself create a conflict of interest under Colo. RPC 1.9.

§ V.B.4.a

AMENDED CJD: CONFLICTING ROLES FOR THE SAME YOUTH

An attorney can **never** simultaneously serve as both GAL and CFY for same child/youth.

Attorney must decline any appointments that present this conflict of interest.

§ V.B.4.c

AMENDED CJD: SIBLING REPRESENTATION

- ✓ GALS, CLRs, and CFY may be appointed to represent multiple siblings if the attorney does not assert a conflict of interest.
- ✓ Attorney should assess at outset of the proceeding and **decline** appointment for one or more siblings if conflict exists.
  - ✓ If transitioning to CFY assess whether new responsibilities to youth client conflict with responsibilities to best interests of other siblings using Colo. RPC 1.7 & 1.9
- ✓ An attorney's assessment of conflicts must be case-specific, as **joint representation of a sibling group alone does not create a conflict of interest**.
- ✓ CFY and GALs should
  - ✓ engage in developmentally appropriate communication to assess for conflicts
  - ✓ explain conflicts and their implications, understand the child or youth's position regarding the conflicts
  - ✓ and ensure that any consent required for ongoing representation is informed
  - ✓ continue to assess for conflicts throughout joint representation and, if conflict develops **take action to ensure the interests of any member of sibling group are not prejudiced.** **§ V.B.4.b**

20

AMENDED CJD: SIBLING REPRESENTATION

In **implementing the informed consent provisions** of Colo. RPC 1.7 and 1.9 (*i.e., if conflict exists*):

- ✓ a CFY may rely on the **informed consent, confirmed in writing**, of a youth age 12 or older
- ✓ a GAL may rely on their **determination that the representation does not adversely impact the best interests of the child** and must document this determination in writing.

Attorney must make sure **all other requirements** for continued representation are met.

§ V.B.4.b

AMENDED CJD GUIDANCE

- ✓ The value of **preserving connections for children, together with the importance of the sibling relationship**, support the appointment of a single attorney to represent siblings to the greatest extent possible.
- ✓ At the same time that attorneys must abide by their professional duty of loyalty to their client, attorneys for children and youth should also **seek to preserve continuity of legal representation and avoid unnecessary case transfers whenever possible**.
- ✓ Early and thorough assessment helps attorneys prevent need to conflict off at a time continuity would be negatively impacted.
- ✓ Attorneys appointed as GAL, CLR, and CFY should continue to assess for conflicts <u>but need not withdraw if there is a mere possibility</u> that a conflict of interest will develop.

§ V.B.4.b

AMENDED CJD GUIDANCE

If a conflict develops, in assessing whether the Colorado Rules of Professional Conduct require an attorney to withdraw from representing one or all children in a sibling group, the attorney should consider whether:

- ✓ The attorney **has exchanged confidential information relevant to the conflicting issue** with any sibling whose interests conflict with those of the siblings the attorney continues to represent.
- ✓ Continued representation of the sibling(s) would otherwise **prejudice any other sibling formerly** represented by the attorney.

§ V.B.4.b

SIBLING CONFLICTS

DECISION FRAMEWORK

(Based on COLO. RPC 1.7, 1.8, 1.9; CJD 04-06)

COLORADO OFFICE OF THE CHILD'S REPRESENTATIVE

§ 19-3-203(2) provides that a **D&N court may appoint the same attorney as CFY and GAL for members of a sibling group** as long as the attorney does not assert a conflict of interest. **The value of preserving connections for children and the importance of the sibling relationship support the appointment of a single attorney to represent siblings in D&N proceedings to the greatest extent possible**. CJD 04-06 V.B.4.b *cmt*. This framework supports attorneys in analyzing sibling conflicts.

IS THERE A CONFLICT OF INTEREST?

- ☐ Will the representation of one client be **directly adverse** to another client?
- ☐ Is there **a significant risk that the representation** of one or more clients will be **materially limited** by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer?

NOTE: *In analyzing conflicts under Colo. RPC, attorneys may consider that* ***the following circumstances alone will not create a conflict****:*

Different ages	*Different likelihood of adoption*	*Different parents*
Different permanency plans	*A purely theoretical or abstract conflict*	*Previous representation of one or more of siblings*
Siblings express conflicting desires or objectives, but the issues are not material to case	*Siblings give different or contradictory accounts of events, but issues involved are not material to the case.*	

No → **Continue joint representation of all children/youth in sibling group.**

Yes →

IS CONTINUED REPRESENTATION OF ALL OR ANY OF SIBLINGS PERMITTED BECAUSE ALL THE BELOW REQUIREMENTS OF 1.7(b) ARE MET?

- ✓ I reasonably believe I will be able to provide **competent and diligent representation** to each affected client
- ✓ The representation is **not prohibited by law**
- ✓ 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
- ✓ Each affected client gives **informed consent, confirmed in writing**.
  - *a* ***CFY*** *may rely on the informed consent, confirmed in writing, of a youth age 12 or older*
  - *a* ***GAL*** *may rely on their determination that the representation does not adversely impact the best interests of the child and must document this determination in writing.*

Note: *At the same time that they must abide by their professional duty of loyalty to their client, attorneys for children and youth should also* ***seek to preserve continuity of legal representation and avoid unnecessary case transfers whenever possible****.*

Yes →

Continue representation of one, some, or all siblings. If necessary, get substitution of counsel for other siblings.

In deciding whether Colo. RPCs require withdrawal from representing one or all siblings, consider:

- ☐ *Whether confidential information related to conflict issue has been exchanged with the child/youth who will no longer be represented.*
- ☐ *Whether continued representation of the other sibling(s) will prejudice the sibling who will no longer be represented.*

Remember:

- ✓ **Do not use information** relating to the representation **to the disadvantage** of your former client unless Colo. RPCs permit or information has become generally known.
- ✓ **Do not reveal information** relating to the representation of your former client unless Colo. RPCs permit.

No → **Conflict off all siblings and arrange for substitute CFY/ GAL(s).**

Reminders

- ✓ **Assess for conflicts** at outset of representation, when transitioning from GAL to CFY, and throughout representation
- ✓ **Engage in developmentally appropriate communication** with children and youth to assess, explain, and understand their position regarding conflicts.

24

Scenario #1 Different permanency plans

You represent Kaley as CFY (age 12) and Abe as GAL (age 2). Their mom, Beatrice, is currently homeless and struggling with mental health and alcohol abuse.

Beatrice is compliant with her treatment plan, should have a place to live soon and demonstrates good parenting when she is sober. Kaley is placed with her paternal grandmother. Kaley and Abe both have permanency goals of Return Home.

A permanency planning hearing is set next month.

25

Scenario #1 (cont'd)

Things have gone downhill with Kaley's relationship with Beatrice, and Kaley wants her permanency goal to be changed to APR to a Relative.

As Abe's GAL, you believe it is in Abe's best interests to continue to work on the permanency goal of return home to Beatrice.

Scenario #1: Analysis

- ✓ Relationship with Kaley: CFY, so client-directed. For Kaley, you advocate for permanency goal of APR to a relative.
- ✓ Relationship with Abe: best interest representation. For Abe, you advocate for goal of return home to Beatrice.
- ✓ Is there a conflict in representing their different positions?

27

Scenario #1: Analysis, cont'd.

Ask: Is there a concurrent conflict of interest?

1) Is there direct adversity? No.
2) Significant risk of material limitation?

CJD says different permanency plans alone do not create a conflict.

28

Scenario #2: Confidential information

- ✓ What if Kaley tells you that she has seen her mom using meth and that that is why she doesn't want a return home goal? She says she is tired of relapses, drama, and the lack of predictability.
- ✓ What if Kaley tells you she doesn't want you to tell anyone about this?

Scenario #2: Analysis

- ✓ Can you reveal the information Kaley told you for the best interest representation of Abe?

  Probably not. Colo. RPC 1.6 requires informed consent or implied authorization to disclose.

  Options:

  Discuss with Kaley the importance of the information for Abe's case. Perhaps she'll authorize disclosure.

Scenario #2: Analysis

- ✓ What if Kaley won't authorize disclosure?
- ✓ Can you still <u>use</u> (not reveal) that information for Abe's case?

See 1.8(b) and Glenn chart. Is there any disadvantage to Kaley if you use this information? If not, you may use the information to also represent best interests of Abe.

Scenario #3 Third party asserts conflict

Two siblings ages 12 and 7 reside in an adoptive foster home together.

The 12 year old was clear over the summer that he doesn't want to be adopted by these parents due to some conflict and their parenting style. He asked to be placed in a different home, and apart from his brother because he believes the foster home provides for the sibling's needs, but he also likes the idea of being an only child.

It is in the 7 year old's best interest to remain with his sibling and also to remain in his current placement.

Scenario #3, cont'd.

After further discussion, the 12 year old changed his mind and decided he is willing to work with the family on remaining in the home through "family preservation therapy" and consider adoption although it's too soon to discuss that.

The foster mother now wants a new GAL for the 7 year old in case the 12 year old changes his mind again or decides he doesn't want to be adopted and a new placement needs to be explored down the road.

Scenario #3: Analysis

- ✓ Relationship with 12 year old: CFY, so client-directed. For 12 year old, you advocate staying with the foster family (his most recent position).
- ✓ Relationship with 7 year old: best interest representation. For 7 year old, as noted, you determined staying in foster home <u>and</u> being with sibling are in his best interest.

At this time, these positions are consistent.

34

Scenario #3: Analysis

- ✓ What about fact foster mom says there's a conflict?

The lawyer assesses for conflicts (hopefully throughout the representation). OARC is also thoughtful about who the complainant is when a conflict of interest allegation is made.

Scenario #3: Analysis

- ✓ Does 12 year old changing his mind create a conflict of interest for you?

CJD: A purely theoretical or abstract conflict does not create a conflict.

Scenario #4 Different objectives in court

You represent 13 year old and her twin sisters who are 9. The matter is set for a jury trial. You believe adjudication is in the best interest of the younger siblings (as well as the 13 year old). However, the 13 year old does not want to be adjudicated.

Scenario #4: Analysis

Relationship with 13 year old: CFY, so client directed. For the 13 year old, you advocate the 13 years old's position, which is to stay with her mom, so you do not argue dependent and neglected.

Relationship with the twin sisters: best interest representation. You advocate to have them adjudicated dependent and neglected.

- ✓ Does this present a conflict of interest?

Scenario #4: Analysis

This scenario likely does constitute a conflict of interest. You would be argue opposing positions at the adjudication hearing.

- ✓ Can you continue the representation of the 13 year old or of the twins?

Consider that as CFY, confidentiality governed the relationship. To the extent you keep the 13 year old as a client and withdraw from the twins, consider obligations under Rule 1.9 and informed consent under the CJD.

- ✓ Assess early and often.
- ✓ Try to assess before obtaining confidential information.
- ✓ Remember language about significant risk of material limitation on representation.
- ✓ Continuity of representation is an important consideration.
- ✓ CJD Guidance re:
  - What may/may not constitute a conflict.
  - IC from youth and best interests client.
  - Engage in developmentally appropriate communication with children and youth to assess, explain, and understand their position regarding conflicts.

40

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41