SPOUSAL REPRESENTATION IN BUSINESS MATTERS WE LEARN FROM ESTATE PLANNING

BY HERRICK K. LIDSTONE, JR. AND SHELLEY C. THOMPSON
BURNS, FIGA & WILL, P.C., GREENWOOD VILLAGE, CO

FEBRUARY 4, 2023

1. INTRODUCTION

Whenever an attorney represents more than a single person, potential or actual conflicts of interest can develop and the attorney must be alert for those conflicts. Issues relating to conflicts of interest are included in Rules 1.7, 1.8, 1.9, and Rule 1.13 of the Colorado Rules of Professional Conduct (Colo. RPC) and are discussed in detail in CBA Ethics Committee Formal Opinion 68.

This can be especially concerning in representing spouses in a business transaction, estate planning, or other non-litigation relationship. (This paper will use the term "spouses" to describe spouses to a marriage as well as persons involved in civil union or any other loving relationship for ease of reference.)

The first place for lawyers to look is the Colorado Rules of Professional Conduct, as discussed below. In most cases, estate planners represent both spouses in their estate planning activities. Business lawyers (including real estate, mineral extraction, and other transactional lawyers) may find themselves representing spouses as well, and it is important to recognize the unique issues that this relationship of intimate partners raise.

2. COLORADO RULES OF PROFESSIONAL CONDUCT

(a) Preamble. As set forth in Paragraph [7] of the *Preamble and Scope* to the Colo. RPC, "[a] lawyer should strive to attain the highest level of skill to improve the law and the legal profession and to exemplify the legal profession's ideals of public service." Paragraph [20] goes on to provide that [emphasis supplied]:

> *Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.* In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a

basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self- assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, *since the Rules do establish standards of conduct by lawyers, in appropriate cases, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.*

(b) Conflicts of Interest -- Informed Consent, Confirmed In Writing. The Colo. RPC have a phrase that is used frequently where conflicts of interest are discussed – "informed consent, confirmed in writing." This is a very important concept for all lawyers to understand where there is any risk of a conflict of interest.

- Rule 1.0(e) defines the term "informed consent" as "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(b) defines the term "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 . . .. 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."

- Under Rule 1.13(g), where there is a potential waivable conflict of interest between an organization and a constituent in a dual representation, the attorney must obtain the organization's consent to the dual representation from an appropriate official of the organization other than the constituent. If that cannot be done, consent may be obtained from the owners.[1] you cannot get informed consent from the same person with the conflict.

(c) Rule 1.7 – Conflicts of Interest: Current Clients. Rule 1.7(a) states simply that, "[e]xcept as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Rule 1.7(a) goes on to define a "concurrent conflict of interest" very broadly stating that it exists if:

[1] Rule 1.13(g) actually refers to consent of the shareholders – but not all organizations have shareholders. The term "owner" is defined much more broadly in C.R.S. § 7-90-102(43).

(i) the representation of one client will be directly adverse to another client; or

(ii) there is 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.

There are various conditions to a client waiver of a concurrent conflict of interest, but in each case it requires first that the lawyer determine that the conflict is waivable, and then "each affected client to give informed consent, confirmed in writing."

A lawyer can only seek to waive the conflict and obtain each client's informed consent, confirmed in writing, if: (i) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client, (ii) the representation is not prohibited by law; and (iii) 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. That is, the conflict has to be waivable; not all conflicts are waivable.

Comment [1] to Rule 1.7 describes the importance of Rule 1.7 as follows:

"Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests."

Comment [2] further explains that "[r]esolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2)."

Comment [7] to Rule 1.7 makes it clear that "[d]irectly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client."

"Even where there is no direct adverseness,' Comment [8] goes on to state that "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 a result of the lawyer's other responsibilities or interests."

Comment [34] recognizes that "[a] lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client."

(d) Rule 1.8 – Conflict of Interest: Current Clients: Specific Rules. Rule 1.8 provides specific rules for determining whether there is a conflict in an attorney-client relationship for current clients. Among the potential conflicts of interest discussed in Rule 1.8 are:

(i) Attorneys entering into a business transaction with a client;

(ii) Using information relating to the representation of a client to the disadvantage of that client;

(iii) Soliciting any substantial gift from a client, including a testamentary gift;

(iv) Negotiating literary or media rights to the client's story "prior to the conclusion of representation of [the] client";

(v) Providing financial assistance to the client in connection with pending or contemplated litigation except in some limited circumstances set forth in Rule 1.8(e); and

(vi) Accepting compensation from one other than the client except with the client's informed consent, and so long as there is no interference with the lawyer's independent judgment on behalf of the client and the confidentiality of client information is protected.

Comment [5] to Rule 1.8 discusses the restriction set forth in Rule 1.8(b) further, saying: **"**Use of information relating to the representation to the disadvantage of the client violates the

lawyer's duty of loyalty." Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. That might occur when the lawyer knows that the client is purchasing and intends to develop one parcel of property and decides to purchase potentially competitive parcels in the same area, or recommends to another client or a friend that purchase.[2]

(e) Rule 1.9 – Duties to Former Clients. Rule 1.9 discusses conflicts of interest with and duties to former clients. In order for Rule 1.9 to be applicable, there first must be a "former client." Rule 1.16 discusses a lawyer declining or terminating representation. This is a very important rule, especially in light of the Colorado Supreme Court's decision in *People v. Bennett*[3] which refers to the attorney-client relationship existing "if the putative client's subjective belief that the attorney-client relationship exists is reasonable." As stated in *Bennett*:

> An attorney-client relationship is "established when it is shown that the client seeks and receives the advice of the lawyer on the legal consequences of the client's past or contemplated actions." The relationship may be inferred from the conduct of the parties. The proper test is a subjective one, and an important factor is whether the client believes that the relationship existed. Further, "[t]he attorney-client relationship is an ongoing relationship giving rise to a continuing duty to the client unless and until the client clearly understands, or reasonably should understand, that the relationship is no longer to be depended on."[4]

Of course, the question always then becomes, when does a current client become a former client? ABA Formal Ethics Opinion 481 attempts to answer that question as follows:

> Generally speaking, a current client becomes a former client (a) at the time specified by the lawyer for the conclusion of the representation, and acknowledged by the client, such as where the lawyer's engagement letter states that the representation will conclude upon the lawyer sending a final invoice, or the lawyer sends a disengagement letter upon the completion of the matter (and thereafter acts consistently with the letter); (b) when the lawyer withdraws from the representation

---

2 Comment [5] goes on to say that the "Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients.

3 *People v. Bennett*, 810 P.2d 661 (Colo. 1991).

4 *People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991). See, also, As *Monus v. Colo. Baseball 1993, Inc.*, 103 F3d 145 at *8 (10th Cir. 1996), "the alleged client's belief is an important factor," "the alleged client's subjective belief must be reasonable." If no reasonable person in the putative client's position could believe that he was seeking and obtaining legal advice from the lawyer, no attorney-client relationship exists"; Simmons and Wollins, *The Implied Attorney-Client Relationship; A Trap for the Unwary*, v. 49, no. 3, The Colorado Lawyer (CBA) at 46 (March 2020).

> pursuant to Model Rule of Professional Conduct 1.16; (c) when the client terminates the representation; or (d) when overt acts inconsistent with the continuation of the attorney-client relationship indicate that the relationship has ended. If a lawyer represents a client in more than one matter, the client is a current client if any of those matters is active or open; in other words, the termination of representation in one or more matters does not transform a client into a former client if the lawyer still represents the client in other matters.
>
> Absent express statements or overt acts by either party, an attorney-client relationship also may be terminated when it would be objectively unreasonable to continue to bind the parties to each other. In such cases, the parties' reasonable expectations often hinge on the scope of the lawyer's representation. In that regard, the court in *National Medical Care, Inc. v. Home Medical of America, Inc.*, suggested that the scope of a lawyer's representation loosely falls into one of three categories: (1) the lawyer is retained as general counsel to handle all of the client's legal matters; (2) the lawyer is retained for all matters in a specific practice area; or (3) the lawyer is retained to represent the client in a discrete matter.

In some cases, it may be unreasonable for a client to infer continuing representation by the lawyer. In all cases, it is likely better for there to be a writing from the lawyer terminating the representation (a "disengagement letter"). The disengagement letter may be polite and look forward to the opportunity for future representation, but it needs to be clear as to the termination of the current representation.[5]

---

[5] See *Dream Finders Homes v. Weyerhaeuser NR Co.*, District Court, City and County of Denver, 2017CV34801, order re: Defendant's Motion to Disqualify Counsel, issued May 22, 2019 at 7:51 am. There Holland & Knight ("H&K") had represented Plum Creek Timber for years until it merged into Weyerhaeuser, and then had a single engagement with Weyerhaeuser on a Florida utilities matter.

> At the completion of that engagement, the H&K attorney sent a "disengagement letter" to Weyerhaeuser enclosing the relevant order in the utilities matter and saying "This should bring the matter to a close. It has been our pleasure to represent Weyerhaeuser. Please let us know if we can be of further assistance." The Weyerhaeuser contact replied by email: "It is nice to bring this to a close."
>
> About a month later, H&K represented a plaintiff against Weyerhaeuser on an unrelated matter in Colorado – and Weyerhaeuser moved to disqualify H&K. In ruling on the motion, the Colorado district court ruled that, as a result of the H&K correspondence, Weyerhaeuser had to be treated as a former client under Rule 1.9, not a current client under Rule 1.8. Since the current work against Weyerhaeuser was not related to the former work for Weyerhaeuser, H&K would not be disqualified under Rule 1.9; without the clear disengagement, the court might had applied Rule 1.8 which would have treated Weyerhaeuser as a current client and disqualified H&K from representing parties adverse to Weyerhaeuser in any matter.

See also discussion in Pera, *The Power of the Disengagement Letter* (ABA Law Practice Magazine, March/April 2022 at 18).

Once a client becomes a former client, the duties under Rule 1.9 are significantly less than to a current client under Rules 1.7 and 1.8. There remain significant limitations on the ability of the lawyer to represent clients adverse to the former client in matters related to the earlier representation.

(f) Rule 1.13 - Organization as Client. Rule 1.13 is a very important rule for all attorneys who represent organizations. Paragraph 1.13(a) makes it clear that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." This emphasizes that, in representing the organization, the lawyer needs to know who the duly authorized constituents are, knowledge which would include an understanding of the limitations of the authority held by the "duly authorized constituents."

Rule 1.13(f) goes on to explain that the lawyer representing the organization does not *per se* represent the organization's constituents. Rule 1.13(f) says:

> In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Subject to Rule 1.7, Rule 1.13(g) makes it clear that the lawyer for the organization may also represent any of its constituents where the conflict is waivable and is waived by the organization's informed consent confirmed in writing. Of course, the constituent involved in the potentially conflicting representation is not the one who should waive the conflict on behalf of the organization.

Comment [10] to Rule 1.13 recognizes that "[t]here are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged."

(g) Rule 4.3 – Dealing With Unrepresented Persons. Be very careful not to even come close to giving legal advice to persons who are not represented by counsel other than "get a lawyer" where the lawyer expects that conflicts of interest may develop. Rule 4.3 is very strict about how a lawyer should act among unrepresented parties:

> 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.

As stated in comment [2], however, Rule 4.3 does distinguish between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's interests. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel.

Where the people sitting around the table for the formation of an entity and engage in cooperative discussion reflecting their understanding of the business plan, the rights and responsibilities of the parties to the entity as owners and managers, the lawyer's burden is somewhat eased. Where the group consists of persons who are sophisticated and those who are unsophisticated, the lawyer's burden is more complex.[6]

In any and all cases, the engagement letter first and the governance documents, second, should include specific identification of the lawyer's client and disclaimer of other representation. These should be specifically acknowledged by the client and others involved.

(h) CBA Formal Opinions 68 and 135. Also important to a consideration of the matters raised is Colorado Bar Association Ethics Committee Formal Opinions 68[7] and 135.[8] Formal Opinion 68 discusses the "Propriety of Multiple Representation" in certain specific conflict-of-interest situations, including "representing a husband and wife in negotiating a property settlement agreement before a dissolution proceeding commences and joint representation after a dissolution proceeding commences, "representing the buyer and the seller in a residential real estate transaction," "representing the buyer and the seller in the sale of a business," and

---

6 *See LLCS IN COLORADO*, § 17.1.4 (*Representation Of An Entity To Be Formed*) through § 17.1.7 (*May the lawyer represent only the entity to be formed?*).

7 CBA Ethics Comm., Formal Op. 68 (*Conflicts of Interest: Propriety of Multiple Representation*) (2011). See, also, New York City Bar Association Committee on Professional Ethics Formal Opinion 2017-7: *Disclosures to Joint Clients When the Representation Does Not Involve a Conflict of Interest.*

8 CBA Ethics Comm., Formal Op. 135 (*Ethical Considerations in the Joint Representation of Clients in the Same Matter or Proceeding*), 47 The Colo. L. (CBA) No. 4 at 75 (April 2018).

"representing individuals in drafting an entity agreement and/or representing solely an entity in its formation."

Formal Opinion 135 discusses a lawyer's responsibility, when requested to represent more than one client in the same matter:

> (i) To identify and address conflicts of interest between the potential clients and
>
> (ii) To obtain informed client consent to the joint representation with respect to the identified conflicts.

The lawyer also should consider how the lawyer will address conflicts that may arise between the jointly represented clients during the representation, the sharing of confidential information, and the possibility that one of the joint clients may revoke consent to joint representation. Admittedly Formal Opinion 135 generally applies within the context of representing parties in a civil or criminal litigation context, but it provides guidance in all contexts.

Formal Opinion 68 is more properly directed toward representation of parties in a transactional matter. It provides a general analysis of conflicts of interest under Rule 1.7 and Rule 1.8, discusses whether the conflict of interest (if one exists) is consentable, and discusses what must be communicated to the client to obtain the client's informed consent. Importantly, the conclusion of the syllabus sets forth the summary of the entire opinion:

> The nature of the disclosures required and the ability to represent each party adequately will depend on the situation in question. **Under no circumstances should a lawyer representing multiple parties be considered a mere "scrivener" in a transaction.**

3. FIDUCIARY DUTIES OWED BY LAWYER TO CLIENT

(a) All lawyers are fiduciaries. All lawyers owe clients fiduciary duties.[9] "A fiduciary duty is the duty of an agent to treat his principal with the utmost candor, rectitude, care, loyalty, and good faith--in fact to treat the principal as well as the agent would treat himself. The common law imposes that duty when the disparity between the parties in knowledge or power relevant to the performance of an undertaking is so vast that it is a reasonable inference that had the parties in advance negotiated expressly over the issue they would have agreed that the agent owed the principal the high duty that we have described, because otherwise the principal would be placing

[9] Restatement of the Law Governing Lawyers, § 16(3). In Colorado, see *Smith v. Mehaffy*, 30 P.3d 727, 733 (Colo. App. 2000) discussed in more detail below.

himself at the agent's mercy. An example is the relation between a guardian and his minor ward, or a lawyer and his client. The ward, the client, is in no position to supervise or control the actions of his principal on his behalf; he must take those actions on trust; the fiduciary principle is designed to prevent that trust from being misplaced."[10]

With regard to claims of the breach of fiduciary duty by an attorney, Colorado law[11] identifies these elements in such an action:

> "[A] lawyer is civilly liable to a client if the lawyer breaches a fiduciary duty [owed] to the client . . . ." *Restatement (Third) of the Law Governing Lawyers § 49*. To establish a breach of fiduciary duty claim against a lawyer, the plaintiff must prove the following elements: (1) a client-lawyer relationship exists between the defendant (as the lawyer) and the plaintiff (as the client); (2) the lawyer was acting as a fiduciary of the plaintiff; (3) the lawyer breached a fiduciary duty to the plaintiff; (4) the plaintiff suffered an injury or loss; and (5) the lawyer's breach of fiduciary duty was a cause of the plaintiff's injury or loss."[12]

(b) Causation. The element of causation is satisfied when the plaintiff proves that the defendant's conduct was a substantial contributing cause of the injury.[13]

(c) Agency Law. Fiduciary duties are also related to agency law. Agency is a type of fiduciary relationship, and agency law is the foundation for many rules specifically addressed to lawyers. As the Restatement (Third) of Agency, §1.01 defines it, "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." The fiduciary principle requires that agents place the principal's interests above their own. Restatement (Third) of Agency, §8.01, states

---

10 *Burdett v. Miller*, 957 F.2d 1375 (7th Cir. 1992) (Posner, J.) As stated by the Colorado Supreme Court in *Destefano v. Grabrian*, 763 P.2d 275 (Colo. 1988) [citations omitted], "[a] fiduciary has a duty to deal 'with utmost good faith and solely for the benefit' of the beneficiary. A fiduciary's obligations to the beneficiary include, among other things, a duty of loyalty, a duty to exercise reasonable care and skill, and a duty to deal impartially with beneficiaries."

11 *Graphic Directions, Inc. v. Bush,* 862 P.2d 1020, 1022 (Colo. App. 1993).

12 See also *Miller v. Byrne*, 916 P.2d 566, 575 (Colo. App. 1995).

13 *Rupert v. Clayton Brokerage Co.*, 737 P.2d 1106, 1112 (Colo. 1987). See also *Aller v. Law Office of Carole Schriefer PC,* (Colo. App. July 28, 2005), No. 04CA0003, where the Court of Appeals, in affirming the trial court's summary judgment, found that "attorney's conduct did not cause plaintiff any pecuniary loss or damage she would not have also suffered had another attorney represented" plaintiff since the plaintiff's new attorney "attested that he would have asserted substantially similar claims against plaintiff and that any reasonable attorney would also have taken the same course of action."

the "General Fiduciary Principle" of Agency: "An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."[14]

(d) Smith v. Mehaffy. In *Smith v. Mehaffy*,[15] the Colorado Court of Appeals stated that "[w]e acknowledge that the attorney-client relationship involves a fiduciary relationship as a matter of law. [Citation omitted]. However, we reject Smith's contention that every plaintiff who prevails against an attorney in a legal malpractice action is *ipso facto* entitled to an award of attorney fees under the breach of fiduciary duty exception to the American Rule." The Court of Appeals goes on to state that:

> Legal malpractice is a generic term for at least three distinct causes of action available to clients who suffer damages because of their lawyers' misbehavior. Clients wronged by their lawyers may sue for damages based on (1) breach of contract, (2) breach of fiduciary duty, or (3) negligence.[16] [Citations omitted]

As made clear throughout the Colorado Rules of Professional Conduct, attorneys working on matters related to their client are fiduciaries with respect to their client and owe the duty of candor, rectitude, care, loyalty and good faith to their client. "As fiduciaries, attorneys have the two-fold legal duty of undivided loyalty and confidentiality. . .. A breach of the duty of undivided loyalty occurs when an attorney obtains a personal advantage in dealing with a client, or when the attorney creates circumstances that adversely affect the client's interests."[17] To further describe the distinction, the *Mehaffy* court went on to state:

> Legal malpractice actions based on negligence concern violations of a standard of care, whereas legal malpractice actions based on breach of fiduciary duty concern violations of a standard of conduct. [Citation omitted][18] Recognizing this

---

14 This is further discussed in Lidstone and Sparkman, *Limited Liability Companies and Partnerships in Colorado* (CBA-CLE 2019) at § 4.1 (*The Source and Nature of Duties in LLCs and Partnerships*) and § 4.2 (*Agency Law – A Common Source of Duties in LLCs and Partnerships*).

15 *Smith v. Mehaffy*, 30 P.3d 727, 733 (Colo. App. 2000)

16 In defining a "negligence claim" in legal malpractice, courts have said: "To succeed on a legal malpractice claim founded in negligence, a plaintiff must establish that (1) an attorney owed a duty of care to the plaintiff; (2) the attorney breached that duty; (3) the breach proximately caused an injury to the plaintiff; and (4) damages resulted." *Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti*, 412 P.3d 751, 758 (Colo. App. 2015); *Gibbons v. Ludlow,* 2013 CO 49, ¶ 12, 304 P.3d 239; *Bebo Constr. Co. v. Mattox & O'Brien, P.C.,* 990 P.2d 78, 83 (Colo.1999). A New Mexico case (*Richter v. Van Amberg*, 97 F. Supp.2d 1255, 1261 (D.N.M. 2000)) defines a negligence claim in legal malpractice slightly differently: "Legal malpractice based upon negligence requires proof of the following elements: (1) the employment of the defendant attorney, (2) the defendant attorney's neglect of a reasonable duty, and (3) the negligence resulted in and was the proximate cause of loss to the plaintiff."

17 *Smith v. Mehaffy*, 30 P.3d 727, 733 (Colo. App. 2000)

18 As stated in *Richter v. Van Amberg*, 97 F. Supp.2d 1255, 1261 (D.N.M. 2000): "Legal malpractice based on negligence concerns violations of the standard of care; whereas legal malpractice based upon breach of duty concerns

> important distinction between an attorney's breach of fiduciary duty and an attorney's act of negligence, a division of the Utah Court of Appeals recently held an attorney's breach of loyalty to a client does not necessarily mean that the attorney acted negligently. [Citation omitted][19]

Furthermore, "a finding of negligence does not create liability on the part of a defendant unless that negligence is a proximate cause of the plaintiff's injury."[20] Establishing whether a defendant's negligence caused a plaintiff's injury requires two separate determinations. Before determining whether the defendant's negligence was the proximate (or "legal") cause of the plaintiff's injury, a determination of causation in fact (or "actual" cause) must be made."[21] The test for causation in fact is "the 'but for' test – whether, but for the alleged negligence, the harm would not have occurred. . .. The requirement of 'but for' causation is satisfied if the negligent conduct in a natural and continued sequence, unbroken by any efficient intervening cause, produce[s] the result complained of, and without which the result would not have occurred."[22] Once causation in fact is established, legal cause (or proximate cause) must be determined."[23]

"[F]oreseeability is the touchstone of proximate [or legal] cause."[24] To establish a negligence claim, a plaintiff must prove that the damages sustained were a "reasonably foreseeable" consequence of the defendant's negligence.[25] "The exact or precise injury need not have been foreseeable, but it is sufficient if a reasonably careful person, under the same or similar circumstances, would have anticipated that injury to a person in the plaintiff's situation might result from the defendant's conduct." The concept of foreseeability in the context of legal cause

---

violations of a standard of conduct." *Kilpatrick v. Wiley, Rein & Fielding,* 909 P.2d 1283, 1290 (Utah App.1996). The standard of conduct pertains to the lawyer's two fiduciary obligations [of] undivided loyalty and confidentiality. 2 Mallen & Smith, *Legal Malpractice* § 14.1.5 (1998 Supp.). It is possible to have professional negligence without a breach of fiduciary duty, and vice-versa."

19 In *Moguls of Aspen, Inc. v. Faegre & Benson*, 956 P.2d 618, 621 (Colo. App. 1997), the court recognized that "circumstances may exist in which a lawyer may be guilty both of malpractice and of other violations of his or her fiduciary obligations."

20 Citing *City of Aurora v. Loveless*, 639 P.2d 1061, 1063 (Colo.1981). "Causation is a question of fact for the jury unless the facts are undisputed and reasonable minds could draw but one inference from them. *Reigel v. SavaSeniorCare L.L.C.*, 292 P.3d 977, 985–96 (Colo.App.2011). Whether the trial court applied the correct test for causation is a legal question. Id. at 985."

21 *City of Aurora v. Loveless*, 639 P.2d 1061, 1063 (Colo.1981).

22 *Reigel v. SavaSeniorCare L.L.C.*, 292 P.3d 977, 985 (Colo.App.2011) (internal quotation marks omitted).

23 *Reigel v. SavaSeniorCare L.L.C.*, 292 P.3d 977, 986 (Colo.App.2011).

24 *Westin Operator, LLC v. Groh*, 2015 CO 25, ¶ 33 n.5.

25 *Vanderbeek v. Vernon Corp.*, 50 P.3d 866, 872 (Colo.2002).

embodies policy considerations of whether a defendant's responsibility should extend to the results in question.[26]

In *Mehaffy*, the Court of Appeals described the distinction clearly – recognizing that the plaintiff, Smith, "sought [lawyer] Mehaffy's expertise and professional counsel[,] . . . and that Smith also established that Mehaffy was negligent in failing adequately to advise him of the proper method of giving notice to creditors." Thus, negligence was proven. The Court of Appeals went on to say that "because there was no evidence of breach of a recognized standard of conduct such as the duty of undivided loyalty or confidentiality, there was no breach of fiduciary duty."[27]

4. ESTATE PLANNING MATTERS

In estate planning, the attorney generally finds herself representing both persons in a marriage, partnership, or other loving relationship. In most cases, the spouses' interests and wishes are not in conflict, but the attorney must nevertheless be on the lookout when representing spouses to carefully comply with the Professional Rules of Conduct. When representing both spouses, it is best practice for the attorney to meet with them together, not separately.[28] While generally two spouses appear before the estate planning attorney together and agree on a great majority of the terms of their estate plans, the attorney and the clients may discover in the meeting that that each partner had some varied ideas on what their estate plan would provide. This is especially the case when one or both spouses have children from a prior marriage.

(a) Concurrent Clients – Conflicts in Estate Planning. As discussed above, Rule 1.7(a) provides that a conflict of interest exists where:

> (i) the representation of one client will be directly adverse to another client; or

---

26 *Koca v. Keller*, 97 P.3d 346, 353 (Colo.App.2004), reversed on other grounds, 111 P.3d 445 (Colo.2005). See also *Palsgraf v. Long Island Railroad Company*, 162 N.E. 99, 101 (N.Y. 1928) where harm to the plaintiff with the "eggshell" head was not reasonably foreseeable when there was no evidence that others would have been similarly affected.

27 *Smith v. Mehaffy*, 30 P.3d 727, 733-4 (Colo. App. 2000). As noted above, the Rules do establish standards of conduct for lawyers. In appropriate cases, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct. Paragraph [20] of the "Preamble: A Lawyer's Responsibilities" to the Colorado Rules of Professional Conduct, the Colorado Supreme Court.

28 The lawyer has a duty of loyalty, communication, and diligence to both clients. Also, attorney-client privilege does not attach between commonly represented clients where they later litigate against each other. Colo. RPC 1.7, Cmt 30.

(ii) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client.

In practice, in the circumstance where an attorney realizes her clients, two spouses, do not agree on the answer to one of the attorneys' questions, like "how do you want to leave your assets when you are both deceased," the attorney may let the clients talk it out amongst themselves until they agree on a joint answer that is best for both of them. The attorney may provide advice to both of the clients, together, on the issue, but should not provide advice in private to either client in secret, nor keep secrets between the two clients. Additionally, if there is a significant risk that providing good advice would be limited by the attorney's responsibility to one or the other of the clients, then there is likely a conflict of interest. Most often, even when there is a disagreement at one point of the estate planning representation, estate planning clients will work out the issue together and execute the estate planning documents with no disagreement.

If the attorney realizes there is really a conflict pursuant to Rule 1.7 above, the attorney may only continue representation if the clients waive the conflict after informed consent in writing, which could mean the attorney would need to describe the nature of the conflict to the clients in detail. In estate planning practice, this rarely happens but if it does, the conflict cannot be ignored by the attorney. The attorney may consider including a waiver of conflict in their engagement letter for the clients to sign; however, as discussed above, informed consent and an understanding by the client of the conflict is required to effectuate a waiver. The attorney may also consider withdrawing from representation of both clients.

Spouses often name each other as fiduciaries and beneficiaries, and often wish for the estate plan to be carried out pursuant to their joint wishes regardless of who dies first; therefore, they will choose a common successor trustee/personal representative and common beneficiaries after they are both deceased or otherwise unable to take care of their affairs. Where it is relevant to their decisions, it may be important to talk to the spouses together about the possibility that a surviving spouse will change an estate plan after the death of the first spouse. Beneficiary designations on accounts and life insurance, as well as titling of property (*i.e.*, joint tenancy, tenancy in common, trust), are extremely important to a joint estate plan, and should be clearly discussed with the client. A good estate planning attorney will help a couple prepare an estate plan, and advise them on beneficiaries and titling, which both spouses desire and find to be in their best interests.

(b) Unmarried couples. If two partners are not married, the same rules apply, and there may be an additional matter of providing advice on titling that is not adverse to one or the other, or limited by the representation of one or the other partners. For example, perhaps a property is in one partner's name, and that partner wishes for it to pass to the other partner on his or her death; yet a joint tenancy deed may not be advisable for an unmarried couple, given the fact it

cannot be revoked on a breakup. A bequest or trust may be more appropriate. Therefore, any advice on this issue should be given to both of them together and should acknowledge those legal issues and consequences. Based on that discussion, the unmarried couple must decide how they wish to proceed.

Similarly, with a married couple, if one spouse has received an inheritance that would be considered separate property in the event of divorce, a transfer on death may be more appropriate than jointly titling that asset and commingling the asset with the other spouse for estate planning purposes.

The clients may, of course, decide that they prefer joint tenancy despite the legal issues you have explained to them. Forthright advice and good information on the legal issues, presented to both clients together, with the two of them making decisions, is the best route for the attorney to take.

(c) Elective Share. Another area where forthright advice to both clients in an estate planning engagement may be needed is the issue of an elective share where there is no prenuptial agreement and one spouse leaves a significant portion of their estate to children from a prior marriage.[29]

An elective share may reduce the estate's ability to distribute assets to other beneficiaries and act to the benefit of the surviving spouse. Where the clients are unmarried, the surviving partner is not eligible to take an elective share.

(d) Multiple Family Members as Clients. An attorney should be careful when representing many members of the same family in different estate planning engagements or other matters. If the estate planning matter is related to the other family member's estate planning matter, even if one is a former client, the representation cannot be adverse to that of the former client.[30] The more members of a family an attorney represents on related issues, the more severe this problem becomes.

(e) Divorce and Former Clients. Where a former estate planning client seeks the representation from the same attorney, but without their spouse/partner because they have divorced or broken up since the representation, the attorney must act carefully. The former spouse/partner

---

29 Constance Tromble Eyster, Engagement Letters and Common Conflicts of Interest in Joint Representation, Colo. Law., February 2009, at 43, 44 where Ms. Eyster says: "The attorney has an obligation to advise the jointly represented clients of the surviving client's right to elect against the estate…"; *see also,* Johnson v. Sandler, Balkin, Hellman & Weinstein, 958 S.W.2d 42 (Mo. App. 1997).

30 Hidden Conflicts of Interest, GPSolo, JULY/AUGUST 2002, at 10, 12.

was the attorney's client in the former engagement, but is a "former client" in the new engagement. Rule 1.9 (a) clearly says:

> 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.

Where the new engagement involves property considered in the former engagement, and where the new engagement involves potential conflicts between the former client and the continuing client, obtaining an informed consent confirmed in writing from each of the two persons is advisable if not required by Rule 1.9. This informed consent confirmed in writing should also address the information that the attorney received from both the continuing client and the former client during the prior representation.

While duties to former clients are different than a potential conflict of interest between current clients, there remain significant limitations on the ability of the lawyer to represent clients whose interests may be adverse to the former client in matters related to the earlier representation. Therefore, depending on the estate planning issues in that matter, the attorney may want to consider either declining the representation or requiring both former clients to sign a waiver after informed consent depending on the individual circumstances.

In some cases, where there has been legal representation during the divorce or other separation proceedings, one of the parties may wish to include an "informed consent confirmed in writing" as part of the resolution of the separation agreement. The continuing estate planning attorney will have to review that consent and determine if it is adequate in her opinion for the continuation of her representation of one of the parties whose position has become potentially adverse to the other party.

In all cases, however, the estate planning attorney must remember that she had a fiduciary relationship with both parties previously, and that relationship survives the termination of the engagement. This is a situation that the old provision, "when in doubt, don't" applies.

(f) Engagement Letter. Consider stating in your engagement letter that the estate planning representation terminates automatically when you complete the clients' documents, in order to eliminate the issue of determining whether a client is a current or former client. Additionally, ACTEC[31] publishes the following sample language for an engagement letter:

[31] ACTEC is the American College of Trust and Estate Counsel. See www.actec.org.

> "It is common for spouses to employ the same law firm to assist them in planning their estates, as you have requested us to do. Please understand that, because we will represent the two of you jointly, it would be unethical for us to withhold information from either of you that is relevant and material to the subject matter of the engagement. Accordingly, by agreeing to this form of representation, each of you authorizes us to disclose to the other information that one of you shares with us or that we acquire from another source which, in our judgment, falls into this category. We will not take any action or refrain from taking an action (pertaining to the subject matter of our representation of you) that affects one of you without the other's knowledge and consent. Of course, anything either of you discusses with us is confidential, and will not be disclosed to third parties, unless you authorize us to disclose the information or disclosure is required or permitted by law or the rules governing our professional conduct. If a conflict of interest arises between you during the course of your planning or if the two of you have a difference of opinion on any subject, we can point out the pros and cons of your respective positions. However, we cannot advocate one of your positions over the other. Furthermore, we cannot advocate one of your positions over the other if there is a disagreement as to your respective property rights or interests or as to other legal issues. [NOTE THAT IN SOME JURISDICTIONS, IT MAY BE NECESSARY TO PROVIDE EXAMPLES OF POTENTIAL CONFLICTS.] By signing this letter, you waive potential conflicts of interest that can arise by virtue of the fact that we represent the two of you together."

You might also include a warning that you may have to withdraw from representing either client if a conflict develops, and that the clients may incur costs of obtaining other counsel. As ACTEC alludes to above, in Colorado, you cannot waive future, unknown conflicts, so this type of waiver language either may not be necessary or may not be enough in the event of a real conflict.

In sum, representation of two spouses or partners in estate planning is typical, but the attorney must nevertheless carefully adhere to the Rules of Professional Conduct. Meeting together with the clients and providing forthright advice without keeping secrets between the clients is important.

5. BUSINESS MATTERS

(a) Caution Advised. In many business matters, lawyers have to be cautious about representing multiple parties in the organization of a business. It does not matter whether the business will involve friends, spouses, or other relationships, but lawyers have to be cautious in sitting around the table with the individuals helping them form a business relationship through the

organization of an entity. Initially the lawyer must identify, and advise all of the parties, who the lawyer has identified as a client.

- Perhaps one of the individuals is a long-term client of the lawyer, and the lawyer identifies that person as the client. That should be followed immediately by a recommendation that any other person may get their own attorney if the person desires to do so. This advice should, of course, be confirmed in writing.

- Perhaps the lawyer, using the facilities of the Colorado Secretary of State, forms the entity in the first 60 seconds and then advises that the lawyer represents only the entity. As stated in Formal Opinion 68, representation of an entity in formation involves numerous potential conflicts of interest. At this formation stage, the prospective owners will be making crucial decisions regarding the financing, management, and operation of the entity. Again, the lawyer should define the client and let all other parties around the table know whom the lawyer represents and that each may get their own attorney if they desire to do so.

Representing the group is not advisable. The parties in this type of transaction may or may not be sophisticated in business and legal matters; some of them may be more sophisticated than others. The lawyer cannot assume that sophistication, however. The lawyer must feel confident that all entity members understand the differing interests and the possibility that, if a dispute arises, the lawyer may be unable to represent either the entity members or the entity. Again, the lawyer should make his representation clear to the prospective constituents of the entity. Otherwise, the lawyer may be perceived to be representing one or more of the individual constituents rather than, or in addition to, the entity itself. Especially if the business fails, an unrepresented entity member might later claim that he or she thought the lawyer represented him or her.

(b) Dealing with Unrepresented Persons. Where members of the group are unrepresented, Colo. RPC 4.3 is applicable. As described above, it is the lawyer's obligation to clearly identify the lawyer's client to all of the parties. We recommend that this be accomplished in writing in the engagement letter, first, and in the governance documents, second. And in other writings from time-to-time as appropriate. Form acknowledgements are included as attachments to this paper.

(c) Add In The Spousal Relationship. When a business is being formed between spouses, the lawyer's life is even more complex. All businesses, like other relationships, start with nothing but blue skies and smooth sailing expected. All relationships have periods of stormy weather, sometimes ending in the termination of the relationship. When that involves a business

operation, emotions may be involved, but not to the extent that emotions are involved in the termination of a spousal relationship where other family members and other issues are frequently involved. These discussions of "who the client is" and notification are even more important in these relationships.

(d) Who Is The Client? Make It Clear. Prudent business attorneys will make the identity of the client (or clients) clear in their engagement letter and in subsequent governance documents. For example, see the following:

(e) The Engagement Letter. The engagement letter is generally the commencement of the attorney-client relationship and is usually the first place to make clear "who is the client."

> *With a Single Person:* In this engagement, the Law Firm represents only Jane Doe and does not represent any other party to the formation of the Business Entity. The Law Firm has advised the other parties to the formation of the Business Entity of this limitation of representation, and may, in the Law Firm's discretion further advise them in the future. Each person not represented by counsel in this matter is advised to consider whether to retain counsel.
>
> *With Spouses:* In this engagement, the Law Firm represents Jane Doe and John Roe with respect to the formation of the Business Entity. Ms. Doe and Mr. Roe are [spouses]. Nevertheless, disputes can arise between the owners and managers of a Business Entity that may also impact, or derive from, other relationships among the owners and managers. To the extent that Ms. Doe or Mr. Roe at any time believes that there is or may be such a dispute existing or anticipated, the Law Firm will not be able to represent either of them and may deem it appropriate to resign from representing each of them and the Business Entity itself. In such a case, each of Ms. Doe and Mr. Roe will be required to obtain separate, independent, counsel for legal advice with respect to the dispute and potentially the operation of the Business Entity.

(i) ***The Governance Documents.*** When parties are joining together to commence a business, the attorney's work usually involves preparation of "constituent documents,"[32] Some of the governance documents must be signed by some or all of the owners who, by doing so, would acknowledge the potentially conflicting relationships of the attorney. Where spouses are involved as the

[32] The term "constituent document" is defined in C.R.S. § 7-90-102(4) as a "constituent filed document" or a "constituent operating document." As defined elsewhere in C.R.S. § 7-90-102, those include articles of incorporation, articles of organization, bylaws, partnership agreement, operating agreement, and other governance documents.

attorney's co-clients, consider a representation such as the following.

A. Each of the undersigned Members represents and warrants that he or she has been advised by the Company to seek independent legal and financial counsel with respect to his or her execution of this Agreement and that he or she has had the opportunity to do so.

B. It is understood by each of Jane Doe and John Roe that the Law Firm drafted this Agreement at the request of Ms. Doe and Mr. Roe. Ms. Doe and Mr. Roe are [spouses].

C. Ms. Doe and Mr. Roe each recognizes the potential for conflicts of interest in the representation by the Law Firm in drafting and potentially interpreting this Agreement in the future. To the extent that any future dispute relating to this Agreement or any other matters develops, the Law Firm will be unable to represent either the Company, Ms. Doe or Mr. Roe. Each will need to retain their own counsel to address any such conflict to the extent they choose to do so.

D. Each of Ms. Doe and Mr. Roe recognizes the risk of a conflict of interest and, by executing this Agreement in their individual capacity and on behalf of the Company, thereby each provides his, her, or its informed consent to the waiver of the conflict of interest, confirmed in writing.

6. CONCLUSION

When representing multiple clients, an attorney cannot ask herself or himself too often: "who is my client." In Section 5.15 of her book,[33] Brooke Wunnicke includes "A checklist for Avoiding Conflict of Interest." Mrs. Wunnicke summarized her advice with respect to business lawyers and potential conflicts of interest by quoting Justice Joseph Story from a case decided in 1824:

> An attorney is bound to disclose to his client every adverse retainer, and even every prior retainer, which may affect the discretion of the latter. No man can be

[33] *Ethics Compliance For Business Lawyers*, John Wiley and Sons, Inc., 1987.

> indifferent to the knowledge of facts, which work directly on his interests, or bear on the freedom of his choice of counsel. Where a client employs an attorney, he has a right to presume, if the latter be silent on the point that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interests, which may betray his judgment, or endanger his fidelity.[34]

As fiduciaries representing clients, this remains true for attorneys in 2023 as it did 200 years ago.

[34] *Williams v. Reed*, 3 Mason 405, 418, 17F Cas. 733 (C.C. Me. 1824), quoted in *Ethics Compliance For Business Lawyers* at pages 112-113, available at https://cite.case.law/f-cas/29/1386/.