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Conflicts of Interest: Propriety of Multiple Representation

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Introduction

The Colorado Bar Association (CBA) Ethics Committee (Committee) has issued several opinions regarding conflicts of interest. Despite the guidelines provided in previous opinions, concern remains over the application of these guidelines to specific conflict situations. This opinion considers the propriety of multiple representation in the following common conflict situations:

- 1) representation of both a husband and wife in negotiating a property settlement before dissolution proceedings commence;
- 2) representation of both the buyer and seller in a residential real estate transaction;
- 3) representation of both the buyer and seller of a business; and
- 4) representation of individuals in drafting an entity agreement, and representation of solely an entity in its formation.

Syllabus

The Colorado Rules of Professional Conduct (Colorado Rules or Colo. RPC) may prohibit a lawyer from representing both a husband and wife in drafting an uncontested divorce settlement agreement, because this agreement ultimately must be approved by a court. Representation of both parties in a filed dissolution of marriage proceeding is not permissible. The other three scenarios present transactional rather than litigation situations and require thorough analysis as to whether the representation is proper. The Committee does not adopt a *per se* rule prohibiting a lawyer from representing opposing parties in a transactional matter; however, a lawyer should proceed very cautiously. Before accepting employment, the lawyer must determine whether the lawyer can adequately represent the interests of each party to the transaction. In those situations in which a lawyer ethically may accept such a role and agrees to do so, the lawyer must obtain the informed consent of each client, confirmed in writing. 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.

Analysis

I. General Conflicts Analysis: Current Clients

Colo. RPC 1.7 addresses conflicts of interest for current clients. It provides:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) 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.

(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.

The structure of Colo. RPC 1.7 provides an analytical framework: (1) identify whether there is a concurrent conflict, based on either direct adversity between the lawyer's clients or a significant risk of a material limitation on the lawyer's representation of the client; (2) if a conflict is present, determine whether each client can consent to the conflict or if it is nonconsentable; and (3) if the conflict is consentable, determine what must be communicated to the client to obtain informed consent, confirmed in writing.

A. Does a concurrent conflict of interest exist?

Colo. RPC 1.7(a) provides that a concurrent conflict of interest exists both where there is direct adversity and where there is a significant risk that a lawyer's other responsibilities or interests will materially limit the lawyer's ability to represent the client.¹ If a concurrent conflict exists, the lawyer must consider whether, despite the existence of the conflict, the lawyer will be able to provide competent and diligent representation. If more than one client is involved, the issue must be resolved as to each client.

The lawyer's duty to assess conflicts does not end with the initial consent of each client. If there is any significant change in the circumstances of the representation, the lawyer should repeat the analysis and again obtain informed consent.

B. If a conflict is present, may the client consent to the conflict?

Some conflicts may not be resolved by consent. Colo. RPC 1.7, cmts. [14]–[15]. If a conflict is nonconsentable, the lawyer must decline the representation. Both Colo. RPC 1.7 and the *Restatement (Third) of the Law Governing Lawyers (Restatement)* identify three categories of nonconsentable conflicts: (1) representation prohibited by law; (2) representation of opposing parties in the same proceeding; and (3) where a lawyer is unable to provide competent and diligent representation to each affected client. Colo. RPC 1.7(b) and *Restatement*, § 122. Representation prohibited by law includes, for example, limitations on the ability of some government entities to consent to conflicts. Colo. RPC 1.7, cmt. [16]. The second category, representation of opposing parties in the same litigation, undercuts our adversarial system of justice. Colo. RPC 1.7, cmt. [17].

Determining whether representation falls in the third category can be difficult. The lawyer must reasonably conclude that the lawyer will be able to provide competent and diligent representation to both clients. Colo.

RPC 1.7(b)(1) and cmt. [15]. The *Restatement* standard asks whether a disinterested lawyer would conclude the conflict would result in an adverse effect on the lawyer's relationship with or representation of either client. *Restatement*, § 122, cmt. g(iv).² If so, the conflict is nonconsentable. *Id.* Nonconsentable conflicts include joint representation of criminal co-defendants with irreconcilable interests and conflicts among members of a class action, despite informed consent of the class representative. *Id.* See also Colo. RPC 1.7, cmts. [16], [33]. A nonconsentable conflict also exists when a lawyer's duty of confidentiality to others precludes the lawyer from providing sufficient information to obtain another client's informed consent. See Thomas D. Morgan, *Lawyer Law: Comparing the ABA Model Rules of Professional Conduct with the ALI Restatement (Third) of the Law Governing Lawyers*, § 4.A.5 (2005).

No *per se* prohibition exists against representing more than one client on the same side in a litigation or transaction as long as the lawyer determines that the representation of all the clients is not materially limited by the joint representation. See Colo. RPC 1.7(b), cmts. [29]–[33]. See also American Bar Association (ABA) Comm. on Ethics and Prof. Resp., Formal Op. 95-390 (1995) (lawyer who represents a corporate client may not represent a non-client corporate affiliate in an unrelated matter if the representation of either entity may be materially limited by the lawyer's obligations to the other). Even outside the litigation context, representing opposing parties is always problematic, and it is the opinion of the Committee that it should be undertaken only in rare circumstances.

A lawyer may not represent opposing parties in negotiations. Colo. RPC 1.7, cmts. [28]–[29]. Therefore, before agreeing to represent both parties, the lawyer must ascertain whether the parties have substantially agreed on the material terms of the subject of the negotiations. Even then, as discussed below, the lawyer must remember that one party or the other may not have understood the consequences of the terms to which "agreement" had been made.

Another factor to be considered is the duration and intimacy of the lawyer's relationship with one or both of the clients. A long-standing relationship with one client may make it difficult for the lawyer to believe reasonably that he or she will be able to represent both parties diligently. The lawyer's personal and financial interest in maintaining that relationship may materially interfere with the lawyer's independent professional judgment. Colo. RPC 1.7, cmts. [8], [26]. See, e.g., *In re Kamp*, 40 N.J. 588, 194 A.2d 236, 240–41 (1963).

Case law holding a conflict is nonconsentable often involves an unsophisticated client who was inadequately informed about or incapable of adequately appreciating the risks of the conflict. *Restatement*, § 122, cmt. g(iv). However, when the client is sophisticated, particularly where the client has made use of independent legal counsel such as in-house counsel, courts rarely hold a conflict nonconsentable. *Id.*

C. What must be communicated to the client to obtain informed consent?

If the lawyer reasonably believes that other interests will not affect the representation, and the conflict is consentable, the lawyer may represent multiple clients if each client gives informed consent confirmed in writing. Colo. RPC 1.7(b)(4).

"Informed consent" and "confirmed in writing" are specifically defined in Colo. RPC 1.0. "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. Colo. RPC 1.0(e). The communication necessary will vary according to the circumstances. The lawyer ordinarily must (1) disclose the facts and circumstances giving rise to the conflict; (2) explain the advantages and disadvantages of the proposed course of conduct; (3) discuss other options or alternatives; and (4) in some circumstances, advise the client to seek advice from independent counsel. Colo. RPC 1.0, cmt. [6].

The lawyer should disclose that as between commonly represented clients, the attorney–client privilege does not attach, and if subsequent litigation develops, the privilege will not protect any communications between the lawyer and each party. In a joint representation, the lawyer also should disclose that information obtained from each client will be shared and that if one client decides that a material matter should not be shared with the other, or if a dispute otherwise develops, the lawyer probably will have to withdraw from representing both parties. The likely effect of such a withdrawal is that each party will incur higher legal costs than if separate counsel had been secured at the outset of the transaction. *See* Colo. RPC 1.7, cmts. [29]–[32].

For informed consent to be valid, the lawyer must explain the risks and benefits in sufficient detail. The analysis of the Wisconsin Supreme Court, although made under a prior version of the Rules of Professional Conduct, is instructive:

An effective waiver of a conflict or potential conflict of interest which is knowing and voluntary requires the lawyer to disclose the following: (1) the existence of all conflicts or potential conflicts in the representation; (2) the nature of the conflicts or potential conflicts, in relationship to the lawyer's representation of the client's interests; and (3) that the exercise of the lawyer's independent professional judgment could be affected by the lawyer's own interests or those of another client. On the part of the client, it also requires: (1) an understanding of the conflicts or potential conflicts and how they could affect the lawyer's representation of the client; (2) an understanding of the risks inherent in the dual representation then under consideration; and (3) the ability to choose other representation.

In re Guardianship of Lillian P., 617 N.W.2d 849, 856 (Wis.App. 2000).

Valid informed consent to a conflict of interest involves more than just a statement from the lawyer; it also requires the lawyer to ensure the client understands the ramifications of the representation. Each client must be aware of his or her ability to reject the proposed conflicted representation.

Even when the lawyer provides an extensive conflicts of interest disclosure, the lawyer may be at risk of violating Colo. RPC 1.7. For example, in *People v. Quiat*, 979 P.2d 1029 (Colo. 1999), the lawyer was suspended for ninety days for representation despite impermissible conflicts of interest. He had provided a disclosure of the conflicts in writing, even though under the former version of Rule 1.7 he was not required to do so. The Colorado Supreme Court upheld the finding that "Quiat's disclosures were 'totally insufficient' in that they did not detail the potential for conflicts, nor disclose the waiver of attorney-client privilege." *Id.* at 1035.

"Confirmed in writing" denotes either informed consent that is given in writing by the client or a writing that the lawyer promptly transmits to the client and that confirms an oral informed consent. If it is not feasible to obtain a contemporaneous written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. Colo. RPC 1.0(b) and cmt. [1]. "Writing" and "written" are defined broadly as "a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail." A "signed" writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing. Colo. RPC 1.0(n).

II. Specific Conflicts Situations

A. Representing a husband and a wife in negotiating a property settlement agreement before a dissolution proceeding commences and joint representation after a dissolution proceeding commences

When a husband and a wife approach a lawyer to draft an "uncontested" settlement agreement as part of their pending dissolution of marriage action, the situation presents a direct conflict. Even though they may not be aware of it, the wife and husband have conflicting interests on matters such as property division, child support, allocation of parental responsibilities, parenting time, and spousal maintenance. Even if the husband and the wife have agreed to the general terms beforehand, the situation may quickly deteriorate into animosity.

Under Colo. RPC 1.7(b)(3), representing both the husband and the wife in a pending dissolution of marriage proceeding is not permissible. It is unclear whether that prohibition applies to joint representation *prior to* the filing of the action. Because a dissolution of marriage cannot be completed without filing the separation agreement with and seeking approval by the court, the rule may also prohibit the representation of both the husband and the wife in any matters related to the dissolution, even prior to filing. Regardless of how amicable the husband and the wife appear, the inherent conflict in their interests may make it impossible for a lawyer to represent both of them.³

B. Representing the buyer and the seller in a residential real estate transaction

In a real estate transaction, the positions of the purchaser and the seller are inherently conflicting because the buyer desires to purchase for less money and the seller to sell for more money.⁴ *In re Wagner*, 599 N.W.2d 721, 726 (Iowa 1999); *Baldasarre v. Butler*, 254 N.J. Super. 502, 517, 604 A.2d 112, 119 (App.Div. 1992), *aff'd in part and rev'd in part on other grounds*, 132 N.J. 278, 625 A.2d 458 (1993).

May the lawyer still proceed with the representation? The lawyer must reasonably believe that the interests of the clients will be adequately protected. Then, if the lawyer reaches that conclusion, the clients must provide informed consent in writing after full disclosure of the potential conflicts.

Other states generally have agreed that, as long as the lawyer complies with the requirements of Colo. RPC 1.7—that is, where the parties already have agreed to the essential terms of the transaction and they have given informed consent confirmed in writing—a lawyer may represent both parties in a residential transaction. *See, e.g., Matter of Dolan*, 384 A.2d 1076, 1081–82 (N.J. 1978); Mass. Bar Comm. on Professional Ethics, Ethics Op. 90-3 (1990); S.C. Bar Ethics Advisory Comm., Advisory Op. 00-17 (2000). Essential terms would include at least price, time, and manner of payment, status of title on transfer, whether any personal property is to be included, status of leases or tenancies, the amount of earnest money deposit, and the treatment of amounts so deposited on default.

The complexity of the transaction will be a factor in whether it is appropriate to ask for client consent. *See Baldasarre*, 625 A.2d at 467 (lawyer may not represent both buyer and seller in high-value or complex commercial real estate transaction, even with client consent). The lawyer also should consider practical factors such as the financial and emotional significance of the transaction for either party. If the lawyer previously has represented either party, this fact must be disclosed. *See* Comment, "Conflicts of Interest in Real Estate Transactions; Dual Representation—Lawyers Stretching the Rules," 6 *W. New Eng. L.Rev.* 73, 78-80 (1983).

Although decided under different rules (requiring, for example, "full" disclosure), several of the cases cited in this opinion will be useful for the lawyer in crafting appropriate disclosures. *See, e.g., People v. Quiat*, 979 P.2d at 1031-42; *In re Wagner*, 599 N.W.2d at 726-29; *Matter of Dolan*, 384 A.2d at 1080-82. *See also id.* at 1085 (dissenting opinion); *In re Kamp*, 194 A.2d at 239–41. Lawyers should be especially mindful that disclosures must be made and all clients' informed consent must be obtained at the outset of the representation.

Even though the parties have negotiated the business terms of their agreement, the lawyer must fulfill the full range of duties accompanying the attorney–client relationship. *See* CBA Formal Op. 29 (Jan. 18, 1964) (the lawyer is "representing" these parties if he or she prepares documents affecting their rights and liabilities for a fee). The lawyer may not act solely as a scrivener. *See In re Cohen*, 8 P.3d 429, 431 (Colo. 1999); *Florida Bar*

v. Teitleman, 261 So.2d 140, 143 (Fla. 1972) (preparation of legal documents for a fee constitutes representation; suggestion that it is merely a "scrivener's" task borders on the presumptuous). *See also*, *Restatement*, § 130, cmt. b. To permit otherwise would allow a lawyer to limit liability for acts performed as a lawyer. Colo. RPC 1.8(h). Although a lawyer may provide unbundled or limited legal services (*see* Colo. RPC 1.2(c)), limitations on the scope of the representation must be made clear at the outset. Even where parties have agreed on what they consider to be the material terms, many if not all of the "boilerplate" provisions of a purchase contract have the potential to result in an advantage for one party over the other. Inherent in legal representation is that a lawyer will provide advice as to the desirability of the terms of the sale. Where the lawyer represents both the buyer and the seller, the lawyer must advise each on many points. For a thorough discussion of the difficulties involved in appropriately carrying out the duties accompanying multiple representation, *see Matter of Dolan*, 384 A.2d at 1082-86 (Pashman, J., concurring and dissenting).

Two issues that frequently develop in multiple representation in real estate transactions are (1) how the lawyer should resolve material issues the parties failed to consider, and (2) how the lawyer should resolve a situation where, in light of information acquired during the representation, a contract term is fraudulent or materially misrepresents the true state of affairs. These issues are difficult because a lawyer accepting multiple representation assumes the role of an adviser to both clients, rather than that of an advocate for only one client. *See* Colo. RPC 1.7, cmt. [17].

The first issue may exist, for example, if inspection of the property reveals previously undiscovered structural defects or needed repairs of other problems. The lawyer must inform the parties of the alternatives in resolving such an issue and of the effect each alternative will have on the parties. Regardless of the lawyer's professional judgment regarding resolution of the issue, such as the terms of the initial agreement, the issue must be resolved solely by the parties, not the lawyer.

The second issue could arise, for example, when prior to closing a lawyer discovers a defect in title that the seller has not previously disclosed. Colo. RPC 1.4 requires a lawyer to communicate adequately with the client (the seller) about the risks of failing to disclose the title defect. However, the seller might not want the lawyer to disclose the defect, to the detriment of the other client (the buyer). Colo. RPC 1.4 also requires the lawyer to communicate adequately with the buyer about the defect in title. Therefore, the lawyer should ensure that each party understands at the commencement of the representation that any problem or defect discovered concerning the real estate or the transaction itself would necessarily be raised for their mutual consideration. *See* Note, "Simultaneous Representation: Transaction Resolution in the Adversary System," 28 *Case W. Res. L.Rev.* 86, 114 (1977). Furthermore, failure to disclose such a defect, if it amounts to a criminal act or fraud, would violate Colo. RPC 1.2(d).

As mentioned above in the general analysis, if circumstances change, the lawyer must reconsider whether joint representation is still permissible. For example, if the transaction fails and the parties disagree about whether the buyer is entitled to a refund of the earnest money, the lawyer might have no option but to withdraw from representing both parties.

In the Committee's judgment, representation of the buyer and the seller in a residential real estate transaction is permissible if the lawyer has complied with the standards outlined above. However, it will be difficult to comply with those standards except, perhaps, in a case where both parties are knowledgeable and sophisticated.

C. Representing the buyer and the seller in the sale of a business

A lawyer's representation of both the buyer and the seller in a business transaction has been characterized as one of the clearest cases of improper representation of conflicting interests. *In re Boivin*, 271 Or. 419, 533 P.2d 171, 174 (1975).

Even where the lawyer's role is merely to set forth the parties' understanding, few agreements are so simple that no provision could be added, condition imposed, or terminology shaded so as to favor one of the parties. Therefore, the Committee concludes that only in the rarest of circumstances would a lawyer be able to represent adequately the interests of the buyer and the seller in a proposed sale of a business. Colo. RPC 1.7. *See also People v. Underhill*, 683 P.2d 349 (Colo. 1984) (representing both the buyers and the sellers of bars in two separate transactions without disclosure of possible conflicts of interests resulted in one year and one day suspension); *accord In re Sedor*, 276 A.D.2d 103 (N.Y. 2000) (representing the buyer and the seller of business without adequate disclosures resulted in six month suspension).

It has been held that where the parties independently agreed to the terms of the agreement, the lawyer did not "sit at both sides of the table during the negotiations," and the clients signed waivers acknowledging both the risks inherent in joint representation and their ability to seek other counsel, the lawyer was ethically permitted to represent both the buyer and the seller in a simple business transaction. *Van Kirk v. Miller*, 869 N.E.2d 534 (Ind. 2007). However, as in a real estate transaction, the more complex the matter, the less likely the lawyer could represent both the buyer and seller.

The inherent difficulty in representing both parties in the sale of a business stems from the many legal decisions that must be made regarding choice of entity, employee status, tax implications, representations to be made or requested, appropriate default provisions, and other issues going far beyond the basic terms and conditions of payment. For an illustration of the dangers inherent in multiple representation in the context of a sale of a business (and the severe repercussions from an improper multiple representation), *see People v. Razatos*, 636 P.2d 666 (Colo. 1981). Thus, a lawyer who undertakes to represent both the buyer and the seller of a business must be aware of the heavy burden that he or she must meet.

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

The comments to Colo. RPC 1.7 specifically contemplate a lawyer acting on behalf of multiple clients when their interests are generally aligned, such as helping entrepreneurs to organize and establish a business entity.⁵ Colo. RPC 1.7, cmt. [28]. In such circumstances, "the lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests." *Id.*

Representation of an entity in formation involves numerous potential conflicts of interest. At this stage, crucial decisions are made regarding the operation of the entity. The lawyer must be very clear about the identity of the client. Otherwise, the lawyer may be perceived to be representing one or more of the individual partners/shareholders/members (entity members) 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. The parties in this type of transaction may be sophisticated in business and legal matters. 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. For a discussion of the possible roles the lawyer may take and the ethics rules implicated, *see* Rothrock, "Entity Formation: Defining the Client and the Duty of Confidentiality," 34 *The Colorado Lawyer* 77 (July 2005) (Rothrock); Thomas E. Rutledge and Phuc H. Lu, "No Good Deed Goes Unpunished: Pitfalls for Counsel to a Business Organization about to be Governed by a New Law," 45 *Brandeis L.J.* 755 (2007).

The lawyer also must consider the implications of Colo. RPC 1.13, which provides in pertinent part:

A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(f) 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.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

If the lawyer intends to represent only the new entity or some but not all of the entity members, and if the lawyer knows or reasonably should know that an unrepresented entity member misunderstands the lawyer's role, the lawyer should inform that entity member that the lawyer does not represent such member. Colo. RPC 4.3.

A common scenario leading to a conflict is when some entity members contribute capital and others contribute ideas or management expertise to a new venture. The parties must agree on the relative value of each entity member's contribution to the enterprise, and the lawyer may not negotiate for the parties.

Another issue arises if the lawyer wishes to represent only the entity in its formation. The conflict potential exists because the entity does not exist at the outset of the representation and, therefore, the lawyer must instead communicate with some or all of the entity members. However, because the entity does not yet exist, it cannot consent to the conflict. Some states overcome these problems by applying the following analysis:

Where (1) a person retains a lawyer for the purpose of organizing the entity and (2) the lawyer's involvement with that person is directly related to that incorporation and (3) such entity is eventually incorporated, the entity rule applies retroactively such that the lawyer's pre-incorporation involvement with the person is deemed to be representation of the entity, not the person.

Jesse v. Danforth, 485 N.W.2d 63, 67 (Wis. 1992). See also Rothrock at 81 n.18, citing additional cases following this approach.

Other courts have concluded that a lawyer does maintain an attorney-client relationship with individual entity members post-formation, contrary to the principle stated in *Jesse*. See, e.g., *Franklin v. Callum*, 804 A.2d 444, 448 (N.H. 2002) (attorney for unincorporated solid waste management district represented each member thereof). Although the Colorado courts have not yet addressed this issue, the Committee suggests that, if a lawyer makes adequate disclosures of his or her intent to not represent individual entity members, then the lawyer should be able to avoid forming an attorney-client relationship with the individuals and may represent solely the to-be-formed entity.

The Committee concludes that in the formation of a new entity, the lawyer may choose to represent (a) some or all of the entity members but not the entity; (b) the entity itself and none of the individual entity members; and (c) the entity and one or more of the individual entity members. However, in all circumstances, the lawyer must first undertake the conflicts analyses described above. The lawyer will need to identify current and potential areas of conflict, adequately determine whether those conflicts are consentable, and then, if they are consentable, obtain informed consent from each affected client.

Formal Ethics Opinions are issued for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel, and do not provide protection against disciplinary actions.

Notes

1. *See also* Colo. RPC 1.7, cmts. [6]–[13].

2. The current version of Colo. RPC 1.7(b)(4) omits the statement in the old rule that the client's consent could not be validly obtained where a disinterested lawyer would conclude that the client should not consent under the circumstances. Nevertheless, the Committee believes the lawyer still should consider carefully whether consent is truly "informed" if a disinterested lawyer would advise against it. Moreover, the Committee believes that most, if not all, situations in which a disinterested lawyer would conclude that the client should not consent also will be situations in which the lawyer considering undertaking the representation will not be able to reasonably believe that the lawyer will be able to provide competent and diligent representation to each affected client. Colo. RPC 1.7(b)(1).

3. Texas Ethics Opinion No. 583 (2008) appears to support the conclusion that the *per se* prohibition stated in Rule 1.7(b)(3) applies to any matters that necessarily must proceed to litigation, whether contested or not. Certainly, the safer course for any lawyer is not to agree to joint representation of adverse parties in any matter that, like a dissolution of marriage, ultimately must proceed to litigation.

4. This opinion assumes the residential real estate transaction is between parties dealing at arm's length and without a prior substantial relationship to each other. The parties' interests may be more closely aligned in transactions between family members, close friends, related entities, or a closely held corporation and its owners. Even in those scenarios, the lawyer must undertake the above analysis to determine whether the representation is proper.

5. This opinion assumes the transaction is between parties dealing at arm's length and without a prior substantial relationship to each other. *See supra* at n.4.