

# ETHICAL ISSUES FOR BUSINESS LAWYERS

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## **I. Introduction.**

### **A. Background**

Over the past decade the landscape of business organization has changed dramatically. Not only are entirely new forms of business association such as limited liability companies, limited liability partnerships and limited liability limited partnerships coming into existence, but the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) has completed a decade long project to revise the uniform partnership act<sup>1</sup> and has promulgated a Uniform Limited Liability Company Act.<sup>2</sup> Limited liability company legislation has been adopted in all but three states, with those expected to enact legislation presently. This article considers the ethical responsibilities and legal liability of attorneys representing various types of partnerships and limited liability companies (collectively “associations”) and partners in partnerships and members in limited liability companies (collectively, “owners”), particularly with respect to the implications for such representation of the fiduciary relationships among the owners and between the owners and the association.

Many aspects of associations are apparently contradictory, or, at best, ambiguous. On one hand, a partnership has been characterized as no more of an entity than a friendship. On the other, an association is at once a contract among its owners and a separate entity with its own legal identity.<sup>3</sup> The owners are at once self-interested, protecting their own interests, and fiduciaries to other owners and the association.<sup>4</sup> The responsibility and liability of attorneys in

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<sup>1</sup>UNIFORM PARTNERSHIP ACT (1994) (formerly, and commonly, known as the Revised Uniform Partnership Act, hereafter referred to as “[R]UPA”).

<sup>2</sup>The UNIFORM LIMITED LIABILITY COMPANY ACT (“ULLCA”) was promulgated by NCCUSL at its annual meeting in Chicago in 1994, but is still undergoing restyling and review by the American Bar Association. References to ULLCA are to the draft being considered in January 1995.

<sup>3</sup>The uniform acts characterize both partnerships and limited liability companies as separate entities, distinct from their owners. ULLCA § 201, RUPA § 201.

<sup>4</sup>The fiduciary nature of general partners and members in a member managed limited liability

representing these entities and their owners has, as a result, been characterized by the same ambiguity and inconsistency.

In order to understand the appropriate conduct in representing an owner, association, or both, an attorney must understand the nature of the relationships and duties among the owners. The attorney then should clearly determine who he or she will represent and make that representation clear to all both the clients and those who might mistakenly believe that the attorney is representing them. This disclosure should also make clear to the client, and probably those who are not clients but may not understand the attorney's responsibility, what is entailed in the representation. Finally, once the attorney has clearly identified his or her representation to all concerned, he or she must consider and understand the potential liability to those that the attorney is not representing.

This article will discuss the representation of unincorporated associations and the emerging area of an attorney's liability for aiding and abetting a breach of fiduciary duty. In this latter context, it is important to understand the duties within limited liability companies, which, as noted below, vary considerably from state to state. Finally, the article suggests some language which attorneys might consider using to make clear the representation that they are undertaking.

#### **B. Sources of Guidance:**

1. The **Model Rules of Professional Conduct** (the "Model Rules"), adopted by the American Bar Association House of Delegates on August 2, 1983.

2. The **Colorado Rules of Professional Conduct** (the "Colorado Rules"), adopted by the Colorado Supreme Court on May 7, 1992 and became effective on January 1, 1993 and represent the Supreme Court's official exercise of its jurisdiction to regulate the practice of law. They are based on the Model Rules with several modifications that are effective in Colorado. The Rules establish the ethical responsibilities of an attorney, they do not necessarily set the standards for civil liability to clients and others.<sup>5</sup>

3. **Colorado case law** interprets and determines the ethical requirements applicable to lawyers and the standards by which the liability of lawyers is determined.

4. **Formal (and Informal) Opinions of the Colorado Bar Association Ethics Committee**, while not necessarily binding on the courts, reflect the only institutional interpretation of the ethical responsibilities of lawyers.

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companies are clear. Limited partners as non-managing members of manager-managed limited liability companies are generally not considered to have fiduciary duties to the association or the other owners.

<sup>5</sup> According to the preface to the Colorado Rules, "Violation of a Rule should not in and of itself give rise to a cause of action nor should create any presumption that a legal duty has been breached."

5. **Formal (and Informal) Opinions of the American Bar Association Ethics Committee** are issued by the Standing Committee on Ethics of the American Bar Association and are interpretations of the Model Rules.

6. The **Restatement (third) of the Law Governing Lawyers** (the “Restatement”) is a project of the American Law Institute (“ALI”) which combines some of what the reporters think the law should be and some “restatement” of what the law is. It provides important discussions of the important issues related to the practice of law. Most of the comments cited in this outline are from Tentative Draft No. 8 (March 21, 1997). It should be noted that the Restatement has not been finalized and is subject to modification by the ALI before it is finalized.

7. **Ethics 2000** is a project of the American Bar Association to review and determine necessary changes in the ABA Rules of Professional Responsibility in light of changes in the legal profession.

8. The **ACTEC Commentaries on the Model Rules of Professional Conduct** (“ACTEC Commentaries”) were written in 1993 and revised into a second edition in 1995 by the American College of Trust and Estate Counsel (Michael Farley, Professor John R. Price, and Bruce S. Ross, Reporters).<sup>6</sup>

9. The **Third-Party Legal Opinion Report, Including the Legal Opinion Accord and the ABA Guidelines** (“Silverado Accord”),<sup>7</sup> consists of a negotiated set of rules and definitions to be used in issuing and requesting third party opinions in business transactions. Several states and the American College of Real Estate Lawyers (“ACREL”) have issued reports incorporating or commenting on the Silverado Accord.<sup>8</sup>

10. The **TriBar and Legal Opinion Accord** is an accord adopted by several state bar associations.<sup>9</sup> The TriBar Opinion Committee began as a committee of the three New York bar

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<sup>6</sup> Copies are available from the ACTEC Foundation, 3415 S. Supulveda Boulevard, Suite 460, Los Angeles, CA 90034, 310-398-1888. In addition, the ACTEC Foundation will be publishing a guide entitled *Engagement Letters: A Guide for Practitioners (for use in conjunction with the ACTEC Commentaries)*.

<sup>7</sup> ABA Business Law Section, 4 Bus. Law. 167 (Nov. 1991).

<sup>8</sup> For an excellent discussion of many of the issues presented by the issuance of opinions, see Edward N. Barad, “Third-Party Opinions of Counsel, Assessing the True Risk,” in the materials for the Practising Law Institute’s Commercial Real Estate Financing - What Borrowers and Lenders Need to Know Now. May, 1999.

<sup>9</sup> The initial version of the report was published as Legal Opinions to Third Parties: An Easier Path, A Report by Special Committee on Legal Opinions in Commercial Transactions, New York County Lawyers' Association, 34 Bus. Law. 1891 (1979). Subsequent addenda and reports have appeared at

Associations (state, city, and county), but now includes members of the Boston, Chicago, Delaware, Toronto, Allegheny County (Pittsburg), Texas and Washington, D.C. bar associations.<sup>10</sup>

## II. The Engagement Process

### A. Commencement of an engagement<sup>11</sup> and initial contacts in connection with potential engagement.

1. **Initial contacts with a person with a potential engagement.** In considering whether to take on a new matter, the lawyer may approach the engagement differently depending upon its source.

a. **Existing clients.** An existing client or former client for whom the lawyer has done work (or the client for whom is currently doing work) may request that the lawyer undertake a new matter. This is an area in which there is a significant potential for misunderstanding on the part of the lawyer and the client, particularly if the lawyer is not attentive to when a new matter is undertaken.

b. **Beauty contests.** A potential (or existing) client may seek bids from more than one law firm to provide legal services. As part of the bid process, it is often necessary for the person with the potential engagement to disclose confidential information with respect to the engagement.<sup>12</sup>

c. **Referrals from colleagues and other attorneys.** It is prudent to consult with the person or attorney referring the client. There may be limitations on what the referring attorney can disclose if the referred potential client is also a client of the referring attorney.

d. **Cold calls.** Calls from<sup>13</sup> potential clients that are completely

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36 Bus. Law. 429 (1979); 44 Bus. Law. 563 (1989); 46 Bus. Law. 717; and id. 959 (1991)).

<sup>10</sup> The TriBar Opinion Committee, *The Collected TriBar Legal Opinion Reports 1979-1998*, ABA Section of Business Law, 1999.

<sup>11</sup> This outline discusses “engagements” rather than “clients” because each relationship with a client is unique and deserves separate consideration. This outline discusses “potential engagements” as opposed to “would-be clients” (the language of ABA Formal Opinion 90-358).

<sup>12</sup> For a thorough discussion of beauty contests, see Kenneth D. Agran, *The Treacherous Path to the Diamond-Studded Tiara: Ethical Dilemmas in Legal Beauty Contests*, 9 Geo. J. Legal Ethics 1307 (Summer 1996).

<sup>13</sup> Note that contacts with potential clients initiated by the lawyer may be limited by Rule 7.3 (as amended effective January 1, 1998).

unknown to the attorney receiving them require the greatest degree of care. Particularly in the case of a client who has gotten into a transaction and has either been underrepresented or is changing attorneys, it is prudent to do some research before undertaking the representation. This may involve speaking to the former attorney, which, in turn, may require that the client consent to the waiver of the previous attorney's duty of confidentiality. If the client is unwilling to do so, the attorney considering undertaking the engagement should be very cautious.

## 2. Duties to potential client.

a. **Confidentiality.** An attorney who is contacted by a potential client owes that potential client a duty of confidentiality. As stated in an ABA Formal Ethics Opinion:

Information imparted to a lawyer by a would-be client seeking legal representation is protected from revelation or use under Model Rule 1.6 even though the lawyer does not undertake representation of or perform legal work for the would-be client. If the lawyer takes adequate measures to limit the information initially imparted by the would-be client, in most situations the lawyer may continue to represent or to undertake representation of another client in the same or a related matter. When the information imparted by the would-be client is critical to the representation of an existing or new client in the same or related matter, however, the lawyer must withdraw or decline the representation unless a waiver of confidentiality has been obtained from the would-be client. ABA Formal Opinion 90-358 (September 13, 1990).

b. **Proposed Model Rule 1.18** The Ethics 2000 - Commission on the Evaluation of the Rules of Professional Conduct has proposed a new Rule 1.8 dealing with the duties to a prospective client. Under the proposed rule, a lawyer who consults with a person concerning the possibility of their forming a client-lawyer relationship has the duty to protect information by not using or disclosing the information and not representing a client whose interests are materially adverse to those of the prospective client in the same of a substantially related matter if the lawyer has received information that could be harmful to the client unless the lawyer is screened or the prospective client has given informed consent. In addition, the lawyer must protect any property of the prospective client and provide competent assistance to the extent the lawyer gives the prospective client legal advice.<sup>14</sup>

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<sup>14</sup> Proposed Rule 1.18 provides:

### DUTIES TO A PROSPECTIVE CLIENT

(a) A person who consults with a lawyer concerning the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has consulted with a prospective client shall not use or reveal information learned in the consultation, except as Rules 1.6 and 1.9 would permit or require with respect to

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information of a client or former client.

(c) Neither a lawyer subject to paragraph (b) nor a lawyer to whom disqualification is imputed under Rule 1.10 shall represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d).

(d) Representation is permissible if either:

(1) both the affected client and the prospective client have given informed consent in writing to the representation, or

(2) the lawyer who received the confidential information took reasonable steps to avoid exposure to more information than was necessary to determine whether to represent the prospective client and that lawyer is screened as provided in Rule 1.11.

Similarly, *Restatement (Third) of Law Governing Lawyers* § 27 (Lawyer's Duties to Prospective Client) (Preliminary Final Draft No. 1, March 29, 1996) provides:

When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter or matters, and no such relationship ensues, the lawyer must:

(1) protect the person's confidential information by:

(a) not subsequently using or disclosing confidential information learned in the consultation, except to the extent permitted with respect to confidential information of a client; and

(b) not representing a client whose interests are materially adverse to those of the prospective client in the same or a substantially related matter, but only when the lawyer (or another lawyer whose disqualification is imputed to the lawyer under the standards of §§ 203 & 204) has received from the prospective client confidential information that could be significantly harmful to the prospective client in the matter, unless:

(i) any personally-prohibited lawyer is screened as stated in s 204(2)(b) & (c); or

(ii) both the affected client and the prospective client have given informed consent to the representation under the limitations and conditions provided in s 202;

3. **Procedure in dealing with potential client.** Formal Opinion 90-358 suggests that the following steps be taken to protect the confidentiality of the information of the potential client and to minimize the possibility of disqualification on other matters.

a. **Identify conflicts of interest.** Conflicts should be identified “at the earliest practicable point in discussions with a would-be client.” For example, are the adversaries of the potential client existing clients.

b. **Limit information to that necessary to check for conflicts.** Before consulting with the potential client, the lawyer should obtain only information sufficient to determine whether a conflict or potential conflict of interest exists. This will normally involve the identities of the potential client, potentially adverse parties, and other parties related to the engagement. Further, in a situation in which conflict is highly likely, such as practice in a small community, an area of practice with few major clients, or large firm practice, by knowing the identities of the parties, a lawyer may determine not to handle a small matter which might create conflicts with more significant matters for other clients in the future. By checking the identities before the initial consultation, if the potential client is adverse to an existing client in a situation in which the conflict may not be waived, or if either the lawyer or the client are not inclined to waive the conflict, the lawyer can decline the engagement without learning anything from the potential client that might disqualify him or her in the representation of existing client. The Formal Opinion also suggests getting information at the outset to determine “whether the new matter is one within the lawyer’s capabilities and one in which the lawyer is willing to represent the would-be client.” In a situation in which time is not critical, the lawyer might want to clear the identities of the participants before finding out the nature of the matter to keep the amount of information imparted to the lawyer to a minimum.

c. **Limit the discussions before the decision to undertake the representation has been made.** In discussions in any new matter (even for an existing client) the lawyer should advise the potential client to limit discussions to the extent necessary to determine whether the lawyer will take the matter. Generally, these matters are: (1) conflicts as described above, (2) the general nature of the matter so the lawyer can determine his or her competence and willingness to take a matter in that area of law, and, (3) perhaps, a general discussion of the client’s expectations with respect to expenditures of success, time and money. Thus, the risk of receipt of confidential information is minimized. As a result, if the lawyer finds that the matter is not one he or she is willing to undertake, the risk of being disqualified from representing an adversary will be minimized.

d. **When practicable obtain waivers of confidentiality.** If the

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(2) protect the person's property in the lawyer's custody as stated in ss 56-58; and

(3) use reasonable care to the extent the lawyer gives the person legal advice or provides other legal services for the person.

potential client agrees and understands the consequences of a waiver, it may be possible to obtain a waiver of confidentiality. The Formal Opinion states:

It also would be proper, in the Committee's opinion, for the lawyer to advise the would-be client that, because of the need to obtain information from which to determine whether a conflict of interest or a potential conflict exists, the information divulged preliminarily for this purpose will not be confidential, and that the lawyer or firm would not be barred as a result of receiving the information from representing another client if a conflict of interest or potential conflict is found to exist or if for other reasons no representation is undertaken. (footnote omitted) The waiver of confidentiality should be in writing and signed by the client; it should reflect clearly that all relevant consequences of providing the waiver were fully explained to and understood by the would-be client.

e. **Screening<sup>15</sup> the lawyer contacted by the potential client.** ABA Formal Opinion 90-358 provides that as soon as a conflict of interest is identified or the would-be client's representation not undertaken for another reason, screen the lawyer with information relating to the proposed representation from disclosing it within the law firm. As is noted below, the attorney may be required to clear conflicts with existing clients. Thus, although the potential client would ordinarily enjoy a right of confidence even if they engagement does not occur, the lawyer should seek consent to disclose at least the scope of the engagement should a potential conflict be identified.<sup>16</sup>

4. **Notification of declination of the engagement.** If either the attorney or the client determines that the attorney will not undertake the representation, it is good practice for the attorney to confirm that the attorney will not be representing the client. It is often also useful to remind the client of any rights, duties or limitations that may be applicable, such as time periods to take such actions as making tax elections and other filings, statutes of limitations or other relevant information that have been discussed with the potential client.

## **B. Determining whether to take the engagement.**

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<sup>15</sup> As used in the parlance of ethics and professional responsibility the term "screening" has two distinct meanings related to conflicts. "Screening" as used here refers to comparing the potential clients and adverse parties against the firm's list of clients and adverse parties. The term "Screening" is sometimes used to describe the circumstances in which an individual lawyer within a firm is prevented from having any contact with a matter with respect to which the lawyer might have a conflict, as in the case where the adverse party is represented by the lawyer's former firm.

<sup>16</sup> Model Rule 1.11 provides for screening of a former government lawyer (but not for screening of private lawyers when they change firms. The Ethics 2000 Committee is considering the rules applicable to screening.



Several factors should be considered before undertaking an engagement.

1. **The rebuttable presumption that the engagement will be undertaken.**

We, our families, our creditors, our employers, the partners in our firms, and our heirs, successors and assigns expect that we will undertake any reasonable engagement that is presented. In the desire to develop and maintain a successful practice and as a concession to the brevity of life, it is important to remember that all of these expectations should be disregarded where the engagement cannot be undertaken for the reasons set forth below.

2. **Considerations that should be weighed before undertaking an engagement.** Each of the following matters should be considered before undertaking any new engagement, including those for an existing client.

a. **Integrity and sophistication of the client.** Representing an untrustworthy client is, of course, a no win situation. The risks of representing such a client include the possibility of being a participant in an action that may give rise to liability and having to constantly worry about the client's holding the lawyer responsible for the client's actions (even when the actions are taken without consulting the lawyer or against the lawyer's advice). If the lawyer is lucky the worst result from representing an untrustworthy client is that the lawyer won't be paid. The trustworthy but unsophisticated client presents a different problem. It is essential that the lawyer ensure that the client understand the alternatives and be able to weigh the comparative risks of alternative courses of action. If the client is "invincibly ignorant" (i.e., the client cannot, or refuses to, intelligently understand the risks of a particular transaction) the lawyer may benefit both himself or herself and the client by declining the engagement. Often the most valuable asset that a lawyer brings to an engagement is the lawyer's judgment. The lawyer should rely on that judgment when considering whether to undertake an engagement.

b. **The ability to meet the client's expectations.** It is important to understand the client's expectations with respect to chances of success, cost, time to completion, and manner of payment at the time the engagement is undertaken. If the lawyer does not believe that any of the expectations are realistic, the lawyer should ensure that the disagreement on expectations is resolved before entering into the engagement.

c. **Competence and comfort in a particular area of law.** An attorney should not undertake matters in which the attorney does not have competence, or at least the willingness to acquire the competence.<sup>17</sup>

d. **Time and resources to complete engagement.** Even where an attorney has the expertise to handle a matter, the attorney should also be satisfied that he or she has the time and desire to conclude the matter promptly. Many of the disciplinary matters

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<sup>17</sup> The commentary to Rule 1.1 indicates that a lawyer "should accept employment only in matters in which the lawyer is or intends to become competent."

reported arise from an attorney's neglect of a matter undertaken.

e. **Impermissible or impracticable conflicts with other work the lawyer is doing or other clients.** As discussed in greater detail below, it is essential to identify conflicts with existing clients and former clients early in the transaction.

### C. Conflicts.

It is essential to identify potential conflicts as early in the discussions as possible. This requires an accurate record of clients and matters handled by the firm. Once the potential conflicts have been identified, the attorney can determine the actions that can be taken in response to the conflicts. What will constitute a conflict and the lawyer's response to it will differ depending on whether the conflict relates to a current client or a former client.

1. **Conflicts with existing clients.** Clients are entitled to rely on the confidentiality of information given to the lawyer<sup>18</sup> and to expect the lawyer's undivided loyalty<sup>19</sup> with respect to services performed. The duty of loyalty precludes the lawyer from representing a person in a matter where the person is directly adverse to a client of the lawyer, unless the lawyer reasonably believes that the representation of the person will not adversely affect the lawyer's relationship with the client and both the person and the existing client consent after consultation.<sup>20</sup> A lawyer may not undertake a matter if the representation of the client in the matter would be limited by the lawyer's responsibilities to another client or the lawyer's own interests unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation.<sup>21</sup>

2. **Duties with respect to former clients.** The duties owed by an attorney to a person who has ceased to be a client of the attorney are fewer than those owed to an existing client, but they are far from eliminated. An attorney may not undertake an engagement (the "new engagement") where the new engagement is in the same or substantially related matter as that in which the lawyer represented the former client if the new engagement involves a position that is materially adverse to the interests of the former client, unless the former client consents after consultation.<sup>22</sup> In addition, a former client has the same right to expect that the client's

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<sup>18</sup> Rule 1.6, 1.8(b).

<sup>19</sup> Rule 1.7.

<sup>20</sup> Rule. 1.7(a)

<sup>21</sup> Rule. 1.7(b)

<sup>22</sup> Rule 1.9(a)

confidences will be respected as an existing client does.<sup>23</sup>

3. **Waivers.** The rules provide that a client or former client may waive some the rights with respect to the conflicts described above. For example, if a lawyer is satisfied that the lawyer's responsibilities and interests will not limit the lawyer's duties to the client, the client, after consultation, may waive the potential conflict unless a disinterested lawyer would conclude that the client should not agree to the representation.<sup>24</sup> Under the Colorado Rules, there are several types of disabilities that may be remedied through waivers.<sup>25</sup>

4. **When to do conflicts screening.** Conflicts checking should be done each time a new engagement is undertaken and each time the attorney becomes aware of new participants in the transaction.

a. **What to screen.** Not only should the client's name be checked, but, if the client is an organization, the names of the principal constituents should be checked. Similarly, all other parties to the transaction, and, to the extent a constituent in another

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<sup>23</sup> Rules 1.6, 1.8(b), 1.9(c).

<sup>24</sup> Rule 1.7(c). This provision is a Colorado modification included to provide additional protection to the client. It is not clear how this test differs from the test already included that the lawyer must reasonably believe that the client will not be adversely affected by the engagement.

<sup>25</sup> Rules 1.6(a) (confidentiality of information), 1.7 (conflicts of interests, but note that Rule 1.7(c) states that the waiver will not be effective if "a disinterested lawyer would conclude that that the client should not agree to the representation under the circumstances of the particular situation."), and 1.8 (Conflict of Interest - Prohibited Transactions. While some transactions between a lawyer and a client are prohibited regardless of consent, the client may consent to a business transaction with the lawyer that is fair (provided that the client consents in writing - this appears to be the only place under the Colorado Rules where consent in writing is required, although lawyers should be cautious about rules in other states, where consent may have to be in writing and signed by the client) under Rule 1.8(a). The lawyer may not use information relating to the representation of a client to the disadvantage of the client unless the client consents after consultation under Rule 1.8(b). The lawyer may not accept compensation from a nonclient for services performed for a client unless the client consents after consultation under Rule 1.8(f). The lawyer may not accept an engagement adverse to a former client about which the lawyer had obtained information while representing the former client unless the former client consents under Rule 1.9(b). A client may waive imputed (firm) disqualification in the same manner as the client may waive an actual conflict under Rule 1.10(c). If the client is an organization and the attorney has been asked to represent one of the principals (officers, directors, employees, partners, members shareholders, etc.) the consent of the organization must be given by persons other than the potential client or by the shareholders (or, presumably, the partners or members). Rule 1.13(e))

organization may become important in his own right, that constituent should be checked. For example, in the case of a corporate subsidiary or a single member LLC, the lawyer should check the parent or member for conflicts.

b. **When to update screening.** The lawyer's conflict data base should reflect all changes and, should a new party become involved, the new party should be cleared. In addition, the lawyer should remember to include organizations created in the transaction, and organizations that have acquired or merged with parties to the transaction in supplemental screenings. Because many organizations participate in mergers and conversions, it is important to maintain proper identification of all parties. In addition, the lawyer should recognize that changes in the scope of work being done for the client may create new adversary relationships and related party relationships that should be identified.

#### **D. The Engagement Letter.**

While, as noted above, the duty of confidentiality may attach as early as the first contact with the potential client, most duties begin at the time the lawyer and client agree that the lawyer will represent the client. While it is not necessary for there to be an engagement letter for an attorney-client relationship to exist, it is in the best interests of both the lawyer and the client for there to be a clear statement of the relationship between them.

1. **Functions.** An engagement letter serves as a written record of the engagement. It serves several functions:

a. **Identifying the client and non-client.** One of the most important things for an attorney in a transaction to do for everyone's benefit is to identify whom the attorney represents and who the attorney is not representing. This should be clearly set forth in the engagement letter. To the extent a person is not a client but might not be clear on that point, it is appropriate to sent the non-client a "non-engagement" letter.

b. **Contract of employment.** An engagement letter constitutes a formal acknowledgment that the client has employed the lawyer and sets forth the economic arrangement between the two.

c. **Educational and informational document for the client.** Not only is an engagement letter a useful place to confirm the disclosures with respect to conflicts of interest and other matters that the lawyer has made to the client and the client's consent to those conflicts, but it also is a useful place to explain to the client what to expect from the representation and the limitations on the certainty that the lawyer can provide as to the outcome of the engagement.

d. **Record of the scope of representation.** The engagement letter provides a useful place to memorialize for both the client and the lawyer what work the lawyer is being engaged to perform.

#### 2. **Contents.**

a. **Identity of the client.** As noted above, the engagement letter

should be addressed to, and clearly identify, the client for whom the services are to be provided.

b. **Attorneys who will perform the services.** In a firm, it is often helpful to identify the staffing of the engagement. If much of the work is to be done by less experienced lawyers at a lower rate, the client should know that.

c. **Fee arrangement, receipt for retainer, interest on unpaid bills.** The engagement letter should accurately describe the economic arrangement with the client. If more than one client is being represented, it should set forth who is responsible for the payment of the bill (generally all represented parties), where the bill is to be sent, and any other matters relating to billing that all of the clients agree to. There are specific rules that apply in the case of a contingent fee arrangements. While this rule is normally thought of in the context of personal injury litigation, attorneys using an alternative billing arrangement in which the amount of the fee is based in part on whether the transaction is completed should consider whether the contingent fee rules apply.<sup>26</sup>

d. **Required or appropriate disclosure.** As noted above, many of the matters that must be disclosed do not have to be disclosed in writing. Nonetheless, if there is a subsequent disagreement over the level of disclosure, the lawyer will be at a disadvantage. Clear written disclosures<sup>27</sup> of the important matters involved in the engagement will most effectively avoid future disagreement.

(1) **Relationship with existing clients.** To the extent the attorney has a conflict that must be disclosed, the disclosure should first be discussed with the existing client, and the existing client should agree to both the waiver of the conflict and to disclosure of whatever information is necessary to advise the potential client of the nature of the conflict. This may involve the disclosure of information beyond the identity of the existing client.

(2) **Scope of confidentiality.** Generally all information acquired during the representation is confidential. It may be prudent to remind the client that inadvertent disclosure on the client's part may reduce evidentiary privilege. In addition, where there are multiple clients, each should be clearly informed about the lack of confidentiality that exists as among clients.<sup>28</sup>

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<sup>26</sup> See Rule. 1.5(c) requiring that a fee which is "contingent on the outcome of the matter for which the service is rendered," be in compliance with Chapter 23.3 of the Colorado Rules of Civil Procedure.

<sup>27</sup> In an engagement letter a clear and understandable statement of the rights of the attorney and client will probably stand the attorney in better stead should a subsequent dispute arise than will a meticulously drafted legal contract that might not be understood by the client.

<sup>28</sup> Rule 1.6. Note, however, that while confidentiality applies to all information coming into an

(3) **Consent with respect to potential conflicts if required or appropriate.** As noted above, many conflicts may be waived by the client after consultation. While the conflict does not have to be waived in writing, it is useful to have a written record that the client was advised of the conflict and consented to the representation. Even in situations in which the rules may not require a waiver, if there is any matter that may have an impact on the representation, such as personal relationships with the other party or any other matter that might arguably have an impact on the lawyer's performance, the engagement letter is an appropriate place to confirm that the disclosure has been made.

e. **Should the engagement letter be signed by the client?** Only conflicts related to the lawyer's personal interest under Rule 1.8(a)(3) and common representation under 2.2(a)(1) require that the client consent "in writing." Nonetheless, it may be appropriate in the case of some consents to obtain a signature from the client on the engagement letter. In many cases, the engagement letter merely confirms that the client, after discussions with the attorney, has already waived or consented to the conflict, and it should not be required that the client sign the letter. The probative value of the signature and the fact that the client is more likely to have read the letter if the client is required to sign argue in favor of requiring signature. On the other hand, to the extent the letter is worded in such a manner as to suggest that the engagement does not begin until after the client has signed the letter, there will be a question of the lawyer's position with respect to any actions taken until the letter is returned signed. For example, if signing the letter constitutes the formal waiver of a conflict, any action the attorney takes before the letter is signed may be called into question. For this reason, in some circumstances it may be better practice to thoroughly discuss the conflict with the client before undertaking the engagement and memorializing the discussion in the letter without requiring the client to sign. Regardless of the approach taken, the letter should encourage the client to discuss any questions with respect to any matter in the letter with the attorney. It may even be wise to state in the letter that the client will not be billed for time spent discussing bills, conflicts or even the scope of representation.

3. **Managing client expectations.** It is never too early to identify and deal with client expectations. By the time the engagement letter is sent out the lawyer and the client should have a clear agreement with respect to the costs, the limits of confidentiality (in a multiple client situation), the results that may be reasonably expected, the risks that those results

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attorney's possession, privilege only applies to communications between the attorney and the client. C.R.S. § 13-90-107(1)(b) (Who may not testify without consent.) provides: "An attorney shall not be examined without the consent of his client as to any communication made by the client to him or his advice given thereon in the course of professional employment; nor shall an attorney's secretary, paralegal, legal assistant, stenographer, or clerk be examined without the consent of his employer concerning any fact, the knowledge of which he has acquired in such capacity."

will not be attained, and the potential upside of the transaction and the likelihood of attaining that result. This process must begin with an agreement between the lawyer and the client, on the scope of work to be provided by the lawyer. It is very important that as circumstances arise that require changes in the scope of the work or would have an effect on the what the client should expect, that the lawyer identify and communicate those matters to the client.

4. **Scope of work.** Rule 1.2(c) provides that a lawyer may limit the objectives of the representation if the client consents after consultation. Nonetheless, in a abstract of a Colorado Bar Association Ethics Committee Opinion that where a lawyer was instructed by the client not to incur the expense of retaining co-counsel where the lawyer needs the assistance of a lawyer more expert in the particular area of law, the lawyer could not follow his client's instructions, but rather was required to withdraw.<sup>29</sup> Restatement § 30(1) provides that "a lawyer and an adequately informed client may agree to limit the scope or objectives of the representation" Restatement § 30(2) provides "Subject to other requirements stated in this Restatement, a client may agree to waive a duty that a lawyer would otherwise owe to the client if: (a) the client gives informed consent, having adequate information about the risks and advantages of waiving the duty; and (b) the terms of the waiver are reasonable in the circumstances."

### III. Responsibilities and Liabilities of Attorneys to Third Parties.

An attorney generally is not liable or responsible to third parties for errors and omissions in performing services for a client.<sup>30</sup> The cases appear split on whether an attorney owes a duty to nonclients for negligent misrepresentation of facts to third parties, where the attorney is aware that the third party will rely on the attorney's statement.<sup>31</sup> An attorney may not have a duty to non-clients provided the attorney's actions are not fraudulent or malicious,<sup>32</sup> but may be liable

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<sup>29</sup> Abstracts of Recent CBA Ethics Opinions 24 Colo. Lawyer 2145 (September 1995).

<sup>30</sup>For example, in Baxt v. Liloia, 656 A.2d 835 (N.J. App. 1995) (attorney not liable to adverse party for breach of rules of professional conduct), *but see* Fire Insurance Exchange v. Bell, 643 N.E. 2d 310 (Ind. 1994).

<sup>31</sup>Fox v. Pollack, 226 Cal.Rptr. 532 (Cal. App. 1986), Brooks v. Zerbe, 792 P.2d 196 (Wyo. 1990); Hacker v. Holland, 570 N.E.2d 951 (Ind. App. 1991); Adams v. Chenowirth, 349 So.2d 230 (Fla. App. 1977); Bloomer v. Amusement Co. v. Eskenazi, 394 N.E.2d 16 (Ill. App. 1979); Legacy Homes, Inc. v. Cole, 421 S.E.2d 127 (Ga. App. 1992). *But see*, Petrillo v. Bachenberg (N.J. March 29, 1995).

<sup>32</sup>Weigel v. Hardesty (37 Colo.App. 541, 549 P.2d 1335) (Attorney for wife in divorce not liable to husband for releasing deed from husband to wife without obtaining a lien to protect husband. "While fulfilling this obligation to his client, he is liable for injuries to third parties only when his conduct is fraudulent or malicious.") Berger v. Dixon & Snow, P.C., 868 P.2d 1149 (Colo.App.1993); Hill v. Boatright, 890 P.2d 180 (Colo.App. 1994).

for the attorney's intentional conduct.<sup>33</sup> The rule has been applied to hold that an attorney who drafted estate planning documents is not liable to beneficiaries.<sup>34</sup> On the other hand, attorneys have been held liable to non-clients who relied on representations of attorneys.<sup>35</sup> This rule has been applied to hold attorneys for partnerships liable to limited partners for misrepresentations.<sup>36</sup>

**A. Obligations with respect to nonclient communications.** While an attorney owes his primary duty to his client, an attorney does have a duty not to knowingly make false or

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<sup>33</sup>Havens v. Hardesty, 43 Colo.App. 162, 600 P.2d 116 (1979) (attorney for creditor liable for enforced collection activity against wrong judgment debtor) citing Pomeranz v. Class, 82 Colo. 173, 257 P. 1086 (1927):

“an attorney may be liable for his intentional torts even if performed for his client's benefit, we hold that, although an attorney's good faith and his acting in his client's behalf may be factors to be considered by the fact finder when determining whether and to what extent exemplary damages will be awarded to a plaintiff, they do not exonerate the attorney or release him from liability for any injuries to plaintiff caused by the attorney's intentional acts.”

<sup>34</sup>Shriners Hospital for Crippled Children, Inc. v. William H. Southard, 892 P.2d 417 (Colo. App.) [*see also* Glover v. Southard, 894 P.2d 21 (Colo. App. 1994):

“An attorney has a duty to act in the best interests of his or her client and is liable to third parties only for injuries caused by the attorney's fraudulent, malicious, or intentionally tortious conduct.

Colorado courts have held that an attorney's liability to third parties should be limited because of the attorney's duty of loyalty and effective advocacy to his or her client, the nature of the potential for adversarial relationships between the attorney and other parties, and because of the attorney's unlimited potential liability if attorney liability is extended to third parties. Schmidt v. Frankewich, 819 P.2d 1074 (Colo.App.1991).” 892 P.2d 418

<sup>35</sup>Central Bank Denver v. Mehaffy, Rider, Windholz & Wilson, 865 P.2d 862 (Colo.App.1993). *aff'd* 892 P. 2d. 23 (1995); *See also* Zimmerman v. Kamphausen Co., 971 P.2d 236 (Colo. App. 1998). (attorney rendering an opinion with respect to power and authority of general partner is making a representation of fact rather than rendering a legal opinion and may be liable for negligent misrepresentation of fact), Bohn v. Cody, 832 P.2d 71 (Wash. 1992). *Contra, see* Krawczyk v. Bank of Sun Prairie, 496 N.W. 218 (Wisc. App. 1993).

<sup>36</sup>Adell v. Somers, Schwartz, Silver & Swartz, 428 N.W.2d 26 (Mich. App. 1988); Pucci v. Santi, 711 F. Supp 916 (N.D. Ill., 1989)



misleading statements to others.<sup>37</sup> While it is clear that to make a statement known to be false will subject a lawyer to ethical, civil and possibly criminal sanctions, the lawyer's responsibility when the client makes a false statement or the lawyer subsequently becomes aware of facts that make the lawyer's past statement false are much more difficult. The Rule recognizes that the lawyer's duty to disclose facts to avoid criminal or fraudulent acts is subject to the duty of confidentiality.<sup>38</sup> Often, the best the lawyer can do is to urge the client to disclose the truth, and, if the client should fail to do so, to withdraw from further representation.<sup>39</sup>

**B. Opinion letters.** One of the areas of transactional practice that may cause particular concern is the issuance of opinion letters.<sup>40</sup> As a general matter, all advice given to a client, whether in the form of a formal opinion letter or not is subject to the same standard of care. With respect to third parties, Colorado cases have held that while there is no attorney-

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<sup>37</sup> Rule 4.1(a). The Colorado rules have eliminated the provision of the ABA Model Rules that limited the lawyer's responsibility to not making a misstatement of a *material* fact, so, under the Colorado rules, any knowingly false or misleading statement violates the rules.

<sup>38</sup> Rule 4.1(b).

<sup>39</sup> An attorney is permitted (but, under the Rules, not required) to disclose "the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime." This exception is broader than the similar provision in ABA Model Rules which only permits disclosure of a "criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." Thus, a lawyer subject to the Colorado rules may disclose an economic crime such as securities fraud. The official comments note that "A lawyer's decision not to take preventative action permitted under paragraph (b) does not violate this rule." Note that while the rule is not mandatory, C.R.S. § 18-8-115 (Duty to report a crime - liability for disclosure) provides: It is the duty of every corporation or person who has reasonable grounds to believe that a crime has been committed to report promptly the suspected crime to law enforcement authorities. Notwithstanding any other provision of the law to the contrary, a corporation or person may disclose information concerning a suspected crime to other persons or corporations for the purpose of giving notice of the possibility that other such criminal conduct may be attempted which may affect the persons or corporations notified. When acting in good faith, such corporation or person shall be immune from any civil liability for such reporting or disclosure. This duty shall exist notwithstanding any other provision of the law to the contrary; except that this section shall not require disclosure of any communication privileged by law.

<sup>40</sup> The term "opinion letter" has different meanings to different lawyers. For purposes of this discussion, an opinion letter is written advice given to a client or third party that purports to express a legal conclusion that is delivered under circumstances involving knowledge or expectation that the conclusions expressed will be relied upon by the addressee for purposes of action or non-action.

client relationship with third parties who receive opinion letters, an attorney may be liable to such third parties for negligent misrepresentation of fact.<sup>41</sup> There may be confusion between the attorney and the recipient of the letter with respect to the function of the letter. The attorney may assume that he or she is only applying the law to an assumed set of facts while the third party may believe that the opinion constitutes a representation of the underlying facts as well as the legal conclusion to be drawn from those facts. As a result, particularly where an opinion is very fact sensitive, it is important for the attorney rendering the opinion clearly state the facts on which the attorney is relying in rendering the opinion. Even where the attorney is expressly disclaiming responsibility for the accuracy of the facts in the opinion, the attorney is not permitted to assume facts that the attorney knows or has reason to know to be incorrect.<sup>42</sup> Because the Colorado courts using the theory of negligent misrepresentation of fact to impose liability with respect to opinion letters, the plaintiff in such a matter should be required to prove each of the elements of negligent misrepresentation as set forth in the Colorado Jury Instructions.<sup>43</sup>

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<sup>41</sup> In Zimmerman v. Dan Kamphausen Co., 971 P.2d 236 (Colo. App. 1998) the Court of Appeals stated:

To establish a claim for negligent misrepresentation, the complaining party must demonstrate that the defendant supplied false information in a business transaction and failed to exercise reasonable care or competence in obtaining or communicating the information upon which other parties justifiably relied. The misrepresentation must be of a material past or present fact. Mehaffy, Rider, Windholz & Wilson v. Central Bank, 892 P.2d 230 (Colo. 1995).

An attorney owes a duty to a third party to whom he issues an opinion letter or to other persons that the attorney expects will rely upon such a letter. Whether there has been a misrepresentation of fact is for the fact-finder to determine. Mehaffy, Rider, Windholz & Wilson v. Central Bank, supra.

<sup>42</sup> Rule 4.1 prohibits both the making of false or misleading statements to third persons and failing to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

<sup>43</sup> See CJI-Civ 9:3B (1998) which sets forth the following elements:

1. Defendant gave false information to plaintiff (the commentary indicates that there need not be privity if the defendant knew the person receiving the information would give it to the plaintiff).
2. Defendant gave the information in the course of the defendant's business or a transaction in which the defendant had a financial interest.
3. The defendant gave the information to the plaintiff for the use or guidance of the plaintiff in a business transaction.

### C. Obligations to Third Parties under Colorado Case Law.

1. *Mehaffy, Rider, Windholz & Wilson v. Central Bank*.<sup>44</sup> A law firm representing the Town of Winter Park (“Town”) was asked to provide “comfort letters to the purchaser (the “Bank”) of bonds to be issued by the Town with respect to the likelihood that certain litigation against the Town with respect to the bonds would be successful. The attorneys, at the request of the Town issued “comfort letter” that contained the following language:

I am of the opinion that the Town and the Authority have adopted the Urban Renewal Plan in accordance with requirements of the laws of the State of Colorado and the Charter of the Town. In addition, I am of the opinion that the Town, in determining that the Project Area constituted a “blighted area” within the meaning of the Act, acted in compliance with applicable provisions of Colorado law and the Charter of the Town. Accordingly, I am of the opinion that insofar as the said litigation questions the adoption of the Urban Renewal Plan or the determination that the Project Area is a “blighted area,” such allegations are without merit.

The comfort letters also contained language:

Further, it is understood that the Original Purchaser [the Bank] has undertaken to verify the accuracy, completeness and truth of any statements made or to be made concerning any of the material facts relating to this transaction, including information regarding the Issuer. The Original Purchaser has conducted its own investigation to the extent it believes necessary. The Original Purchaser has been offered an opportunity to have made available to it any and all such information it might request from the Issuer. On this basis, the Original Purchaser agrees that it is not relying on any other party or person to undertake the furnishing or verification of information relating to this transaction.

The litigation against the Town was ultimately successful, causing the bonds to go into default. The Bank sued the attorneys for malpractice and for negligent misrepresentation of fact. The trial court dismissed all of the Bank’s claims. The court of appeals affirmed the dismissal of the claim for malpractice, but found that an attorney who issues an opinion letter for the purpose

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4. The defendant was negligent in obtaining or communicating the information.

5. The defendant gave the information with the intent or knowing that the plaintiff or a limited group of which the plaintiff was a member would act or decide not to act in reliance on the information.

6. The plaintiff relied on the information supplied by the defendant; and

7. This reliance on the information supplied by the defendant caused damage to the plaintiff.

<sup>44</sup> 892 P.2d 230 (Colo. 1995) aff’g 865 P.2d 862 (Colo. App. 1993).

of inducing a non-client to purchase municipal notes or bonds can be liable for negligent misrepresentation when the opinion letter contains material misstatements of fact, and reversed the dismissal of the claim for negligent misrepresentation of fact.<sup>45</sup>

The Supreme Court affirmed the court of appeals. In its opinion the confirmed that the Bank, as a non-client, could not maintain an action for malpractice against the attorney. In addition, it held that an attorney would not be held liable for the expression of a legal opinion.<sup>46</sup> Nonetheless, in determining that the comfort letters might be found to constitute representations of fact, the court cited the court of appeals description of the comfort letters as follows:

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<sup>45</sup> Central Bank Denver, N.A. v. Mehaffy, Rider, Windholz & Wilson, 865 P.2d 862 (Colo.App.1993).

<sup>46</sup> The court expressed the rule as follows;

In a claim for negligent misrepresentation, the misrepresentation must be of a material fact that presently exists or has existed in the past. Van Leeuwan v. Nuzzi, 810 F. Supp. 1120, 1124 (D. Colo. 1993). A promise relating to future events without a present intent not to fulfill the promise is not actionable. *Id.* Expressions of opinion cannot support a misrepresentation claim. *Id.*; see, e.g., Chacon v. Scavo, 145 Colo. 222, 358 P.2d 614 (1960) (representations as to whether certain lots were usable as building sites required an interpretation of the relevant city ordinances, and were not actionable because they were representations of law); Two, Inc. v. Gilmore, 679 P.2d 116 (Colo. App. 1984) (hotel owner's representation to plaintiff was an individual belief and opinion concerning the purchase, sale, and dispensation of liquor, and was a representation of law that was not actionable).

In Kunz v. Warren, 725 P.2d 794 (Colo. App. 1986), a licensed real estate broker and a licensed real estate salesman represented to buyers of lots that the lots were ready to be sold as building sites. The court of appeals held that:

[the] representation concerned the subdivision's existing status, and was made in the face of their knowledge that the El Campo Estates subdivision had only been conditionally approved by the pertinent zoning authority. This constituted a misrepresentation of fact, not requiring a legal opinion such as might be required to determine the adequacy of a legal filing in the county land records, or the applicability of a city ordinance restricting land use.

892 P.2d 237.

In the body of the letter, there is no specific reference to the opinion of counsel. Instead, reference is made generically to questions and answers from representatives of the “issuer” concerning the terms and conditions of the “offering.”

The Supreme Court refused to dismiss the claim against the attorney for negligent misrepresentation because, the matters set forth in the “comfort letters” written by the attorney might be found by a trier of fact to constitute a representation of fact as opposed to an opinion of law. As such, the court refused to dismiss the claims against the attorney as a matter of law. In setting forth the standard to be applied, the court cited the Colorado Jury Instructions.<sup>47</sup>

The Supreme Court also noted that neither language in the letters issued by the attorney to the effect that the Bank was conducting its own investigation nor that the Bank disclaimed reliance on the attorney’s letters were both questions of fact that precluded the granting of a summary judgment dismissing the claims against the attorneys. Rather, the court noted, the Bank might be able to establish that it had relied on the letter as part of the investigation it thought necessary.<sup>48</sup>

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<sup>47</sup> See CJI-Civ 9:3B (1998) which sets forth the following elements:

1. Defendant gave false information to plaintiff (the commentary indicates that there need not be privity if the defendant knew the person receiving the information would give it to the plaintiff).
2. Defendant gave the information in the course of the defendant’s business or a transaction in which the defendant had a financial interest.
3. The defendant gave the information to the plaintiff for the use or guidance of the plaintiff in a business transaction.
4. The defendant was negligent in obtaining or communicating the information.
5. The defendant gave the information with the intent or knowing that the plaintiff or a limited group of which the plaintiff was a member would act or decide not to act in reliance on the information.
6. The plaintiff relied on the information supplied by the defendant; and
7. This reliance on the information supplied by the defendant caused damage to the plaintiff.

<sup>48</sup> Apparently the case was ultimately dismissed on a claim under the statute of limitations.

2. *Zimmerman v. Dan Kamphausen Co.*<sup>49</sup> A father and son established a partnership and a trust as part of an estate plan. In 1985 the father purchased property giving a promissory note guaranteed by the partnership and the trust. As part of the transaction, the attorney for the father and the partnership issued an opinion that the partnership was properly constituted, that it had the legal power to execute a guaranty of the note and perform its obligations thereunder, and that the father was authorized to sign the guaranty on behalf of the partnership.

The seller of the property foreclosed the property and sought a deficiency judgment from the partnership and the son. The trial court granted the partnership's and the son's motion for summary judgment, finding that it was undisputed that the son knew nothing about the obligation incurred by the guaranty agreement, that he did nothing to ratify the agreement after it was signed, and that plaintiff was not looking to bind the son's assets at the time the agreement was made. It then determined that because the partnership was acting as an agent for the trust, a disclosed principal, the partnership and its partners were not liable for the debts of the trust.

The court of appeals, among other matters, considered claims against the attorney for the partnership. One concerned whether the attorney was liable to the seller on a claim of negligent misrepresentation with respect to the attorney's opinion on the validity and enforceability of the guaranty. The second was a claim by the son with respect to the father's execution of the guaranty.

With respect to the opinion letter, the court found that an opinion with respect to the enforceability of the guaranty might be found to be more than an a series of legal opinions but may also contain representations of fact.<sup>50</sup> The court of appeals found that there was a question

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Mehaffy, Rider, Windholz & Wilson v. Central Bank, 940 P.2d 1097 (Colo. App. 1997).

<sup>49</sup> 971 P.2d 236 (Colo. App. 1998).

<sup>50</sup> The court of appeals stated:

... we do not read the law firm's opinion letter as representing only a series of legal opinions as distinguished from representations of fact. Plaintiff accepted the guaranty signed by the father on behalf of the partnership and concluded the real estate transaction. To the contrary, plaintiff might rationally infer from the representations made in the letter that the guarantee was binding upon the partnership and each of its partners. Plaintiff's assertions that he relied on the letter's representation concerning the scope of the partnership's authority and that such reliance was to his detriment create issues of material fact on plaintiff's claim of negligent misrepresentation, and thus, the trial court erred in entering summary judgment on this issue.

971 P.2d 240.

of fact as to whether the attorney in making issuing the opinion had made a negligent misrepresentation of fact upon which plaintiff relied to his detriment.<sup>51</sup>

Both the son and the seller also asserted a claim against the attorney for general negligence. In the case of the seller, the court reconfirmed that “absent willful and wanton conduct, fraud, or malice, an attorney is not liable to his or her client’s opponent for damages resulting from the attorney’s conduct.”<sup>52</sup> The son asserted that because the attorney had previously represented the son in other matters and because the attorney represented the partnership in which the son was a partner, the attorney had a duty to the son. The court clearly reconfirmed that merely because the attorney had formerly represented the son on other matters, the attorney did not have any duties to the son in this matter. The court analyzed the several decisions from other states on the question of the duty of the attorney for the partnership to the partners in the partnership. It then followed previously established Colorado law to hold that the attorney for the partnership does not have an attorney-client relationship with the partners.<sup>53</sup>

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<sup>51</sup> The court, citing Mehaffy, stated:

To establish a claim for negligent misrepresentation, the complaining party must demonstrate that the defendant supplied false information in a business transaction and failed to exercise reasonable care or competence in obtaining or communicating the information upon which other parties justifiably relied. The misrepresentation must be of a material past or present fact.

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An attorney owes a duty to a third party to whom he issues an opinion letter or to other persons that the attorney expects will rely upon such a letter. Whether there has been a misrepresentation of fact is for the fact-finder to determine.

971 P.2d 240.

<sup>52</sup> Citing Holmes v. Young, 885 P.2d 305 (Colo. App. 1994).

<sup>53</sup> The court held:

In Colorado, the fact that an attorney represents a partnership does not, standing alone, create an attorney-client relationship with each of the partners. See Glover v. Southard, 894 P.2d 21 (Colo. App. 1994) (declining to impose duty of care in favor of beneficiaries named in testamentary documents drafted by attorney); Schmidt v. Frankewich, 819 P.2d 1074 (Colo. App. 1991)(attorney for corporation not liable to shareholders or guarantors in absence of fraud or malicious conduct); In re Estate of Brooks, 42 Colo. App. 333, 596 P.2d 1220 (1979)(trustee’s attorney not liable to alleged beneficiary for breach of trust). See

Zimmerman not only confirms that the courts are reluctant to find the existence of an attorney-client relationship, but also provides a warning that attorneys may be liable to non-client recipients of their opinions on the basis of negligent misrepresentation of fact even when the attorneys believe they are issuing opinions on the law.

#### **D. Other Views**

1. **Rules of Professional Conduct.** The Model Rules, and the Colorado Rules have provisions dealing with the obligations to non-clients. Under the Colorado Rules:

a. A lawyer may undertake an evaluation affecting a client for the use of a non-client if the lawyer believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client, and the client consents after consultation.<sup>54</sup>

b. In the course of representing a client, a lawyer may not knowingly make a false or misleading statement of fact or law to a third person, or fail to disclose a material fact to a third person when disclosure is necessary to avoid a criminal or fraudulent act by a client.<sup>55</sup>

c. Generally a lawyer may not communicate with a person represented by counsel about the subject of the representation.<sup>56</sup>

d. A lawyer has the obligation to ensure that an unrepresented person understands the role of the attorney in the transaction and should disabuse the unrepresented person of the misconception that the lawyer is disinterested.<sup>57</sup>

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also Holmes v. Young, supra (attorney representing partnership was not thereby attorney for limited partner).

971 P.2d 241. The Supreme Court in denying certiorari noted that Justices Scott and Bender would grant certiorari as to the following issue:

Whether a partnership's attorney can ever owe a duty of care to an individual partner who has not expressly retained that attorney.

<sup>54</sup> Colorado Rule 2.3.

<sup>55</sup> Colorado Rule 4.1. Colorado Rule 4.1 does not contain the provision in Model Rule 4.1 that prohibits a lawyer from making a misstatement of a *material* fact, so, under the Colorado Rule, any knowingly false or misleading statement constitutes an ethical violation, regardless of the materiality of violation.

<sup>56</sup> Colorado Rule 4.3.

<sup>57</sup> Colorado Rule 4.1.



e. In making evaluations for, and disclosures to, non-clients, a lawyer is always subject to Colorado Rule 1.6.<sup>58</sup> Colorado Rule 1.6 permits, but does not require, an attorney to disclose “the intention of the lawyer’s client to commit a crime and the information necessary to prevent the crime.”<sup>59</sup> This exception is broader than the similar provision in Model Rules which only permits disclosure of a “criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.”<sup>60</sup> Thus, arguably, a lawyer subject to the Colorado Rules may be permitted to disclose a client’s intention to commit an economic crime such as securities fraud. The official comments to the Colorado Rules note that “A lawyer’s decision not to take preventative action permitted under paragraph (b) does not violate this rule.” Nonetheless, a lawyer may be confronted with a duty to disclose potential future crime, while at the same time be prohibited by the rule from disclosing past criminal activity.<sup>61</sup>

## 2. Restatement of the Law Governing Lawyers:

a. Restatement § 73 sets provides that a lawyer has a duty to a non-client when and to the extent that the lawyer or (with the lawyer’s acquiescence) the lawyer’s client invites the non-client to rely on the lawyer’s opinion or provision of other legal services, and the non-client so relies, and the non-client is not, under applicable tort law, too remote from the lawyer to be entitled to protection.<sup>62</sup>

b. Restatement § 152 provides the rules with respect to evaluations

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<sup>58</sup> Colorado Rules 2.3(b) and 4.1(b).

<sup>59</sup> Colorado Rule 1.6(b).

<sup>60</sup> Model Rule 1.6(b)(1).

<sup>61</sup> C.R.S. § 18-8-115 (Duty to report a crime - liability for disclosure) provides:

It is the duty of every corporation or person who has reasonable grounds to believe that a crime has been committed to report promptly the suspected crime to law enforcement authorities. Notwithstanding any other provision of the law to the contrary, a corporation or person may disclose information concerning a suspected crime to other persons or corporations *for the purpose of giving notice of the possibility that other such criminal conduct may be attempted which may affect the persons or corporations notified*. When acting in good faith, such corporation or person shall be immune from any civil liability for such reporting or disclosure. This duty shall exist notwithstanding any other provision of the law to the contrary; except that this section shall not require disclosure of any communication privileged by law. (emphasis added)

<sup>62</sup> Restatement § 73(2).

conducted by a lawyer for a non-client:

(1) In furtherance of the objectives of a client in a representation, a lawyer may provide to a non-client the results of the lawyer's investigation and analysis of facts or the lawyer's professional evaluation or opinion on the matter.

(2) When providing the information, evaluation, or opinion under Subsection (1) is reasonably likely to affect the client's interests materially and adversely, the lawyer shall first obtain the client's consent after the client is adequately informed concerning important possible effects on the client's interests.

(3) In providing the information, evaluation, or opinion under Subsection (1), the lawyer shall exercise care with respect to the non-client to the extent stated in § 73(2) and not make false statements prohibited under § 157.<sup>63</sup>

### 3. **Ethics 2000:**

a. Rule 4.1 is being reviewed to determine if the relationship between this section and Rules 1.6 and 1.2(d) needs clarification, e.g., whether there is an implicit exception under Rule 1.6 for disclosures necessary to avoid lawyer assistance in crimes or frauds. In any event, the comment could include a reminder that even if the lawyer may not or chooses not to disclose, the lawyer may still be obligated to withdraw in order to avoid assisting a crime or fraud. The Commission could rethink Comment [2] and reconsider the definition of "fraud." Rule 1.6 (confidentiality).

b. In light of the fact that several states, like Colorado, have declined to adopt the limitations on disclosure required by Model Rule 1.6, and that the Restatement has come out with a slightly different rule than the Model Rule, the Ethics 2000 Committee is reviewing Model Rule 1.6 to determine what role, if any, a "model" rule can play when it has already been demonstrated to be unacceptable to the majority of those for whom it is intended. In addition, the Commission should consider the extent to which the absence of any "noisy withdrawal" provision or exception in the text is contrary to other law prohibiting lawyers from assisting in crimes or frauds. The Commission is also considering when confidentiality should trump reporting of lawyer misconduct and the confidentiality obligations of temporary lawyers as addressed by ABA Formal Ethics Opinion 88-356. The commentary will address the problem

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<sup>63</sup> Restatement § 157 provides:

A lawyer communicating on behalf of a client with a non-client may not:

- (1) knowingly make a false statement of material fact or law to the non-client,
- (2) make other statements prohibited by law; or
- (3) fail to make a disclosure of information required by law.

of the misdirected fax, the protection of confidences from prospective clients and the handling of confidences among co-clients. Rule 2.3 (evaluation for use by third person)

c. In light of Restatement §§ 73 and 152 the Ethics 2000 Commission is considering requiring information on risks, including risks to confidentiality, to the client, as well as the nature and scope of the evaluation, auditors' requests for information and tax opinion letters. The Commission is also considering: under what circumstances lawyers must disclose their interests in the company on whose behalf the opinion is rendered, whether there are certain requests for opinions that should be prohibited as unprofessional and whether there are certain qualifications on opinions that are unprofessional.

4. **Colorado Formal Ethics Opinion 80.** Colorado Formal Opinion 80,<sup>64</sup> the Colorado Bar Association Ethics Committee considered the duties of an attorney in a case in which the other party or its attorney has made an undeniable mistake in the closing settlement statement regarding a basic assumption or element upon which the contract between the parties is based. The opinion held that where silence by the lawyer and the lawyer's client would be conduct amounting to a knowing misrepresentation under the facts and circumstances, the attorney must advise the client to disclose the mistake rather than remain silent about the mistake and accept the benefits of it. If the client refuses disclosure, the attorney may not continue representing the client in the closing. If the attorney participates in the closing without disclosure being made and later determines disclosure should have been made, the attorney should call upon the client to rectify the error. If the client refuses, the lawyer may similarly be permitted or required to disclose the mistake to the other party, depending on the facts and circumstances.

#### **IV. The Ethical Framework of Representation of an Association and Its Owners.**

##### **A. The Basic Nature of an Association**

An unincorporated association is a contractually based relationship among owners to conduct a business. Subject to the specific provisions of the contract, each owner has the right to participate in the financial success of the association, to participate in decisionmaking for the association, and, in many cases, to act as general agent for the association, with the ability to bind the association with respect to transactions in the ordinary course of business. Not all owners are agents of the organization, limited partners and members in a manager-managed limited liability company who are not managers do not have the power to bind the association solely by reason of being owners. As discussed below, this lack of agency authority may have an impact on the fiduciary duties owed by such limited partners and members. Unlike directors and officers of a corporation, who coincidentally may own stock in the corporation, owners of association manage and act as agents by virtue of their economic ownership in the association.

##### **B. General Considerations**

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<sup>64</sup> Formal Opinion 80 Lawyer's Duty To Disclose Mistakes In Commercial Closing (Adopted February 18, 1989. Addendum issued 1995.)

At the outset, an attorney representing those organizing or operating an association must determine who the client is. Among the possible clients are:

1. one of the owners,
2. the association itself,
3. one owner and the association, or
4. more than one of owners the association.

If the attorney chooses to represent one of the owners, the attorney's duties are to the individual and the individual's confidences should be maintained. Nonetheless, even in this circumstance, the attorney may have liability if the attorney aids and abets the owner's breach of fiduciary duty. An attorney who is not representing any of the members separately should be able to limit the representation to the association, but at least some courts are suggesting that the attorney has a duty to the other owners of the association. If the attorney represents the association and one of its members, the attorney will have a duty to both the association and the owner, which may come into conflict. Finally, if the attorney undertakes to represent more than one of the organizers, the attorney may be acting as an "intermediary" and subject to an especially delicate set of ethical and legal liability rules.

### **C. Representing Associations and Owners.**

1. **Fiduciary Duties in Associations.** Under the Uniform Partnership Act partners owe a fiduciary duty to each other and the partnership to account for any gains made in the formation operation an winding up of the partnership.<sup>65</sup> In addition, partners, as agents of the partnership,<sup>66</sup> owe the fiduciary duties owed by agents to principals.<sup>67</sup> Finally, partners owe each other an obligation to disclose information concerning the partnership business.<sup>68</sup> RUPA takes these duties, which are stated tersely in the UPA, and amplifies them to reflect what the drafters understood the common law to be. It sets forth the fiduciary duties<sup>69</sup> and the duty to

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<sup>65</sup> UNIFORM PARTNERSHIP ACT ' 9(1) 6 U.L.A. (hereafter "UPA"), § 21(1).

<sup>66</sup>UPA § 9.

<sup>67</sup>UPA § 4(3) (law of agency applies to partnerships).

<sup>68</sup>UPA § 20.

<sup>69</sup>While RUPA § 404(a) specifically spells out the fiduciary duties in a partnership ("The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c).), the proposed Colorado Uniform Partnership Act (1997) (House Bill 97-1237) defines the duties of partners without an express reference to fiduciary duties as follows:

render information (which it does not characterize as fiduciary).<sup>70</sup> In a limited partnership, the

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SECTION 7-64-404. General standards of partner's conduct. (1) The duties a partner owes to the partnership and the other partners, in addition to those established elsewhere in this article, include the duties to:

(a) Account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct or winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;

(b) Refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership;

(c) Refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership; and

(d) Comply with the provisions of the partnership agreement.

(2) A partner owes to the partnership and the other partners a duty of care in the conduct and winding up of the partnership business which shall be limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(3) A partner shall discharge the partner's duties to the partnership and the other partners and exercise any rights consistently with the obligation of good faith and fair dealing.

(4) A partner does not violate a duty or obligation to the partnership or the other partners solely because the partner's conduct furthers the partner's own interest.

(5) A partner may lend money to and transact other business with the partnership, and as to each loan or transaction the rights and obligations of the partner may be exercised or performed in the same manner as those of a person who is not a partner, subject to other applicable law.

(6) If a partnership is formed, the duties a partner owes to the partnership and the other partners pertain to all transactions connected with the formation, conduct, or liquidation of the partnership.

(7) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.

<sup>70</sup>RUPA § 403.

general partners have the same fiduciary duties that they have in general partnerships,<sup>71</sup> but limited partners, who are not statutory agents of the partnership and with respect to whom there is no statutory statement of duties, are not generally considered to be fiduciaries of the limited partnership.

The Colorado limited liability company statute permits the LLC to be managed either by the members themselves or by managers who may be selected in any manner that the members select.<sup>72</sup> As with limited partnerships, the same people who have management authority have the ability to enter into contracts for the LLC and to bind the LLC.<sup>73</sup> Thus, in an LLC in which management is reserved to the members, members can bind the LLC to contracts and deal in the LLC's property, but if the LLC is managed by managers, only managers may bind the LLC, and members, unless they are acting in some other agency capacity, do not have the authority to bind the LLC.<sup>74</sup>

Like a general partner in a general partnership governed by RUPA, a member in a member-managed or a manager in a manager-managed limited liability company has a duties which are often characterized as "fiduciary." As discussed below, members of a member-managed limited liability company are similar to general partners in that they are general agents of the association, but they differ in that their actions do not create liabilities that are individually binding on other owners. The owners of an association therefore owe each other a duty to perform under the contract that establishes the relationship, which contract will often incorporate default provisions under the statute where owners have not agreed otherwise, and owe to each other fiduciary duties that arises from the agency relationship, and, possibly, from the control that a majority member exercises over the business.

The statutes vary in their description of the duties owed by members and managers.<sup>75</sup> The Colorado act requires the manager to act in good faith, with the care of an ordinary prudent

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<sup>71</sup>REVISED UNIFORM LIMITED PARTNERSHIP (1985) (hereafter "RULPA") 6 U.L.A. § 403.

<sup>72</sup>C.R.S § 7-80-401.

<sup>73</sup>For a discussion of the requirements for ownership and transfer of property including real estate, see Larry E. Ribstein and Robert R. Keatinge, *Ribstein and Keatinge on Limited Liability Companies* (Clark Boardman Callaghan, 1992 and supplement) at Chapter 7.

<sup>74</sup>COLO. REV. STAT. §§ 7-80-407, 408 (1990) (manager has authority to contract debts and deal with property, members have no authority modified in 1994 to provide that in a member-managed LLC, members have the authority of managers).

<sup>75</sup>For a discussion of the fiduciary duties of managers and members, see Larry E. Ribstein and Robert R. Keatinge, *Ribstein and Keatinge on Limited Liability Companies* (Clark Boardman Callaghan, 1992 and supplement) at Chapter 9.

person, and in a manner the manager believes to be in the best interests of the LLC.<sup>76</sup> The Colorado<sup>77</sup> statute permits the members and managers to engage in transactions with the LLC to the same extent as third parties.

2. **Representation of One Owner.** A lawyer who represents a partner or a member in that person's personal capacity should have no direct obligation to the association, even though the partner or member may be in a fiduciary relationship with the association. Again, so long as it is clear to the client, and preferably the association, that the attorney is representing only the partner or member, there should not be a direct ethical duty to the association. Of course at the critical time when the association is being formed, there is a particularly delicate relationship, and the lawyer will probably be considered to represent one of the constituents rather than the entity<sup>78</sup>

3. **Representation of the Association and None of the Constituents.** Under the Model Rules of Professional Conduct ("Rules"), a lawyer who represents an association represents the association acting through its duly authorized constituents.<sup>79</sup> The rule treats the association as an entity separate and apart from the "officer, employee or other person acting on behalf of the organization." Under the rule, if an attorney finds that a constituent of the association is taking an action which is inconsistent with the association's interest, the lawyer may go to higher authorities within the association. If the action is not reversed, the lawyer may

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<sup>76</sup>COLO. REV. STAT. § 7-80-406 (1990).

<sup>77</sup>COLO. REV. STAT. § 7-80-409 (1990).

<sup>78</sup>One commentator has stated:

"The premise that there is an entity being represented is most obviously inappropriate where separately represented parties are negotiating over the very *creation* of an entity such as a corporation or a partnership. The lawyer for each party represents that party, with corresponding duties of loyalty and confidentiality, and neither lawyer represents the entity in the full sense."  
Geoffrey C. Hazard, Jr., and W. William Hodes, *The Law of Lawyering* Second Edition § 1.13.108 (1990 and Supp.).

*But see* Buehler v. Sbardellati, 34 Cal.App.4th 1527, 41 Cal.Rptr.2d 104 (Cal. Ct. App. Fourth App. Dist Div. One. May 19, 1995 (modified without altering judgment June 19, 1995)) (Attorney who drafts the partnership agreement after parties have reached agreement does not have duty to advise each party to obtain its own attorney nor does he have a conflict of interest. Lawyer was to represent the partnership, not the individual partners.)

<sup>79</sup>Rule 1.13(a).

“quietly” resign,<sup>80</sup> but is not required to disclose the situation to persons outside the association unless required by law.<sup>81</sup>

While the Rules discuss the situation in which the client is a corporation, an ABA Formal Ethics Opinion provides that a partnership is an association within the meaning of Rule 1.13, and that an attorney representing the partnership does not represent the individual members unless the circumstances indicate otherwise.<sup>82</sup>

Assuming the lawyer is representing the association and none of the constituents or owners, there should be no formal duty owed to these constituents *as clients*. Nonetheless, the lawyer may be required to ensure that the constituents know that they are not being represented,<sup>83</sup> and, to the extent that a constituent becomes adverse to the association, the lawyer should proceed with the best interests of the association “*without involving unreasonable risks of disrupting the organization.*”<sup>84</sup> This limitation involves both the seriousness of the constituent’s violation and the potential disruption to the association resulting from the lawyer’s proceeding with remedial actions.<sup>85</sup>

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<sup>80</sup>Rule 1.13(c).

<sup>81</sup>Rule 1.12(c). The attorney-client privilege as applied to information received from a constituent of an organization is discussed in Upjohn Co. v. United States, 449 U.S. 383 (1981), and Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering*, Second Edition § 1.13:107 (1990 and Supp.).

<sup>82</sup>American Bar Association Formal Ethics Opinion 91-361 (July 12, 1991) (“The entity concept upon which Rule 1.13 is based, broadly stated, rests on two notions. The first is that an organization of persons, often in corporate form, is a separate jural entity having distinct rights and duties and capable, among other things, of entering into contracts and either bringing suit or being sued in its own name. Second, under the law of agency, a lawyer is an agent of the employing organization and it is the organization, as principal, to which the lawyer is professionally responsible, not its directors, officers, owners or other agents.”).

<sup>83</sup>Rule 1.13(d) *but see* Buehler v. Sbardellati, *supra*. In this case the trial court gave (and the appellate court approved) the following instruction:

“If you find that the partners to this transaction sought to accomplish a common end result and engaged the services of the defendant to implement their joint plan, then the defendant’s representation of their joint interests does not give rise to a conflict.”

<sup>84</sup> Rule 1.13(a).

<sup>85</sup> Rule 1.12(b), *see also* Geoffrey C. Hazard, Jr., and W. William Hodes, *The Law of Lawyering*



**4. Representation of the Association and an Owner.** Under the rule, representation of the partnership does not preclude representing parties who are adverse to individual partners.<sup>86</sup> Even where the attorney is clearly representing the partnership rather than any of the partners, apparently all of the partners are entitled to information regarding the partnership from the attorney:

“Thus, information thought to have been given in confidence by an individual partner to the attorney for a partnership may have to be disclosed to other partners, particularly if the interests of the individual partner and the partnership, or vis-a-vis the other partners, become antagonistic.”<sup>87</sup>

The opinion goes on to suggest that full disclosure will assist the attorney in making clear who the attorney represents:

“Lest the difficulties of representing both a partnership and one or more of its partners appear impossible to overcome, however, Rule 1.7(b)(2) and, to a lesser extent, Rule 1.13(d) suggest a procedure that may be helpful in many situations. If an attorney retained by a partnership explains at the outset of the representation, preferably in writing, his or her role as counsel to the association and not to the individual partners, and if, when asked to represent an individual partner, the lawyer puts the question before the partnership or its governing body, explains the implications of the dual representation, and obtains the informed consent of both the partnership and the individual partners, the likelihood of perceived ethical impropriety on the part of the lawyer should be significantly reduced.”

New York City Bar Association Formal Opinion 1986-2 (April 30, 1986) applies this rule to the situation in which the attorney representing the limited partnership becomes aware of wrongdoing by the general partner. Under the opinion, if the general partner refuses to disclose

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Second Edition § 1.13:305 (1990 and Supp.) for examples discussing this issue.

<sup>86</sup> “However, a lawyer undertaking to represent a partnership with respect to a particular matter does not thereby enter into a lawyer-client relationship with each member of the partnership, so as to be barred, for example, by Rule 1.7(a) from representing another client on a matter adverse to one of the partners but unrelated to the partnership affairs.” *Id. but see, Margulies v. Upchurch*, 696 P.2d 1195 (Utah, 1985).

<sup>87</sup> *Id.* citing Wortham and Van Liew v. Superior Court (Clubb), 188 Cal.App.3d 927, 233 Cal.Rptr. 725 (1987); the California Joint Client Rule of Evidence (“the attorney must divulge all partnership information to all partners.”); and Fassih v. Sommers, et al., 107 Mich.App. 509, 309 N.W.2d 645 (1981). A footnote to the ruling cites numerous cases on both sides of the issue of whether an attorney has a duty to disclose information to limited partners.

the wrongdoing to the limited partners, the attorney may do so. This opinion is somewhat troubling as it contains the language “an attorney represents the partnership interest of each individual partner of a partnership when he represents the entity of a partnership.” citing Alaska Op. 84-2 (1984). As noted below, the Rules as interpreted by the American Bar Association negate this result by holding that the attorney who represents an association does not represent any of the “constituents.” The Colorado Bar Association Ethics Committee has acknowledged that the attorney organizing a partnership represents the entity rather than individual partners, but states that the lawyer should not represent the partnership in drafting a partnership, unless the attorney feels confident “that the partners perceive the differing interests and acknowledge the possibility that if a dispute arises, the attorney may be unable to represent either the individual partners or the partnership.”<sup>88</sup>

Even where the attorney is representing the association, it is also possible, particularly in closely held enterprises for the attorney to also represent one or more of the owners. While the Rules recognize this situation<sup>89</sup> there are still problems that arise in the representation of clients in business transactions such as association and ongoing representation of businesses. The New York City Bar Association considered this situation in Formal Opinion 1994-10 (October 21, 1994). In that opinion the attorney represented both the general partner individually and the limited partnership. The opinion notes that the attorney represented the general partner with respect to the partnership. Nonetheless, when the attorney learned (from persons other than the general partner) about misdeeds of the general partner, she was obligated to notify the limited partners. The opinion blurs the distinction between representation of the limited partnership and the limited partners, but is quite explicit that any conflict between the representation of the owner and of the partnership must be resolved in favor of the partnership.

In order to represent an organization and one of its partners or members, or other constituents subject to the requirements of rule 1.7 (conflicts of interests).<sup>90</sup> Under that rule a lawyer shall not represent a client in a matter directly adverse to another client if (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other

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<sup>88</sup> Colorado Bar Association Ethics Opinion 68 (April 20, 1985) stating that DR 5-105(A) (now Rules 1.7 and 2.2) applies to the representation of the partners in the formation of a partnership agreement, and that the lawyer’s ability to represent the partners depends on “the degree to which the partners understand the conflicts of the attorney’s role” which will depend on the parties sophistication. The Opinion also notes that the partners may look to the attorney’s business judgment and concludes by noting that under DR 5-105(B) (now Rule 2.2(c)) the attorney will be obligated to withdraw from any representation if a dispute arises.

<sup>89</sup> See Rules 1.7, 1.13(e).

<sup>90</sup> Rule 1.13(e).

client; and each client consents after consultation.”<sup>91</sup> Even if the lawyer believes that the representation will not adversely affect the relationship with the other client, the lawyer’s representation of the client would be materially limited by the lawyer’s responsibilities to the other client unless: “(1) the lawyer reasonably believes the representation will not be adversely affected, and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.”<sup>92</sup> Thus, in the context of representing the organization and one of its constituents, the lawyer must first determine whether the representation of the constituent will be adverse to the representation of the organization. If the representation will not be adverse to the organization, the rule suggests that the lawyer may represent both the organization and the constituent without the consent of the organization so long as the constituent consents after consultation. On the other hand, if the lawyer determines that the representation will be “directly adverse” to the organization or the constituent, the lawyer may only represent both with the informed consent of both parties, probably subject to the rules applicable to intermediaries set forth below. If this situation is presented, the organization may only consent through a constituent other than the constituent being represented.<sup>93</sup>

**5. Representation of More than One Owner.** The Rules also contemplate an attorney’s representation of more than one client in the association, operation or dissolution of a association. In this circumstance, the attorney is acting as an “intermediary” within the meaning of Rule 2.2. This rule imposes significant limitations on the representation of any of the clients.<sup>94</sup> Under the rule, attorney is required to clearly explain the scope of the representation in this circumstance and must notify the client that the lawyer does not anticipate mediating or arbitrating any disputes between the parties. The Restatement of the Law Governing Lawyers recognizes that an attorney may be able to represent both parties to the organization of a business, but, because of the potential conflict, the lawyer must explain to the clients that their interests may differ in the future and must obtain informed consent from the clients.<sup>95</sup> One solution proposed by the Restatement, is the limitation of the scope of the

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<sup>91</sup> Rule 1.7(a).

<sup>92</sup> Rule 1.7(b).

<sup>93</sup> Rule 1.13(e).

<sup>94</sup> For a thorough review of the history of the “lawyer for the situation” and issues that arise when an attorney acts as an “intermediary,” see Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U OF ILL. L.R. 741.

<sup>95</sup> Restatement of the Law Governing Lawyers Proposed Final Draft No. 1(March 29, 1996) § 201, Illustration 3, pages 545 and 546.

engagement, if the limitation can be given effect without rendering the remaining representation objectively inadequate.<sup>96</sup>

Because the attorney has a duty to each of the clients, there is probably no attorney-client privilege as among the clients, although the attorney may not reveal such information to third parties.<sup>97</sup> Hence, it must be assumed that if litigation or other dispute arises between any clients, the privilege will not attach to such communications. The clients should be advised that their request that the attorney act as “intermediary” may result in (as stated in the commentary to the Rule) “additional cost, embarrassment, and recrimination.” Obviously such representation should be approached very carefully and never at the point at which discussions among the clients are antagonistic and contentious. Finally, the clients should be advised that to the extent that they are not able to resolve any differences among themselves, it may be necessary for the attorney to withdraw from the representation of any or all of you, depending on the circumstances. Further, if the attorneys determine that they are incapable of complying with the Rule, or if either of you requests, they may be required to withdraw, in which event they are prohibited from representing any of the clients with respect to the matters.<sup>98</sup>

Before undertaking this representation, the lawyer must be satisfied: (1) that the matter can be resolved in a matter compatible with the best interests of the clients, (2) that the clients can make adequately informed decisions in the matter, (3) that if the representation is unsuccessful, the clients will not be prejudiced, and (4) that the lawyer’s prior representation of clients outside of the transaction will not adversely impact the lawyer’s representation as intermediary.<sup>99</sup> In acting as intermediary, the lawyer is attempting to “establish or adjust a relationship between clients on a amicable and mutually advantageous basis . . .”<sup>100</sup> In this situation, the lawyer has a duty to keep each client informed and to protect each client’s interest.

Colorado Rule 2.2(a)(1) that the lawyer consult with and provide full disclosure in writing to each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges. The rule also requires the lawyer obtain each client's written consent to the common representation. In this respect Colorado Rule 2.2 differs from Colorado Rule 1.7(a)(2) which only requires that the client consent, but does not

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<sup>96</sup> Restatement of the Law Governing Lawyers Proposed Final Draft No. 1(March 29, 1996) §§ 30 and 202.

<sup>97</sup> New York City Bar Formal Opinion 1994-10.

<sup>98</sup> Rule 2.2(c).

<sup>99</sup> Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U OF ILL. L.R. 741 at pages 764 through 766.

<sup>100</sup> Rule 2.2 comment.

expressly require written consent.

The Ethics 2000 Commission has proposed eliminating Rule 2.2 from the Model Rules. This change does not indicate an abandonment of the joint representation, but rather is an attempt to clarify that Rule 1.7, dealing with conflicts generally, should apply to the relationship customarily known as “intermediation.” In their recommendation, the Commission stated:

The Commission recommends deleting Rule 2.2 and moving any discussion of joint representation to the Rule 1.7 Comment. The Commission is convinced that neither the concept of “intermediation” (as distinct from either “representation” or “mediation”) nor the relationship between Rules 2.2 and 1.7 has been well understood. Prior to the adoption of the Model Rules, there was more resistance to the idea of lawyers helping multiple clients to resolve their differences through joint representation; thus, the original idea behind Rule 2.2 was to permit joint representation when the circumstances were such that the potential benefits for the clients outweighed the potential risks. Rule 2.2, however, contains some limitations not present in Rule 1.7; for example, a flat prohibition on a lawyer continuing to represent one client and not the other if intermediation fails, even if neither client objects. As a result, lawyers not wishing to be bound by such limitations may choose to consider the representation as falling under Rule 1.7 rather than Rule 2.2, and there is nothing in the Rules themselves that clearly dictates a contrary result.

Rather than amending Rule 2.2, the Commission believes that the ideas expressed therein are better dealt with in the Comment to Rule 1.7. There is much in Rule 2.2 and its Comment that applies to all examples of joint representation and ought to appear in Rule 1.7. Moreover, there is less resistance to joint representation today than there was in 1983; thus, there is no longer any particular need to establish the propriety of joint representation through a separate Rule.

While representation of intermediaries appears to be fraught with peril, it is nonetheless a common situation in the association of businesses and the formation of contracts. In those cases, attorneys, even those who have made full disclosure of the conflict, may find themselves liable if the transaction fails.

Generally the attorney must maintain the confidential information received in the course of representing the client.<sup>101</sup> When the lawyer represents both the association and the owner, the lawyer is required to keep both clients fully informed but to otherwise maintain the confidentiality of the information received in the representation. This obligation to make information available even supersedes the attorney client privilege when the person represented owes a fiduciary duty to another, such as the obligation owed by directors to shareholders,<sup>102</sup> or

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<sup>101</sup> Rule 1.05(b).

<sup>102</sup> See, Garner v. Wolfenbarger, 430 F.2d 1093, (5th Cir. 1970), *cert denied sub nom.* Garner v.

the obligations owed by owners to associations.<sup>103</sup> In addition, when a dispute arises among the owners concerning the association, the attorney for the association may be required to refrain from representing any of the owners.<sup>104</sup> When the lawyer represents the partnership or LLC, the lawyer may be required to disclose information to all partners or members.<sup>105</sup> As noted above, as among clients being represented by an attorney as intermediary, confidentiality does not attach.<sup>106</sup> As in the case of the representation of both the organization and the constituent, one or both of the clients must consent to the representation after consultation. In the case of an intermediary, the lawyer must further determine that there is little risk of material prejudice to the clients.<sup>107</sup>

The Ethics 2000 Commission recommends the adoption of a single definition of “informed consent” in Rule 1.4(c) as follows:

As used in these Rules, "informed consent" denotes the agreement of a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation regarding the material risks of and reasonably available alternatives to the proposed course of conduct.

This rule would apply to all of the situations in which client consent or waiver is required under the Rules. The Comment states:

Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.6-1.12. The communication necessary to obtain such consent will vary according to the Rule

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First American Life Ins. Co., 401 U.S. 974 (1971), *on remand* 56 F.R.D. 499 (S.D. Ala. 1972), Valente v. Pepsico, Inc. 68 F.R.D. 361 (D.Del. 1975) and numerous other cases cited in Alvin K. Hellerstein, *A Comprehensive Survey of the Attorney-Client Privilege Work Product Doctrine*, (Rev. January 17, 1994) prepared for American Bar Association Business Law Section Program, April 8, 1994. *Contra, see Ward v. Succession of Freeman*, 854 F.2d 780 (5th Cir., 1988). For an extensive listing of cases discussing this issue *see* 17 PROFESSIONAL LIABILITY REPORTER 105 (April 1992).

<sup>103</sup> Ferguson v. Lurie, 139 F.R.D. 362 (N.D. Ill. 1991).

<sup>104</sup> Giva v. Davison, 637 A.2d 830 (D.C. App. 1994); Prisco v. Westgate Entertainment, Inc., 799 F. Supp. 266 (D. Conn. August 1992).

<sup>105</sup> ABA Formal Opinion 91-361.

<sup>106</sup> Rule 1.07 Comment 6.

<sup>107</sup> Rule 2.2.

involved and the circumstances giving rise to the need for disclosure. The lawyer must make reasonable efforts to assure that the client possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client to seek the advice of other counsel. A lawyer need not inform a client of facts or implications already known to the client; nevertheless, a lawyer who does not personally inform the client assumes the risk that the client is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client is sophisticated in legal matters generally and in making decisions of the type involved and whether the client is independently represented by other counsel in giving the consent.

The Colorado Bar Association Ethics Committee has adopted a formal opinion dealing with a lawyer's duties in those cases in which the lawyer attempts to represent more than one party to a transaction.<sup>108</sup> In that Formal Opinion, the Ethic Committee concludes:

While attorneys are frequently requested to act as the attorney for multiple parties in drafting an agreement, the Committee does not recommend multiple representation because this situation places an attorney in the clearest of conflicts regarding client confidentiality and the ability to exercise professional judgment free of compromising influences. In those situations in which an attorney agrees to accept such a role, the attorney may do so only after fully disclosing the risks of multiple representation and obtaining the consent of each party. Furthermore, prior to accepting employment, the attorney must determine if it is obvious whether the attorney can adequately represent the interests of each party to the transaction. The nature of the disclosure required and the ability adequately to represent each party will depend on the agreement in question. However, regardless of the agreement in question, representing both parties requires adherence to the full range of duties accompanying the attorney-client relationship and under no circumstances is multiple representation to be considered a "scrivener's" role.

The Formal Opinion suggests that the ability of an attorney to represent more than one member of a partnership may turn in part on the sophistication of the parties.<sup>109</sup>

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<sup>108</sup> Formal Opinion 68 "Conflicts of Interest: Propriety of Multiple Representation" (April 20, 1985).

<sup>109</sup> The Formal Opinion provides:

*Representation of a Partnership in Drafting a Partnership Agreement.*

## 6. Separate Representation of More than One Owner. The American

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Representation of a partnership in the drafting of the partnership agreement involves numerous potential conflicts of interest which attorneys often overlook. EC 5-18 addresses these concerns by stating:

A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such case, the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

These potential conflicts are most apparent in the formation of the partnership because it is at this stage that crucial decisions regarding the operation of the entity will be made. Furthermore, it is often at this stage that an attorney is representing one or more of the partners requiring the attorney, prior to agreeing to draft the partnership agreement, to consider the implications of DR 5-105(A). That disciplinary rule provides:

A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

An important consideration in evaluating the degree to which the partners understand the potential conflicts of the attorney's role is the sophistication of the parties involved in business and legal matters. Often they are much more capable of appreciating the potential conflicts, and of weighing them, during the drafting stage and throughout subsequent dealings, than are parties to a divorce proceeding who may have had little or no prior contact with the legal process. But, the possibility that the partners may have experience in legal matters cannot be assumed; frequently the partners will seek not only the attorney's legal advice, but also the attorney's business judgment in formulating the direction of the proposed partnership. In any event, the attorney should feel confident that the partners perceive the differing interests and acknowledge the possibility that if a dispute arises, the attorney may be unable to represent either the individual partners or the partnership. DR 5-105(B).



College of Trust and Estate Council (“ACTEC”) in their *Commentaries on the Model Rules of Professional Conduct*, 2nd Edition (March 1995) (the “ACTEC Commentaries”) suggest that, particularly in the context of estate planning, it is possible for an attorney to represent two persons with respect to the same transaction as separate clients. Example 17.1 of the ACTEC Commentaries describes the relationship as follows:

“However, some experienced estate planners believe that it is appropriate to represent a husband and wife as separate clients, each of whom is entitled to presume the confidentiality of information disclosed to the lawyer in connection with the representation. If permitted in the jurisdiction in which the lawyer practices, the lawyer may properly represent a husband and wife as separate clients.” ACTEC Commentaries, page 88.

This relationship does not appear to be expressly sanctioned by the Model Rules,<sup>110</sup> but the ability to represent multiple clients in the same matter and maintain confidences of the clients from each other has been recognized by the Restatement of the Law Governing Lawyers.<sup>111</sup>

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<sup>110</sup> The ACTEC Commentaries acknowledge the lack of authority for such a representation:

There does not appear to be any authority that expressly authorizes a lawyer to represent multiple clients separately with respect to related legal matters. However, with full disclosure and the consent of the clients, some experienced estate planners regularly undertake to represent husbands and wives as separate clients. . . . A lawyer who is asked to provide separate representation to multiple clients should do so with great care because of the stress it necessarily places on the lawyer’s duties of impartiality and loyalty and the extent to which it may limit the lawyers ability to advise each of the clients adequately. For example, without disclosing a confidence of one spouse the lawyer may be unable adequately to represent the other spouse. However, within the limits of MRPC 1.7 (Conflict of Interest: General Rule) it may be possible to provide separate representation regarding related matters to adequately informed clients who give their consent to the terms of the representation. It is unclear whether representation could be given within the scope of MRPC 2.2 (Intermediary). ACTEC Commentaries, pages 66 and 67.

<sup>111</sup> Restatement of the Law Governing Lawyers Proposed Final Draft No. 1 (March 29, 1996) § 211 (Multiple Representation in Non-Litigated Matter) Comment a provides:

Clients represented by the lawyer under the terms of this Section are “co-clients”; the communications of each with the lawyer are not privileged from disclosure to the other co-clients unless the co-clients have agreed otherwise (see § 125).

Restatement § 125(2) provides:

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#### D. Liability of Lawyers Representing Associations and Members.

The ethical rules adopt the entity approach to the representation of associations providing that the association, rather than the owners or managers, is the client.<sup>112</sup> The Restatement of the Law Governing Lawyers provides that a lawyer generally will have duties to clients and nonclients to the same extent as nonlawyer.<sup>113</sup> Nonetheless, a lawyer is privileged to advise clients with respect to entering into or breaching contracts, including the dissolution of an unincorporated business organization.<sup>114</sup> An attorney who represents a person in a fiduciary

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Unless the co-clients have agreed otherwise, a communication described in Subsection (1) [a communication by any co-client] is not privileged as between the co-clients in a subsequent adverse proceeding between them.

The commentary to § 125 explains:

Co-clients may agree that the lawyer will not disclose certain confidential communications of one co-client to other co-clients. If the co-clients have so agreed and the co-clients are subsequently involved in adverse proceedings, the communicating client can invoke the privilege with respect to such communications not in fact disclosed to the former co-client seeking to introduce it. **In the absence of such an agreement, the lawyer ordinarily is required to convey communications to all interested clients** (see § 112, Comment *l*).

<sup>112</sup> Rule 1.12(a).

<sup>113</sup> *Restatement of the Law Governing Lawyers (Draft 12)*, § 77.

<sup>114</sup> *Restatement of the Law Governing Lawyers (Draft 12)* § 78(3) (restating the same provision in Draft 7) provides:

(3) A lawyer who advises or assists a client to make or break a contract, to enter or dissolve a legal relationship, or to enter or not enter a contractual relation, is not liable to a non-client for interference with contract or with prospective contractual relations or with a legal relationship, if the lawyer acts to advance the client's objectives without using wrongful means.

Comment (g) to § 78 of Draft 12 provides:

As with other advisors to a contracting party, lawyers are protected against liability for interfering with contracts or with prospective contractual relations or business relationships [Citation omitted] That protection reflects the need of contracting parties for advice and assistance, the difficulty of knowing in advance whether an arguable refusal to perform will be held to constitute an actionable breach of contract, and the view that even an actionable breach may sometimes be

capacity to another may owe duties to the beneficiary of the client's duties. The 1994 draft of Restatement of the Law Governing Lawyers provides that an attorney has the duty "to prevent or rectify a breach of fiduciary duty owed by a client to a non-client, when the non-client is not reasonably able to protect its rights and such a duty would not significantly impair the performance of the lawyer's obligations to the client."<sup>115</sup> The comment to this section was

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defensible. Thus a lawyer may ordinarily, without civil liability, advise a client not to enter a contract or to breach an existing contract. A lawyer may also assist such a breach, for example by sending a letter stating the client's intention not to perform, or by negotiating and drafting a contract with someone else that is inconsistent with the client's other contractual obligations. The same principles apply to dissolving relationships such as marriage or business partnership. They likewise apply to advising or assisting a client to interfere with a contract or a prospective contract or business relationship with one party, for example by entering into a contract or relationship with another, or to interfere with a contract or relationship between non-clients.

A lawyer so advising and acting is not liable if the lawyer does not employ wrongful means, and if the lawyer acts to protect the client's welfare (citation omitted). So long as the lawyer acts or advises with the purpose of promoting the client's welfare, it is immaterial that the lawyer hopes that the action will increase the lawyer's fees or reputation as or lawyer or takes satisfaction in the consequences to a non-client. Nor does a lawyer become liable to non-clients for giving with a proper purpose advice that is negligent or harms the client. But a lawyer who acts or advises a client for the lawyer's own benefit, for example so that the client will enter contractual relations with a business in which the lawyer owns an interest, is subject to liability to a non-client when the lawyer's activities satisfy the other requirements of the tort. A lawyer may also be liable to a non-client for assisting a client with a proper purpose but by a wrongful means, such as by threatening the non-client with an unfounded criminal prosecution in order to induce the non-client to cancel a contract.

<sup>115</sup> *Restatement of the Law Governing Lawyers (Draft 7)* § 73(4)(b). Comment (g) provides:

A lawyer who knowingly assists a client to violate the client's fiduciary duties is civilly liable as would be a non-lawyer. [citations omitted] Moreover, a lawyer must use due care to protect a beneficiary when it is clear that his is necessary to prevent a violation of fiduciary duties by the lawyer's client or to rectify (typically by disclosure) the consequences of such a violation, and when action by the lawyer would not violate the jurisdiction's professional rules. The duty is essential because of the importance of fiduciary duties and the need of their beneficiaries for protection. Because fiduciaries are generally to pursue the interests of their beneficiaries, recognizing the duty will not ordinarily subject the

modified to state that the rule setting forth an attorney's liability to third parties is not applicable to an attorney for a partner or director.<sup>116</sup> The 1996 changes also add a new section to Chapter 6

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lawyer to conflicting or inconsistent duties. Moreover, to the extent the lawyer has assisted, even unwittingly, in creating a risk of injury, it is appropriate to impose a preventative and corrective duty on the lawyer.

The existence and scope of fiduciary duties is delimited by the law governing relationships where special protection is appropriate, such as those of a trustee and beneficiary, executor and beneficiary, lawyer and client, partner and partner or corporate officer or director and the corporation (where the lawyer represents the officer or director in that capacity and not the corporation). Even where the relationship is fiduciary for all purposes, not all duties it imposes are necessarily fiduciary. Thus, violation of duties of loyalty by a fiduciary are ordinarily considered breaches of fiduciary duty, while violations of duties of care are not. Sometimes a lawyer will represent both the fiduciary and the fiduciary's beneficiary, and thus, may be liable to the beneficiary under § 72 as well as incurring remedies due to a conflict of interest (see “ 211-212); a lawyer may ordinarily avoid such difficulties by making clear to the beneficiary that the lawyer represents the fiduciary rather than the beneficiary.

The duty recognized by Subsection (4) arises only when circumstances known to the lawyer make it clear that the appropriate action by the lawyer make it clear that appropriate action by the lawyer is necessary to prevent to rectify a breach of fiduciary duty owed by a client. The duty thus exists only when circumstances known to the lawyer make it clear that such a breach has occurred or is about to occur. It is not enough that someone might advance an argument that the fiduciary client's conduct constitutes a breach. Normally, a lawyer must follow the instructions of the fiduciary with respect to the representation.

Subsection (4) recognizes a lawyer's duty only when the beneficiary duties is not reasonably able to protect himself or herself. That would be the case, for example, where the beneficiary is incompetent and not represented by counsel or protected by a guardian other than the lawyer's client. It would also be the case where the fiduciary had kept from the beneficiary the information needed to put the beneficiary on notice of a breach. On the other hand, when a lawyer represents a corporate officer or director owing fiduciary duties to a corporation that the lawyer does not represent, the corporation is ordinary able to protect itself.

<sup>116</sup> *Restatement of the Law Governing Lawyers (Draft 12)* § 73(4)(b). Comment (h) provides:

The duty recognized by Subsection (4) is limited to lawyers representing only a limited category of the persons sometimes described as fiduciaries -

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dealing with Representing Clients expressly dealing with the duties of an attorney representing a fiduciary.<sup>117</sup> The Comment to this section indicates a broader coverage than that applicable to the section dealing with the liability of attorneys to beneficiaries.<sup>118</sup> Section 154 of the Restatement was removed in 1997.<sup>119</sup> The difference in the breadth of coverage between § 73(4)

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trustees, executors, guardians, other lawyers, and similar fiduciaries. Fiduciary responsibility is the chief end of such relationships. The lawyer is hence less likely to encounter conflicting considerations arising from other responsibilities of the fiduciary-client than are entailed in other relationships in which fiduciary duty is only a part of a broader role. Thus, subsection (4) does not apply when the client is a partner in a business partnership, a corporate officer or director, or a controlling stockholder.

<sup>117</sup>*Restatement of the Law Governing Lawyers (Draft 12)* § 154 (Representing Client with Fiduciary Duties) provides:

In providing assistance to a client having fiduciary obligations to another:

- (1) a lawyer must regard the fiduciary as the client under § 28 and follow instructions of the fiduciary concerning the representation as stated in § 32(2); and
- (2) a lawyer violates a duty to a beneficiary if the lawyer:
  - (a) fails to exercise due care, when the lawyer owes due care to the beneficiary to the extent stated in § 73(4); or
  - (b) assists in an unlawful act of the client fiduciary to the extent stated in § 77 [Chapter 4].

<sup>118</sup>*Restatement of the Law Governing Lawyers (Draft 12)*, § 154. Comment (b) provides:

Fiduciary duties included within this Section are imposed in relationships such as those between: lawyer and client; trustee of an express trust and beneficiary of the trust; guardian and ward; agent and principal; executor or personal representative of an estate and estate beneficiary; partner in a partnership and other partners, including limited partners; officer or director (and, to a more limited extent, persons such as controlling shareholders) of a corporation and the corporation or association, where the lawyer represents such a person in his or her capacity as officer or director rather than representing, for example, the corporation or association as an entity; and principal in a joint venture and another member of a joint venture. A lawyer's liability under § 73(4) is, as stated there, limited to representation of certain kinds of fiduciaries.

<sup>119</sup>*Restatement (Third) of Law Governing Lawyers* Reporters Memorandum (Tentative Draft No.8, March 21, 1997) provides:

and former § 154 suggests that a lawyer may be liable to a client's partners or other members if the lawyer participates in a client's deceit or fraud rather than a simple breach of the duty of loyalty. The concept of a lawyer's liability for aiding and abetting a breach of fiduciary duty has been recognized, albeit in dicta, in Colorado<sup>120</sup> and California.<sup>121</sup> Similarly, an attorney has been

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§ 154 -This former Section was also deleted after discussion of Preliminary Draft No. 12 with the Advisers and Members Consultative Group. It dealt with the general problem of advising clients who owe fiduciary duties to non-client third persons. There is no present plan to move the text to another Section.

<sup>120</sup>In Holmes v. Young, 885 P.2d 305 (Colo. App. 1994), the Court addressed a lawyer's liability when representing a partnership:

In jurisdictions which have recognized the tort of aiding and abetting a breach of fiduciary duty, the plaintiff must prove each of the following elements: "(1) breach by a fiduciary of a duty owed to plaintiff, (2) defendant's knowing participation in the breach, and (3) damages." Diduck v. Kaszycki & Sons Contractors, Inc., 974 F.2d 270, 281-82 (2d Cir.1992); see also Terrydale Liquidating Trust v. Barness, 611 F.Supp. 1006 (S.D.N.Y.1984). The gravamen of a claim of aiding and abetting a breach of fiduciary duty is the defendant's "knowing participation" in the fiduciary's breach of trust; wrongful intent is not necessary as the factfinder is required only to "find that the [defendant] knew of the breach of duty and participated in it." S & K Sales Co. v. Nike, Inc., 816 F.2d 843, 848 (2d Cir.1987).

A general partner owes a fiduciary duty to a limited partner not to misappropriate partnership assets, and this fiduciary duty continues past the dissolution of a partnership through the winding up period until the division of partnership assets is complete. See Steeby v. Fial, 765 P.2d 1081 (Colo.App.1988); Gundelach v. Gollehon, 42 Colo.App. 437, 598 P.2d 521 (1979). We perceive no reason why the tort of aiding and abetting a breach of fiduciary duty should not be recognized in a limited partnership situation.

<sup>121</sup>In Ronson v. Superior Court of San Diego County, 24 Cal. App. 4th 94; 29 Cal. Rptr. 2d 268. (Cal. App. 4th App. Dist. Div. 1, 1994), the Court held:

As to the factors of whether the individual partners sought professional advice or attempted to establish an attorney-client relationship with the partnership's attorneys, of course there was no such direct contact here. However, it is alleged that the attorney defendants prepared the draft documents in order to induce the limited partners to rely on them. This case is thus distinguishable from Roberts v. Ball, Hunt, Hart, Brown & Baerwitz (1976) 57 Cal.App.3d 104, 110-111 [128 Cal.Rptr. 901], and Courtney v. Waring (1987) 191 Cal.App.3d 1434

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held liable for breach of fiduciary duty for assisting in ousting a former client.<sup>122</sup> To the contrary, a recent New York opinion has stated that a partner lacked standing to sue the partnership's receiver and the receiver's attorney for breach of fiduciary duty,<sup>123</sup> although another New York case has held that attorneys for a group that acquired a corporation may be liable to creditors of the corporation where the attorneys issued opinions and assisted in causing the corporation to issue debentures in violation of covenants with creditors.<sup>124</sup> Other cases have held that an attorney does not have a duty to disclose client's fraud to persons to whom the

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[237 Cal.Rptr. 233] because in those cases the attorneys' names were evidently on the opinion letter or prospectus which was sent out to induce third party reliance. Here, the attorneys ghost-wrote the documents for the general partner, and thus did not intentionally induce knowing reliance on their participation in the transaction. Even so, if there are other factors leading to an implied attorney-client relationship, where the attorney has knowledge regarding the purpose of his or her work product, a duty may be established to those whose [\*39] conduct has been influenced. ( at p. 1444.) In such a case, an attorney may owe a plaintiff a duty of care where the "end and aim" of the attorney's advice, even to another, is to induce the plaintiff's reliance on it. (Goodman v. Kennedy, supra, 18 Cal.3d at p. 343, fn. 4.)

Similarly, since the attorney defendants advised the fiduciary about his duty of disclosure to the limited partners, they may have undertaken some kind of duty to protect those interests. (See Morales v. Field, DeGoff, Huppert & MacGowan (1979) 99 Cal.App.3d 307, 316 [160 Cal.Rptr. 239] [holding that in the trust context an attorney undertaking a relationship as advisor to a trustee also assumes a relationship with the trust beneficiary akin to that between trustee and beneficiary].)

<sup>122</sup>Fassihi v. Sommers, Schwartz, Silver, Schwartz, and Tyler, 309 N.W.2d 645 (Mich. App. 1981).

<sup>123</sup> Lubitz v. Mehlman, 187 A.D.2d 97, 591 N.Y.S.2d 839 (1993).

Although part of Fellner's [the attorney] job was to counsel Grossman [the receiver] in safeguarding Heather's [the limited partnership] interests, and, as a court-appointed lawyer, Fellner was under court supervision, he was still Grossman's counsel rather than Heather's. Accordingly, only Grossman could sue Fellner for malpractice and complain of his having violated his fiduciary duties.

<sup>124</sup>Massachusetts Financial High Income Trust v. Playing Card Corp. (New York Cty. Sup. Ct., 1995).

attorney does not have a fiduciary relationship.<sup>125</sup> It is essential that the attorney have a clear understanding of the fiduciary relationships of the owners and the association.

The significance of characterizing these duties as fiduciary rather than contractual may be very important. As noted above, while a lawyer may be liable for aiding and abetting a client's breach of fiduciary duty, it seems clear that an attorney is privileged in counselling a client with respect to the client's anticipated not be immediately clear. This, of course, may give rise to confusion where the relationship of the owners of an association is at once fiduciary and contractual. For this reason, both the lawyer and the client will benefit from a clear statement of the duties owed by the owners to the organization.

The duties owed by a lawyer who represents a fiduciary to the beneficiary has been a source of considerable discussion in the estate and trust area.<sup>126</sup> In many respects this issue is somewhat simpler in the pure fiduciary context that exists in the estate and trust area, in which the fiduciary is expected to be disinterested, than it is in the context of unincorporated associations in which each owner is anticipated to have an individual interest in the economic arrangement of the association.<sup>127</sup> Owners, in contrast to trustees, are not only agents of the association, with the fiduciary duties attendant to that relationship, but also personally financially interested in the association. Thus, unlike trustees, owners will have economic conflicts and will be expected to be self-interested. For this reason, the representation of an owner or the association must specifically address the effects of this conflict.

Although similar, the rules governing the liability of lawyers for malpractice and breach of fiduciary duty differ from the rules setting forth ethical responsibility of an attorney. The legal profession has long regulated its own activities through its ethical rules and through malpractice litigation. The Model Rules of Professional Conduct, have been adopted in thirty-five states, in some instances with slight amendments; California has developed its own rules;<sup>128</sup> Illinois based its new rules on both the Model Rules and the earlier model code; New York uses primarily the model code incorporating certain matters from the Model Rules; North Carolina

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<sup>125</sup>Camp v. Dema, 948 F.2d 455 (8th Cir., 1991), Barker v. Henderson, Franklin, Starnes & Holt, 797 F.2d 490 (7th Cir. 1986); Schatz v. Rosenberg, 943 F.2d 485 (4th Cir. 1991).

<sup>126</sup>Special Study Committee on Professional Responsibility of the Section of Real Property, Probate and Trust Law of the American Bar Association, *Counseling the Fiduciary*, 28 REAL PROPERTY PROBATE AND TRUST J. 825 (Winter 1994); Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. OF LEGAL ETHICS 15 (1987).

<sup>127</sup>See, e.g., ULLCA § 409(e), RUPA § 404(e) (owner's action not a breach of duty merely because it further's owner's own interest).

<sup>128</sup>See generally, D. L. Karpman and S.L. Margolis, *California Lawyer's Guide to Professional Responsibility* (Shepard's/McGraw-Hill, Inc. 1994).



uses both substantive provisions from the Model Rules and the model code; Oregon uses the model code incorporating some Model Rules; and Virginia uses the model code adopting some of the Model Rules. Although ethical considerations are designed to provide professional disciplinary guidance rather than a basis for liability,<sup>129</sup> there is little question that these form the basis for legal liability.<sup>130</sup> While the rules of professional conduct may provide a starting point,

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<sup>129</sup>In the Comments describing the Scope of the Model Rules of Professional Conduct (the *Rules*), the drafters of the Rules state:

“Violation of a Rule should not in and of itself give rise to a cause of action nor should it create any presumption that a legal duty has been breached. 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.*” (emphasis supplied)

For a thorough exposition of the growth of liability of attorneys (both for malpractice and otherwise) in the context of regulated clients see American Bar Association Working Group on Lawyers’ Representation of Regulated Clients, *Laborers in Different Vineyards? The Banking Regulators and the Legal Profession* (Discussion Draft, January 1993). Emily Couric, *The Tangled Web, When Ethical Misconduct Becomes Legal Liability*, 79 AMERICAN BAR ASSOCIATION JOURNAL (April 1993) 64 at 67-68 “In sum, the lawyers who are at greatest risk of finding themselves on the wrong end of a malpractice suit are those who are reasonably competent, practicing in larger firms, handling larger matters with adequate insurance protection.” The liabilities of attorneys has also been a focus in the American Law Institute’s *Restatement of the Law Third of the Law Governing Lawyers, Tentative Draft No. 7 (April 7, 1994) Chapter 4. “Lawyer Civil Liability” § 74, Comment g.* “Even when unexcused violation of a statute or rule is admissible under this Section, it is not conclusive proof of the standard of care to which lawyers must conform for purposes of liability.” At its annual meeting on May 20, 1994, the ALI voted to return Draft 7 to the reporters for further consideration. On May 15, 1996, the reporters released *Restatement of the Law Third of the Law Governing Lawyers, Preliminary Draft No. 12 (May 15, 1996)* which included Chapter 1 Regulation of the Legal Profession (for information only); Chapter 3. Client and Lawyer: the Financial and Property Relationship, Topic 5. Fee Splitting; Chapter 6. Representing Clients - In General; and Chapter 7. Representing Clients in Litigation. On September 24, 1996, the reporters released *Restatement of the Law Third of the Law Governing Lawyers, Council Draft No. 12 (September 24, 1996)* which included Chapter 3, Client and Lawyer: The financial and Property Relationship, Topic 5. Fee Splitting; Chapter 4, Lawyer Civil Liability; Chapter 6. Representing Clients - In General; and Chapter 7. Representing Clients in Litigation.

<sup>130</sup>Emily Couric, *The Tangled Web, When Ethical Misconduct Becomes Legal Liability*, 79 AMERICAN BAR ASSOCIATION JOURNAL (April 1993) 64, at page 68 quoting Allen Snyder as stating, “A lot of complicated malpractice cases today are based upon allegations that lawyers

the responsibility of attorneys is also governed by various regulatory agencies before whom they practice.<sup>131</sup> At the least, violation of ethical rules is probative of violation of the standard of care.<sup>132</sup>

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failed to fill their ethical responsibilities . . . In some instances violations of the code are automatically malpractice.” See also, American Bar Association Working Group on Lawyers’ Representation of Regulated Clients, *Laborers in Different Vineyards? The Banking Regulators and the Legal Profession* (Discussion Draft, January 1993), at page 141.

<sup>131</sup>See, e.g. Remarks of Harris Weinstein, Chief Counsel, Office of Thrift Supervision, United States Department of the Treasury before the Pennsylvania Association of Community Bankers (March 23, 1992) cited in American Bar Association Working Group on Lawyers’ Representation of Regulated Clients, *Laborers in Different Vineyards? The Banking Regulators and the Legal Profession* (Discussion Draft, January 1993) at page 144. Internal Revenue Service Circular 230.

<sup>132</sup>The evolution of the limitation of the application of ethical rules demonstrates the evolution of the reporters’ thinking on this subject. The most recent draft of § 74(2) provides:

“Proof of a violation of a rule or statute regulating the conduct of lawyers:

- (a) does not as such give rise to an implied cause of action for lack of care;
- (b) does not preclude other proof concerning the duty of care in Subsection (1); and
- (c) May be considered by a trier of fact as an aid in understanding and applying the standard of Subsection (1) to the extent that (i) the rule or statute was designed for the protection of person in the position of the claimant and (ii) proof of the content and construction of such a rule or statute is relevant to claimant’s claim.” *Restatement of the Law Governing Lawyers (Council Draft 12)* § 74(2).

The previous draft of § 74 concluded with the additional sentence at the end of paragraph (c): The trier of fact may be informed of that content and construction in accordance with evidentiary and procedural law” *Restatement of the Law Governing Lawyers (Preliminary Draft 12)* § 74(2)(c).

As originally proposed, subsection (2) provided:

“Proof of a violation of a rule or statute regulating the conduct of lawyers does not irrebuttably prove negligence or give rise to an implied cause of action for negligence; but a trier of fact applying the standard of care of Subsection (1)

**1. Representation of One Owner.** Generally, if the lawyer is representing only the partner or member, there should be no direct responsibility to the association. Thus, the information obtained should be maintained in confidence from the association and the other owners.

**2. Representation of the Association.** An attorney representing an association owes duties to the association. The duty of to the owners the professional representing the association is less clear and varies from state to state. Most states appear to hold that an attorney representing an organization does not also. The Utah Supreme Court has ruled that an attorney representing a limited partnership has an implied attorney-client relationship or fiduciary duty with respect to the individual limited partners, who reasonably believed the firm was acting for their individual interests as well as those of the partnership.<sup>133</sup> The court went on to suggest that this implied relationship might have been resolved through disclosure.

In an Ohio case, the court has held:

“whether the duty arising from an attorney-client relationship is owed to the limited partnership itself or to the general partner thereof, it must be viewed as extending to the limited partners as well. Inasmuch as a limited partnership is indistinguishable from the partners which compose it, the duty arising from the relationship between the attorney and the partnership extends as well to the limited partners. Where such duty arises from the relationship between the attorney and the general partner, the fiduciary relationship between the general partner and the limited partners provides the requisite element of privity recognized under Elam, *supra*. Such privity, in turn, extends the duty owed to the general partner to the limited partners regarding matters of concern to the enterprise.

“Our determination that the duty owed by an attorney to a partnership extends to the individual partners thereof is in accord with other jurisdictions which have considered the issue. . . . We therefore hold that appellees herein owed a duty of due care to appellants arising from the attorney-client relationship between appellees and the general partner and the limited partnership. Arpadi v. First MSP Corporation, 68 Ohio St.3d 453, 458; 628 N.E.2d 1335, 1339

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may be informed, by instruction and through expert testimony, of the content and construction of such a rule or statute that was intended for the protection of persons in the position of the claimant, and an expert witness may rely on such rule or statute in forming an opinion as to that application.” *Restatement of the Law Governing Lawyers* § 74(2).

<sup>133</sup> Margulies v. Upchurch, 696 P.2d 1195 (Utah, 1985)

(Supreme Court of Ohio, 1994).

California courts have held that an attorney representing a partnership does not necessarily have an attorney-client relationship with an individual partner for purposes of applying conflict of interest rules. The court stated that whether such a relationship exists depends on whether there is an express or implied agreement that the attorney also represents the partner.<sup>134</sup> Recent cases<sup>135</sup> have followed the entity rule recognizing that an attorney could represent a limited partnership without being attorney to the limited partner. The sound result is that stated in the Rule, that the attorney for the association does not represent the owners. As discussed below, however, although the attorney may not represent the owners individually, the attorney may owe duties to the owners by virtue of fiduciary duties owed to the owners by the attorney's client (either the association or an owner).

Similarly, a Wyoming case has held that an attorney retained to form a closely held corporation may have an attorney-client relationship with the incorporators.<sup>136</sup>

### **E. Engagement Letters with Respect to Associations and Their**

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<sup>134</sup> Kapelus v. State Bar (1987) 44 Cal.3d 179, 191-196 [242 Cal.Rptr. 196, 745 P.2d 917; Responsible Citizens v. Superior Court (1993) 16 Cal.App.4th 1717, 1732, 20 Cal.Rptr.2d 756.

<sup>135</sup> Turkey Creek, LLC v. Rosania, 953 P.2d 1306 (Colo. App. 1998 Turkey). (Joint venturer who is not client of attorney does not have standing to assert that attorney was negligent in representing other joint venturer who is a client of the attorney). Zimmerman v. Kamphausen Co., 971 P.2d 236 (Colo. App. 1998) (while the court confirmed that an attorney for the partnership does not represent the individual partners, it also held that in rendering an opinion on behalf of the partnership, the attorney could be liable to third parties for negligent misrepresentation of fact, as in Mehaffy, Rider, Windholz & Wilson v. Central Bank, 892 P.2d 230 (Colo.1995)); Holmes v. Young, 885 P.2d 305 (Colo. App. 1994); Responsible Citizens, (1993) 16 Cal.App.4th 1717, 1732, 20 Cal.Rptr.2d 756; Rendler v. Markos, 453 N.W. 2d 202 (Wisc. App. 1990); Hackett v. Village Court Associates, 602 F.Supp 856 (E.D. Wisc. 1985); Quintel Corp. v. Citibank, 589 F. Supp. 1235 (S.D. N.Y. 1984); Alpert v. Shea & Gould et. al., 559 N.Y.S. 2d (N.Y. App. 1989); Hopper v. Frank, 16 F.3d 92 (5th Cir. 1994) (Mississippi limited partnership); *contra.*, Ronson v. Superior Court of San Diego County, 24 Cal. App. 4th 94; 29 Cal. Rptr. 2d 268. (Cal. App. 4th App. Dist. Div. 1, 1994), *ordered not to be published*; Rose v. Summers, Compton, Wells & Hamburg, P.C., 887 S.W.2d (Mo. App. 1994).

<sup>136</sup> Meyer v. Mulligan, 889 P.2d 509 (Wyo. 1995); Hager-Freemen v. Spricoff, 593 N.E.2d 821 (Ill. App. 1992). For cases holding that attorney for corporation does not represent minority shareholders, *see* Bowen v. Smith, 838 P.2d 186 (Wyo. 1992); Felty v. Hartweg, 523 N.E.2d 555 (Ill. App. 1988); TJD Dissolution Corp. v. Savo Supply Co., Inc., 460 N.W.2d 59 (Minn. App. 1990); Skarbrevik v. Cohen, England & Whitfield, 231 Cal.App.3d 692 (1991); Goerlich v. Courtney Industries, 581 A.2d 825 (Md. App. 1990); Brennan v. Ruffner, (Fla. App. 1994).

## Members

An attorney representing the organizers of a small unincorporated business should first clearly determine who the client is, this determination should be clearly communicated to the client and any non-clients who may be misled, and should be cautious of potential actions on the part of the client that may constitute a breach of fiduciary duty owed by the client to other owners.

1. **Representation of an Owner.** If the attorney is only representing an individual owner, the engagement letter should reflect that fact:

In doing our work for you, you will be our client, and we will not represent the Partnership or the Corporation or any other partner, shareholder, officer or director of any of those organizations. We assume these entities and individuals have independent counsel and do not look to us as their counsel. It is possible that your best interest may differ from what is in the best interests of these organizations or of other partners, shareholders, officers or directors of these organizations. In those situations those organizations must seek and obtain advice from their own independent counsel and not look to us for advice as to what is in their best interest. Of course, you, as a partner, officer, or director may owe fiduciary duties to these organizations, and we will be happy to discuss those duties with you.

2. **Representation of the Association and an Owner.** If the attorney is representing both the association and one of the owners, that fact should be made clear in the engagement letter, as should the effect of that on the attorney client privilege:

In general, information learned by lawyers about their clients and communications between lawyers and their clients are privileged and confidential and may not be disclosed to third parties without the client's consent. Because both of you [The engagement letter would have been addressed to both the partner and the partnership] and each of you is our client, information we learn about either of you and confidential communications between us and either of you will be privileged and confidential and may not be disclosed to persons. However, as your lawyers we may be ethically required to disclose to either of you any information or any problem concerning either of you which is disclosed to us or which we discover in the course of our work for either of you. For example, a matter disclosed by the Partner may have to be disclosed to the Partnership and other partners.

At this time, neither you nor we perceive any conflicting or differing interests between you. Accordingly, it appears to be entirely proper for our firm to represent each of you in this case, and you have retained us to do so. If during the course of this representation, we perceive any conflicting or differing interests between you, we will advise you of that fact at once. Similarly, you will advise

us at once if you come across differing or conflicting interests of which we are not aware, now or later during the course of the representation. In that event, we may not participate in the resolution of any such conflict between you; rather you will attempt to resolve your differences between yourselves in such manner as you determine to be proper. In the event you are unable to resolve such differences, it may be necessary for our firm to withdraw from the representation of either or both of you, depending on the circumstances.

3. **Representation of More than One Owner.** Finally, if the attorney is representing all (or at least more than one) of the owners, in the capacity of being an intermediary, the letter should be fairly explicit on the limitations to be imposed on the attorney:

As we discussed, we will represent all of you with respect to the Matter. In this capacity, we would be acting as “intermediaries” within the meaning of Rule 2.2 (the “Rule”) of the Colorado Rules of Professional Conduct. In particular, we anticipate that we will advise you with respect to the law applicable to the Matter, make suggestions as to the appropriate steps to be taken, and provide such additional advice with respect to the Matter as you request. We do not anticipate mediating or arbitrating any disputes between you. Because we have a duty as attorney for each of you, we do not anticipate that as between the you, the attorney client privilege will attach with respect to communications from any of you. Hence, it must be assumed that if litigation or other dispute arises among you, the privilege will not attach to such communications. You understand that in such event, your request that we act as “intermediaries” may result in (as stated in the commentary to the Rule) “additional cost, embarrassment, and recrimination.” Nonetheless, because the assistance from us you are seeking is not in the nature of resolving differences among yourselves, and because your discussions among yourselves are neither antagonistic nor contentious, you have requested us to represent you both. We will endeavor to do so both impartially and efficiently, and we will consult with each of you so that each of you may make an adequately informed decision. Your interests on dissolution are, of course, different, and each of you understands that to the extent that you are not able to resolve differences between yourselves, it may be necessary for the firm to withdraw from the representation of any or all of you, depending on the circumstances. Further, if we determine that we are incapable of complying with the Rule, or if any of you requests, we are required to withdraw, in which event we are prohibited from representing any of you with respect to the matters described above.

Note that this provision reflects that obligation of the Rule that if a dispute arises and either party requests, the attorney must “quit the field.” If a dispute arises, it is probably a safe assumption that a nonrepresented client will request that the attorney withdraw.

4. **Unengagement Letter .** Finally, the attorney should consider, under

appropriate circumstances, an “unengagement” letter to a person who might believe that the attorney is representing them. While this may seem peculiar and antagonistic in the otherwise congenial atmosphere of the association of business, such a letter may not only clarify the attorney’s position in the negotiation but also emphasize that the parties may have different interests that they should be considering in the association. While this may make the negotiation more spirited at the outset, it is often easier to resolve the differences that are considered in the abstract on when the parties do not know which side of the deal (such as a “buy-sell” arrangement) they will be on than when there are actual dollars at stake and each party has a financial stake in the outcome of the issue.

An “unengagement” provision might read as follows:

This letter is simply to formally inform you that we will be representing only Client in the Matter, and not either you or the Partnership. We made this determination based upon the potential complexity of trying to represent more than one party in a situation in which the interests of each of you may be quite different. I know that it is Client’s desire, and I understand yours, that the resolution of the Matter be as beneficial, and accompanied by as much goodwill, as is possible. I hope you will not take our representing Client as reflecting in any way on you but simply as our desire to try to maintain a reasonably clear relationship with regard to confidentiality and advice. You should understand that any communication between Client and us will be privileged, and that we may not disclose such communication to either you or the Partnership without client’s authorization. You, the Partnership or both may want to retain independent counsel for advice with respect to the Matter.

Obviously, this sort of letter should be carefully drafted, taking into account the non-client’s level of understanding of the role of an attorney and the dynamics of the transaction and the relationship of the client and the non-client.

ENGAGEMENT LETTER LANGUAGE  
FOR ATTORNEYS REPRESENTING PARTNERSHIP

[add to comprehensive engagement letter and fee agreement]

As we have discussed, our firm has been retained to represent the partnership as an entity, rather than act as legal counsel for any individual partner. The Code of Professional Responsibility governing lawyers in Colorado requires that we explain fully the implications of this arrangement and that we assist the individual partners in evaluating the need to obtain separate counsel.

The fact that we will be representing the partnership means that it is our duty to place the partnership's welfare and interests ahead of the interests of any partner. While in many cases what is best for the partnership will be best for all partners, there are invariably a great number of matters as to which the interest of the partners will differ.

For example, partners may have different views with respect to: (i) the valuation of property and services to be contributed to the partnership; (ii) the financing of additional capital requirements by partnership borrowings or further contributions by individual partners; (iii) the avoidance of individual liability on partnership borrowings; (iv) the treatment of partners voluntarily or involuntarily withdrawing from the partnership; (v) long-term operation of the partnership as opposed to more rapid realization of values by sale of the business; (vi) buy-sell, or "shotgun" provisions; and (vii) changes in the nature of the business or business expansion. The foregoing are merely illustrative of the many ways in which the partners' interests, objectives and estate planning may diverge.

Disputes which arise between partners frequently raise issues that cannot be resolved by the partnership, but must be resolved between individual partners, with or without separate counsel. If there were matters of substantial difference between you now, we would strongly recommend that you retain separate counsel now to advise you fully of your alternatives and to assist you in resolving the differences. Resolving differences now would help to avoid unnecessary expense, delay or acrimony at a later time.

We are undertaking representation of the partnership in reliance upon our understanding that no substantial differences now exist among the partners, and that you are generally in agreement with respect to the structure, management, and financial plans of the partnership. We are also acting in reliance upon the understanding that each of you has disclosed to us fully your own objectives and requirements with respect to the partnership. If we are not correct in this understanding, please advise us immediately so that we can re-evaluate existing or potential conflicts among the partners and between individual partners and the partnership.



In general, communications between lawyers and their clients are privileged and may not be disclosed to third parties without the clients' consent. Because the partnership is our client, confidential communications between us and individual partners with respect to matters within the scope of our representation will be privileged as to non-partners. However, as the partnership's lawyers, we cannot ethically conceal from any partner a problem concerning the partnership or other partners which is disclosed to us or which we discover in the course of our representation of the partnership. We will be required to disclose any such information to all partners, even though the disclosure might be detrimental to one or more of the partners. The attorney-client privilege does not extend to communications between partners outside of the presence of the partnership's lawyers, communications to third parties, or communications with a lawyer that are subsequently disclosed to third parties.

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