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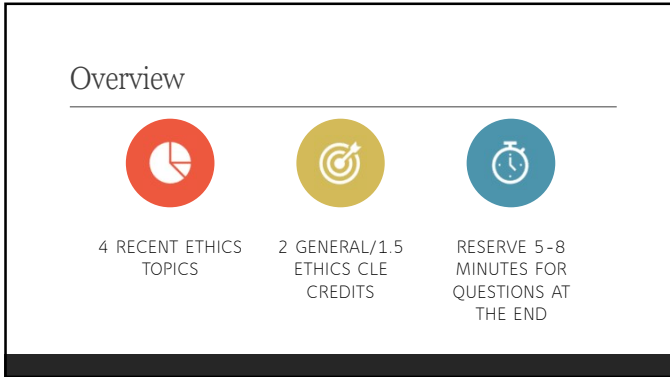
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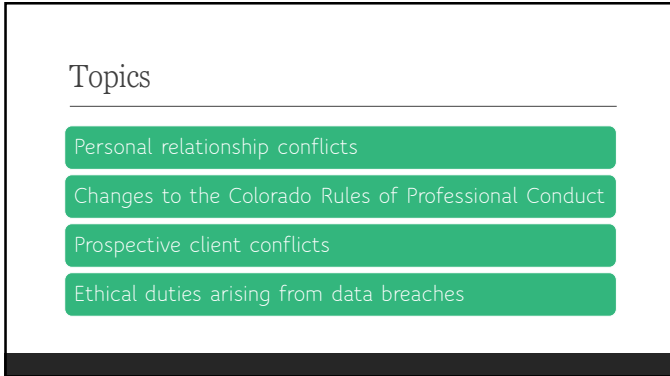
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## Personal relationship conflicts

WHY CAN'T WE BE FRIENDS?

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### Applicable sources

- ABA Standing Comm. on Ethics & Prof. Resp., Formal Opinion 494, *Conflicts Arising Out of a Lawyer's Personal Relationship with Opposing Counsel* (2020)
- ABA Standing Comm. on Ethics & Prof. Resp., Formal Op. 488, *Judges' Social or Close Personal Relationships with Lawyers or Parties as Grounds for Disqualification or Disclosure* (2019)
- Colo. RPC 1.7
- Comment 11, Colo. RPC 1.7

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Colo. RPC 1.7(a)

A lawyer shall not represent a client if the representation involves a concurrent conflict of interest.

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Colo. RPC 1.7(a)(2)

A concurrent conflict of interest - a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to . . . a third person or by a personal interest of the lawyer.

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Colo. RPC 1.7(b)(1), (4)

Notwithstanding the existence of a concurrent conflict, a lawyer may represent a client if (1) the lawyer reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client; and (4) each affected client gives informed consent, confirmed in writing.

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Principles applicable to all categories

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- Not all relationships require disclosure or informed consent or disqualification
  - Will it materially affect your independent judgment?
  - Do you reasonably believe that you can provide competent and diligent representation and obtain the client's informed consent, confirmed in writing?

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Principles applicable to all categories

- Consider role in the matter:
  - Solo or lead counsel?
  - Subordinate or tangential role?
  - Level of client contact?

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Principles applicable to all categories

- Do not reveal Colo. RPC 1.6 information either in obtaining informed consent or in discussions with opposing lawyer
- Withdraw if later become unable to provide competent and diligent representation

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Principles applicable to all categories

- Personal interest conflicts are not imputed
- You can find someone else in your firm or organization to represent the client

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Comment 11

When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage or when there is a cohabiting relationship between the lawyers, there may be a significant risk that client confidences will be revealed and that the lawyer's family or cohabiting relationship will interfere with both loyalty and independent professional judgment.

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Three categories of relationships

- INTIMATE RELATIONSHIPS
- FRIENDSHIPS
- ACQUAINTANCES



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Intimate relationships

Opposing counsel who "cohabit" and are married, engaged, or in an "exclusive intimate relationship"

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**Intimate relationships**

- ☐ Must disclose relationship to respective clients and cannot move forward with representation unless each client gives informed consent, confirmed in writing
- ☐ Opposing counsel in "some other type of intimate relationship, but are not exclusive, engaged, or cohabitating"
  - ☐ Must consider whether relationship creates a significant risk that representation will be materially limited

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**Friendships** | imply a degree of affinity greater than being acquainted with a person; some degree of mutual affection

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**Friendships**

- ☐ Some friendships that require disclosure and informed consent, confirmed in writing
  - ☐ Are your children close friends?
- ☐ Some friendships only require disclosure but may not require informed consent (depends)
  - ☐ Were you long-lost law school classmates?
- ☐ TAKE AWAY: analysis will turn on the friendship's closeness

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**Aquaintances** | Relationships that do not carry the familiarity, affinity, or attachment of friendships

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**Aquaintances**

- Do you simply say hi at the PTA meeting or gym?
- "Neither seeks contact with the other, but greet each other amicably and are cordial when their lives intersect."
- Do NOT need to disclose relationship to clients (although may choose to do so)
  - Advisable to maintain good client relations
- No informed consent

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**Recent rule changes**

COLORADO RULES OF PROFESSIONAL CONDUCT CONCERNING ADVERTISING AND CONTINGENT FEES

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Changes to “7 Series” - advertising

- Replace “advertising” with “communications concerning a lawyer’s services”
- Advertising is permitted through a more expansive definition of media (Colo. RPC 7.2(a))
- Allows for “nominal gifts” as expression of gratitude to a person (Colo. RPC 7.2(b))
- Former Colo. RPC 7.4 (fields of practice rule) moved to Colo. RPC 7.2 comments
- Former Colo. RPC 7.5 (firm name and letterheads) moved to Colo. RPC 7.1 comments

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Changes to “7 Series” - solicitation

- Solicitation definition moved from comments to Colo. RPC 7.3
- Allows solicitation to occur when there is a prior business or professional relationship with the lawyer or law firm
- Solicitation communications must now be maintained for a period of five years

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Contingent fee agreements

- Moved content of Colo. R. Civ. P. 23.3 to Colo. RPC 1.5 and cmt. 6
- Sets forth a detailed explanation of what contingent fees are and how they are earned, what letter should contain, etc.
- Provides form contingent fee agreement
- Effective January 1, 2020

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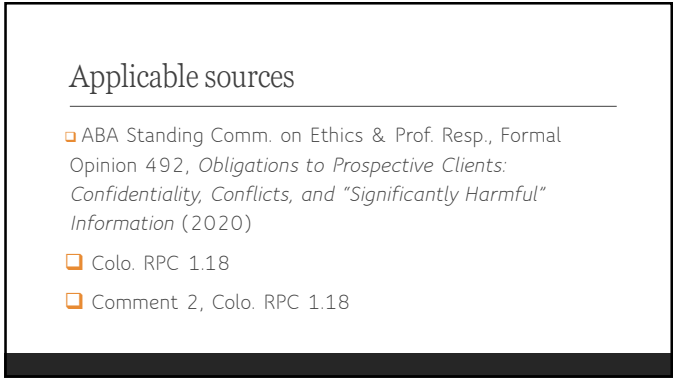
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Three key concepts


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WHO IS A PROSPECTIVE CLIENT



WHEN CAN YOU BE DISQUALIFIED



BEST PRACTICES

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Who is a prospective client

A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.

Colo. RPC 1.18(a)

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Turns on whether consultation occurred

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- Depends on the circumstances
- Likely has occurred:
  - if lawyer, either in person or through advertising, specifically requests or invites submission of information about a potential representation without clear and reasonably understandable warning and cautionary statements that limit the lawyer's obligations, and a person provides information in response.

Colo. RPC 1.18(a), cmt. [2]

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**Not every interaction is a consultation**

- ❑ Does not occur if person provides information to a lawyer in response to advertising that merely describes a lawyer's education, experience, areas of practice, and contact information, or
- ❑ Provides legal information of general interest
- ❑ Typically unilateral communication to a lawyer, without any reasonable expectation that lawyer is willing to discuss possibility of forming a relationship, is not enough
- ❑ If purpose of communication is solely for the purpose of disqualification

Colo. RPC 1.18, cmt. 2

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**Cannot disclose information learned**

Information learned from prospective client shall not be used or revealed, except as Colo. RPC 1.9 (duties to former clients) would allow.

Colo. RPC 1.18(b)

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**A prospective client can cause future problems**

A lawyer may be disqualified from future representation in the same or substantially similar matter if the lawyer received information from prospective client that could be significantly harmful to that person in the matter.

Colo. RPC 1.18(c)

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### When is there risk of disqualification

- ❑ Mere fact of consultation is not enough
- ❑ Nor is fact that prospective client unilaterally transmitted information
- ❑ Significantly harmful information

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### Significantly harmful information

- ❑ Evidence beyond the mere fact of consultation is generally required
- ❑ Sensitive or privileged information that the lawyer would not have received in the ordinary course of due diligence, or if it is information that has long-term significance or continuing relevance
- ❑ "Exquisitely fact-sensitive and -specific"

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### Examples of significantly harmful information

- ❑ Settlement views (value, timing)
- ❑ Strategic thinking on how to handle dispute, weaknesses
- ❑ Sensitive personal information (domestic cases)
- ❑ Motives, weaknesses
- ❑ Civil or criminal liability

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### Examples of information that is NOT significantly harmful

- Half-hour consultation where lawyer avoided learning details of case
- One-day beauty contest where prospective client's in-house lawyer regulated disclosures and there was no showing that confidential information disclosed could be detrimental to client
- Where it is generally known to parties

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How can you protect yourself?



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More information learned in the consultation

More likely lawyer will obtain significantly harmful information

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Limit information during consultation

- Limit the information you obtain to “only such information as reasonably appears necessary” for the purpose of “considering whether or not to undertake the new matter.”

Colo. RPC 1.18, cmt. 5

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Can condition consultation

- Lawyer can condition consultation on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter
- May also expressly agree that lawyer’s subsequent use
- Website disclaimer
- But beware informed consent - see Colo. RPC 1.0(e)

Colo. RPC 1.18, cmt. 5

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**Data breaches**

“PASSWORDS ARE LIKE UNDERWEAR. DON’T LET PEOPLE SEE IT, CHANGE IT VERY OFTEN, AND YOU SHOULDN’T SHARE IT WITH STRANGERS.” - CHRIS PIRILLO

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Applicable sources

- ▣ CBA Ethics Comm., Formal Op. 141, *Ethical Duties Arising from Data Breach* (2020)
- ▣ ABA Standing Comm. on Ethics & Prof. Responsibility, Formal Op. 483, *Lawyers' Obligations After an Electronic Data Breach or Cyberattack* (2018)
- ▣ Colo. RPC 1.1, 1.6, 5.1, 5.3

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Types of data breaches

- Results in misappropriation of ESI
- Destroys or alters ESI
- Causes ESI to become temporarily or permanently inaccessible

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Your duties

A lawyer must make reasonable efforts to prevent, monitor for, halt, and investigate any security breach involving data that the lawyer controls.  
CBA Ethics Op. 141.

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in technologies.  
Colo. RPC 1.1, cmt. [8].

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What's reasonable

Must make reasonable efforts to prevent inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Colo. RPC 1.6(c).

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What's NOT reasonable



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Factors to be considered

- ❑ Sensitivity of information
- ❑ Likelihood of disclosure if safeguards not employed
- ❑ Cost of employing safeguards
- ❑ Difficulty of implementing safeguards
- ❑ Extent to which safeguards adversely affect the lawyer's ability to represent clients (difficulty in use, etc.).

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### Scope of reasonableness

- Ethical violation does not necessarily occur if cyber-intrusion or loss of electronic information is not immediately detected
- Not a strict liability standard - you don't have to be invulnerable or impenetrable - just reasonable

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### Recommended steps

Develop an incident response plan of "reasonable scope" in advance of any breach

- Must notify the client
- Don't have to notify former clients (but good practice to have policy)

Make reasonable efforts to determine what occurred and restore computer operations

- Consider a data backup that will allow you to get back to work quickly
- Losses are overhead

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Time for Questions?

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